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PLEADING, PRACTICE AND FORMS

IN

ACTIONS AND SPECIAL PROCEEDINGS AT LAW AND IN EQUITY IN THE STATE OF IOWA.

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Section **771. Garnishment, how effected.** — Attachment by garnishment creates no lien on the property, but the remedy is of a personal nature against the garnishee.[1] It is effected by informing the supposed debtor,

[1] Moore v. Walker, 46-164; McConnell v. Denham, 72-494.

or person holding the property, that he is attached as garnishee, and by serving him with an original notice in the manner provided for in civil actions, forbidding his paying any debt due by him to the defendant, or thereafter to become due, and requiring him to retain possession of all property of the defendant, then or thereafter being in his custody or under his control, in order that the same may be dealt with according to law; and the sheriff must summon such persons as garnishees as the plaintiff may direct. And unless three answers are required to be taken they must be cited to appear on the first day of the next term.[2] The plaintiff may in writing direct the sheriff to take the answers of the garnishees, and attach such answers to his return to the writ.[3] Such direction should be indorsed on the writ and may be as follows:

FORM OF DIRECTION OF PLAINTIFF TO SHERIFF TO TAKE ANSWER OF GARNISHEE.

The sheriff to whom the within writ of attachment is directed, is hereby ordered to take the answer of (here name person) garnished herein in the manner provided by law, and attach said answer to his return on the within writ.

Dated the ——— day of ———, 18—.

———, plaintiff.

This notice may be signed by the attorney of the party, and it may also be written on a separate paper, in which case it must be entitled in the cause and the form changed accordingly. The notice of garnishment may be in the following form:

FORM OF NOTICE OF GARNISHMENT.

Title, }
Venue. }

To ——— (here insert names of parties garnished): You, and each of you, are hereby notified that you are attached as garnishees in the above entitled cause, and that you are forbidden to pay any debt due by you to the defendant therein, or which may hereafter become due, and that you are required to retain possession of all property of the said de-

[2] Code, Sec. 3935; Van Fossen v. Anderson, 8-251.

[3] Code, Sec. 3935; Conable v. Hylton, 10-593.

fendant now, or hereafter, being in your custody or under your control, in order that the same be dealt with according to law. (When the sheriff has no direction to take the answer the following must be added, and it may be when the answer is taken if it is desired to have the garnishee present at court.) And you are further notified to appear at the next term of said court on the first day thereof, to be commenced on the ——— day of ———, 18—, at the court house in said county, then and there to answer such interrogatories as may be propounded to you, or you will be liable to pay the entire judgment which the said plaintiff has obtained, or eventually obtains, against said defendant.

———, sheriff of ——— county, Iowa.

§ 772. Of taking the answer by the sheriff.—When the sheriff is directed to take the answer of the garnishee he must first administer to him the following oath:[4]

FORM OF OATH ADMINISTERED BY SHERIFF TO GARNISHEE.

You do solemnly swear (or affirm) that in the case of ——— v. ———, in which you are attached as garnishee, you will true answers make to the questions propounded to you as such garnishee, so help you God.

The deputy sheriff has the same power as the sheriff to administer the oath and take the answers.[5] After the oath is administered the officer must propound the following questions in writing, and write the answer to each thereunder.[6]

FORM OF QUESTIONS TO BE PROPOUNDED TO GARNISHEE.

1. Are you in any manner indebted to the defendant in this suit, or do you owe him money, or property, which is not yet due? if so, state the particulars.

Answer (here insert answer).

2. Have you in your possession or under your control, any property, rights or credits of the said defendant? if so, what is the value of the same, and state all the particulars.

Answer (here insert answer).

3. Do you know of any debts owing to the said defendant, whether due or not due, or any property, rights or credits belonging to him and now in the possession or under the control of others? if so, state the particulars.

Answer (here insert answer).

[4] Code, Sec. 3935.
[5] Code, Secs. 499, 510
[6] Code, Sec. 3939.

(After the answers are written out they should be signed and subscribed as shown below.)

I do solemnly swear that I have made full and true answers to the above questions, touching the matter wherein I have been attached as garnishee, so help me God.

———.

Subscribed and sworn to before me, and in my presence by ———, this ——— day of ———, 18—.

———, sheriff of ——— county, Iowa.

The notice of garnishment, and questions and answers of the garnishee should be properly marked as exhibits and attached to and made a part of the officer's return to the writ.[7]

§ 773. When garnishee to appear at court.—If the garnishee refuses to answer fully and unequivocally, all the foregoing interrogatories, he must be notified and required to appear and answer on the first day of the next term of court, and he may be so required in any event if the plaintiff notify him to that effect.[8] The sheriff can not garnish a party nor take his answer without having a writ of attachment.[9] It is competent for a corporation aggregate to answer in writing, or through some officer or agent authorized to do so and cognizant of the facts.[10] It is held that if the notice be served on the garnishee it is valid although it does not require him to appear on the first day of the next term to answer.[11] The garnishment process may be served before service of the notice of the commencement of the action.[12] The questions propounded to the garnishee in court may be the same as those the sheriff is required to ask, or any others the court may deem right and proper.[13] And it is within the discretion of the court to require that the questions to be propounded to the garnishee be written out and submitted to the court before being answered.[14] A wife

7 Code, Sec. 3939.

8 Code, Secs. 3935, 3940; Thompson v. Silvers, 59-670; Westphal v. Clark, 42-371; Parmenter v. Childs, 12-22; Allison v. C., B. & Q. R. Co., 76-209.

9 Van Fossen v. Anderson, 8-251.

10 Bailey v. U. P. R. Co., 62-354.

11 Gilmor v. Cohn, 71 N. W., 244.

12 Phillips v. Germon, 43-101.

13 Code, Sec. 3941; Walker v. Irwin, 62 N. W., 785.

14 Elwood v. Crowley, 64-68.

garnished as a debtor of her husband, is not exempt from answering questions touching such indebtedness, on the ground that such answers would be testimony against her husband, as it could not be regarded as against her husband's interest that his property should be subjected to the payment of his debts.[15] The garnishee may be asked any questions tending to reveal the true character and consideration of the transaction.[16] He may make special answer for his own benefit, and is not obliged to assume the responsibility of a categorical answer to the general questions, but may explain the circumstances in which he stands.[17] And he has the right to have the correctness of an interrogatory adjudicated by the court, and is not bound to submit to any and every conceivable question without objection, or if he objects, become liable to pay the entire debt of the principal action, in case his objection shall prove to be unfounded.[18] When the garnishee appears in pursuance of notice, the court will appoint a commissioner to take his answer on the oral motion of the plaintiff, his attorney or the garnishee.[19] The creditor has a right to examine the garnishee personally, and a sworn answer of a garnishee may be stricken from the files.[20]

§ 774. Who may be garnished.—A sheriff or constable may be garnished for money of the defendant in his hands.[21] So also may a judgment debtor of the defendant, when the judgment has not been previously assigned on the record, or by writing filed in the office of the clerk, and by him minuted as an assignment on the margin of the judgment docket. An executor may be garnished for money due from the decedent to the defendant.[22] So also a fund in court may be garnished by leaving with the clerk of the court a copy of the writ of

15 Thompson v. Silvers, 59-670.
16 Bebb v. Preston, 1-460.
17 Bebb v. Preston, 3-325; Same, 1-460.
18 Sawyer v. Webb, 5-315.
19 Thomas v. Hoffman, 62-125.
20 Penn v. Phelan, 52-535.
21 Code, Sec. 3936; Patterson v. Pratt, 19-358; Reifsnyder v. Lee, 44-101; Com. Ex. Bk. v. McLeod, 65-665; Hoffman v. Wetherell, 42-89; Minthorn v. Hemphill, 73-257.
22 Code, Sec. 3936; see Clark v. Shrader, 41-491.

attachment, with a notice that he is attached, specifying the fund.[23] All private corporations may be garnished.[24] A notice of garnishment directed to and served on one member of a partnership will not hold a debt due by the firm to the defendant, but it will support a judgment against the firm as garnishees when it is directed to the firm, and served on a member who answers in behalf of the firm.[25]

A trustee can be garnished, and the surplus money arising from the sale under a trust deed held, and such surplus applied to satisfy the debt of the person entitled thereto.[26] An agent may be garnished and a fund in his hands held.[27] A mortgagee in possession of chattels may be garnished, and required to answer as to the amount of his claim yet unpaid, the amount and value of the property, and may be held responsible for the sale and disposition of the mortgaged property over and above the payment of his own claim.[28] But a mortgagee of personal property not in his possession, can not be garnished.[29] The guests of an inn-keeper may be garnished in an action by a creditor against the inn-keeper but if the inn-keeper requires the guests to pay, or pledge payment in advance, no indebtedness arises that is the subject of garnishment, and this is so, though prior to such advanced payment or pledge, the guests may have been served with process of garnishment; such a garnishment would only hold the amount due in the ordinary way from the guests.[30] Money belonging to a principal, deposited by an agent in a bank as his agent, can not be garnished by creditors of the agent.[31] Where mortgaged chattels have been seized by an officer to be sold

[23] Code, Sec. 3937; Patterson v. Pratt, 19-358.

[24] Taylor v. B. & M. R. R. Co., 5-114; Wales v. Muscatine, 4-302; Burton v. Dist. Twp., 11-166; Buchanan County Bk. v. C., R. I. F. & N. W. R. Co., 62-494.

[25] Bean v. Barney, 10-498.

[26] Cook v. Dillon, 9-407.

[27] First Nat'l Bk. v. D. & St. P. R. Co., 45-120.

[28] Torbet v. Hayden, 11-435; Campbell v. Leonard, 11-489; Downer v. Garretson, 24-351; Fountain v. Smith, 70-282; Brainard v. Van Kuren, 22-261; Davis v. Wilson, 52-187.

[29] Curtis v. Raymond, 29-52; First Nat'l Bk. v. Perry, 29-266.

[30] Caldwell v. Stewart, 30-379.

[31] Des Moines Cotton Mill Co. v. Cooper, 61 N. W., 1084.

under the mortgage, the balance of the proceeds, after satisfying the mortgage, is the property of the mortgagor, and subject to garnishment in the sheriff's hands.[32] But the garnishment of a judgment debtor does not affect the rights of claimants, but simply the liability of the garnishee.[33] Ordinarily, one indebted to, or having property of another, may be garnished.[34] The landlord's interest in growing crops can be reached only by garnishment of the tenant.[35] A garnishment will be valid as against a fund of which the garnishee is the equitable custodian.[36] A party who it is claimed has fraudulently purchased property may be garnished by the creditor of the vendor.[37] And a mortgagee who it is claimed fraudulently took his mortgage may be garnished by a creditor of the mortgagor.[38]

§ 775. **Who can not be garnished.**—A municipal or political corporation can not be garnished, and this rule is universal in its application, and the objection may be made at the time or before filing answer.[39] Prior to the revision of 1860, a municipal corporation could be garnished, but if it was exempt, it was a privilege which it alone could assert; it could not be interposed by the debtor.[40] A receiver can not be garnished; property in his hands, being in custody of the law, can only be reached by proper petition to the court.[41] The holders of certain notes and accounts, assigned to them for collection, and the proceeds to be applied on certain specified debts of the assignor, were held not subject to garnishment by other creditors of the assignor.[42] A county

[32] Hoffman v. Wetherell, 42-89.
[33] Howe v. Jones, 57-130.
[34] Kesler v. St. John, 22-565; Nat'l Bk., etc., v. Chase, 71-120; see Deere v. Young, 39-588.
[35] Howard County v. Kyte, 69-307.
[36] Des Moines County v. Hinkley, 62-637.
[37] Goll & Frank Co. v. Miller, 87-426; Liddle v. Allen, 90-738.
[38] Citizens State Bk. v. Council Bluffs Fuel Co., 89-618.
[39] Code, Sec. 3936; Jenks v. Osceola, 45-554; Clapp v. Walker, 25-315; Caldwell v. Stewart, 30-379.
[40] Clapp v. Walker, 25-315; Burton v. Dist. Twp., 11-166; Wales v. Muscatine, 4-302.
[41] Martin v. Davis, 21-535; McGowan v. Myers, 66-99.
[42] Van Winkle v. I. I. & S. F. Co., 56-245.

can not be garnished.[43] A judgment defendant in an action in the district court can not be attached as garnishee, and subject to a judgment in a garnishment proceeding in the circuit court.[44] The preference which the law gives the creditors of a partnership to be first satisfied out of the firm property, will be protected in proceedings by garnishment by firm and individual creditors.[45] Real estate of a debtor, the title to which is in another person, can not be reached by garnishment.[46] Personal property under the control of the garnishee but situated out of the State where the action was brought can not be reached by this process.[47] Nor can the court in a garnishment proceeding against a non-resident acquire such jurisdiction over him while he is temporarily in the State, as to reach indebtedness which is not in any way connected with an office or agency of the garnishee in this State.[48] Where a mortgage authorized the appointment of a receiver the rents accruing after his appointment are not subject to garnishment by other creditors.[49] An action will lie against one who maliciously and without probable cause garnishes the exempt earnings of his debtor, knowing them to be exempt, with the purpose of harassing the latter's employers, and thereby compelling him to pay the debt out of such exempt money in order to avoid discharge.[50] The fact that plaintiff stipulates to dismiss an action on payment by the defendant of a certain sum to other persons, does not, in the absence of fraud, render such money subject to garnishment by his creditors.[51] A notice of garnishment directed to the mayor, recorder and treasurer of an incorporated city, by their individual names and name of office, respectively, informing them that they, and each of them, were "at-

[43] County of Des Moines v. Hinkley, 62-637.
[44] McGuire v. Pitts, 42-535.
[45] Switzer v. Smith, 35-269; see Harlan v. Moriarty, 2 G. Gr., 486; Robinson v. Moriarty, 2 G. Gr., 497.
[46] Baxter v. Myers, 85-328.
[47] Montrose Pickle Co. v. Dodson & Hills Mfg. Co., 76-172.
[48] German Bk. v. American F. Ins. Co., 83-491.
[49] Stetson v. Nor. Inv. Co., 70 N. W., 595.
[50] Nix v. Goodhile, 63 N. W., 701.
[51] Phillips v. Van Horn, 68 N. W., 452.

tached and held as garnishees as a debtor and a person holding property of" the defendant, did not give the court jurisdiction of the city as garnishee.[52]

Where, by the terms of a policy of fire insurance, the same became forfeited and void, the company was not liable to be garnished as a debtor of the policy holder, there being no legal indebtedness on the part of the company.[53] A judgment for damages done to a homestead can not be garnished to satisfy another judgment which is not a lien on the homestead.[54]

And when a judgment debtor and creditor are both residents of this State, and the creditor seeks, in the courts of another State, to subject to the payment of his judgment the exempt wages of the debtor due him from a railroad company, doing business in both States, he will be enjoined from so proceeding and may be punished for violating such injunction.[55] Ordinarily an executor or an administrator can not be garnished until payment of the creditor's claim is ordered, or the estate fully settled and an order of distribution made.[56]

§ **776. Of proceedings when garnishee dies.**—If the garnishee dies after he has been summoned by garnishment, and pending the litigation, the proceedings may be revived by or against his heirs or legal representatives.[57]

§ **777. Of fees and mileage of the garnishee.**—When the garnishee is required to appear at court, unless he has refused to answer before the sheriff, he is entitled to the pay and mileage of a witness, and may in like manner require payment beforehand in order to be made liable for non-attendance.[58] But a failure to pay fees and mileage does not relieve the garnishee from the ob-

[52] Clafflin v. Iowa City, 12-284.

[53] Victor v. Hartford F. Ins. Co., 33-210; see McArthur v. Garman, 71-34.

[54] Mudge v. Lanning, 68-641; see Kaiser v. Seaton, 62-463.

[55] Teagler v. Landsley, 69-725; Hager v. Adams, 70-746; and see Willard v. Sturm, 65 N. W., 847.

[56] Boyer v. Hawkins, 86-40; Shepherd v. Bridenstine, 80-225.

[57] Code, Sec. 3938.

[58] Code, Sec. 3942; Westphal v. Clark, 42-371; Stockberger v. Lindsey, 65-471.

ligation to retain in his possession the property of the defendant, under his control, and to withhold payment of any money due him, and such fees and mileage may subsequently be paid or tendered and his attendance at court thus secured.[59] The power to compel the attendance of a garnishee is not limited to seventy miles as in the case of witnesses.[60] Where a garnishee, without demanding his fees and mileage, attends court, he can not then demand, as a condition to testifying, his fees and mileage; whether he might not, after appearance, be entitled to one day's attendance before answering, has never been decided by our supreme court, but it would seem that he might insist on such payment.[61]

§ 778. Of waiver by garnishee of his exemption.—The objection that the garnishee is exempt from the process of garnishment is a privilege which he alone can assert,[62] and the garnishee may waive the exemption.[63]

§ 779. Penalty for failure to attend and answer.—If the garnishee has been duly summoned, and his fees paid or tendered, if demanded, and he fails to appear and answer, without sufficient excuse for his delinquency, he will be presumed to be indebted to the defendant to the full amount of the plaintiff's demand, and his default may be taken and judgment rendered thereon.[64] But for a mere failure to appear, he is not liable to pay the amount of the plaintiff's judgment until he has had an opportunity to show cause against the issuing of an execution.[65] Nor should he, failing to appear, be taxed with interest and costs.[66]

§ 780. Of showing cause against the issuance of execution—Setting aside default.—A garnishee in de-

[59] Same as No. 58.
[60] Same as No. 58.
[61] Stockberger v. Lindsey, 65-471.
[62] Wales v. Muscatine, 4-302; Burton v. Dist. Twp., 11-166.
[63] Clapp v. Walker, 25-315; Taylor v. B. & M. R. R. Co., 5-114; Jenks v. Osceola, 45-554; Des Moines County v. Hinkley, 62-637.
[64] Code, Sec. 3943; Westphal v. Clark, 42-371; Parmenter v. Childs, 12-22; Thomas v. Hoffman, 62-125; Thompson v. Silvers, 59-670; McDonald v. Finley, 87-529.
[65] Code, Sec. 3943; Langford v. Ottumwa W. P. Co., 53-415; Padden v. Moore, 58-703; McPhail v. Hyatt, 29-137.
[66] Langford v. Ottumwa W. P. Co., 53-415.

fault must be served with notice to show cause why execution should not issue against him, and this notice is not a scire facias.[67] It may be in the following form:

FORM OF NOTICE TO GARNISHEE TO SHOW CAUSE.

Title, }
Venue. }

To ———, garnishee:

You are hereby notified that on the ——— day of ———, 18—, by the judgment of the court, rendered in the above entitled action, you were made liable, as a garnishee, to pay the judgment rendered by said court in favor of plaintiff, and against ———, for the sum of ——— dollars; and you are hereby further notified to be and appear, before noon of the second day of the ——— term, 18—, of said court, which will commence on the ——— day of ———, 18—, at the court house in ———, in said county, and show cause why execution should not issue against your property to satisfy said judgment.

———, attorney for plaintiff.

In no case, however, can a judgment be rendered against a garnishee until ten days after service of notice on the principal defendant.[68] It is the duty of the garnishee to show that he has a good excuse for being in default, that he was not acting in contempt of court, and that he had a good defense, which may be made to appear by answering the statutory questions, denying his indebtedness.[69] The showing of the garnishee for setting aside the default and against the issuance of an execution should be in writing under oath, and should set forth fully the facts, and be accompanied by a motion asking that the default be set aside. The motion and showing may be as follows:

FORM OF MOTION TO SET ASIDE DEFAULT.

Title, }
Venue. }

The undersigned garnishee in the above entitled cause moves the court to set aside the default and judgment entered against him in this cause, and that no execution be issued on such judgment, and for cause

[67] Fifield v. Wood, 9-249; Evans v. Mohn, 55-302; Langford v. Ottumwa W. P. Co., 53-415; Padden v. Moore, 58-703; Duncan v. Sangamon F. Ins. Co., 35-20.

[68] Code, Sec. 3947; Williams v. Williams, 61-612; Wise v. Rothschild, 67-84; Hamilton Buggy Co. v. Iowa Buggy Co., 88-364; Ammerman v. Vosburg, 70 N. W., 620.

[69] Parmenter v. Childs, 12-22; Evans v. Mohn, 55-302.

of such motion presents the affidavits of himself and ———, which are attached hereto and made a part of this motion.

———, garnishee.

(The motion may be signed by the attorney of the garnishee.)

FORM OF SHOWING TO SET ASIDE DEFAULT AND AGAINST THE ISSUANCE OF EXECUTION.

State of Iowa, }
——— County. } ss.

I, ———, garnishee in the above entitled cause, being duly sworn, on oath say: That as such garnishee I fully expected to be present at this court on the ——— day of ———, 18— (the time the notice required him to appear), and give my answer as such garnishee; that I was on the morning of said day taken violently ill and was then and ever since have been, until to-day, unable to leave my bed (or, as the case may be, state the facts fully). That at the time I was garnished, and ever since that time, I was not and have not been in any manner indebted to the defendant in said action, nor have I during said time owed him money or property which is not due, nor have I during said time had in my possession or under my control, any rights, property or credits of said defendant, nor do I know of any debts owing to said defendant, due or not due, nor of any property, rights or credits belonging to him and now in the possession or under the control of others. That my failure to be present in accordance with the notice served on me was not due to any desire to disobey the orders of this court, but was unavoidable for the reasons heretofore given.

———.

The affidavit should not only be signed but sworn to, and it should be accompanied by one or more affidavits corroborating the statements of the garnishee. If the showing to set aside the default is supported only by the affidavit of the garnishee, the court may refuse to set it aside.[70] A judgment by default against a garnishee who failed to appear, constitutes no bar to a subsequent action against him on the same debt for which he was garnished, by one claiming to own the same by assignment from the defendant in the attachment proceedings prior to the garnishment.[71] Where a garnishee has been required to make his answer more specific, and, upon failure to do so, judgment has been rendered against him by default, a motion to set aside the default must be made at the term when it was entered.[72] The notice to show

[70] Parmenter v. Childs, 12-22.
[71] McPhail v. Hyatt, 29-137.
[72] Scamahorn v. Scott, 42-529.

cause may be served during the term at which the garnishee is required to appear.[73] Where a garnishee, after answering the statutory questions, was summoned before a referee for further examination, but refused to answer, it was held that plaintiff might have taken judgment against her, but failing to move for judgment, or having moved and not insisting on a ruling on his motion, but procuring an order for the further appearance and examination of the garnishee, she had a right to assume that no judgment would be rendered against her until such further examination had been completed, and it was further held on appeal to the supreme court from the ruling of the court below, excusing the garnishee from answering further, that judgment could not be rendered against her in the supreme court, although it reversed the ruling of the lower court.[74] Service of an original notice of the action alone will not do away with the necessity for serving notice on the principal defendant.[75] But the principal defendant may by appearing waive the service of notice.[76] When the court appoints a commissioner to take the answer of a garnishee, without fixing a time or place for such answer to be made, the garnishee should not be held to be in default for failure to appear and answer, unless notified by the commissioner of the time and place fixed for taking his answer.[77] Where the garnishee fails to appear in response to the notice to show cause why execution should not issue, no new judgment need be entered, and no motion is necessary.[78] Where the court has not acquired jurisdiction of the garnishee by proper notice, the fact that the garnishee, when served with notice to show cause, appears and protests that the court has not jurisdiction, will not render the judgment valid.[79]

If the garnishee has appeared but failed to answer in

[73] Langford v. Ottumwa W. P. Co., 53-415.
[74] Thompson v. Silvers, 59-670.
[75] Wise v. Rothschild, 67-84.
[76] Hamilton Buggy Co. v. Iowa Buggy Co., 88-364.
[77] Thomas v. Hoffman, 62-125.
[78] Langford v. Ottumwa W. P. Co., 53-415.
[79] Padden v. Moore, 58-703.

accordance with an order of the court, judgment on default may be rendered against him under section 3788 of the code, and it can only be set aside as provided in section 3790 of the code.[80] But where the garnishee appears in response to the notice to show cause and makes a proper showing, the default will be set aside.

§ 781. Of the garnishee's liability for costs.—Ordinarily a garnishee is not liable for costs, but if he refuses to answer, or seeks to avoid a fair investigation of his liability to the party attached, he will be charged with the costs caused by such conduct.[81] The failure of the garnishee to pay into court before answering does not render him liable for costs.[82]

§ 782. Of the garnishee's exonerating himself.—The garnishee may at any time after answer exonerate himself from further responsibility by paying over to the sheriff the amount owing by him to the defendant, and placing at the sheriff's disposal the property of the defendant, or so much of said debts and property as are equal to the value of the property to be attached, all of which may afterward be treated as though attached in the usual manner.[83] But a judgment against a garnishee will not be discharged by the payment of a sum less than the amount of such judgment, even though the judgment be rendered for a greater sum than is actually due.[84] When property is turned over by the garnishee to an officer upon certain conditions, such conditions should be recognized when shown to the court and carried out.[85] But the garnishee can not be held liable for not turning over property to the sheriff when he holds it under a lien which has not been satisfied.[86] Nor for property not

[80] Scamahorn v. Scott, 42-529.
[81] Randolph v. Heaslip, 11-37; Fifield v. Wood, 9-249; Fagg v. Parker, 11-18.
[82] Randolph v. Heaslip, 11-37.
[83] Code, Sec. 3944; Randolph v. Heaslip, 11-37; Montrose Pickle Co. v. Dodson & Hills Mfg. Co., 76-172; Kramer v. Adams, 63 N. W., 180; B. & M. R. R. Co. v. Hall, 37-620.
[84] B. & M. R. R. Co. v. Hall, 37-620.
[85] Buckham v. Wolf, 58-601.
[86] Smith v. Clark, 9-241.

in his possession, nor when he only has a right of possession.[87]

§ 783. Of the garnishee's liability for interest.—A garnishee is not chargeable with interest on funds in his hands after the service of notice of garnishment, unless the presumption which obtains that they were not used by him from that time, but kept as a separate fund to answer the judgment of the court, is in some manner overcome, and this rule is not changed by the provisions of the code, section 3944.[88]

§ 784. Of the position of the garnishee and his rights generally.—A garnishee occupies the relation of defendant to the principal action, and can not, it seems, take a change of venue; and when either of the parties to the principal action have taken a change of venue in which the garnishee has not joined, the cause as to him will be heard in the court where it was commenced.[89] A garnishee is, however, not a party to an action in such a sense that he is required to make defense for either of the parties, between whom he is supposed to be indifferent as to the merits of the case, nor is he bound to interpose his exemption as a defense, and if he does not do so, and a judgment is rendered against him, it can not be attacked in a collateral proceeding for the purpose of again holding the garnishee liable to the principal defendant.[90] But if a garnishee fraudulently procures himself to be garnished without the knowledge of his creditors, for a debt, the proceeds of which are exempt, and does not set up such exemption or notify his creditors, he is guilty of fraud, and will not be released from liability by a judgment against him.[91] A garnishee can not be made liable for property which is never in his possession or under his control.[92] The garnishee occupies the same position as if

[87] Smalley v. Miller, 71-90.
[88] Moore v. Lowrey, 25-336.
[89] Westphal v. Clark, 42-371; Miller v. Mason, 51-239.
[90] Moore v. C., R. I. & P. R. Co., 43-385; Leiber v. U. P. R. Co., 49-688; Wignall v. Union C., etc., Co., 37-129.
[91] Smith v. Dickson, 58-444.
[92] Kiggins v. Woodke, 78-34.

the defendant had sued him.[93] And while his position can be no worse than it would be if the defendant was enforcing his claim, neither can he occupy any better position.[94] He must not be placed in a situation, except by his own negligence or carelessness, where he will be compelled to pay the debt twice.[95] He must pay no money to his creditor until he is discharged as garnishee; if he does, he may be compelled to pay it again.[96] He can not be held liable for a debt which had no existence at the time of the garnishment.[97] And in order to make the garnishee liable it must appear that he was indebted to the defendant when the notice was served, or afterward.[98] If his indebtedness is only conditional, judgment should not be rendered against him until the condition is fulfilled.[99] When it was agreed by and between the mortgagor, the mortgagee and attaching creditors, that the property should be sold in bulk and the proceeds applied upon the attachment, it was held that the proceeding amounted to a transfer of the equity of redemption of the mortgagor, and took priority over a subsequent garnishment by a second attaching creditor, of the surplus in the sheriff's hands after the satisfaction of the first mortgage.[1] A garnishee who has notice of an assignment of a negotiable debt before answering, and fails to set up that fact in defense, and allows judgment to go against him, can not plead such judgment against the assignee.[2] And where the creditor of the garnishee has, by assignment in any form, appropriated the property or indebtedness, and the assignment has been accepted by the assignee, the garnishee can not be held liable.[3] The burden is on the defendant, or gar-

[93] Fifield v. Wood, 9-249; Smith v. Clark, 9-241; Walters v. Washington Ins. Co., 1-404; Williams v. Housell, 2-154; Burton v. Dist. Twp., 11-166.

[94] Smith v. Clark, 9-241; Fifield v. Wood, 9-249; Hartington v. Risdon, 43-517; Victor v. Hartford Ins. Co., 33-210; Cox v. Russell, 44-556; Metcalf v. Kincaid, 87-443.

[95] Burton v. Dist. Twp., 11-166; McCord v. Beatty, 12-299; Houston v. Wolcott, 7-173.

[96] Hughes v. Monty, 24-499.

[97] Thomas v. Gibbons, 61-50.

[98] Weire v. Davenport, 11-49.

[99] Williams v. Young, 46-140.

[1] Phelps v. Winters, 59-561.

[2] Dalhoff v. Coffman, 37-283; see Bailey v. U. P. R. Co., 62-354.

[3] Smith v. Clarke, 9-241; see

nishee, to show that the amount due the defendant in the principal action is exempt as earnings, and unless that fact clearly appears, the debt will be held subject to the garnishment.[4] And where an attorney is garnished for money collected by him on a note, and he has knowledge of facts which, if pleaded and proven, would have protected the rights of an assignee of such note, he should have set up such facts in his answer.[5] If issue is not taken on the garnishee's answer at the term it is filed, the garnishee is entitled to notice.[6] The fact that one or more terms intervene between the garnishment and the judgment against the garnishee does not show an abandonment of the proceeding.[7] The garnishee will not be held liable for the proceeds of exempt property of the debtor, held by him at the time of the garnishment under a mortgage which he has sold, or allowed to be sold, for the debtor's benefit.[8] So long as money paid into court by a garnishee has not been paid over to the execution plaintiff, a third party claiming it may intervene in an action, and assert his claim to the money.[9] Where one delivered his property to a railroad company for shipment, and it was garnished and held the goods, and neither the company nor the officer knew the goods were exempt, and the officer, on learning that fact, released them, it was held that neither the creditor, the company nor the officer were liable to the judgment debtor.[10]

§ 785. Of controverting answer of the garnishee and of trial.—When the answer of the garnishee is made either before the sheriff or at court, the plaintiff may controvert by pleadings filed, any fact or facts contained in the answer, and may in such pleadings specifically set out the facts relied on by him to show the liability of the garnishee, and the issue thus joined must

Moore v. Lowrey, 25-336; Phillips v. Germon, 43-101.

[4] Oakes v. Marquardt, 49-643.

[5] Large v. Moore, 17-258.

[6] Kienne v. Anderson, 13-565.

[7] Phillips v. Germon, 43-101.

[8] Brainard v. Simmons, 67-646.

[9] Code, Sec. 3928; Edwards v. Cosgro, 71-296.

[10] Hynds v. Wynn, 71-593.

be tried in the usual manner, and the answer of the garnishee is competent testimony on such trial.[11] The plaintiff's pleading will be sufficient if it denies the answer of the garnishee.[12] The proceeding is to be tried as an ordinary proceeding, and none but legal issues can be tried therein.[13] The parties have a right to have a general verdict when the issue is tried to a jury.[14] It is not permissible to further examine the garnishee on a jury trial on issues joined on the garnishee's answers since new issues might be opened, and for the further reason that the examination of the garnishee is not a matter for the jury.[15] The credit and weight to be given to the answer of the garnishee must be left for the determination of the jury, without instructions or reference thereto from the court.[16] Though the answer of the garnishee may positively deny any indebtedness, yet the facts and circumstances disclosed in the answer may show that he is indebted and liable, and such facts and circumstances may be relied on by the plaintiff to establish liability.[17] The liability of the garnishee will never be presumed, nor will he be charged on his answer alone, unless it contains a clear admission of a debt due to, or the possession of money or property of the defendant, not exempt from execution. If the question of his liability is left in reasonable doubt, judgment should be rendered in his favor.[18] If the garnishee's answer is not controverted, it must be taken as true.[19] If the garnishee has a lien on attached property in his hands, he has a right to hold it until such lien is discharged.[20] The trial of an issue upon the answer of the garnishee denying indebtedness, must take place in the court wherein the principal action

[11] Code, Sec 3945; Drake v. Buck, 35-472; Brainard v. Simmonds, 58-464; Easley v. Gibbs, 29-129.

[12] Henny Buggy Co. v. Patt, 73-485.

[13] Seers v. Thompson, 72-61.

[14] Shadbolt & Boyd Iron Co. v. Camp, 80-539.

[15] Kelley v. Andrews, 71 N. W., 251.

[16] Code, Sec. 3945; Fairfield v. McNanny, 37-75; Bean v. Barney, 10-498; Drake v. Buck, 35-472.

[17] Bebb v. Preston, 1-460; Church v. Simpson, 25-408.

[18] Morse v. Marshall, 22-290; Smith v. Clark, 9-241; Farwell v. Howard, 26-381; Letts-Fletcher Co. v. McMaster, 83-449; Kiggins v. Woodke, 78-34.

[19] Bean v. Barney, 10-498.

[20] Smith v. Clark, 9-246.

is pending, and the garnishee is not entitled to a change of venue to the county of his residence.[21] If the garnishee denies any indebtedness, and the plaintiff files a pleading controverting such answer, alleging in general terms an indebtedness, the garnishee can not object to the introduction of evidence, tending to show an indebtedness, having failed to demur or move to make the pleading more specific.[22] If a garnishee after making his answer fails to move to be discharged, he must take notice of whatever is done in the case, and follow it until it is disposed of.[23] If the garnishee answers confessing an indebtedness, the defendant may make any objection that the indebtedness is exempt from execution against the debtor, or that the principal judgment is satisfied, or any other defense of like nature.[24] The pleading controverting the answer need not be sworn to.[25] The garnishee process only reaches the right which the defendant actually has in the property at the time it is sought to be attached.[26] Whether the facts show an indebtedness to the principal debtor is a question of law, but if the answer is controverted and evidence introduced, the supreme court can not pass on the correctness of the decision unless all the evidence is before it.[27] Though the notice to a garnishee to appear and answer specifies the wrong court, yet, if answers are taken by the sheriff, under execution from the proper court, and such answers are duly returned, the court acquires jurisdiction to render judgment against the garnishee.[28] When a debtor is garnished in a suit against a creditor, but no judgment has been rendered in the proceeding, he may, in defense to an action by the assignee of his creditor's claim, to whom such claim has been assigned after the

21 Miller v. Mason, 51-239; Smith v. Dickson, 58-444; see Westphal v. Clark, 42-371, where it is intimated a change of venue would lie.

22 Ruby v. Schee, 51-422.

23 Chase v. Foster, 9-429.

24 Wales v. Muscatine, 4-302.

25 Code, Sec. 3586.

26 Thomas v. Hillhouse, 17-67; Huntington v. Risdon, 43-517, and cases cited.

27 Sheppard v. Downing, 14-597.

28 Fanning v. Minn. R. Co., 37-379.

garnishment, plead the pendency of such proceeding as a matter in abatement but not in bar of the action.[29]

While a garnishment of an employer for wages of an employe will hold not only wages due, but such as afterward become due, yet, as the employe, if a married man, is entitled to have ninety days' wages exempt by the code, section 4008, the employer is not liable to a judgment in such a case, unless it appears that at the time of the garnishment, or some time subsequent thereto, he had more than ninety days' wages in his hands.[30] The garnishee's answer is in the nature of evidence, and is not a part of the record unless made so by a bill of exceptions.[31] A garnishee procuring himself to be garnished without the knowledge of his creditor, for a debt the proceeds of which are exempt, and failing to plead such exemption, or notify his creditor so that he might do so, is guilty of a fraud and will not be released from liability by a judgment against him.[32] When a garnishee answered that he was informed and believed that the defendant was a married man living with his family, it was not sufficient to show the right of exemption; it should have been alleged to be a fact and also that he was a resident of this State.[33] An indebtedness due from a resident of this State to a non-resident for services rendered outside of the State, is subject to garnishment in an action brought against such non-resident by publication.[34] The equity of redemption of the mortgagor of personal property, after condition broken, is subject to sale or transfer and passes under a general assignment, and after such assignment, the mortgagee is not subject to garnishment in a suit against the mortgagor.[35] Judgment against a garnishee can not be properly entered where there is no return to the writ of attachment showing the fact of garnishment.[36] When the trial is required to determine the

[29] Clise v. Freeborne, 27-280.
[30] Davis v. Humphrey, 22-132.
[31] Brainard v. Simmons, 58-464.
[32] Smith v. Dickson, 58-444.
[33] Smith v. C. & N. W. R. Co., 60-312.
[34] Mooney v. U. P. R. Co., 60-346.
[35] Gimble v. Ferguson, 58-414.
[36] Rock v. Singmaster, 62-511; McDonald v. Moore, 65-171.

rights of all the parties, the question as to whether the garnishee is indebted to the defendant, is not to be presented separate from that as to whether the debt in his hands is to be condemned for the payment of such debt.[37] Where the garnishee seeks in equity to have a judgment against him set aside, on the ground that the notice is not sufficient to confer jurisdiction, the burden is not on him to show that he was not indebted, but is on the adverse party, and a notice to a garnishee requiring him to appear on any other day than the first day of the next term of court is void.[38] A judge can not, in the absence of an agreement, hear and determine in vacation a motion for the discharge of a garnishee against whom a judgment has been rendered in a justice's court, and who appealed therefrom.[39] Where a garnishee received a note belonging to the principal debtor, with the understanding that he should collect it and apply the proceeds to the payment of a debt owing to him by the principal debtor, and that the residue should be paid to another creditor of the principal debtor, but such creditor was not a party to the arrangement, it was held that such residue in the hands of the garnishee was subject to garnishment as the property of the principal debtor.[40] If the garnishee claims the fund in his hands as compensation for services rendered the principal debtor, it is incumbent on him to prove the value of such services, or that they were performed for a stipulated price.[41] Where the allegations pleaded to controvert the answer of a garnishee do not tend to establish his liability, they should be stricken out on motion.[42] The exemption laws of another State or Territory can not be pleaded, or relied on as a defense, either by the garnishee or judgment debtor in a garnishment proceeding in this State.[43]

Where the garnishee before the execution was issued

[37] Williams v. Williams, 61-612.
[38] Padden v. Moore, 58-703.
[39] Laughlin v. Peckham, 66-121.
[40] Witter v. Little, 66-431.
[41] Same as No. 40.
[42] McDonald v. Moore, 65-171.
[43] Broadstreet v. Clark, 65-670; Newell v. Hayden, 8-140; Leiber v. U. P. R. Co., 49-688; Mooney v. U. P. R. Co., 60-346; B. & M. R. Co. v. Thompson, 31 Kan., 180

stated to the execution plaintiff that he was indebted to the execution defendant, and he would withhold payment until he could be served with notice of garnishment, he was not thereby estopped from denying that he was indebted to the execution defendant at the time he was garnished.[44] While it is not held that a reply to the answer of the garnishee is necessary, yet, if no reply is filed, the issues are limited, and, in such case, fraud not having been pleaded, can not be submitted to the jury.[45] If a judgment appearing of record to belong to the execution defendant, in fact is owned by another, it can not be subjected to execution, when it appears that the execution plaintiff has not been prejudiced by the fact that the judgment appeared to belong to his debtor.[46]

§ 786. Of notice to the principal defendant.—No judgment can be entered in any garnishment proceedings condemning the property or debt in the hands of the garnishee, until the principal defendant has had ten days' notice of such proceedings; such notice, if the case is in the district court, must be served in the same manner as an original notice.[47] And the original notice will not answer in lieu of the notice required by the statute.[48] But the principal defendant may by appearing waive the notice.[49] After the principal defendant has been notified, he is bound to take notice of any further steps in the garnishment proceedings.[50] A notice in suit in the justice court stated that an attachment had been issued and a railroad company named had been attached as a garnishee. It was held that it was a sufficient statutory notice upon the principal defendant.[51]

§ 787. Of showing the exemption of the property, etc.—The defendant in the main action may, by suitable

[44] Starry v. Korab, 65-267.

[45] Freese v. Co-operative Coal Co., 67-42.

[46] Beaver Valley Bk. v. Cousins, 67-310.

[47] Code, Sec. 3947; Williams v. Williams, 61-612; Wise v. Rothschild, 67-84; see Buchanan Co. Bk. v. C., R. I. F. & N. W. R. Co., 62-494.

[48] Wise v. Rothschild, 67-84.

[49] Hamilton Buggy Co. v. Iowa Buggy Co., 88-364.

[50] Ammerman v. Vosburg, 70 N. W., 620.

[51] Ammerman v. Vosburg, 70 N. W., 620.

pleading filed in the garnishment proceedings, set up facts showing that the debt or the property, with which it is sought to charge the garnishee is exempt from execution, or for any other reason is not liable for plaintiff's claim, and if issue thereon be joined by the plaintiff, it must be tried with the issues as to the garnishee's liability. If such debt or property, or any part thereof, is found to be thus exempt or not liable, the garnishee must be discharged.[52]

§ 788. When judgment will be rendered against a garnishee.—When it appears from the answer of the garnishee, or on trial of an issue on his answer, that he was indebted to the defendant, or had any of the defendant's property in his hands, either at the time of being served with the notice of garnishment, or at any time subsequent thereto, he is liable to the plaintiff in case judgment is finally recovered by him, to the full amount of that judgment, or to the amount of the indebtedness of the garnishee and of the property so held by him; and a conditional judgment will be entered against him for the amount due from the garnishee to the defendant in the main action, or for the delivery to the sheriff of any money or property in the garnishee's hands, belonging to the defendant in the main action, within a time fixed by the court, and for the value of the same as fixed in said judgment, if not delivered within the time thus fixed unless before such judgment is entered he pays or delivers the money or property owing or in his hands to the sheriff, which he may do at any time after answer and before judgment. The property thus delivered will be treated as if levied upon under the writ.[53] Judgment can not be rendered against a garnishee unless judgment has been recovered against the defendant in the main action.[54] An answer of the garnishee that he was indebted to the defendant on the evening of a certain day

[52] Code, Sec. 3948.
[53] Code, Sec. 3946.
[54] Barton v. Smith, 7-85; Wilson v. Albaugh, 2 G. Gr., 125; Bean v. Barney, 10-498; Toll v. Knight, 15-370.

about the time of the service of the notice of garnishment, (it having been served the next day) will warrant a judgment against him.[55] Where the garnishee held property of the execution debtor to the value of seven hundred dollars under a chattel mortgage, which was fraudulent, because made for the purpose of putting the property beyond the reach of creditors, but a portion of the property so held was exempt in the hands of the execution debtor, judgment could not be rendered against the garnishee for the value of the exempt property, and there being no evidence of its value, the court could not determine the extent of the garnishee's liability and could not render any judgment against him.[56] The garnishee will not be required to pay over more than the amount of the plaintiff's judgment, interest and costs.[57] Where a judgment is rendered against the defendant the court will take judicial notice of the fact and that plaintiff is a creditor of the defendant.[58]

§ 789. Of the form of the judgment.—The judgment must be for the amount found against the garnishee, but to be discharged by him on paying the money, or delivering the property to the sheriff, on failure of which the judgment may, on motion, be made absolute.[59]

But the judgment against the garnishee can not exceed that against the defendant in the principal action, and the costs in such action.[60] If the debt from the garnishee to the principal defendant is not due, execution must be suspended until its maturity.[61] The garnishee can not be made liable on a mortgage which is not negotiable but is assignable, unless the mortgage is produced, or the garnishee completely exonerated or indemnified from liability thereon, after he may have satisfied the judgment.[62] And a garnishee will be liable to a judg-

[55] Hoops v. Culbertson, 17-305.
[56] Brainard v. Simmons, 67-646.
[57] McDonald v. Creager, 65 N. W., 1021.
[58] Kenosha Stove Co. v. Shedd, 82-540.
[59] Stadler v. Parmlee, 14-175.
[60] Timmons v. Johnson, 15-23; McDonald v. Creager, 65 N. W., 1021.
[61] Code, Sec. 3949.
[62] Timmons v. Johnson, 15-23; Yocum v. White, 36-288.

ment if he, after garnishment, pays over money in his hands to the defendant as agent when such payment is so made with the knowledge of the garnishee that it is for the purpose of defrauding creditors of the defendant, and defendant was, in fact, the owner of the money, and the garnishee knew that the object of the garnishment was to reach it.[63] Where a garnishee had been a partner of defendant and held unpaid accounts belonging to the firm, judgment should be rendered only that he pay over the sum to which the defendant was entitled, as the same should be collected.[64] A money judgment can not be rendered against a garnishee upon his answer showing that he has in his possession property of the defendant upon which he has a lien, without giving him an opportunity to discharge the judgment by a surrender of the property upon provision being made for the payment of his lien.[65] The court can not render a contingent or alternative judgment.[66] If the garnishee is found indebted to the defendant on a contract payable in property other than money, the judgment must be conditioned that it may be discharged in property, or on failure thereof become absolute and a general execution issue.[67] Where the liability of other garnishees would be increased by the discharge of one, such other garnishees have an interest in the determination of the liability of their co-garnishee.[68] An unconditional judgment should not be rendered against a garnishee until judgment is rendered against the defendant, but a conditional judgment may be entered which will hold the debt or property pending the final adjudication.[69]

The garnishee can not object to a judgment by confession under which it is sought to hold him liable on account of errors or irregularities which do not render it

[63] Kesler v. St. John, 22-565.
[64] Cox v. Russell, 44-556.
[65] Hawthorn v. Unthank, 52-507; Capital City Bank v. Wakefield, 83-46; Brakke v. Hoskins, 67 N. W., 235.
[66] Battell v. Lowery, 46-49; see Seals v. Wright, 37-171.
[67] Stadler v. Parmlee, 14-175; Ransom v. Stanberry, 22-334.
[68] Creasap v. Bower, 41-210.
[69] Capital City Bank v. Wakefield, 83-46.

void.[70] The garnishee can maintain an action to set aside a judgment rendered against him by fraud.[71] And see.[72]

§ 790. Of debts due by negotiable paper.—No judgment can be rendered against a garnishee on a debt due by a negotiable or assignable paper unless such paper is delivered, or the garnishee completely exonerated or indemnified from all liability thereon, after he may have satisfied the judgment.[73] But if he fails to require the indemnity, and does not interpose to prevent a judgment against him, the judgment rendered against him will constitute no defense in an action by the holder of the paper, who received it before the garnishment.[74] Where the answer of a garnishee shows that he holds a note executed by a third party to the debtor which he received from the latter for the purpose of paying a certain judgment against the debtor, on which the garnishee is a surety for the stay of execution, judgment can not be rendered against the garnishee.[75] Where the answer shows that the garnishee holds a mortgage on personal property of the debtor which is in the possession of the latter, and the value is not shown, no judgment can be rendered against him.[76] While the rights of the holder of a promissory note may be affected by a garnishment of the maker, before the transfer under which he claims, the rights of a holder who receives a note before garnishment are not affected thereby.[77] An order for a judgment in the alternative, or on condition that certain things are not done, is not a final judgment on which execution can issue, and if execution is issued thereon it may be enjoined.[78]

The provisions of section 3950 of the code may be

[70] Henny Buggy Co. v. Patt, 73-485.
[71] Searle v. Fairbanks, 80-307.
[72] Boyle v. Maroney, 73-70.
[73] Code, Sec. 3950; Yocum v. White, 36-288; Hughes v. Monty, 24-499; Seals v. Wright, 37-171; Kauffman v. Jacobs, 49-432; Timmons v. Johnson, 15-23; McCord v. Beatty, 12-299; Stevens v. Pugh, 12-430; McPhail v. Hyatt, 29-137.
[74] Yocum v. White, 36-288.
[75] Dryden v. Adams, 29-195.
[76] First Nat'l Bk. v. Perry, 29-266.
[77] Fowler v. Doyle, 16-534.
[78] Seals v. Wright, 37-171.

waived by the garnishee.[79] Under the revision of 1860 it was held that the garnishee was liable on negotiable paper assigned after maturity, without indemnity being given.[80]

§ 791. Of conclusiveness of the judgment, appeal, etc.—The judgment in the garnishment action condemning the property or debt in the hands of the garnishee to the satisfaction of the plaintiff's claim, is conclusive between the garnishee and the defendant, and is a judgment in rem and can not be collaterally attacked.[81] The clerk in docketing the original action must show by a statement therein all the garnishments in the case, and when judgment is rendered against a garnishee such judgment must distinctly refer to the original judgment.[82] An appeal lies in all garnishment cases at the instance of the plaintiff, the defendant, the garnishee or any intervenor claiming the property or money.[83] In a garnishment proceeding before a justice of the peace having jurisdiction of the person of the garnishee, as well as the subject-matter of an erroneous judgment, which is rendered against the garnishee, from which he neglects to appeal, a court of equity will not grant relief.[84] The legal effect of a judgment against the garnishee on his answer, condemning the property in his hands, is to satisfy to the extent thereof, the indebtedness between the garnishee and the principal debtor, and the judgment need not in terms express such satisfaction.[85] Money paid out by a garnishee in connection with the proceedings in the original case, but not in accordance with any judgment in such case, can not be allowed in satisfaction of his indebtedness.[86] An assignee of non-

[79] McPhail v. Hyatt, 39-137.

[80] McCord v. Beatty, 12-299; Stevens v. Pugh, 12-430; Walters v. W. Ins. Co., 1-404; see Hughes v. Monty, 24-499.

[81] Code, Sec. 3951; Stadler v Parmlee, 14-175; Houston v. Walcott, 1-86; Moore v. C., R. I. & P. R. Co., 43-385.

[82] Code, Sec. 3952; Boyd v. Rutledge, 25-271.

[83] Code, Sec. 3953; Sinard v. Gleason, 19-165; Fanning v. Minn. R. Co., 37-379; see Daniels v. Clark, 38-556; Farwell v. Tiffany, 82-405.

[84] B. & M. R. R. Co. v. Hall, 37-620.

[85] Stadler v. Parmlee, 14-175.

[86] Myers v. McHugh, 16-335.

negotiable paper must give the maker notice of the assignment before such maker is required to answer as garnishee in a suit against the assignor, or at least before judgment is rendered against such garnishee, or he will be barred by the judgment.[87] If the debtor brings suit against the garnishee in this State for a debt due him, the latter may set up the fact that he has been garnished on such debt in another State.[88] If the defendant relies upon garnishment proceedings in another State as a bar to an action, he may show that the principal judgment on which the garnishment proceeding is based, is invalid for want of service of notice.[89] The release of a garnishee who is, in fact, indebted, does not estop the creditor from levying on property bought with money paid by the garnishee to the debtor, and which was due and unpaid at the time of garnishment and release.[90] Where a judgment debtor has been garnished and judgment rendered against him, without notice of a prior assignment of the judgment, the assignee can not compel payment while the judgment in the garnishment proceedings remains in force.[91] Where one pleading is filed controverting the answers of two garnishees, and afterward one garnishee is dismissed, plaintiff may file further pleading, taking issue on the answer of the one not discharged.[92] An erroneous judgment appealed from will not be reviewed by the supreme court unless it appears that exception was taken at the time of its rendition.[93] An appeal lies from an order discharging a garnishee.[94] Plaintiff, a judgment creditor, obtained a decree setting aside a fraudulent deed by the debtor and adjudging that the rents of property so conveyed (which accrued in 1890 and 1891) were subject to

[87] Walters v. Washington Ins. Co., 1-404; McCord v. Beatty, 12-299.

[88] Moore v. C., R. I. & P. R. Co., 43-385; Leiber v. U. P. R. Co., 49-688.

[89] O'Rourke v. C., M. & St. P. R. 55-332.

[90] Milligan v. Bowman, 46-55.

[91] McGuire v. Pitts' Sons, 42-535.

[92] Coffman v. Ford, 56-185.

[93] Eason v. Lester, 31-475; Pigman v. Denny, 12-396; McKinley v. Bechtel, 12-561; Downing v. Harmon, 13-535; Robison v. Saunders, 14-539; Perkins v. Whittam, 14-596.

[94] National Bk. v. Chase, 71-120.

plaintiff's judgment if taken by due process of law, but the plaintiff had no lien thereon. Afterwards plaintiff garnished "W", in whose possession the rents were. "D" intervened, claiming the fund on the ground that he had recovered judgment against the defendant in 1892, and had garnished "W" before the notice was served in plaintiff's case, but he failed to show whether he became a creditor of defendant before or after the fraudulent deed was made, or that the same was invalid as to him. It was held that plaintiff's claim was entitled to priority over that of "D's" claim.[95] When an order is entered in garnishment proceedings and the garnishee has uncollected securities of the debtor in his hands which he is required to account for, supplemental proceedings may be had on his failure to account and further orders be made, and a garnishee who is required by order of the court to account for the proceeds of securities in his hands after collections is entitled to credit for proper expenses of collections, and may pay attorneys in necessary litigation reasonable compensation.[96] The fact that a garnishee testified that the money attached was given him by the debtor to pay a claim, does not estop him to deny obligation on the claim when suit is brought thereon against him.[97] Garnishee proceedings commenced in this State against a railroad company for wages due an employe are not abated by the commencement of an action in another State by the employe against the railroad for such wages. Nor does a judgment recovered against the railroad in such action bar the garnishment proceeding. The retroactive provision in a law giving exemptions can not avail in a garnishment proceeding instituted before the passage of the law.[98]

[95] Clark v. Raymond, 66 N. W., 86.

[96] McDonald v. Creager, 65 N. W., 1021.

[97] Walker v. Irwin, 62 N. W., 785.

[98] Willard v. Sturm, 65 N. W., 847.

CHAPTER XLIX.

OF EXECUTIONS AND EXEMPTIONS.

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Section **792. Within what time an execution may issue.**—An execution is said to be a writ directed to an officer authorizing him to carry into effect the judgment of the court,[1] and executions may issue at any time before the judgment is barred by the statute of limitations, and upon judgments in the district and supreme courts into any county which the party ordering may direct, but one execution can be in existence at the same time on the same judgment or order.[2] An execution may issue on a judgment after the lien thereof on land has expired, and at any time within twenty years, and a sale of real estate thereunder will pass all the interest of the defendant therein at the time of the levy.[3]

If there is no valid existing judgment when the execution is issued it is void.[4] And a subsequent entry of a judgment will not relate back so as to legalize an execution issued when no judgment had been entered.[5] An execution must be regarded as "in existence" until it is returned, even though the return day is past; and a sale under a second execution issued before the first is returned will be set aside as to a judgment creditor purchasing at the sale.[6]

While the provision of the statute that but one execution can be in existence at the same time is mandatory,

[1] Bouv. Law Dic. 495.
[2] Code, Sec. 3955; Stahl v. Roost, 34-475; Ayres v. Campbell, 9-213.
[3] Stahl v. Roost, 34-475.
[4] Balm v. Nunn, 63-641, and cases cited.
[5] Winter v. Coulthard, 62 N. W., 732.
[6] Merritt v. Grover, 57-493, and 61-99.

yet such provision may be waived by the party for whose benefit it was enacted; and when the party against whom an execution was issued knew that another execution was in existence and stood by and made no objection at the sale under the second execution, and, at the expiration of the period of redemption, surrendered possession of the property voluntarily, he could not afterward, in the absence of a showing that the land sold for less than its value, and an offer on his part to pay the judgment, complain.[7] The mere issuance of a second execution before the return of the first under which a levy has been made will not of itself establish an abandonment of such levy.[8] It is not necessary to give the defendant in an execution notice of its issuance.[9] An execution on a judgment in justice's court on a transcript which is not filed in the office of the clerk of the district court can not issue after ten years.[10] A second execution should not issue until the levy under a prior one has been disposed of.[11] When a superior court has been abolished, executions from its records are to be issued by the clerk of the district court, under the seal of said court.[12]

Executions should only issue in the name of the judgment creditor or his assignee, except in case of his death, bankruptcy, or the like.[13]

§ 793. What judgments and orders are enforceable by execution.—Judgments and orders requiring the payment of money or the delivery or the possession of property are enforceable by execution, and obedience to those requiring the performance of other acts is to be coerced by attachment for contempt.[14] A court of law by its judgment declares the conclusion of the law on the facts proved, leaving the party to the proper process to enforce it; it grants specific relief only in actions in

[7] Merritt v. Grover, 61-99.
[8] West v. St. John, 63-287.
[9] Ayres v. Campbell, 9-213.
[10] Givens v. Campbell, 20-79; Code, Sec. 4539; Walton v. Wray, 54-531; Woods v. Haviland, 59-476.
[11] McWilliams v. Myers, 10-325.
[12] Code, Sec. 277.
[13] Corriell v. Doolittle, 2 G. Gr., 385; McWilliams v. Myers, 10-325; Meek v. Bunker, 33-169.
[14] Code, Sec. 3954.

rem,[15] and it is held the proper method of enforcing obedience to a continuing order in the nature of a mandatory injunction is by attachment for contempt.[16]

Execution can not be issued on a judgment after the death of the defendant,[17] and in such a case the judgment should be filed as a claim against the decedent's estate.[18] Executions may be recalled by the court when they have been improperly issued, and when an execution is allowed, it will be presumed it was done by one authorized.[19] An order to pay to the clerk a sum of money in a divorce action for alimony is enforceable by execution.[20] For a discussion of the issuance of a special execution for the sale of attached property reference is made to the chapter herein on attachments.

§ 794. Into what counties the writ may run.—Executions from the district or supreme court may issue into any county which the party ordering may direct.[21] But when a judgment is rendered in one county and a transcript filed in another, execution must issue from the former county for the sale of land in the latter, and a sale made under an execution issued in the latter county is invalid.[22] But execution may issue from the county where the judgment was rendered into any county in the State.[23]

The provision of the statute that a transcript must be filed is directory.[24]

§ 795. When issued on Sunday.—An execution may be issued and executed on Sunday when an affidavit is filed by plaintiff, or some person in his behalf stating that he believes he will lose his judgment unless process issues on that day.[25] Such affidavit may be in the following form:

[15] Kramer v. Rebman, 9-114.
[16] State v. Baldwin, 57-266.
[17] Welch v. Battern, 47-147; see Sprott v. Reid, 3 G. Gr., 489.
[18] Bayless v. Powers, 62-601.
[19] Mayfield v. Bennett, 48-194; Preston v. Wright, 60-351.
[20] Allen v. Allen, 72-502.
[21] Code, Sec. 3955.
[22] Furman v. Dewell, 35-170; Seaton v. Hamilton, 10-394.
[23] Anderson v. Hall, 48-346.
[24] Hubbard v. Barnes, 29-239; McGinnis v. Edgell, 39-419; see Foreman v. Higham, 35-382.
[25] Code, Sec. 3956.

FORM OF AFFIDAVIT FOR ISSUANCE OF EXECUTION ON SUNDAY.

Title, }
Venue. }

State of ———, }
——— County. } ss.

I, ———, being duly sworn, say: That on the ——— day of ———, 18—, I obtained a judgment in the district court in and for said county in the above entitled action against the defendant (or plaintiff) for ——— dollars debt and ——— dollars costs, which remains wholly unsatisfied (or as the case may be); that I verily believe I will lose my said judgment unless an execution be this day, Sunday, issued and executed.

———.

(Add certificate of officer.)

§ 796. Of the issuance of the writ and of the duty of the clerk.—When a judgment is rendered the clerk must, on demand of the party entitled thereto, at once issue an execution, and at the same time enter on his judgment docket the date of its issuance, and to what county and officer issued.[26]

§ 797. Of the requisites of the writ generally.—The execution must intelligibly refer to the judgment, stating the time and place at which it was rendered, the names of the parties to the action, and to the judgment, its amount, and the amount still to be collected thereon, if for money, and if not for money it must state what act is to be performed, and if against the property of a judgment debtor, it should require the sheriff to satisfy the judgment interest and costs out of the property of the debtor, subject to execution describing such property.[27]

A slight variance between the amount stated in the execution and that stated in the judgment will not vitiate the writ.[28] Below will be found a form of execution which can be used in ordinary cases.

[26] Code, Sec. 3957.
[27] Code, Sec. 3960.
[28] Williams v. Brown, 28-247; see Burdick v. Shigley, 30-63.

GENERAL FORM OF EXECUTION FOR MONEY.

State of Iowa.

To the sheriff of ——— county, greeting:

Whereas, on the ——— day of ———, A. D. 18—, judgment was rendered in the district court of ——— county against (here insert names of parties against whom judgment was rendered) for the sum of ——— dollars debt and —— dollars cost of suit at the suit of (here insert names of parties to the suit), you are therefore hereby commanded to cause to be made of the goods and chattels, lands, tenements and effects of the said (name of party against whom judgment was rendered), in your county, subject to execution, the said sum with interest at ——— per cent. per annum from the ——— day of ———, 18—, and costs in the sum of ——— dollars, and accruing costs by levy and sale according to law, and of this writ make legal service and due return to the court within seventy days from the date hereof.

Witness, ———, clerk of said court, with the seal thereof hereto affixed at ———, Iowa, this ——— day of ———, 18—.

[Seal.] ———, clerk, etc.

If the execution issue against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it must require the sheriff to satisfy the judgment, interest and costs out of such property.[29] It must not be levied on exempt property.[30] A lien will not be lost because property is levied on and sold under a general execution when the sale should have been made under a special execution.[31] When the remedy will be exhausted.[32] If it issue for the delivery of possession of real or personal property, it must require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the sheriff to satisfy any costs, damages, or rents and profits, with interest, recovered, by the same judgment, out of the property of the party against whom it was rendered, subject to execution, and the value of the property for which judgment was recovered must be specified therein, if a delivery thereof can not be had, and it shall in that respect be regarded as an execution

[29] Code, Sec. 3961.
[30] Nix v. Goodhile, 63 N. W., 701.
[31] Valley Nat. Bk. v. Jackaway, 80-512.
[32] Bevans v. Dewey, 82-85.

against property.[33] And when it requires the performance of any other act, a certified copy of the judgment may be served on the person against whom it is rendered, or upon the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced.[34]

An execution which sufficiently describes and identifies the judgment so as to render certain the authority on which it was issued invests the officer with power to levy and sell,[35] and slight defects in the execution will not render it invalid.[36]

§ 798. Of proceedings when writ is issued to another county.—In case an execution is issued to a county other than that in which the judgment is rendered, and is levied upon real estate in such county, a transcript of such judgment must be filed in the office of the clerk of the district court of said county, who must make an entry thereof in the judgment docket of said court, and the officer making the levy must make an entry thereof upon the incumbrance book showing the same particulars required in case of an attachment of real estate, which will be bound from the time of such entry.[37] But it seems that an execution may issue into any county and a valid sale of the property be made as between the parties and subsequent purchasers having actual notice, notwithstanding no transcript of the judgment is filed in the county where the land is situated which is sold.[38] The provision of the statute requiring transcript to be filed in the foreign county is directory, but in the absence of actual notice the proceedings of levy and sale, where such transcript is not filed, will not impart constructive notice to the purchaser prior to the filing of the sheriff's deed.[39] But the deed, when record-

[33] Code, Sec. 3962.

[34] Code, Sec. 3963.

[35] Dean v. Goddard, 13-292; Sprott v. Reid, 3 G. Gr., 489; Sheldon v. Van Buskirk, 2 Comst., 473; Elliott v. Cronk's Adm'rs, 13 Wend., 35.

[36] Cooley v. Brayton, 16-10; Dean v. Goddard, 13-292; Williams v. Brown, 28-247; Cunningham v. Felker, 26-117.

[37] Code, Sec. 3958.

[38] Hubbard v. Barnes, 29-239, and see cases cited under No. 40.

[39] Hubbard v. Barnes, 29-239; McGinnis v. Edgell, 39-419; Fore-

ed, will be constructive notice of the title to a purchaser; the purpose of filing a transcript is only to make the judgment a lien.[40] The powers of the clerk are only such as are given in this section; he cannot receive payment of the judgment nor satisfy it.[41]

§ 799. Of forms of executions.—Below will be found several forms of executions in addition to the general form heretofore given. It will be observed that no particular form of words need be used. All that is required is that the execution in each case contains sufficient to comply with the statutory requirements heretofore stated:

FORM OF EXECUTION FOR THE DELIVERY OF SPECIFIC CHATTELS.

The State of Iowa.

To the sheriff of ——— county, greeting:

Whereas, on the ——— day of ———, A. D. 18—, by the judgment of the district court held at the court house in ——— in said county, ——— recovered against ——— the possession of the following described personal property, to-wit: (here describe the property) or in case a delivery thereof can not be had then for ——— dollars, the value thereof duly assessed, and also (here state any other sums recovered as damages, costs, etc.) in a certain action then pending in said court wherein the said ——— was plaintiff and the said ——— was defendant, which said judgment remains in full force and unsatisfied. You are therefore commanded that you cause the above described property forthwith to be delivered to the said ———, and that you cause to be made of the goods and chattels, lands and tenements of the said ———, subject to execution in your county, the sum of ——— dollars damages and ——— dollars costs of said action together with all the legal costs that may accrue by virtue of this writ, with legal interest, and also in case a delivery of said property can not be had, that you cause to be made, as aforesaid, the further sum of ——— dollars with interest thereon from the ——— day of ——— A. D. 18—, and have you said moneys, etc. (as in form of general execution heretofore given).

FORM OF EXECUTION ON TRANSCRIPT OF JUDGMENT FROM A JUSTICE OF THE PEACE.

The State of Iowa.

To the sheriff of said county, greeting:

Whereas, on the ——— day of ———, A. D. 18—, a duly certified transcript of a judgment from the docket of ———, a justice of the peace

man v. Highan, 35-382; see Code, Sec. 3958.

[40] Foreman v. Highan, 35-382; Code, Sec. 3802; see Lathrop v. Brown, 23-40; Blaney v. Hanks, 14-400; Hendershott v. Ping, 24-134.

[41] Hawkeye Ins. Co. v. Luckow, 76-21.

of ——— county, was filed in the office of the clerk of the district court of said county, and a memorandum thereof was entered on the judgment docket of said court, and whereas it appears from the transcript that ——— did on the ——— day of ———, A. D. 18—, recover a judgment against ———, for the sum of ——— dollars and costs of suit, before ———, justice of the peace. You are therefore hereby commanded, etc. (as in form of general execution heretofore given).

(For form of execution in case of sale of real estate under mortgage-foreclosure reference is made to the chapter on mortgages.)

§ 800. When a stay of execution is allowed.—On all judgments for the recovery of money, except those rendered in any court on appeal, or writ of error thereto, or in favor of a laborer or mechanic for his wages, or against one who is surety in the stay of execution, or against any officer, person or corporation, or the sureties of any of them, for money received in a fiduciary capacity, or for the breach of any official duty, there may be a stay of execution, if the defendant therein shall, within ten days from the entry of judgment, procure one or more sufficient freehold sureties to enter into a bond acknowledging themselves security for the defendant for the payment of the judgment, interest and costs from the time of rendering the judgment until it is paid. If the sum for which judgment was rendered, inclusive of cost, does not exceed one hundred dollars, execution may be stayed for three months; if such sum and costs exceeds one hundred dollars, it may be stayed six months.[42]

A subsequent purchaser of mortgaged property, who has assumed as between himself and the mortgagor, the payment of the mortgaged debt, and who is a co-defendant with the mortgagor in an action to foreclose the mortgage, may, without the mortgagor's consent, stay the execution on the judgment of foreclosure.[43] And a stay of execution properly taken, is not rendered invalid by the failure of the clerk to require the sureties to justify.[44]

The provisions of the stay law are general, and apply to justices' courts as well as courts of record,[45] and it

[42] Code, Sec. 3996.

[43] Moses v. The Clerk, etc., 12-139.

[44] Du Bois v. Bloom, 38-512.

[45] Brown v. Markley, 58-689.

seems that any one may stay a judgment who, being a party to the proceeding, has such an interest as that in equity as between him and the judgment debtor, he may be compelled to pay the debt.[46] But no stay is allowed on a judgment rendered against one who is a surety in a stay of execution, nor to a judgment obtained by a laboring man or mechanic for his wages; nor will an appeal be allowed after stay is taken, it being a waiver of a right to appeal.[47] The time of the stay begins to run from the time the judgment is rendered.[48]

§ **801. Of debts contracted prior to September 1, 1873.**—The provisions of the existing law relating to stay of executions do not apply to contracts made prior to September 1, 1873, such contracts being governed by the law in force at the time they were made.[49]

§ **802. Of stay bonds and their approval.**—The surety for a stay of execution may be taken and approved by the clerk, and the bond must be recorded in a book kept for that purpose, and will have the force and effect of a judgment confessed, from the date thereof, against the property of the sureties, and the clerk must enter and index the same in the proper judgment docket.[50] Unless the surety objects, and such objection appears of record, he will be presumed to have consented to the stay, and thereby waived the right to redeem his property, if sold under execution.[51] The right of trial is waived by executing a bond.[52] Officers approving stay bonds, unless waived in writing, by the party in whose favor the judgment is rendered, must require the affidavits of the signers of such bond to the effect that they own real estate, not exempt from execution, and exclusive of incumbrances, to the value of twice the amount of the judgment.[53] The act of the clerk in passing upon

[46] Moses v. The Clerk, etc., 12-139.
[47] Code, Sec. 3998; Seacrist v. Newman, 19-323.
[48] Okey v. Sigler, 82-94.
[49] Code, Sec. 3996; Revision of 1860, Sec. 3293.
[50] Code, Sec. 3999.
[51] Chase v. Wilty, 57-230.
[52] Cavender v. Heirs of Smith, 5-157.
[53] Code, Sec. 3997.

the sufficiency of a stay bond is not judicial, and he is liable for any damage sustained by the judgment creditor by reason of his negligence in accepting an insufficient bond, and taking the affidavit of the surety will not exonerate the clerk from liability.[54] Where a stay bond has been taken and filed with the clerk, and was lost, and no entry with reference thereto made on the records of the court, it was held it did not become a lien upon the property of the surety, as against subsequent incumbrances, without actual notice.[55]

Parol evidence is not admissible to prove that a stay bond was not filed at the time stated in the record.[56] Even when a stay bond is accepted and approved, in a case in which the debtor is not entitled to a stay of execution, it is nevertheless a lien on the land owned by the surety, the clerk's action in accepting or approving such bonds not being subject to review in a collateral proceeding.[57] The right of action against the clerk for damages arising from his fault in approving a stay bond does not accrue until the expiration of the stay, and the right of action of the clerk against his deputy for a like fault arises at the same time, and it is no defense for the deputy that the principal had previously approved bonds signed by the same surety.[58] The determination of the clerk as to whether a stay bond is filed within the time required by law, or whether the filing of it is essential to its validity, is a judicial act, and an error in such a case will render the judgment voidable, not void.[59] Bond for stay of execution in any case may be in the following form:

FORM OF STAY BOND.

Title, }
Venue. }

We hereby acknowledge ourselves security for the defendant herein for the payment of the judgment, costs and interest thereon, rendered by the district court of Iowa in and for ——— county, in the above entitled

[54] Hubbard v. Switzer, 47-681; see Moore v. McKinley, 60-367.
[55] Waldron v. Dickerson, 52-171.
[56] Maynes v. Brockway, 55-457.
[57] Wishard v. Biddle, 64-526; see Maynes v. Brockway, 55-457.
[58] Moore v. McKinley, 60-367, and cases cited.
[59] Maynes v. Brockway, 55-457.

action, on the ——— day of ———, 18—, against said defendant, for the purpose of a stay of execution thereon for ——— months, and to that end we hereby undertake and promise to pay the said judgment, interest, costs and accruing costs, at or before the expiration of the said term of the stay of execution, and upon the expiration of said term we hereby authorize and empower the clerk of said court to issue execution against us as provided by law.

Dated this ——— day of ———, 18—.

———,
———,
———.

And the affidavit required by statute may be in the following form:

FORM OF AFFIDAVIT OF JUSTIFICATION BY SURETIES.

State of Iowa, }
——— County. }

I, ———, do solemnly swear that I am a resident and a freeholder of the State of Iowa, and am worth the sum of ——— dollars beyond the amount of my debts and have property liable to execution in this State equal to the sum of ——— dollars.

———.

(Must be sworn to.)

Where there are two or more sureties they may each make a separate justification for an amount which in the aggregate will be sufficient, or they may justify together and the above form can be changed accordingly.

This bond must be approved by the clerk by making the proper indorsement thereon.

§ 803. Effect of stay after execution has been issued—The bond.—When the stay is taken after execution has issued, and the clerk has accepted and approved the bond, he must immediately notify the sheriff of the stay, who must forthwith return the execution with his doings thereon.[60]

And all property levied on before stay of execution and all written undertakings for the delivery of personal property to the sheriff must be relinquished by the officer upon stay of execution being entered.[61] The giving of the bond will not release any judgment lien by virtue

[60] Code, Sec. 4000.

[61] Code, Sec. 4001.

of the original judgment for the amount then due.[62] Some courts have held that a judgment and its legal incidents can not be affected by an antecedent or contemporaneous, independent, collateral agreement to stay execution.[63]

§ 804. Of sureties preventing or determining the stay of execution.—At the expiration of the stay the clerk must issue a joint execution against the property of all the judgment debtors and sureties, describing them as debtors or sureties in the writ; the liabilities of such sureties will be subject to that of their principal.[64] But a delay in issuing the execution after expiration of the stay, will not discharge the lien of the judgment.[65] The sheriff must return on the execution what amount is made from the principal debtor and what amount from the sureties.[66] When any court renders judgment against two or more persons, any one of whom is surety for any other in the contract on which the judgment is founded, there will be no stay of execution allowed, if the surety objects thereto at or before the time of rendering the judgment; and if such objection is made, the court will order that no stay be allowed unless the surety for the stay of execution will undertake specifically to pay the judgment in case the amount thereof can not be collected from a principal defendant, and the judgment must recite that the liability of such stay is prior to that of the objecting surety.[67] Any surety for the stay of execution may file with the clerk an affidavit stating that he verily believes he will be compelled to pay the judgment, interest and costs thereon, unless execution issues immediately, and if he gives notice thereof in writing to the party for whom he is surety, the clerk must thereupon issue execution forthwith, unless other sufficient surety is given within five days after such notice is

[62] Code, Secs. 3999, 4006.

[63] Woolworth v. Brinker, 11 Ohio St., 593; Fullam v. Valentine, 11 Pick., 156; see Tousey v. Bishop, 22-178.

[64] Code, Sec. 4002.

[65] Parish v. Elwell, 46-162, and cases cited.

[66] Code, Sec. 3966.

[67] Code, Sec. 4003; see Okey v. Sigler, 82-94.

given.[68] If other sufficient surety is given it will have the force and effect of the original surety entered before the filing of the affidavit, and will discharge the original surety.[69]

§ 805. Duty of sheriff on receiving execution.— When the sheriff receives an execution he must receipt for it if required, stating the hour when the same was received, and must make sufficient return thereof, together with the money collected, on or before the seventieth day from the date of its issuance.[70] And he must indorse thereon the day and hour when he received it, and the levy sale, or other acts done by virtue thereof, with the date and dates and amounts of any receipts or payments in satisfaction thereof, and these indorsements must be made at the time of the receipt or acts done.[71] But a failure to return the execution within the seventy days does not render the officer liable to damages unless special injury is alleged and proved.[72]

And it has been held that the failure of the sheriff to make return for the year during which redemption was allowed did not render the sale void.[73] Sales made after the expiration of the seventy days are good if the levy was made when the execution was alive.[74] And sales made on justices' executions are good though made after the seventy days if the levy was made within that time.[75] If the execution is lost it would seem that the return might be made on a copy, but unless the fact of such loss or destruction be shown by the return, a return made on a copy could not be introduced in evidence, nor could the return be explained by parol unless it is shown that the execution has issued and a levy been made thereunder and the execution has been lost and can not be produced.[76] If the right of the sheriff to subject the

[68] Code, Sec. 4004.
[69] Code, Sec. 4005.
[70] Code, Sec. 3964.
[71] Code, Sec. 3965.
[72] Musser v. Maynard, 55-197, and cases cited.
[73] Cooper v. French, 52-531.
[74] Stein v. Chambless, 18-474; Mooney v. Mass, 22-380; Childs v. McChesney, 20-431; Butterfield v. Walsh, 21-97; Thorington v. Allen, 21-291; Wright v. Howell, 35-288.
[75] Walton v. Wray, 54-531.
[76] West v. St. John, 63-287; Code,

property levied on to the satisfaction of the execution is contested by an action of replevin, he should not make any return of the execution until the final disposition of the replevin suit.[77] A statement in the return of an execution which is entered on the judgment record and which recites acts of a person other than the officer, is without authority and can not be relied on by a subsequent incumbrancer.[78] If the sale is treated as a nullity by the parties, parol evidence is receivable to show that it never was completed. Irregularities in the officer's return will not ordinarily prejudice a purchaser at the sale.[79] Matters not recited in the return may be shown by parol testimony.[80]

§ 806. Same—When against principal and surety.—The clerk issuing an execution on a judgment against principal and surety, must state therein the order of liability recited in the judgment, and the officer serving it must exhaust the property of the principal first, and of the other defendants in the order of liability thus stated.[81] But this only applies when judgment has been obtained against both principal and surety, and not then unless the order of liability is stated in the judgment.[82] And one of two joint judgment debtors can not compel the creditor to resort to the other first unless so directed in the judgment.[83] The term surety, as herein used, embraces accommodation indorsers, stayers, and all other persons whose liability on the claim is posterior to that of another; but the surety must, if required by the officer, show property of the principal to entitle him to the benefit of these provisions of the statute.[84] And all the parties, in all cases, will be considered as equally liable unless the order of liability is shown to the court

Sec. 3968; Flannigan v. Althouse, 56-513; Le Barron v. Taylor, 53-637.

77 Cox v. Currier, 62-551.

78 Aultman v. McGrady, 58-118.

79 Winnebago County v. Brones, 68-682; Hopping v. Burnam, 2 G. Gr., 39; Corriell v. Doolittle, 2 G. Gr., 385; Humphry v. Beeson, 1 G. Gr., 199.

80 Smith v. De Kock, 81-535.

81 Code, Sec. 3966; Bockholt v. Kraft, 78-661.

82 Palmer v. Stacy, 44-340.

83 Palmer v. Stacy, 44-340.

84 Code, Sec. 3966.

and recited in the judgment; and the clerk issuing execution on the judgment containing such recital must set out such order of liability therein, and the officer holding the execution must show in his return the amount collected from the principal and from the surety.[85] After exhausting the property of the principal the officer must subject the property of the other parties in the order of their liability in the execution. But the party subsequently liable must, if requested by the officer, show property of the party liable before him to entitle himself to the benefit of the provisions of the statute heretofore mentioned.[86] Any act of the creditor which entitles the principal to claim for any time an exemption from performance, will work a discharge of the surety; but if time is given the principal with the consent of the surety, it will not operate as a discharge, nor will it when the surety ratifies such act.[87] And this is true after the contract has passed into a judgment.[88] A judgment defendant who is a surety for his co-defendant has such an interest against his co-defendant that he may show property of his principal which is subject to execution for his debts.[89] In an action at law on a note against principal and surety, when the surety pleads his suretyship and asks judgment accordingly, plaintiff may dismiss as to the principal and pursue the surety alone; as to plaintiff both are principals.[90]

§ 807. Of the levy of the execution.—After the officer receives an execution it is his duty to proceed to execute it with diligence, and in doing so an exact description of the property at length, with the date of the levy, must be indorsed on or appended to the execution; if it is not executed, or is executed in part only, the reason therefor must be set out in the return.[91] And the

[85] Code, Sec. 3966; see State v. McGlothlin, 61-312; Walters v. Wood, 61-290.
[86] Code, Sec. 3966.
[87] Hershler v. Reynolds, 22-153.
[88] Hershler v. Reynolds, 22-153; Chambers v. Cochran, 18-159.
[89] Delevan v. Pratt, 19-429.
[90] Dorothy v. Hicks, 63-240.
[91] Code, Sec. 3968; Citizens Nat. Bk. v. Loomis, 69 N. W., 443.

officer's return indorsed on the writ is the best and generally the only evidence as to what property is covered by the levy.[92] If it is shown that the execution and return are lost, then parol evidence is admissible to show the contents of the return, but for no other purpose.[93] Sales made under levies not in compliance with the statutory requirements are void.[94] Where an officer levied an execution on standing corn by going into the field for that purpose and notifying persons interested that he had made the levy, it was held a good levy as against such persons, and it was not necessary to keep a guard over the field to maintain the levy.[95] A levy on a safe which is locked and its contents described in the return as "Notes and money and books," is a good levy on notes payable to the execution defendant and contained therein.[96] When the writ is sent into another county than that in which the judgment was rendered, return may be made by mail, but money can not be thus sent except by direction of the party entitled to it, or his attorney.[97] The mortgagor of chattels in possession for a definite time may have his interest therein levied on before the expiration of such period.[98] A leasehold interest may be levied on.[99] And so may an equitable interest in real property,[1] and so may property intended for a special use.[2]

§ 808. When sheriff dies or goes out of office.—In case the sheriff dies or goes out of office before returning the execution, his successor, or other officer authorized to discharge his duties in such a case, the coroner, may proceed in the same manner thereon that the sheriff should have done.[3]

And the sureties on the official bond of the coroner are liable for his acts while he is acting as sheriff ex officio.[4]

92 Flannigan v. Althouse, 56-513.
93 LeBarron v. Taylor, 53-636.
94 Payne v. Billingham, 10-360.
95 Barr v. Cannon, 69-20; Stuart v. Phelps, 39-14.
96 Smith v. Clark, 69 N. W., 1011.
97 Code, Sec. 3959.
98 Rindskoff v. Lyman, 16-260.
99 Sweezy v. Jones, 65-272.
1 Lippencott v. Wilson, 40-425.
2 Coffey v. Wilson, 65-270.
3 Code, Sec. 506.
4 Tieman v. Haw, 49-312.

§ 809. How the levy is made.—The officer must execute the writ promptly by levying on the property of the judgment debtor, collecting the things in action by suit in his own name, if necessary, or by selling the same and the other property and paying to the clerk or the plaintiff the proceeds or so much thereof as will satisfy the execution, he may retain his own costs on receipting therefor on the judgment docket.[5] And by the term property, is meant real as well as personal property.[6] A judgment creditor may elect, but is not compelled to take in payment of his debt, script, or the ordinary evidence of indebtedness issued by a corporation.[7] There must be a levy on, or a seizure of the property,[8] and to be a sufficient levy, it must describe the property taken with such certainty as to enable the successor of the sheriff, if one should be appointed, or the purchaser at the sale, to find and identify it.[9] To make a valid levy on personal property, the officer must take or have it within his power or control, or at least within his view, and if so having it, he makes a levy upon it, it will be good if followed up, in a reasonable time, by his taking possession of the property in such a manner as to apprise the world of its having been levied on.[10] And he may take possession by placing the property in the control or possession of some third person, but if left in the possession and custody of the defendant, the levy will not be good.[11] The officer must in all cases select such property, and in such quantity, as will be likely to bring the amount required to be raised as nearly as practicable, and having made one levy, may afterward make other levies, if he finds it necessary, but no writ of execution is a lien on personal property until the actual levy thereon.[12] The officer levying the writ is held to the

[5] Code, Sec. 3969; Hawkeye v. Diddy, 84-634; Stuart v. Trotter, 75-96.

[6] Harrison v. Kramer, 3-543.

[7] Oswald v. Thedinga, 17-13.

[8] Downard v. Crenshaw, 49-296.

[9] Payne v. Billingham, 10-360.

[10] Kingsberry v. Buchanan, 11-387; Rix v. Silknitter, 57-262; Border v. Benge, 12-330.

[11] Kingsberry v. Buchanan, 11-387; Rix v. Silknitter, 57-262; Techmeyer v. Waltz,, 49-645.

[12] Code, Sec. 3970; Reeves v. Sebrun, 16-234.

exercise of ordinary care in the preservation of the property levied on, while it remains in his hands or under his control.[13] When the levy is excessive the sale will be set aside even though the whole property sold has been previously attached in the same action.[14] The mere noting the fact of a levy on personal property without taking and keeping possession of it, is not a levy sufficient to create a lien.[15] A levy on a growing crop is not valid as against after-acquired liens, if made so long before the officer can properly proceed to advertise and sell it, as to evince an intention on the part of the judgment creditors to hold the levy for the time being merely as a security; and, indeed, the tendency of our court seems to be to hold that immature growing crops can not be levied on and sold.[16] For a failure to perform his duty the officer is liable if it appear that the property levied on belonged to the execution defendant, was subject to levy and was lost because of the officer's negligence.[17]

§ 810. Of levying on judgments, bank bills, etc.— Judgments, bank bills and other things in action may be levied on and sold or appropriated, and assignments thereof by the officer will have the same effect as if made by defendant.[18]

When a railroad company received a number of its own mortgage bonds from a debtor, in payment of his debt, not for the purpose of canceling the same, but with the intention of putting them in circulation as securities, such bonds were property of the corporation and could be levied on.[19] Generally it may be said the right to levy on and sell personal property is measured by the power to take and deliver possession of it.[20] It has been

[13] Cresswell v. Burt, 61-590, and cases cited.
[14] Cook v. Jenkins, 30-452.
[15] Techmeyer v. Waltz, 49-645; Rix v. Silknitter, 57-262.
[16] Burleigh v. Piper, 51-649; see Downard v. Groff, 40-597; Hecht v. Dethman, 56-679; Martin v. Knapp, 57-336; Ellithrope v. Reidesil, 71-316.
[17] Hawkeye L. Co. v. Diddy, 84-634.
[18] Code, Sec. 3971.
[19] Hetherington v. Hayden, 11-335.
[20] Campbell v. Leonard, 11-489.

held that the mortgagor of personal property in possession of the mortgagee has no interest in it subject to levy; but provision is now made by statute for levying on mortgaged chattels.[21] A promissory note may be levied on and sold on execution.[22] Under section 3272 of the revision of 1860, which did not expressly include judgments, it was held that a judgment could not be reached by levy and sale on execution,[23] but that the proper method of procedure was to garnish the judgment debtor. Under sections 3971 and 4035 of the code an assignment of a promissory note by an officer levying on and selling it has the same effect as if made by the defendant in execution.[24] And the word "defendant," as used in the statute, includes not only the execution defendant, but the defendant in a garnishment proceeding auxiliary to execution. A judgment may now be levied on and sold as other personal property.[25] When land is sold on execution issued on a judgment which was not a lien on it, and such sale is set aside, the satisfaction of the judgment by the sale should also be set aside.[26]

§ 811. Of proceedings by garnishment.—In proceedings by garnishment on execution, the garnishee must be served as in case of an attachment; his answer may be taken by the officer or he may be notified to appear in court, and in every particular the proceedings must be the same as under garnishment on attachment as near as practicable.[27] And proceedings by garnishment on execution will not, in any manner, be affected by the expiration of the execution or its return, and when parties thereunder have been garnished, the officer must return to the next term of court thereafter a copy of the execution with all his doings thereon, so far as they re-

[21] Code, Secs. 3979 to 3990; Campbell v. Leonard, 11-489; Torbet v. Hayden, 11-435; Gordon v. Hardin, 33-550; Vanslyck v. Mills, 34-375; Wells v. Sabelowitz, 68-238.

[22] Osborn v. Cloud, 23-104.

[23] Osborn v. Cloud, 23-104.

[24] Earhart v. Gant, 32-481.

[25] Ochiltree v. The M., I. & N. R. Co., 49-150; see Osborn v. Cloud, 23-104; Beaver Valley Bk. v. Cousins, 67-310.

[26] Farmer v. Sasseen, 63-110.

[27] Code, Sec. 3975; Ball v. Cedar Valley Creamery Co., 67 N. W., 232.

late to said garnishment, and the clerk must docket an action thereon without fee, and the further proceedings must conform to proceedings in garnishment under attachments.[28] When issue is not taken on the answer of the garnishee at the term it is filed, he is entitled to notice unless he voluntarily appears.[29] A fund in court may be levied on.[30] Formerly the statute did not require notice of the garnishment proceeding to be given to the judgment debtor.[31] Now such notice is necessary.[32]

§ 812. Of levying on mortgaged chattels.—Mortgaged personal property, not exempt from execution, may be taken on attachment or execution issued against the mortgagor if the officer, or the attachment or execution creditor, within ten days after such levy shall pay to the holder of the mortgage the amount of the mortgage debt and interest accrued, or deposit the same with the clerk of the district court of the county from which the attachment or execution issued for the use of the holder of the mortgage, or secure the same as hereinafter provided.[33]

When the debt secured by the mortgage is not due as shown by the mortgage, the officer, or the attachment or execution creditor must also pay or deposit with the clerk interest on the principal sum at the rate specified in the mortgage for the term of sixty days from the date of the deposit unless the debt secured falls due in a less time, in which case interest must be deposited for such shorter period.[34]

If within ten days after such levy the attachment or execution creditor does not pay the amount, make the deposit, or give the security required, the levy will be discharged and the property restored to the possession of

[28] Code, Sec. 3976.
[29] Kienne v. Anderson, 13-565.
[30] Patterson v. Pratt, 19-358.
[31] Smith v. Dickson, 58-444.
[32] Code, Sec. 3947; Hamilton Buggy Co. v. Iowa Buggy Co., 88-364; Ammerman v. Vosburg, 70 N. W., 620.
[33] Code, Sec. 3979; Blotcky v. O'Neill, 83-574; Danforth v. Harlow, 76-236; Deering v. Wheeler, 76-496; Willson v. Felthouse, 90-315.
[34] Code, Sec. 3980.

the person from whom it was taken and the creditor will be liable to the holder of the mortgage for any damages sustained by reason of such levy.[35]

When such sum is paid to the holder of the mortgage or deposited with the clerk, the attachment or execution creditor will be subrogated to all the rights of such holder and the proceeds of the sale of the mortgaged property will be first applied in the discharge of such indebtedness and the costs incurred under the writ of attachment or execution.[36]

If for any reason the levy upon the mortgaged property is discharged or released without a sale thereof, the attachment or execution creditor who has paid or deposited the amount of the mortgage debt will have all the rights under such mortgage possessed by the holder at the time of the levy.

If the holder thereof desire to be reinstated in his rights thereunder he may repay the money received by him with interest thereon at the rate borne by the mortgage debt for the time it has been held by him and demand the return of the mortgage, whereupon his rights thereunder will revest in him and the attachment or execution creditor will be entitled to the deposit made, or any part thereof remaining in the hands of the clerk, or any money returned to the clerk by the holder of the mortgage.[37]

The holder of the mortgage must before receiving the money tendered to him by the attaching or execution creditor or deposited with the clerk, state over his signature and under oath, on the back of the mortgage, the amount due or to become due thereon, and deliver the same, together with the note or other evidence of indebtedness secured by said mortgage, to the person paying the said amount or to the clerk with whom the deposit is made, and the holder of the mortgage will only receive

[35] Code, Sec. 3981.
[36] Code, Sec. 3982; Frantz v. Hanford, 87-469.
[37] Code, Sec. 3983.

the amount so stated to be due and the surplus, if any, will be returned to the person making the deposit.[38]

When the attaching or execution creditor thus pays the amount of the claim under the mortgage, he will not be required to give an indemnifying bond on notice to the sheriff by the holder of the mortgage of his right to the property thereunder, or if one has been given, it will be released.[39]

If under execution sale the mortgaged property does not sell for enough to pay the mortgage debt, interest and costs of sale, the judgment creditor will be liable for all costs thus made, but if a greater sum is realized the officer conducting the sale must at once pay to the mortgage holder the amount due thereunder and apply the surplus on the execution.[40]

For the purpose of enabling the execution or attaching creditor to determine the amount to be tendered or deposited to hold the levy under the writ of attachment or execution, the person entitled to receive payment of the mortgage debt must deliver to any such person, upon written demand therefor, a statement in writing under oath showing the nature and amount of the original debt, the date and the amount of each payment, if any, which has been made thereon, and an itemized statement of the amount then due and unpaid.[41] If the right of the mortgagee to receive such or any sum is for any reason questioned by the levying creditor, he may within ten days after the levy or after demand is made for a statement of the amount due, commence an action in equity to contest such right, upon filing a bond in a penalty double the amount of such mortgage, conditioned for the payment of any sum to be found due to the person entitled thereto, with sureties to be approved by the clerk, and if such mortgagee is a non-resident or his residence is unknown, service may be had by publication as in other actions, but if such residence becomes known

[38] Code, Sec. 3984.
[39] Code, Sec. 3985.
[40] Code, Sec. 3986; Tyler v. Budd, 64 N. W., 679.
[41] Code, Sec. 3987.

before final submission, the court may order personal service to be made. If commenced at law the court may transfer the same to the equity calendar as in other cases. The court may appoint a receiver and must determine the amount due on the mortgage and all other questions properly presented, and may continue and preserve or dismiss the lien of the levy, the costs to be taxed to the losing party. If there are two or more mortgages, the creditor may admit the validity of one or more, and make the required deposit as to such, and contest the other, and where there are two or more such mortgages, each of which is questioned, a failure to establish the invalidity of all will not defeat the rights of the levying creditor, but in such case the decree must determine the priority of liens and direct the order of payment out of the proceeds of the property, which must be sold under a special execution to be awarded in said cause. A creditor may, however, contest in any other way the validity of any mortgage.[42] A failure to make the statement above mentioned when required will postpone the lien of the mortgage and give the levy of the writ of attachment or execution priority over the claim of the holder thereof.[43] If the mortgagee before the levy of an attachment or execution has been garnished at the suit of a creditor of the mortgagor, a creditor desiring to seize the mortgaged property under a writ of attachment or execution must pay to the holder of the mortgage, or deposit with the clerk, in addition to the mortgage debt, the sum claimed under the garnishment.[44]

Prior to the enactment of this statute it was held, generally, that the interest of the mortgagor in mortgaged chattels could not be levied on.[45] And it was also held that the proper method of reaching mortgaged chattels was by garnishment of the mortgagee.[46] The

[42] Code, Sec. 3988; Hibbard v. Zenor, 75-471; Thomas v. Farley Mfg. Co., 76-735; Citizens State Bk. v. Council Bluffs Fuel Co., 89-618; Clark v. Patton, 92-247.

[43] Code, Sec. 3989.

[44] Code, Sec. 3990.

[45] Campbell v. Leonard, 11-489; Gordon v. Hardin, 33-550; Vanslyck v. Mills, 34-375; Porter v. Knight, 63-365.

[46] Torbet v. Hayden, 11-444;

levy of an attachment on mortgaged chattels is not void because of a failure to pay or offer to pay the mortgage debt where the creditors are contesting the validity of the mortgage.[47] Before a creditor can contest the right of the mortgagee under this statute he must acquire an apparent lien upon the property by making a levy as therein provided.[48] But when a mortgage is alleged to be fraudulent the creditor may resort to any other remedy which was available to him before the passage of this statute.[49] As to the effect of the levy upon a subsequent valid mortgage taken with knowledge of the levy.[50] Where execution is levied on mortgage chattels the deposit by the execution creditor of the amount of the mortgage debt is properly deducted from the amount realized at the sale.[51]

§ 813. Of the levy on partnership property and proceedings thereunder.—When the officer has an execution in his hands against one owning property jointly, in common or in partnership with another, he may levy on and take possession of such property sufficiently to enable him to appraise and inventory the same, and for that purpose must call to his assistance three disinterested persons; which inventory and appraisement must be returned by the officer with the execution, and he must state in his return who claims to own the property.[52]

And in such a case, the plaintiff will, from the time the property was so levied on, have a lien on the interest of the defendant therein and may commence an action in equity to ascertain the nature and extent of such interest, and to enforce the lien, and if it be deemed necessary or proper by the court, a receiver may be appointed to take possession of the property.[53] The interest of the defend-

Buck-Reiner Co. v. Beatty, 82-353; Blotcky v. O'Neill, 83-574.

[47] Hibbard v. Zenor, 75-471.

[48] Thomas v. Farley Mfg. Co., 76-735.

[49] Citizens State Bk. v. Council Bluffs Fuel Co., 89-618.

[50] Clark v. Patton, 92-247.

[51] Tyler v. Budd, 64 N. W., 679.

[52] Code, Sec. 3977; Lambert v. Powers, 36-18; see Richards v. Haines, 30-574.

[53] Code, Sec. 3978; Richards v. Haines, 30-574; Lambert v. Pow-

ant in the assets of a partnership of which he is a member, is liable on execution, and must be first exhausted before resort can be had to his homestead.[54] When a separate creditor of an individual partner levied on and sold partnership property, without bringing an action to determine the partner's interest therein, as provided by law, such sale was held invalid as against creditors of the partnership who afterward levied on the same property.[55]

When it is sought to reach an interest of a party in partnership property, the burden is on the plaintiff to show that the party is a member of the partnership, and, unless such fact is established by the evidence, the appointment of a receiver to determine the value of his interest is erroneous.[56] The creditor of an insolvent person may subject to the payment of his debt, real property, the title to which is in the insolvent's wife's name, but toward the payment of which the debtor has contributed, to the extent of such contribution, and this is so even though the property in controversy is the homestead.[57]

§ 814. Of executions against municipal corporations.— If the sheriff has in his hands an execution against a municipal corporation, he must levy the same upon the property of such corporation, not exempt from execution, if any be found, and, if none such is found, the sheriff must return the writ, reciting the facts in his return; if no property be found, or if the judgment creditor elect not to issue execution against the corporation, a tax must be levied as early as practicable to pay off the judgment, and when a tax has been so levied and any part thereof collected, the treasurer of the corporation must pay the same to the judgment creditor or to the clerk of the court in which judgment was rendered in satisfaction thereof.[58] A municipal corporation can ex-

ers, 36-18; Aultman v. Fuller, 53-60.

[54] Lambert v. Powers, 36-18.

[55] Aultman v. Fuller, 53-60.

[56] Dupuy v. Sheak, 57-361.

[57] Croup v. Morton, 49-16.

[58] Code, Sec. 3973.

ercise the power of taxation only when expressly conferred by statute.[59] But when a judgment against a municipal corporation can be paid in no other manner, it is the duty of the corporate authorities to levy a special tax to discharge the same if within the limit of their power to levy taxes.[60] And such duty will be enforced by mandamus.[61] And when it is not in the power of the corporation to pay off the judgment by a single levy, it may make levies from year to year until the indebtedness is paid.[62] While a judgment creditor may take the scrip of a municipal corporation in payment of his judgment, he is not compelled to do so.[63] It was held under the revision of 1860 that if the proper officers of a municipal corporation having power to levy a tax for the payment of a judgment refused to do so after a demand made, they were individually liable.[64] If the current expense of a corporation absorbs the entire tax authorized to be levied, the officers of such corporation are not liable for refusing to make a further levy, nor for a failure to set apart a portion of that levy in payment of the judgment,[65] and the provisions of section 3049 of the code are applicable to school districts.[66] If the corporation purposely makes its assessment and valuation low to avoid a judgment against it, it may be compelled by mandamus to make a fair assessment.[67] The tax may be an addition to that provided for in sections 496 to 498 of the code.[68]

§ 815. How stock interests of the defendant in a corporation are levied on.—Stock interests owned by the defendant in any company or corporation, also debts due him and property of his in the hands of third per-

[59] Clark v. Davenport, 14-494; Jeffries v. Lawrence, 42-498; Iowa R. L. Co. v. County of Sac, 39-124.

[60] Oswald v. Thedinga, 17-13; Coy v. Lyons, 17-1; Coffin v. City Council, etc., 26-515; Porter v. Thompson, 22-391; Iowa R. L. Co. v. County of Sac, 39-124.

[61] Coy v. Lyons, 17-1; Boynton v. Dist. Twp., 34-510.

[62] Boynton v. Dist. Twp., 34-510.

[63] Porter v. Thompson, 22-391; Oswald v. Thedinga, 17-13.

[64] Same as No. 63 above.

[65] Porter v. Thompson, 22-391; Coffin v. Davenport, 26-515.

[66] Boynton v. Dist. Twp., 34-510; Stevenson v. Dist. Twp., 35-462; Brown v. Crego, 32-498; State v Davenport, 12-335.

[67] Coffin v. Davenport, 26-515.

[68] Rice v. Walker, 44-458.

sons, may be levied upon by process of garnishment.[69] But, as we have seen, judgments owned by him may be levied on and sold under execution without garnishment.[70]

§ 816. Debtor may pay the sheriff.—After the rendition of a judgment, any person indebted to the defendant in execution may pay to the sheriff the amount of such indebtedness, or so much thereof as is necessary to satisfy the execution, and the sheriff's receipt will be a sufficient discharge of the debt to the extent of such payment.[71] The assignee of railroad bonds under an assignment made after the levy of an execution thereon takes them subject to the levy.[72]

§ 817. Effect of the levy, surplus, etc.—When property subject to execution, and sufficient to pay the debt, has been levied on and advertised as provided by law, neither plaintiff nor his assignee can treat it as a nullity, and sue out a second execution to be levied on additional property; sometimes the writ may be ordered returned by the plaintiff or his assignee after levy and before sale, as when further time is given, or the proceedings are illegal, or irregular, or when the sale, if made, would be void.[73] When the sheriff levies on the property of a third person the act is a tort and the writ does not protect him,[74] and the officer is liable as a trespasser to the owner.[75] Or the owner may replevin the property without making any demand therefor.[76] Where a surplus arises from a sale of property by the sheriff on foreclosure of a mortgage, and he has an execution in his hands against the party entitled to such surplus, he may levy on such surplus and apply it on such execution.[77] And when he has other executions in his hands he may

[69] Code, Sec. 3974; Claflin v. Iowa City, 12-286; Lambert v. Powers, 36-18.
[70] Code, Sec. 3971.
[71] Code, Sec. 3972.
[72] Hetherington v. Hayden, 11-335.
[73] McWilliams v. Myers, 10-325; Downard v. Grenshaw, 49-296; Code, Sec. 4042.
[74] Shea v. Watkins, 12-605.
[75] Rakestraw v. Hamilton, 14-147.
[76] Gimble v. Ackley, 12-27; Shea v. Watkins, 12-605.
[77] Payne v. Billingham, 10-360.

apply the surplus thereon, whether it arises from a sale of mortgaged premises or on a general execution; if a surplus still remains, it must be paid to the debtor unless there are liens upon the property which ought to be paid therefrom and the holders of them make claim to such surplus, in which case the same must be paid into the hands of the clerk to be applied as ordered by the court.[78] Property in the hands of a receiver appointed by the court is not liable to be seized on execution.[79] Ordinarily a levy on sufficient personal property to satisfy the judgment becomes prima facie a satisfaction of the claim as to junior execution creditors, and sometimes, it seems, as to the defendant in execution.[80] And a release of the levy without the knowledge of a surety will release him, and no judgment can be sued on while property sufficient to satisfy it is held under execution.[81]

§ 818. When an indemnity bond may be demanded.—An officer must levy the execution in his hands on any personal property in the possession of, or that he has reason to believe belongs to the defendant, or on which the plaintiff directs him to levy, unless he has received notice in writing under oath from some other person, his agent or attorney, that such property belongs to him, or, if after levy he receives such notice, he may release the property unless an indemnifying bond is given, but the officer will be protected from all liability by reason of such levy until he receives such written notice.[82] And the provisions of this section apply also to levies under special execution.[83] A judgment creditor to induce the sheriff to sell property levied upon under an execution where no notice had been received that the property was claimed by a third person, voluntarily ex-

[78] Code, Sec. 4030.

[79] Martin v. Davis, 21-535.

[80] Lucas v. Cassady, 2 G. Gr., 208; Williams v. Gartrell, 4 G. Gr., 287; see Reed v. Crossthwaite, 6-219.

[81] Sherraden v. Parker, 24-28; Peck v. Parchen, 52-46.

[82] Code, Sec. 3991; Koster v. Pease, 42-488; Finch v. Hollinger, 43-598; West v. St. John, 63-287; Cox v. Currier, 62-551; Allen v. Wheeler, 54-628; Evans v. Thurston, 53-122; Whitney v. Gammon, 67 N. W., 405.

[83] Bank of Reinbeck v. Brown, 76-696.

ecuted a bond to indemnify the sheriff conditioned to pay "to any claimant of the property" the damages he may sustain in consequence of the levy and sale. Such creditor and his sureties were not liable on the bond.[84] Under code 3991 it is sufficient to serve the notice on the deputy who made the levy, and the claimant having delivered the notice and a copy to the deputy, and he having read the original, and indorsed acceptance of service thereon and returned it, keeping a copy, the service is sufficient.[85] The action of replevin will not lie against an officer holding the property under execution, unless, prior to the commencement of the suit, he is served with written notice of the ownership of such property.[86] But it seems that the failure of plaintiff to plead service of his notice may be waived, as may objections to the sufficiency of the notice or service.[87] The reading of a bill of sale to the officer does not constitute the notice required by the statute.[88] An officer can not recover for expenses and attorney's fees in defending a replevin suit for the property levied on in which he is successful.[89] Service of the written notice upon the deputy sheriff who made the levy is sufficient,[90] and where the execution was levied on mortgaged chattels and the mortgagee gave written notice to the officer that he was the owner of the chattels by virtue of the chattel mortgage, and demanded their immediate return, it was held the notice was sufficient.[91] Where an officer had several executions in favor of several plaintiffs and all against the same defendant which he levied on the property as that of the defendant, which was claimed by a third person as owner, and such third person gave one notice to

[84] Whitney v. Gammon, 67 N. W., 405.

[85] Peterman v. Jones, 63 N. W., 338; Burrows v. Waddell, 52-195.

[86] Finch v. Hollinger, 43-598; Koster v. Pease, 42-488; Peterson v. Espeset, 48-262; Allen v. Wheeler, 54-628; see chapter on Attachments.

[87] Warder v. Hoover, 51-49.

[88] Gray v. Parker, 49-624.

[89] Rickabaugh v. Bada, 50-56; Danforth v. Harlow, 76-236; Dolittle v. Hall, 78-571.

[90] Burrows v. Waddell, 52-195; Waterhouse v. Black, 87-317; Turner v. Younker, 76-258; Linden v. Green, 81-365.

[91] Wells v. Chapman, 59-658; and see Kern v. Wilson, 82-407.

the officer making it applicable to all the executions, and the execution creditors all united in one bond, it was held the notice and bond were good.[92] Acceptance of service of the notice herein provided for by the deputy sheriff is not binding on the sheriff who makes the levy.[93] Where the sheriff seizes property of one person under execution against another, the owner may maintain replevin to recover the value of the property, even though it has been sold by the sheriff, providing, of course, the owner has given the statutory notice.[94] When the deputy sheriff levies an execution on personal property and alone retains the actual possession of it, the notice of ownership by a third person may be served on the sheriff, the deputy being his agent.[95] The notice is not necessary in an action by the owner against one other than the sheriff.[96] The notice is for the protection of the officer.[97] It is not therefore necessary where a delivery bond has been executed.[98]

The notice herein mentioned must be in the form prescribed in such cases in attachments, and reference is made to the form given in the chapter on attachments.

§ 819. **Levy discharged, when.**—If the bond is not given the officer may refuse to levy the execution, or, if he has levied, he may refuse to sell and may restore the property to the person from whose possession it was taken, and the levy will in such case be discharged. The bond must be given within a reasonable time after it is required by the officer.[99] When the defendant, as sheriff, levied an execution on certain chattels as the property of the execution defendant, and plaintiff gave notice that he was the owner of the chattels, and defendant demanded an indemnifying bond, which the execution plaintiff refused to give, and the property was released and execution returned, such facts did not estop the de-

[92] Baxter v. Ray, 62-336.
[93] Chapin v. Pinkerton, 58-236.
[94] Hardy v. Moore, 62-65.
[95] Headington v. Langland, 65-276.
[96] Guest v. Heinly, 93-183.
[97] Bradley v. Miller, 69 N. W., 426.
[98] Ayres, etc. Co. v. Dorsey Produce Co., 70 N. W., 111.
[99] Code, Sec. 3993.

fendant—the officer—from levying a second execution issued on the same judgment, upon the same property.[1]

§ 820. Of the bond, its terms and conditions.—When the officer receives notice of claim of ownership of the property in some third person, he should forthwith notify the plaintiff, his agent or attorney, that an indemnifying bond is required. Bond may thereupon be given by or for the plaintiff, with one or more sufficient sureties, to be approved by the officer, to the effect that the obligors will indemnify him against the damages which he may sustain in consequence of the seizure or sale of the property, and will pay to any claimant thereof the damages he may sustain in consequence of the seizure or sale, and will warrant to any purchaser of the property such estate or interest therein as is sold, and thereupon the officer must proceed to subject the property to the execution and must return the indemnifying bond to the district court of the county in which the levy is made, which must be by the clerk filed and kept for the use of those for whom it was executed.[2]

Such bond may be in the following form:

FORM OF INDEMNIFYING BOND.

Know all men by these presents, that we, ———, principal, and——— and ———, sureties, are held and firmly bound unto ———, sheriff of ——— county, Iowa in the penal sum of ——— dollars, lawful money of the United States, well and truly to be paid to the said ———, his heirs, executors and assigns. The conditions of this obligation are such that whereas, the said ———, sheriff as aforesaid, has in his hands to be executed a certain writ of execution, issued from the office of the clerk of the district court of ——— county, Iowa, on a judgment rendered in said court on the ——— day of ———, 18—, for the sum of ——— dollars damages, and ——— dollars costs, in favor of the said ——— and against the said ———, which said writ is directed to the said sheriff. Now, if said obligors shall and will indemnify the said ——— against all damages which he may sustain in consequence of the seizure or sale on said writ of the following described personal property, to-wit: (here describe the property particularly) and shall and will pay to any claimant of said property the damages he may sustain in consequence of the said seizure or sale thereof, and shall and will warrant and make good

[1] Clark v. Reiniger, 66-507. [2] Code, Sec. 3992.

to the purchaser thereof at such sale, all the estate and interest which shall be sold therein under said sale, then this obligation to be void, otherwise to remain in full force and virtue.

Dated this ——— day of ———, 18—.

———, principal.

———, surety.

There should be indorsed upon this bond the approval of the sheriff, as follows:

The foregoing bond taken and the surety therein approved by me, this ——— day of ——— A. D. 18—.

———, sheriff of ——— county, Iowa.

If the indemnifying bond is given, the officer must hold the property; his liability in such cases is absolute, unless the property is taken from him by legal process.[3] An officer is not liable in damages for failing to levy upon property in the execution defendant's possession, if he had no interest therein subject to levy.[4] When an execution is levied on chattels under mortgage, and the mortgagee claims the property, but the execution plaintiff gives an indemnifying bond and directs the seizure of the property, it is held he can not defeat a money judgment on the bond, in favor of the mortgagee, on the ground that he had the property which the mortgagee might take under his mortgage.[5] But, as the statute relating to notice does not apply to cases where the execution defendant claims the property as exempt, it would seem that the officer would have no right to demand the bond provided in cases where notice is given.[6]

§ 821. **Of the application of proceeds, etc.**—When property, for the sale of which the officer is indemnified, sells for more than enough to satisfy the execution under which it was taken, the surplus must be paid into the court to which the indemnifying bond is directed to be returned. The court may order such disposition or pay-

[3] Evans v. Thurston, 53-122.
[4] Crosby v. Hungerford, 59-712.
[5] Rand v. Barrett, 66-731.
[6] McCoy v. Cornell, 40-457; Parsons v. Thomas, 62-319.

ment of the money to be made, temporarily or absolutely, as may be proper in respect to the rights of the parties interested.[7]

§ 822. What property is exempt from execution. —Property exempt from execution can not be levied on, and there is exempt to every debtor who is a resident of this State and the head of a family the following property: All wearing apparel of himself and family kept for actual use and suitable to their condition, and the trunks or other receptacles necessary to contain the same, one musket or rifle and shot gun, all private libraries, family bibles, portraits, pictures, musical instruments and paintings, not kept for the purpose of sale. A seat or pew occupied by the debtor or his family in any house of public worship, an interest in a public or private burying ground not exceeding one acre for any defendant, two cows and two calves, one horse, unless a horse is exempt as hereinafter specified. Fifty sheep and the wool therefrom and the materials manufactured from such wool. Six stands of bees, five hogs and all pigs under six months old. The necessary food for all animals exempt from execution for six months. All flax raised by the defendant on not exceeding one acre of ground and the manufactures therefrom. One bedstead and the necessary bedding for every two in the family; all cloth manufactured by the defendant not exceeding one hundred yards in quantity; household and kitchen furniture not exceeding two hundred dollars in value. All spinning wheels and looms; one sewing machine and other instruments of domestic labor kept for actual use. The necessary provisions and fuel for the use of the family for six months; the proper tools, instruments or books of the debtor, if a farmer, mechanic, surveyor, clergyman, lawyer,[8] physician, teacher or professor. The horse or the team, consisting of not more than two horses or mules, or two yoke of cattle, and the wagon or other vehicle, with a proper harness or tackle, by the use of

[7] Code, Sec. 3994.

[8] Abraham v. Davenport, 73-111.

which a debtor, if a physician,[9] public officer, farmer,[10] teamster or other laborer habitually earns his living; and if the debtor is a seamstress, one sewing machine will be exempt; if he is a printer, there is also exempt to him the printing press and the type, furniture and material necessary for the use of such printing press and a newspaper office connected therewith, not exceeding in all the value of twelve hundred dollars; poultry to the value of fifty dollars and the same to any woman, whether the head of a family or not.[11] The words "by the use of which the debtor habitually earns his living" refer alone to the team, wagon, etc., and not to the tools of the mechanic or books and instruments of the physician.[12]

A threshing machine used by a farmer to thresh the grain of others for hire, as well as his own grain, is not exempt from execution.[13] A physician, in order to avail himself of the exemption of two horses, must show the use of both for the purpose and in the manner contemplated by the statute, but he need not use both together.[14] Property which is by law exempt to a widow as the head of a family, is not to be deemed assets by the administrator, nor administered upon as such.[15] And consent of the widow to such administration, under a misapprehension of her rights, will not estop her afterward from claiming the property.[16] The exemption law is to be liberally construed.[17] A person owning exempt property can sell the same.[18] The building in which a photographer carries on his business, even though personal property, is not exempt.[19] The word family is used in its ordinary sense and necessarily includes more than

[9] Farmer v. Turner, 1-53; Consolidated Tank Line v. Hunt, 83-6; Pearson v. Quist, 79-54; Hickman v. Cruise, 72-528.

[10] Hickman v. Cruise, 72-528; Pease v. Price, 69 N. W., 1120.

[11] Code, Sec. 4008; Baker v. Hazlett, 53-18; Patterson v. Johnson, 59-397; Mitchell v. Joyce, 69-121.

[12] Perkins v. Wisner, 9-320.

[13] Meyer v. Meyer, 23-359.

[14] Corp v. Griswold, 27-379.

[15] Ellsworth v. Ellsworth, 33-164.

[16] Same as No. 15.

[17] Bevan v. Hayden, 13-122; Davis v. Humphrey, 22-137; Kaiser v. Seaton, 62-463; Equitable Life Ass. Soc. v. Goode, 70 N. W., 113; Tyler v. Coulthard, 64 N. W., 681.

[18] Bevan v. Hayden, 13-122.

[19] Holden v. Stranahan, 48-70.

one person.[20] A lawyer who is the head of a family is entitled to hold his books and office furniture exempt where he earns part of his living by legal work for others in his office.[21] A stallion kept by a farmer for breeding purposes is not exempt as one of a team by which he habitually earns his living.[22] An abstractor of titles is not a mechanic within the meaning of the law so as to exempt his books from execution.[23] One engaged in the livery business may be a laborer under the statute.[24] Food prepared by a restaurant keeper for his boarders is not exempt.[25]

§ 823. Same — Of personal earnings, etc.—The earnings of the debtor for his personal services, or those of his family, at any time within ninety days next preceding the levy, are exempt from execution and attachment.[26] Earnings exempt from execution may be used in payment of property purchased by the wife, and will be held by her free from her husband's debts.[27] The personal earnings above spoken of refer to professional men, mechanics, laborers, artists or other workers.[28] Nor is it necessary that the person claiming such exemption should give notice of his claim to the sheriff who seeks to levy on such exempt property.[29] The creditor can not seize by garnishment the earnings of a debtor accruing after such garnishment, except those which accrue after ninety days, as during the ninety days the earnings are exempt whether they accrued before or after garnishment.[30] Money due from boarders to a boardinghouse keeper for boarding and lodging, furnished at a stated sum per month, is not exempt.[31] Wages for personal ser-

[20] Emerson v. Leonard, 65 N. W., 153.
[21] Equitable Life Ass. Soc. v. Goode, 70 N. W., 113.
[22] Smith v. Dayton, 62 N. W., 650.
[23] Tyler v. Coulthard, 64 N. W., 681.
[24] Root v. Gay, 64-399; and see Farmer v. Turner, 1-53.
[25] Coffey v. Wilson, 65-270.
[26] Code, Sec. 4011; Banks v. Rodenbach, 54-695; see Patterson v. Johnson, 59-397.
[27] Robb v. Brewer, 60-539; Carse v. Reticker, 63 N. W., 461; Nash v. Stevens, 65 N. W., 825; King v. Bird, 85-535.
[28] McCoy v. Cornell, 40-457; Millington v. Laurer, 89-322.
[29] Same as No. 28.
[30] Davis v. Humphrey, 22-137; see Banks v. Rodenbach, 54-695.
[31] Shelby v. Smith, 59-453.

vices earned in the use of exempt property are exempt.[32] But a non-resident is not entitled to an exemption of his wages, even where the services are rendered in the State where he resides, and are such that under the laws of that State they would be exempt in an action brought there,[33] but a creditor residing in this State can not, by instituting a proceeding by garnishment in another State, seize a debt due to a debtor in this State, and which would be here exempt from execution.[34]

§ 824. Same—Of pension money.—All moneys received by any person residing in this State as a pension from the general government, whether in possession of such pensioner or deposited, loaned or invested by him, are exempt from execution or attachment, or seizure under any legal process whatever, whether he be the head of a family or not.[35] And if he absconds, and leaves a family, such moneys will be exempt to them.[36]

The exemption of pension money provided by the statutes of the United States, section 4747, applies only to such money while in course of transmission to the pensioner;[37] but the act of the legislature above referred to extends the protection of the law to this fund while in the hands of the pensioner. A pensioner may make a gift of his pension money and the donee will hold the same, or property purchased with it, as against the donor's creditors.[38] Under this section the exemption applies to animals purchased with pension money, but not to their increase and to money, but not to the accumulations and proceeds of it.[39]

[32] Patterson v. Johnson, 59-397.

[33] Mooney v. U. P. R. R. Co., 60-346; Newell v. Hayden, 8-140; Leiber v. U. P. R. Co., 49-688; Burlington & M R. Co. v. Thompson, 31 Kan., 180; Broadstreet v. Clark, 65-670; Smith v. C. & N. W. R. Co., 60-312; Lyon Co. v. Callopy, 87-567.

[34] Teager v. Landsley, 69-725; Hager v. Adams, 70-746; see Mumper v. Wilson, 72-163.

[35] Code, Sec. 4009; Fayette County v. Hancock, 83-694; Diamond v. Palmer, 79-578; Baugh v. Barrett, 69-495; Goble v. Stephenson, 68-270.

[36] Code, Sec. 4016.

[37] Webb v. Holt, 57-712; Triplet v. Graham, 58-135; and see Baugh v. Barrett, 69-495.

[38] Goble v. Stephenson, 68-270; Crow v. Brown, 81-344; Smith v. Hill, 83-684; Haefer v. Mullison, 90-372; Marquardt v. Mason, 87-136.

[39] Diamond v. Palmer, 79-578; Haefer v. Mullison, 90-372.

§ 825. Of insurance money.—A policy of insurance on the life of an individual, in the absence of an agreement or assignment to the contrary, enures to the separate use of the husband or wife and children of such individual independently of his or her creditors; and an endowment policy payable to the assured on attaining a certain age, is exempt from liability for any of his or her debts, as is also any benefit or indemnity paid under an accident policy, and the avails of all policies of insurance on the life of any individual payable to his surviving widow are exempt from liabilities for all debts of such beneficiary contracted prior to the death of the assured; provided the total exemption in any case for the benefit of any one person shall not exceed five thousand dollars.[40] This exemption is not merely to the wife and children, but embraces heirs generally.[41] But the avails of a policy of insurance are not exempted from the debts of a beneficiary when such beneficiary is a person other than the assured.[42]

§ 826. Same—Of exemptions to unmarried persons.—There is exempt to an unmarried person, not the head of a family, and to non-residents, their own ordinary wearing apparel and trunks necessary to contain the same.[43]

§ 827. Same—Of the head of the family.—When the debtor, if the head of a family, has started to leave the State, he will be entitled to hold, as exempt from execution, only the ordinary wearing apparel of himself and his family, and such other property in addition as he may select, in all not exceeding seventy-five dollars in value; which property must be selected by the debtor and appraised according to the provisions of section 3910 of the

[40] Code, Section 1805; McClure v. Johnson, 56-620; Stephenson v. Stephenson, 64-534; Mitchell v. Grand Lodge, 70-360; Wilmaser v. Continental L. Ins. Co., 66-417; Wendt v. Iowa Legion of Honor, 72-682; Rhode v. Bank, 52-375; Smedley v. Felt, 43-607; Murray v. Wells, 53-256; Herriman v. McKee, 49-185; Friedlander v. Mahoney, 31-311; Kelley v. Mann, 56 Iowa, 625; Phillips v. Carpenter, 79-600; In re Conrad's Estate, 89-396.

[41] Larrabee v. Palmer, 70 N. W., 100.

[42] Murdy v. Skyles, 70 N. W., 714.

[43] Code, Sec. 4113.

code.[44] As to what constitutes starting to leave the State.[45]

The word family, does not include strangers or boarders.[46] Ordinarily by the head of the family is meant the husband or father, but one may be such without being either the husband or father; a son having a mother and brothers and sisters, or either, depending on him for support and living in a household controlled by him may be such head; and so may a mother on the death of her husband. The party claiming the exemption as the head of the family must be master in law of it.[47] But an unmarried man for whom his brother and his brother's wife kept house, he supplying the provisions, etc., is not the head of the family.[48] But a widower with whom lived his son and his son's wife, and who employed a household servant, is the head of the family.[49] Where the husband and wife, having no children, had for seven years prior to the husband's death lived apart, he boarding with others and not contributing to his wife's support, he was not at the time of his death the head of the family.[50]

§ 828. When exemptions not allowed — Of absconding, etc.—Any person coming into this State with the intention of remaining is to be considered a resident within the meaning of the exemption laws.[51] None of the exemptions heretofore referred to are or can be allowed against an execution issued for the purchase money of property claimed to be exempt, and on which such execution is levied.[52]

When a debtor absconds and leaves his family, his property is exempt in the hands of his wife and children, or either of them.[53] And in order for the wife to obtain the benefit of this provision of the statute, the departure of

[44] Code, Sec. 4014; Graw v. Manning, 54-719; Tubbs v. Garrison, 68-44; Cox v. Allen, 91-462.
[45] Graw v. Manning, 54-719.
[46] Code, Sec. 4112.
[47] Whalen v. Cadman, 11-226.
[48] Same as No. 47.
[49] Tyson v. Reynolds, 52-431; see Van Doran v. Marden, 48-186.
[50] Linton v. Crosby, 56-386.
[51] Code, Sec. 4014; Cox v. Allen, 91-462.
[52] Code, Sec. 4015; Mitchell v. Joyce, 69-121.
[53] Code, Sec. 4016; Waugh v. Bridgeford, 69-334.

the husband need not be without her knowledge or consent.[54]

Proceeds of a voluntary sale of exempt property are not exempt from execution.[55] When a husband abandons his wife, leaving in her hands exempt property, she may dispose of it as she pleases, as it is exempt in her hands.[56] If the debtor is to select an animal to be held as exempt, written notice to do so may be served on her by the sheriff claiming it.[57] Under prior laws it was held that a voluntary surrender of property would be a waiver of the exemption.[58] Under the existing law it is provided that one entitled to the exemption does not waive it by failing to designate the exempt property or to object to a levy thereon unless he neglects to do so when required in writing by an officer about to levy.[59] But a mere failure to assert the claim when the property is seized will not always be a waiver.[60] An exemption can not be waived in a note, but it is held otherwise as to a lease covering exempt property.[61] A partner can not hold partnership property exempt.[62]

§ **829. Of other exemptions.**—Where an article belonging to the realty is wrongfully severed from it, it is still exempt from execution in case it was so before severance.[63] Public buildings owned by the State or by any county, city, school district, or other municipal corporation, or any other public property which is necessary and proper for carrying out the general purposes for which such corporations are organized, are exempt from execution, and the property of a private citizen can in no case be levied on to pay any debt of such corporation.[64] A judgment against a city is not a lien upon

[54] Malvin v. Christoph, 54-562.
[55] Harrier v. Fassett, 56-264.
[56] Waugh v. Bridgeford, 69-334; see Malvin v. Christoph, 54-562; Rawson v. Spangler, 62-59.
[57] Malvin v. Christoph, 54-562; Code, Sec. 4017; Glover v. Narey, 92-286.
[58] Richard v. Haines, 30-574.
[59] Code, Sec. 4017; Ellsworth v. Savre, 67-449.
[60] Gunsel v. McDowell, 67-521.
[61] Curtis v. O'Brien, 20-376; Fejavary v. Broesch, 52-88.
[62] Van Stadden v. Kline, 64-180.
[63] Congregational Society v. Fleming, 11-533.
[64] Code, Sec. 4007; Whiting v. Story County, 54-81; Davenport v. Peoria F. & M. Ins. Co., 17-276; Fort Dodge v. Moore, 37-389; Lewis v. Chickasaw County, 50-234; Lor-

premises owned by it and used for a hospital.[65] Insurance money is by statute exempt from execution.[66]

§ 830. Of waiver of right of exemption.—Any person entitled to any of the exemptions provided by section 4008 of the code does not waive his rights by failing to designate or select such exempt property, or by failing to object to a levy thereon, unless failing or refusing so to do when required in writing to make such designation or selection by the officer about to levy.[67] A waiver of exemption laws contained in a promissory note will not, when judgment is obtained thereon, entitle plaintiff to have execution levied on property exempt from execution.[68] Under the former law, if the owner of exempt personal property was present at the levy and permitted the property to be taken, without objection, he was deemed to have waived his right of exemption, and was estopped from afterward asserting it.[69] When it appears that the debtor has the right to select one of several vehicles as exempt, and such selection was made before levy, it should be respected by the officer.[70]

§ 831. Of securing the claims of laborers of insolvent corporations, etc.—When the property of any company, corporation, firm or person is seized upon by any process of any court, or placed in the hands of a receiver, trustee, or assignee for the purpose of paying or securing the payment of the debts of such company, corporation, firm, or person, the debts owing to employes for labor performed within the ninety days next preceding the seizure or transfer of such property, to an amount not exceeding one hundred dollars to each person, are preferred debts and will be paid in full, or if

ing v. Small, 50-271; Charnock v. Dist. Twp., 51-70.

[65] Davenport v. Peoria F. & M. Ins. Co., 17-276.

[66] Code, Sec. 1805; but see McClure v. Johnson, 56-620; Smedley v. Fell, 43-607; Murray v. Wells, 53-256; Friedlander v. Mahoney, 31-311.

[67] Code, Secs. 4008, 4017; Ellsworth v. Savre, 67-449; see Angell v. Johnson, 51-625; Moffit v. Adams, 60-44; Glover v. Narey, 92-286.

[68] Curtis v. O'Brien, 20-376.

[69] Angell v. Johnson, 51-625; Moffit v. Adams, 60-44; Green v. Blunt, 59-79.

[70] Parker v. Haley, 60-325.

there is not sufficient realized from such property to pay the same in full, then after the payment of costs, ratably out of the fund remaining, but such preferences shall be junior and inferior to mechanics' liens for labor in opening and developing coal mines.[71]

Any employe desiring to enforce his claim for wages at any time after the seizure of the property under execution or writ of attachment and before sale thereof is ordered, must present to the officer levying on such property or to such receiver, trustee or assignee, or to the court having custody of such property, or from which such process issued, a statement under oath showing the amount due after allowing all just credits and set-offs, and the kind of work for which such wages are due, and when performed, and unless objection be made thereto as provided in the following section, such claim must be allowed and paid to the person entitled thereto, after first paying all costs occasioned by the proceeding out of the proceeds of the sale of the property so seized or placed in the hands of a receiver, trustee, or assignee, subject to the provisions of the preceding section.[72]

Any person interested may contest any claim or any part thereof by filing objections thereto supported by affidavit with such court, receiver, trustee, or assignee, and its validity must be determined in the same way the validity of other claims are which are sought to be enforced against such property.[73]

Claims of employes for labor if not contested, or if allowed after contest, will have priority over all claims against, or liens upon property, except prior mechanics' liens for labor in opening or developing coal mines as allowed by law.[74]

§ 832. Of depriving persons of the benefit of the exemption laws.—If any person, with intent to deprive a resident in good faith of this State of the benefit of the exemption laws thereof, sends a claim against such resi-

[71] Code, Sec. 4019.
[72] Code, Sec. 4020.
[73] Code, Sec. 4021.
[74] Code, Sec. 4022.

dent and belonging to a resident, to another State for action, or causes action to be brought on such claim in another State, or assigns or transfers such claim to a non-resident of the State with intent that action thereon be brought in the courts of another State, the action in either case being one which might have been brought in this State, and the property or debt sought to be reached by such action being such as might, but for the exemption laws of this State, have been reached by action in the courts of this State, he is guilty of a misdemeanor and may be punished by a fine of not less than ten nor more than fifty dollars.[75]

§ 833. Of exchange of exempt property, liens, etc.—When property which is exempt is exchanged for property not by law exempt, the latter is liable for the owner's debts.[76] If exempt property is converted into a money claim against the will of the owner, it seems that such money will be exempt for a reasonable time.[77] The statute as to exemptions does not prevent the attachment of other liens recognized by law, such as innkeepers' liens.[78] A mortgagor of exempt property may maintain an action for a wrongful levy thereon.[79]

§ 834. Of the construction of the statute, remedy, etc.—It is the policy of courts to construe exemption laws with great liberality.[80] And when property ordinarily exempt, is levied on, on the ground that the owner is about to leave the State, the owner, in an action against the officer for the wrongful conversion of the property, is not estopped by his declarations of intention previously made, and evidence of such declarations is not admissible against him unless made at, after, or so near the time of starting, as to be a part of the res gesta.[81] And in such a case it is not competent for the

[75] Code, Sec. 4018; Willard v. Sturm, 65 N. W., 847.

[76] Friedlander v. Mahoney, 31-311.

[77] Kaiser v. Seaton, 62-463; Mudge v. Lanning, 68-641.

[78] Swan v. Bournes, 47-501; Munson v. Porter, 63-453.

[79] Evans v. St. Paul, etc., 63-204.

[80] Bevan v. Hayden, 13-122; Davis v. Humphrey, 22-137; Kaiser v. Seaton, 62-463.

[81] Tubbs v. Garrison, 68-44.

officer to show that he was informed, before making the levy, that plaintiff had left the State.[82] The exemption of property from sale on execution relates to the remedy and is governed by the lex fori and not by the lex loci contractus; hence, if the remedy is sought in this State, our laws govern.[83]

[82] Same as No. 81.

[83] Newell v. Hayden, 8-140; Helfenstein v. Cave, 3-287; Smith v. C. & N. W. R. Co., 60-312; Mooney v. U. P. R. Co., 60-346; Leiber v. U. P. R. Co., 49-688; Burlington & M. R. Co. v. Thompson, 31 Kan., 180; Broadstreet v. Clarke, 65-670.

CHAPTER L.

OF PROCEEDINGS AUXILIARY TO EXECUTION.

Sec. 835. Of proceedings after execution is returned.
836. Of proceedings before execution is returned.
837. Of granting the order.
838. Of the examination of the debtor.
839. Of power of the court or officer on the hearing.
840. Of disposal of equitable interests in lands.
841. Of debtor in contempt.
842. When a warrant of arrest will issue.
843. When the debtor may give bond.
844. Of the effect of the statute.
845. Of compensation of officers, etc.
846. Of actions by equitable proceedings.
847. Of the petition in equity supplemental to execution.
848. Of the answers.
849. Of the lien.
850. Of enforcing surrender of property.

Section **835. Of proceedings after execution is returned.**—When an execution against the property of a judgment debtor, or one of several judgment debtors on the same judgment, has been issued from the superior district or supreme court to the sheriff of the county where such debtor resides, or, if he does not reside in the State, to the sheriff of the county where the judgment was rendered, or a transcript of a justice's judgment has been filed, and execution issued thereon is returned unsatisfied, in whole or in part, the owner of the judgment is entitled to an order for the appearance and examination of such debtor.[1] The following form may be used in this case:

[1] Code, Sec. 4072; Osborn v. Reardon, 79-175; Reardon v. Henry, 82-134.

FORM OF PETITION FOR EXAMINATION OF JUDGMENT DEBTOR.

Title, }
Venue. }

The plaintiff states:

1. That judgment was rendered in this court in favor of the plaintiff and against the defendant, ———, on the ——— day of ———, 18—, for the sum of ——— dollars, said judgment drawing ——— per cent. interest from date of its rendition, and for costs.

2. That an execution was duly issued on said judgment, on the ——— day of ———, 18—, against the property of the said defendant in the county of ———, Iowa, which has been returned by the sheriff of said county wholly (or partly, as the case may be) unsatisfied.

3. That said defendant resides in said county of ———, Iowa.

Wherefore plaintiff asks that an order issue for the appearance and examination of said defendant.

———, plaintiff.

(Add verification).

(The petition may be signed by attorney and verified by plaintiff or his agent, or attorney, if they show proper knowledge of the facts.)

§ 836. Of proceedings before execution is returned. —The same kind of an order may be obtained at any time after the execution has been issued, upon proof, by affidavit of the party or otherwise, to the satisfaction of the court or judge who is to grant the same, that any judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment.[2] A second examination without a new affidavit may be held to be a continuation of an examination previously had.[3]

Such affidavit may be in the following form:

FORM OF AFFIDAVIT FOR ORDER BEFORE RETURN OF EXECUTION.

Title, }
Venue. }

State of Iowa, }
——— County. } ss.

I, ———, being duly sworn, depose and say that I am the plaintiff in the above entitled action; that judgment was rendered thereon in my favor and against said ———, defendant, on the ——— day of ———, 18—, in this court for ——— dollars, drawing ——— per cent. interest from date of its rendition, and for costs.

[2] Code, Sec. 4073.

[3] McDonnell v. Henderson, 74-619.

That on the ——— day of ———, 18—, an execution was issued on said judgment directed to the sheriff of said county; that said defendant is a resident of said county, (or if of another county so state), and that he has property therein which he unjustly refuses to apply toward the satisfaction of said judgment.

———.

(Add verification.)

(This affidavit may be sworn to before any officer having authority to administer an oath.)

The proceedings treated of in this chapter are not exclusive for the purpose of discovering a judgment debtor's property and subjecting it to execution in satisfaction of the judgment, but it is a proceeding at law additional to the remedy provided in equity. Before it can be made available there must be a judgment or order enforceable by execution. And it has been held that an order that an execution issue against a corporation, with a clause inserted therein directing that it shall be levied upon the property of certain stockholders, does not render such stockholders judgment debtors within the meaning of the statute, and they can not be compelled, after the return of such an execution, to disclose property in the summary manner provided by this statute, as there is no judgment against them individually.[4]

§ 837. Of granting the order.—The order may be made by the superior or district court of the county in which the judgment was rendered, or by the district court of the county to which execution has been issued, or in vacation by a judge of said court, and it may require the debtor to appear and answer before such court, or judge, or before a referee appointed for that purpose by the court or judge issuing the order, to report either the evidence or the facts.[5] It may be in the following form:

Title,)
Venue.)

It appearing to the undersigned by the petition (or affidavit, as the case may be) that a judgment has been rendered (here recite the statements of the petition or affidavit). Therefore, in the name of the State of Iowa, you, the said defendant, are hereby commanded to

[4] Code, Secs. 4072, 4073; Bailey v. The D. W. R. Co., 13-97.

[5] Code, Sec. 4074.

appear before (the court, judge or referee, as the case may be), at the (fix the town or city) in ——— county, on the ——— day of ———, 18—, at ———, o'clock —. M., to make discovery concerning your property.

Dated the ——— day of ———, 18—.

(Signature of judge).

If the order issues when the court is in session it should be under the hand of the clerk and seal of the court, and in such case the order should read as of the court, instead of the judge.

§ 838. Of the examination of the debtor.—As has been seen the examination may be had before the court, judge or referee appointed for that purpose.[6] The debtor may be interrogated in relation to any facts calculated to show the amount of his property or the disposition he has made of it, or any other matter pertaining to the purpose for which the examination is permitted to be made, and the interrogatories and answers must be reduced to writing, and preserved by the court or officer before whom they are taken. All examinations and answers must be under oath, and no person on such examination is excused from answering any question on the ground that his examination will tend to convict him of a fraud, but his answers can not be used in evidence against him on a prosecution for such fraud.[7] Witnesses may be required by the order of the court or judge, or by subpœnas from the referee, to appear and testify upon such examination in the same manner as upon the trial of an issue.[8]

§ 839. Of power of the court or officer upon the hearing.—If any property, rights or credits subject to execution are found on the examination, an execution may be issued; and the same be levied thereon as in other cases. The court or judge may order any property of the judgment debtor not exempt by law in the hands of himself, or of any other person or corporation, or due to the judgment debtor, to be delivered up or in any other mode

[6] Code, Sec. 4074.

[7] Code, Sec. 4075; see Parks v. Johnson, 86-475.

[8] Code, Sec. 4076; McDonnell v. Henderson, 74-619.

applied toward the satisfaction of the judgment.[9] But such an order should not be made when the ordinary processes of law are adequate for the subjugation of the property to the payment of the debt.[10] The object of this proceeding is to obtain an order for the payment of the debt, and not alone to settle the right of the creditor to the application of the proceeds of a certain fund.[11] It has been held, however, that the provisions of the law, in so far as they purport to confer upon the examining officer the power to order any property in the hands of the judgment debtor, or of others, to be delivered up and applied in satisfaction of the judgment under which the proceedings are had, and the further power to punish, as for contempt, any disobedience of any order made by the examining officer, are repugnant to sections 9 and 10 of article 1 of the constitution, and therefore void. But this decision has been overruled and the present law held constitutional.[12] The court or judge may also, by order, appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the debtor, and may also, by order, forbid a transfer or other disposition of the property of the judgment debtor not exempt by law, or may forbid any interference therewith. The court, judge or referee has power to continue his proceedings from time to time until they shall be completed.[13]

§ 840. Of disposal of equitable interests in land—If it appears on the hearing that the judgment debtor has any equitable interest in real estate in the county in which the proceedings are had, as mortgagor, mortgagee, or otherwise, and the interest of the debtor can be ascertained, as between himself and the person holding the legal estate, or having any lien on or interest in the same, without controversy as to the interest of such person, the receiver may be ordered to sell and convey such real estate, or the debtor's equitable interest therein, in the

[9] Code, Sec. 4077.
[10] Reardon v. Henry, 82-134.
[11] Ex parte Grace, 12-208.
[12] Ex parte Grace, 12-208; Eikenberry v. Edwards, 67-621; Farmer v. Hoffman, 67-678; Marriage v. Woodruff, 77-291.
[13] Code, Sec. 4081.

same manner as is provided by law for the sale of real estate on execution.[14] And if the sheriff is appointed receiver, he and his sureties will be liable on his official bond for the faithful discharge of his duties as such receiver.[15]

§ 841. Of debtor in contempt.—If the judgment debtor fails to appear after being personally served with notice to that effect, or if he fails to make full answers to all proper interrogatories propounded to him, he will be guilty of contempt, and may be arrested and imprisoned until he complies with the requirements of the law in this respect. And if any person, party or witness disobey an order of the court, or judge, or referee, duly served, such person, party or witness may be punished as for contempt.[16] The order mentioned must be in writing, and signed by the court, or judge, or referee making the same, and must be served as an original notice in other cases.[17] If, however, a party is present and has had an opportunity to be heard, it need not appear that he has been served with the order contemplated by the statute.[18]

§ 842. When a warrant of arrest will issue.—Upon proof to the satisfaction of the court, or judge authorized to grant the order, that there is danger that the defendant will leave the state, or that he will conceal himself, the court or judge, instead of issuing the order, may issue a warrant for the arrest of the debtor and for bringing him forthwith before the court or judge authorized to take his examination; and after he is thus brought before said court or judge he may be examined in the same manner and with like effect as heretofore stated.[19] And this warrant may be issued by a referee appointed by the court to examine the judgment debtor.[20]

§ 843. When the debtor may give bond.—On being brought before the court or judge he may enter into an

[14] Code, Sec. 4079.

[15] Code, Sec. 4080.

[16] Code, Sec. 4082; Eikenberry v. Edwards, 67-621; Farmer v. Hoffman, 67-678; Marriage v. Woodruff, 77-291; Reardon v. Henry, 82-134; Esty v. Fuller Impt. Co., 82-678.

[17] Code, Sec. 4083.

[18] McDonnell v. Henderson, 74-619.

[19] Code, Sec. 4085.

[20] Marriage v. Woodruff, 77-291.

undertaking in such sum as the court or judge shall prescribe, with one or more sureties, that he will attend from time to time for examination before the court, or judge, as shall be directed, and will not in the meantime dispose of his property or any part thereof, in default of which he shall continue under arrest and may be committed to jail on the warrant of such court, or officer, from time to time, for safe keeping until the examination is concluded.[21]

§ **844. Of the effect of the statute.**—It was held by the supreme court that the provisions of chapter 126 of the revision, and which are almost identical with the law now under consideration, were unconstitutional.[22] But recently the present law has been construed by the supreme court and held constitutional, though Beck and Adams, justices, dissent.[23]

§ **845. Of compensation of officers, etc.**—Sheriffs, referees, receivers and witnesses receive such compensation as is allowed for like services in other cases, to be taxed as costs in the case, and the collection thereof from such party or parties as ought to pay the same may be enforced by an order or execution.[24]

§ **846. Of actions by equitable proceedings.**—At any time after the rendition of a judgment an action by equitable proceedings may be brought to subject any property, money, rights, credits or interest therein belonging to the defendant, to the satisfaction of the judgment, and in such action persons indebted to the judgment debtor, or holding any property or money in which such debtor has any interest, or the evidences of sureties for the same, may be made defendants.[25] Under the revision of 1860 it was necessary to issue execution on the judgment and have it returned unsatisfied, either in whole or in part, for want of property of the judgment debtor to

[21] Farmer v. Hoffman, 67-678; Code, Sec. 4086; Ex parte Grace, 12-208; Eikenberry v. Edwards, 67-621.

[22] Ex parte Grace, 12-208.

[23] Eikenberry v. Edwards, 67-621; Farmer v. Hoffman, 67-678; Marriage v. Woodruff, 77-291.

[24] Code, Sec. 4084.

[25] Code, Sec. 4087; Bridgman v. McKissick, 15-260; Faivre v. Gillman, 84-573.

satisfy the same before this proceeding could be commenced.[26] In the absence of a holding that it is not necessary to issue execution and have it returned unsatisfied before bringing this action, the safer practice is to do so.[27] But it is held that the lien of a judgment attaches to an equitable interest in real estate, and it may be subjected to the satisfaction of the judgment by proceedings in equity for that purpose, and a junior judgment creditor by first instituting his proceedings in equity to subject the property to the payment of his debt thus acquires a priority over the senior judgment creditor who is less diligent.[28] This action can only be maintained after a judgment has been recovered.[29] By this proceeding he acquires a lien on the property.[30] The notice and copy of the petition must be served or a lien will not be effected.[31]

§ 847. Of the petition in equity supplemental to execution.

FORM OF PETITION IN EQUITY SUPPLEMENTAL TO EXECUTION.

Title, }
Venue. }

Par. 1. Plaintiff states: That on the ——— day of ———, 18—, judgment was rendered in the (name of court) in his favor and against the defendant for ——— dollars and costs.

Par. 2. That on the ——— day of ———, 18—, an execution was issued on said judgment directed to the sheriff of ——— county, Iowa, in which the defendant resided, and the same has been returned wholly unsatisfied, and no property of said defendant subject to execution could be found in said county on which to levy, and said judgment is wholly unsatisfied.

Par. 3. That said defendant, ———, on the ——— day of ———, 18—, (before judgment was rendered) was the owner of the following described real (or personal) property, to wit, (here describe it) and did make a pretended conveyance (or sale) of the same to the said ———, defendant, with the intent to hinder, delay and defraud plaintiff in the collection of his said judgment, and the said ———, defendant, took such conveyance (or made such purchase) with the like intent and without any consideration paid therefor.

[26] Revision, Sec. 3150; see Loving v. Pairo, 10-282, 289.
[27] McCormick Harv. Mch. Co. v. Gates, 75-343.
[28] Bridgman v. McKissick, 15-260.
[29] Faivre v. Gillman, 84-573; Ware v. Delahaye, 64 N. W., 640.
[30] Falker v. Linehan, 88-641.
[31] Ware v. Delahaye, 64 N. W., 640.

Par. 4. That said defendant, ———, is indebted to the plaintiff, ———, in the sum of ——— dollars upon a negotiable promissory note which is now held by the said ———, defendant, dated the ——— day of ———, 18—, payable on the ——— day of ———, 18—, and given for $1,000 and drawing ——— per cent. interest from date (or state that he holds money or property or securities belonging to the debtor, or in which he has an interest, and state how he is indebted, as that the judgment debtor has made an assignment for the benefit of creditors, which was done to defeat, delay and defraud plaintiff, etc.).

Wherefore plaintiff asks that said conveyance (or sale or assignment) be decreed and adjudged to be fraudulent and void as against him; that the said defendants, ——— and ———, be compelled to account, under the direction of the court, for all money, property, securities, etc., and surrender the same, under the directions of the court, and that plaintiff's judgment may be satisfied out of the same, together with the costs of this proceeding.

———, attorney for plaintiff.

(Add verification.)

§ 848. Of the answers.—The answers of all the defendants must be verified by their own oath and not by that of an agent or attorney, and the court must enforce full and explicit discoveries in the answers by process of contempt, or upon failure to answer the petition, or any part thereof, as fully and explicitly as the court may require; the same, or such part not thus answered, will be deemed true, and such order made or judgment rendered as the nature of the case may require.[32]

§ 849. Of the lien.—Plaintiff will acquire a lien on the property of the judgment debtor, or his interest therein, in the hands of any defendant, or under his control, which is sufficiently described in the petition, from the time of the service of notice and a copy of the petition on the defendant holding or controlling such property, or any interest therein.[33] An ordinary original notice, with a copy of the petition, must be served on the defendants, to which they must appear and plead in the time prescribed for pleading in equitable actions.[34]

§ 850. Of enforcing surrender of property.—The court must enforce the surrender of the money, or securi-

[32] Code, Sec. 4088.

[33] Code, Sec. 4089; Boggs v. Douglass, 89-150; Ware v. Purdy, 60 N. W., 526.

[34] Code, Sec. 4088.

ties therefor, or of any other property of the defendant in the execution which may be discovered in the action, and for this purpose may commit to jail any defendant or garnishee failing or refusing to make such surrender until it shall be done, or the court is satisfied that it is out of his power so to do.[35] And the provisions of the law relating to equitable proceedings apply as well to equities of the debtor in real property as to moneys, choses in action or other personal property, but as to real property the remedy is merely cumulative.[36]

[35] Code, Sec. 4090.

[36] Bridgman v. McKissick, 15-260.

CHAPTER LI.

OF ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

Sec. 851. When an action of right will lie.
852. When an action to quiet title will lie.
853. Of the parties.
854. Of proceedings in an action to recover real property.
855. Of proceedings in an action to quiet title.
856. Of service of notice.
857. Of the petition in an action of right.
858. Of the answer.
859. Of practice.
860. Of the verdict.
861. Of judgment.
862. Of limitations, etc.
863. Of tenants.
864. Of notice in actions to quiet title.
865. Of the petition to quiet title.
866. Of disclaimer and costs.
867. Of new trials.
868. Of appeals.
869. Of constructive notice.

Section **851. When an action of right will lie.**—Any person having a valid, subsisting interest in real property, and a right to the immediate possession thereof, may recover the same by an action against any person acting as owner, landlord or tenant of the property claimed.[1] But an action by ordinary proceedings will not lie in favor of one not claiming to have the legal title, but simply the right of possession.[2]

To maintain the action, the party must have a valid, subsisting interest in the premises, and a right to the immediate possession, and the defendant must be acting as

[1] Code, Sec. 4183; Beatty v. Gregory, 17-109; Doolittle v. Harrington, Mor., 226; Kerr v. Leighton, 2 G. Greene, 196.

[2] Kitteringham v. Blair Town Lot and Land Co., 66-280; Paige v. Cole, 6-153; Pendergast v. B. & M. R. R. Co., 53-326.

owner, landlord or tenant.[3] One seeking to redeem in equity from a tax deed should bring his action under section 1440 of the code.[4] An action to establish and quiet title is an action for the recovery of real property and plaintiff must show title in himself.[5] The plaintiff must recover on the strength of his own title.[6] The action of right is maintainable for corporeal, but not incorporeal, hereditaments. The general rule being that an action of ejectment will lie for anything real of which the officer can deliver possession.[7]

§ 852. When an action to quiet title will lie.—An action in the nature of an action of right will lie in favor of one having an interest in real property (whether in possession or not), against another who claims title to it, although not in possession of the property, for the purpose of determining and quieting the title.[8] But it will not lie against judgment creditors, and others not claiming title,[9] nor can it be maintained against one holding a certificate of tax sale and not claiming title.[10] But it will lie at the instance of executors, who, by the will, are given possession and control of real property, for the purpose of carrying out the provisions of the will,[11] and it lies against a non-resident defendant, and the statutes relating to service of notice by publication apply in such a case,[12] and it may be maintained in all cases where the defendant makes some claim adverse to the estate of the plaintiff, even if the defendant is in possession of the land.[13] It will lie by a claimant of swamp lands by conveyance from the state to quiet his interest.[14] It will lie by a legatee to quiet title against the widow of the testator who claims dower therein,[15] and by a railroad company to which land

[3] See Nos. 1 and 2.
[4] Callanan v. Lewis, 79-452.
[5] Schlosser v. Crookshank, 65 N. W., 344.
[6] McCarty v. Rochel, 85-427; Kreuger v. Walker, 80-733.
[7] Beatty v. Gregory, 17-109; see Bush v. Sullivan, 3 G. Greene, 344.
[8] Code, Sec. 4223; Fejervary v. Langer, 9-159; Standish v. Dow, 21-363; Eldridge v. Kuehl, 27-160.
[9] Fejervary v. Langer, 9-159.
[10] Eldridge v. Kuehl, 27-160, 176.
[11] Laverty v. Sexton, 41-435.
[12] Miller v. Davison, 31-435.
[13] Lewis v. Soule, 52-11; see Bartlett v. Love, 48-103, 107; Lees v. Wetmore, 58-170.
[14] Snell v. D. & S. C. R. Co., 78-88.
[15] Peet v. Peet, 81-172.

has been granted after it has complied with the conditions of the grant.[16]

§ 853. Of the parties.—If the plaintiff in an action of right seeks to recover damages against the ancestor for rents and profits his administrator and heirs must be made parties.[17]

An agent of the owner can not maintain an action in his own name.[18] The landlord in such action may be substituted, when it appears that the defendant is only a tenant, but such substitution is not required, as the action may proceed against the tenant alone, but in such case the landlord would not be bound unless he had been notified of the action.[19]

§ 854. Of proceedings in an action for the recovery of real property.—Actions for the recovery of real property must be by ordinary proceedings, and there can be no joinder and no counter claim therein except like proceedings, and as provided by statute;[20] but an equitable defense may be interposed in this action.[21]

The joinder of actions referred to in the statute relates to the cause of action, and not to the relief sought, and it seems an action in equity will lie if full relief can not be obtained by a decree quieting title.[22]

§ 855. Of proceedings in an action to quiet title.—The action to quiet title, except as otherwise provided, is to be conducted as other actions by equitable proceedings.[23]

§ 856. Of service of notice.—If the defendant is a non-resident and has an agent of record for the property in this State, service of the notice may be made on such agent in the same manner and with like effect as though made on the principal.[24]

[16] Cole v. D. M. V. R. Co., 76-185.
[17] Cavender v. Smith, 8-360.
[18] McHenry v. Painter, 58-365.
[19] State v. Orwig, 34-112.
[20] Code, Sec. 4182.
[21] Rosierz v. Van Dam, 16-175, and see Thompson v. Hurley, 19-331; Van Orman v. Spafford, 16-186; Kramer v. Conger, 16-434; Warren v. Crew, 22-315; Shawham v. Long, 26-488; Van Orman v. Merrill, 27-476.
[22] The County, etc., v. The I. F. & S. C. R. Co., 49-657, 662.
[23] Code, Sec. 4227.
[24] Code, Sec. 4186.

§ **857. Of the petition in an action of right.**—The plaintiff must recover on the strength of his own title.[25] Where the action is brought by a tenant in common or joint tenant of real property against his co-tenant, the plaintiff must show in addition to his evidence of right, that the defendant either denied the plaintiff's right, or did some act amounting to such denial,[26] and it would seem that the denial of plaintiff's right should be averred in the petition. If one tenant is a disseisor of his co-tenant he is liable to an action for rents and for waste.[27]

The petition should also state that the plaintiff is entitled to the possession of the premises, particularly describing them, and state the quantity of his estate, and the extent of his interest therein, and that the defendant unlawfully keeps him out of possession,[28] and the damages, if any, which he claims for withholding the property, and if other damages than the rents and profits are stated, it should set out the facts constituting the cause of such claim.[29] But the objection that plaintiff can not recover without proof that the defendant denied his right before suit brought, can not be made for the first time in the supreme court.[30] The plaintiff need not attach to his petition the evidence upon which he relies to prove his title.[31] The plaintiff must attach to his petition an abstract of the title relied on, showing from and through whom such title was obtained, together with a statement of the book and page where the same appears of record, and if such title or any portion thereof is not in writing, or does not appear, that fact must be stated in the abstract.[32] As to when an action is one of right and not of trespass.[33]

The petition may be in the following form:

[25] Code, Sec. 4184; Hurley v. Street, 29-429; Armstrong v. Pierson, 4 G. Greene, 45; McCarty v. Rochel, 85-427; Heinz v. Cramer, 84-497; Kreuger v. Walker, 80-733.

[26] Code, Sec. 4185.

[27] Dodge v. Davis, 85-77.

[28] Barrett v. Love, 48-103, 123.

[29] Code, Sec. 4187, see Phillips v. Blair, 38-649; Larum v. Wilmer, 35-244; Dunn v. Starkweather, 6-466.

[30] Starry v. Starry, 21-254, 256.

[31] Boardman v. Beckwith, 18-292; Larum v. Wilmer, 35-244, 247.

[32] Code, Sec. 4188.

[33] Van Sickle v. Keith, 88-9.

FORM OF PETITION IN ACTION OF RIGHT.

Title, }
Venue. }

The plaintiff states:

That he is entitled to the immediate possession of the following described property, to wit (give a particular description of the premises); that he is the absolute owner thereof in fee simple (or whatever the quantity of his estate, and the extent of his interest therein may be; that the defendant unlawfully keeps the plaintiff out of possession of said ——— premises (and in case where the action is by one tenant in common or joint tenant against his co-tenant insert the following: "that prior to the commencement of this action plaintiff demanded of said defendant possession of said premises, and said defendant denied plaintiff's right to the same or to any part thereof,") and that the plaintiff has sustained damages by reason of the wrongful withholding of said property by the defendant, in the loss of the rents and profits (if other damages are claimed, state the facts constituting the claim,) thereof, in the sum of ——— dollars.

Wherefore the plaintiff demands judgment for the immediate possession of said real property, and for ——— dollars, damages and costs.

———, attorney for plaintiff.

(Attach abstract of title.)

(The petition may be verified, but need not be unless it is sought to quiet title.)

§ 858. Of the answer.—The defendant must attach to his answer, if he claims title, an abstract of the title relied on, showing from and through whom such title was obtained, together with a statement showing the book and page where the same appears of record, and if such title, or any portion thereof, is not in writing, or does not appear of record, such fact must be stated in the abstract.[34] The answer of the defendant, and of each, if more than one, must also set forth what part of the land he claims, and what interest he claims therein generally, and if as a mere tenant, the name and residence of his landlord must be given.[35] If defendant fails to state what interest in or title to the premises he claims, such answer is fatally defective, nor can he in his answer set out plaintiff's title and then allege defects therein, thereby raising immaterial issues.[36]

[34] Code, Sec. 4188.

[35] Code, Sec. 4189; Phillips v. Blair, 38-649; Boardman v. Beckwith, 18-292; Larum v. Wilmer, 35-244, 247.

[36] Gillis v. Black, 6-439.

Facts constituting an estoppel in pais need not be specially pleaded; the averment of the facts constituting defendant's interest is sufficient.[37]

If defendant aver and prove that he has a crop sowed, planted, or growing on the premises, the jury must find the value of the premises from the date of the trial till January 1st next succeeding, and no execution will issue till that time, if defendant executes, with sureties to be approved by the clerk, a bond in double such sum, to pay said sum at that date. This bond has the force and effect of a judgment, and if not paid when due, execution may issue thereon.[38] Defendant may plead and rely on an equitable title as a defense.[39] Such bond may be in the following form:

FORM OF BOND FOR PAYMENT OF RENT IN ACTION OF RIGHT.

Know all men by these presents, that we, ———, principal, and ——— and ———, sureties, are held and firmly bound unto ——— in the sum of ——— dollars, lawful money of the United States, well and truly to be paid to the said ———, his heirs, executors and assigns.

The condition of this obligation is such, that whereas, on the ——— day of ———, 18—, in an action of right then pending in the district court of the State of Iowa, in and for——— county, wherein said ——— was plaintiff, and said ——— was defendant, it was found by the verdict of a jury, and determined by the judgment of the court in said action, that the said plaintiff recover the premises in controversy therein; that the said defendant is in the actual possession of, and has crops sowed (or planted or growing) thereon, and that the value of said premises from the date of said verdict until the 1st day of January, 18—, is the sum of ——— dollars. Now, if the said ——— shall and will pay to the said ——— on the 1st day of January, 18—, the said sum of ——— dollars, so assessed, then this obligation to be void, otherwise to remain in full force and virtue.

Dated this ———, 18—.

———, principal.
———, } sureties.
———, }

(Add justification and approval.)

§ 859. Of practice.—The trial may be to a jury, or by consent to the court, or a referee. When it appears that a defendant is only a tenant the landlord may be substi-

[37] Phillips v. Blair, 38-649.
[38] Code, Sec. 4202.
[39] Adams County v. Graves, 75-642.

tuted by serving an original notice on him, or by his voluntary appearance, and the judgment will in such case be conclusive against him;[40] but the statute does not require such substitution.[41] It is not necessary, when the defendant makes defense, to prove him in possession of the premises.[42]

A demurrer to the petition should be sustained when the action is by ordinary proceedings, when plaintiff does not claim to have the title; nor in such a case should the cause be transferred to the equity docket, no equitable relief being asked.[43] And a defendant in this action who holds a lien on the property can not foreclose it by way of counter claim.[44] This action against a person in possession can not be prejudiced by any alienation made by such person after the action is commenced.[45]

The court, on motion, and after notice to the opposite party, may, for cause shown, grant an order allowing the party applying therefor to enter upon the land in controversy and survey the same for the purpose of the action; such order must describe the property, and a copy thereof must be served on the owner or person having the occupancy and control of the land.[46] Either party must furnish the adverse party with a copy of any unrecorded conveyance, or furnish a satisfactory reason for not so doing within a reasonable time after demand therefor. No written evidence of title can be introduced on the trial unless it has been sufficiently referred to in the abstract, which may, on motion, be made more specific, and may be amended as other pleadings by the party setting it out.[47]

When the plaintiff is entitled to damages for withholding or using, or injuring his property, the defendant may set off the value of any permanent improvements made thereon, to the extent of the damages, unless he prefers to

[40] Code, Sec. 4190; State v. Orwig, 34-112.
[41] State v. Orwig, 34-112.
[42] Code, Sec. 4191.
[43] Kitteringham v. Blair Town Lot and Land Co., 66-280; see Page v. Cole, 6-153; Pendergast v. B. & M. R. R. Co., 53-326.
[44] Kemerer v. Bournes, 53-172, 176.
[45] Code, Sec. 4192; Jordan v. Ping, 32-64.
[46] Code, Secs. 4193, 4194.
[47] Code, Sec. 4188.

avail himself of the law for the benefit of occupying claimants.[48]

When an owner in possession of real property brings an action against adverse claimants to quiet his title, he will be entitled to the relief sought, if sustained by the proofs; under a general prayer for relief, if the petition embodies the essential averments of the statute, though it is manifest that it was not framed with special reference thereto.[49]

An instrument which is the basis of title may be introduced in evidence by a party, before showing its connection with the rest of his claim of title. In order to recover, title must be traced back to a common source, to the government, or to one under whom both parties claim.

In case title to real estate is in question, the fact that a party's only title is by an executory contract may be shown by parol, as a measure of directing the further investigation of title.[50] The right of recovery is to be limited to and determined by the pleadings.[51]

§ 860. Of the verdict.—The verdict may specify the extent and quantity of the plaintiff's estate, and the premises to which he is entitled, with reasonable certainty, by metes and bounds, and other sufficient descriptions, according to the facts proved,[52] and a general verdict in favor of the plaintiff without such specifications, entitles the plaintiff to the quantity of interest or estate in the premises as set forth and described in the petition.[53] In case of wanton aggression on the part of the defendant, the jury may award exemplary damages.[54]

§ 861. Of judgment.—If the interest of the plaintiff expire before the time in which he could be put in possession, he can obtain a judgment for damages only;[55] but the above provision does not apply to a case when, during action pending, the plaintiff conveys the land; in such

[48] Code, Secs. 4199, 2964; Parsons v. Moses, 16-440.
[49] Paton v. Lancaster, 38-494.
[50] Davis v. Strohm, 17-421.
[51] Pfotzer v. Mullany, 30-197.
[52] Code, Sec. 4195.
[53] Code, Sec. 4196.
[54] Code, Sec. 4200.
[55] Code, Sec. 4197.

case it may continue to be prosecuted in his name. But it does apply when the plaintiff holds a limited and determinable estate which expires pending the proceedings.[56]

When it appears that the plaintiff is entitled to the immediate possession of the premises it seems judgment will be entered and an execution issued accordingly,[57] and plaintiff may have judgment for the rent or rental value, of the premises which accrues after judgment, and before delivery of possession, by motion, in the court in which the judgment was rendered, ten days' notice thereof in writing being given, unless judgment has been stayed by appeal, and bond given, in which case the motion may be made after the affirmance of the judgment.[58]

§ **862. Of limitations, etc.**—No recovery can be had by the plaintiff for the use and occupation of the premises for more than five years prior to the commencement of the action.[59] A doweress can only recover damages for detainer of her dower from the proper party (as measured by use and profits at least) from the time of demand, provided the time of such demand was not more than six years prior to the commencement of the suit, and she can only recover for the six years preceding the commencement of the suit in any event.[60] The limitation in this section has no aplication to the right of an occupying claimant to recover for improvements.[61] The plaintiff, where he holds the legal title and right of possession, may recover for the use and occupation of the land, as well as title and possession.[62] In an action against the ancestor where the heirs are made parties after his death, they are not liable for damages for rents and profits, while the ancestor held possession, but only during the time they are in possession.[63]

An action to recover for use and occupation of real property, must be brought within five years from the

[56] Jordan v. Ping, 32-64.
[57] Code, Sec. 4203; see Dunn v. Starkweather, 6-470.
[58] Code, Sec. 4204.
[59] Code, Sec. 4198.
[60] O'Farrell v. Simplot, 4-381.
[61] Parsons v. Moses, 16-440.
[62] Dunn v. Starkweather, 6-470.
[63] Cavender v. Smith, 8-360.

time when the cause of action accrued.[64] If possession is relied on to bar an action of right, it must be uninterrupted, and the length of time and possession relied on must be set forth in the answer.[65]

§ **863. Of tenants.**—A tenant in possession, in good faith, under a lease or license from another, is not liable beyond the rent in arrears at the time of suit brought, and that which may afterward accrue, during the continuance of his possession.[66]

§ **864. Of notice in actions to quiet title.**—The notice in this action must accurately describe the property, and in general terms the nature and extent of plaintiff's claims, and is to be served as in other cases.[67] Such notice may be served by publication and will cut off the rights of a non-resident.[68] It may be in the following form:

FORM OF NOTICE IN ACTIONS TO QUIET TITLE.

Title, }
Venue. }

To ———:

Sir:—You are hereby notified that there is now (or state when there will be) on file in the clerk's office of the district court in and for said county, the petition of the plaintiff ———, in which he states that he is the owner in fee simple of (here accurately describe the premises) and praying that the title thereto be quieted in him and that you be barred and forever estopped from having, or claiming, any right or title thereto adverse to the plaintiff. Now, unless you appear thereto and defend before noon of the second day of the (name of term) term, 18—, of said court, which will commence on the ——— day of ———, 18—, at the court house in ———, Iowa, default will be entered against you, and a decree rendered thereon as prayed.

———, attorney for plaintiff.

§ **865. Of the petition to quiet title.**—The petition in an action to quiet title must be under oath, and must set forth the nature and extent of the plaintiff's estate, and describe the premises as accurately as possible and

[64] Tibbetts v. Morris, 42-120; see Muir v. Bozarth, 44-499.

[65] Wright v. Keithler, 7-92; Gillis v. Black, 6-439.

[66] Code, Sec. 4201; see Gardner v. Gardner, 25-102; Stanborough v. Cook, 83-705.

[67] Code, Sec. 4224.

[68] Knudson v. Litchfield, 87-111.

aver that he is credibly informed and believes that the defendant makes some claim adverse to the plaintiff, and pray for the establishment of plaintiff's estate against such adverse claims, and that the defendant be forever estopped from having or claiming any right or title to the premises adverse to plaintiff.[69] It may be in the following form:

FORM OF PETITION TO QUIET TITLE.

Title, }
Venue. }

The plaintiff states:

Par. 1. That he is the absolute owner in fee simple of the following described real estate, to wit: (Here describe the premises as accurately as possible.)

Par. 2. That he is credibly informed and believes that the defendant makes some claim adverse to the estate of the plaintiff in said property.

Par. 3. Wherefore, the plaintiff prays that his title and estate be established against the adverse claims of the defendant, and that said defendant and all persons claiming by or through him be barred and forever estopped from having or claiming any right or title adverse to the plaintiff in and to said premises, and that the title thereto be quieted in the plaintiff and that the defendant be adjudged to pay the costs of this proceeding.

———, attorney for plaintiff.

(Add verification.)

The plaintiff may unite in his petition a prayer to recover possession, and one that the cloud on his title be removed.[70]

§ 866. Of disclaimer and costs.—The defendant may appear and disclaim all right and title adverse to the plaintiff, in which case he will recover his costs. In other cases costs will be taxed in the discretion of the court. If a party twenty days or more before bringing suit to quiet title to real estate, requests of the person holding an apparent adverse interest or right therein the execution of a quit claim deed thereto, and shall also tender to him one dollar and twenty-five cents to cover the expense of the execution and delivery of the deed, and he shall refuse and neglect to comply therewith, the filing of a dis-

[69] Code, Sec. 4224; Paton v. Lancaster, 38-494.

[70] Lees v. Wetmore, 58-170.

claimer of interest or right will not avoid costs in an action thereafter brought, and the court may in its discretion, if the plaintiff succeeds, tax in addition to the ordinary costs of court, an attorney's fee for plaintiff's attorney not exceeding twenty-five dollars if there is but a single tract not exceeding forty acres in extent or a single lot in a city or town involved, and forty dollars if but a single tract exceeding forty acres and not more than eighty acres; in cases in which two or more tracts are included that may not be embraced in one description, or single tracts covering more than eighty acres, or two or more city or town lots, a reasonable fee may be taxed, not exceeding, proportionately, those above s.ated.[71]

§ 867. Of new trials.—In any of the causes mentioned in this chapter 3 of Title 21 of the Code, the court, in its discretion, may grant a new trial on the application of any party thereto, or those claiming under a party, made at any time within one year after the former trial, although the grounds for a new trial in other cases are not shown; but only one such new trial shall be granted.[72]

If the application for a new trial be made after the close of the term at which the judgment was rendered, the party obtaining a new trial must give the opposite party ten days' notice thereof before the term at which the action stands for trial.[73] The result of a new trial granted at a term subsequent to the one at which the first trial was had will not affect the rights of third parties, acquired in good faith, for a valuable consideration, since the former trial.[74]

But a party who, on such new trial, shows himself entitled to lands which have so passed to the purchaser in good faith, may recover the amount of damages against the other party in the same or a subsequent action.[75] The party who is successful in such new trial shall, if the case

[71] Code, Sec. 4225, 4226; Deacon v. Central Ia. Inv. Co., 63 N. W., 673.

[72] Code, Sec. 4205; Newell v. Sanford, 10-396; White v. Poorman, 24-108; Floyd v. Hamilton, 10-552; Butterfield v. Walsh, 25-263; The County, etc., v. The I. F. & S. C. R. Co., 49-657.

[73] Code, Sec. 4206.

[74] Code, Sec. 4207.

[75] Code, Sec. 4207.

require it, have his writ of execution to restore him his property.[76]

The statute does not seem to contemplate any notice to, or defense by, the opposite party as to the application for a new trial.[77] Greater latitude is given the courts with reference to new trials in this action than in any other.[78]

A mistake by a third party in selecting a paper to be used as documentary evidence when not discovered in time to correct it before the conclusion of the trial, is good cause for a new trial in an action of right.[79]

The unsuccessful party in an action of right is entitled to the benefit of the provision of the statute relating to new trials in such cases, when the defense is equitable in its nature, as well as when it is legal,[80] nor will the fact that the petition, in addition to asking that plaintiff's title be quieted, prays for other equitable relief regarding the land, take the case out of the provisions of the law relating to granting new trials, in relation to quieting title; and a new trial in such a case will be granted for failure to make defense through mistake which is due to misinformation and not to neglect.[81] But it will not be granted to relieve a party from results of his own negligence.[82] The law does not contemplate a trial upon an application for a new trial.[83]

§ 868. Of appeals.—An appeal may be taken from an order of the court granting a new trial, but such order will not be interfered with unless it is shown that the discretion vested in the court has been abused, or that great injustice has been done the appellant. A stronger case must be made than would be required to justify the reversal of an order refusing a new trial.[84] And an appeal lies from the final judgment in an action of right, that is,

[76] Code, Sec. 4207.
[77] The County, etc., v. The I. F. & S. C. R. Co., 55-157.
[78] White v. Poorman, 24-108; Newell v. Sanford, 10-396.
[79] Floyd v. Hamilton, 10-552.
[80] Butterfield v. Walsh, 25-263.
[81] The County, etc., v. The I. F. & S. C. R. Co., 49-657.
[82] Russell v. Nelson, 32-215.
[83] The County, etc., v. The I. F. & S. C. R. Co., 49-657.
[84] Newell v. Sanford, 10-396.

from the judgment and decree adjudicating the rights of the parties as to title.[85]

§ **869. Of constructive notice.**—When any part of the real property which is the subject of the action is situated in any other county than the one in which the action is brought, the plaintiff must, in order to affect third persons with constructive notice of the pendency of the action, file with the clerk of the district court of such county a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property in the county affected thereby, who must at once index and enter a memorandum thereof in the incumbrance book, and from the time of such indexing only will the pendency of the action be constructive notice to subsequent purchasers or incumbrancers thereof, who will be bound by all the proceedings taken after the filing of such notice to the same extent as if parties to the action; and within two months after the determination of such action, there shall be filed with such clerk a certified copy of the final order, judgment or decree, and he must enter and index the same as if it had been rendered in his county, or the notice will cease to be constructive notice.[86]

[85] McMurray v. Day, 70-671; see Williams v. Wells, 62-747.

[86] Code, Sec. 3544.

CHAPTER LII.

OF ACTIONS ON OFFICIAL SECURITIES AND FOR FINES AND FORFEITURES.

Sec. 870. Of bonds of public officers.
871. When the action lies
872. May be several actions on the same security.
873. Extent of liability of sureties.
874. Of the petition.
875. Fines and forfeitures.
876. Of the petition in cases of forfeiture.
877. To what county fines belong.
878. Effect of paying part of a fine.
879. Of recovery of fine paid.

Section **870. Of bonds of public officers.**—Our statute provides that the official bond of an officer is to be construed as security to the body politic or civil corporation of which he is an officer, and also to all the members thereof, severally, who are intended to be thereby secured.[1]

§ **871. When the action lies.**—The action will lie in favor of a land owner against a sheriff for money received by him from a railroad company on the condemnation of the right of way, upon the expiration of the thirty days allowed for an appeal from such proceedings; but it is barred unless brought within three years after it accrues, and the bar of the statute operates in favor of both the sheriff and the sureties on his bond.[2]

1 Code, Sec. 4336.

2 Code, Secs. 3447, 4336; Lower v. Miller, 66-408; see Prescott v. Gouser, 34-175; State v. Henderson, 40-242; Keokuk County v. Howard, 41-11; Wadsworth v. Gerhard, 55-367; Steel v. Bryant, 49-116; Moore v. McKinley, 60-367; Dewey v. Lins, 57-235; Wells v. Stomback, 59-376, 378; Bank of Reinbeck v. Brown, 76-696; Walters-Cates v. Wilkinson, 92-129; State v. Farrell, 83-661; Eyerly v. Board, 77-470; Hintrager v. Richter, 76-406; Sac County v. Hobbs, 72-69.

It will lie against a sheriff and his sureties for trespasses committed by him in attempting to perform his official duties,[3] and against a constable and sureties on his bond, where the constable acting in his official capacity levies on and sells property exempt from execution.[4] And against the sheriff when his deputy collects money on an execution and fails to pay it over to the parties entitled thereto.[5]

§ 872. May be several actions on the same security.—A judgment in favor of a party for one delinquency does not preclude the same, or another party, from an action on the same security for another delinquency, except that sureties can be made liable in the aggregate only to the extent of their undertaking.[6]

§ 873. Extent of liability of sureties.—Sureties on official bonds are liable only for acts done by the principal during the term for which the bond was given, nor are they responsible for the acts of the officer after his term has expired, although his successor may not have qualified.[7]

§ 874. Of the petition.—The petition may be in the following form:

FORM OF PETITION AGAINST SHERIFF FOR NEGLECTING TO PAY OVER MONEYS COLLECTED ON EXECUTION.

Title, }
Venue. }

The plaintiff states:

That at the times hereinafter mentioned the defendant was the sheriff of the county of ———, and State of Iowa. That on the ——— day of ———, 18—, at ———, an execution was duly issued in form and effect as required by law against the property of one ——— and in favor of the plaintiff upon a judgment for the sum ——— dollars principal, and ——— dollars costs, which had been duly recovered in favor of the plaintiff against said ——— in district court of the county of ———, in this State, and said execution was, by the plaintiff, directed and delivered to the defendant as such sheriff. That the defendant thereafter as such sheriff collected and received upon said exe-

[3] Charles v. Haskins, 11-329.
[4] Strunk v. Ocheltree, 11-158.
[5] Brayton v. Town, 12-346.
[6] Code, Sec. 4337; Charles v. Haskins, 11-329.
[7] Wapello County v. Bigham, 10-39.

cution for the use and benefit of plaintiff the sum of ——— dollars, besides the costs and his lawful fees thereon. That more than seventy days had elapsed since the issuance and delivery of said execution to the defendant, before this action was commenced.

That said defendant, in violation of his duty as said sheriff, has failed and neglected to pay over to the plaintiff the amount so collected or any part thereof, though often requested so to do, to the damage of this plaintiff, in sum of ——— dollars, no part of which has been paid.

Wherefore plaintiff demands judgment against said defendant for ——— dollars, with interest thereon from the ——— day of ———, 18—, and costs of this action.

———, attorney for plaintiff.

(Add verification if desired.)

§ 875. Fines and forfeitures.—Fines and forfeitures not otherwise disposed of go into the treasury of the county where the same are collected for the benefit of the school fund,[8] and actions for their recovery may be prosecuted by the officers or persons to whom they by law belong in whole or in part, or by the public officers into whose hands they are to be paid when collected.[9] A judgment for a penalty or forfeiture rendered by collusion, does not prevent another action for the same subject-matter.[10]

§ 876. Of the petition in cases of forfeiture.—The petition in an action to recover on a forfeited bond may be in the following form:

FORM OF PETITION IN ACTION ON A FORFEITED BOND.

Title, }
Venue. }

Your petitioner claims of the defendants, ——— and ———, the sum of ——— hundred dollars and for cause of such claim states: That heretofore, to wit: on the ——— day of ———, 18—, the grand jury of the county of ———, in the State of Iowa, duly returned into court an indictment against one ———, charging him with the crime of (here insert the crime charged) which said indictment was duly and properly filed by the clerk of the district court of said county and State.

That the judge of said court made an order on said indictment admitting the said ——— to bail in the sum of ——— hundred dollars.

[8] Code, Sec. 4338; Const., Art. 9, Sec. 4.

[9] Code, Sec. 4339.

[10] Code, Sec. 4340.

That afterward, to wit, on the ——— day of ———, 18—, the defendants, ——— and ———, made their certain bond, a copy of which bond is hereto attached and marked exhibit "A" and made a part hereof, conditioned that the said ——— should appear and answer said indictment and abide the orders and judgments of the court, and not depart without leave of same, and if they failed to perform either of these conditions, they would pay to the State of Iowa, the sum of ——— hundred dollars. That the said bond was on the ——— day of ———, A. D. 18—, accepted and approved, and duly and properly filed in the office of the clerk of said district court. That at the ——— term of said court for the year 18—, the said ——— was duly arraigned on said indictment, and that on ———, 18—, the said ——— plead guilty of the charge contained in said indictment, to wit (here insert crime charged); and that on the ——— day of ———, 18—, the said ——— was, by the judgment of the court then and there pronounced, sentenced to pay a fine of ——— dollars and costs taxed at ——— dollars.

That at the ——— term, 18—, of said district court, the said ——— was called to surrender himself in execution of the judgment but failed to appear, when the court made a further order declaring the bond given by said defendants herein forfeited.

That the said ——— having failed to abide the judgment of the court by surrendering himself in execution thereof, as these defendants agreed he should do, the whole amount of said bond, to wit: ——— dollars, became by the terms thereof due the plaintiff, and no part thereof has been paid.

Wherefore plaintiff demands judgment against the defendants in the sum of ——— dollars and costs.

———, county attorney,
of ——— county, Iowa.

(Add verification.)

§ 877. To what county fines belong.—When a criminal case is taken on a change of venue to another county and fines which have been imposed are paid in to the clerk of the county where the case is finally disposed of, they are "collected" within the meaning of the law in that county and should be paid into its treasury.[11]

§ 878. Effect of paying part of a fine.—If one is convicted of a crime, and fined, and in default of payment of the same is committed to prison for a time fixed, he can not, after being imprisoned for a part of the time, pay a part of the fine, and have his term of imprisonment reduced pro tanto.[12]

[11] Pottawatamie County v. Carroll County, 67-456. See also Warren County v. Polk County, 89-44.

[12] Galles v. Wilcox, 68-664.

§ 879. Of recovery of fine paid.—One who is arrested for the violation of a void ordinance, and pleads not guilty, but makes no objection to the ordinance, is found guilty and fined, and pays the same while under arrest, without protest, believing that the judgment against him is valid, does not pay under duress and can not recover back the money so paid.[13]

[13] Bailey v. Paulina, 69-463; see Kraft v. City of Keokuk, 14-86; Espy v. Ft. Madison, 14-226.

CHAPTER LIII.

OF ACTIONS AGAINST RAILWAY COMPANIES FOR DAMAGES CAUSED BY FIRE AND FOR INJURIES TO STOCK.

Sec. 880. Of former statutes.
881. Of the liability under the present statute.
882. Of liability of company operating a road.
883. Of contributory negligence.
884. Of the evidence.
885. Of damages.
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887. Of liability of railway companies for killing stock, etc.
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Section **880. Of former statutes.**—Prior to the enactment of the present law it was held that in actions to recover damages caused by fire set out by the engine of a railway company that it was incumbent on the plaintiff to show negligence of the defendant, and proof of the injury complained of was not sufficient to make out a prima facie case.[1]

§ **881. Of the liability under the present statute.**—The statute provides that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of said railway, and such damages may be recovered in the same manner as is pro-

[1] Gandy v. C. & N. W. R. Co., 30-420; McCummons v. C. & N. W. R. Co., 33-187; Garrett v. C. & N. W. R. Co., 36-121; see Jackson v. C. & N. W. R. Co., 31-176; Kesee v. C. & N. W. R. Co., 30-78; McCormick v. C., R. I. & P. R. Co., 41-193.

vided by law in regard to injuries to stock, except as to double damages. Under this statute it is held that no absolute liability is created against the defendant, but the statute makes the fact of the injury prima facie evidence of the negligence of the defendant, which presumption of negligence may be rebutted by evidence showing its freedom from such negligence.[2] And this same doctrine is recognized and approved in the latter cases.[3] Under this statute it was held that where the plaintiff in a reasonable attempt to save the property of another from destruction by fire set out by defendant's negligence received a personal injury that he might recover.[4] The question to be determined under the statute is, did defendant's engine set out the fire, if so, was the engine properly constructed and operated, and in good condition? and the duty of a railroad company to use the best devices available to prevent the escape of fire does not depend upon and is not fixed by the usage of other roads.[5] This statute does not invalidate a contract between a company and one given a license by it to erect a building on the right of way and which by its terms relieves the company from liability for an injury caused by its negligence.[6]

§ 882. Of liability of company operating a road. —The liability imposed by statute is not confined to the company which owns the railroad by the operation of which the damage was caused; but a company which is operating a line of railway owned and also used by another company which permits combustible matter to accumulate on its right of way, by reason of which fire from the engine of the company so operating the road

[2] Small v. C., R. I. & P. R. Co., 50-338; Slossen v. B., C. R. & N. R. Co., 51-295; Libby v. C., R. I. & P. R. Co., 52-92; Code, Sec. 2056; Babcock v. C. & N. W. R. Co., 62-593; Seska v. C., M. & St. P. R. Co., 77-137.

[3] Leland v. C., M. & St. P. R. Co. (not reported), 23 N. W. Rep. page 390; Engle v. C., M. & St. P. R. Co., 77-661; Rose v. C. & N. W. R. Co., 72-625; West v. C. & N. W. R. Co., 77-654; Babcock v. Railway, 62-593.

[4] Liming v. Ill. Cent. R. Co., 81-246.

[5] Metzgar v. C., M. & St. P. R. Co., 76-387.

[6] Griswold v. Ill. Cent. R. Co., 90-265.

originates on such right of way, is liable for the damages which result.[7]

§ 883. Of contributory negligence.—Prior to the enactment of the present provision of the code, it was held that the plaintiff, by his negligence or want of care, might contribute to produce the injury complained of, and if he did so, he could not recover; but what acts of commission or omission on his part would amount to negligence was a question for the jury to determine.[8] Later, it was suggested that it might not be incumbent on the plaintiff to prove his freedom from negligence.[9] But it is now held that the negligence of plaintiff, which may have contributed to the result complained of, will not defeat his recovery.[10]

§ 884. Of the evidence.—The fact of the fire being prima facie evidence of negligence, the plaintiff, it seems, need only prove the fact that it was set out by defendant's engine used in the operation of its road, and that he suffered damages thereby, their amount, that they have not been paid, also the corporate character of the defendant. He need not prove negligence on part of the defendant even if he pleads it.[11] Nor need he prove that he did not contribute to produce the injury.[12] Having established the facts above stated the plaintiff has made his case, which entitles him to recover unless the negligence which the law thus infers is overcome by proof of due care and freedom from negligence on the part of the defendant.[13] That an engine caused several fires on the

[7] Slossen v. B., C. R. & N. R. Co., 60-215.

[8] Kesee v. C. & N. W. R. Co., 30-78; Garrett v. C. & N. W. R. Co., 36-121; and see Slossen v. B., C. N. & N. R. Co., 60-221; Engle v. C., M. & St. P. R. Co., 77-661.

[9] Ormond v. C. Ia. Ry. Co., 58-742.

[10] West v. C. & N. W. R. Co., 77-654; Engle v. C., M. & St. P. R. Co., 77-661; see Rose v. C. & N. W. Co., 72-625; Seska v C., M. & St. P. R. Co., 77-137.

[11] Small v. C., R. I. & P. R. Co., 50-338; Code, Sec. 3639; Engle v. C., M. & St. P. R. Co., 77-661; Rose v. C. & N. W. R. Co., 72-625.

[12] See references to preceding section.

[13] Small v. C., R. I. & P. R. Co., 50-338; Slossen v. B., C. R. & N. R. Co., 60-214; Babcock v. C. & N. W. R. Co., 62-593; West v. C. & N. W. R. Co., 77-654; Leland v. C., M. & St. P. R. Co., 23 N. W. Rep. page 290; Engle v. C., M. & St. P. R. Co., 77-661; Greenfield v. C. & N. W. R. Co., 83-270.

same trip may be shown for the purpose of proving that it was out of repair, or negligently constructed, or negligently handled or operated.[14] But it can not be shown that other fires occurred along the right of way in the same vicinity shortly after the engines passed over the road and before the fire that destroyed the plaintiff's property.[15] After the defendant has introduced evidence showing its freedom from negligence plaintiff may rebut the same by evidence of a circumstantial character showing defendant's negligence.[16] As that the engine which set out the fire had set out other fires on the same trip, or that the fire caught in dry grass and weeds on the right of way, or other facts showing defendant's negligence.[17] The fact that the right of way was procured from the owner of the land on which the damages complained of occurred, will not prevent a recovery if such damages could not properly have been taken into consideration in estimating the right of way damages.[18] And it has been held that a railroad company was liable for damages by fire communicated by its negligence to a building of a third person and from such building to plaintiff's buildings, regardless of the negligence of the owner of the intermediate structure.[19] In an action by a tenant to recover the value of a crop destroyed by fire set by the defendant's engine, it appeared that the plaintiff did not pay cash rent for the premises, and it was held error not to permit him to be cross-examined as to whether he was to give a share of the crop as rent.[20] But one who is a trespasser can not maintain an action against a railroad company for negligence in the destruction of crops which he has raised, as such trespasser, on land to which he has no title and of which he was not

[14] Slossen v. B., C. R. & N. R. Co., 60-215; Lanning v. C., B. & Q. R. Co., 68-502; West v. C. & N. W. R. Co., 77-654; Johnson v. C. & N. W. R. Co., 77-666.

[15] Babcock v. C. & N. W. R. Co., 62-593; Hudson v. C. & N. W. R. Co., 59-581; Bell v. C., B. & Q. R. Co., 64-325.

[16] Babcock v. C. & N. W. R. Co., 62-593.

[17] Engle v. C., M. & St. P. R. Co., 77-661.

[18] Rodemacher v. C., M. & St. P. R. Co., 41-297.

[19] Small v. C., R. I. & P. R. Co., 55-582.

[20] Ormond v. C. Ia. R. Co., 58-742.

in possession, and which were on such land when burned,[21] but it would be otherwise as to a licensee,[22] and as to what is sufficient evidence of title.[23]

§ 885. Of damages.—In this class of actions ordinarily the damages recoverable will be the market value of the property burned or destroyed. But the measure of damages will depend somewhat on the character of the thing destroyed. Thus if an action be brought for damages for burning meadow or pasture land, it is clear that plaintiff, if entitled to recover, may show what it would cost to restore the meadow or pasture to as good a condition as it was in before the fire, and such sum will be the measure of his damages. As to what evidence is proper in such cases.[24] And if growing timber, an orchard, or a grove is burned, the value of it to the farm on which it is situated may be recovered, and this may be established by showing the value of the farm with the grove as it was before the fire, and its value immediately after the fire, and doubtless it may be established in other ways.[25]

§ 886. Of the petition.—It would seem that the petition will be good if it alleges the corporate capacity of defendant and the fact that it was at the time of the alleged injury running and operating a railroad over and across the plaintiff's farm, that while so operating its road its engine set fire to and burned the property of plaintiff, and the damage resulting therefrom, and that such damage is unpaid. It is not necessary to aver negligence on part of defendant nor the exercise of due care on part of plaintiff.[26]

[21] Murphy v. S., C. & P. R. Co., 55-473; Lewis v. C., M. & St. P. R. Co., 57-127; Comes v. C., M. & St. P. R. Co., 78-391.

[22] Metzgar v. C., M. & St. P. R. Co., 76-387; Bullis v. C., M. & St. P. R. Co., 76-680.

[23] Johnson v. C. & N. W. R. Co., 77-666; Fish v. C., R. I. & P. R. Co., 81-280.

[24] Vermilyea v. C., M. & St. P. R. Co., 66-606; and see Hamilton v. D. M. & K. C. R. Co., 84-131.

[25] Brooks v. C., M. & St. P. R. Co., 73-179; see Williamson v. Miller, 55-86; Leiber v. C., M. & St. P. R. Co., 84-97; Greenfield v. C. & N. W. R. Co., 83-270; Rowe v. C. & N. W. R. Co., 71 N. W., 409.

[26] Small v. C., R. I. & P. R. Co., 50-341; Rose v. C. & N. W. R. Co., 72-625; Engle v. C., M. & St. P. R. Co., 77-661.

The petition may be in the following form:

FORM OF PETITION FOR DAMAGES CAUSED BY FIRE SET BY AN ENGINE OF A RAILROAD COMPANY.

Title, }
Venue. }

Plaintiff states: That at the time of the fire and damages hereinafter mentioned he was and still is the owner and in possession of the following described premises (here describe the land) and that the same was meadow land well seeded and in good condition for raising grass, and that at the time hereinafter mentioned said land had a good crop of grass thereon.

That on the ——— day of ———, 18—, the defendant was and still is a corporation and railway company running and operating its railway (over, across and through the land above described) in ——— county, Iowa, by the name and style in which it is sued herein.

That at the time aforesaid and while so operating its railway as aforesaid, fire and sparks emitted and thrown from the locomotive engine run by defendant on its said railway set fire to the grass and weeds upon defendant's right of way, which spread to and burned and destroyed ——— acres of the grass aforesaid and the roots thereof, being situated on (here describe the land) the property of plaintiff, to his damage in the sum of ——— dollars, no part of which has been paid.

Wherefore, etc.

———, attorney for plaintiff.

It will be noticed that the above form does not contain any allegation that the fire occurred without the fault or negligence of plaintiff, and in view of the recent decisions of the supreme court, it is not believed such an allegation is necessary. If the action is for the burning of articles detached from the realty the petition can be changed accordingly. If it is sought in one action to recover for damages caused by the setting of several fires, each should be stated in a separate count of the petition.

FORM OF A PETITION TO RECOVER FROM A RAILWAY COMPANY FOR SETTING OUT FIRE CAUSING DAMAGE TO AN ORCHARD.

Title, }
Venue. }

The plaintiff states: That the defendant is a corporation duly organized, and during all the times herein referred to was operating a line of railway through ——— county, Iowa, from Clinton to Council Bluffs, Iowa. That the plaintiff is now, and for many years last past

has been the owner of a valuable farm of about 500 acres in (here insert description of land) ——— county, Iowa, and was such owner and in possession of it on the ——— day of ———, 18—, and defendant's line of railway passed through said farm. That upon said farm there existed a large apple orchard, producing annually a crop of great value. That on or about the ——— day of ———, 18—, the defendant in operating its said railway through said farm carelessly and negligently allowed fire to escape from one of its locomotive engines and set on fire, and injured and destroyed of the property of plaintiff about 1,000 matured apple trees to plaintiff's damage in the sum of about $———.

Plaintiff further stated that he is unable to state the number of the engine which set said fire, but avers that it was a freight engine which was going east at the time the fire was set, being about one o'clock P. M. of the ——— day of ———, 18—.

Plaintiff avers that the defendant negligently allowed said engine to get out of order and to remain out of repair and was guilty of negligence in operating the same while in such condition. Plaintiff is unable to state fully the defects of said engine, but avers that it was in such defective condition and so out of repair that while in motion it would throw out and drop large chunks and coals of fire along the road and in the adjacent fields.

That by reason of said facts and without fault of this plaintiff his property was set on fire, damaged and destroyed by the negligent acts of the defendant in the sum of ——— dollars, no part of which has been paid. Wherefore plaintiff demands judgment for the sum of ——— dollars, with interest and cost of suit.

———, attorney for plaintiff.

§ 887. Of liability of railway companies for killing stock, etc.

FORM OF PETITION AGAINST RAILROAD COMPANY FOR STOCK KILLED WHEN ROAD IS NOT FENCED.

Title, }
Venue. }

Plaintiff states: That the defendant is a corporation owning and operating a railway in and through ——— county, Iowa, by running its engine and cars thereon, and on the ——— day of ———, 18—, while so engaged in running and operating its said railway, at a point on the said road in said county where the defendant had the right to fence the same, but had not done so, said defendant by its agents, servants and employes ran an engine (or its train of cars) against and upon a certain gray mare (then running at large), the property of the plaintiff, and of the value of ——— hundred dollars, whereby said mare was killed (or injured). That on the ——— day of ———, 18—, (more than thirty days before suit is brought if double damages are claimed), plaintiff caused a written notice, accompanied with an affidavit of said killing of (or injury to) said mare to be served on ———, the station

(or ticket) agent employed in the management of the business of the defendant at ———, in said county. Copies of said notice and affidavit are hereto annexed and made a part of this petition marked exhibits "A" and "B" respectively. That said defendant has neglected and refused to pay the value of (or damage caused to) said mare.

Wherefore plaintiff demands judgment for ——— hundred dollars (double the value of the mare) and costs.

(Signature.)

(Attach exhibits "A" and "B.")

EXHIBIT "A."

To the (name of railroad company): You are hereby notified that on the ——— day of ———, 18—, while an engine (or train of cars) was being run and operated by your agents, servants and employes, upon your railroad in ——— county, at a point on said road in said county where you had the right to fence the same, but had not done so, said engine (or cars) was run against and upon a gray mare belonging to the undersigned (then running at large), of the value of ——— hundred dollars, whereby said mare was killed (or injured). You are therefore requested to pay said sum of ——— hundred dollars within thirty days from the service of this notice. (That there is a difference between the amount of damages claimed in the petition and notice is immaterial unless there is bad faith shown.[27])

(Signature of plaintiff.)

EXHIBIT "B."

State of Iowa, } ss.
——— County. }

I (name of owner of animal), being duly sworn, depose and say that on the ——— day of ———, 18—, I was the owner of a gray mare, ——— years old and of the value of ——— hundred dollars. That on said day said mare was killed (or injured) on the line of the (name of railroad) in ——— county, Iowa, by an engine (or train of cars) being run against and upon said mare by the agents, servants and employes of said railroad company, while she was running at large, at a point on said railroad in said county where the said railroad company had the right to fence their road but had not done so.

(Signature of plaintiff.)

Subscribed and sworn to before me and in my presence by ———, this ——— day of ———, 18—.

[Seal.] (Signature of officer.)

§ 888. Same—Of stock running at large.—Before the enactment of the present statute,[28] it was held that to permit cattle to run at large was not negligence on part of the owner, and they would not be trespassers if found on the unfenced track of a railway, and if the track

[27] Valleau v. C., M. & St. P. R. Co., 73-723.

[28] Code, Sec. 2055.

was unfenced the company would be held to the use of ordinary care and diligence in running its trains, but if its track was fenced it would only be liable for injuries resulting from gross or willful negligence.[29] The company is only liable for injuries to stock "running at large," and not when it is in charge of the owner and being driven by him at the time of the injury.[30] But if the injury occurs when the animal has escaped from the owner, the company will be liable.[31] When a horse got on the track where it should have been fenced, but was not, and being frightened by a train ran into a bridge and was injured, held, that the company was liable.[32] Stock in a field through which the railway passes, and where the company has failed to fence, is "running at large,"[33] and the company is liable for sheep and swine killed, when it has failed to fence, even though it is unlawful for such stock to run at large,[34] and it is liable in such cases even though it has constructed a fence sufficient to turn horses and cattle.[35] A team hitched to a wagon and which have escaped from the control of the owner are "live stock running at large," but not so if such loss of control is due to the intoxication of the driver and they wander on the track.[36] A sucking colt will be considered as "running at large" although its mother is under the control of the owner.[37] Colts escaping from a pasture through a defective gate were held to be run-

[29] Russel v. Hanley, 20-219; Alger v. M. & M. R. Co., 10-268.

[30] Smith v. C., R. I. & P. R. Co., 34-96.

[31] Hammond v. C. & N. W. R. Co., 43-168; Liston v. Central R. of I., 70-714; Brentner v. Chicago, M. & St. P. R. Co., 68-530; Hinman v. C., R. I. & P. R. Co., 28-491; Welsh v. C., B. & Q. R. Co., 53-632; Krebs v. M. & St. L. Ry. Co., 64-670; Swift v. N. M. R. Co., 29-243; Valleau v. C., M. & St. P. R. Co., 73-723.

[32] Young v. St. L., K. C. & N. Ry. Co., 44-172.

[33] Swift v. North M. R. Co., 29-243.

[34] Spence v. C. & N. W. R. Co., 25-139; Stewart v. Same, 27-282; Fernow v. D. & S. W. R. Co., 22-528; Lee v. Minneapolis & St. L. R. Co., 66-131; see Pearson v. The M. & St. L. P. R. Co., 45-497; Van Horn v. Burlington, C. R. & N. R. Co., 59-33 and 63-67; Krebs v. Minneapolis & St. L. R. Co., 64-670.

[35] Fritz v. M. & St. P. R. Co., 34-337.

[36] Inman v. C., M. & St. P. Ry. Co., 60-459; Grove v. B. C. R. & N. R. Co., 75-163.

[37] Smith v. K. C., St. J. & C. B. R. Co., 58-622.

ning at large.[38] Negligence of the owner not amounting to a willful act, will not defeat his right to recover where the company has a right to fence.[39] See further as to when stock is running at large.[40]

§ 889. Of fencing at depot grounds, highways, etc.—The company is not required to fence where it would not, in view of public convenience, be fit and proper or suitable for it to do so, and depot or station grounds may be left uninclosed when the business of the road and the interests of the public require it.[41] And in the absence of proof of want of ordinary care the company is not liable for stock killed on such grounds.[42] The burden is on the company to show that the place where stock is injured, and where there is no fence, is a portion of the station grounds. The fact that a switch is there maintained will not necessarily give it that character.[43] It is negligence in the owner of cattle to allow them to frequent such places of danger.[44] The provisions of the statute [45] making railroad companies liable for stock killed on depot grounds by trains running at a greater rate of speed than eight miles an hour, applies only to cases when the stock is killed on such grounds and where the animal killed was running at large.[46] The company is not required to fence its track where it

[38] Morrison v. B., C. R. & N. R Co., 84-663.

[39] Inman v. C., M. & St. P. R. Co., 60-459; Smith v. K. C., St. J. & C. B. R. Co., 58-622; Lee v. M. & St. L. R. Co., 66-131; Spence v. C. & N. W. R. Co., 25-139; Hammond v. S. C. & P. R. Co., 49-450; Miller v. C. & N. W. R. Co., 59-707; Kuhn v. C., R. I. & P. R. Co., 42-420; Moriarity v. Cent. Ia. R. Co., 64-696.

[40] Valleau v. C., M. & St. P. R. Co., 73-723; Doran v. C., M. & St. P. R. Co., 73-115.

[41] Latty v. Burlington, C. R. & M. R. Co., 38-250; Smith v. Chicago, R. I. & P. R. Co., 34-506; Davis v. Burlington & M. R. R. Co., 26-549; Rogers v. Chicago & N. W. R. Co., 26-558; Durand v. Same, 26-559; Packard v. Illinois Cent. R. Co., 30-474; Smith v. Chicago, M. & St. P. R. Co., 60-512; Cole v. Chicago & N. W. R. Co., 38-311; see Peyton v. Chicago, R. I. & P. R. Co., 70-522; Rhines v. C. & N. W. R. Co., 75-597.

[42] Packard v. Ill. Cent. R. Co., 30-474.

[43] Comstock v. D. V. R. Co., 32-376.

[44] Smith v. C., R. I. & P. R. Co., 34-506, but see Miller v. Chicago & N. W. Ry. Co., 59-707.

[45] Code, Sec. 2055.

[46] Monahan v. K. & D. M. R. Co., 45-523; Sullivan v. W., St. L. & P. Ry. Co., 58-602; Smith v. K. C., St. J. & C. B. Ry. Co., 58-622; Smith v. C., M. & St. P. Ry. Co., 60-512; Miller v. C. & N. W. Ry. Co., 59-707; Story v. C., M. & St. P. R. Co., 79-402; Cohoon v. C., B. & Q. R. Co., 90-169.

crosses a public highway, whether it be a de jure or de facto highway, and the same is true as to streets and alleys.[47] It must use ordinary and reasonable care to avoid injuring stock at points where it is not required to fence.[48] If animals are running at large in violation of a city ordinance, and come upon the railroad track, they are trespassers, and the company is not liable for the injury unless it acts wantonly or recklessly.[49] The company has no right to fence its track across the platted streets and alleys of a town, even though they are not used, nor in a condition to be used.[50] And it is liable for stock killed where it has the right to fence and has not done so, unless the injury is caused by the willful act of the owner,[51] and this is so even though the road is not fully completed and open to traffic.[52] But it is not liable for injuries to stock which break through a fence which is reasonably sufficient to turn live stock.[53] When an occupant of land traversed by a railroad, allows his swine to run at large on his land, and they go on the track at a point where the company has a right to fence, but has not fenced, and are killed by a train, he can recover and

[47] Soward v. C. & N. W. R. Co., 33-386; Andre v. C. & N. W. R. Co., 30-107; Long v. Central I. R. Co., 64-657; Lathrop v. Central Ia. R. Co., 69-105; Coyle v. Chicago, M. & St. P. R. Co., 62-518; Smith v. Kansas C., St. J. & C. B. Ry. C., 58-622; Blanford v. M. & St. L. R. Co., 71-310.

[48] Lawson v. Chicago, R. I. & P. R. Co., 57-672; Parker v. Dubuque & S. W. R. Co., 34-399; Whitbeck v. D. & P. R. Co., 21-103; Balcom v. D. & S. C. R. Co., 21-102; Plaster v. Illinois Cent. R. Co., 35-449; Cleveland v. Chicago & N. W. R. Co., 35-220; Schneir v. Chicago, R. I. & P. R. Co., 40-337; Jackson v. Chicago & N. W. R. Co., 36-451; Edson v. Central R. Co., 40-47.

[49] Van Horn v. B., C. R. & N. R. Co., 59-33; Doran v. C., M. & St. P. R. Co., 73-115.

[50] Lathrop v. C. I. Ry. Co., 69-105; Blanford v. M. & St. L. R. Co., 71-310.

[51] Krebs v. M. & St. L. Ry. Co., 64-670; Lee v. M. & St. L. Ry. Co., 66-131; Jones v. The G. & C. U. R. Co., 16-6; McCool v. Same, 17-461; Koons v. Same, 23-493; Helphery v. C., R. I. & P. Ry. Co., 29-480; Andre v. C. & N. W. Ry. Co., 30-107; Soward v. Same, 30-551; Stewart v. B. & M. R. Co., 32-561; Davis v. C., R. I. & P. Ry. Co., 40-292; McCormick v. Same, 41-193; Davis v. B. & M. R. R. Co., 26-549; Brandt v. C., R. I. & P. Ry. Co., 26-114; Treadway v. The S. C. & St. P. R. Co., 43-527; Aylesworth v. C., R. I. & P. Co., 30-459; Lemmon v. C. & N. W. Ry. Co., 32-151; Inman v. C., M. & St. P. R. Co., 60-459; Smith v. K. C., St. J. & C. B. R. Co., 58-622; Spence v. C. & N. W. R. Co., 25-139; Miller v. C. & N. W. R. Co., 59-707; Peyton v. C., R. I. & P. R. Co., 70-522.

[52] Glandon v. C., M. & St. P. Ry. Co., 68-457.

[53] Shellabarger v. C., R. I. & P. Ry. Co., 66-18.

need not prove that the killing was the result of negligence of the company's servants,[54] and the provisions of the code,[55] fixing what shall constitute a lawful fence, do not determine the character of fence which a railroad company must build against "live stock" running at large.[56] A railroad company has the right to fence its track in towns on lands situated beyond streets and highways.[57]

§ **890. Same—Of failure to repair fences.**—The company will be liable for stock killed or injured on its track, by reason of its failure to keep the fences in repair which have been erected along its line of road, but before it will be liable in such cases it must have knowledge, actual or implied, that the fence was out of repair, and have a reasonable time thereafter to put it in proper condition, and the same is true when gates and bars are left open by third persons.[58] And if the company has used necessary care and caution and without their fault the fence is thrown down or gate left open by some third person, he will be liable for the injury which may result and not the company.[59] One who has agreed with the company to maintain a fence between his land and the railroad is estopped from suing for injuries to his stock caused by want of such fence, or by defects therein, and so are his tenants.[60]

§ **891. Same—Of double damages.**[61]—The provisions of the statute allowing double damages are consti-

[54] Lee v. M. & St. L. Ry. Co., 66-131.

[55] Code, Sec. 2367.

[56] Lee v. M. & St. L. Ry. Co., 66-131.

[57] Coyle v. C., M. & St. P. Ry. Co., 62-518

[58] Ayelsworth v. The C., R. I. & P. Ry. Co., 30-459; Davis v. Same, 40-292; McCormick v. Same, 41-193; Perry v. The D. & S. W. R. Co., 36-102; Lemmon v. C. & N. W. Ry. Co., 32-151; Hammond v. Same, 43-168; Bartlett v. The D. & S. C. R. Co., 20-188; Bennett v. W., St. L. & P. Ry. Co., 61-355; Brentner v. C., M. & St. P. Ry. Co., 58-625; Dunn v. C. & N. W. R. Co., 58-674; Fritz v. K. C., St. J. & C. B. R. Co., 61-323; Bothwell v. C., M. & St. P. R. Co., 59-192; McKinley v. C., R. I. & P. R. Co., 47-76; Mackie v. Cent. R. of I., 54-540; Hilliard v. Chicago & N. W. R. Co., 37-442; Butler v. C. & N. W. R. Co., 71-206; Wait v. B. C. R. & N. R. Co., 74-207; Taylor v. C., St. P. & K. C. R. Co., 76-753.

[59] Russell v. Hanley, 20-219.

[60] Warren v. The K. & D. M. R. Co., 41-484.

[61] Payne v. K. C., St. J. & C. B. R. Co., 72-214.

tutional.[62] The action is barred in five years.[63] Double damages can not be recovered by reason of an injury resulting because the company has fenced where it should not.[64] An action for double damages may be maintained in the courts of this State for an injury occurring in another State which has a statute authorizing the recovery of such double damages.[65]

§ 892. Same—Of the affidavit and notice.—To render the company liable for double damages for stock killed, it must be served with a written notice of the killing or injury, accompanied by the original affidavit provided for by the statute; a copy of the affidavit is not sufficient, but the notice may be served by copy, and the sufficiency of the service is a question for the court.[66] The affidavit need not be made by the owner of the stock killed, it may be made by any one cognizant of the facts.[67] Nor need the affidavit and notice be separate. The notice, if containing all the statements required in the affidavit and sworn to, will be sufficient.[68] The written notice is only necessary when double damages are claimed.[69] Service of the notice and affidavit should be made by delivering the original affidavit and a copy of the notice to the agent of the company; they need not be read.[70] A return stating that the notice was served on a certain person, "being the station agent of said road," etc., held to show a good service.[71] The original

[62] Jones v. The Galena & C. U. R. Co., 16-6; Tredway v. S. C. & St. P. Ry. Co., 43-527; Welsh v. C., B. & Q. R. Co., 53-632; Mackie v. Cent. Ry. of Iowa, 54-540; Chines v. C. & N. W. R. Co., 75-597.

[63] Koons v. C. & N. W. Ry. Co., 23-493.

[64] Davis v. C., R. I. & P. R. Co., 40-292.

[65] Boyce v. Wabash R. Co., 63-70.

[66] McNaught v. The C. & N. W. Ry. Co., 30-336; Cole v. Same, 38-311; Campbell v. The C., R. I. & P. Ry. Co., 35-334; Van Slyke v. Chicago, St. P. & K. C. R. Co., 80-620; Brockert v. Central Ia. R. Co., 82-369.

[67] Henderson v. The St. L., K. C. & N. R. Co., 36-387.

[68] Mendell v. C. & N. W. R. Co., 20-9.

[69] Rodemacher v. M. & St. P. R. Co., 41-297.

[70] Mendell v. C. & N. W. Ry. Co., 20-9; Brentner v. C., M. & St. P. R. Co., 68-530; Brockert v. Central Ia. R. Co., 82-369; McNaught v. C. & N. W. R. Co., 30-336; Campbell v. C., R. I. & P. R. Co., 35-334; Kyser v. K. C., St. J. & C. B. R. Co., 56-207; Liston v. Central Ia. R. Co., 70-714.

[71] Welsh v. C., B. & Q. R. Co., 53-632; Schlengener v. C., M. & St. P. Ry. Co., 61-235.

notice and affidavit of loss which have been served on defendant's agent, are not evidence of such service, in such sense that notice on the defendant to produce them must be shown before other evidence thereof can be introduced to show double liability.[72] The affidavit need not designate the place of the injury.[73] The affidavit may be amended for the purpose of perfecting the jurat, but the company will not be allowed thirty days thereafter in which to pay the claim and escape double damages; service of the affidavit may be made by the claimant, or any other person, and if served by an officer, and his return is made thereon, it is admissible as evidence.[74]

Whether proof of service of notice and affidavit upon the company can be made by an ex parte affidavit quære.[75]

§ 893. Same—Of practice, evidence, etc.—When stock is injured through the negligence of a railroad company it is its duty to take proper care of the injured animals and if it fails to do so, the owner may take care of them and recover from the company reasonable compensation therefor.[76] Plaintiff, in order to recover for an injury to an animal, must prove his ownership of it.[77] The law will not be so construed as to authorize the recovery of double damages for injury to stock on depot grounds caused by negligence in operating trains thereon at an illegal rate of speed.[78] If the company is compelled to pay for injuries to animals of a third person which have got on the track through a gate at a private crossing wrongfully removed by the land owner for whom the gate was constructed it may recover from him the

[72] Brentner v. C., M. & St. P. Ry. Co., 58-625; Smith v. K. C., St. J. & C. B. R. Co., 58-622; McLenon v. K. C., St. J. & C. B. R. Co., 69-320.

[73] Mundhenk v. C. I. R. Co., 57-718.

[74] Brentner v. C., M. & St. P. R. Co., 58-625; Brandt v. Chicago, R. I. & P. R. Co., 26-114; Mundhenk v. Central Ia. R. Co., 57-718.

[75] Brentner v. C., M. & St. P. Ry. Co., 58-625.

[76] Finch v. C. R. of I., 42-304; Manwell v. B., C. R. & N. R. Co., 80-662.

[77] Welsh v. C., B. & Q. R. Co., 53-632; Morrison v. B. C. R. & N. R. Co., 84-663; Scott v. C., M. & St. P. R. Co., 78-199.

[78] Miller v. C. & N. W. R. Co., 59-707; Monahan v. Keokuk & D. M. R. Co., 45-523.

amount so paid.[79] A copy of the notice and affidavit served on the company, duly sworn to by the person making such service, is admissible in evidence to prove the fact of such service.[80] In an action for the value of stock killed by reason of want of fence the burden is on the company to prove that it had a sufficient fence.[81] Evidence of service of notice and affidavit in a particular case held not sufficient.[82] If the petition fails to set out the notice served on the company the question should be raised by demurrer, or it will be waived.[83] Individuals building and operating a railroad seem to be within the spirit, if not the letter of the law as to liability.[84] So a lessee of a railway is liable as well as the company owning the road.[85] And a receiver operating a road is liable.[86]

§ **894. Same—Of speed of trains.**—A railway company is not authorized to diminish the speed of a train to avoid injury to stock if by so doing it augments the danger to passengers.[87] In the absence of statutory limitations upon the speed of railway trains no conceivable rate is evidence of negligence per se.[88]

[79] C. & N. W. R. Co. v. Dunn, 59-619.

[80] McLemon v. K. C., St. J. & C. B. Ry. Co., 69-320.

[81] Small v. C., R. I. & P. R. Co., 50-338; Brentner v. C., M. & St. P. Ry. Co., 68-530.

[82] Keyser v. K. C., St. J. & C. B. R. Co., 56-440.

[83] McKinley v. C., R. I. & P. R. Co., 47-76.

[84] Liddle v. K., Mt. P. & M. R. Co., 23-378.

[85] Clary v. Iowa M. R. Co., 37-344; Stephens v. D. & St. P. R. Co., 36-327; Bower v. B. & S. W. R. Co., 42-546.

[86] Brockert v. Central Ia. R. Co., 82-369; Schurr v. O. & St. L. R. Co., 67 N. W., 280.

[87] Sandham v. The C., R. I. & P. R. Co., 38-88.

[88] McKonkey v. C., B. & Q. R. Co., 40-205; Cohoon v. C., B. & Q. R. Co., 90-169.

CHAPTER LIV.

OF ACTIONS OF REPLEVIN.

Sec. 895. When the action lies.
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910. Of proceedings when property has been concealed.
911. Of detinue.

Section **895. When the action lies.**—Plaintiff may bring his action and obtain possession of the property at the commencement of the action, or he may bring his action in detinue for the delivery of the property claimed after judgment. The action lies for the recovery of specific personal property[1] by one not in possession of it.[2] And if the plaintiff is entitled to the present possession of the property he can maintain the action.[3] He need not be the absolute owner or general owner of the property; if he has a special property in the goods which entitles him to their possession, it is sufficient.[4] And if he has the

[1] Code, Sec. 4163; Savery v. Hays, 20-25.

[2] Hove v. McHenry, 60-227; Coffin v. Gephart, 18-256.

[3] McCoy v. Cadle, 4-557; Campbell v. Williams, 39-646;; see Draper v. Ellis, 12-316.

[4] Cassel v. Western Stage Co., 12-47; Kingsbury v. Buchanan, 11-387; Jones v. Hetherington, 45-681; Goldsmith v. Willson, 67-662; Harvey v. Pinkerton, 70 N. W., 192.

mere naked right of possession he may maintain the action of replevin against one who deprives him of such possession, having no right to the property himself.[5] But his right to the possession of the property must exist when the action is commenced.[6] The plaintiff must recover on the strength of his own title, no matter what the right or title of the defendant may be, and plaintiff, in order to maintain the action, must be entitled to the present possession of the property.[7] The action will lie for any personal goods that can be identified.[8] It lies for a note, the consideration of which has failed, or which has been paid and has been attached by a creditor of the holder, even before maturity.[9] It lies at the instance of a party whose property has been improperly seized by an officer.[10] It lies for a fixture which has been severed from the realty.[11] It lies at the instance of the owner for the recovery of the possession of a building erected under an agreement with the owner of the land upon which it is placed, that the lessee should have free use of the land as long as the house should remain thereon.[12] And so it lies to recover a building which is being wrongfully removed from the land of the owner.[13] It lies where an officer without authority seizes property for taxes.[14] It lies to recover possession of a draft which has been rendered void after its acceptance by reason of material alterations.[15]

[5] McCoy v. Cadle, 4-557, and cases cited; Cumberledge v. Cole, 44-181; Beroud v. Lyons, 85-482; Bray v. Wise, 82-581; Kelley v. Cosgrove, 83-229; Briggs v. McEwen, 77-303; Smith v. Eals, 81-235; Hibbard v. Zenor, 82-505.

[6] Alden v. Carver, 13-253; see Cumberledge v. Cole, 44-181.

[7] Marienthal v. Shafer, 6-223; McCoy v. Cadle, 4-557; Hamilton v. Iowa City Nat'l Bk., 40-307; Hardy v. Moore, 62-65; Litchfield v. Halligan, 48-126; Burrows v. Waddell, 52-195; McNorton v. Akers, 24-369.

[8] Code, Sec. 4163; Ellsworth v. Henshall, 4 G. Gr., 417.

[9] Savery v. Hays, 20-25; Graff v. Shannon, 7-508.

[10] Smith v. Montgomery, 5-370; Wilson v. Stripe, 4 G. Gr., 551; Miller v. Bryan, 3-58; Gimble v. Ackley, 12-27; Shea v. Watkins, 12-605; Cooley v. Davis, 34-128; Campbell v. Williams, 39-446; Ramsden v. Wilson, 49-211; Armel v. Lendrun, 47-535; Ralston v. Black, 15-47; Davis v. Gambert, 57-239; Seaton v. Higgins, 50-305.

[11] Congregational Society, etc., v. Fleming, 11-533.

[12] Dist. Twp. v. Moorehead, 43-466.

[13] Crum v. Hill, 40-506.

[14] Buel v. Ball, 20-282; Macklot v. Davenport, 17-379.

[15] Smith v. Eals, 81-235.

§ 896. When the action does not lie.—If the defendant is not in possession of the property, and does not claim any interest in it, nor collude with another to keep possession of it, the action will not lie.[16] One who purchases and takes possession of personal property subject to mortgages thereon, which he assumes to pay, can not, in an action of replevin in his own name, recover on the ground that he is the agent of the mortgagees.[17] So where the possession and title to the property was never in the debtor, it seems the action will not lie.[18] Nor will it lie in favor of a party who has contracted for personal property, but has paid no part of the purchase money, and no time or place is fixed for the delivery of the property, unless the purchase price is first tendered.[19] And an agreement of a debtor to deliver certain personal property to his creditor, will not enable the latter to maintain the action if the former fails to deliver it.[20] Nor will the action lie when the possession is rightful, until after demand is made.[21] And when proceedings are commenced under the prohibitory liquor law by seizing intoxicating liquors alleged to be owned and kept for sale in violation of law, the case can not be taken away from the tribunal whose jurisdiction has attached by instituting an action of replevin.[22] Nor will the action lie against a sheriff for property held by him subject to an execution, unless the plaintiff prior to the commencement of the action gives the sheriff written notice of his ownership thereof.[23] Nor to

16 Coffin v. Gephart, 18-256.

17 McNorton v. Akers, 24-369.

18 Rutlege v. Evans, 11-287.

19 Hart v. Livingston, 29-217.

20 Berry v. Berry, 31-415.

21 Funk v. Israel, 5-438; Smith v. Montgomery, 5-370; Cooley v. Davis, 34-128; Stanchfield v. Palmer, 4 G. Gr., 23; Gilchrist v. Moore, 7-9; Smith v. McLean, 24-322; Redding v. Page, 52-406; Oswego S. Co. v. Lendrum, 57-573; Robinson v. Keith, 25-321; Delaney v. Holcomb, 26-94; Jones v. Clark, 37-586; Leek v. Chesley, 67 N. W., 580; Ruiter v. Plate, 77-17; Peck v. Bonbright, 75-98.

22 Funk v. Israel, 5-438; Cooley v. Davis, 34-128; State v. Harris, 38-242; Weir v. Allen, 47-482, and cases cited.

23 Finch v. Hollinger, 43-598; Kaster v. Pease, 42-488; Gray v. Parker, 53-505; Richabaugh v. Bada, 50-56; Peterson v. Espeset, 48-262; Gray v. Parker, 49-624; Burrows v. Waddell, 52-195; Wadsworth v. Wallinker, 41-395; West v. St. John, 63-287; Baxter v. Ray, 62-336; Allen v. Wheeler, 54-628; Wells v. Chapman, 59-658.

recover back a horse which was traded on Sunday.[24] The action may lie against the sheriff for property held by him subject to an execution where no notice is served on him as provided by law, if the want of such notice is not pleaded in the answer.[25] The action will not lie to take property from the possession of an officer upon the mere allegation that the judgment has been satisfied.[26] Where an officer acting under a tax warrant for the collection of taxes erroneously assessed by a board having competent authority, seizes property, replevin will not lie therefor.[27] Nor will it lie against one who does not detain from the plaintiff the possession of the property.[28] Where the sheriff in levying on personal property under an execution simply made a list of the property and took a delivery bond from the execution defendant therefor, it was held such defendant could not maintain replevin against the officer for the property.[29] Ordinarily it will not lie to try the title to an office, and especially so if the holder of it is not a party to the action.[30] Nor can the interests of partners be determined in an action of replevin.[31] Nor will it lie at the instance of one joint owner of property when it can not be divided.[32] So it has been held not to lie for the recovery of property sold when it was claimed the consideration had failed.[33]

§ 897. Of place of bringing suit.—The action must be brought in the county where the property, or some part of it, is situated,[34] or where the defendant resides.[35] It can not be brought in the county from which the property has been wrongfully removed, unless that be the defendant's residence.[36] And it has been held that where the action was begun in the county where the property was

[24] Kelley v. Cosgrove, 83-229.
[25] Warder v. Hoover, 51-491.
[26] Armel v. Lendrum, 47-535.
[27] Belbo v. Henderson, 21-66; Emerick v. Sloan, 18-139.
[28] Hove v. McHenry, 60-227.
[29] Same as No. 28.
[30] Lufkin v. Preston, 52-235; see 57-28.
[31] Kuhn v. Newman, 49-424.
[32] Read v. Middleton, 62-317, and cases cited; see Francis v. Young, 24-375.
[33] Gittings v. Carter, 49-338.
[34] Code, Sec. 4163.
[35] Hibbs v. Dunham, 54-559; Parker v. Norris, 56-295; Code, Sec. 4168.
[36] Hibbs v. Dunham, 54-559; Parker v. Norris, 56-295; Porter v. Dalhoff, 59-459.

situated, but against a defendant residing in another county, a failure to secure the property under the writ, did not defeat the jurisdiction of the court to entertain the case to the end, and defendant was not entitled to have the case removed.[37] Plaintiff need not aver the place of detention of the property, and no issue can be raised on that question except by a motion to change the place of trial to the proper county.[38]

§ 898. Of the parties.—The action should be brought by the party claiming possession of the property.[39] One partner can not maintain the action against the other.[40] The owner of personal property taken by an officer, under a writ of replevin in an action to which such owner was not a party, may bring an action and replevin the property.[41] And an assignee in bankruptcy may bring an action to recover property belonging to the bankrupt's estate, when the right thereto does not depend on the bankrupt law; and if the assignee has such an interest that he could intervene, he can bring an independent action for the recovery of the property.[42] If a third person claims the property, or any of it, the plaintiff may amend his petition and bring him in as a co-defendant, or the defendant may obtain his substitution in the proper mode, or the claimant may himself intervene, by the process of intervention.[43] But the remedy by intervention is not exclusive, and an independent action may be maintained by the third person claiming the property.[44] In case of intervention the judgment concludes all the parties.[45] Where one is substituted for the sheriff in an ac-

[37] Laughlin v. Main, 63-580; see Goldsmith v. Willson, 67-662; Porter v. Dalhoff, 59-459.

[38] Kelley v. Cosgrove, 83-229.

[39] Hove v. McHenry, 60-227; McCoy v. Cadle, 4-557; Pangburn v. Partridge, 7 Johns, 140; Cassel v. Western Stage Co., 12-47; Kingsbury v. Buchanan, 11-387; Waterhouse v. Black, 87-317; Beroud v. Lyons, 85-482; Smith v. Eals, 81-235; Harvey v. Pinkerton, 70 N.W., 192.

[40] Kuhn v. Newman, 49-424.

[41] Davis v. Gambert, 57-239.

[42] Wetmore v. McMillan, 57-344.

[43] Code, Sec. 4166; Bevan v. Hayden, 13-122; Witter v. Fisher, 27-9; Davis v. Gambert, 57-239; Wetmore v. McMillan, 57-344; Dupont v. Amos, 66 N. W., 774.

[44] Davis v. Gambert, 57-239; Wetmore v. McMillan, 57-344.

[45] Witter v. Fisher, 27-9.

tion of replevin, the plaintiff will be entitled to a judgment against him for costs if he would have been entitled to such judgment against the original defendant.[46]

§ **899. Of the proceedings.**—The action is tried as an ordinary action, but there can be no joinder of any cause of action not of the same kind, nor can there be any counter claim.[47] But in Sigler v. Hidy, 56 Iowa, 504, it was held that an action for the possession of a note on the ground that it had been paid, could properly be set up as a counter claim to an action on the note. A claim for the return of property not taken under the writ is a counter claim and not allowable.[48] The defendant is not precluded from setting up an affirmative defense showing ownership in himself, but not an independent claim against the plaintiff based on the transactions in which the property was involved.[49] And see[50]

§ **900. Of the petition.**—The petition must be sworn to, and if it is not, the writ should not be issued.[51] But an objection that it is not verified cannot be made the ground for directing the jury to find a verdict for the defendant, nor can it be taken advantage of by motion in arrest of judgment.[52] It must state:

1. A particular description of the property claimed, and by this is meant a description so definite and certain that the property may be identified therefrom.[53] A description sufficiently specific to pass the title in a chattel mortgage is sufficient.[54]

2. The actual cash value of the property, and when there are several articles, the actual cash value of each must be stated; this is necessary in order that in case of

[46] Romick v. Perry, 61-238.
[47] Code, Sec. 4164; Kuhn v. Newman, 49-424; McIntire v. Eastman, 76-455.
[48] Chapin v. Garretson, 85-377.
[49] Palmer v. Palmer, 90-17.
[50] Beroud v. Lyons, 85-482; Muir v. Miller, 82-700.
[51] Cure v. Wilson, 25-205; Duffey v. Dale, 42-215; Hoover v. Rhoads, 6-505.
[52] Turner v. Younker, 76-258.
[53] Code, Sec. 4163, Sub. 1; Stanchfield v. Palmer, 4 G. Gr., 23; Wright v. Ross, 2 G. Gr., 266; Ellsworth v. Henshaw, 4 G. Gr., 417; Fort Dodge v. Moore, 37-388; Stephens v. Williams, 46-540.
[54] Fort Dodge v. Moore, 37-388; Smith v. McLean, 24-322.

a partial recovery the proper judgment can be entered for the property recovered, but such allegations of value do not limit the amount of defendant's recovery, in case he is successful, even though such allegations are not denied in the answer.[55] As to what may be shown as evidence of value.[56]

3. The facts constituting the plaintiff's right to the present possession of the goods or property must be stated, and the extent of his interest therein, whether it be a full or qualified ownership.[57] If he is the absolute owner, a statement of that fact is sufficient.[58] If he claims a special property in the goods the facts upon which his right of possession rests must be pleaded. When ownership is put in issue.[59]

4. It must also be stated that the property was neither taken on the order or judgment of a court against him, or against the property, but if it has been taken by either of these modes, then it must state the facts constituting an exemption from seizure under such process.[60] The facts constituting an exemption under this paragraph are such as would render the property exempt under section 4017 of the code.[61] Property in the custody of the law, under an order or judgment of, or writ from, any court, if the process under which it is held is legal, can not be replevied unless it is exempt from seizure.[62] When the property is claimed as exempt from seizure under the process, the facts must be stated, showing such exemption; but in replevin for mechanic's tools, seized under execution and claimed as exempt, the petition need not state that the tools are those with which the plaintiff "habitually earns his living."[63] Under the code of 1851 it was held that in a petition in an action to recover prop-

[55] Code, Sec. 4163, Sub. 2; Chicago and S. W. R. Co. v. Northwestern U. P. Co., 38-377.

[56] Minthon v. Lewis, 78-620; Miller v. James, 83-242.

[57] Code, Sec. 4163, Sub. 3; Harvey v. Pinkerton, 70 N. W., 192.

[58] Cassel v. Western Stage Co., 12-47; Kingsbury v. Buchanan, 11-387.

[59] McIntire v. Eastman, 76-455.

[60] Code, Sec. 4163, Sub. 4.

[61] Armel v. Lendrum, 47-535.

[62] Funck v. Israel, 5-438; Miller v. Bryan, 3-58; Smith v. Montgomery, 5-370; Cooley v. Davis, 34-128.

[63] Perkins v. Wisner, 9-320.

erty seized under execution, on the ground of its exemption, that it was not necessary to allege that plaintiff was a resident of the State.[64] Property cannot be taken under a writ of replevin from an officer holding it under a writ properly issued in a criminal proceeding.[65] If the process under which the property is held is void, replevin may be maintained.[66]

5. The petition must also allege that the property is wrongfully detained; the gist of the action is the wrongful detention of the property, and a failure to allege this fact is a fatal defect, and may be taken advantage of on demurrer, in arrest of judgment or on error.[67]

6. The facts constituting the alleged cause of the detention, according to the best belief of plaintiff, must also be alleged.[68]

7. The amount of damages, if any, which affiant believes the plaintiff ought to recover for the detention of the property must be stated.[69]

8. A proper prayer for judgment.[70] The petition must be signed by the plaintiff or his attorney, and verified; and an affidavit signed "G. W. & R. H.," and sworn to by both plaintiffs, was held good.[71] If the writ is to issue or be served on Sunday, the petition must contain the additional statement that the plaintiff believes he will lose his property unless process issues on that day.[72] The petition in an action of replevin may be in the following form:

FORM OF PETITION IN REPLEVIN.

Title, }
Venue. }

The plaintiff for a cause of action against the defendant states: That he is the absolute and unqualified owner of a certain red cow, three years old, having a white star on her forehead, and being branded with the letter "S" on her right shoulder; that he acquired said ownership by purchase (or state that he has a special property

64 Newell v. Hayden, 8-140.
65 Lemp v. Fullerton, 83-192.
66 Morgan v. Zenor, 88-175.
67 Draper v. Ellis, 12-316; Houghtaling v. Wells, 59-287, and cases cited.
68 Code, Sec. 4163, Sub. 5; Nolan v. Jones, 53-387.
69 Code, Sec. 4163, Sub. 6.
70 Williams v. Wilcox, 66-65.
71 Cure v. Wilson, 25-205; Duffey v. Dale, 42-215; Hoover v. Rhodes, 6-515; see Turner v. Younker, 76-258; see chapter on Verification.
72 Code, Sec. 4165.

in the cow, viz., that he is the bailee of said cow for a term of three months from the ——— day of ———, 18—, she having been put in the possession and charge of plaintiff, to keep for said time, he to have the milk from said cow for furnishing her food and care, and that ——— is the general owner, or as the case may be); that the defendant wrongfully detains possession of said cow from the plaintiff, at ——— county, Iowa; that said cow is of the actual cash value of ——— dollars; that said cow was neither taken on the order or judgment of a court against the plaintiff, nor under an execution or attachment against him, or against the property (if the property was taken on such process, it must be so stated, and the facts showing the exemption alleged); that the alleged cause of detention, according to the best belief of the plaintiff, is (here state the alleged ground of detention, viz., that she is held by the defendant as sheriff of ——— county, Iowa, by virtue of an execution in his hands, issued out of the office of the clerk of the district court of ——— county, Iowa, in a cause wherein ——— was plaintiff, and ——— was defendant, and wherein judgment was rendered against said defendant, which said execution was by said sheriff levied on said cow as the property of said ———, or as the case may be); that the plaintiff has sustained damages, by reason of the said wrongful detention, in the sum of ——— dollars, no part of which has been paid.

Wherefore plaintiff asks a writ of replevin for said property, and demands judgment for the said property (or for the possession thereof, as the case may be), or for the value thereof, if the same can not be found, and for his damages and costs.

———, attorney for plaintiff.

(Add verification.)

When the action is against a sheriff or constable holding the property by virtue of an execution or attachment, the petition must allege the service of the notice required by the statute on the officer before suit was commenced, and in such a case the following should be inserted in the petition before the prayer:

FORM OF ADDITIONAL ALLEGATIONS IN PETITION OF SERVICE OF NOTICE.

"And plaintiff further avers that on the ——— day of ———, 18—, (before suit was commenced) he served a written notice on said defendant that the cow described in this petition belonged to him, and demanded therein that said defendant release her and turn her over to this plaintiff, which he has failed and refused to do; a copy of said notice is hereto attached marked 'A' and made a part hereof."

§ 901. Of the bond.—Before a writ of replevin can issue the plaintiff must execute a bond to the defendant

with sureties to be approved by the clerk in a penalty of at least equal to twice the value of the property sought to be replevied, conditioned that he will appear at the next term of the court and prosecute his action to judgment, and return the property, if a return be awarded, and also pay all costs and damages that may be adjudged against him. This bond must be filed with the clerk of the court and is for the use of any person injured by the proceeding, and a judgment for money rendered against the plaintiff must also go against the sureties on the bond.[1]

Said bond may be in the following form:

FORM OF REPLEVIN BOND.

Know all men by these presents:

That we ———, of the county of ——— and State of Iowa, principal, and ——— and ———, of the county of ——— and State of Iowa, sureties, are held and firmly bound unto ———, in the penal sum of ——— dollars, lawful money of the United States, well and truly to be paid to the said ———, his heirs, executors and assigns. The condition of this obligation is such that whereas the said ——— did, on the ——— day of ———, 18—, file his petition in the clerk's office, in the district court of the State of Iowa, in and for ——— county, claiming of the said ——— the present possession of (here describe the chattels as in the petition) and asking the issuance of a writ of replevin therefor. Now, if the said ——— shall appear at the next term of said court and prosecute his said action to judgment, and return the property, if a return be awarded, and also pay all costs and damages that may be adjudged against him in said action, then this obligation to be void, otherwise to remain in full force and virtue.

Dated the ——— day of ———, 18—.

———, principal.

———, } sureties.
———, }

(Add justification.)

The sureties in the bond by signing it covenant and agree that a judgment for money against the principal shall be rendered against them also.[2] When the property levied upon under execution was replevied in an action by the execution defendant, who was the general owner, and sold to a bona fide purchaser, it was held that as to such purchaser the filing of the replevin bond operated

[1] Code, Sec. 4167-4176.

[2] Hershler v. Reynolds, 22-152.

to release the property from the lien of the execution.[3] If the defendant has a lien upon the property he is entitled in an action on the bond to recover the value of his interest at the time the property was taken.[4] In some cases a tender or offer to deliver the property to the plaintiff may relieve the surety on the bond.[5]

§ 902. Of the writ of replevin.—When the proper bond is filed the clerk must issue an order or writ of replevin directed to the sheriff, commanding him to take the property therein described and deliver it to the plaintiff. An original notice must be served on the defendant as required by statute.[6]

The writ above mentioned may be in the following form:

FORM OF WRIT OF REPLEVIN.

The State of Iowa.

To the sheriff of ——— county, greeting:

Whereas, ———, plaintiff, on the ——— day of ———, 18—, filed his petition in the clerk's office of the district court of the State of Iowa, in and for ——— county, sworn to as required by law, against ———, defendant, claiming of him the following described personal property, to wit (here describe property as in plaintiff's petition), which the said plaintiff alleges is wrongfully detained from him by the said defendant, and the plaintiff having executed a bond to the defendant, with sureties approved by me as required by law, and filed the same in my office, you are, therefore, hereby commanded to take the said property above described and deliver the same without delay to the plaintiff, and of this writ make legal service and due return thereof to said court on or before the first day of the next term thereof, to be begun and holden at the court house in ———, in the county of ———, Iowa, on the ——— day of ———, 18—.

Witness ———, clerk of the district court, with the seal of said court hereunto affixed, this ——— day of ———, 18—.

[Seal.] ———, clerk, etc.

When the petition shows that the property has been wrongfully removed into another county from the one in which the action was commenced, the writ may issue from the county from whence the property was wrongfully taken, and may be served in any county where the prop-

[3] Gimble v. Ackley, 12-27.
[4] McMeekin v. Worcester, 68 N. W., 680.
[5] Nimon v. Reed, 79-524.
[6] Code, Sec. 4168.

erty may be found, in the same manner, and with like effect, as in the county where suit is brought.[7] When any of the property is removed to another county after the commencement of the action, the officer to whom the writ is issued may follow the same and execute the writ in any county of the State where the property is found, and for the purpose of following the property duplicate writs may be issued, if necessary, and served as the original.[8] When the petition alleges that the property has been wrongfully removed out of the county before the commencement of the suit, the writ must set out this allegation, so as to show on its face the authority for its being executed in a county other than the one in which it was issued.

§ 903. Of service of the writ.—When the writ is placed in the sheriff's hands he should execute it at once by taking possession of the property described therein, if the property is found in the possession of the defendant or his agent, or of any other person who obtained possession thereof from the defendant, directly or indirectly, after the order was placed in the sheriff's hands; and for such purpose he may break open any dwelling house, or other inclosure, having first demanded entrance and exhibited his writ if demanded.[9] When the sheriff has obtained possession of the property, or any of it, he must forthwith deliver it to the plaintiff, unless a bond is given as hereafter stated, and if instead of taking actual possession of the property the sheriff leaves it with the defendant, taking his receipt therefor, the plaintiff acquires no possession of the property, and may take a money judgment in case he recovers.[10] If it appears by affidavit that the property claimed has been disposed of or concealed, so that the writ can not be executed, the court or judge, upon verified petition, may compel the attendance of the defendant, or other person claiming or concealing the property, and examine him on oath as to the situation of

[7] Code, Sec. 4168.
[8] Code, Sec. 4169.
[9] Code, Sec. 4170; Smith v. Eals, 81-235.
[10] Code, Sec. 4172; Davis v. Bayliss, 51-438.

the property, and punish a willful obstruction, hindrance or disobedience of the order of the court as in case of contempt.[11]

The judge in vacation may punish a willful disobedience or hindrance of the execution of the writ, as well as any disobedience of any order made necessary by the proceedings to examine the defendant under oath.[12] The affidavit should state the facts showing the property has been disposed of, or concealed, and the defendant may be brought before the court as in cases of proceedings auxiliary to execution.[13] The facts must be stated in writing; oral evidence is not proper.[14] The affidavit may be in the following form:

FORM OF AFFIDAVIT OF CONCEALMENT.

State of Iowa, ——— County. } ss.

I, ———, being duly sworn, say: That on the ——— day of ———, 18—, I commenced an action in the district court of ——— county, Iowa, against ——— to recover the possession of the following described personal property, to wit (here describe the property as in the petition). That the said ——— has concealed (or disposed of) the property claimed (or some portion of it, as the case may be), so that the order of replevin in (or order of the court issued in said action, as the case may be) can not be executed (here state the facts showing the disposition of or concealment of the property). He therefore asks that said ——— may be brought before this court (or judge) to be dealt with according to law.

(Add certificate of officer.) ———.

The above affidavit must be made by some person knowing the facts, and the statement in the affidavit of the facts, or of the circumstances tending to establish them, should be as full and accurate as the nature of the case permits. Where no order of replevin is asked, but the examination of the defendant is desired after a final judgment, the affidavit must be changed accordingly.

§ 904. Of the delivery bond.—At any time before the actual delivery of the property to the plaintiff, the

11 Code, Sec. 4171.
12 Code, Sec. 4171; State v. Meyers, 44-580.
13 Code, Chapter 4, Title 19.
14 Code, Sec. 4466; State v. Meyers, 44-580.

defendant may stay all proceedings under the writ of replevin, and retain the property in his own possession by executing a bond to the plaintiff, with sureties to be approved by the clerk, or sheriff, conditioned that he will appear in and defend the action, and deliver the property to the plaintiff, if he recover judgment therefor, in as good condition as it was when the action was commenced, and that he will also pay all costs and damages that may be adjudged against him, for the taking or detention of the property, which bond must be delivered to the officer who must return the property to the defendant, and the officer must return the bond with the writ to the clerk making reference to such bond in his return.[15] If the defendant gives a delivery bond for the property, and it perishes in his hands, plaintiff's measure of damages is the same as if the property had been preserved to abide the result of the action.[16]

The bond may be in the following form:

FORM OF DELIVERY BOND IN REPLEVIN.

Know all men by these presents:

That we ———, principal, and ——— and ———, sureties, are held and firmly bound unto ———, his executors and assigns, in the penal sum of (the sum must be fixed by the clerk or sheriff accepting the bond in sufficient amount to cover the value of the property claimed, and all damages and costs) well and truly to be paid. The condition of this obligation is such: That whereas in an action in the district court of ——— county, Iowa, wherein ——— is plaintiff and ——— is defendant, a writ of replevin has been issued, directing the sheriff of said county to take the personal property therein described, and deliver the same to said plaintiff. Now, if the said ——— shall appear and defend the said action, and deliver the said property to the plaintiff, if he recover judgment therefor, in as good condition as it was when said action was commenced, and will also pay all costs and damages that may be adjudged against him, for the taking (or the detention, as the case may be) of said property, then this obligation to be void, otherwise to remain in full force and virtue.

Dated the ——— day of ———, 18—.

———, principal.

———, } sureties.
———, }

(Add justification.)

[15] Code, Sec. 4172.

[16] Hinkson v. Morrison, 47-167; Lillie v. McMillan, 52-463.

The bond must be approved by the officer accepting it, as follows:

FORM OF APPROVAL OF ABOVE BOND.

I hereby approve the within bond and the sureties therein, this ——— day of ———, 18—.

———, clerk (or sheriff).

If the bond is executed in the presence of the clerk or sheriff, the approval should be in the following form:

FORM OF APPROVAL OF ABOVE BOND.

Executed in my presence, and I hereby approve the within bond and sureties therein, this ——— day of ———, 18—.

———, clerk (or sheriff).

And in using either form the approval must be indorsed on the bond. The officer accepting and approving the bond must require the sureties to justify as to their qualifications to become bondsmen. When the property is so retained by the defendant, he must permit the sheriff and plaintiff to inspect the same, and if the plaintiff requests it, the sheriff must cause the property to be examined and appraised by two sworn appraisers, chosen by the parties to the action, and in case they cannot agree he must select a third, and an appraisement agreed to by two of them will be sufficient, and he must return their appraisement with the execution.[17]

The following forms may be used:

FORM OF NOTICE TO CHOOSE APPRAISERS.

To——— (or to ———, his agent or attorney):

You are hereby notified that by virtue of an order of replevin to me directed, issued out of the office of the clerk of the district court of ——— county, Iowa, in an action therein pending, wherein ——— is plaintiff and ——— is defendant, and commanding me to take possession of (here describe the property as in the petition), I have taken possession of said property; and whereas, the said ———, defendant in said action, has given a delivery bond, and said property has been turned over to him, and whereas, said ———, plaintiff in said action, has requested me to have said property appraised, you are therefore required to choose an appraiser on your behalf (or on behalf of said defendant), to value said property according to law.

Dated the ——— day of ———, 18—.

———, sheriff, etc.

[17] Code, Sec. 4173.

FORM OF APPRAISEMENT.

State of Iowa, } ss.
——— County. }

We, the undersigned appraisers, selected to value the property hereinafter described, which was taken by ———, sheriff of ——— county, Iowa, by virtue of an order of replevin issued out of the clerk's office of the district court in favor of ———, against certain personal property below described, in the possession (or under the control of) ———, defendant in said action, do hereby report that we have valued said property according to its fair value at this time, and that the schedule hereto annexed contains a correct inventory of said property, and that the values therein affixed to each article respectively are the fair values thereof, viz.: schedule of property appraised (here give a description of each article of personal property with the value set opposite thereof).

Signed this ——— day of ———, 18—.

———, }
———, } appraisers.

The appraisement must be sworn to as follows:

FORM OF OATH TO APPRAISEMENT.

State of Iowa, } ss.
——— County. }

We (names of appraisers) being duly sworn, depose and say that the foregoing is a just and true appraisement of the property in the above schedule described at this time, as we believe.

———, }
———, } appraisers.

(Add certificate of officer.)

§ 905. Of the sheriff's return.—The sheriff must return the writ of replevin on or before the first day of the trial term of court, with a statement of his doings under it, which should be indorsed on the back of the writ, or, if on a separate paper, should be attached thereto, and this return must particularly describe any property taken under the order.[18] The taking of a receipt of the defendant for the property is not authorized by statute and does not constitute a levy; actual possession of the property must be taken.[19]

The form of return may be as follows:

[18] Code, Secs. 4172, 4174.

[19] Davis v. Bayliss, 51-438.

FORM OF RETURN OF WRIT OF REPLEVIN.

State of Iowa, } ss.
——— County. }

I, ———, sheriff of said county, hereby certify and return: That the within writ of replevin came into my hands for service, on the ——— day of ———, 18—. That on the same day (or if on another day, state the fact) by virtue thereof I took the following described personal property found in the possession of the defendant at said county, to wit (here give a particular description of the property taken). And I forthwith delivered the same to the plaintiff herein, (or if a delivery bond is taken, the return should recite that fact, the approval of the bond and the return of the property to the possession of the defendant). And I now return this writ executed.

Dated this ——— day of ———, 18—.

———, sheriff, etc.

Fees, $——.

The writ and bond, if one is taken, must be returned to the clerk and by him filed and preserved.

§ 906. Of pleading, practice, evidence, etc.—The defendant may plead and prove any defense, legal or equitable, which goes to defeat the plaintiff's right of recovery, but defenses not raised by the pleadings are not available on appeal.[20] The question is, in whom was the right of possession at the time the suit was instituted. Plaintiff having alleged it to be in him, it is not necessary for defendant to plead property in himself, or that he is entitled to the possession.[21] And generally it may be said that whatever tends to disprove plaintiff's right to recover, may be given in evidence under a denial of that right; but if it is sought to attack plaintiff's right of possession for fraud, it must be specially pleaded.[22] If possession only is claimed, plaintiff may maintain the action by proving general ownership, or special property in the goods.[23] In an action of replevin against an officer who has levied on property under an execution against a third

[20] Code, Sec. 3566; Jansen v. Effey, 10-227; Palmer v. Palmer, 90-17; Chapin v. Garretson, 85-377.

[21] Hunt v. Burnett, 4 G. Gr., 512; Campbell v. Williams, 39-646.

[22] Gray v. Earl, 13-188; Jansen v. Effey, 10-227; Parsons v. Hedges, 15-119.

[23] Cassel v. Western Stage Co., 12-47; Corbitt v. Heisey, 15-296; Jansen v. Effey, 10-227; Waterhouse v. Black, 87-317; Smith v. Eals, 81-235; Hibbard v. Zenor, 82-505; Harvey v. Pinkerton, 70 N. W., 192.

person, the defendant may plead that since the commencement of the action a landlord's lien has been established against it and the property taken from him to satisfy such lien, and this though plaintiff was not a party to the landlord's attachment.[24] A farmer engaged in raising, handling and selling horses and acquainted with their value, may testify as to the value of a race horse.[25] When the defendant relies on legal process to justify him in taking the property, he must plead the writ or process under which he acted.[26]

An officer in defending an action in replevin may justify under writs still in his hands, and not yet returned, and such defense will not be affected by a failure to recover judgment in the action in which such writs issued.[27] When the order of replevin is quashed for defects in the affidavit or order, it does not affect the action, but only abates the order, and when defendant has demurred or answered, he can not afterward move to quash the order.[28] For instructions in case of replevin, reference is made to the case of McCoy v. Cadle, 4 Iowa, 557. In an action of replevin for property seized by virtue of a writ of attachment, but claimed to be exempt from such seizure, the objection can not be made that it takes issue upon the facts stated as grounds for an attachment.[29] The residence of plaintiff, when material, may be proved without being pleaded, but if plaintiff is a non-resident of the State, and hence not entitled to the property in question as exempt, such defense should be specially pleaded.[30] If the petition alleges the right of possession as in plaintiff, an answer which does not specifically deny that fact, but states facts sufficient to defeat plaintiff's recovery, is good.[31] When the action is against a sheriff or constable, and the want of service of notice of owner-

[24] Neeb v. McMillan, 68 N. W., 438.
[25] Leek v. Chesley, 67 N. W., 580.
[26] Kingsbury v. Buchanan, 11-387; Gray v. Earl, 13-188; Parsons v. Hedges, 15-119.
[27] Kingsbury v. Buchanan, 11-387.
[28] Beard v. Smith, 9-50.
[29] Mumma v. McKee, 10-107.
[30] Newell v. Hayden, 8-140.
[31] Skinner v. C., R. I. & P. R. Co., 12-191.

ship is not pleaded, and defendant proceeds to trial on the question of ownership of the property, plaintiff will, on proper proof, receive the property, but may be adjudged to pay the costs.[32] A surety in a replevin bond can not, in an action of replevin instituted by his principal before a justice of the peace, prosecute an appeal in his own name, and have the issue between his principal and the defendant retried in the district court.[33] Quashing the writ will not cause the suit to abate, and in a proceeding to quash the writ on the ground of fraud in procuring jurisdiction of the property, such process should not be set aside, unless the evidence is clear and satisfactory.[34] It is held to be error to render judgment against plaintiff for a mere failure to produce the writ after it has served its purpose, and the property has been seized under it.[35] Demand of possession before commencing the action need only be made when it is necessary to terminate the right of possession in defendant and confer it on plaintiff; that is, where the possession of defendant was in its inception rightful, a demand must be made.[36] But where both parties claim title to the property and the right of possession incident thereto, no demand need be made.[37] Nor need it be where the original taking is wrongful or illegal.[38] If property is sold on trial and notes are given for the purchase money, no part of which has been paid, in an action of replevin to recover the property a demand is not necessary.[39] Where the judgment in a replevin suit simply determines the right of possession, the title may afterward be determined in an action on the bond.[40] Where one sought to recover possession of property held by a sheriff, but failed to allege service of notice

[32] Warder v. Hoover, 51-491.

[33] Crites v. Littleton, 23-205.

[34] Minott v. Vineyard, 11-90; Goodon v. Bucknell, 38-438, and cases cited.

[35] Saubman v. Greatrakes, 34-598; see Beard v. Smith, 9-50.

[36] Gilchrist v. Moore, 7-9; Smith v. McLean, 24-322; Ruiter v. Plate, 77-17; Leek v. Chesley, 67 N. W., 580.

[37] Smith v. McLean, 24-322; Leek v. Chesley, 67 N. W., 580.

[38] Stanchfield v. Palmer, 4 G. Gr., 23; Robinson v. Keith, 25-321; Delancey v. Holcomb, 26-94.

[39] Peck v. Bonebright, 75-98.

[40] Harmon v. Goodrich, 1 G. Gr., 13; Buck v. Rhodes, 11-348; Hawley v. Warner, 12-42; Hall v. Smith, 10-45.

of ownership, and upon demurrer being interposed upon that ground, the court allowed him to dismiss his action on payment of costs, and on payment to the sheriff of the amount of the judgment for which the property was seized, to retain possession of it, it was held not to be error.[41]

In an action of replevin, when the defendant retains the property it is not necessary, in order to recover a judgment for the value of the property, for the plaintiff to show the value of each article; it is sufficient in such a case to show the aggregate value of the property wrongfully detained.[42] A failure to prove that the property sought to be replevied is detained in the county where suit is brought, will not defeat the action when suit is brought in the county where the defendant resides.[43]

§ **907. Of the verdict.**—When by the verdict there will be a judgment for the recovery or the return of the property, the jury must assess the value of the property, and also damages, for the taking or detention, and, when required to do so by either party, they must fix the value of each article of property and find which is entitled to possession, designating his right therein and the value of such right.[44] And if they fail to do so when required, they may be sent back to amend their verdict.[45] But when the ownership and right of possession of the property is in question, being put in issue on the allegations of plaintiff's petition, the defendant setting up no special property in himself, a verdict for plaintiff, which assessed the value of the property and the damages for wrongful detention only, was held sufficient in form.[46] And where property taken in execution was taken from the sheriff by replevin and the plaintiff in said action failed to prosecute the same successfully, the measure of the defendant's damages is the balance due him as

[41] Reisner v. Currier, 58-213.
[42] Goldsmith v. Willson, 67-662.
[43] Same as No. 42.
[44] Code, Sec. 4175; see Van Horn v. Overman, 75-421; Neeb v. McMillan, 68 N. W., 438; Coleman v. Reel, 75-304; Peck v. Bonebright, 75-98.
[45] Reed v. Thayer, 9 Ind., 157.
[46] Cassel v. Western Stage Co., 12-47.

execution plaintiff, with interest and costs.[47] So, where the petition alleged the value of the property, and that plaintiff was the absolute owner and the possession was taken under the writ from defendant and delivered to plaintiff, a verdict in the words "we, the jury, find for the plaintiff," was held good.[48] But where an action of replevin was tried to the court and judgment found for plaintiff, it was held the defendant could not have been prejudiced by the failure of the court to assess the value of each article of property.[49]

§ 908. Of the judgment, etc.—Certain requisites of the judgment herein treated of apply to the verdict. The judgment must determine which party is entitled to the possession of the property, and must designate his rights therein, as absolute owner or otherwise, and if the party in whose favor judgment is given has not the possession of the property, the judgment must also determine the value of his right therein, which right is absolute as to an adverse party having no right in said property, and the judgment must also include such amount as damages as the party may be entitled to for the illegal detention of the property. If judgment be against the plaintiff for the money value of the property, it shall also be against the sureties on the bond.[50] In an action of replevin the court can not render judgment in favor of defendant for the value of goods included in plaintiff's claim which were not taken under the writ. In such action a judgment in favor of several defendants jointly for the value of the goods was erroneous where one of them claimed no interest therein. And a judgment for the value of the goods in favor of a defendant who claimed them under a mortgage but introduced no evidence to show any interest in the property was erroneous.[51] And when plaintiff dismisses his action before an answer is filed, the defendant is entitled to have judgment for his interest in the property replevied, but if he files answer, notwith-

[47] Hayden v. Anderson, 17-158.
[48] Newlin v. Reed, 30-496.
[49] Williams v. Wilcox, 66-65.
[50] Code, Sec. 4176.
[51] Jandt v. Potthast, 71 N. W., 216.

standing the dismissal, claiming other and further relief, plaintiff should be allowed to plead thereto and introduce evidence upon such issue.[52] In rendering the judgment on a verdict in favor of the defendant, interest may be allowed him on the value of the property from the time it was wrongfully taken.[53] The defendant in replevin may, after the action has been dismissed by plaintiff, have an alternative judgment for the return of the property, or the amount of his damages against both principal and sureties on the bond.[54] Generally the judgment in replevin, when plaintiff fails to maintain his action, should be for a return of the property.[55] The entire legal rights of the parties to the suit in the property in controversy should be adjudicated in the main action, and such adjudication is conclusive and final.[56] And in such action, when it is adjudicated that the property replevied was subject to a judgment, which plaintiff was compelled to pay, his remedy is not by an action for a wrongful conversion against the sheriff who levied on the property under the judgment.[57] The defendant can only recover the value of his right in the property, and it can not exceed the amount of the claim for which he held the property when taken from him.[58] If a party holds the property for a lien thereon he is entitled in an action for a recovery of the property by the owner to a judgment for its possession, and in default thereof a money judgment for the amount of his lien.[59] When the property for which a bond has been given by defendant is not forthcoming to answer the judgment, and a party entitled thereto elects to take a money judgment for the value thereof, such a judgment may be entered against the principal and sureties on the bond.[60] A money judgment, taken as heretofore stated, and in lieu of property

[52] Crist v. Francis, 50-257; see Funk v. Israel, 5-438; Jansen v. Effey, 10-227; Marshall v. Bunker, 40-121.

[53] Heard v. Gallagher, 14-394.

[54] Wilkens v. Treynor, 14-391; Clark v. Warner, 32-219.

[55] Chadwick v. Miller, 6-38; Jansen v. Effey, 10-227; Mason v. Richards, 12-73.

[56] Hayden v. Anderson, 17-158.

[57] Finch v. Hollinger, 46-216.

[58] McNorton v. Akers, 24-369; Morris v. Burley, 74-45.

[59] Kundson v. Geison, 38-234.

[60] Code, Sec. 4179.

exempt from execution, will also be to the same extent exempt from execution and from all set-off or diminution, either by the adverse party or by any other person, and such exemption may, at the option of the party entitled thereto, be stated in the judgment.[61] Where the defendant who is not the general owner of the property, recovers judgment for the possession based on the special property therein, the judgment should not be for the value of the property, but only for the value of his interest therein; and in an action on the bond, or on the assessment of damages in the principal action, where plaintiff has failed to prosecute his suit, and a return of the property is ordered, plaintiff in the replevin suit may show that the other party is not the owner of the property, for the purpose of determining the measure of damages.[62] Where grain was taken on a writ of replevin, and threshed and sold, by the plaintiff, and on the trial the ownership was found to be in the defendant, the measure of his recovery on plaintiff's bond was held to be the market value of grain at the time of trial, less the cost of threshing and marketing, it not appearing that plaintiff had acted in bad faith in obtaining the writ.[63] The bona fide purchaser of property (after the replevin bond is given) held under execution, takes the property discharged of the lien;[64] whether the successful party must elect at the time judgment is entered as to whether he will take the property or its value, or may do so when execution issues, seems to be in doubt; but where judgment was entered that plaintiff have immediate possession of the property, and in default thereof recover its value, it was held that the judgment amounted to an election to take the property, and it should have been accepted when tendered and the judgment satisfied.[65] Where plaintiff neglected to ask for a judgment for possession of the property, but

[61] Code, Sec. 4181; Harrier v. Fassett, 56-264.

[62] Havely v. Warner, 12-42; Buck v. Rhoads, 11-348; Hayden v. Anderson, 17-158; see Ormsby v. Nolan, 69-130.

[63] Clement v. Duffy, 54-632.

[64] Gimble v. Ackley, 12-27.

[65] Oskaloosa S. E. Works v. Nelson, 54-519; see Williams v. Chapman, 60-57.

asked for a money judgment for its value, and the property was in plaintiff's possession, under the order of replevin, and the court upon the merits rendered judgment that plaintiff have and recover possession, and no objection was raised in the petition or judgment, such objection can not be raised in the supreme court.[66] Where mortgaged chattels were levied on under execution against the mortgagor, and the mortgagee replevied them, and judgment was rendered for the defendant (the officer who made the levy), the plaintiff can not complain that the judgment should have been for the return of the property, or in default thereof for the amount due on the execution, so long as he can discharge the same by a return of the property.[67] If the plaintiff in an action against an officer has obtained possession of property levied on, and dismisses his action before issue is joined, and the property is allowed to remain in the plaintiff's hands, a mortgage executed by him on it, during said time, will be superior to the claim of the officer under a writ of restitution, or a subsequent levy, the plaintiff being in fact the real owner.[68] The statute provides two distinct remedies; first, the delivery of the property to the plaintiff; and, second, when it can not be delivered, the rendition of a judgment in his favor for its value.[69] Where the jury found generally for the defendant for a certain sum, but did not award him the possession of the property, it will not be presumed that he was found entitled to its possession.[70] If, after the property is seized, it is determined in some other forum that plaintiff is not the owner of it, the defendant is not entitled to judgment by default for its value, and the plaintiff may introduce evidence as to such value.[71] When the judgment was for a return of the property and in default thereof the plaintiff recover of defendant a certain sum as its value, it was held that the defendant could elect to tender the property within a reasonable time, and if he did so,

[66] Williams v. Wilcox, 66-65.
[67] Ormsby v. Nolan, 69-130.
[68] Case v. Woleben, 52-389.
[69] Laughlin v. Main, 63-580.
[70] Hunt v. Bennett, 4 G. Gr., 512.
[71] Dehr v. Lampton, 31-172.

plaintiff might be enjoined from enforcing his money judgment.[72] And where, by the act of the parties, the property is restored to defendant before judgment is rendered in his favor, he can only recover damages for its unlawful detention.[73] When the action is to recover property seized under an execution, and it is determined that the execution is void, plaintiff is entitled to judgment for the return of the property.[74] If the plaintiff fails to prosecute his suit, defendant will be entitled to recover such damages as he may prove himself entitled to, either in the action of replevin or in an action on the bond, nor can an action of replevin be so dismissed as to deprive defendant of his right to have damages assessed and a return of the property awarded unless he consents thereto.[75]

When the property, though exempt from execution, is voluntarily sold, a money judgment for its purchase price is not exempt.[76] If the judgment in a replevin suit determines the title to the property, it can not be questioned in an action on the bond, but it is otherwise where the right to possession only is settled.[77] While the judgment, if in favor of defendant, should direct a return of the property, yet the surety on the bond will be bound, though the judgment against the principal be for the value of it only.[78] And the judgment on the replevin bond is at least prima facie evidence of the measure of damages, in an action against the obligor on a bond of indemnity, given to secure a surety on the replevin bond; and if it appears that he has paid the whole amount of such indebtedness it will establish his claim unless it be rebutted.[79] And in an action on a replevin bond, for failing to return the property, the record in the replevin suit is admissible in evidence.[80] The liability of sureties on a replevin bond under particular facts and circumstances

[72] McClelland v. Marshall, 19-561.
[73] Harrow v. Ryan, 31-156.
[74] Balm v. Nunn, 63-641.
[75] Hall v. Smith, 10-45.
[76] Harrier v. Fassett, 56-264, and cases cited.
[77] Harman v. Goodrich, 1 G. Gr., 13; Buck v. Rhodes, 11-348; Hawley v. Warner, 12-42.
[78] Mason v. Richards, 12-73.
[79] Lyon v. Northrup, 17-314, and cases cited.
[80] McGinnis v. Hart, 6-204.

is further discussed in the cases cited.[81] In an action against a sheriff to recover property illegally seized, plaintiff will not be permitted to show, by way of damages, that he was compelled in order to obtain his writ to deposit with his surety a bond to indemnify him.[82] Plaintiff is not limited in recovering damages for detention of the property to cases where he takes judgment for its possession, but may recover such damages when he elects to, and does take judgment for its value.[83] If the defendant has a lien on the property the value of his lien must be determined and he should recover costs if he has the right of possession.[84] The holder of a first mortgage on personal property, which has been sold by a second mortgagee, the purchaser being in possession, can not in replevin against the two refuse to take the property under his writ and recover judgment for its value against the second mortgagee who has parted with his interest and possession.[85] In a replevin action it was held that the fact that pending such suit defendant sought and failed to establish a mechanic's lien on a building covering the property sought to be replevied, did not bar his right to judgment.[86]

§ **909. Of the execution.**—If the party found entitled to the property is not already in possession of it by delivery under the writ or replevin or otherwise, he may at his option have execution for the specific delivery of the property, or for the value thereof, as determined by the jury, and if any article of the property can not be obtained on execution, he may take the remainder with the value of the missing articles.[87] Defendant is entitled to a money judgment at his option when he is found en-

[81] McNorton v. Akers, 24-369; Hershler v. Reynolds, 22-152; Jansen v. Effey, 10-227; Hurd v. Gallager, 14-394; Struman v. Robb, 37-311; Edwards v. Cottrell, 43-194.

[82] Wilson v. Hillhouse, 14-199.

[83] Cook v. Hamilton, 67-394; Hartley State Bk. v. McCorkell, 91-660; Turner v. Younker, 76-258; McIntire v. Eastman, 76-455.

[84] Harvey v. Pinkerton, 70 N. W., 192.

[85] Nichols v. Sheldon Bk., 67 N. W., 582.

[86] McMeekin v. Worcester, 68 N. W., 680.

[87] Code, Sec. 4178; see Oskaloosa S. E. Works v. Nelson, 54-519.

titled to the possession of the property, and is not already in possession of it.[88] But this election is only intended to apply to cases in which the court has jurisdiction to try and determine the merits of the controversy, and not to a case where the plaintiff is defeated for lack of jurisdiction of the court trying the case.[89] The execution must require the sheriff to deliver the possession of the property, particularly describing it, to the party entitled thereto, if he is not already in possession of it, and may at the same time require the sheriff to satisfy any costs, damages, or rents and profits, with interest, recovered by the same judgment, out of the property of the party against whom it was rendered, subject to execution, and the value of the property for which judgment was recovered should be specified therein, if a delivery thereof can not be had, and must, in that respect, be deemed an execution against property.[90] The execution may be in the following form:

FORM OF EXECUTION IN REPLEVIN.

The State of Iowa.

To the sheriff of ——— county, greeting:

Whereas, on the ——— day of ———, 18—, by the judgment of the district court of ——— county, Iowa, ——— recovered against ——— the possession of the following described personal property, to wit: (here describe each article of property, affixing the value thereto as found by the jury or the court), together with (state other sums recovered as damages, costs, etc.) in a certain action then pending in said court, wherein ——— was plaintiff and ——— was defendant, which judgment remains in force and unsatisfied. You are therefore commanded that you cause the said above described property forthwith to be delivered to the said ———, and that you cause to be made of the goods and chattels, lands and tenements of the said ———, subject to execution in your county, the sum of ——— dollars damages, and ——— dollars costs of said action, together with all legal costs that may accrue by virtue of this writ, with legal interest, and also in case a delivery of said property, or any part thereof, can not be had, that you further cause to be made of the goods and chattels, lands and tenements of said ———, subject to execution, the sum of the value of said property as above specified with legal interest thereon from the ——— day of ———, 18—, (date of the judgment) and have said money in our said court in seventy days from the date hereof, to

[88] Clark v. Warner, 32-219.
[89] Williams v. Chapman, 60-57.
[90] Code, Sec. 4177.

render the same unto the said ———, and have you then and there this writ with your doings thereon.

Witness ———, clerk of said court, with the seal thereof hereto affixed, this ——— day of ———, 18—.

[Seal.] ———, clerk, etc.

If the officer levies on the property of a third person the act is a tort, and the writ affords no protection; he is liable to the true owner in trespass for the value of the goods.[91] Or replevin may be brought without making a demand for the property.[92]

§ 910. Of proceedings when property has been concealed. — When it appears by the return of the officer, or by the affidavit of the plaintiff, that any specific property which has been adjudged to belong to one party, has been concealed or removed by the other party, the court or judge may require such party to attend and be examined on oath, respecting such matter, and may enforce its order in this respect as in cases of contempt.[93]

§ 911. Of detinue.—This action is substantially the same as replevin, differing only in the following respects, viz.: In an action of detinue the petition asks the delivery of the property claimed after judgment.

No bond is required, and no writ asked for or issued when the action is begun, and if the plaintiff fails in his action he is liable only for a judgment for costs. It affords persons who are unable to give a bond an opportunity to recover possession of personal property. The action lies whenever the action of replevin will lie, and it is in substance the same under the code as it was at common law, except as to the enforcement of the judgment. The form of petition used in replevin may be used in this action except the prayer. The form of prayer should be as follows:

FORM OF PRAYER TO PETITION IN DETINUE.

Wherefore plaintiff demands judgment for said property to be delivered to him, or for the value thereof if the same can not be found, and for damages and costs.

[91] Shea v. Watkins, 12-605.
[92] Shea v. Watkins, 12-605.
[93] Code, Sec. 4180; see chapter on Contempts.

CHAPTER LV.

OF ARBITRATION.

Sec. 912. What may be submitted.
913. Of the submission.
914. Of the powers of the arbitrators.
915. Of the award.
916. Of proceedings on an award in court.
917. Of bonds to abide the award.
918. Of common law submissions and awards.
919. Of the action on the award or bond.

Section **912. What may be submitted.**—All controversies which might be the subject of civil action, may be submitted to the decision of one or more arbitrators, in the manner provided by our statute.[1] The submission may be of any particular matters or demands, or of all demands which the one party has against the other, or of all mutual demands on both sides.[2] The subject matter of an action may, by an order of court upon agreement of the parties, be submitted to arbitration while said action is pending;[3] and the parties to an action pending may, by agreement and without any order of the court, submit to arbitration all matters involved in such action between them;[4] but in such case the agreement of submission must be acknowledged;[5] but it has also been held that such submission, when made by court by consent of

[1] Code, Sec. 4385; Conger v. Dean, 3-463; Tomlinson v. Hammond, 8-40; Van Horn v. Bellar, 20-255; McKnight v. McCullough, 21-111; McKinnis v. Freeman, 38-364; Gorman v. Millard, 50-554; City of Marion v. Ganby, 68-142; Richards v. Holt, 61-529; Donican v. Mulry, 70-583.

[2] Code, Sec. 4387; Tomlinson v. Hammond, 8-40; Van Horn v. Bellar, 20-255; McKnight v. McCullough, 21-111; McKinnis v. Freeman, 38-364; Woodward v. Atwater, 3-61; Fink v. Fink, 8-313; Higgins v. Kennedy, 20-474; Ratliff v. Mann, 5-423; City of Marion v. Ganby, 68-142; Richards v. Holt, 61-529.

[3] Code, Sec. 4388; Schomer v. Lynch, 11-461; Marion v. Ganby, 68-142.

[4] Higgins v. Kennedy, 20-474.

[5] Fink v. Fink, 8-313.

the parties, need not be in writing, nor need it be signed and acknowledged.[6] A proceeding to condemn land for the extension of a street in a city may be submitted to arbitrators,[7] so the question of whether an alleged nuisance should be abated may be submitted to arbitrators.[8] A public corporation may arbitrate matters of difference between it and its officers.[9]

§ 913. Of the submission.—The parties, or those who might lawfully have controlled a civil action in their behalf for the same subject-matter, must sign and acknowledge a written agreement, specifying particularly what demands are to be submitted,[10] the names of the arbitrators[11] and the court by which the judgment on their award is to be rendered.[12] The submission may be in the following form:

FORM OF SUBMISSION TO ARBITRATORS.

Whereas differences have existed between us with relation to certain claims and demands which ——— has against ———, now to the end that the same may be fully and finally settled we, ——— and ———, do mutually agree that all claims and demands which the said ——— has against the said ——— of every kind and nature (or if it is desired to submit certain particular matters or demands they should be specifically set forth), be and the same are hereby submitted to ——— and ——— as arbitrators, who shall have full power to hear and determine the same at ——— in ——— county, Iowa, after giving at least ——— days' notice in writing to each of us, and at said hearing either party thereto may be represented by counsel, and may produce such evidence as he deems proper, which shall be heard by said arbitrators, and that within ——— days after said hearing, said arbitrators shall make their award in writing, in which they shall determine what amount, if anything, is due from the said ——— to ———, and when the same shall be paid, which shall be within ——— days thereafter, and said award shall be signed by said arbitrators, and judgment shall be rendered by the district court of ——— county, Iowa,

[6] City of Marion v. Ganby, 68-142.
[7] City of Marion v. Ganby, 68-142.
[8] Richards v. Holt, 61-529.
[9] Dist. Twp. v. Rankin, 70-65.
[10] Code, Sec. 4386; Fink v. Fink, 8-313; McKnight v. McCullough, 21-111; Love v. Burns, 35-150; Foust v. Hastings, 66-522; see City of Marion v. Ganby, 68-142; Woodward v. Atwater, 3-61; Sweney v. Davidson, 68-386; Skrable v. Pryne, 93-691; Older v. Quinn, 89-445.
[11] Code, Sec. 4386; McKnight v. McCullough, 21-111.
[12] Code, Sec. 4386; Love v. Burns, 35-150; Foust v. Hastings, 66-522; see City of Marion v. Ganby, 68-142.

for the amount found due by said award, which award shall be filed with the clerk of the district court of ——— county, Iowa, within ——— days after the same has been made.

Said arbitrators are hereby authorized to fix the amount of fees which shall be allowed, or taxed, in favor of witnesses that may come before them, and they shall be allowed for their own services at the rate of ——— per day during the time they are actually employed in said arbitration, which costs and fees shall be allowed by them in said award.

Dated at ———, this ——— day of ———, 18—.

———,
———.

FORM OF ACKNOWLEDGMENT TO THE SUBMISSION.

State of Iowa, } ss.
——— County. }

Be it remembered, that on this ——— day of ———, 18—, before the undersigned, a notary public in and for said county, personally appeared ——— and ———, to me personally known to be the identical persons whose names are affixed to the foregoing submission to arbitration, and acknowledged that they signed and executed the same as their voluntary act and deed, for the purposes therein mentioned.

(Add official signature and seal.)

Generally, an agent can not submit matters in dispute to arbitration, unless authorized by his principal;[13] but if he has authority to prosecute a suit, he may submit to a reference under a rule of court;[14] nor can one partner, unless expressly authorized so to do, submit partnership controversies to arbitration,[15] but it seems such unauthorized submission would bind the one making it.[16]

A proceeding under the code, to condemn land for the extension of a city street, is a suit pending within the meaning of section 4388 of the code, and may be submitted to arbitrators, on the agreement of parties, by order of the court.[17] So, the question whether or not an alleged nuisance should be abated may be submitted,[18] and questions concerning boundary lines.[19] A claim of

[13] Trout v. Emmons, 29 Ill., 433.
[14] Buckland v. Conway, 16 Mass., 396.
[15] Jones v. Bailey, 5 Cal., 345; Buchanan v. Curry, 19 John, 137; Buchhoz v. Grandjean, 1 Mich., 367; Backus v. Coyne, 35 Mich., 5.
[16] Jones v. Bailey, 5 Cal., 345; Karthaus v. Ferrer, 1 Pet., 222.
[17] City of Marion v. Ganby, 68-142.
[18] Richards v. Holt, 61-529.
[19] Jones v. Boston Mill Corp., 6 Pick., 148; Id., 4 Pick., 507.

dower may be submitted.[20] The submission in any case can not be revoked, except by consent.[21] So, when changes in civil township boundaries are made, and a district is to be divided, if the respective boards of directors can not agree on an equitable division of assets and liabilities, they must choose arbitrators to decide it, and their decision will be final.[22] Where parties agreed orally to settle difficulties by arbitration, and have selected arbitrators to whom they furnished evidence of their respective claims, and where the arbitrators refuse to settle certain claims and the parties waive them and an award is found in favor of one party, and complied with by him, but it was not made in writing, and satisfaction therewith was expressed by both parties, they are bound by the award.[23] Provisions in the articles of incorporation of an insurance company that all disputed claims shall be arbitrated before suit and the award be final and conclusive will not be enforced.[24] Where a policy provided that differences as to the amount of the loss should at the written request of either party be submitted to arbitration, and that no action should be brought until after the award, arbitration in the absence of a request, therefore, is not a condition precedent to an action even if such provisions are valid.[25]

§ 914. Of the powers of the arbitrators.—It would seem that where the court would not have jurisdiction of the subject-matter submitted, then the arbitrators can have none,[26] and the award being in such a case void, a release of an action by one of the parties filed in pursuance of such submission is void.[27]

Arbitrators are governed by the same rules as referees, except as otherwise agreed upon by the parties, or as

[20] Cox v. Jagger, 2 Cow., 638; Green v. Ford, 17 Ark., 586.

[21] Code, Sec. 4390.

[22] Code, Sec. 2802; Dist. Twp. v. Dist. Twp., 45-104; Ind. Dist., etc., v. Ind. Dist., etc., 45-391; Dist. Twp. v. Dist. Twp., 60-141.

[23] Skrable v. Pryne, 62 N. W., 21.

[24] Prader v. Nat'l Masonic Acc. Assn., 63 N. W., 601.

[25] Davis v. Anchor Mut. Fire Ins. Co., 64 N. W., 687.

[26] Williams v. Walton, 9 Cal., 142.

[27] Whitney v. Stone, 23 Cal., 275.

otherwise set forth in the statute.[28] They are, however, not required like referees to make a finding of facts and their conclusions of law based thereon.[29] They can not amend their award after it is once made and delivered except by consent of parties.

They must appoint the time and place of hearing unless the same are fixed in the submission.[30] and must give each party timely notice of the time and place so fixed.[31] The notice of hearing may be in the following form:

FORM OF NOTICE OF HEARING BY ARBITRATORS.

To ———:

You are hereby notified that the undersigned, who were agreed upon by you and ——— to hear and determine (here state what claims and demands were included in the submission), have duly qualified and will meet at ——— in the city of ———, Iowa, at ——— o'clock, ——— noon, for the purpose of hearing any evidence and proof which may be submitted by either party as well as any arguments that may be made.

Dated ———, Iowa, this ——— day of ———, 18—.

———, }
———, } signature of arbitrators.
———, }

But a surety on a submission is not entitled to notice of the hearing,[32] but the parties may waive notice.[33] After due notice, if one party fails to appear, they can proceed to hear and determine the controversy without him.[34]

In the absence of an agreement they may refuse to hear counsel.[35] They have power to administer oaths,[36] and compel the attendance of witnesses.[37] They can not go behind the question submitted.[38]

§ 915. Of the award.—If the time within which the award is to be made is fixed in the submission, no award

[28] Code, Secs. 4389, 3736 to 3739, 3745, 3748; Thompson v. Blanchard, 2-44; McKnight v. McCullough, 21-111; Tomlinson v. Hammond, 8-40.

[29] McKnight v. McCullough, 21-111.

[30] Morse on Arbitration and Award, p. 116.

[31] Morse on A. and A., p. 117.

[32] Farmer v. Stewart, 2 N. H., 97.

[33] Hill v. Hill, 11 Sm. & M., 616; Harding v. Wallace, 8 B. Monroe, 536.

[34] Code, Sec. 4391; Russell on Arbitration, 3 Ed., p. 191.

[35] Morse on A. and A., page 130.

[36] Code, Sec. 4389; Older v. Quinn, 89-445.

[37] Code, Sec. 4389.

[38] Wyman v. Hammond, 55 Me., 534.

made after that time will have any legal effect unless made upon recommitment of the matter by the court to which it is reported.[39] If the time of filing the award is not fixed in the submission, it must be filed within one year from the time such submission is signed and acknowledged, unless the time is by mutual consent extended.[40] The award must be in writing, and must be delivered by one of the arbitrators to the court designated in the agreement, or it may be enclosed and sealed by them and transmitted to the court, and not opened until the court orders,[41] but they may deliver their award to the clerk of the court personally in vacation.[42]

It must be submitted in the manner required by the statute if the court is to be asked to enter judgment on the award.[43] Unless the submission provides otherwise, or parties consent to a minority award, all the arbitrators must concur in the award.[44] If there is no provision in the submission respecting costs, the arbitrators may apportion the same in their discretion.[45] In the absence of any provision in the submission, the arbitrators may make their award payable in installments without interest.[46]

The award may be in the following form:

FORM OF AN AWARD.

In the matter of the controversy between ———, and ———. } Award of arbitrators.

The undersigned arbitrators who were duly appointed in the annexed submission to hear and determine all claims and demands which the said ——— had against the said ——— of every kind and nature, (or if certain particular demands only were submitted, so state) met at ———, in ——— county, Iowa, on the ——— day of ———, 18—, and were then and there duly sworn as such arbitrators, and we did give to each of the parties to said submission ——— days' notice in writing

[39] Code, Sec. 4392.
[40] Code, Sec. 4393.
[41] Code, Sec. 4394; Love v. Burns, 35-150, 153.
[42] Love v. Burns, 35-150, 151; McKnight v. McCullough, 21-111.
[43] Code, Secs. 4385, 4386; Conger v. Dean, 3-463; McKnight v. McCullough, 21-111; Fink v. Fink, 8-313; Love v. Burns, 35-150; Foust v. Hastings, 66-522; Sweney v. Davidson, 68-386.
[44] Richards v. Holt, 61-529.
[45] Code, Sec. 4400; Ratliff v. Mann, 5-423.
[46] Donican v. Mulry, 70-583.

that we would meet on the ——— day of ——— 18—, at ———, in ——— county, Iowa, at ——— o'clock, ——— noon, and then hear the evidence and proofs of said parties, and the arguments of their counsel, and we met at said time and place, and after hearing all the evidence, proofs and arguments, we do find and adjudge that there is now due and owing from the said ——— to the said ——— the sum of ——— dollars, which sum it is ordered that said ——— pay to said ——— within ——— days from this date. We further find that (here name the witnesses) were each in attendance ——— days on said hearing, and they are allowed ——— dollars per day for each day's attendance as their fees. That we, as arbitrators, have each been occupied in the hearing of said controversy and in agreeing upon and in preparing our award, ——— days.

Dated ———, Iowa, ——— the ——— 18—.

———, }
———, } signature of arbitrators.
———, }

§ 916. Of proceedings on an award in court.—The cause will be entered in the docket of the court at the term to which the award is returned, and will be called up and acted on in its order. But the court may require actual notice to be given either party, when it appears necessary and proper, before acting on the award.[47] The award may be rejected by the court for any legal and sufficient reasons, or it may be re-committed for a hearing to the same arbitrators, or to any others agreed upon by the parties, or appointed by the court if they cannot agree.[48] It may be rejected if it appears that one of the parties was not bound by or did not authorize the arbitration,[49] or if one of the arbitrators refused to act.[50]

It may entertain jurisdiction to set aside an award made by arbitrators under the code to make division of assets and liabilities in case of a division of a district township.[51] But it can not decrease the amount of the award in such case, nor differently apportion the costs.[52]

It may be set aside for fraud, mistake, misconduct or

[47] Code, Sec. 4396.

[48] Code, Sec. 4397; Sullivan v. Frink, 3-66; Dunn v. Starkweather, 6-466; Ratliff v. Mann, 5-423; Higgins v. Kinneady, 20-474; Sweney v. Davidson, 68-386; M. & M. R. Co. v. S. C. & St. P. R. Co., 49-604; Depew v. Davis, 2 G. Gr., 260; McDaniels v. Van Fossen, 11-195; Sharp v. Woodbury, 18-195.

[49] Sweney v. Davidson, 68-386.

[50] Kent v. French, 76-187.

[51] Dist. Twp. v. Dist. Twp., 54-286.

[52] Dist. Twp. v. Ind. Dist., 60-141; Ratliff v. Mann, 5-423.

partiality of the arbitrators.[53] To entitle a party to have an award set aside for a mistake or for fraud he must show the same and that he was prejudiced thereby and that, but for it, the award would have been different.[54] If there be error or mistake in their finding it must be made apparent.[55]

The decision of the arbitrators will stand until it is shown that they have abused the discretion given them by law and the agreement of submission.[56] Nor will an award be set aside because it was not "enclosed and sealed and transmitted to the court" when the record shows that it was placed in the hands of the clerk by one of the arbitrators.[57]

Nor can an award be rejected or re-committed at the mere discretion of the court.[58] But if, by the terms of the submission, they are to determine all questions at issue, it may be set aside if not final and conclusive of the rights of the parties.[59] It will not be set aside for mistake unless it is shown that if the mistake had not occurred the award would have been different, and more favorable to the party complaining.[60] When the award has been adopted it must be filed and entered of record, and will have the same force and effect as the verdict of a jury; judgment may be entered and execution issued thereon.[61] And when the award has been returned to court it is a proceeding in court, and prior to its adoption is in the nature of a verdict which has been agreed upon but not reported, and the parties cannot abandon the proceeding and sue upon the award as a common law award.[62] Our statute provides that nothing in it shall be construed to affect in any manner the control of the court over the parties, the arbitrators or their award; nor to impair or affect any action on the award, or on any bond or other engagement to

[53] Sullivan v. Frink, 3-66; Adams v. Bowery Fire Ins. Co., 85-6.
[54] Tank v. Rohweder, 67 N. W., 106.
[55] Dunn v. Starkweather, 6-466.
[56] Ratliff v. Mann, 5-423.
[57] Higgins v. Kinneady, 20-474.
[58] Brown v. Harper, 54-549.
[59] The M. & M. R. Co., v. The S. C. & St. P. R. Co., 49-604.
[60] Gorham v. Millard, 50-554.
[61] Code, Sec. 4398.
[62] Older v. Quinn, 89-445

abide an award.[62] When an appeal is taken to the supreme court on a judgment rendered on an award, copies of the submission and award, together with all affidavits, must be filed with the clerk of the supreme court.[63]

A justice of the peace may render a judgment on an award when the amount is within his jurisdiction.[64] And an appeal will not lie from a judgment of a justice on an award, and his refusal to set aside the award or to recommit the case may be reviewed on writ of error.[65] The willful misconduct of an arbitrator may be shown to defeat an arbitrator who sues for his fees.[66]

§ 917. Of bonds to abide the award.—Often when parties submit matters in controversy to arbitrators, they, at the time of making the submission, enter into a bond to abide the determination of the arbitration. Said bond may be in the following form:

FORM OF BOND TO ABIDE AWARD OF ARBITRATORS.

I, ———, hereby acknowledge myself indebted to ——— in the penal sum of ——— hundred dollars, lawful money of the United States, well and truly to be paid. The condition of this obligation is this, that whereas said ——— and ——— did, on the ——— day of ———, 18—, enter into a written agreement to submit certain claims and demands therein mentioned to ——— and ——— as arbitrators to hear and determine, now if the said ——— shall well and truly abide by the award which may be made by said arbitrators, and fulfill all the conditions thereof on his part, then this obligation to be null and void, otherwise to be in full force and virtue.

Dated ——— day of ———, 18—.

———, principal.
———, surety.

(The above form of bond can be changed to suit each case, or a mutual obligation may be entered into between them.)

§ 918. Of common law submissions and awards.—At common law parties might submit by parol, or in writing, any matter in controversy between them to arbitration, and that power has not been affected by the statute.[67] And the remedy upon an award of arbitrators

[62] Code, Sec. 4401.
[63] Code, Sec. 4399.
[64] Whitis v. Culver, 25-30.
[65] Whitis v. Culver, 25-30.
[66] Bever v. Brown, 56-565.
[67] Morse on A. & A., p. 43; Conger v. Dean, 3-463; McKinnis v. Freeman, 38-364; Fink v. Fink, 8-

when the submission has not been in conformity with the statute is by an action thereon.[68] Such a submission is construed most liberally,[69] and in the absence of a showing of fraud, or partiality, a common law award will be sustained;[70] and mere departures from the agreement of submission, which in no way affect the rights of the parties, will not defeat an action on a common law award.[71] Nor will a judgment on a common law award be disturbed unless it be plainly and palpably unsupported by the evidence.[72]

§ 919. Of the action on the award or bond.—After the award is made, if the party who has a duty to perform under it, fail to comply with its provisions, an action will lie on the award against him,[73] or if a bond has been given conditioned for compliance with the award, an action may be brought on it.[74] The petition on an award may be in the following form:

FORM OF PETITION ON AN AWARD OF ARBITRATORS.

Title,
Venue.

The plaintiff for cause of action against the defendant states:

That on or about the ——— day of ———, 18—, certain disputes and controversies existed between the plaintiff and defendant concerning (here insert statement of disputes as set forth in submission), and thereupon on the day above mentioned, said plaintiff and defendant agreed in writing to submit the same to ——— and ——— as arbitrators between them, a copy of which said agreement is hereunto annexed and marked exhibit "A," and made a part thereof.

That thereafter said arbitrators duly qualified and after giving due notice to each of said parties of the hearing of the matters in dispute between plaintiff and defendant, did on the ——— day of ———, 18—, at ———, hear said parties and the evidence and arguments introduced by them, and on the same day (or if another day state the time), said arbitrators duly made and published their award in writing of and concerning the matters so referred to them, and thereby awarded and

313; Foust v. Hastings, 66-522; Love v. Burns, 35-150; McKnight v. McCullough, 21-111.

[68] Conger v. Dean, 3-463; McKinnis v. Freeman, 38-364; Thornton v. McCormick, 75-285.

[69] McKinnis v. Freeman, 38-364.

[70] McKinnis v. Freeman, 38-364.

[71] Foust v. Hastings, 66-522.

[72] Foust v. Hastings, 66-522.

[73] McKinnis v. Freeman, 38-364; Foust v. Hastings, 66-522; Code, Sec. 4401.

[74] Code, Sec. 4401; Estee's Pldg. Vol. 1, Sec. 651.

found; that said defendant was justly indebted to the plaintiff in the sum of ——— dollars, for and on account of (here insert statement of matters on which amount was found due), a copy of which said award is hereto attached and marked exhibit "B," and made a part hereof. That plaintiff duly performed all the conditions of said award on his part, and afterward, on or about the ——— day of ———, 18—, caused a notice of said award and its terms and conditions to be served on the defendant, and then demanded of him payment of said sum of ——— dollars, so awarded to the plaintiff, as aforesaid.

That the defendant has not paid the same nor any part thereof, though the time within which said sum was to be paid according to the terms of said award has long since elapsed, and there is now due from the defendant to the plaintiff thereon the sum of ——— dollars, with interest at ——— per cent. from the ——— day of ———, 18—, for which amount plaintiff prays judgment against said defendant and for the costs of this action.

(Add verification.) ———, attorney for plaintiff.

(Attach the exhibits referred to in the petition.)

An action to recover on an award is an action at law, and can not be referred against the objection of a party.[75]

[75] McMartin v. Bingham, 27-234; see Bellows v. Dist. Twp., 70-320.

CHAPTER LVI.

OF THE ADMISSION OF ATTORNEYS.

Sec. 920. Of statutory provisions.
921. Of rules of the supreme court.

Section **920. Of statutory provisions.**—The power to admit persons to practice as attorneys and counselors in the courts of Iowa, or any of them, is vested exclusively in the supreme court.[1] Every applicant for admission must be at least twenty-one years old, of good moral character and an inhabitant of the State, and must have actually and in good faith pursued a regular course of study of the law for at least two full years, either in the office of a member of the bar in regular practice of this State or other State, or of a judge of a court of record thereof, or in some reputable law school in the United States, or partly in such office and partly in such school, but in reckoning such period of study the school year of any such law school consisting of not less than thirty-six weeks, exclusive of vacations, shall be considered equivalent to a full year.[2]

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

Such examinations must be held in open court; provided that the graduates of the law department of the State university may be examined at the university in

[1] Code, Sec. 309.
[2] Code, Sec. 310.
[3] Code, Sec. 311.

Iowa City by a committee of not less than three members of the bar or judges of courts of record appointed by the supreme court for that purpose; and upon the certificate of such committee that such candidates possess the learning and skill requisite for practice of the law, they shall be admitted without further examination.[4]

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

Persons admitted to the bar must take an oath, or affirmation, to support the constitution of the United States and of the State of Iowa, and to faithfully discharge the duties of an attorney and counselor of this State, according to the best of their ability.[6]

The supreme court is authorized by the law to prescribe by general rules, the mode in which examinations shall be conducted, and in which the qualifications required as to age, residence, character and term of study shall be proved, and may make further rules not inconsistent with the law for the purpose of carrying out its object and intent.[7] Members of the bar from other States, actually engaged in any cause or matter pending in any court in this State, may be permitted by such court to appear in and conduct such cause or matter, while retaining his residence in another State, without being subject to the provisions of the law heretofore stated.[8]

§ **921. Of rules of the supreme court.**—The supreme court has adopted the following rules which are now in force with reference to admission to the bar, viz:

[4] Code, Sec. 312.
[5] Code, Sec. 313.
[6] Code, Sec. 314.
[7] Code, Sec. 315.
[8] Code, Sec. 316.

98. Examinations of applicants for admission to the bar will be held at each regular term of the court commencing on the first day of the term.

99. Each applicant for admission shall, at least five days before the first day of the term at which he asks to be examined, file with the clerk a written request for examination in his own handwriting and signed by himself, accompanied with proofs of his qualifications as to age, residence and character and time of study, as required by code, section 310, all prepared and presented in the manner prescribed by these rules.

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

The proof of the applicant's character, residence and age, shall be by affidavits from at least two witnesses, and the applicant shall also make affidavit as to his age and place of residence. Proof of his term of study shall be by affidavit of the member of the bar or judge, with whom he pursued his studies; and when he has studied at a law school, such fact and his term of study shall be shown by the affidavit of one or more of the professors or instructors of such school. Such affidavits must show that the applicant has actually, and in good faith, pursued the study of the law in the manner and for the time prescribed by the statute; and must also show that the affiant is a practicing lawyer, judge of a court of record, or professor or instructor in a law school at which the applicant studied.

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

tion of a full year spent in an office of an attorney or judge.

102. On the morning of the first day appointed for the examination, the court will appoint a committee of not less than three members of the bar, who, with the attorney general, as ex officio chairman of the committee, will assist in the examination of applicants for admission.

103. The court will also prepare not less than thirty printed questions to be submitted to each applicant which he shall answer in writing. While engaged in answering these questions he shall not have access to books or papers, nor will he communicate with any one upon the subject of the examination. The printed questions will be varied at each term.

104. Upon consideration of the proofs as to qualification and of the oral and written examinations, the court will admit or reject the candidate.

105. Students in the law department of the university who are recommended by the faculty of said department as candidates for graduation, and as persons of good moral character who have actually and in good faith studied law for the time and in the manner required by statute, at least one year of such study having been as a student in said department, may be examined at the university by a committee composed of not less than three persons, members of the bar, or judges of courts of record, appointed by the supreme court for that purpose, and upon the certificate of such committee that such candidates possess the learning and skill requisite for the practice of law, they shall be admitted without further examination.

106. The chief justice or any judge of this court may administer the oath prescribed by the statute at Iowa City to each and every person recommended by the examining committee appointed to examine students of the law department, and the person so administering the oath shall report to the clerk of this court the names and postoffice addresses of the persons so admitted. The clerk will thereupon enter of record the fact of their admission, and upon payment of the requisite fee will issue to each of the

persons so reported, a certificate of admission to the bar.

107. Any person who becomes a resident of this State after having been admitted to the bar of any other of the United States in which he has previously resided, upon satisfactory proof that he is at least twenty-one years of age, of good moral character and an inhabitant of this State, and that he has practiced law regularly for not less than one year in the State from which he came, may be admitted to practice in this State without examination, or proof of the period of study required of other applicants.

Proof of admission to the bar in another State may be made by the original certificate of admission, or by a duly authenticated copy of the record showing his admission to the bar, proved as records of sister States, must be when admitted in evidence in the courts of this State.

Proof of other qualifications must be made in the same manner as the showing required of applicants for examination.

108. Any member of the bar of another State actually engaged in any cause or matter pending in this court may appear in and conduct such cause or matter, while retaining his residence in such other State, without being admitted to practice under the foregoing provisions.

CHAPTER LVII.

OF THE ADMINISTRATION OF OATHS.

Sec. 922. Who may administer.

Section **922. Who may administer.**—Judges of the supreme, district, superior and police courts, clerks of said courts and their deputies; county auditors and their deputies; justices of the peace and notaries public within the counties of their residence; sheriffs and their deputies, in cases where they are authorized by law to select commissioners or appraisers, or to impanel jurors for the view or appraisement of property, or are directed as an official duty to have property appraised, or take the answers of garnishees; the governor, secretary of State, auditor and treasurer of State, in any matter pertaining to the business of their respective offices, or that may come before them for consideration and action as members of the executive council; the mayor and clerk of cities and towns; judges and clerks of election, township clerks, the chairman of the board of supervisors; the surveyor or coroner in any county, in relation to any duty imposed upon either of them where the administration of an oath may be required; members of all boards of any state institutions, of all commissions, boards or bodies created by law, and all persons, referees or appraisers appointed by authority of law, who have any duty to perform by virtue of their office or appointment requiring the administration of oaths, are authorized to administer oaths and take affirmations.

Notaries public may perform such services in any adjoining county in which they have filed with the clerk of the district court a certified copy of the certificate of their appointment.[1] The court, that is, the judge while holding court, may administer an oath.[2]

[1] Code, Sec. 393.

[2] State v. Caywood, 65 N. W. Rep., 385.

CHAPTER LVIII.

OF ASSIGNMENTS FOR THE BENEFIT OF CREDITORS.

Sec. 923. When valid as a general assignment.
924. When valid as a partial assignment.
925. Of assignments embraced in several instruments.
926. Of defective assignments.
927. Of insolvency.
928. Of assignments by partners.
929. Of the inventory.
930. Of property passed by the assignment.
931. Of the rights of the assignee.
932. Of the duty of the assignee.
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934. Of the filing of claims.
935. Of claims filed after three months.
936. Of the assignee's report of creditors.
937. Of contesting claims.
938. Of priority of taxes.
939. Of preferred claims.
940. Of dividends.
941. Of the settlement.
942. Of sale of the property.
943. Of removal of the assignee.
944. Of the death or misconduct of the assignee.

Section **923. When valid as a general assignment.** —Under our law no general assignment of property by an insolvent person, firm or corporation, or in contemplation of insolvency, for the benefit of creditors, will be valid unless it is made for the benefit of all the creditors in proportion to the amount of their respective claims; and the assent of the creditors to such an assignment is presumed.[1] Such an assignment may be in the form of a deed and may be executed in another State.[2]

If the instrument purports on its face to be a general assignment it will be so treated, although it designates persons as creditors who do not hold valid claims.[3] It would, however, be otherwise if it is made for a fraud-

[1] Code, Sec. 3071.
[2] Schee v. La Grange, 78-101.
[3] Hamilton-Brown Shoe Co. v. Mercer, 84-537.

ulent purpose or for the benefit of a portion of the creditors only. The following matters will not avoid an assignment: Omitting property which is exempt from execution; the fact that the assignor supposes he will escape further liability for his debts; the fact that some of the creditors are attempting to defraud others under the assignment;[4] the fact that the assignee is directed to sell the property when convenient, and as soon as it can be done without material sacrifice;[5] a provision in an assignment for the payment of the debts as fast as they become due;[6] a provision authorizing the assignee to compound with debtors;[7] the failure of the assignee to report the amount and condition of the estate;[8] the employment by the assignee of the assignor.[9] The following matters will avoid an assignment: When it is for the benefit of creditors and preferences are given;[10] authorizing the assignee to sell on credit.[11]

A creditor or a co-debtor may be the assignee.[12] Delivery of the assignment to the attorney of the assignor, with directions to file it is in effect a delivery to the assignee.[13] A general assignment directing the application of the property of the insolvent to the payment of his debts will not affect a creditor's right to priority.[14] A general assignment for the benefit of creditors may be in the following form:

FORM OF A GENERAL ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

The undersigned (name), a (describe the business), residing in the city (or town) of ———, in the county of ———, and State of Iowa, being insolvent and being desirous of having all of my property which is situated in the city (or town) of ———, in ——— county, Iowa, applied in payment of my debts, do hereby make a general assignment to (name of assignee) as assignee, a (state his business), residing in the city (or town) of ———, in the county of ———, and State of Iowa, of all of

4 Bradley v. Bischel, 81-80.
5 Wooster v. Stanfield, 11-128.
6 Meeker v. Sanders, 6-60.
7 Berry v. Hayden, 7-469.
8 Savery v. Spaulding, 8-239.
9 Savery v. Spaulding, 8-239.
10 Wise v. Wilds, 77-586; Arnold v. Wilds, 77-593.
11 Meeker v. Sanders, 6-61; Berry v. Hayden, 7-469.
12 Wooster v. Stanfield, 11-128.
13 American v. Frank, 62-202.
14 In re Carter, 67 N. W., 239.

my property both real and personal of every kind and nature, and authorize said assignee to sell the same and apply the proceeds thereof, to the payment of all of my debts and for the benefit of all of my creditors in proportion to the amount of their respective claims without any preferences whatsoever.

Dated this ———, day of ———, 18—.

———, assignor.

State of Iowa, } ss.
——— County. }

Be it remembered that on this ——— day of ———, 18—, personally appeared before me (name), a notary public in and for (name of county), (name of assignor), the assignor above named, presumably known to me to be the identical person whose name is affixed to the above and foregoing instrument, as assignor, and acknowledged the execution of the same to be his voluntary act and deed for the purposes therein mentioned.

Witness my hand and notarial seal the day and date above written.

[Seal.] (Signature of notary),
Notary public in and for ——— County, Iowa.

§ 924. When valid as a partial assignment.—The common-law right of an insolvent to make a partial assignment for the benefit of creditors is not affected by the statute.[15] And the provisions of the statute with reference to a general assignment do not apply in such a case.[16] If a debtor acts without fraud he may even transfer property to certain creditors in payment of their claims and thereafter make a general assignment.[17] A debtor may encumber all of his property to secure a portion of his debts, even though nothing is left for the payment of other creditors.[18] Nor will the validity of such partial assignment be effected by the knowledge of the debtor that other creditors are not provided for, or that he knew he was insolvent, or that he intended to exclude other creditors from sharing in his estate.[19]

§ 925. Of assignments embraced in several instruments.—No general rule can be laid down from

[15] Loomis v. Stewart, 75-387.
[16] Buck v. Chase, 85-296.
[17] Lampson v. Arnold, 19-479; Van Patten v. Burr, 52-518; Bolles v. Creighton, 73-199.
[18] Rollins v. Shaver Wagon, etc., Co., 80-380; Hutchinson v. Watkins, 17-475; Fromme v. Jones, 13-474; Davis v. Gibbon, 24-257; Farwell v. Howard, 26-381.
[19] Cowles v. Rickets, 1-582; Butler v. Diddy, 83-533; Stewart v. Mills County Nat'l Bk., 76-571; Southern White Lead Co. v. Haas, 73-399.

which it can be determined in all cases when several instruments are executed by the debtor disposing of his property for the benefit of his creditors, whether the various instruments will be treated as constituting a single transaction, a disposition of all of the debtors' property with preferences and therefore void as a general assignment or not. In the following cases it was held that under the facts the instruments were to be treated as a general assignment, with preferences, and therefore void.[20]

In the following cases the instruments, though executed near the same time, were held valid:[21] In determining whether a disposition of property is a general assignment, in such cases, the intention of the parties is controlling.[22] If the party thus disposing of his property intended to make an assignment and if the instruments were all a part of the same transaction they will be construed as constituting a general assignment and being with preferences will be void.[23] On the other hand, if there was no intention to make an assignment, and if the several instruments were independent transactions, they will be held good.[24]

§ 926. Of defective assignments.—An assignment for the benefit of creditors to be valid must be unconditional, otherwise it will be void.[25] But mere informality will not defeat an assignment.[26] And an assignment making no reference to real estate, but apparently de-

[20] Burrows v. Lendorff, 8-96; Cole v. Dealhman, 13-551; Van Patten v. Burr, 52-518; Moore v. Church, 70-208; Rock Island Plow Co. v. Breese, 83-553; Falker v. Linehan, 88-641; Van Horn v. Smith, 59-142.

[21] McCandless v. Hazen, 67 N. W., 256; Clement v. Johnson, 85-566; Gage v. Parry, 69-605; Le Moyne v. Braden, 87-739.

[22] Letts v. McMaster, 83-449.

[23] Perry v. Vezina, 63-25; Creglon v. Creglon, 69 N. W., 446; Elwell v. Kimball, 69 N. W., 286; Bradley v. Bailey, 64 N. W., 758; Cadwells Bk. v. Crittenden, 66-237.

[24] Cleveland, etc., Stove Co. v. Welson, 80-697; Loomis v. Stewart, 75-387; Gage v. Perry, 69-605; Farwell v. Jones, 63-316; Van Patten, v. Thompson, 73-103; Bradley v. Hopkins, 67 N. W., 261; In re Bloomfield Woolen Mills, 70 N. W., 115; Farwell v. Cunningham, 86-67; Farwell v. Weber, 91-122; Kohn v. Clement, 58-589; Carson v. Byers, 67-606; Aulman v. Aulman, 71-124; Garrett v. Burlington Plow Co., 70-697; Jaffray v. Greenbaum. 64-492.

[25] Sperry v. Gallaher, 77-107; Williams v. Gartrell, 4 G. Gr., 287.

[26] Meeker v. Sanders, 6-61.

signed to be a general assignment was held good as such.[27] An assignment regular on its face can not be collaterally attacked.[28]

§ 927. Of insolvency.—One may be said to be insolvent so as to justify the making of an assignment for the benefit of creditors if he is unable to pay his debts in the usual course of business, or to proceed in business without making a general arrangement with his creditors.[29]

§ 928. Of assignments by partners.—Generally an assignment by one partner of the firm's property will not be good and will not prevent an attachment by a creditor of the firm.[30]

When a firm executed a conveyance covering all of their property to a trustee and authorized him to dispose of the same for the benefit of creditors and providing for the benefit of certain creditors it was held that the conveyance constituted an assignment and was invalid as to creditors and would not prevail as against an attachment levied on the property.[31]

§ 929. Of the inventory.—The assignment must be in writing and set out the name of the assignor, his residence and business, the name of the assignee, his residence and business, and in a general way the property assigned and its location, and the purpose of the assignment; it must be signed and acknowledged in the manner prescribed for the execution and acknowledgment of deeds, and must be recorded in the office of the recorder of the county where the assignor resides, and in any other county in the State in which he has real property to be assigned thereby, in the records of deeds and indexed in the proper index books. The assignor must annex to the assignment an inventory, under oath, of his estate, real and personal, according to the

[27] Loomis v. Griffin, 78-482.
[28] McCandless v. Hazen, 67 N. W., 256.
[29] State v. Cadwell, 79-432; McCandless v. Hazen, 67 N. W., 256; Savery v. Spaulding, 8-239; see In re Bloomfield Woolen Mills, 70 N. W., 115.
[30] Loeb v. Pierpont, 58-469.
[31] King v. Gustafson, 80-207.

best of his knowledge, and a list of his creditors and the amount of their respective demands, but such inventory will not be conclusive as to the amount of the debtor's estate; and such assignment will vest in the assignee the title to any other property belonging to the debtor at the time of making the assignment, not exempt from execution. As soon as the assignment is recorded it must be filed, with the inventory and list of creditors, in the office of the clerk of the district court, as must all subsequent papers connected with the proceedings.[32]

The provision of the law as to recording is intended for the protection of subsequent purchasers and when an assignment was properly executed and acknowledged and the assignee had consented to accept the trust prior to the levy of an attachment, it was held that the failure to record it until a few seconds after the writ came into the sheriff's hands would not invalidate the assignment.[33] And an assignment for the benefit of creditors, though not acknowledged or recorded takes precedence over a judgment rendered after its execution.[34] From time to time as additional property may come into the hands of the assignee he must file an additional inventory and valuation of it and may thereupon be required to give additional security.[35]

§ 930. Of property passed by the assignment.—The equity of redemption of a mortgagor of personal property passes by the assignment.[36] All property possessed by the assignor at the time of the assignment passes by it.[37]

§ 931. Of the rights of the assignee.—The assignee and creditors have no greater rights than the assignor had.[38] Nor has the assignee higher rights than the creditors themselves would have had, had the assignment not been made.[39]

[32] Code, Sec. 3072.
[33] American v. Frank, 62-202.
[34] Munson v. Frazer, 73-177.
[35] Code, Sec. 3082.
[36] Gimble v. Ferguson, 58-414.
[37] Goldsmith v. Willson, 67-662; Gage v. Perry, 69-605; Prouty v. Clark, 73-55.
[38] Meyer v. Evans, 66-179; Schaller v. Wright, 70-667.
[39] Davenport Plow Co. v. Lamp., 80-722.

§ **932. Of the duty of the assignee.**—The assignee must file with the clerk of the district court where the assignor resides a true and full inventory and valuation of the estate under oath, and must give a bond to the clerk, for the use of the creditors, in double the amount of the inventory and valuation, with one or more sureties, to be approved by said clerk, for the faithful performance of his trust and may then proceed under said assignment.[40]

Taking possession of the property is evidence of an acceptance of the trust and he may bring an action in relation to the property before he has filed his inventory and bond.[41]

If the assignee orally agrees to accept the trust before the assignment is executed and after it is filed for record an attachment is levied on the property, the assignment will take effect before the levy of the attachment.[42]

§ **933. Of the notice.**—The assignee must at once give notice of the assignment by publication in some newspaper in the county for six weeks and must mail a notice to each creditor of whom he is informed, directed to his usual place of residence, requiring him to present his claim under oath to him within three months thereafter.[43]

The creditor must at his own risk see to it that his claim reaches the assignee in time or at least is mailed in time to reach him within the time provided.[44] But the creditor should file his claim even if not notified.[45] A creditor can not insist upon the invalidity of the assignment and at the same time seek to share under it.[46] If the creditor has special security he may be required by the other creditors to exhaust it before claiming a dividend.[47]

[40] Code, Secs. 3073, 3082.
[41] Price v. Parker, 11-144.
[42] Singer v. Armstrong, 77-397.
[43] Code, Sec. 3074.
[44] Conlee Lumber Co. v. Meyer, 74-403; In re Assignment of Rea, 82-231.
[45] Carter v. Lee, 82-26.
[46] Loomis v. Griffin, 78-482.
[47] Wurtz v. Hart, 13-515.

The time for filing claims begins to run from the date of the first publication in the newspaper.[48]

§ 934. Of the filing of claims.—All creditors must file their claims with the assignee within three months from the date of the first publication unless the court shall extend the time, which it may do in its discretion when peculiar circumstances seem to justify, but in no case can time be extended beyond nine months. The claims must be clearly and distinctly stated and sworn to by the claimant or by some person acquainted with the facts.[49]

§ 935. Of claims filed after three months.—Creditors may claim debts to become due, as well as debts due, but on debts not due a reasonable rebate must be made if the same do not draw interest, and all creditors not filing their claims within three months from the first publication of notice will not be permitted to participate in the dividends until after the payment in full of all claims presented within said time, except as otherwise provided.[50] But an application to have a claim already filed may be made after the three months.[51]

And a creditor having collateral security need not file his claim with the assignee.[52] As to priority of claims.[53]

§ 936. Of the assignee's report of creditors.—At the expiration of the three months the assignee must report and file with the clerk of the court a true and full list, under oath, of all such creditors of the assignor as shall have claimed to be such, with a statement of their claims, an affidavit of publication of the notice, and a list of the creditors, with their places of residence, to whom notice has been mailed, and the date of such mailing.[54] The failure of the assignee to perform his duty

[48] Scott v. Thomas, 62 N. W., 790; Code, Sec. 3075.

[49] Code, Sec. 3075.

[50] Code, Sec. 3083; Carter v. Lee, 82-26; In re Assignment of Holt, 45-301; Conlee Lumber Co. v. Meyer, 74-403; McKinley v. Nourse, 67-118; see Code, Sec. 3075.

[51] In re Knapp, 70 N. W., 626.

[52] Satterlee v. Kirby, 86-518.

[53] Budd v. King, 83-97.

[54] Code, Sec. 3076; Conlee Lumber Co. v. Meyer, 74-403; In re Assignment of Rea, 82-231.

will not be allowed to predjudice the rights of a claimant.[55] Under some circumstances one, by filing a claim with the assignee, will not be prevented from claiming a preference, nor be estopped from disputing the validity of the assignment.[56] Section applied.[57]

§ 937. Of contesting claims. — Any person interested may appear within three months after the filing of the report and contest the claim or demand of any creditor by filing written exceptions thereto with the clerk, who must cause notice thereof to be given to such creditor, which must be served as an original notice and returnable at the next term, when the court will hear the proofs and allegations of the parties, and render such a judgment as shall be just, and it may allow a trial by a jury.[58] No pleadings are required in addition to such exceptions.[59] In this proceeding the court may determine the question of priority among creditors.[60] But an independent action in equity may be brought to determine questions of priority.[61] Whether under this section a cause might, on motion, be transferred to the equity docket when equitable issues were involved is an open question.[62]

§ 938. Of priority of taxes.—Assessments on property held under assignments for the benefit of creditors or taxes levied thereon under the laws of the State or the ordinances of a municipal corporation are entitled to priority and to be paid in full by the assignee and such claims need not be filed with him.[63]

§ 939. Of preferred claims.—If a claim is for personal services rendered the assignor within ninety days

[55] Lacey v. Newcomb, 63 N. W., 704.

[56] Muse v. Satterlee, 81-491; Franzen v. Hutchinson, 62 N. W., 698.

[57] In re Cadwells Bk., 89-533.

[58] Code, Sec. 3077.

[59] In re Assignment of Guyer, 69-585; In re Cadwells Bk., 89-533.

[60] Perry v. Murray, 55-416.

[61] Knoxville Nat'l B'k v. Hamrick, 67-583; but see Mehlhop v. Ellsworth, 64 N. W., 638.

[62] In re Assignment of Hobson, 81-392.

[63] Code, Sec. 3078; Brooks v. Eighmey, 53-276; Huiscamp v. Albert, 60-421; Brown v. Kiene, 72-342.

next preceding the execution of the asignment, it must be paid in full.[64]

§ 940. Of dividends.—Subject to the provisions of the preceding section and of the following section and if no exception be made to the claim of any creditor, or if the same has been adjudicated, the court will order the assignee, from time to time, to make fair and equal dividends among the creditors of the assets in his hands in proportion to their claims, and as soon as may be to render a final account of his trust to the court, which will allow him such compensation in the final settlement as may be considered just and right.

If, upon making the final dividend to the creditors the assignee shall be unable, after reasonable efforts, to ascertain the place of residence of any creditor, or any person authorized to receive the dividend due him, he must report such fact to the court, with evidence showing diligent attempts to find such party, whereupon the court may, in its discretion, order the distribution of said unclaimed dividend among the other creditors.[65] The court may direct the assignee as to payments to be made without the formal application of either party.[66]

§ 941. Of the settlement.—The assignee is at all times subject to the supervision and orders of the court or judge, and he may be compelled by citation or attachment to file reports of his proceedings and of the situation and condition of the trust, and to proceed in the execution of his duties; and he must dispose of all personal property and divide the proceeds of the same among creditors as they may be entitled thereto within six months from the date of the assignment, and must dispose of real estate within one year from such date, and make full settlement by that time, unless the court or judge, for good reason shown, shall extend the time within which such disposition or settle-

[64] Code, Sec. 3079.
[65] Code, Sec. 3079; In re Carter, 67 N. W., 239.
[66] In re Assignment of Hooker, 75-377.

ment shall be made.[67] If the assignment is claimed to be fraudulent by a creditor he should attack it in the assignment proceedings, and can not levy an attachment upon the property in an action against the assignor.[68] The assignee may not pay an illegal claim simply because no exception has been made thereto by a creditor.[69] An assignment will not be declared fraudulent or void for want of any list or inventory. The court or judge upon the application of the assignee or of any creditor may compel the appearance in person of the debtor before him to answer under oath as to such matters as may be inquired of him, and he may be fully examined under oath as to the amount and situation of his estate, and the names of the creditors and the amounts due to each, with their places of residence, and he may be compelled to deliver to the assignee any property or estate embraced in the assignment.[70]

§ **942. Of sale of the property.**—The assignee may dispose of and sell all the assigned estate, real and personal, which the debtor had at the time of the assignment, and may sue for and recover in his name everything belonging or appertaining to said estate, and generally may do whatever the debtor might have done in the premises; but no real estate can be sold without notice published, as in case of sales on execution, unless the court or judge shall otherwise order, and no such sales will be valid until approved by such court or judge.[71] And an assignee's sale is a judicial sale and cuts off the right of dower.[72]

§ **943. Of removal of the assignee.**—Upon a written application of two-thirds of the creditors in number, and two-thirds in amount, the court must remove the assignee and appoint in his place a person approved by the creditors in the same number and amount, and the per-

[67] Code, Sec. 3080; McCandless v. Hazen, 67 N. W., 256.
[68] Hamilton-Brown Shoe Co. v. Mercer, 84-537.
[69] In re Cadwells Bk., 89-533.
[70] Code, Sec. 3081.
[71] Code, Sec. 3084; Lynch v. Simmons Hardware Co., 80-503; Waterman v. Baldwin, 68-255.
[72] Stidger v. Evans, 64-91.

son so removed must immediately turn over to the clerk of the district court, or to any person appointed by the court, all moneys and property of the estate in his hands. If an assignee resides out of the estate, or becomes insane, or otherwise incapable of discharging the trust, the court may, upon ten days' notice to him or his attorney, remove him and appoint another in his stead.[73] And attorney's fees in resisting a removal when the motion was overruled were held properly taxed to the estate.[74]

§ 944. Of the death or misconduct of the assignee.—If an assignee die before closing his trust, or if he fail or neglect for the period of twenty days after the making of an assignment to file an inventory and valuation, and give bond, the district court, or any judge thereof, of the county where such assignment is recorded, on the application of any person interested, must appoint some person to execute the trust who shall on giving bond with sureties, as required of an assignee, have all the powers of the assignee first appointed, and be subject to all of the duties imposed by law. If any bond or surety is found to be insufficient, or on complaint before the court or judge, it shall be made to appear that any assignee is guilty of wasting or misapplying the trust estate, such court or judge may require additional security, may remove the assignee and appoint another in his place, and such person so appointed on giving bond shall execute such duties and may demand and sue for all the estate in the hands of the person removed, and recover the amount and value of all moneys and property or estate wasted and misapplied from such person and his sureties.[75]

Any judge of the district court in vacation has power under this chapter to issue citations and attachments, order the sale of personal or real property, and to approve the sales and deeds thereof.[76]

[73] Code, Sec. 3085.
[74] In re Cadwells Bk., 89-533.
[75] Code, Sec. 3086; Drain v. Mickel, 8-438.
[76] Code, Sec. 3087.

CHAPTER LIX.

OF THE WRIT OF CERTIORARI.

Sec. 945. When the action will lie.
946. When the action will not lie.
947. Of parties to the action.
948. What court may grant the writ.
949. Of the proceedings.
950. Of the petition for the writ, and of notice.
951. Of the writ, and of service and return.
952. Of the hearing.
953. Of limitation of the action, etc.

Section **945. When the action will lie.**—Certiorari is defined as a writ issued from a superior court directed to one of inferior jurisdiction commanding the latter to certify and return to the former the record in the particular case.[1] It is granted whenever especially authorized by law, and especially in all cases when an inferior tribunal, board or officer exercising judicial functions is alleged to have exceeded its proper jurisdiction, or is otherwise acting illegally, when, in the judgment of the court in which the writ is sought, there is no other plain, speedy and adequate remedy.[2] When the proceedings of the inferior court, board or tribunal are irregular and no plain, speedy and adequate remedy at law is provided by appeal, certiorari will lie.[3] So when the trial court

[1] Bouv. Law Dic., 14th Ed., pg. 251.

[2] Code, Sec. 4154; Edgar v. Greer, 14-211; Royce v. Jenney, 50-676; Smith v. Powell, 55-215; Coburn v. Mahaska County, 4 G. Greene, 242; College of Physicians and Surgeons v. Guilbert, 69 N. W., 453; Abney v. Clark, 87-727; Currier v. Mueller, 79-316; State v. District Court, 84-167; Ind. Dist. of Ottumwa v. Taylor, 69 N. W., 1009.

[3] The M. & M. R. Co. v. Rosseau, 8-373; Davis County v. Horn, 4 G. Greene, 94; Dubuque v. Rebman, 1-444; Rockwell v. Bowers, 88-88; Dunham v. Fox, 69 N. W., 436; Rockafellow v. Board of Equalization, 77-493; Hamman v. Van Wagenen, 62 N. W., 795; Callanan v. Lewis, 79-452.

exceeds its jurisdiction in acting upon a procedendo from the supreme court, its proceedings may be corrected by certiorari.[4] And orders punishing for contempt can only be taken to a higher court by certiorari.[5] The writ may be granted to test the legality of the action of township trustees in calling an election for the purpose of voting on the question of a tax to aid in the construction of a railroad.[6] So also to determine the jurisdiction of the board of supervisors to remove a county seat.[7] And the action of the board of supervisors in the establishment of a road may be reviewed by certiorari when it is shown that they exceeded their jurisdiction, or acted illegally.[8] The writ may issue when the board of directors of a district township direct their secretary not to certify for collection a tax voted by the electors of the district.[9] And it lies when a board of equalization exceeds its powers by raising an individual assessment.[10] When an assessor fails to make on his books the corrections ordered by the township board of equalization, and such books have passed beyond his control, an action of certiorari will lie for their correction.[11] It lies to review the action of a city council in improperly vacating streets,[12] and to test the legality of the action of such a council in condemning land for a street.[13] And to question the action of township trustees in consolidating road districts.[14] And where a judge, in vacation and without notice to the other party, changes the conditions of a decree of divorce.[15] And where a court in an equitable action to redeem from a tax deed entertained a motion for a new trial after the cause was decided, and without notice to

[4] Edgar v. Greer, 14-211.

[5] The First Cong. Church, etc. v. City of Muscatine, 2-69; Code, Sec. 4468; Dunham v. State, 6-245; Henry v. Ellis, 49-205; Currier v. Mueller, 79-316.

[6] Jordan v. Hayne, 36-9.

[7] Bennett v. Hetherington, 41-142; Herrick v. Carpenter, 54-340.

[8] McCollister v. Shuey, 24-362; McCrory v. Griswold, 7-248; Moffitt v. Brainard, 92-122.

[9] Smith v. Powell, 55-215.

[10] Royce v. Jenney, 50-676; Polk County v. Des Moines, 70-351; Rockafellow v. Board of Equalization, 77-493.

[11] Keck v. The Board of Supervisors, 37-547.

[12] Stubenraugh v. Neyenesch, 54-567.

[13] Rockwell v. Bowers, 88-88.

[14] Dunham v. Fox, 69 N. W., 436.

[15] Hamman v. Van Wagenen, 62 N. W., 795.

the opposite party.[16] And to review the proceedings of a board of supervisors whereby a taxpayer's taxes are wrongfully increased.[17] And so in this proceeding a taxpayer having no greater interest than any other taxpayer may question the action of the city council in remitting taxes assessed.[18] And a resident of the county appearing before the board of supervisors and objecting to the granting of a permit to sell intoxicating liquors may have the proceedings of the board reviewed by certiorari.[19] Certiorari will lie to correct an unwarranted change of a court record,[20] and it lies when a tax is voted by a township to aid in the construction of a county bridge and the board of supervisors have not first determined the cost.[21] And under certain peculiar facts it was held to lie.[22]

§ **946. When the action will not lie.**—It will not lie if a plain, speedy and adequate remedy is afforded at law by appeal or otherwise, nor when the party fails to appeal in time,[23] nor will it lie against a court of probate for refusing to correct a mistake in the settlement of an administrator's account, as the remedy is by appeal.[24] Nor will it lie generally when an appeal can be taken.[25] It will not lie to review the question of damages for land taken for a highway.[26] Nor does it lie when the district court did not exceed its jurisdiction in entertaining an action on a school order against several independent districts into which the district issuing the order had been subsequently divided.[27] And when the

[16] Callanan v. Lewis, 79-452.
[17] Goetzman v. Whitaker, 81-527.
[18] Collins v. Davis, 57-256.
[19] Darling v. Boesch, 67-702, and see Welch v. Board of Supervisors, 23-199; Smith v. Yoram, 37-89; Iowa News Co. v. Harris, 62-501.
[20] Code, Sec. 4154; Hawkeye Ins. Co. v. Duffee, 67-175.
[21] Retz v. Tannehill, 69-476.
[22] Rowley v. Baugh, 33-201; State v. Fidelity & Casualty Co., 77-648.
[23] McCrory v. Griswold, 7-248; Meyers v. Simms, 4-500; McCune v. Swafford, 5-552; Spray v. Thompson, 9-40; Davis County v. Horn, 4 G. Greene, 94; Sunberg v. The Dist. Ct., etc., 61-597; Flagg v. Parker, 11-18; State v. Wilson, 12-424; Ransom v. Cummins, 66-137; State v. Schmidtz, 65-556; Ind. School Dist. v. Dist. Ct., 48-182; Brockman v. Creston, 79-587.
[24] O'Hare v. Hempstead, etc., 21-33.
[25] Spray v. Thompson, 9-40.
[26] McCrory v. Griswold, 7-248.
[27] The Ind. Dist. of Asbury v. The Dist. Court, etc., 48-182.

act sought to be reviewed is of a legislative or discretionary, rather than of a judicial character, the action will not lie.[28] Questions of fact can not be reviewed in this manner.[29] Nor can a party thus review some erroneous ruling of an inferior tribunal.[30] The finding of a board of supervisors on questions of fact arising out of applications to sell intoxicating liquors can not be reviewed in this manner.[31] It will not lie to review the action of a city board of equalization in reducing the assessment of the property of the city water works company.[32] And where the question sought to be reviewed is only the amount of damages or the failure to make an award on the proper day, it will not lie.[33]

§ 947. Of parties to the action.—One who has no specific right which is violated by a city ordinance, can not contest its validity by certiorari proceeding.[34] But it is held that one taxpayer may thus have reviewed the action of the city council in remitting taxes assessed against another taxpayer, although such plaintiff has no greater interest in the matter than any other taxpayer.[35] And a taxpayer may maintain the proceeding to review the action of the board of supervisors whereby his taxes are increased.[36] And when the remedy is sought for the purpose of correcting proceedings to assess damages resulting from the establishment of a road, several owners of distinct pieces of land can not join as plaintiffs.[37] So when taxes have been levied in different townships in aid of a railroad, the levy in each township must be treated as distinct, and taxpayers of different townships can not join as plaintiffs in this action to test the validity of such taxes.[38] The officer against whom the writ issues should be made a defend-

[28] Iske v. City of Newton, 54-586; Smith v. Board of Supervisors, 30-531; Iowa Eclectic Med. Coll. Assn. v. Schrader, 87-659.

[29] Tiedt v. Carstenson, 61-334; Hildreth v. Crawford, 65-339; Darling v. Boesch, 67-702.

[30] O'Hare v. Hempstead, 21-33.

[31] Darling v. Boesch, 67-702; see Forbes v. Delashmutt, 68-166.

[32] Polk County v. City of Des Moines, 70-351.

[33] Cedar Rapids, I. F. & N. W. R. Co. v. Whelan, 64-694.

[34] Iske v. City of Newton, 54-586.

[35] Collins v. Davis, 57-256.

[36] Goetzman v. Whitakar, 81-527.

[37] Chambers v. Lewis, 9-583.

[38] Woodward v. Gibbs, 61-398.

ant, naming him; it is not sufficient to merely state his official title.[39] Under the law authorizing boards of supervisors to issue permits to sell intoxicating liquors, any citizen if a party may have its action reviewed by certiorari.[40] But it will not lie at the instance of one in no way affected by the proceedings in which the writ is sought.[41] But in a proceeding to review the action of a board of supervisors in assessing the costs of constructing a levee upon adjoining land, different property owners, whose property is subject to the assessment, may join as plaintiffs.[42]

§ **948. What court may grant the writ.**—The writ may be granted by the district court, or by the judge thereof. But if the writ is to be directed to such court, or judge, or to the superior court or its judge, then it must be granted by the supreme court, or by a judge thereof, and must command the defendant therein to certify fully to the court issuing the writ, at a time and place specified therein, a transcript of the records and proceedings, as well as the facts in the case, describing or referring to them, or any of them, with convenient certainty, and also make due return of the writ, and when allowed by a court it must be issued by the clerk thereof and under its seal.[43] Under the revision of 1860 the circuit court did not have jurisdiction in certiorari cases.[44] But this was afterward conferred on it.[45]

§ **949. Of the proceedings.**—The action must be prosecuted by ordinary proceedings so far as applicable, and an appeal lies from the judgment of the court to the supreme court as in other ordinary actions, and the record is to be prepared in the same manner,[46] and the findings of the court have the same presumptions in their favor.[47] Under the revision it was a special proceeding.[48]

[39] Keck v. Board of Supervisors, 37-547; Chambers v. Lewis, 9-583.
[40] Darling v. Boesch, 67-702.
[41] Davis v. Horn, 4 G. Greene, 94.
[42] Richman v. Board, etc., 70-627.
[43] Code, Sec. 4155; State v. District Court, 84-167.
[44] Thompson v. Reed, 29-117; Hunt v. Free, 29-156.
[45] Keniston v. Hewitt, 48-679.
[46] Code, Sec. 4161.
[47] Remey v. Board of Equalization, 80-470.
[48] Revision, Secs. 2606, 2607;

§ 950. Of the petition for the writ and of notice. —The petition for the writ must state facts constituting a case wherein the writ may issue, and must be verified by affidavit; and the court, or judge, before issuing the writ, may require notice of the application to be given the adverse party, or may grant the writ without notice. If a stay of proceedings is sought the writ can only be granted upon reasonable notice[49] of the time, place, and court, or judge before whom the application will be made, which must be fixed by the court or judge to whom the application is presented, who must require a bond and fix the penalty and conditions thereof; the sureties may be approved by the court or judge granting, or the clerk issuing, the writ, and which bond must be filed with the clerk,[50] and when proceedings are had under section 4156 of the code the remedy is full and complete, and the proceedings of the inferior tribunal may be stayed when the writ is applied for.[51] The petition for the writ may be in the following form:

FORM OF PETITION FOR WRIT OF CERTIORARI.

Title, }
Venue, }

The plaintiff states:

That the above named defendants are members of the board of supervisors of ——— county, Iowa. That said board has exceeded its jurisdiction in this, that on the ——— day of ———, 18—, at the ——— session an order was made by said board establishing a certain county road as follows (here describe road as in order). That said road established as aforesaid passes over and across plaintiffs' land as follows, viz.: (describe the premises and the location of the road over them). That no notice whatever was given of the time when a petition for the establishment of said road would be presented; that no viewer was appointed to examine and report on said proposed road (here state any other illegalities complained of). Plaintiff further states that said board has ordered that said road be opened and worked (or as the fact may be).

That plaintiff has no plain, speedy and adequate remedy for the injury done him by said illegal act except by certiorari. Wherefore he prays that a writ of certiorari issue from this court commanding

Thompson v. Reed, 29-118; Ainsworth v. House, 31-504.

[49] Iske v. City of Newton, 54-586.

[50] Code, Secs. 4156, 4157.

[51] Stubenraugh v. Neyenesch, 54-571.

the said defendants herein to certify fully to this court a transcript of the records and proceedings in reference to the establishment of said road, with all the facts relating to the same, and that said proceedings may be annulled, set aside and held for naught, and that he have judgment for costs.

———, attorney for plaintiff.

(Add verification.)

The notice of the application may be in the following form:

FORM OF NOTICE OF APPLICATION FOR WRIT.

Title, }
Venue. }

You are hereby notified that ——— will make application to (name of court or judge), at ——— o'clock A. M., on the ——— day of ———, 18—, at ———, in ——— county, Iowa, for a writ of certiorari to remove into said court the records and proceedings in the above entitled cause (here set out the proceedings sought to be removed), at which time and place you can attend, if you desire.

———, attorney for plaintiff.

§ 951. Of the writ, and of service and return.— The writ is issued by the clerk, under the seal of the court, and may be in the following form:

FORM OF WRIT OF CERTIORARI.

To (names of all defendants, as in petition), greeting:

Whereas, on the petition of ———, it has been made to appear to the (name of court or judge) that you have exceeded your jurisdiction as the (board of supervisors, or as the case may be) of ——— county, Iowa, and are proceeding illegally in the matter of the establishment of (a road or other proceeding, as the case may be). You are, therefore, hereby commanded that you certify and return fully to our said court, on the ——— day of ———, 18—, a transcript of the records and proceedings, as well as the facts in the case (describing them, or any of them, as the case may be, with convenient certainty) of the (name and describe the case), as fully as the same are now before you; and have you then and there this writ.

Witness ———, clerk of said court, with the seal thereof hereto affixed, this ——— day of ———, 18—.

[Seal.] ———, clerk, etc.

The writ must be served and proof of service made, in the same manner as an original notice in an action, except that the original must be left with the defendant,

and the return or proof of service made upon a copy.[52] And if the return to the writ is defective the court may order a further return to be made, and may compel obedience to the writ and to such further order by attachment, if necessary.[53] The appearance of a party to the writ cures any defect in the writ or the service of it.[54] The defendant should certify to the court issuing the writ a full and perfect transcript of the record and proceedings in the case.

§ 952. Of the hearing.—When a full return has been made the court must proceed to hear the parties, or such of them as may attend for that purpose, on the records, proceedings and facts as certified, and such other testimony, oral or written, as either party may introduce pertinent to the issue, and may give judgment affirming or annulling the proceedings in whole or in part, or, in its discretion, correcting the same and prescribing the manner in which the defendant shall further proceed.[55] And though a writ be defective in not ordering the facts to be certified, yet, if they are in fact certified, a motion to quash the writ for the defect will not lie.[56]

Under the revision it was held that trial in this proceeding, after the writ had been returned, must be had on the record alone and that evidence aliunde was not admissible.[57] Under the law now all facts relating to the matter, whether of record or not, may be certified and oral evidence introduced on the hearing.[58] But the court will not consider errors or irregularities relating to, or dependent on facts, not stated in the petition, nor will allegations without a return to sustain them be ground for interference.[59] The supreme court may, in this action, modify the judgment of the court below rendered in a proceeding for contempt.[60] And in a proceeding in cer-

[52] Code, Sec. 4158.
[53] Code, Sec. 4159.
[54] Remey v. Board of Equalization, 80-470.
[55] Code, Sec. 4160; McKinney v. Baker, 69 N. W., 683.
[56] Richman v. Board, 70-627.
[57] Smith v. Board of Supervisors, 30-531; Jordan v. Hayne, 36-9.
[58] Code, Sec. 4160; Tiedt v. Carstensen, 61-334.
[59] Everett v. The C., R. & M. R. Ry. Co., 28-417; Jordan v. Hayne, 36-9, and 15.
[60] State v. Myers, 44-580.

tiorari as to the legality of the action of the board of supervisors in establishing a road, notice of appeal can not be served on the county auditor.[61]

As to the sufficiency of the return in particular cases.[62] It is held that parties may waive the writ and submit themselves to the jurisdiction of the court.[63] The auditor's cerificate touching the receipt of certain evidence by the board of supervisors will not overturn its action.[64] The supreme court can not inquire whether the evidence before the lower court justified the order and thus review its decision.[65] Judgment on the bond provided in this proceeding can not be summarily entered.[66]

§ 953. Of limitation of the action, etc.—No writ can be granted after twelve months have elapsed from the time the inferior court, tribunal, board or officer has, as alleged, exceeded its proper jurisdiction, or has otherwise acted illegally.[67] But a writ of certiorari to the board of supervisors directing them to certify up a transcript of their proceedings upon the question of the removal of a county seat is not barred until twelve months after the adoption of the order submitting the question to a vote.[68] When a petition for certiorari was filed with due diligence, but the writ was delayed on account of the disqualification of the judge to take cognizance of the case, it was held the plaintiffs did not lose their rights by reason of the delay.[69] If issued in time the writ is not required to be returned within the twelve months.[70]

[61] Polk v. Foster, 71-26.
[62] Stone v. Miller, 60-243; Schroeder v. Carey, 11-555.
[63] Groves v. Richmond, 56-69.
[64] Woolsey v. Board, etc., 32-130.
[65] Wise v. Chaney, 67-73.
[66] Smith v. Bissell, 2 G. Greene, 379.
[67] Code, Sec. 4162; Jamison v. The Board, etc., 47-388; Shepard v. Supervisors, 72-258.
[68] Jamison v. The Board, etc., 47-388.
[69] Bush v. Dubuque, 69-233.
[70] Remey v. Board of Equalization, 80-470.

CHAPTER LX.

OF CHATTEL MORTGAGES.

Sec. 954. Of mortgages on after-acquired property.
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971. Of equitable mortgages.
972. When valid against existing creditors, etc.
973. Of waiver of the lien and of estoppel.
974. Of the enforcement of foreign mortgages.
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976. Of the notice in such cases.
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978. Of parties to the proceedings.
979. Of the sale and of attorneys' fees.
980. Perpetuating evidence of the sale, etc.
981. Of the validity of the sale.
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983. Of the remedy, costs, etc.
984. Of injunction and transfer to the district court.
985. Of proceedings in the district court.
986. Relating to levies on mortgaged personal property.
987. Of the sale of chattel mortgage property which has been pledged as collateral.

Section **954. Of mortgages on after-acquired property.**[1]—The law is now well settled that one may mortgage property to be acquired in the future.[2] Especially is this true where the property is in existence at the time the mortgage is executed.[3] Where a mortgage on a stock of goods provides for a lien on the goods which may be purchased and added to the stock, it is good.[4] But a mortgage will not be held to cover after-acquired goods unless it is expressly provided for in the mortgage.[5]

§ **955. Of mortgages on growing crops and crops to be grown.**— Where a mortgage, after describing certain property, included "all crops to be grown or raised" by the mortgagor in a certain year, on land described therein, it was held that it was good as against a creditor of the mortgagor, and that it attached to the property when it came into existence, and that the record of the mortgage imparted notice.[6] But a mortgage on crops to be grown or planted, in order to be regarded as valid against third parties, must state the year or term in which they are to be grown.[7] But a mortgage on crops "growing" is good.[8] If the owner of land executes a mortgage on crops afterwards to be grown, and thereafter, and before planting the crop lets the land to a tenant who puts in a crop, the mortgage by the lessor will not attach to the crop planted by the lessee.[9] The landlord's share of crops to be grown under a lease will be bound by a chattel mortgage from the time such share is set apart, and such a

[1] As to mortgages on the increase of stock see Thompson v. Anderson, 63 N. W., 355.

[2] Scharfenburg v. Bishop, 35-60; Fejavary v. Broesch, 52-88; Stephen v. Pence, 56-257; Beall v. White, 94 U. S., 382; Arques v. Wasson, 51 Cal., 620; Hughes v. Wheeler, 66-641; Brown v. Allen, 35-306; Holley v. Brown, 14 Conn., 255; Abbott v. Goodwin, 20 Me., 408; Pierce v. Emory, 32 N. H., 484, and see Dunham v. Isett, 15-284, and cases cited; Thompson v. Anderson, 63 N. W., 355.

[3] Hughes v. Wheeler, 66-641.

[4] Philips v. Both, 58-499.

[5] Philips v. Both, 58-499; Lormer v. Allyn, 64-725; McArthur v. Garman, 71-34; Iowa State Nat'l Bk. v. Taylor, 67 N. W., 677.

[6] Wheeler v. Becker, 68-723; see Muir v. Blake, 57-662; Wright v. Dickey Co., 83-332.

[7] Pennington v. Jones, 57-37; Muir v. Blake, 57-662; Hayes v. Wilcox, 61-732; Crary v. Currier, 62-535; Van Patten v. Leonard, 55-520; Stephens v. Pence, 56-257; Rowley v. Bartholomew, 37-374; Eggert v. White, 59-464.

[8] Luce v. Morehead, 73-498.

[9] Knaebel v. Wilson, 92-536.

mortgage will be prior to the claims of an attaching creditor who garnishes the tenant after the execution of the mortgage.[10]

§ 956. Of mortgages of book accounts.—Book accounts may be mortgaged.[11] But such a mortgage which fails to show the county or state in which the accounts are to be earned, or the person against whom they might accrue will not create a lien on unearned accounts.[12] So a mortgage on "our accounts" is not good as against third parties without notice.[13] Nor is one which describes the accounts as "book accounts" or "book accounts for goods sold."[14] But a description of "all books of account and accounts and notes contracted and to be contracted from the sale of merchandise" was held good.[15] And while a description in a chattel mortgage of notes and book accounts may be insufficient as to a third person without notice, it may be good as between the parties thereto, and in such a case if the mortgagee, before being served with a notice of garnishment, has taken possession of the property and caused it to be sold and has bid it in the defective description is cured as against the party garnisheeing.[16]

§ 957. Description of the property other than book accounts.—The property sought to be covered by the mortgage should be as accurately and specifically described as its nature will permit, and to defeat a subsequent sale of chattels, the description in the mortgage must be so specific as to enable third persons, who have examined the record and made such inquiries as the instrument itself suggests, to identify the property covered by the mortgage.[17] The sufficiency of the description of property in

[10] Riddle v. Dow, 66 N. W., 1066.

[11] Sandwich Mfg. Co. v. Robinson, 83-567; Davis v. Pitcher, 65 N. W., 1005; Lawrence v. McKenzie, 88-432.

[12] Sandwich Mfg. Co. v. Robinson, 83-567.

[13] Sperry v. Clark, 76-503.

[14] Laurence v. McKenzie, 88-432.

[15] Davis v. Pitcher, 65 N. W., 1005.

[16] Kelley v. Andrews, 71 N. W., 251.

[17] Winter v. Landphere, 45-73; Smith v. McLean, 24-322; Rhutasel v. Stephens, 68-627; Wells v. Willcox, 68-708; Wheeler v. Becker, 68-723; Hayes v. Wilcox, 61-732; Peterson v. Foli, 67-402; Yount v. Harvey, 55-421; Pennington v. Jones, 57-37; Eggert v. White, 59-464; Broch v. Barr, 70-399; Gil-

a chattel mortgage has been frequently passed upon by our supreme court; an extended review of these cases is not necessary. In addition to those heretofore referred to, the following cases will be found to present the law on this subject.[18]

§ 958. Of the effect of retention, of possession by the mortgagor and of sale by him of the property.—A chattel mortgage providing that the mortgagor may retain possession and dispose of the property by sale, is not fraudulent.[19] In case of a foreign mortgage retention by a mortgagor of possession beyond the time stipulated in the mortgage may render it fraudulent and void as to subsequent purchasers, if such retention is with the consent of the mortgagee.[20] A provision in a mortgage for the mortgagor to retain possession of the goods and sell them, receiving the money therefor, and after paying his own expenses and the expenses of sale to pay the proceeds to the bankers of the creditor does not render it void.[21] But facts and circumstances showing that the retention is for the benefit of the mortgagor alone, will justify a jury in finding it not bona fide.[22] If there is no actual intent to defraud, a chattel mortgage is not rendered per se fraudulent by an agreement of the parties that the mortgagor

christ v. McGee, 67 N. W., 392; Andregg v. Brunskill, 87-351; Sandwich Mfg. Co. v. Robinson, 83-567; Taylor v. Gilbert, 92-587; King v. Howell, 62 N. W., 738; City Bk. v. Ratkey, 79-215; Shellhammer v. Jones, 87-520; Citizens' Nat'l Bk. v. Johnson, 79-290; Kenyon v. Tramel, 71-693; Iowa State Nat'l Bk. v. Taylor, 67 N. W., 677; Haller v. Parrott, 82-42; Plano Mfg. Co. v. Griffith, 75-102; McGarry & Brown v. McDonnell, 82-732; Haller v. Parrott, 82-42; Magirl v. Magirl, 89-342.

[18] Caldwell v. Trowbridge, 68-150; Ivins v. Hines, 45-73; Everett v. Brown, 64-420; Barr v. Cannon, 69-20; Ormsby v. Nolan, 69-130; Kenyon v. Tramel, 71-693; Warner v. Wilson, 73-719; State Bk. v. Felt, 68 N. W., 818; King v. Howell, 62 N. W., 738; Plano Mfg. Co. v. Griffith, 75-102; Clapp v. Trowbridge, 74-550; Norris v. Hix, 74-524; Luce v. Moorehead, 73-498; Towslee v. Russell, 76-525; Barrett v. Finch, 76-553; Cook v. Gilchrist, 82-277; Kern v. Wilson, 82-407; Chapin v. Garretson, 85-377; Myers v. Snyder, 64 N. W., 771; Johnston v. Rider, 84-50; Kneller v. Kneller, 86-417; Funk v. Mer. Trust Co., 89-264.

[19] Torbet v. Hayden, 11-435; Kuhn v. Graves, 9-303; Campbell v. Leonard, 11-489; Hughes v. Cory, 20-399; Jessup v. Bridge, 11-572; Fromme v. Jones, 13-474; Smith v. McLean, 24-322; Jordan v. Lendrum, 55-478.

[20] Simms v. McKee, 25-341.

[21] Adler v. Clafflin, 17-89; Hughes v. Cory, 20-399; Meyer v. Gage, 65-606; Starker v. McCosh Iron & Steel Co., 62 N. W., 848.

[22] Wilhelmi v. Leonard, 13-330.

might retain possession and dispose of the property in the ordinary course of trade.[23] And the reservation in a mortgage of power to sell in the ordinary course of trade does not invalidate it.[24] Nor will the fact that a mortgage does not require the mortgagor to account for the proceeds of sales of the property affect its validity,[25] and the retaining possession by the mortgagor and reserving the right to sell the property in the ordinary course of trade applying the proceeds to his own use will not render the mortgage fraudulent.[26] A provision in a mortgage that the mortgagee will not take possession until default, unless necessary for protection against other creditors, is not per se fraudulent.[27]

So a mortgage given to trustees upon a stock of goods to secure certain creditors, is not void because it provides for an extension of the time of the indebtedness, and that the mortgagor shall have the right to retain possession and carry on the business in the usual retail way for a certain time, paying the costs and expenses of running the business, and keeping up the stock to what it was when the mortgage was given.[28]

§ 959. Of the effect of agreements not to record. —If a mortgage is witheld from record for the purpose of enabling the mortgagor to obtain credit it is invalid as against creditors who became such while the mortgage was thus withheld.[29]

But a mere failure to record a mortgage will not render it fraudulent as to subsequent mortgagees in the absence of any showing that it was withheld from record by virtue of an agreement between the parties or at the request of the mortgagor.[30]

[23] Sperry v. Etheridge, 63-543; Meyer v. Evans, 66-179.

[24] Clark v. Hyman, 55-14; Hughes v. Cory, 20-398.

[25] Clark v. Hyman, 55-14.

[26] Meyer v. Evans, 66-179; see Hughes v. Cory, 20-399; Clark v. Hyman, 55-14; Sperry v. Etheridge, 63-543; Jaffery v. Greenbaum, 64-492; Meyer v. Gage, 65-606.

[27] Gilmore v. Kilpatrick-Kock Dry Goods Co., 70 N. W., 175.

[28] Hughes v. Cory, 20-399; Jaffery v. Greenbaum, 64-492.

[29] Goll & Frank Co. v. Miller, 87-426; Snouffer v. Kinley, 64 N. W., 770.

[30] Mull v. Dooley, 89-312; H. E. Spencer Co. v. Papach, 70 N. W., 748; In re Bloomfield Woolen Mills Co., 70 N. W., 115.

§ 960. Of questions of priority over landlords' liens. — A lease giving a landlord a mortgage on the tenant's goods and not recorded, is not valid as against a mortgage subsequently executed on the same goods and recorded, where the holder has no notice of the prior mortgage.[31] The lien created by a chattel mortgage upon goods used in a hotel before the beginning of a lease of the building is superior to the landlord's lien for rent.[32] Where there was a prior unrecorded mortgage upon goods which were claimed under a landlord's lien, and after the landlord's lien had attached the note secured by the mortgage was sold and transferred to a third party, but no assignment of the mortgage recorded, and the mortgagee fraudulently entered satisfaction of the mortgage on the margin of the record, and after this by an agreement between the landlord and the lessees a third party was substituted for one of the original lessees, no new lease being made, these transactions did not have the effect to make the landlord's lien superior to the lien of the mortgage.[33]

The lessor of a hotel has no lien for rent on property owned by the lessee's wife, though it be used in the hotel during the term of the lease, and where she mortgaged such property to secure a debt, and the mortgage was recorded, and the lessee afterward sold his lease to a party, and the wife sold the mortgaged property to the same party subject to the mortgage, and he took possession under such purchase, it was held that the lessor had a lien on the property to secure the rent accruing after the purchaser took possession, but that such lien was inferior to the mortgage which the original lessee's wife had placed on the property.[34]

§ 961. Of priority of the lien generally.—When an action of replevin was dismissed by plaintiffs before issue joined, and an order entered for the return of the property, which was not complied with by plaintiffs, it was held that a chattel mortgage executed by them while in

[31] Pitkins v. Fletcher, 47-53.
[32] Rand v. Barrett, 66-731.
[33] Rand v. Barrett, 66-731.
[34] Perry v. Waggoner, 68-403; see Jarchow v. Pickens, 51-381.

possession of the property, and before the issuance of the writ of restitution, taken by the mortgagee in good faith, was valid, the ownership and right to possession of the mortgagor being afterward established.[35] A writ of attachment issued out of the United States court directing the marshal to attach the property of "A" is no defense in an action against him by "A's" mortgagee for converting chattels covered by the mortgage.[36] Where a debtor agreed to execute to one of his creditors a mortgage on stock, but the animals were not specifically pointed out and agreed upon, and the debtor afterward executed a mortgage upon cattle and filed it for record, and the mortgagee had notice of it, but before the mortgage came into his possession and on the same day, a creditor levied an attachment on the property, the attachment was held to be a first lien thereon.[37] Where the mortgagor sold the property, with the consent of the mortgagee, the purchaser agreeing to pay part of the mortgage debt, and agreeing that the lien should continue, and the purchaser sold the property to one who had no knowledge of the agreement, and no actual notice of it, the lien of the mortgage followed the property into the hands of the last purchaser.[38] An unrecorded chattel mortgage of a building erected on leased premises will not take priority over a mortgage on the landlord's interest in the premises when it appears that it was intended that the building should constitute a permanent improvement.[39]

Where a payee of a note secured by chattel mortgage gave it to the maker and took a new one different in amount, and payable at a different date, without any agreement to show that it was to be secured by the mortgage, he lost his right to the security as against the holder of other notes secured by the mortgage.[40] Where a mortgagee, acting under a power of sale in a mortgage, sold the mortgaged property to a purchaser who bought it for

[35] Case v. Woleben, 52-389.
[36] Sperry v. Etheridge, 70-27.
[37] Cobb v. Chase, 54-253; Day v. Griffith, 15-104.
[38] Oswald v. Hayes, 42-104.
[39] Fletcher v. Kelly, 88-475.
[40] Wilhelmi v. Leonard, 13-330.

the benefit of a co-mortgagee at about one-sixth of its actual value, the purchaser in such case did not acquire the title to the property, divested of the equity or right of redemption in the mortgagor, or junior mortgagee.[41] When a sale under execution is made of property mortgaged, and before the levy the sheriff and the attorney for the judgment plaintiff knew of the mortgage, and the purchaser at the sale had knowledge of it before he paid the purchase money, he is not protected as a bona fide purchaser.[42]

The owner of land in fee who leased it to the owner of a mill situated thereon, and who purchases the mill and lease, does not thereby extinguish the lien of an existing chattel mortgage on the mill.[43] When the mortgagor retains possession of the property, the mortgage, to be notice to third parties and take precedence over a subsequent attachment, must be filed for record in the county where the holder of the property resides, or the attaching creditors must have had notice of the mortgage.[44]

Where one, prior to becoming insolvent, executed a chattel mortgage to secure a pre-existing debt and subsequently made an assignment for the benefit of creditors, the property so mortgaged passed to the assignee charged with and subject to the mortgage.[45] The interest retained by the mortgagor in property mortgaged when the mortgagee has the right at any time to take possession, can not be levied on and sold under execution or attachment against the mortgagor, and one who secures a second mortgage thereon while such property is in the custody of the officer under such levy, will hold it or its proceeds against the attaching creditors.[46]

[41] Alger v. Farley, 19-518.

[42] Cummings v. Tovey, 39-195; Campbell v. Leonard, 11-489; Gordon v. Harding, 33-550.

[43] Denham v. Sankey, 38-269.

[44] Code, Sec. 2906; Stewart v. Smith, 60-275; Allen v. McCalla, 25-464; Manny v. Woods, 33-265; Hessler v. Wilson, 36-152; Kern v. Wilson, 82-407; Hibbard v. Zenor, 82-505; Cook v. Gilchrist, 82-277; Carson & Rand L. Co. v. Bunker, 83-751; Ordway v. Kittle, 83-752; Coleman v. Reel, 75-304; American Wheel Works v. Whinnery, 76-400; Cole v. Green, 77-307; Luce v. Moorehead, 77-376; Citizens Nat'l Bk. v. Johnson, 79-290; Plano Mfg. Co. v. Griffith, 75-102.

[45] Meyer v. Evans, 66-179; see Sec. 934.

[46] Wells v. Sabelowitz, 68-238.

Where a husband made a chattel mortgage of a stock of goods to his wife and sent it to the recorder for record, all without her knowledge, and there was no evidence that it was to be delivered to her, or that it was for her use, it did not constitute a delivery of the mortgage to her, and attachments levied upon the goods after the date of the mortgage were prior liens, even though she knew of the mortgage before the attachments were levied.[47] Where goods were in the hands of a party who was an unsatisfied pledgee of the mortgagor at the time when the mortgage was made, and when the property was seized thereunder, and he objected to such seizure and claimed to be the owner of the property but did not claim a lien upon it, his failure to assert his lien did not preclude him from recovering for the conversion of the property.[48] The assignee of a mortgagor may recover by action of detinue specific personal property from attaching creditors which is under mortgage by the debtor, and which mortgage is prior to both the assignment and the attachments.[49] Where mortgaged chattels have passed into the hands of the mortgagees, their possession is notice of their interest to subsequent attaching creditors, and in such case it is immaterial that the mortgage was not recorded.[50]

To set aside a sale of mortgaged chattels made by the mortgagee at the instance of garnishing creditors of the mortgagor, fraud must be established, and mere inadequacy of price alone is not sufficient to establish it.[51] Creditors of the mortgagor, who, subsequent to an agreement between the mortgagor and the mortgagee with reference to place of sale of the property, garnish the mortgagee, are bound by such agreement and can not have it set aside in the absence of proof of collusion and fraud.[52] The mortgagor of mares, mortgaged before the colts were foaled, has, prior to the time they should be weaned, no interest in them subject to attachment.[53] One who in-

[47] Wadsworth v. Barton, 68-599.
[48] Gunsel v. McDonnell, 67-521.
[49] Goldsmith v. Willson, 67-662; Evans v. St. Paul Harvester Works, 63-204.
[50] Jaffray v. Greenbaum, 64-492.
[51] Tootle v. Taylor, 64-629.
[52] Tootle v. Taylor, 64-629.
[53] Rogers v. Highland, 69-504.

tervenes in a garnishment proceeding, claiming an attached fund as proceeds of mortgaged property, must show that his debt has not been paid,[54] and further as to questions of priority.[55]

§ 962. Of mortgages between husband and wife.—A chattel mortgage made by husband to his wife, if executed in good faith to secure an existing debt, is valid against the creditors of the husband who had notice thereof.[56]

§ 963. When an instrument is a chattel mortgage and when an assignment for the benefit of creditors.—Whether an instrument is to be regarded as an assignment for the benefit of creditors or as a mortgage, is to be determined from the intention of the parties, and if the intention of the debtor is merely to secure a debt of one or more of his creditors and the conveyance is not intended as an absolute disposition of his property but he reserves to himself a right therein, it will be treated as a mortgage, even though the debtor is insolvent at the time, and it covers all his property and only a portion of his debts are secured by it.[57]

§ 964. Of agreements between mortgagor and mortgagee regarding time of sale.—It seems that the mortgagor and mortgagee may, after the execution of the mortgage, fix a different time and place of sale of the property than that stated in the mortgage, and that their agreement will be binding upon every one, if made in good faith.[58]

[54] Pool v. Carhart, 71-37.

[55] Reynolds v. Black, 91-1; Leggett & Myers Tobacco Co. v. Collier, 89-144; Burdette v. Woodworth, 77-144; Mass. Loan & Trust Co. v. Moulton, 81-155; Bray v. Flickinger, 79-313; Parker v. Loan & Trust Co., 81-458; Wood v. Duval, 69 N. W., 1061; Smith v. Clark, 69 N. W., 1011; King v. Wallace Bros., 78-221; Parker v. Farmers L. & T. Co., 81-458; Blotcky Bros. v. O'Neill, 83-374; Letts, Fletcher & Co. v. McMasters & Dryden, 83-446; Harlan v. Ash, 84-38; Gammon v. Bull, 86-754; Stern v. Linehan, 88-641; Nat'l State Bk. v. Morse, 73-174; Clark v. Barnes, 72-563.

[56] Headington v. Langland, 65-276.

[57] Cadwell's Bk. v. Crittenden, 66-237; Fromme v. Jones, 13-480; Gage v. Parry, 69-605; David Bradley & Co. v. Hopkins, 67 N. W., 261.

[58] Tootle v. Taylor, 64-629.

§ 965. Of second mortgages.—The execution of a second mortgage on personal property which, in legal contemplation, amounts to a sale of the equity of redemption of the mortgagor in the property, is valid.[59] Where there are two mortgages on crops to be grown they are entitled to precedence in the order of their execution and record.[60]

§ 966. Of protection to diligent creditors.—When an insolvent debtor executes a mortgage to bona fide creditors to hinder and delay other creditors in the enforcement of their claims, and there is no evidence that the mortgagees had any intention of taking part in any such fraudulent plan, except so far as was necessary to protect themselves, it is a case of race between creditors and the mortgage is not void.[61]

The law will protect a creditor who, by his diligence, secures his own claim, even though he knew of the failing condition of the debtor when he accepted the security, if his purpose was to protect his own interest.

§ 967. Of actions to recover property mortgaged—Actions at law.—Where a mortgage provides that the mortgagor shall not sell or dispose of the mortgaged property, and a party with notice of the mortgage purchases part of the property, he is liable in damages to the mortgagee for the wrongful conversion of the merchandise purchased.[62]

Where a mortgagee took possession of the mortgaged property before the debt was due in accordance with the provision in the mortgage authorizing him so to do, such possession is legal and he does not render himself liable to damages for so doing, providing he sells in the manner allowed by the mortgage.[63] Where one seeks to recover by virtue of a chattel mortgage the property which he

[59] Tootle v. Taylor, 64-629; Stafford Emery v. Kempton, 2 Gray, 257; Roys v. Johnson, Id., 162; Wells v. Sabelowitz, 68-238.

[60] Bradley v. Gelkinson, 57-300.

[61] Kuhn v. Clement, 58-589.

[62] Fisher v. Friedman, 47-443.

[63] Mather v. Robinson, 47-403; Colby v. W. W. Kimball Co., 68 N. W., 786; Howery v. Hoover, 66 N. W., 772.

claims is covered by it, he must rely on the strength of his own title.[64]

Under a clause authorizing the mortgagee to take the property whenever he chooses so to do, and sell the same to satisfy his debt, he can assert that right when the goods are seized by an officer on execution against the mortgagor.[65] Though a chattel mortgage authorizes the mortgagee to take possession of the mortgaged property at any time he may choose, and to sell sufficient to pay the debt secured where it also contains a provision that on payment of such debt according to the tenor of the notes given for the same the mortgage shall be void, the mortgagee is not authorized to sell the property in advance of maturity of the debt or some part thereof until which time the mortgagor's equity of redemption does not expire.[66]

§ 968. Of the mortgagor's interest in the property before sale.—The mortgagor of personal property has no interest in the property that can be levied on and sold under execution, though the ownership remains in him.[67]

But when the mortgagor is in possession and has the right to possession of the property for a definite period, his interest prior to the expiration of such period is subject to levy and sale.[68] But it might be otherwise if the mortgagee could take possession at his pleasure, or if the mortgagor's right of possession was for no definite time.[69] See provisions of last section of this chapter.

§ 969. Of the mortgagor's interest after sale.—The mortgagor has an equity of redemption in the property after the conditions in the mortgage have been broken and the mortgagee having possession thereof may be garnished for any surplus which there may be in his hands after paying his debt.[70]

[64] Eggert v. White, 59-464.
[65] Wells v. Chapman, 59-658.
[66] Koster v. Seney, 69 N. W., 868.
[67] Gordon v. Hardin, 33-550; Campbell v. Leonard, 11-489; Kern v. Wilson, 73-490; Hollingsworth v. Holbrook, 80-151; Taylor v. Merchants & Bankers Ins. Co., 83-402.
[68] Rindskopf v. Lyman, 16-260; McConnell v. Denham, 72-494.
[69] Rindskopf v. Lyman, 16-260; see Sec. 986.
[70] Doane v. Garretson, 24-351.

The equity of redemption of the mortgagor after condition broken, will pass to an assignee under an assignment for the benefit of creditors.[71]

§ 970. Of the interest of the mortgagee in the property. — In the absence of stipulations to the contrary in the mortgage, the mortgagee is entitled to the possession of the property.[72] He is in law the owner of it, subject only to have his title divested by the mortgagor's paying his debt, but his right to hold possession of the property ceases when the debt secured thereby is discharged.[73]

If the mortgagor fail to fulfill the conditions of the mortgage, the mortgagee becomes the absolute owner of the property.[74] If the mortgagee rightfully take possession of the property under his mortgage, a failure to sell the same will not make the possession wrongful.[75] But a mortgagee in possession is liable to garnishment; if not in possession he can not be charged with such surplus.[76]

§ 971. Of equitable mortgages. — When a party claims a lien on property without having a technical mortgage, a court of equity will recognize and sustain his claim when it appears from the agreement, or contract, that it was intended that he should be secured thereon.[77]

§ 972. When valid against existing creditors, etc. —A chattel mortgage is valid against existing creditors if duly executed though not recorded, if such creditors have notice thereof, and when recorded the record is constructive notice,[78] but if the mortgage is invalid it imparts no notice, and if there has been no change of possession

71 Gimble v. Ferguson, 58-414.

72 Code, Sec. 2911; Warder-Bushnell, etc., v. Harris, 81-153; Hibbard v. Zenor, 82-505.

73 Bellamy v. Doud, 11-285; Hunt v. Daniels, 15-146.

74 Talbot v. DeForest, 3 G. Greene, 586; Blair v. Barney, 10-498.

75 Bradley v. Redmond, 42-452.

76 Fountain v. Smith, 70-284; Citizens State Bk. v. Council Bluffs Fuel Co., 89-618.

77 Whiting v. Eichelberger, 16-422.

78 Kern v. Wilson, 82-407; Hibbard v. Zenor, 82-505; Cook v. Gilchrist, 82-277; Carson & Rand L. Co. v. Bunker, 83-751; Ordway v. Kittle, 83-752; Allen v. McCalla, 25-464; Reeves v. Sebern, 16-234; Manny v. Woods, 33-265; Fox v. Edwards, 38-215; Hessler v. Hull, 36-152; Boothby v. Brown, 40-104; Pitkin v. Fletcher, 47-53; Hicock v. Buell, 51-655; Nuckols v. Pence, 52-581; Smith v. Champney, 50-174; Bacon v. Thompson, 60-284.

under such a mortgage the mortgagee can not claim anything as against an execution creditor of the mortgagor.[79]

§ 973. Of waiver of the lien and of estoppel.—Taking a new note and mortgage to secure an indebtedness already evidenced by note and mortgage on the same property, does not operate to discharge the lien under such first mortgage;[80] but it seems this would be otherwise if the payee of a note secured by mortgage surrendered it to the maker and took a new note for a different amount, and payable at different time, without any agreement that it was to be secured by the mortgage.[81]

A mortgagee, in the absence of fraud, is not precluded from recovery upon the mortgage debt because he permits property covered by his mortgage to be sold under an inferior claim or lien.[82] Where one leaves property in the possession of another under such circumstances that such other person appears to be the owner of it, and the one in possession of it mortgages it to a third person who knows of the rights of the real owner, the latter is not estopped to claim such property of the mortgagee.[83]

§ 974. Of the enforcement of foreign mortgages.—Mortgages of personal property executed in another State in accordance with the laws of such State, will be enforced by our courts when the property is removed to this State.[84]

§ 975. Of foreclosure by notice and sale.—Any mortgage of personal property to secure a payment of money only, and wherein the time of payment is fixed in the instrument, may be foreclosed by notice and sale by a sheriff or constable, unless the parties have agreed otherwise. And if a mortgage provides for the posting of notices in three public places in the county, any three public places therein will be sufficient.[85]

§ 976. Of the notice in such cases.—If the foreclos-

[79] Barr v. Cannon, 69-20.
[80] Packard v. Kingman, 11-219.
[81] Wilhelmi v. Leonard, 13-330.
[82] Jones, etc., v. Turck, etc., 33-246.
[83] Bray v. Fleckinger, 69-167.
[84] Smith v. McLean, 24-322; Simms v. McKee, etc., 25-341.
[85] Campbell v. Wheeler, 69-588, and cases cited; Code, Sec. 4273.

ure is by notice and sale, the notice must contain a full description of the property mortgaged, together with the time, place and terms of sale.[86] The notice should be signed by the mortgagee, but if it has been assigned by his assignee, or if it has been placed in the hands of an agent or attorney for foreclosure, it may be signed by such agent or attorney for his principal.

A sale without posting notices or without posting as provided in the mortgage, will not affect the title of the purchaser, but the mortgagor may have an action for damages against the mortgagee.[87] The notice may be in the following form:

FORM OF NOTICE OF SALE OF MORTGAGED CHATTELS IN FORECLOSURE.

Whereas, ——— on the ——— day of ———, 18—, executed and delivered to ——— a chattel mortgage, dated on the said day, upon the following described personal property, to wit (here describe the property), to secure the payment of ——— dollars, on the ——— day of ———, 18—, and which mortgage was duly recorded in the office of the recorder of deeds in and for ——— county, State of Iowa, in book No. ——— of chattel mortgages, on page ———, on the ——— day of ———, 18—, at ——— o'clock — M., and whereas, default has been made in the payment of the money secured by said chattel mortgage.

Now, therefore, notice is hereby given, that in pursuance of the statute in such cases made and provided, the said chattel mortgage will be foreclosed by a sale of the property therein described at public auction at the front door of the court house (or if at another place state it), in ———, in the county of ———, State of Iowa, on the ——— day of ———, 18—, at ——— o'clock in the ——— noon of said day, or so much thereof as shall be necessary to satisfy the said sum of ——— dollars, with interest, costs and expenses of sale (including attorney's fees as provided in said mortgage, if any are provided), unless the same shall be sooner paid, upon the following terms, to wit (here give terms of sale).

Dated this ——— day of ———, 18—.

———, mortgagee.

———, sheriff of ——— county, Iowa.

§ 977. Of service of the notice.—The notice must be served on the mortgagor and upon all purchasers from him subsequent to its execution, and upon all persons having recorded liens upon the same property which are

[86] Code, Sec. 4274. [87] Campbell v. Wheeler, 69-588.

junior to the mortgage, or they will not be bound by the proceedings.[88] The service and return may be made in the same manner as in the case of an original notice in a civil action, in a court of record, except that no publication is necessary for this purpose, the general publication below specified being a sufficient service upon all parties in cases where service is to be made by publication.[89]

When notice has been served upon the parties it must be published in the same manner and for the same length of time as is required in cases of the sale of like property on execution, and the sale is to be conducted in the same manner.[90] The evidence of the service and publication of the notice, as well as of the sale made in accordance therewith, may be perpetuated by proper affidavits and will constitute the return of the officer or person making the sale.[91] Proof of the posting the notice of sale may be in the following form:

FORM OF AFFIDAVIT OF POSTING NOTICE.

State of Iowa, }
——— County. } ss.

I, ———, being duly sworn, depose and say, that on the ——— day of ———, 18—, I posted up true copies of the annexed notice in (not less than three) public places in said county, one of which was at the place where the last district court was held.

(Signature of deponent.)

(Add proper certificate.)

The time of posting must be at least three weeks before the day of sale, and if the value of the property is two hundred dollars or upward, there must be also two publications of the notice in a newspaper published in the county. The form of affidavit of proof of service by publication heretofore given may be used in this class of cases.

§ 978. Of parties to the proceedings.—We have already shown that the notice should be served on the mortgagor and all purchasers from him subsequent to the execution of the mortgage and on all persons having recorded liens on the same property junior to the mortgage. It is

[88] Code, Sec. 4275.
[89] Code, Sec. 4276.
[90] Code, Sec. 4277.
[91] Code, Sec. 4281.

not, however, absolutely necessary that subsequent mortgagees should be made parties in these proceedings, but as they will not be bound by the proceedings unless they are made parties, the better practice is to serve them with notice, that the interests of all parties in the property may be determined and concluded by sale.[92]

§ 979. Of the sale and of attorney's fees.—The sheriff conducting the sale must execute to the purchaser a bill of sale of the property which shall be effectual to carry the whole title and interest purchased, and the purchaser will take all the title and interest on which the mortgage operated as a lien.[93] If the notes secured by such mortgage or the mortgage itself provide for the payment of attorney's fees, the same fees must be collected as are provided by law in actions upon such contracts, and if an attorney is employed to look after and direct the proceedings, he must make an affidavit like that required in actions, and have it attached by the officer, or person making the sale, to his return of the proceedings thereunder.[94]

The bill of sale above mentioned may be in the following form:

FORM OF BILL OF SALE BY SHERIFF.

Know all men by these presents, that whereas (name of mortgagor) on the ——— day of ———, 18—, executed and delivered to (name of mortgagee), a certain chattel mortgage dated on said day upon the following described personal property, to wit: (give a full description of the property) to secure the payment of the sum of ——— dollars on the ——— day of ———, 18—, which mortgage was duly recorded in the office of the recorder of deeds, of ——— county, Iowa, in book No. ———, of chattel mortgages, on page No. ———, on the ——— day of ———, 18—. And whereas default was made in the payment of said sum of ——— dollars, so secured to be paid by said chattel mortgage, and whereas, by virtue of the statute in such cases made and provided, a notice containing the statements required by law was duly served and published, and stating that the said mortgaged property or so much thereof as should be necessary to satisfy said

[92] Code, Sec. 4275; Street v. Beal, 16-68; Semple v. Lee, 13-304; Chase v. Abbott, 20-54; Parrott v. Hughes, 10-459; Donnelly v. Rush, 15-99; Johnson v. Harmon, 19-56.

[93] Code, Secs. 4278, 4280.

[94] Code, Sec. 4279; Aultman & Taylor Co. v. Shelton, 90-288.

mortgage, with interest and costs, would be sold at public auction at the (state exact place of sale), on the ——— day of ———, 18—, last, at ——— o'clock, in the ——— noon of that day.

And whereas, in pursuance of such notice and statute in such cases made and provided, I, ———, sheriff of ——— county, did expose said property for sale at public auction, at the time and place mentioned in said notice, and then and there sold the same to (name of purchaser) who bid therefor the sum of ——— dollars, he being the highest and best bidder, and that being the highest sum bidden for the same. Now, therefore, know ye that in pursuance of the statute in such cases made and provided and in consideration of the premises, and of the sum of ——— dollars, so bid as aforesaid, the receipt of which is hereby acknowledged, I, the said ———, sheriff as aforesaid, do hereby sell and deliver the said personal property, to-wit: (describe the particular property sold to the purchaser) and all the title and interest therein upon which the said chattel mortgage was a lien, to the said (name of the purchaser), his heirs, executors and assigns.

In witness whereof, I have hereto set my hand this ——— day of ———, 18—.

———, sheriff of ——— county, Iowa.

A bill of sale should be given, if demanded, to each purchaser of property at the sale. If the mortgage provided for attorney's fees the affidavit heretofore mentioned must be attached to the return.

§ 980. Perpetuating evidence of the sale, etc.— Evidence of the service and publication of notice and of the sale itself may be perpetuated by affidavits which must be attached to the bill of sale and are receivable in evidence to prove the facts they state.[95] The affidavit of the sheriff conducting the sale may be in the following form:

FORM OF AFFIDAVIT OF THE SHERIFF CONDUCTING THE SALE.

State of Iowa, }
——— County. } ss.

(Here affix a copy of the printed notice of sale.)

I, ———, sheriff of ——— county, Iowa, being duly sworn, depose and say, that I conducted the sale of personal property described in the annexed printed notice, at public auction, at the time and place mentioned in said notice, to wit: on the ——— day of ———, 18—, at ——— o'clock in the ——— noon of that day, at the front door of the court house (as the case may be), in the ——— of ——— county, aforesaid. That ——— then and there purchased said property for the

[95] Code, Sec. 4281.

price of ——— dollars, he being the highest and best bidder therefor (if there are several purchasers the facts must be stated accordingly), and that I then and there executed to the said purchaser a bill of sale for the said property so purchased by him.

———, sheriff, etc.

(Add the usual certificate.)

§ 981. Of the validity of the sale.—Sales made in accordance with the requirements heretofore stated are valid in the hands of a bona fide purchaser whatever may be the equities between the mortgagor and the mortgagee.[1] But it seems that a sale made under a deed of trust after the payment of the debt secured thereby is absolutely void; there must be a valid subsisting power under the deed to render the sale valid.[2]

§ 982. Of the power of sale.—A clause in a mortgage giving the mortgagee power to take possession of the property and sell the same does not authorize him to dispose of the property except for cash; he can not, under such authority, barter it away.[3] Where a mortgage provides for advertisement and sale, and the mortgagee sells without advertising, representatives of the mortgagor can not, for that reason, have the sale set aside.[4]

The mortgagee may foreclose by notice and sale or by proceeding in equity, at his election, and the latter would be the proper course to pursue when third parties have claims on the property.[5]

§ 983. Of the remedy, costs, etc.—If property is wrongfully seized under a chattel mortgage the owner need not enjoin, but may maintain an action at law for the property or its value.[6] And if one has a complete remedy at law, he can not remove the case to the district court by injunction.[7] A chattel mortgagee authorized to take possession and to sell at public auction can not recover for his services or for clerk hire in selling the goods at retail.

1 Code, Sec. 4282.
2 Penny v. Cook, 19-538.
3 Edwards, etc., v. Cottrell, 43-194.
4 Whitaker v. Sigler, 44-419.
5 Packard v. Kingman, 11-219.
6 Black v. Howell, 56-630.
7 Sweet v. Oliver, 56-744; Silverman v. Kuhn, 53-436.

And under a mortgage authorizing the mortgagee to take possession on default of payment of the debt and to sell, if he takes possession and keeps the property, treating it as his own, without foreclosing the mortgage, he will be liable as for a conversion, and in such a case damages are to be estimated as of the time he took possession, and expenses incurred by him in the care of the property can not be allowed to him. Where the mortgage authorizes the sale of the property at private sale, the proceeds to be applied on the debt, after deducting all of the expenses of sale, the mortgagee has the right to sell and to reimburse himself for necessary expenses incurred, but not for sheriff's fees and the costs of appraisement, as such expenses were unnecessary.[8]

It has been said that under stipulations authorizing the mortgagee to take possession whenever he "shall choose so to do," that his motive or purpose in taking possession cannot be questioned. Under a like stipulation and authority to "sell the same at public or private sale, or so much thereof as will be sufficient to pay the amount due him or to become due, as the case may be," it was held that the stipulation contemplated the right of the mortgagee to sell the property before the maturity of the mortgage debt and apply the proceeds in its extinguishment.

§ 984. Of injunction and transfer to the district court. — The right of the mortgagee to foreclose as well as the amount claimed to be due, may be contested by any one interested in so doing, and the proceedings may be transferred to the district court, for which purpose an injunction may issue.[9]

And where such foreclosure and sale is restrained on the ground of usury and transferred to the district court, it stands as a foreclosure in that court, and the court has power to render a judgment or forfeiture in favor of the school fund.[10]

[8] Myers v. Snyder, 64 N. W., 771.
[9] Code, Sec. 4283.
[10] Hanlin v. Parsons, 33-207.

But an injunction will not issue as a matter of right in such cases, where it is not necessary to protect the rights of the parties interested, and they have already adopted another proceeding affording a full and complete remedy.[11] Nor does section 4283 of the code have any reference to or authorize the appointment of a receiver.[12]

§ **985. Of proceedings in the district court.**—If the case is transferred to the district court it stands there for trial for all purposes as though originally commenced therein, and the proceedings in court will be the same as in case of foreclosure of real estate mortgages, to which chapter the reader is referred.

§ **986. Relating to levies on mortgaged personal property.** — In the chapter on executions and exemptions, section 812, will be found a discussion of this subject.

§ **987. Of the sale of chattel mortgage property which has been pledged as collateral.**—Where chattel property is pledged as security for an indebtedness, unless provision is made by agreement in writing therefor, the same may be sold for the non-payment of the indebtedness by giving the pledgor or any purchaser or assignee under him of the property or any part of it, which he has, ten days' notice in writing of the intention to sell the same and to make an application of the proceeds to the satisfaction of the debt and by posting for the same time, in three public places in the township of such pledgor's residence, a notice containing a full and accurate description of the property to be sold, the time and hour when, and the place at which the sale will take place. If redemption is not made before the date thus fixed, the pledgee may sell at public auction, to the highest bidder, the pledged property or so much of the same as may be necessary to pay the debt, interest, and all costs of making such sale, and may be a bidder at such sale. He must apply the proceeds first, in payment of such costs, and,

[11] Rankin v. Rankin, 67-322. [12] Silverman v. Kuhn, 53-436.

second, to the payment of the debt. Any surplus arising from the sale and any property remaining unsold must be paid or returned to the pledgor or to his assigns.[13] Such pledgee may commence an action in equity for the foreclosure of such collaterals, or pledges, and the court must determine all of the issues presented as in other equity cases, and render a judgment for the amount due from the pledgor and award special execution for the sale of the collaterals—or pledges and general execution for any balance, or may render such a judgment as may be necessary to carry out any written agreement of the parties concerning the subject matter; but in all cases a sale may be ordered unless there be a written stipulation to the contrary.[14]

[13] Code, Sec. 4285.

[14] Code, Sec. 4286.

CHAPTER LXI.

OF CONTEMPTS

Sec. 988. What acts and omissions are deemed to be contempts.
989. Of contempts of the general assembly.
990. Failure to answer interrogatories, a contempt.
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996. Of contempts for failure to obey subpœna.
997. Of acts which are not considered contempts.
998. Of the punishment for contempts.
999. The preservation of the evidence.
1000. Of the trial, pleadings, evidence, etc.
1001. Of appeals.
1002. Punishment for contempt not a bar to an indictment.

Section **988. What acts and omissions are deemed to be contempts.**—Our statute provides that the following acts or omissions shall be deemed to be contempts, and may be punished as such by any of the courts of this State, or by any judicial officer acting in the discharge of an official duty.[1]

1st. Contemptuous or insolent behavior toward the court, while engaged in the discharge of a judicial duty, which may tend to impair the respect due to its authority.[2]

2d. Any willful disturbance calculated to interrupt the due course of its official proceedings.[3]

[1] Dunham v. State, 6-245; State v. Anderson, 40-207; Robb v. McDonald, 29-330; State v. Start, 7-501; State v. Duffy, 15-425; State v. Archer, 48-310; Saylor v. Mockbie, 9-209; State v. Meyers, 44-580; Skiff v. State, 2-550; Lutz v. Aylesworth, 66-629; Russell v. French, 67-102; Eikenberry v. Edwards, 67-619; Farmer v. Hoffman, 67-678; Wise v. Chaney, 67-73; Treadway v. Van Wagenen, 91-556.

[2] Code, Sec. 4460.

[3] Code, Sec. 4460.

3d. Illegal resistance to any order or process made or issued by it.[4]

4th. Disobedience to any subpœna issued by it and duly served, or refusing to be sworn or to answer as a witness.[5]

5th. The unlawfully detaining of a witness or party to an action or proceeding, pending before such court, while going to or remaining at the place where the action or proceeding is pending after being summoned, or knowingly assisting, aiding, or abetting any person in evading the service of process of a court.[6]

6th. Any other act or omission specially declared a contempt by law.[7] To constitute a contempt under the first subdivision above, the act or conduct complained of must take place in the actual or constructive presence of the court, and the contemptuous or insolent behavior must be toward the court, and the court must be engaged in the discharge of an official duty, which behavior tends to impair the respect due to its authority.[8]

But the contemptuous or insolent conduct need not be in the court room and under the eye of the court, in order to amount to a contempt.[9] The statute above mentioned confers general authority on the courts of this State, and upon any judicial officer, acting in the discharge of an official duty, to punish for contempt.[10]

A defendant in attachment who is called before a judge to discover his property under the code, section 3901, may be punished by the judge for contempt, in refusing to answer a proper question, and the power to punish such a contempt is not confined to the courts.[11] Where a contention arose between counsel as to whether the witness had not already answered a question, and the court, after hearing the reporter's notes read, decided that she had answered the question, whereupon one of

[4] Code, Sec. 4460.
[5] Code, Sec. 4460.
[6] Code, Sec. 4460.
[7] Code, Sec. 4460.
[8] Dunham v. State, 6-245.
[9] Dunham v. State, 6-245.
[10] Brown v. Davidson, 59-461, 463.
[11] Lutz v. Aylesworth, 66-629.

the attorneys sprang to his feet, and, turning to the court, said in loud tones and insulting manner "she has not answered the question," he was held guilty of contempt, and that regardless of the question whether the court was right or wrong in its decision.[12] In a proceeding auxiliary to execution a party was ordered by the judge to turn over certain notes to be sold in satisfaction of the execution; the notes were not in his hands, but in the hands of a resident of a distant State, but were under the control of the party against whom the order was made; his disobedience of the order of the court was a contempt.[13] And it is held that the chapter of the code which provides for proceedings auxiliary to execution, is constitutional.[14]

Where the defendant, as judge, ordered plaintiff, under sections 3315, 3316 of the code, to pay to the administrator of an estate certain money in his hands belonging to the estate, and he refused on the ground that he had received it as a mere clerk of a prior administrator, and had paid it out to the widow for the support of her family, and in discharge of claims against the estate, and that he had in his possession no money belonging to the estate, his disobedience of the order was a contempt, and it was held, his showing did not purge him of the same, and he was properly committed to jail until he complied with the order.[15]

Any court of record is also authorized to punish the following acts or omissions as contempts:

1st. The failure to testify before a grand jury when lawfully required so to do. 2d. Assuming to be an officer, attorney or counselor of the court, and acting as such without authority. 3d. Misbehavior as a juror by improperly conversing with a party or with any other person, in relation to the merits of an action, in which he is acting, or is to act, as a juror; or receiving a communication from any person in respect to it, without

[12] Russell v. French, 67-102.
[13] Eikenberry v. Edwards, 67-619.
[14] Eikenberry v. Edwards, 67-619; Farmer v. Hoffman, 67-678.
[15] Wise v. Chaney, 67-73.

immediately disclosing the same to the court. 4th. Bribing, attempting to bribe, or in any other manner improperly influencing, or attempting to influence, a juror to render a verdict, or suborning, or attempting to suborn a witness. 5th. Disobedience by an inferior tribunal, magistrate, or officer, to any lawful judgment, order, or process, of a superior court of procedure, in any matter in a manner contrary to law, after it has been removed from such tribunal, magistrate or officer.[16]

§ 989. Of contempts of the general assembly.— Each house has authority to punish, as a contempt, by fine and imprisonment, or either of them, the offense of knowingly arresting a party in violation of his privileges, or assaulting or threatening to assault a member, or threatening to do any harm to the person or property of a member, for anything by him said or done in either house, as a member thereof; or attempting by menace or other corrupt means, to control or influence a member in giving his vote, or prevent his giving it; of disorderly or contemptuous conduct tending to disturb its proceedings, or refusal to attend or be sworn, or be examined as a witness before either house or a committee when duly summoned; or assaulting or preventing any person going to either house or its committee by order thereof, knowing the same; or rescuing, or attempting to rescue, any person arrested by order of either house, knowing of such arrest, or knowingly impeding any officer of either house in the discharge of their duties as such.[17]

Fines and imprisonment for such contempt are only such as are imposed by an order of the proper house entered on its journals, stating the grounds thereof, and imprisonment will not extend beyond the session at which it is ordered, will be in the jail of the county in which the general assembly is then sitting, and such punishment will not constitute a bar to any other proceeding, civil or criminal, for the same act.

[16] Code, Sec. 4461; State v. Duffy, 15-425.

[17] Code, Sec. 18.

Imprisonment is effected by a warrant of the presiding officer for the time being of the house ordering it, countersigned by the acting secretary or clerk, running in the name of the State, and directed to the sheriff or jailer of the proper county. Under such warrant the officer is authorized to commit or detain the person. Fines are collected by a similar warrant, directed to any proper officer of any county in which the offender has property, and executed in the same manner as executions for fines issued in courts of record, and the proceeds must be paid into the State treasury.[18]

§ **990. Failure to answer interrogatories, a contempt.**—The court may compel answers to interrogatories to pleadings by process for contempt.[19]

§ **991. Disobedience of judgments or orders, a contempt.**—Disobedience of judgments or orders which do not require the payment of money, or the delivery of the possession of property, may be enforced by process for contempt of court.[20]

So attachment for contempt is the proper mode for enforcing obedience to a continuing order, in the form of a mandatory injunction.[21]

§ **992. Of contempts in proceedings auxiliary to execution.**—Where the judgment debtor fails to appear after being personally served with notice to that effect, or when appearing, fails to make full answers to all proper interrogatories propounded to him, he is guilty of contempt and may be arrested and imprisoned until he complies with the requirements of the law in that respect, and if any person, party or witness, disobey an order of the court, or judge, or referee, duly served, such person, or party, or witness, may be punished for contempt.[22] And this statute has been held constitutional.[23]

[18] Code, Secs. 19, 20.
[19] Code, Sec. 3611.
[20] Code, Sec. 3954; see W., I. & N. Ry. Co. v. Given, 69-581; Allen v. Allen, 72-502.
[21] State v. Baldwin, 57-266.
[22] Code, Sec. 4082; Eikenberry v. Edwards, 67-619; Reardon v. Henry, 82-134; Estey v. Fuller Implement Co., 82-678.
[23] Eikenberry v. Edwards, 67-619; Farmer v. Hoffman, 67-678; Marriage v. Woodruff, 77-291.

§ 993. Of contempts in equitable proceedings.—In actions by equitable proceedings brought after the rendition of a judgment, to subject property belonging to the defendant to the satisfaction of such judgment, the court may enforce full and explicit discoveries in answers in such cases by process of contempt.[24]

§ 994. Of contempts in violation of injunctions.—Where a party is arrested for the violation of an injunction and fails to file an affidavit, denying or sufficiently excusing the contempt, and fails or refuses to give bond with surety for his appearance at next term of court and for his future obedience to the injunction, he may be punished for contempt.[25] In proceedings for contempt for violating an injunction, the court will take judicial notice of its own order granting it, and the sheriff's return is sufficient evidence of its service.[26]

§ 995. Of contempts in habeas corpus proceedings.—A willful failure on the part of the defendant in a habeas corpus proceeding to appear after service, and answer said petition, is a contempt.[27] So disobedience to any order of discharge subjects the defendant to attachment for contempt.[28]

§ 996. Of contempts for failure to obey a subpœna.—Failure to obey a valid subpœna without a sufficient cause or excuse, or a refusal to testify after appearance, is a contempt.[29] The purchaser of intoxicating liquors can not refuse to testify on the ground that his testimony would criminate him.[30] Nor can the agent of an express company refuse to produce certain books of the corporation before the grand jury for the purpose of showing that said company had transported intoxicating liquors contrary to law.[31]

[24] Code, Sec. 4088.

[25] Code, Secs. 4373, 4374, 4375, 4376, 4372; Jordan v. Circuit Court, 69-177; Benson v. Connors, 63-670; McLane v. Granger, 74-152; Fisher v. Cass County Dist. Court, 75-232; Silvers v. Traverse, 82-52.

[26] Jordan v. Circuit Court, 69-177.

[27] Code, Sec. 4444.

[28] Code, Sec. 4457.

[29] Code, Sec. 4664.

[30] Wakeman v. Chambers, 69-169.

[31] U. S. Ex. Co. v. Henderson, 69-40.

§ 997. Of acts which are not considered contempts.— The publication of articles in a newspaper reflecting upon the conduct of a judge in respect to causes pending in his court, and which were disposed of before the publication, or the publication of the evidence and arguments of counsel in a case undisposed of, or where there was no rule of court against such publication, however unjust and libelous the publication may be, do not amount to contemptuous or insolent behavior toward the court, nor are they so calculated to impede the merits or to obstruct the court in the administration of law as to justify a punishment of the offender for contempt.[32]

The court has no authority to order a party to deliver to the sheriff the key of a safe the contents of which the party claims as his own property, and punish him for contempt for failure so to do.[33]

The visiting committee of an insane hospital has no authority under the law to punish a witness for contempt for refusing to testify when summoned before it.[34]

A person is not bound to make an affidavit which is sought only as information on which to base a civil action, and when subpœnaed by a justice of the peace to do so, and he disobeys the subpœna, he can not be punished for contempt.[35]

§ 998. Of the punishment for contempts.—Contempts may be punished by fine or imprisonment, or both, but where not otherwise specially provided, courts of record are limited to a fine of fifty dollars and imprisonment not exceeding one day; and all other courts are limited to a fine of ten dollars.[36] But where a contempt consists in an omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he performs it, and in such case the act to be performed must be specified in the warrant of commitment.[37] Unless the contempt is committed in the imme-

[32] Dunham v. State, 6-245; State v. Anderson, 40-207.
[33] State v. Start, 7-501.
[34] Brown v. Davidson, 59-461.
[35] Dudly v. McCord, 65-671; see Robb v. McDonald, 29-339.
[36] Code, Sec. 4462.
[37] Code, Sec. 4463.

diate view and presence of the court, or comes officially to its knowledge, an affidavit showing the nature of the prosecution is necessary as a basis for further action in the premises.[38] But such affidavit need not show that the affiant has personal knowledge of the acts constituting the alleged contempt.[39] And where information is filed before a court for the violation of an injunction granted by the same court the information under oath is a compliance with this requirement of the statute.[40]

Unless the offender is already in the presence of the court, before he can be punished for contempt, he must be served personally with a rule to show cause against the punishment, and a reasonable time given him therefor, and if he appear and attempt to show such cause, he thereby waives any irregularity in the rule to show cause.[41] Or he may be brought before the court forthwith, or on a given day, by warrant if necessary; in either case he may, at his option, make a written explanation of his conduct under oath, which must be filed and preserved.[42] A witness is liable to a party by whom he was subpœnaed for all the consequences of his delinquency, together with fifty dollars additional damages.[43] The rule to show cause above spoken of may be in the following form:

FORM OF RULE TO SHOW CAUSE AGAINST PUNISHMENT FOR CONTEMPT.

The State of Iowa.

To the sheriff of ——— county, greeting:

Whereas on the ——— day of ———, 18——, a subpœna issued from the district court of the State of Iowa, in and for ——— county, at the instance of ———, commanding ——— to be brought before said court at the court house, in ———, on the ——— day of ———, 18—, at ——— o'clock — M., on said day, then and there to testify and give evidence in behalf of the plaintiff (or defendant) in an action pending

[38] Code, Sec. 4464; State v. Start, 7-501; Silvers v. Traverse, 82-52.

[39] Jordan v. Circuit Court, 69-177.

[40] Silvers v. Traverse, 82-52.

[41] Manderchied v. District Court, 69-240.

[42] Code, Sec. 4465; State v. Duffy, 15-425; Russell v. French, 67-102; Jordan v. Circuit Court, 69-177; Hogue v. Hayes, 53-377; State v. Baldwin, 57-266; Wise v. Chaney, 67-73; McDonnell v. Henderson, 74-619.

[43] Code, Sec. 4664.

in said court wherein ——— was plaintiff and ——— was defendant, which subpœna was duly served by ———, sheriff of ——— county, Iowa, on the said ——— on the ——— day of ———, 18—, and his traveling and his attendance fees then paid him (if no fees were demanded it should so state), and whereas on the ——— day of ———, 18—, on motion of the plaintiff (or defendant as the case may be), the said ——— being solemnly called to come into court and give evidence in behalf of the plaintiff (or defendant) according to said subpœna, came not, but made default. You are therefore hereby commanded to make known to the said ———, that he be and appear before the said court on the ——— day of ———, 18—, to show cause, if any he has, why he should not be punished according to law for a contempt of court.

In witness whereof I have hereunto subscribed my hand and fixed the seal of said court this ——— day of ———, 18—.

[Seal.] ———, clerk.

Where the attachment is issued to bring the witness forthwith the above form should be modified as follows:

"You are, therefore, hereby commanded to attach the said ———, and have his body before said court forthwith to answer for a contempt in not appearing to testify in obedience to said subpœna."

The return of the subpœna and the failure of the witness to appear when called, brings the matter officially before the court, except where the subpœna is served by leaving a copy together with the fees at the witness' usual place of residence, in which case he is not liable for a contempt, unless it is shown by affidavit that the copy with the proper fees came into his hands in time for him to appear and testify in the case.[44]

When the witness is brought before the court, either by rule to show cause, or an attachment, and he fails to purge himself of the contempt, he may be committed to jail. The following form of warrant of commitment may be used:

FORM OF WARRANT OF COMMITMENT.

State of Iowa.

To the sheriff of ——— county, greeting:

Whereas on the ——— day of ———, 18—, by an order made by the district court of ——— county, Iowa, ——— was convicted of a

[44] Code, Sec. 4465.

contempt of court for disobedience of a lawful process of said court (or refusing to testify as a witness in a certain action), and it was then ordered by the court that (here insert judgment or order as in record of conviction). Now, therefore, you are commanded that you take the body of said ———, and him safely keep in your custody in the county jail (or some other place, as the case may be) for the period of (as in the record of conviction), (in case of refusal to testify state as follows: "until he, the said ———, shall express a willingness to testify and give his evidence in a certain cause (naming it), and when he shall express his willingness to do so, that you forthwith bring him into court") or until he shall be legally discharged.

In witness whereof I have hereunto fixed my hand and seal, this ——— day of ———, 18—.

[Seal.] ———, clerk.

The record of conviction for contempt may be in the following form:

FORM OF RECORD OF CONVICTION FOR CONTEMPT.

Title, }
Venue. }

Be it remembered, that heretofore, to wit, (date of service of subpœna), a writ of subpœna, issued from this court, was duly served on the defendant ———, commanding him to appear on a certain day therein named and testify in an action pending in this court, wherein ——— was plaintiff and ——— was defendant, on part of said plaintiff, and his fees paid him (or state the fact); and be it further remembered, that on the ——— day of ——— A. D. 18—, said ——— being called to come into court and testify according to said subpoena, came not but made default; and be it further remembered, that on the ——— day of ——— A. D. 18—, on motion of the said ———, it was ordered that a rule of court issue forthwith (or a warrant, as the case may be), requiring said ——— to appear on (state time of appearance), and show cause, if any he had, why he should not be punished for a contempt of court in disobeying said writ of subpœna, which rule was duly issued and served on the said ———. And now, at this day, to wit (date) the said ——— appearing in person, and by counsel, and failing to show sufficient excuse for disobeying the said writ of subpœna, it is considered and adjudged that the said ——— is guilty of a contempt of this court, and it is therefore ordered and adjudged that he pay a fine of ——— dollars, and that he be imprisoned in the county jail of ——— county, ——— days and pay the costs of this proceeding, (if the contempt is for refusing to testify, the fact must be recited accordingly, and the order should in that case, after the record imposing the fine, if any, direct as follows: "and it is further ordered, that the said ——— be imprisoned in the county jail until he shall express his willingness to testify and give evidence in said cause,") and that a warrant issue for the execution of this order.

The foregoing forms, with proper modifications, which will easily suggest themselves, can be used in any case of contempt.

Where the offender is committed, the warrant must state the particular facts and circumstances on which the court acted in the premises, and whether the same were in the knowledge of the court, or were proved by the witnesses.[45]

§ **999. The preservation of the evidence.**—Where the action is founded upon evidence given by others, such evidence must be in writing, and be filed and preserved, and if the court act upon its own knowledge in the premises, a statement of the facts upon which the order is founded must be entered on the records of the court, or be filed and preserved when the court keeps no record, and will be a part of the record.[46] If the evidence is taken in shorthand but the notes are not filed or certified by the judge, nor any transcript of them filed in the case, the commitment will be erroneous.[47] If, however, the notes were left on the clerk's desk the same day the order is made, it will be sufficient.[48]

§ **1000. Of the trial, pleadings, evidence, etc.**—Proceedings to punish for contempt are in their nature criminal, and are not entitled in the case wherein the contempt occurs.[49]

A party in contempt by failure to comply with a rule awarded against him may be refused leave to plead until he has purged himself of the contempt.[50]

A writ of attachment against an officer for contempt should run against him in his individual name.[51]

It is error without prejudice to permit oral evidence to be given in a hearing for contempt, if the action of the

[45] Code, Sec. 4467; Goetz v. Stutsman, 73-693.

[46] Code, Sec. 4466; State v. Utley, 13-593; Skiff v. State, 2-550; State v. Dougherty, 32-261; State v. Fulsom, 34-583; State v. White, 34-583; Lutz v. Aylesworth, 66-629; Dorgan v. Granger, 76-156; Small v. Wakefield, 84-533.

[47] Dorgan v. Granger, 76-156.

[48] Small v. Wakefield, 84-533.

[49] First Cong. Ch. v. Muscatine, 2-69.

[50] Saylor v. Mockbie, 9-209.

[51] State, etc., v. Smith, 9-334.

court is sufficiently supported by affidavit.[52] If one charged with contempt and duly notified to appear, fails to do so, and the evidence on which he is found guilty is taken in his absence, he can not object that it was taken ex parte.[53]

Where the hearing was had before a judge, and a party committed for contempt, the judge must preserve and file the statement of facts on which the order was founded; but where all the proceedings were taken down by a shorthand reporter and his notes were extended and filed, and the transcript thus preserved contained a statement of all the necessary facts, it was held a sufficient compliance with the statute.[54]

A judgment in contempt that the defendant should pay a fine and stand committed until it was satisfied, should specify the extent of the imprisonment, which can not exceed one day for every three and one third dollars.[55]

A proceeding against a corporation is necessarily personal; while the corporation can not be imprisoned, those acting in its aid in violating an injunction may be.[56] A person may show as an excuse for disobedience of an order of the court, that a compliance with such order was impossible; he is not bound to appeal.[57] A proceeding for contempt in disobeying an injunction in selling intoxicating liquors may be entitled the same as the action in which the injunction issued.[58]

§ **1001. Of appeals.**—No appeal lies from an order to punish for contempt, but in proper case the proceedings may be taken to a higher court for revision by certiorari.[59]

§ **1002. Punishment for contempt not a bar to an indictment.**— Punishment for contempt constitutes no

[52] State v. Meyers, 44-580.
[53] Jordan v. Circuit Court, 69-177.
[54] Lutz v. Aylesworth, 66-629.
[55] State v. Meyers, 44-580; Jordan v. Circuit Court. 69-177.
[56] Ex parte Holman, 28-88.
[57] Hogue v. Hayes, 53-337.
[58] Manderchied v. District Court, 69-240.
[59] Code, Sec. 4468; First Cong. Ch. v. Muscatine, 2-69; Dunham v. State, 6-245; Henry v. Ellis, 49-205; Lindsay v. Clayton Dist. Court, 75-509; Currier v. Mueller, 79-316; State v. Dist. Court, 84-167.

bar to an indictment, but if the offender is indicted and convicted for the same offense, the court, in passing sentence, must take in consideration the punishment before inflicted.[60]

Any officer authorized to punish for contempt is a court within the meaning of the law.[61]

It is held that a judge may in vacation punish for contempt.[62]

[60] Code, Sec. 4469.
[61] Code, Sec. 4470.
[62] State v. Meyers, 44-580.

CHAPTER LXII.

OF CHANGING THE NAMES OF PERSONS.

Sec. 1003. Of power to change the names of persons.
1004. Of the petition.
1005. Of the order.
1006. When the change takes effect.
1007. Of the notice.

Section **1003. Of power to change the names of persons.**—The district or superior court has power to change the names of persons, in the manner hereinafter stated.[1]

§ **1004. Of the petition.**—A person desiring to change his name must file his petition in the district or superior court of the proper county, verified by his oath, stating that he is a resident of the county, and has for one year then last past been an actual resident of the State. It must also give a description of his person, stating, as accurately as possible, his age, height, the color of his hair and eyes, the place of his birth, and the names of his parents.[2]

A petition for this purpose may be in the following form:

FORM OF PETITION FOR CHANGE OF NAME.

Title, }
Venue. }

To the district court of the State of Iowa, in and for ——— county:

Your petitioner represents that his name is ———; that he is a resident of ——— county, Iowa; that he has for one year last past been a bona fide resident of the State of Iowa; that his age is ——— years, height, ——— feet and ——— inches; hair ———, and eyes ———; that he was born in (here state the town or city, and country or State where born); that his parents were (here give the names and residence of parents); that he is desirous of, and files this petition for the purpose of having his name changed from ——— to that of ———.

(Signature of petitioner.)

(Add usual verification.)

[1] Code, Sec. 4471.

[2] Code, Sec. 4472.

§ 1005. Of the order.—Upon the above petition the court will make an order of record, giving a description of the applicant, as set forth in his petition, the new name given, and fix the time at which the change shall take effect, which shall not be less than thirty days thereafter, and directing in what newspaper of general circulation in the county notice of such change shall be published.[3]

The order changing the name may be in the following form:

FORM OF ORDER CHANGING NAME OF A PERSON.

In the matter of the petition of ——— for a change of name.

Be it remembered that on this ——— day of ———, 18—, the petition of ——— for a change of name came on for hearing before the court, and the court being satisfied that the statute in such cases made and provided has in all respects been complied with by the said ———, it is therefore ordered that the prayer of the said applicant, who is named in said petition as ———, and described as ——— years of age, ——— feet and ——— inches in height, and ——— hair and eyes ———, and that he was born in ——— (town or city) in ——— (here insert State or country where born), that his parents were (here give name and residence of parents), be granted; that the said applicant's name be changed from ——— to ———, and that he shall hereafter be known in law and in fact by the name of ——— from and after the ——— day of ———, 18—. And it is further ordered and directed that notice of this order and of the change of name of said applicant be published in (here insert name of newspaper) a newspaper of general circulation in ——— county, for four consecutive weeks previous to the taking effect of the change of name hereby ordered.

§ 1006. When the change takes effect.—Previous to the time prescribed for the taking effect of such change of name, the applicant must cause notice thereof to be published for four consecutive weeks in the paper ordered by the court.[4]

§ 1007. Of the notice.—The notice mentioned in the above section may be in the following form:

FORM OF NOTICE OF CHANGE OF NAME.

Notice is hereby given that on the ——— day of ———, 18—, an order was made by the district court of ——— county, Iowa, by which the name of a person described as being ——— years of age (here

[3] Code, Sec. 4473.

[4] Code, Sec. 4474.

insert same description as in petition and order) was changed from ——— to that of ———, and that said change will, by order of said court, take effect on and after the ——— day of ———, 18—.

(Signature.)

On the filing in the office of the clerk of said court of the ordinary proof of such publication, and on the day fixed by the court in said order, the change of name will be complete.

The proof of publication above mentioned must be preserved by the clerk.[5]

The clerk should make a complete record of all the proceedings in such cases, to the end that it may always appear that every step required by statute has been properly taken.

A change in the name of a partnership does not have the effect to revoke or annul an agency conferred upon it, when the firm under the new name is composed of the same persons as that under the old one.[6]

[5] Code, Sec. 4475.

[6] Billingsley v. Dawson, 27-210.

CHAPTER. LXIII.

OF DIVORCE, ANNULLING MARRIAGES AND OF ALIMONY.

Sec. 1008. Of jurisdiction and trial.
1009. Of the grounds for a divorce generally.
1010. Of adultery.
1011. Of desertion.
1012. Of conviction for a felony.
1013. Of habitual drunkenness
1014. Of inhuman treatment.
1015. Of condonation and misconduct of the plaintiff.
1016. Of the petition.
1017. Of cross-petition, etc.
1018. Of temporary alimony.
1019. Of attachment and injunction.
1020. Of attorney's fees.
1021. Of the custody of children.
1022. Of allowance of permanent alimony without divorce.
1023. Of the power to grant permanent alimony.
1024. When an allowance of alimony is proper.
1025. Of allowing specific property.
1026. Of the lien of the judgment.
1027. Of setting aside the decree and of its modification, etc.
1028. Of the causes for annulling marriages.
1029. Of the petition, etc.
1030. Of the legitimacy of children, etc.

Section **1008. Of the jurisdiction and trial.**—The district court in the county where either party resides, has jurisdiction of the subject-matter relating to granting divorces, annulling marriages and allowing alimony.[1] The action is not local but transitory, and the court being satisfied of the residence of the plaintiff may try the case regardless of the residence of the defendant.[2] But the residence required of the plaintiff is a legal, not merely an actual residence,[3] and a mere temporary so-

[1] Code, Sec. 3171.
[2] Smith v. Smith, 4 G. Gr., 266.
[3] Hinds v. Hinds, 1-36.

journ for a season without the intention of making the place his domicile is not sufficient to constitute residence within the meaning of the statute.[4] A Utah divorce obtained without jurisdiction or where neither party resided within the Territory, is absolutely void.[5] In a proceeding for a divorce the law recognizes the husband and wife as having separate domiciles, hence a divorce may be granted in an action brought in a county where either of them resides.[6] When an action for a divorce is brought in one State by the husband against the wife, who resides in another State, and jurisdiction is acquired by publication, the court may declare the status of the parties, and grant the decree, but can not make a valid decree as to the custody of the children, who are non-residents of the State where the divorce proceedings were had.[7] But if the children were within the jurisdiction of the court when the decree was granted, though granted in another State, it will be treated as conclusive and binding upon the courts of this State, when the right to the custody of such children is called in question in this State, until such decree is modified, reversed or set aside for cause shown to the jurisdiction rendering it.[8] The legislature has no power to grant divorces.[9] A divorce granted in the State of Nebraska in accordance with its laws and on notice by publication against a resident of this State is valid.[10] A want of jurisdiction of a court to grant a divorce, owing to the non-residence of the plaintiff, can not afterward be interposed by such plaintiff as an objection to the decree, when it appears that she authorized the cause to be prosecuted and received the money which was allowed as alimony.[11] It may be established by parol evidence that a decree of divorce granted in another State is void for want of jurisdiction under the laws of such State.[12] A supple-

[4] Smith v. Smith, 4 G. Gr., 266; Whitcomb v. Whitcomb, 46-437; see Rush v. Rush, 48-701.
[5] State v. Fleak, 54-429.
[6] Kline v. Kline, 57-386.
[7] Kline v. Kline, 57-386.
[8] Wakefield v. Ives, 35-238.
[9] Const. Art. 3, Sec. 27; see Levins v. Sleator, 2 G. Gr., 604.
[10] Van Orsdal v. Van Orsdal, 67-35.
[11] Ellis v. White, 61-644.
[12] Neff v. Beauchamp, 74-92.

mental decree as to alimony in the court of another State under a decree of divorce previously rendered in that State will be recognized in this State.[13] The action must be prosecuted by equitable proceedings and no cause of action, except for alimony, can be joined with it,[14] and the action is triable de novo in the supreme court,[15] and the appearance term is the trial term.[16] Divorce cases must be tried in open court; they can not be tried by a referee, but the testimony may be taken by a commissioner and the cause tried in open court.[17] The verification of the petition is not jurisdictional, but the action must be prosecuted by the injured party in his personal capacity, and it cannot be instituted by a guardian of one of the parties.[18] A divorce can not be granted by consent of parties unless proper grounds are shown for a divorce.[19]

§ **1009. Of the grounds for a divorce generally.**—A divorce can only be granted for some of the causes stated in the statute.[20] Hence a divorce can not be granted for impotency, insanity or idiocy.[21] A decree of divorce is an adjudication of all causes for divorce existing at the time it is rendered.[22] The violation of an antenuptial contract is not a ground for a divorce.[23]

§ **1010. Of adultery.**—In order to establish adultery it is not necessary to prove the fact of the adultery, but it may be inferred from the circumstances. If the circumstances, when all taken together, tend to establish the criminal disposition of the party charged with adultery and a like disposition of the particeps criminis and an opportunity to commit the act, it will ordinarily be sufficient to warrant the inference that the act was, in fact, committed, and especially so when the acts of the

[13] Alderson v. Alderson, 84-198.
[14] Code, Sec. 3430.
[15] Sherwood v. Sherwood, 44-192.
[16] Code, Sec. 3656.
[17] Hobart v. Hobart, 45-501; Code, Sec. 3173.
[18] Mohler v. Shanks Estate, 93-273; see Van Duzer v. Van Duzer, 65-625.
[19] Code, Sec. 3781; Lyster v. Lyster, 1-130.
[20] Miller v. Miller, 43-325; York v. Ferner, 59-487; see McCraney v. McCraney, 5-232.
[21] Wertz v. Wertz, 43-534.
[22] Rivers v. Rivers, 65-568.
[23] Owen v. Owen, 90-365.

parties are inconsistent with any rational theory of innocence.[24] And when a wife deserts her husband without reasonable cause, and before she has been absent long enough to entitle him to a divorce, he commits adultery, she is entitled to a divorce and to alimony.[25] While, as a general rule, the adultery of plaintiff in an action for a divorce will bar her from procuring a divorce on the ground of a like crime committed by the defendant, yet where the marriage of plaintiff, which is claimed to be adulterous, was contracted in ignorance of the fact that the first husband, the defendant, was alive, and he had not in fact been heard from for many years, such second marriage was held not to defeat her action against the defendant for a divorce.[26] Adultery committed after the marriage is one of the statutory grounds for a divorce.[27]

§ **1011. Of desertion.**—A divorce may be granted one party to the marriage when the other willfully deserts him or her, as the case may be, and absents himself without a reasonable cause, for two years.[28] And a reasonable cause is said to be such cause as would, prima facie, entitle the party so deserting to a divorce.[29] But where the separation was mutually agreed upon, neither party is entitled to a divorce on the ground of absence of the other, until such party offers to, and expresses a willingness to live with the other, and such offer must appear to be made in good faith.[30] And in an application for a divorce on the ground of desertion, the petition must state that such desertion was without reasonable cause.[31] For a discussion as to what will constitute desertion, reference is made to the cases cited.[32]

[24] Inskeep v. Inskeep, 5-204; Names v. Names, 67-383; see Haggard v. Haggard, 62-82; Aitchison v. Aitchison, 68 N. W., 573; Peavey v. Peavey, 76-443; Carlisle v. Carlisle, 68 N. W., 681.

[25] Dupont v. Dupont, 10-112.

[26] Smith v. Smith, 64-682.

[27] Code, Sec. 3174.

[28] Code, Sec. 3174; Doolittle v. Doolittle, 78-691; Day v. Day, 84-221; Taylor v. Taylor, 80-29; Packard v. Packard, 90-765; Owen v. Owen, 90-365.

[29] Pierce v. Pierce, 33-238; see Douglass v. Douglass, 31-421; Taylor v. Taylor, 80-29.

[30] Farber v. Farber, 64-362.

[31] Pinkney v. Pinkney, 4 G. Greene, 324; Owen v. Owen, 90-365.

[32] Pilgrim v. Pilgrim, 57-370; Lane v. Lane, 67-76; Atkinson v.

§ 1012. Of conviction for a felony.—The statute makes the conviction for a felony after the marriage of one of the parties to the marriage contract a cause for a divorce.[33] But such conviction must be final, and a divorce will not be granted on this ground when there has been a conviction in the lower court, and an appeal therefrom is pending and undetermined;[34] but where the action for a divorce was brought pending such appeal and a divorce granted, and the conviction was afterward affirmed by the supreme court, it was held another action for a divorce might be brought and the first action would not be a bar thereto.[35]

§ 1013. Of habitual drunkenness.—So a divorce may be granted when, after marriage, one of the parties to the marriage contract becomes addicted to habitual drunkenness;[36] and to constitute one an habitual drunkard it is not necessary that the party be in that condition during business hours.[37] What constitutes an habitual drunkard, so as to entitle one to a divorce, has never been determined by our court.[38]

§ 1014. Of inhuman treatment.—A divorce may be granted when either party to the marriage contract is guilty of such inhuman treatment as to endanger the life of the other.[39] The question is, considering the treatment in the past, is there reasonable ground to apprehend danger to the life or health of the party.[40] And there may be inhuman treatment endangering life

Atkinson, 67-364; Doolittle v. Doolittle, 78-691; Day v. Day, 84-221; Packard v. Packard, 90-765.

[33] Code, Sec. 3174.

[34] Vinsant v. Vinsant, 49-639; Rivers v. Rivers, 60-378.

[35] Rivers v. Rivers, 65-568.

[36] Code, Sec. 3174.

[37] Wheeler v. Wheeler, 53-511.

[38] Wheeler v. Wheeler, 53-511, and cases cited; Lewis v. Lewis, 75-200.

[39] Code, Sec. 3174; Freerking v. Freerking, 19-34.

[40] Beebe v. Beebe, 10-133; Knight v. Knight, 31-451; Aitchison v. Aitchison, 68 N. W., 573; Van Duzer v. Van Duzer, 70-614; Doolittle v. Doolittle, 78-691; Douglass v. Douglass, 81-258; Potter v. Potter, 75-211; McKee v. McKee, 77-464; Gilbertson v. Gilbertson, 78-755; Edgerton v. Edgerton, 79-68; Evans v. Evans, 82-462; Tiffany v. Tiffany, 84-122; Owen v. Owen, 90-365; Coulthard v. Coulthard, 91-742; Ennis v. Ennis, 92-107; Schlichtl v. Schlichtl, 88-210; Felton v. Felton, 62 N. W., 677; Prather v. Prather, 68 N. W., 806; Briggs v. Briggs, 71 N. W., 198; Hart v. Hart, 74-487.

though no physical injury is sustained, as when threats to do injury or to take life are made, coupled with the ability and intent so to do.[41] So, treatment calculated to affect the mind of a party so as to destroy her health and ultimately endanger life, or which involve, by natural consequences, a permanent, injurious and prejudicial effect on a party, is sufficient grounds for a divorce,[42] and so is persistent abuse in the presence of one's children, and in the presence of neighbors and others, by applying epithets imputing unchastity.[43] As to what has been held in particular cases sufficient evidence of inhuman treatment reference is made to the cases cited.[44] But inhuman treatment resulting from insanity is not ground for divorce.[45] But the facts showing inhuman treatment must be pleaded and a general allegation to that effect is not good.[46] But the facts as alleged need not be proved; it will be sufficient if from the evidence it appears that the treatment is inhuman.[47] A wife is not entitled to a divorce on the grounds of cruel treatment, endangering her life, although the husband admits that he struck her on one occasion, two years before they separated, where he was generally industrious and kind to his family, and their difficulties were largely due to her quarrelsome disposition and the evidence fails to show that her health was impaired or her life endangered by his conduct towards her.[48]

§ 1015. Of condonation and misconduct of the plaintiff.—If the inhuman treatment was caused by the applicant's own misconduct, no divorce will be granted.[49] And where the wife voluntarily has sexual intercourse with her husband after the commencement of suit for

[41] Sackrider v. Sackrider, 60-397;
[42] Caruthers v. Caruthers, 13-266; Cole v. Cole, 23-433.
[43] Wheeler v. Wheeler, 53-511.
[44] Harnett v. Harnett, 55-45; Platner v. Platner, 66-378; Sesterhen v. Sesterhen, 60-301; Rivers v. Rivers, 60-378; Whaley v. Whaley, 68-647; Maben v. Maben, 72-658; and see No. 40 above.
[45] Wertz v. Wertz, 43-534.
[46] Freerking v. Freerking, 19-34.
[47] Cole v. Cole, 23-433.
[48] Felton v. Felton, 62 N. W., 677.
[49] Knight v. Knight, 31-451; see Marsh v. Marsh, 64-667; Edgerton v. Edgerton, 79-68.

divorce, ordinarily it will be a condonation of the act or acts complained of.[50] But such is not the case where the intercourse was involuntary.[51] Nor will the fact that the wife, after beginning her action for a divorce, remained in the same house with her husband and did his housework, amount to condonation.[52]

§ 1016. Of the petition.—The petition may be in the following form:

FORM OF PETITION FOR A DIVORCE.

Title, }
Venue. }

The plaintiff states:

Par. 1. That she is now and has been for the last (more than a year) years past, a resident of the State of Iowa, and residing at ——— in ——— county, and that she has resided at said place continuously during all of said time (or if absent a part of the time state the entire length of her residence in the State, after deducting all absences from the State).

Par. 2. That the residence of said plaintiff, as above stated, has been in good faith, and not for the purpose of obtaining a divorce only.

Par. 3. That this application is made in good faith and for the purpose set forth herein.

Par. 4. That plaintiff and defendant were married at (place) in (county and State) on the ——— day of ———, 18—, and lived together as husband and wife until the ——— day of ———, 18—.

Par. 5. That during all the time plaintiff and defendant so lived together as husband and wife, this plaintiff at all times conducted herself toward her said husband as a dutiful and loving wife.

Par. 6. That on the ——— day of ———, 18—, the defendant, in violation of his marriage vows, and without any fault of plaintiff, willfully deserted this plaintiff, and has ever since absented himself from her without any reasonable or just cause therefor.

Par. 7. That there was born to plaintiff and defendant, as the issue of said marriage, a son, named (here give his name), now ——— years of age, and who has resided with plaintiff ever since his birth.

Par. 8. That plaintiff has no property in her own right, and no means with which to prosecute this suit, and her only means of maintaining her said son and herself is by working out as a servant.

Par. 9. That defendant is possessed of personal property, consisting of (here describe it), worth ——— dollars, and has real estate, unincumbered, situated in ——— county, Iowa, worth ——— dollars.

[50] Harnett v. Harnett, 55-45; Cochran v. Cochran, 35-477; Sesterhen v. Sesterhen, 60-301; but see Douglass v. Douglass, 81-258; Lewis v. Lewis, 75-200.

[51] Cochran v. Cochran, 35-477; Sesterhen v. Sesterhen, 60-301.

[52] Harnett v. Harnett, 59-401.

Wherefore plaintiff prays that she may be divorced from the defendant; that she may be awarded the custody of her said minor son (naming him); that she may be allowed the sum of ——— dollars as temporary alimony, and on final hearing, the sum of ——— dollars, as permanent alimony, out of her said husband's estate, and that she have judgment for said alimony, and that execution issue to make the same, and for such other and further relief as may be equitable in the premises, and for costs.

(The petition must be verified by the applicant.)

The petition, if for cruel and inhuman treatment, must set out the facts constituting it, as "That on the —— day of ——, 18—, the defendant drew and pointed a loaded revolver at plaintiff and threatened to take her life,"etc. It will be noticed that some of the allegations in the foregoing form of petition are only necessary when the defendant is a non-resident of the State;[53] it can be changed to suit the circumstances of each case.

Although the statute requires the petition to be verified, yet if it is not verified it will not prevent the court from having jurisdiction of the cause; but the petition should always be verified.[54] But the fact that a petition was not verified can not be urged in a collateral attack.[55]

§ 1017. Of cross-petition, etc.—The causes for divorce heretofore mentioned may be taken advantage of by either husband or wife, and the husband may also obtain a divorce from his wife when she, at the time of the marriage, was pregnant by one other than such husband, of which fact he had no knowledge, unless such husband has an illegitimate child or children then living which was unknown to the wife at the time of their marriage.[56] The defendant may obtain a divorce in any case where entitled to it by filing a cross-petition in the action,[57] and the cause of action thus set up by the defendant may be based on causes of divorce occurring subsequent to the commencement of the original action, and will be regarded as a counter claim.[58]

[53] Code, Secs. 3172, 3173.
[54] Code, Sec. 3173; McCraney v. McCraney, 5-232; Van Duzer v. Van Duzer, 65-625; Mohler v. Shanks Estate, 93-273.
[55] Ellis v. White, 61-644.
[56] Code, Sec. 3175; Branum v. O'Conner, 77-632.
[57] Code, Sec. 3176.
[58] Wilson v. Wilson, 40-230. Code, Sec. 3570.

§ 1018. Of temporary alimony.—Temporary alimony can not be allowed without the fact of the marriage between the parties is either admitted or proved.[59] It may be allowed before right to divorce is established.[60] But when, after a divorce, the parties again lived together as husband and wife, it was held to sufficiently establish the marital relation to justify granting temporary alimony.[61] The judge in vacation can not make an allowance of temporary alimony.[62] When the wife brings an action for alimony without a divorce, a temporary allowance may be made her the same as if she sought a divorce.[63] Orders regarding temporary alimony and for attorney's fees are not to be regarded as a final adjudication of the rights of the parties.[64] But temporary alimony is not allowed in an action to set aside a voidable decree of divorce.[65] Defendant answering her husband's bill for divorce alleged that his conduct had compelled her to leave him, and asked an allowance for temporary alimony, plaintiff dismissed his bill. Defendant moved for judgment for costs and attorney's fees, but a motion by plaintiff to strike out that part relating to attorney's fees was sustained, it was held that such ruling was not an adjudication of defendant's right to attorney's fees when the matter came on for hearing on the motion for temporary alimony, and that the dismissal of the bill did not deprive the court of jurisdiction to inquire as to defendant's right to alimony.[66]

The application for temporary alimony may be made in the petition or by motion setting out the circumstances and situation of the applicant, and the amount needed to pay attorney's fees, witness' fees, and to maintain the applicant pending the proceedings, and if the witnesses are to be brought from a great distance,

[59] Code, Sec. 3177; York v. York, 34-530; Wilson v. Wilson, 49-544; Smith v. Smith, 61-138.

[60] Campbell v. Campbell, 73-482.

[61] McFarland v. McFarland, 51-565.

[62] Code, Sec. 3177; Prosser v. Prosser, 64-378.

[63] Finn v. Finn, 62-482; Graves v. Graves, 36-310; Simpson v. Simpson, 91-235.

[64] Clyde v. Peavy, 74-47.

[65] Shaw v. Shaw, 92-722.

[66] O'Neil v. O'Neil, 69 N. W., 523.

such fact, and all other facts showing the amount asked to be a proper allowance, should be set out.[67] And temporary alimony may be granted to either party in a divorce proceeding as against the other.[68] Nor can the husband off-set as against the amount he is directed to pay, the value of the household goods appropriated by the wife.[69] The failure of the plaintiff to pay temporary alimony may be punished by dismissing the action, or striking the petition from the files, but this can not be done when the defendant fails to pay money awarded as temporary alimony.[70]

§ **1019. Of attachment and injunction.**—The petition may be presented to the court or judge for the allowance of an order of attachment, and the court or judge may, by indorsement thereon, direct such attachment and the amount for which the same may issue, and the amount of the bond, if any, that shall be given; and the clerk must issue the same accordingly, and any property taken by virtue thereof will be held to satisfy the judgment or decree of the court, but it may be discharged or released as in other cases.[71] But the provisions of the general attachment law are not applicable to attachments in divorce cases.[72] Nor is the remedy by attachment to restrain the disposition of the property of the defendant exclusive of that by injunction.[73] And the attachment in divorce cases may be levied on the homestead, and it may be granted in a suit to annul a marriage, as well as in an action for a divorce.[74] Such an attachment may issue to compel the performance of an order to pay temporary alimony.[75] A conveyance of property made and accepted with the purpose of putting the property beyond the reach of such an attachment is

[67] Champlin v. Champlin, 42-169; Van Duzer v. Van Duzer, 65-625; Briggs v. Briggs, 36-383; Maben v. Maben, 67-284; Miller v. Miller, 43-325; Peavey v. Peavey, 76-443; Campbell v. Campbell, 73-482.

[68] Small v. Small, 42-111.

[69] Dayton v. Drake, 64-714.

[70] Peel v. Peel, 50-521; Baily v. Baily, 69-77; Allen v. Allen, 72-502.

[71] Code, Sec. 3178.

[72] Smith v. Smith, 61-138.

[73] Wharton v. Wharton, 57-696; Dullard v. Phelan, 83-471.

[74] Daniels v. Morris, 54-369.

[75] Van Duzer v. Van Duzer, 65-625.

invalid.[76] The filing of a petition for a divorce which asks for permanent alimony to be made a lien upon the defendant's real estate will not of itself create a lien thereon.[77] But no such attachment can affect the lien of a creditor of the husband, whose judgment is obtained prior to the decree; nor can the decree be dated back to the time of the attachment, so as to cut out intervening judgments.[78]

§ **1020. Of attorney's fees.**—Attorney's fees may be taxed as a part of the costs in favor of the successful party, but can not be made a lien upon the homestead of the opposite party.[79] The attorney for the wife may sue and recover from the husband for his attorney's fees for the wife in a divorce proceeding, nor, in order to recover, need he show that the wife was entitled to a divorce.[80] An attorney can, for services rendered a client, in a divorce suit, recover of her husband only what the services were reasonably worth where rendered, and witnesses testifying to the value of such services must show that they know the rates charged in the vicinity where the services were rendered.[81]

§ **1021. Of the custody of children.**—The control of the children of the parties is in the court pending the suit as well as when final decree is granted.[82] But the right of custody does not survive the death of the party entitled thereto.[83]

§ **1022. Of allowance of permanent alimony without divorce.**—An action may be brought for alimony alone when the wife is separated from the husband on account of misconduct on his part which justified the separa-

[76] Picket v. Garrison, 76-347.
[77] Scott v. Rogers, 77-483.
[78] Daniels v. Lindley, 44-567.
[79] Wilson v. Wilson, 40-230; see Porter v. Briggs, 38-166; Johnson v. Williams, 3 G. Gr., 97.
[80] Preston v. Johnson, 65-285; Porter v. Briggs, 38-166; Sherwin v. Maben, 78-467; Doolittle v. Doolittle, 78-691; Clyde v. Peavy, 74-47.
[81] Stevens v. Ellsworth, 63 N. W., 683.
[82] Code, Secs. 3177, 3180; Green v. Green, 52-403; Zuver v. Zuver, 36-190; Cole v. Cole, 23-433; Hunt v. Hunt, 4 G. Gr., 216; Farrer v. Farrer, 75-125; Aitchison v. Aitchison, 68 N. W., 573.
[83] Barney v. Barney, 14-189.

tion.[84] But an action can not be maintained for alimony as an independent proceeding after the divorce of the parties.[85] But a wife residing in this State, against whom a valid decree of divorce has been rendered in another State, according to its laws, can not afterward maintain an action in this State for alimony out of property not belonging to her former husband at the time of the granting of such divorce.[86]

§ 1023. Of the power to grant permanent alimony. —The power to allow alimony is an incident of the power to grant a divorce, and it may be granted though not claimed in the original notice.[87] And this is true though the service is had by publication only, and in such a case the court can declare and enforce a lien for alimony against real estate of the defendant, situated in another county.[88] And alimony may be granted though no reference thereto is made in the pleadings.[89] Nor will an agreement for settlement in view of separation bar a claim for alimony in a subsequent action for a divorce.[90] A contract may be made between husband and wife making provision for her in lieu of alimony.[91] But alimony can not be allowed unless the relation of husband and wife exists.[92]

§ 1024. When an allowance of alimony is proper. —Where the wife, without sufficient cause, had left the husband, and the latter afterward committed adultery, for which a divorce was granted the wife, it was held that she was entitled to alimony.[93] Ordinarily where the husband obtains a divorce from his wife on the ground of adultery, she will not be awarded alimony.[94] And generally alimony is not given to the party in fault.[95] In

[84] Graves v. Graves, 36-310; Whitcomb v. Whitcomb, 46-437; Finn v. Finn, 62-482; Farber v. Farber, 64-362; Platner v. Platner, 66-378; Simpson v. Simpson, 91-235.

[85] Wilde v. Wilde, 36-319.

[86] Van Orsdal v. Van Orsdal, 67-35.

[87] McEwen v. McEwen, 26-375.

[88] Harshberger v. Harshberger, 26-503.

[89] Zuver v. Zuver, 36-190.

[90] Wilson v. Wilson, 40-230; Campbell v. Campbell, 73-482.

[91] Martin v. Martin, 65-255, and cases cited.

[92] Blythe v. Blythe, 25-266.

[93] Dupont v. Dupont, 10-112.

[94] Fivecoat v. Fivecoat, 32-198.

[95] Barnes v. Barnes, 59-456.

the cases cited below the amount and kind of alimony proper to be allowed in particular cases is considered.[96]

§ **1025. Of allowing specific property.**—A specific part of the husband's estate may be allowed the wife as alimony.[97] But ordinarily specific property should not be thus allowed as alimony, especially so if the husband is able to pay in money the amount to be allowed.[98] And it seems to be held that in no case should more than one third of the husband's property be allowed as alimony, and sometimes a less amount.[99]

§ **1026. Of the lien of the judgment.**—Alimony may be made a lien on the homestead,[1] but a general judgment for alimony, in some cases at least, can not be enforced against a homestead.[2] But where the decree makes the alimony a lien on the homestead the fact that such property is a homestead must be set up in the action as it can not be taken advantage of after decree.[3] A judgment for alimony decreed to be a lien as against property of the defendant in another county will take priority over a subsequent attachment of such property, although the attachment is prior to the filing of a transcript of the lien in the county where the land is situated.[4] And sometimes alimony will be decreed to be a lien prior to an existing mortgage.[5]

§ **1027. Of setting aside the decree, and of its modification, etc.**—A decree of divorce may be set aside for fraud in obtaining it, though the rights of subsequent innocent parties have intervened, and the plaintiff has remarried.[6] And in such case the fraudulent decree is no defense to a prosecution for adultery for cohabiting with

[96] Abey v. Abey, 32-575; Farley v. Farley, 30-353; Sesterhen v. Sesterhen, 60-301; Day v. Day, 84-221; Doolittle v. Doolittle, 78-691; Douglass v. Douglass, 81-258; Parker v. Albee, 86-46; Abel v. Abel, 89-300; Ensler v. Ensler, 72-159.

[97] Jolly v. Jolly, 1-9; Twing v. O'Meara, 59-326; see Russell v. Russell, 4 G. Gr., 26.

[98] Inskeep v. Inskeep, 5-204.

[99] Zuver v. Zuver, 36-190.

[1] Wilson v. Wilson, 40-230.

[2] Byers v. Byers, 21-268.

[3] Hemenway v. Wood, 53-21.

[4] Harshberger v. Harshberger, 26-503.

[5] Sesterhen v. Sesterhen, 60-301.

[6] Whitcomb v. Whitcomb, 46-437; Rush v. Rush, 46-648, and 48-701.

a woman to whom the party procuring the divorce was married after the divorce was granted, and before it was set aside.[7] But it has been held that a divorce claimed to have been procured by fraud would not be set aside at the instance of the husband, who had himself been divorced in another State, and who waited a year after knowing of such fraudulent divorce, and until his wife had re-married, before moving in the matter.[8] The statute authorizes subsequent changes to be made by the court, with reference to alimony, the custody of children, and the maintenance of the parties.[9] But such changes can not be made after the death of a party against whom the change is sought.[10] But in other cases the court possesses the power to modify the decree, even though the parties have removed from the State.[11] But this power to change or modify the decree exists only when there is a change in the circumstances or conditions of the parties.[12] Nor, it seems, will a decree be modified on account of change in the conditions of the party, when such change has been brought about by the improper conduct of the party seeking a change in the decree.[13] Nor will a decree be so changed as to allow alimony when none was claimed, or intended to be claimed, when the divorce was granted.[14] Nor can a judge in vacation and without notice to the parties change the terms of a decree.[15] While it is a question whether any court other than the one granting the decree can change or modify it, yet another court may make an order in a habeas corpus proceeding, relating to the custody of a child, which will be valid.[16] Until modified, the decree is valid and binding, and can not be attacked or changed in a collateral proceeding.[17] One to whom a divorce is granted has no further right or

[7] State v. Whitcomb, 52-85.
[8] Webster v. Webster, 54-153.
[9] Code, Sec. 3180; Sherwood v. Sherwood, 56-608; Boggs v. Boggs, 49-190; White v. White, 75-218; Reid v. Reid, 74-681.
[10] O'Hagan v. O'Hagan, 4-509.
[11] Andrews v. Andrews, 15-423; Jungk v. Jungk, 5-541.
[12] Blythe v. Blythe, 25-266; Wilde v. Wilde, 36-319.
[13] Fisher v. Fisher, 32-20.
[14] Rouse v. Rouse, 47-422.
[15] Hamman v. Van Wagenen, 62 N. W., 795.
[16] Shaw v. McHenry, 52-182.
[17] Jennings v. Jennings, 56-288.

interest in the property of the other party than is given by the decree, and can not claim any share of it as dower in case of survival.[18] A proceeding for a divorce abates upon the death of the defendant.[19]

In making its orders for an attachment or for alimony, or for the custody of the children, the court must take into consideration the age and sex of the plaintiff, and the physical and pecuniary condition of the parties, and all other matters which are pertinent, which facts may be shown by affidavits in addition to the pleadings, or by other evidence as the court or judge may direct.[20]

§ **1028. Of the causes for annulling marriages.**—Marriages may be annulled for the following reasons: 1. When the marriage between the parties is prohibited by law. 2. When either party was impotent at the time of the marriage. 3. When either party had a husband or wife living at the time of the marriage; provided they have not, with a knowledge of such fact, lived and cohabited together after the death of the former spouse of such party. 4. Where either party was insane or idiotic at the time of the marriage.[21]

§ **1029. Of the petition, etc.**—The petition must be filed in such cases as in an action for divorce, except that some one of the causes for annulling the marriage must be stated.[22] From the form given of a petition for a divorce one can readily be drawn to annul a marriage. When the validity of a marriage is doubted, either party may file a petition setting up the fact and it will be annulled or affirmed according to the proof.[23]

§ **1030. Of the legitimacy of children, etc.**—When a marriage is annulled on account of consanguinity or affinity of the parties, the issue will be illegitimate; if because of the impotency of the husband, any issue of the

[18] Boyles v. Latham, 61-174, and see McCraney v. McCraney, 5-232; Winch v. Bolton, 63 N. W., 330.

[19] O'Hagan v. O'Hagan, 4-509; Barney v. Barney, 14-189.

[20] Code, Sec. 3179.

[21] Code, Sec. 3182; State v. Henke, 58-457; Carpenter v. Smith, 24-200; Drummond v. Irish, 52-41; Wier v. Still, 31-107; Shaw v. Shaw, 92-722.

[22] Code, Sec. 3183.

[23] Code, Sec. 3184.

wife will be illegitimate, but when it is annulled on account of non-age, insanity or idiocy, the issue is the legitimate issue of the party capable of contracting marriage.[24] If a marriage is annulled on account of a prior marriage, and the parties contracted the second marriage in good faith, believing the prior husband or wife to be dead, that fact must be stated in the decree, and the issue of the second marriage begotten before the decree of the court is the legitimate issue of the parent capable of contracting.[25] In case either party entered into the contract in good faith, supposing the other to be capable of contracting, and the marriage is declared a nullity, such fact must be entered in the decree, and the court may award such innocent party compensation as in cases of divorce.[26] Where a person after his second marriage lived in the town where the first wife lived and she did not question the validity of the second marriage nor the legitimacy of the issue thereof, the presumption is the parties to the first marriage were divorced before the second marriage, and that the issue of each marriage will inherit from their father.[27] And see further as to presumptions.[28]

[24] Code, Sec. 3185.
[25] Code, Sec. 3186.
[26] Code, Sec. 3187; Daniels v. Morris, 54-369; Barber v. Barber, 74-301.
[27] Leach v. Hall, 64 N. W., 790.
[28] Blanchard v. Lambert, 43-228; In re Estate of Edwards, 58-431.

CHAPTER LXIV.

OF HABEAS CORPUS.

Sec. 1031. When the writ lies.
1032. When it does not lie.
1033. Of the petition.
1034. Of the application for the writ.
1035. Of the issuance of the writ.
1036. Of notice to the county attorney.
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1041. How the order is served.
1042. Presumptions—Appearance of the parties.
1043. Of contempt and attachment.
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1046. Of the answer to the writ.
1047. Of pleas to the answer.
1048. Of the trial and judgment.
1049. Of proceedings by habeas corpus for the custody of children.
1050. Of disobedience of an order of discharge—Filing of papers.

Section **1031. When the writ lies.**—It lies to ascertain whether any person is rightfully in confinement or not and the cause of his confinement.[1] It lies in every case of illegal restraint.[2] It lies in every case when the application therefor is made as required by law, except in case of rebellion or invasion, when the public safety may require it.[3]

It has always been regarded as the great safeguard against oppression and wrong, and the bulwark of personal liberty.[4] It lies to inquire into the legality of a

[1] Story on Const., Vol. 2, Sec. 1339.
[2] Shaw v. McHenry, 52-182, 184.
[3] Const. of Iowa, Art. 1, Sec. 13; Const. of U. S., Art. 1, Sec. 9, clause 2.
[4] Story on Const., Vol. 2, Sec. 1339.

restraint in case one is imprisoned by a usurper in office.[5] It lies for the purpose of inquiring into the validity of an enlistment into the army of the United States.[6]

It has been held to lie in a case where one charged on preliminary information with a crime, waived a hearing and gave bond with sureties for his appearance at the next term of court, and where he was arrested at the instance of his bondsmen, who surrendered him to the sheriff; and in that case the plaintiff claimed that the law under which he was charged with the crime was unconstitutional and he applied for a writ of habeas corpus; it was held that his sureties had no right to arrest him for the purpose of his own exoneration, but that the court would not be justified in refusing to entertain the case, when the determining of the constitutionality of the law was of great importance to the public interest.[7] As a justice of the peace has no power to compel a party to appear by subpœna and make affidavit which is sought only as information on which to base a civil action, the writ will lie to release one who has been committed for disobedience of such subpœna.[8]

It will also lie in favor of persons confined as insane, and the question of insanity will be decided at the hearing, and if the judge decides that the person is insane, such decision will be no bar to the issuance of a writ the second time, whenever it is alleged that such person has been restored to reason.[9] It lies where minor children are alleged to be concealed in one of two counties, and the court in either county will have jurisdiction to issue the writ.[10]

§ **1032. When it does not lie.**—It does not lie unless application is made to the judge most convenient in point of distance to the applicant, unless a sufficient reason be stated in the petition for not making the application to the more convenient court or judge thereof.[11]

[5] Ex parte Strahl, 16-369.
[6] Ex parte Anderson, 16-595.
[7] Brown v. Duffus, 66-193.
[8] Dudley v. McCord, 65-671.
[9] Code, Sec. 2306; In re Breese, 82-573.
[10] Rivers v. Mitchell, 57-193.
[11] Code, Sec. 4420; Thompson v.

It does not lie where, from the showing of the petitioner, the plaintiff would not be entitled to any relief.[12] It does not lie for the purpose of revising a judgment and proceedings of a competent court, which had jurisdiction of the case, and this is true even though the conviction be irregular or erroneous.[13] It does not lie by a State court to release one who is held in custody under an order of a United States court, issued in the regular course of its procedure.[14] Nor will it lie in case where a court having jurisdiction of a cause is proceeding to arrest a party for contempt; in such a case no other court can intermeddle with, or stay the proceedings.[15]

So it will not lie to inquire into the right of one who is holding an office by color of right, though he be not an officer de jure.[16] It will not lie where a person is held to answer to the grand jury, and he claims that the evidence on which he was committed was insufficient in law, and on such grounds sues out a writ of habeas corpus, he and the sheriff agreeing in the petition and answer as to what the evidence was.[17] Nor will it lie to determine whether the offense for which one is imprisoned is a crime under the statute, nor to correct an erroneous taxation of costs.[18] Nor will it lie in case fraud is found by a competent tribunal, to question the correctness of that finding on bringing up the body of the fraudulent debtor.[19] Nor to attack the validity of a judgment unless it is void.[20] Nor to release a prisoner because the length of imprisonment for the non-payment of a fine is not fixed.[21]

§ 1033. Of the petition.—Application for the writ of habeas corpus must be made by petition, must be sworn to and must state: 1st. That the person in whose behalf it is sought is restrained of his liberty, and the

Oglesby, 42-598; Shaw v. McHenry, 52-182, 184.

[12] Code, Sec. 4421.

[13] Platt v. Harrison, 6-79; Zelle v. McHenry, 51-572; Ex parte Grace, 12-208; Robb v. McDonald, 29-330; Ex parte Holman, 28-88; State v. Orton, 67-554; Jackson v. Boyd, 53-536.

[14] Ex parte Holman, 28-88.

[15] Ex parte Holman, 28-88; see Robb v. McDonald, 29-330.

[16] Ex parte Strahl, 16-369.

[17] State v. Rosecrans, 65-382.

[18] State v. Orton, 67-554.

[19] Ex parte Grace, 12-208.

[20] Turney v. Barr, 75-758.

[21] Elsner v. Shrigley, 80-30.

person by whom, and the place where he is restrained, mentioning the names of the parties if known, and if unknown, describing them with such particularity as is practicable. 2d. The cause or pretense of such restraint according to the best information of the applicant, and if it be by virtue of any legal process, a copy thereof must be annexed, or a satisfactory reason given for its absence. 3d. It must state that the restraint is illegal and wherein. 4th. That the illegality of the imprisonment has not already been adjudged upon a prior proceeding of the same character, to the best knowledge and belief of the applicant. 5th. It must also state whether application for the writ has been made to and refused by any court or judge, and if such application has been made, a copy of the petition in that case with the reasons for the refusal thereto appended must be produced, or satisfactory reasons given for the failure to do so.[22]

The petition must be sworn to by the person confined, or by some one in his behalf, and presented to some court or officer authorized to allow the writ.[23]

It may be in the following form:

FORM OF PETITION FOR HABEAS CORPUS.

Title, }
Venue. }

To the supreme (or district) court, (or any judge of either as the case may be, naming judge to whom application is made), of the State of Iowa:

The petition of ——— respectfully shows that he is restrained of his liberty by ———, sheriff of ——— county, Iowa, at the county jail of said county (or if at any other place state it), in (name of place where person is restrained); that the cause or pretense of such restraint according to the best information of your petitioner is by virtue of a warrant of commitment, a copy of which is hereto annexed and marked exhibit "A." (If a copy can not be obtained state the reason and what efforts have been used to obtain it.)

Your petitioner further states that said restraint is illegal, and that said illegality consists in this, to wit (here state the alleged illegality); that the legality of said imprisonment has not been adjudged

[22] Code, Sec. 4417; Platt v. Harrison, 6-79; Zelle v. McHenry, 51-572; Ex parte Holman, 28-88; Robb v. McDonald, 29-330; Ex parte Strahl, 16-369; Ex parte Anderson, 16-595; Thompson v. Oglesby, 42-598; Shaw v. McHenry, 52-182, 184.

[23] Code, Sec. 4418.

upon a prior proceeding of this character, to the best knowledge and belief of your petitioner; that application for the writ of habeas corpus has not been by your petitioner, or any one in his behalf, made to and refused by any court or judge (if such application has been made that fact should be stated and a copy of the petition in such case with the reasons for the refusal thereof appended thereto must be produced or satisfactory reasons given for the failure to do so). Wherefore, your petitioner prays a writ of habeas corpus to the end that he may be discharged from said illegal imprisonment (or to the end that he may be admitted to bail, as the case may be).

———, petitioner.

(or ———, attorney for petitioner, as the case may be).

(Add verification.)

(Attach and mark the exhibits referred to in the petition.)

If the application for a writ is made by some one in behalf of a person confined the form must be changed accordingly and be sworn to by the person making the application.

§ 1034. Of the application for the writ.—A writ of habeas corpus may be allowed by the supreme, district or superior court, or any judge thereof, and may be served in any part of the State,[24] and when the writ is properly applied for it must be allowed by the court or judge to whom application is made, providing, of course, such application be made to the proper court or judge.[25] The application for the writ must be made to the court or judge most convenient in point of distance to the applicant, and the more remote court or judge, if applied to for the writ, may refuse the same unless a sufficient reason be stated in the petition for not making the application to the more convenient court or judge thereof.[26] The court or judge applied to may refuse to allow the writ, whenever it appears from the showing of the petitioner that the plaintiff would not be entitled to any relief.[27] When any court or judge refuses the writ his reasons for so doing must be appended to the petition, and returned to the person applying for the writ.[28]

[24] Code, Sec. 4419.
[25] Code, Secs. 4420, 4423.
[26] Code, Sec. 4420; Thompson v. Oglesby, 42-598; Shaw v. McHenry, 52-182, 184.
[27] Code, Sec. 4421.
[28] Code, Sec. 4422.

§ 1035. Of the issuance of the writ.—It is the duty of the court or judge to whom the application is made, if it shows sufficient grounds for relief and is in the form provided by law, to allow the writ, which may be in the following form:

FORM OF WRIT OF HABEAS CORPUS.

The State of Iowa.

To the sheriff of ——— county, Iowa (or to ——— as the case may be):

You are hereby commanded to have the body of ———, by you unlawfully detained as is alleged before the court (or before me, or before ———, judge of the ——— judicial district of Iowa, or ——— judge of the supreme court of Iowa, as the case may be,) at ———, on the ——— day of ———, 18—, (or immediately after being served with this writ) to be dealt with according to law, and have you then and there this writ with a return thereon of your doings in the premises.[29]

In witness whereof I have hereto signed my name and affixed hereto the seal of said court.

[Seal.] ———, clerk of the ——— court of Iowa.

When a writ is allowed by the court it is to be issued by the clerk, but when allowed by a judge he must issue the writ himself, subscribing his name thereto without any seal.[30]

Any judge, whether acting individually or as a member of the court, who wrongfully and willfully refuses to allow the writ when properly applied for, forfeits to the party aggrieved the sum of one thousand dollars.[31]

So whenever it appears to any court or judge authorized to grant this writ, from evidence from a judicial proceeding before them, that any person within the jurisdiction of such court, or officer, is illegally imprisoned or restrained of his liberty, such court or judge shall issue or cause to be issued the writ as aforesaid, though no application be made therefor.[32]

§ 1036. Of notice to the county attorney.—The court or officer allowing the writ must cause the county attorney of the proper county to be informed of the issuance of the same and of the time and place when and where it is made returnable.[33]

[29] Code, Sec. 4423.
[30] Code, Sec. 4424.
[31] Code, Sec. 4425
[32] Code, Sec. 4426.
[33] Code, Sec. 4427; Miller v. Buena Vista County, 68-711.

When the notice above required is not given, the county attorney, the court, or judge, can not, by the appointment of a member of the bar to appear for the defendant, confer upon said attorney the right to demand of the county pay for his services; whether it could be done if the county attorney had been notified and failed to appear, quaere.[34]

The notice to be given the county attorney may be in the following form:

FORM OF NOTICE TO COUNTY ATTORNEY.

To ———, county attorney of ——— county, Iowa:

You are hereby notified that a writ of habeas corpus has been issued by me (or by the court) to inquire into the cause of the imprisonment of ———, now confined in the jail of ——— county; that said writ is made returnable before me (or said court), at the court house (or if at any other place designate it), in ———, on the ——— day of ———, 18—, at ——— o'clock in the ——— noon of said day, when and where you can attend if you think proper.

Dated this ——— day of ———, 18—.

———, judge, etc.

(The court or judge issuing the writ may cause the notice to the county attorney to be given by the plaintiff's attorney, or by the clerk of the court when it is issued by the court.)

§ 1037. Of service of the writ.—The writ may be served by the sheriff or by any other person appointed for that purpose, in writing, by the court or judge by whom it is issued or allowed; if served by any other than the sheriff he possesses the same power and is liable to the same penalty for non-performance of his duty as though he was the sheriff.[35] The proper mode of service is by leaving the original writ with the defendant, and preserving a copy thereof, on which to make the return of service, but a failure in this respect will not be held material.[36] If the defendant can not be found or if he has not the plaintiff in custody, the service may be made upon any person having the plaintiff in his custody in the same manner and to the same effect as though he had

[34] Miller v. Buena Vista County, 68-711.

[35] Code, Sec. 4428.

[36] Code, Sec. 4429.

been made defendant therein.[37] If the plaintiff can be found and no one appear to have the charge or custody of him, the person having the writ may take him into custody and make return accordingly.[38]

And if necessary to obtain possession of the plaintiff's person, in such case the person having the writ may arrest the defendant and bring him before the officer before whom the writ is made returnable.[39]

If the defendant conceals himself or refuses admittance to the person attempting to serve the writ, or if he attempt wrongfully to carry the plaintiff out of the county, or the State, after the service of the writ, the sheriff or the person who is attempting to serve, or who has served the writ, is authorized to arrest the defendant, and bring him with the plaintiff before the officer or court before whom the writ is made returnable.[40]

And in order to make such arrest the sheriff or person having the writ possesses the same power as is given to the sheriff for the arrest of a person charged with a felony.[41]

§ **1038. Of disobedience of the writ.**—The writ of habeas corpus must not be disobeyed for any defects of form or misdescription of the plaintiff or defendant, provided enough is stated to show the meaning and intent of the writ.[42]

If the defendant attempt to elude the service of the writ or to avoid the effect thereof by transferring the plaintiff to another or by concealing him, he will, on conviction, be imprisoned in the penitentiary, or county jail, not more than one year, and fined not exceeding one thousand dollars, and any person knowingly aiding or abetting in any such act will be subject to the same punishment.[43]

§ **1039. Duties of the officer.**—If an officer refuse to deliver a copy of any legal process by which he detains

[37] Code, Sec. 4430.
[38] Code, Sec. 4433.
[39] Code, Secs. 4433, 4432.
[40] Code, Sec. 4431.
[41] Code, Sec. 4432.
[42] Code, Sec. 4434.
[43] Code, Sec. 4435.

the plaintiff in custody, to any person demanding the same, and who tenders the fees therefor, he will forfeit two hundred dollars to the person so detained.[44]

§ 1040. Of the order and when it will issue.—The court or judge to whom the application for the writ is made, if satisfied that the plaintiff would suffer irreparable injury, before he could be relieved by the proceedings of habeas corpus, may issue an order to the sheriff, or any other person selected instead, commanding him to bring the plaintiff forthwith before such court or judge,[45] and when the evidence is sufficient to justify the arrest of the defendant for a criminal offense, in connection with the illegal detention of the plaintiff, the order must direct the arrest of the defendant.[46]

The order may be in the following form:

FORM OF ORDER FOR PLAINTIFF.

The State of Iowa.

To the sheriff of ——— county (or to some person selected and named), greeting:

Whereas, ——— has applied to me for a warrant for the body of ———, alleged to be illegally restrained of his liberty by ——— in the county jail of ——— county, Iowa, (or at ———, as the case may be). And whereas, it satisfactorily appears to me that the said ——— is illegally restrained of his liberty by the said ———, and also that the said ——— will suffer irreparable injury before he can be relieved by issuing the ordinary writ of habeas corpus. You are, therefore, hereby commanded that you forthwith take the said ——— and bring him before me to be dealt with according to law.

Witness my hand this ——— day of ———, 18—.

———, judge, etc.

If the defendant is also to be arrested on the order, insert in the above form before the date-line and signature the following:

"And whereas it further satisfactorily appears to me that the said ——— has committed the crime of (here name the offense) in connection with the illegal detention of the said ———, you are, therefore, hereby commanded forthwith to arrest the said ——— and bring him before me to be dealt with according to law, and have you then and there this writ with a return hereon of your doings in the premises."

(Add date and signature as above.)

[44] Code, Sec. 4436.
[45] Code, Sec. 4437.
[46] Code, Sec. 4438.

If the application is to the court, the order issues by the clerk with the seal of the court affixed.

§ **1041. How the order is served.**—The officer or person to whom the order is directed must execute the same by bringing the defendant, and the plaintiff if required, before the court or judge issuing it, and thereupon the defendant must make return to the writ of habeas corpus in the same manner as if the ordinary course had been pursued.[47]

§ **1042. Presumptions—Appearance of the parties.**—Any person served with a writ is presumed to be the person to whom it is directed, although it may be directed to him by the wrong name or description, or to another person.[48]

And where service is made, as heretofore stated, the defendant must appear at the proper time and answer the petition, but no verification to the answer is necessary.[49] He must also produce the body of the plaintiff or show good cause for not so doing.[50]

§ **1043. Of contempt and attachment.**—A willful failure to comply with the foregoing requirements renders the defendant liable to be attached for contempt and imprisoned until a compliance is obtained, and also subjects himself to the forfeiture of one thousand dollars to the party thereby aggrieved.[51]

The attachment in such case may be in the following form:

FORM OF ATTACHMENT FOR CONTEMPT IN DISOBEYING WRIT OF HABEAS CORPUS.

The State of Iowa.

To the sheriff of ——— county (or to any other person named), greeting:

It appearing satisfactorily to me (or to the ——— court), on the oath of ———, that ——— to whom a writ of habeas corpus was delivered commanding him to have the body of ——— in said writ named before me (or before ——— court), at ———, on the ———

47 Code, Sec. 4439.
48 Code, Sec. 4441.
49 Code, Sec. 4442.
50 Code, Sec. 4443; Rivers v. Mitchell, 57-193.
51 Code, Sec. 4444.

day of ———, 18—, to be dealt with according to law, has willfully neglected to obey said writ, according to the commands thereof, by not producing the said ——— before me (or before ——— court), and also by not making return of said writ.

You are, therefore, hereby commanded forthwith to arrest the said ——— and bring him immediately before me, (or before ——— court) at (state the place), in said county, to be dealt with according to law. And you are hereby further commanded to bring up and have before me at said time and place, the body of the said ———, who is alleged to be illegally restrained of his liberty by the said ———, at ——— (here insert place where plaintiff is confined) to be dealt with according to law, and have you then and there this writ with a return thereon of your doings in the premises.

Witness my hand this ——— day of ———, 18—.

———, judge, etc.

(If attachment is issued by order of the court, it must be signed by the clerk, and seal of the court affixed; if issued by the judge he must sign it himself without any seal.)

§ 1044. Of commitment for failure to comply with the writ.—A willful failure to comply with the above requirements renders the defendant, who has been produced on attachment (before the court or judge), liable to be imprisoned until a compliance is obtained, and also subjects him to the forfeiture of one thousand dollars to the party thereby aggrieved.[52]

And if on his appearance he still refuses to comply with the orders of the court, he may be committed to the jail of the county. The warrant of commitment may be in the following form:

FORM OF WARRANT OF COMMITMENT.

The State of Iowa.

To the sheriff of ——— county, greeting:

To ——— (or to any person named, as the case may be): Whereas ——— has been brought before me on an attachment for contempt issued by me stating (here set forth the contempt as stated in the attachment). And whereas the said ——— still refuses to produce the body of said ——— according to the command of said writ, and refuses to make a plain and unequivocal return and answer to said writ of habeas corpus, you are hereby commanded to take the said ——— and him safely keep in the jail of ——— county, Iowa, until he shall comply with the said writ of habeas corpus, or until otherwise legally discharged.

———, judge, etc.

(If the order for the warrant is made by the court it should be signed by the clerk with the seal of court attached.)

[52] Code, Sec. 4444.

§ **1045. Of the service of the attachment.**—The attachment may be served by the sheriff, or any other person thereto authorized by the court or judge, who shall also be empowered to produce the body of the plaintiff, forthwith, and has for this purpose the same powers as are conferred upon him in similar cases heretofore explained.[53]

§ **1046. Of the answer to the writ.**—The defendant upon his appearance must make answer in which he must state plainly whether he then has, or at any time has had, the plaintiff under control or restraint, and if so, the causes thereof.[54] Where the petition for habeas corpus alleged that minor children were concealed by the defendant in one of two counties, and the court in one of these counties issued the writ, and the defendant in his answer pleaded that the children were in a foreign jurisdiction, it was held that these facts did not deprive the court of jurisdiction or excuse the defendant from not producing the children in court in obedience to the writ.[55]

If he has transferred the plaintiff to another person, he must state that fact, and to whom and the time when, as well as the reasons or authority for such transfer.[56] If he holds him by virtue of legal process or written authority he must annex a copy thereof to his answer.[57]

He must produce the bodies of the persons deprived of their liberties before the court or judge, or state in his return to the writ that he does not have the power to do so in obedience to the writ.[58] When the custody of a child is in controversy the controlling fact is the best interest of the child.[59]

The answer of the defendant may be in the following form:

[53] Code, Sec. 4445.
[54] Code, Sec. 4446; Rivers v. Mitchell, 57-195.
[55] Rivers v. Mitchell, 57-195.
[56] Code, Sec. 4447.
[57] Code, Sec. 4448.
[58] Rivers v. Mitchell, 57-195.
[59] Kuhn v. Breen. 70 N. W.. 722.

FORM OF ANSWER TO WRIT OF HABEAS CORPUS.

Title, }
Venue. }

The defendant for answer and return to the writ of habeas corpus hereto annexed states: That at and before the coming of said writ to him, and prior to its service on him, to wit, on the ——— day of ———, 18—, at ———, the said (here insert name of person mentioned in said writ), was placed in his custody by virtue of a warrant of commitment (or as the case may be), issued by (here state name and official character of the magistrate who issued warrant), a copy of which is hereto annexed; that the defendant now holds ——— in custody by virtue of said warrant, and that in obedience to the said writ of habeas corpus the body of said ——— is now produced by defendant before said ———, judge (or ——— court, as the case may be), to be dealt with according to law, as by said writ commanded.

———, sheriff, defendant.

(The answer need not be verified.)[60]

§ 1047. Of pleas to the answer.—The plaintiff may demur or reply to the defendant's answer, but no verification will be required to the reply.[61]

Such reply may deny the sufficiency of the testimony to justify the action of the committing magistrate.[62]

§ 1048. Of the trial and judgment.—Trial is by ordinary proceedings, and the determination of the court upon the facts has the effect of a verdict of a jury,[63] and as it is a proceeding at law, neither party is entitled to a trial de novo in the supreme court.[64] The proceedings are not criminal in their nature, and the action should be in the name of the person alleged to be illegally restrained and not in the name of the State.[65]

Where the applicant is remanded to the custody of the defendant, the costs can not be taxed to the county.[66] All issues in the case are to be tried by the judge or court.[67] And on the trial the written testimony taken before the committing magistrate, may be given in evi-

[60] Code, Secs. 4442, 4449.
[61] Code, Sec. 4449.
[62] Code, Sec. 4450.
[63] Bonnett v. Bonnett, 61-199; Fouts v. Pierce, 64-71; Kuhn v. Breen, 70 N. W., 722; Jenkins v. Clark, 71-552.
[64] Fouts v. Pierce, 64-71; Shaw v. Natchwey, 43-653.
[65] State v. Collins, 54-441.
[66] State v. Collins, 54-441.
[67] Code, Sec. 4449.

dence in connection with any other testimony which may then be produced.[68] And if the plaintiff waived examination before the committing magistrate, it will not prevent the introduction in a habeas corpus proceeding, of testimony, for the purpose of showing that he is detained upon insufficient evidence to sustain the charge.[69]

The warrant of committment issued to the sheriff of the county in which the examination is held will authorize the plaintiff's detention and custody by the sheriff.[70] It is not permissible to question the correctness of the action of a grand jury in finding a bill of indictment, or of the trial jury in the trial of a cause, nor of a court or judge when lawfully acting within the scope of their authority.[71] If no sufficient cause of legal detention is shown, the plaintiff must be discharged.[72]

Although the commitment of the plaintiff may have been irregular, still, if the court or judge is satisfied from the evidence before them that he ought to be held to bail or committed, either for the offense charged or any other, the order may be made accordingly.[73]

The plaintiff may in any case be committed, admitted to bail, or his bail may be reduced or increased, as justice may require.[74]

The defendant may also be examined and committed, or bailed and discharged, according to the nature of the case.[75]

Until the sufficiency of the cause of restraint is determined, the defendant may retain the plaintiff in his custody, and may use all necessary and proper means for that purpose.[76] The plaintiff may in writing waive, or his attorney may waive, his right to be present at the

[68] Code, Sec. 4450; Cowell v. Patterson, 49-514; State v. Rosencrans, 65-382.

[69] Cowell v. Patterson, 49-514.

[70] Cowell v. Patterson, 49-514.

[71] Code, Sec. 4451; Turney v. Barr, 75-758; Elsner v. Sprigley, 80-30; State v. Zimmerman, 83-118; Ex parte Grace, 12-208; Ex parte Holman, 28-88; Robb v. McDonald, 29-330; State v. Seaton, 61-563; Platt v. Harrison, 6-79; Zelle v. McHenry, 51-572; State v. Orton, 67-554.

[72] Code, Sec. 4452; Shaw v. McHenry, 52-182; State v. Kirkpatrick, 54-373.

[73] Code, Sec. 4453; Jackson v. Boyd, 53-536.

[74] Code, Sec. 4454.

[75] Code, Sec. 4440.

[76] Code, Sec. 4455.

trial, in which case the proceedings may be had in his absence. If the waiver is made before the writ issues, it should be modified accordingly.[77] And in such case, the form of writ heretofore given will be changed by omitting the clause requiring the body of the plaintiff to be produced.

§ 1049. Of proceedings by habeas corpus for the custody of children.—In cases where it is sought by habeas corpus to obtain the control and custody of children, the controlling consideration is the interest of the child itself.[78] This is always the rule when the parent seeking the custody has, either by abandonment or contract, surrendered his personal legal right to such custody.[79] And where a child, by permission of her parents, resided for a time with others, who sought to detain her beyond the expiration of the time, and with whom she preferred to remain, it was held that while the wishes of the child should not be disregarded, yet the controlling consideration would be the best interests of the child, with due regard to the natural rights of the parents.[80] As between the father and mother of a child, the former has no particular right to its custody, and it will be awarded so as best to promote the interests of the child.[81]

Nor is the right of the parents to the custody of their children absolute under all circumstances; they may surrender the custody of the child to another, either by abandonment or contract, and in such case the matter of primary importance is the interest and welfare of the child.[82]

A step-father of minor children, who are members of his family, stands in loco parentis to such children, and, under ordinary circumstances, can make no claim for their support and maintenance.[83]

[77] Code, Sec. 4456.

[78] Fouts v. Pierce, 64-71; Jenkins v. Clark, 71-552; Kuhn v. Breen, 70 N. W., 722.

[79] Bonnett v. Bonnett, 61-199, and cases cited; see Drum v. Keen, 47-435.

[80] State ex rel. Shaw v. Nachtwey, 43-653.

[81] State v. Kirkpatrick, 54-373.

[82] Bonnett v. Bonnett, 61-199.

[83] Latham v. Meyers, 57-519.

§ 1050. Of disobedience of an order of discharge—Filing of papers—Costs.—Disobedience to an order of discharge subjects the defendant to attachment for contempt, and also to the forfeiture of one thousand dollars to the party aggrieved, besides all damages sustained by him in consequence of such disobedience.[84] When the proceedings are before a judge, except when the writ is refused, all the papers in the case, including his official order, must be filed with the clerk of the district court of the county wherein the final proceedings are had, and a memorandum thereof must be entered by the clerk in his judgment docket.[85] If the plaintiff is discharged, the costs must be taxed to the defendant unless he is an officer holding the plaintiff in custody under a warrant of arrest or commitment, or under other legal process, in which case the costs must be taxed to the county. If the plaintiff's application is refused, the costs must be taxed against him, and, in the discretion of the court, against the person who filed the petition in his behalf.[86]

[84] Code, Sec. 4457.

[85] Code, Sec. 4458; see also chapter on Appellate Proceedings.

[86] Code, Sec. 4459; State v. Collins, 54-441.

CHAPTER LXV.

OF THE HOMESTEAD.

Sec. 1051. When the homestead is exempt.
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1055. Of the head of the family.
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1064. Of the action of the court, etc.
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1067. Of the disposal of the homestead.
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1069. Of abandonment of the homestead.

Section **1051. When the homestead is exempt.**—Except when otherwise provided by statute, the homestead of every family, whether owned by the husband or wife, is exempt from judicial sale, and so may be the proceeds of a sale of the homestead, where sold with the intention of investing in a new one and the husband dies before receiving such proceeds.[1] Where a homestead acquired previous to the creation of a debt, was sold by the owner for other property of less value, which last homestead was acquired after the contraction of the debt but before judgment was rendered thereon, the new homestead was

[1] Code, Sec. 2972; Schuttloffel v. Collins, 67 N. W., 337.

exempt.[2] The homestead character does not attach to property until it is actually occupied as a home. A mere intention to occupy it is not sufficient.[3] The fact that the vendor retains the legal title as security for the unpaid purchase money will not defeat the vendee's claim to a homestead in the property.[4] A tenant in common may hold a homestead in his interest in the undivided premises.[5] And so a tenant holding by an equitable title may have a homestead in lands which he occupies as a home.[6] And a building erected on leased land and occupied by the family as a home becomes a homestead.[7] And when the dwelling house is situated on land of the wife lying contiguous to that owned by the husband and both tracts were occupied as a homestead, it was held that the wife, as against her husband's creditors' might claim a homestead carved in part out of her own land, and in part out of the husband's.[8] An unmarried woman who had accepted, protected, and was providing for children of a deceased sister, was held entitled to the homestead exemption.[9] While a judgment under which a homestead is not liable to sale does not attach as a lien thereon, yet it will attach if the homestead is abandoned.[10] The homestead of every pensioner who is a resident of this State, whether he is the head of a family or not, which is purchased and paid for with pension money or the proceeds or accumulation of such money, is exempt, and such exemption applies as against debts of such pensioner contracted prior to the purchase of such homestead.[11] Where a portion of the homestead was by prop-

[2] Pierson v. Minturn, 18-36; but see First Nat'l Bk. v. Thompson, 72-417.

[3] Charless v. Lambertson, 1-435; Williams v. Swetland, 10-51; Christy v. Dyer, 14-438; Cole v. Gill, 14-527; Hale v. Heaslip, 16-451; Page v. Ewbank, 18-580; Elston v. Robinson, 23-208; Givans v. Dewey, 47-414; Yost v. Devault, 9-60; Neal v. Coe, 35-407; Cogwell v. Warrington, 66-666; First Nat'l Bk. v. Hollingsworth, 78-575; Mann v. Carrington, 93-108; Neal v. Coe, 35-407.

[4] Stinson v. Richardson, 44-373; Lessell v. Goodman, 66 N. W., 917.

[5] Thorn v. Thorn, 53-706; Bolton v. Oberne, 79-278.

[6] Hewett v. Rankin, 41-35.

[7] Pelan v. De Bevard, 13-53.

[8] Lowell v. Shannon, 60-713.

[9] Arnold v. Waltz, 14-49.

[10] Lamb v. Shays, 14-567; Cummings v. Long, 16-41.

[11] Code, Sec. 4010.

er proceedings condemned for right of way, the damages allowed are exempt from execution; whether the proceeds of a voluntary conveyance by the husband of a portion of the homestead for the right of way would be exempt, quære.[12] And carrying this doctrine still further, it is held that a judgment for damages done to a homestead can not be garnished to satisfy another judgment which is not a lien on the homestead.[13] A conveyance of the homestead property by the husband to the wife will not affect its homestead character.[14] The giving of notice of the sale of the homestead on execution will not prevent the owner from claiming the same as against a purchaser at such a sale.[15] Rents accruing under a lease of the homestead to a tenant are exempt.[16] And see further as to homestead exemption,[17] and see further.[18]

§ **1052. When it is not exempt.**—The homestead is liable for taxes and subject to mechanic's liens for work, labor or material done or furnished exclusively for the improvement of the same, and the whole or sufficient portion thereof may be sold to pay such claims.[19] A sale of a tract of land of which the homestead constitutes a part, for delinquent taxes on the whole tract, is void.[20] And the homestead right is subordinate to the right of the vendor for his unpaid purchase money.[21] One partner can not acquire a homestead right in real estate belonging to the firm.[22] Nor can a purchaser of a pre-emption claim, until he has obtained his title from the government.[23]

[12] Kaiser v. Seaton, 62-463.
[13] Mudge v. Lanning, 68-641.
[14] Green v. Farrar, 53-426.
[15] Jones v. Blumenstein, 77-361.
[16] Morgan v. Rountree, 88-249; see Clark v. Raymond, 86-661.
[17] Reeseman v. Davenport, 65 N. W., 301; Fordyce v. Hicks, 80-272.
[18] Wells v. Anderson, 66 N. W., 102.
[19] Code, Secs. 2975, 1423; Penn v. Clemans, 19-372.
[20] Steward v. Corbin, 25-144; Brumeister v. Dewey, 27-468.
[21] Christy v. Dyer, 14-438; Cole v. Gill, 14-527; Burnap v. Cook, 16-149; Hyatt v. Spearman, 20-510; Hurley v. Gilchrist, 13-594; Bills v. Mason, 42-329.
[22] Drake v. Moore, 66-58; Hoyt v. Hoyt, 69-174; State v. Cadwell, 79-432.
[23] Le Land v. Day, 45-37.

It is held that when a part of a house and lot owned by the wife and occupied as a homestead, was used by the husband for a saloon, such part was subject to execution for the satisfaction of a judgment against the husband for damages for the unlawful sale of liquors therein.[24] If the homestead right is relied on as against a mortgage, it must be pleaded in the foreclosure proceeding, or it will be lost.[25] When there is an exchange of homesteads, and one of the parties remains temporarily thereafter in his old homestead, his rights are less than and antagonistic to the possession necessary to constitute a homestead.[26]

§ 1053. Same—Of debts contracted prior to its purchase.—The homestead may be levied on and sold for debts contracted prior to its acquisition, but in such cases it can only be sold to supply the deficiency remaining after exhausting the other property of the debtor liable to execution.[27] But the conveyance of a homestead by a husband to his wife will not render it liable for her debts contracted prior to such conveyance.[28] A widow having elected to occupy the homestead for life, and acquiring by inheritance from an heir an undivided share of the reversion, such share will be subject to execution for her debts.[29] The homestead may be sold in satisfaction of a debt for its purchase money, and a mortgage of the husband alone to secure such purchase money is valid.[30] It can only be sold to supply a deficiency remaining after exhausting the other property of the

[24] Arnold v. Gotshall, 71-572; McClure v. Braniff, 75-38.

[25] Haynes v. Meek, 14-320; Collins v. Chantland, 48-241; Larson v. Reynolds, 13-579.

[26] Windle v. Brandt, 55-221.

[27] Code, Sec. 2976; Phelps v. Finn, 45-447; Warner v. Cammack, 37-642; Denegre v. Haun, 14-240; Barhydt v. Bonney, 55-717; Greely v. Sample, 22-338; Hale v. Heaslip, 16-451; Hyatt v. Spearman, 20-510; Elston v. Robinson, 23-208; Green v. Farrer, 53-426; Laing v. Cunningham, 17-510; Brainard v. Van Kuran, 22-261; Sloan v. Waugh, 18-224; Higley v. Millard, 45-586; Bills v. Mason, 42-329; Butler v. Nelson, 72-732; Lamb v. McConkey, 76-47.

[28] White v. Kinley, 92-598.

[29] Strong v. Garrett, 90-100.

[30] Christy v. Dyer, 14-438; Barnes v. Gay, 7-26; Cole v. Gill, 14-527; Burnap v. Cook, 16-149; Hyatt v. Spearman, 20-510; Bills v. Mason, 42-329; Campbell v. McGinnis, 70-589.

debtor liable to execution.[31] But the right to compel a creditor to first exhaust other property does not exist in favor of a third person purchasing the homestead after the execution of the mortgage under which the sale is had.[32] And if one claiming a homestead right seeks to restrain a sale of the homestead on a judgment on a debt for which it is liable, on the ground that the debtor has other property not exempt, which should be first exhausted, he must make that fact appear affirmatively.[33]

The interest of a defendant in the assets of a partnership of which he is a member, must be exhausted before resort can be had to the homestead.[34] The lien of a judgment on an indebtedness contracted prior to the acquisition of the homestead attaches from date of the creation of the indebtedness, and not from the date of the judgment.[35] In case of an exchange of homesteads the new one will be liable for an existing debt for the purchase money of the old one, the liability being transferred by operation of law.[36] And the homestead will be liable to sale for debts previously contracted in another State, after the debtor's other property is exhausted.[37] But when the sheriff on a sale on foreclosure of a mortgage embracing a homestead, first offers the land in forty-acre tracts according to the government subdivisions, and, receiving no bids, offers and sells the whole including the homestead, such sale will not be set aside.[38] The homestead descends to the issue of the owner charged with the debts of the latter which in his lifetime could have been enforced against it only.[39] A judgment against a surviving husband is not a lien upon his homestead rights in the lands of his wife, unless he has aban-

[31] Dilger v. Palmer, 60-117; Equitable L. Ins. Co. v. Gleason, 62-277; Grant v. Parsons, 67-31.

[32] Barker v. Rollins, 30-412; Kemerer v. Bournes, 53-172.

[33] Hale v. Heaslip, 16-451; Stevens v. Myers, 11-183.

[34] Lambert v. Powers, 36-18.

[35] Bills v. Mason, 42-329.

[36] Bills v. Mason, 42-329.

[37] Brainard v. Van Kuran, 22-261; Laing v. Cunningham, 17-510.

[38] Brumbaugh v. Shoemaker, 51-148; Brumeister v. Dewey, 27-468; Eggers v. Redwood, 50-289; and see Smith v. De Kock, 81-535.

[39] Moninger v. Ramsey, 48-368; Kite v. Kite, 79-491; In re Coulson's Estate, 64 N. W., 755; Maguire v. Kennedy, 91-272.

doned them, nor can he create a valid lien thereon by the execution of a mortgage.[40] A delay, by the creditor holding an indebtedness contracted prior to the purchase of, and which is a lien on the homestead, in enforcing it, until all the debtor's other property is disposed of, will not affect his right to sell the homestead.[41] The entry of land under the homestead laws of the United States is a purchase within the meaning of the homestead law.[42] The conveyance of the homestead by the husband to the wife does not render it liable to the debts of the wife contracted prior to such conveyance.[43]

Nor is a judgment recovered against a wife after the husband's death a lien on the homestead which was occupied as such both before and after his death.[44] A failure to plat the premises, or have the same recorded, does not render them liable for debts incurred by the wife after her husband's death.[45] When it does not appear from the judgment itself that the debt was contracted prior to the acquisition of the homestead, that fact may be shown aliunde.[46] When a debt contracted prior to the purchase of the homestead has become barred and is renewed by a new note given subsequent to the acquisition of a homestead, it remains liable.[47] Under the revision, section 2281, it was held that the execution of a mortgage on the homestead by the husband alone to secure a debt contracted prior to its acquisition, created no additional burden so far as the rights of the wife were concerned, but was not valid as to innocent purchasers before judgment on the debt, and the recording thereof did not affect them with notice.[48] The homestead right is equal, if not superior, in dignity, to any other legal or vested right, and should not be disturbed until after a fair sale to the highest bid-

[40] Smith v. Eaton, 50-488; Meyer v. Meyer, 23-359; Butterfield v. Wicks, 44-310.
[41] Denegre v. Haun, 14-240.
[42] Green v. Farrer, 53-426.
[43] Same as No. 42.
[44] Nye v. Walliker, 46-306.
[45] Nye v. Walliker, 46-306; Linscott v. Lamart, 46-312.
[46] Hale v. Heaslip, 16-451; Delevan v Pratt, 19-429; Phelps v. Finn 45-447.
[47] Sloan v. Waugh, 18-224.
[48] Higley v. Millard, 45-586.

der of all the other property subject to execution.[49] It is an interest of a higher nature than dower.[50] A conveyance of the homestead can not be set aside as a fraud on creditors whose claims are not a lien against it.[51] A purchaser of a homestead subject to the lien of a judgment for a debt contracted before its acquisition, takes it subject thereto, and in case of sale of the property thereon has no other right than that of redemption.[52]

§ 1054. When sold for debts created by written contract. — The homestead may be sold on execution for debts created by written contract, executed by the parties having the power to convey, and expressly stipulating that the homestead is liable therefor, but it can not in such cases be sold except to supply the deficiency remaining after exhausting the other property, pledged for the payment of the debt in the same written contract.[53] It is not necessary in the execution of a mortgage on a homestead to describe it as a "homestead" in such conveyance.[54] The homestead can not be subjected to liability for debt upon mere oral agreement.[55] An agreement in a confession of judgment to waive the benefit of exemption laws and permit execution to issue against any property of the debtor including the homestead, is not such a written contract as will subject the homestead to liability.[56] It is held that a wife, by joining in the concluding clause of a deed of trust, did not thereby convey the homestead interest, but only relinquished her dower.[57] In the cases cited below, mort-

[49] Twogood v. Stevens, 19-405; Lay v. Gibbons, 14-334; Linscott v. Lamart, 46-312.

[50] Larson v. Reynolds, 13-582; see Sharp v. Bailey, 14-387.

[51] Altman v. Heiney, 59-654; Roane v. Hamilton, 70 N. W., 181.

[52] Kimball v. Wilson, 59-638.

[53] Code, Sec. 2976; Hale v. Heaslip, 16-451; Twogood v Stevens, 19-405; Lay v. Gibbons, 14-377; Stevens v Myers, 11-185; Foley v. Cooper, 43-376; Dickson v. Chorn, 6-19; Rutt v. Howell, 50-535; Bockhold v. Kraft, 78-661; Blake v. McCosh, 91-544.

[54] Babcock v. Hoey, 11-375; Reynolds v. Morse, 52-155; O'Brien v. Young, 15-5; Van Sickles v. Town, 53-259; Waterman v. Baldwin, 68-255.

[55] Rutt v. Howell, 50-535.

[56] Rutt v Howell, 50-535; Bockhold v Kraft, 78-661; Blake v. McCosh. 91-544.

[57] Sharp v. Bailey, 14-387; Grapengather v. Fejervary. 9-163; Schaffner v. Grutzmacher, 6-137;

gages on homesteads procured by fraud were held void.[58] The provisions of section 2976 of the code do not apply to a third person who purchases the property after the execution of a mortgage thereon, nor afford it in his hands any exemption from sale in satisfaction of the mortgage.[59] When a widow elects to take her distributive share of the deceased husband's estate under the law, and when such share embraces a part or all of the homestead, she does not surrender her right to have the property, other than that set apart to her, first exhausted in payment of a mortgage lien on the whole premises.[60]

It has been held that the homestead is not liable to sale for the satisfaction of a decree for alimony, entered long after the homestead was acquired.[61] Temporary absence of several months leaving the homestead in the possession of a tenant is held not to be an abandonment.[62] The words "other property," in section 2976 of the code, are held to be limited to the property which belonged to the mortgagor at the time of foreclosure, but Justice Beck dissents from this construction of the statute.[63] Where possession of the property as a homestead is taken pending foreclosure proceedings, the wife has no right she could assert against the mortgage; not even to compel plaintiff to first exhaust other property.[64] When a mortgage is executed by a husband on the homestead before marriage, it is a lien prior to any claim the wife may have by such marriage, but she should be made a party in a suit of foreclosure.[65] The right to compel a sale of other property before the homestead is sold, can not be enforced by cross-action, but by special direction in the execution, and may be set up in the answer, or obtained upon a supplemental showing.[66] When a mort-

Westfall v. Lee, 7-12; Larson v. Reynolds, 13-579; Fuller v. Hunt, 48-163; Wilson v. Christopherson, 53-481; Eisenstadt v. Cramer, 55-733; see Reynolds v. Morse, 52-155.

[58] Cutler v. Rose, 35-456; Lay v. Gibbons, 14-377.

[59] Parker v. Rollins, 30-412; Kemerer v. Bournes, 53-172.

[60] Wilson v. Hardesty, 48-515.

[61] Byers v. Byers, 21-268; Whitcomb v. Whitcomb, 42-715.

[62] Robb v. McBride, 28-386; Morris v. Sargent, 18-90.

[63] Dilger v. Palmer, 60-117.

[64] Kemerer v. Bournes, 53-172.

[65] Chase v. Abbott, 20-154.

[66] Barker v. Rollins, 30-412.

gage is given covering the homestead and other land, and afterward a second mortgage is executed on the same land except the homestead, and the second mortgage is foreclosed and lands covered by it sold, the purchaser can not insist that the homestead be first subjected to the payment of the first mortgage.[67] When a homestead was sold under a special execution and the surplus in the sheriff's hands applied on other executions against the defendant, and such executions were upon judgments which could not be enforced against the homestead, such application having been made without objection on the plaintiff's part, he can not recover such surplus in an action against the sheriff.[68] In some cases it is held that equity will not interefere to set aside a sale.[69]

§ 1055. Of the head of the family.—A widow or widower, though without children, will be deemed the head of a family while continuing to occupy the real estate used as a homestead at the time of the death of the husband or wife, and such right will continue to the party to whom it is adjudged in a decree of divorce, during continued personal occupancy.[70] The title to the homestead, on the death of the owner, leaving a widow, vests in the heirs, the right of the widow being limited to that of occupancy.[71] The abandonment of the homestead by the widow, when there are surviving heirs, does not render it liable for debts, other than those which were liens on it before the death of the owner.[72] Nor need the homestead be occupied by the heirs, in such a case, to be protected.[73] A widower without children, acquiring real property, which he occupies as a homestead for himself and mother, who is the only other member of his family, is the head of the family.[74] Where a divorce was granted the wife, and she was given the

67 Equitable Life Ins. Co. v. Gleason, 62-277.
68 Brumbach v. Zollinger, 59-384.
69 Sigerson v. Sigerson, 71-476.
70 Code, Sec. 2973; Floyd v. Mosier, 1-512.
71 Johnson v. Gaylord, 41-362.
72 Same as No. 71.
73 Same as No. 71.
74 Parsons v. Livingstone, 11-104.

custody of the children, that does not render the homestead remaining in the husband's possession liable for his debts.[75] A widow can not enjoy both dower and homestead rights in her deceased husband's property.[76] And it seems that occupancy of the homestead will often be deemed an election to take it in lieu of dower.[77] After the death of either husband or wife the survivor has the right to occupy the whole homestead, without regard to which of them had the legal title, or whether or not there was issue.[78]

§ 1056. Of conveyance, incumbrance, judgments, etc. — A conveyance or incumbrance of the homestead, or a contract to convey or encumber it, by the owner is of no validity if the owner is married, unless the husband and wife join in and sign the same joint instrument.[79] But a conveyance of all the real estate owned at the time by the grantors (husband and wife), without more particular description, also covers the homestead.[80] And an agreement by the husband to convey the homestead, which is not concurred in by the wife, is void.[81] No damages are recoverable for breach of a contract made by a husband alone to convey the homestead.[82] Abandonment of the homestead will not affect the wife's rights, except to render it liable to the husband's debts, and the assignee of a bond taking posses-

[75] Woods v. Davis, 34-264.

[76] Meyer v. Meyer, 23-359; Butterfield v. Wicks, 44-310.

[77] Stevens v. Stevens, 50-491; Cunningham v. Gamble, 57-46; Conn v. Conn, 58-747; Butterfield v. Wicks, 44-310; Holbrook v. Perry, 66-286; Smith v. Zuckmeyer, 53-14.

[78] Burns v. Keas, 21-257.

[79] Code, Sec. 2974; Lunt v. Neely, 67-97; Burnett v. Mendenhall, 42-296; Stinson v. Richardson, 44-373; Harsh v. Griffin, 73-608; Lunt v. Neeley, 67-97; Rogers v. McFarland, 89-286; Higley v. Millard, 45-586; Garlock v. Baker, 46-334; Cowgell v. Warrington, 66-666; Harding v. Des Moines Nat'l Bk., 81-499; Woolcut v. Lerdell, 78-668; Bolton v. Oberne, 79-278; Blake v. McCosh, 91-544; Drake v. Moore, 66-58; Belden v. Younger, 76-567; Guion v. Giller, 70 N. W., 201.

[80] Waterman v. Baldwin, 68-255; see Babcock v. Hoey, 11-375.

[81] Clay v. Richardson, 59-484; Wilson v. Christopherson, 53-481; Spoon v. Van Fossen, 53-494; Williams v. Swetland, 10-51; Larson v. Reynolds, 13-579; Burnap v. Cook, 16-149; Burnett v. Mendenhall, 42-296; Allen v. Bay, 9-509; Yost v. Devault, 9-60; Eli v. Gridley, 27-376; Stinson v. Richardson, 44-373; Clark v. Evarts, 46-248; Garlock v. Baker, 46-334; Anderson v. Culbert, 55-233.

[82] Barnett v. Mendenhall, 42-296; Cowgell v. Warrington, 66-666; see Downer v. Rodenbaugh, 61-269.

sion under an assignment, in which the wife did not join, was held accountable for rents and profits, and entitled to compensation for improvements.[83] The record of an instrument incumbering the homestead imparts no notice to subsequent purchasers, unless the instrument was concurred in and signed by both husband and wife.[84] A conveyance of the homestead which is void will be set aside at the suit of the wife, in which the husband is joined as co-plaintiff.[85] It is held that a license to remove minerals from land occupied as a homestead, when its use as a homestead is not impaired thereby, may be given by the husband alone, when he is the owner;[86] so it is held that the husband may make a valid conveyance of the right of way over the homestead without the wife's concurrence or signature to the deed, the husband being the owner, when such conveyance will not defeat the substantial enjoyment of the homestead as such.[87] A wife may ratify a void conveyance of her homestead in all cases when a similar deed of other property could be ratified by assent of the parties express or implied from their acts.[88] But a mere verbal assent will not amount to such ratification.[89] A contract for the conveyance of the homestead by a married man which is not concurred in by his wife is void, and can not be enforced, even though the consideration has been paid.[90] The rights of the wife in the homestead are such that she can redeem from a tax sale or an execution sale of it.[91] A mortgage given for the purchase money of the homestead by the husband alone is good and it may be renewed by him without the wife's joining therein.[92] If the wife actually

[83] Stinson v. Richardson, 44-373; see Pelan v. De Bevard, 13-53.

[84] Higley v. Milliard, 45-586.

[85] Eli v. Gridley, 27-376.

[86] Harkness v. Burton, 39-101.

[87] C. S. W. R. Co. v. Swinney, 38-182; Ottumwa, C. F. & St. P. Ry. Co. v. McWilliams, 71-164.

[88] Spafford v. Warren, 47-47; see Clark v. Evarts, 46-248; Corbin v. Minchen, 81-682; Seiffert & Wiese Lumber Co. v. Hartwell, 63 N. W., 333.

[89] Downer v. Rodenbaugh, 61-269; Stinson v. Richardson, 44-373; Anderson v. Culbert, 55-233, and see Clay v. Richardson, 59-483.

[90] Anderson v. Culbert, 55-233.

[91] Adams v. Beale, 19-61; Byers v. Johnson, 89-278.

[92] Chrysty v. Dyer, 14-38; Mahon v. Cooley, 36-479; see Burnap v. Cook, 16-149.

sign an instrument of conveyance or incumbrance of the homestead she will not thereafter be permitted to dispute its validity on the ground that she was ignorant of its contents, or that she was induced to do so by fraud, or deception of her husband, unless it be shown that the grantee, or mortgagee, had knowledge of the same.[93] A conveyance of the homestead from the husband to the wife will not vest her with such title that she alone can make a valid conveyance thereof.[94] A mortgage to which the concurrence of the wife is obtained by duress is void.[95] An express agreement on the part of a wife to convey a homestead will not bind her if not in writing.[96] The subsequent adoption of property as a homestead will not affect conveyances previously made.[97] And when leased premises are occupied as a homestead the husband alone can not make a valid assignment of such lease.[98]

And the same is true where it is held under a contract of purchase.[99] If the wife is insane when she joins in the conveyance of the homestead it will be invalid.[1] The wife may join in a mortgage of the homestead for the payment of her husband's debts, or to secure their joint note.[2] It is held that when one takes possession of a homestead under a void transfer, but in good faith, and makes improvements which are proper, he is entitled to an allowance for the same, but whether the wife, who in such case attempted to convey the homestead, can recover rents and profits, quære.[3] If the title to the homestead has its inception in fraud, the homestead character can not be set up as against the claim of the one from whom it was obtained.[4] A judgment defendant who is

[93] Edgell v. Hagens, 53-223; Van Sickles v. Town, 53-259; Ætna L. Ins. Co. v. Franks, 53-618; Sawyer v. Perry, 62-238; see Johnston v. McPherran, 81-230.

[94] Spoon v. Van Fossen, 53-494; Harsh v. Griffin, 72-608.

[95] 1st Nat'l Bk. v. Bryon, 62-42.

[96] Anderson v. Culbert, 55-233; Clay v. Richardson, 59-483; Downer v. Rodenbaugh, 61-269; Stinson v. Richardson, 44-373.

[97] Yost v. Devault, 3-345.

[98] Phelan v. De Bevard, 13-53.

[99] Drake v. Moore, 66-58.

[1] Alexander v. Vennum, 61-160; see Abbott v. Creal, 56-175.

[2] Rock v. Kreig, 39-239; Low v. Anderson, 41-476.

[3] Stinson v. Richardson, 44-373.

[4] Muir v. Bozarth, 44-499.

a surety for his co-defendant may show that the judgment is for a debt antedating the acquisition of the homestead.[5] Creditors whose claims are not a lien on the homestead can not have the conveyance of it set aside.[6] Nor will a voluntary conveyance of a homestead be fraudulent as to creditors who have no lien thereon.[7] The law regarding homestead has, it is held, no application in a suit for divorce and alimony, and an attachment may issue in such cases against the homestead.[8] The wife will not be affected by a suit foreclosing a mortgage against the homestead to which she is not a party,[9] but her interest in a homestead covered by a mortgage executed by the owner before marriage will be junior to such mortgage, but she should be made a party to a suit foreclosing such mortgage to cut off her dower right.[10] Ordinarily one will be precluded from setting up a homestead right, or a right to the proceeds thereof, who fails to do so when the mortgage is foreclosed, or when he consents to the application of the surplus on such sale to the payment of certain debts, or when it is sold on a judgment for alimony.[11] The invalidity of a mortgage on a homestead executed by the husband alone, may be set up by a junior mortgagee against a prior mortgage.[12] The provisions of the code, section 4292, do not apply in case of homesteads.[13] The debtor can not enjoin the sale of the homestead on execution on the ground that his other property has not been exhausted unless he avers that he has other property.[14] Nor can he complain that such other property is not first exhausted when he makes no objection to the

[5] Delevan v. Pratt, 19-429.

[6] Aultman v. Heiney, 59-654; Payne v. Wilson, 76-377; Beyer v. Thoeming, 81-517; Wells v. Anderson, 66 N. W., 102.

[7] Delashmut v. Trau, 44-613; Officer v. Evans, 48-557; Butler v. Nelson, 72-732; Wheeler & Wilson Mfg. Co. v. Bjelland, 66 N. W., 885.

[8] Code, Sec. 3178; Daniels v. Morris, 54-369.

[9] Burnap v. Cook, 16-149.

[10] Chase v. Abbott, 20-154; Larson v. Reynolds, 13-579; see Goodrich v. Brown, 63-247.

[11] Larson v. Reynolds, 13-579; Haynes v. Meek, 14-320; Collins v. Chantland, 48-241; Brumbaugh v. Zollinger, 59-384; Hemenway v. Wood, 53-21.

[12] Allen v. Bay, 9-509.

[13] Grant v. Parsons, 67-31.

[14] Stevens v. Myers, 11-183; Owens v. Hart, 62-620.

sale, having notice thereof.[15] When a husband has contributed a portion of the purchase price of a homestead, the title of which is in his wife, creditors of the husband, whose claims antedate the acquisition of the homestead, may subject it to the satisfaction of such claims to the extent of his contribution thereto.[16] The earnings of a wife not derived from her separate property or business, but acquired in the management of family affairs, are not her separate property so that she can invest them in her homestead and have it exempt from the debts to which such homestead would be liable in the hands of her husband.[17] Minor children have no such interest in the homestead of their parents during their lifetime, as the law will enforce against the contracts, or acts of such parents.[18] In case a homestead is conveyed to the son of the owners, subject to the right of either of them to occupy it during life, and the husband, surviving, resided until his death with his son, who did not reside on the homestead, the son did not acquire the property as a homestead.[19]

§ 1057. Of the extent of the homestead.—The homestead must embrace the house used as a home by the owner thereof, and if he has two or more houses thus used by him at different times and places, he may select which he will retain as a homestead.[20] An actual removal from the homestead with no intention of returning will be a waiver or forfeiture of the homestead right as against purchasers or creditors, though no new homestead be gained.[21] If, however, such removal is but temporary and third persons have not been led to believe that the property was not a homestead, by the owner out of possession, and to act on such belief by altering their condition, the homestead right will still subsist.[22] In

[15] Foley v. Cooper, 43-376; see McCleary v. Ellis, 54-311.

[16] Croup v. Morton, 49-16, 53-599; Hamill v. Henry, 69-752; see First Nat'l Bk. v. Hollinsworth, 78-575.

[17] Hamill v. Henry, 69-752.

[18] Collins v. Chantland, 48-241.

[19] Reifenstahl v. Osborne, 66-567.

[20] Code, Sec. 2977; Fyffe v. Beers, 18-4.

[21] Fyffe v. Beers, 18-4.

[22] Davis v. Kelley, 14-523; Des Moines v. Sargent, 18-90; Bradshaw v. Hurst, 57-745.

these cases, each one must to a great extent be decided on its own peculiar facts.[23] Stronger and clearer proof of the abandonment of a homestead is required, where the lien sought to be enforced against it arose during the actual occupancy, than where it arose when the owner was not in actual possession.[24] Length of absence from the homestead is not conclusive evidence of abandonment, but is an important fact to be taken into consideration. For a discussion of the facts in particular cases with reference to abandonment the reader is referred to cases under the section treating of abandonment. A homestead law in force at the date of a contract becomes a part of it, and a repeal of the law does not impair the right of exemption.[25] In order to constitute a homestead there must be a house situated on real estate which is used as a home.[26] But the homestead character will not be lost by the property being rented to a tenant.[27] Sometimes portions of a building used as a store are exempt from execution, while other portions of the same building are not exempt.[28] And it is held that when a wife owning a homestead left it and removed with her husband to another State for a temporary purpose, the intention to return will be presumed to continue until the contrary is shown.[29] Two tracts of land belonging, the one to the husband and the other to the wife, may together constitute the homestead.[30] Abandonment of the homestead may be shown without proof of the acquisition of a new homestead.[31]

§ 1058. Same—Of several lots.—The homestead may contain one or more contiguous lots or tracts of land, with the buildings thereon, and other appurtenances,

[23] Fyffe v. Beers, 18-4; Dodds v. Dodds, 26-311; Stewart v. Brand, 23-477.

[24] Davis v. Kelley, 14-523; Dunton v. Woodbury, 24-74.

[25] Bridgmen v. Wilcut, 4 G. Gr., 563; Coriell v. Ham, 4 G. Gr., 455.

[26] Windle v. Brandt, 55-221; see Neal v. Coe, 35-407.

[27] Rob v. McBride, 28-386.

[28] Rhodes v. McCormick, 4-368; McCormick v. Bishop, 28-233; see Wright v. Ditzler, 54-620; Mayfield v. Maasden, 59-517; Johnson v. Moser, 66-536; Smith v. Quiggans, 65-637.

[29] Bradshaw v. Hurst, 57-745.

[30] Lovell v. Shannon, 60-713.

[31] Cotton v. Hamil, 58-594.

subject to the limitations below stated. It must in no case embrace different lots or tracts, unless they are contiguous, or unless they are habitually and in good faith used as a part of it.[32]

If within a city or town, the homestead must not exceed one-half an acre in extent, otherwise it must not embrace, in the aggregate, more than forty acres; but if, when thus limited, in either case, its value is less than five hundred dollars, it may be enlarged until its value reaches that amount.[33] But the extent of a homestead situated in a town will not be limited to a half acre, unless the territory embracing it has been platted.[34] There is no limit to the value of the building used as a homestead, but only on the land.[35]

When a husband and wife are occupying as a homestead more land than the law exempts, and the homestead has not been platted as required by statute, a mortgage executed by the husband alone on any of the land is void; but a judgment rendered on a debt intended to be secured may be enforced against the excess of land so occupied, provided the homestead is marked off.[36] The value of the homestead does not affect the right of the owner to its exemption. It is a right conferred by statute on rich and poor alike. Nor will a homestead outside of a town plat be affected by the town being so extended as to include it.[37]

§ 1059. Same—What it embraces.—A homestead may embrace leasehold property as well as a freehold, and it may attach to land in possession of a vendee under a contract when the legal title is in the vendor,[38] but it

[32] Code, Sec. 2977; Reynolds v. Hull, 36-394; Henderson v. Rainbow, 76-320; First Nat'l Bk. v. Hollingsworth, 78-575; Mann v. Corrington, 61 N. W., 409; Johnson v. Moser, 72-523; McClure v. Braniff, 75-38; Arnold v. Gotshall, 71-572; Cass County Bk. v. Weber, 83-6; Woolcut v. Lerdell, 78-668; Groneweg v. Beck, 62 N. W., 31.

[33] Code, Sec. 2978; Thorn v. Thorn, 14-49; Yates v. McKibben, 66-357; Boot v. Brewster, 75-631; Frost v. Rainbow, 85-289; First Nat'l Bk. v. Hollinsworth, 78-575.

[34] McDaniel v. Mace, 47-509; Finley v. Detrick, 12-516; Truax v. Pool, 46-256; Beyer v. Thoeming, 81-517.

[35] Rhodes v. McCormick, 4-368.

[36] Goodrich v. Brown, 63-247; see Helfenstein v. Cave, 3-287, and 6-374.

[37] Finley v. Deitrick, 12-516.

[38] Pelan v. De Bevard, 13-53; Lessell v. Goodman, 66 N. W., 917.

must not embrace more than one dwelling house, or any other building, except such as are properly appurtenant to the homestead as such; but a shop or other building situated thereon and used and occupied by the owner in the prosecution of his own ordinary business, and not exceeding three hundred dollars in value, may be deemed appurtenant to such homestead.[39] But it will not embrace buildings appurtenant and which are leased to others.[40] A barn or stable used for ordinary purposes in connection with a homestead is exempt without regard to its value, as property appurtenant to the homestead.[41] But a building or a portion of a building used as a place for the illegal sale of intoxicating liquors will not be exempt as a part of the homestead.[42] And rooms used for business purposes may lose their homestead character, except as they are appurtenant to the homestead.[43]

§ **1060. Of selecting and platting the homestead.** —The owner, husband or wife, may select the homestead and cause it to be platted, as hereafter set forth, but a failure to do so does not leave the homestead liable, nor prevent the owner from claiming more than forty acres, and a selection by the owner will control.[44] The property occupied by the parties as a homestead will be regarded and treated as such where the husband and wife fail to select their homestead.[45] The plat must be recorded to constitute a valid selection of a homestead under the statue.[46] Where an officer holds an execution against a homestead and other lands, and the occupants fail to select and plat a homestead, it is the duty of the officer to do so, and it seems a failure to do so and a sale en gross of the property will be void.[47] And he

[39] Code, Sec. 2978; Rhodes v. McCormick, 4-368; Smith v. Quiggans, 65-637.

[40] Kurz v. Brusch, 13-371.

[41] Wright v. Ditzler, 54-620.

[42] Arnold v. Gotshall, 71-572.

[43] McClure v. Braniff, 75-38.

[44] Code, Sec. 2979; Nye v. Walliker, 46-306; Linscott v. Lamart, 46-312; Green v. Farrar, 53-426.

[45] Alley v. Bay, 9-509.

[46] White v. Rowley, 46-680; Lowell v. Shannon, 60-713; Martin v. Knapp, 57-336; Owen v. Hart, 62-620.

[47] Code, Sec. 2979; Visek v. Doolittle, 69-602; Linscott v. Lamart, 46-312; Owens v. Hart, 62-620; White v. Rowley, 46-680; Lovell v. Shannon, 60-713.

must first exhaust other property, if there be any. But it is held that the requirement of the statute, code of 1873, section 1998, that the officer must select and plat a homestead in case the parties fail so to do, applies to special executions as well as to a general execution, and if a sale is made without platting the homestead it is voidable only.[48] The old statute expressly required the officer, in certain cases, to plat the homestead, and the above decisions were made under that law, now the statute contains no such provision, but in lieu thereof it is provided that upon the application of any creditor of the owner of a homestead, or of any other interested person, to the district court, such court must hear the cause upon the proof offered and fix and establish the boundaries of the homestead, and its judgment must be filed with the county recorder and recorded in his office.[49] In an execution sale of the interest of a tenant in common it is not proper for the officer to set off any specific portion of the property as a homestead.[50] But where a tract including the homestead was sold in a lump after being first offered in forties, it was held that no prejudice resulted from a failure of the sheriff to mark off and plat the homestead.[51] The homestead must be marked off by fixed and visible monuments, and in giving a description thereof, the direction and distance of the starting point from some corner of the dwelling house must be stated; the description and plat must then be filed and recorded by the recorder of the county in a book to be called a "homestead book," which must be provided with a proper index.[52]

If the undivided interest of a tenant in common be sold, in land in which he has a homestead interest, the officer should not set off any portion as his homestead.[53] The selection and platting of the homestead may be in the following form:

[48] Newman v. Franklin, 69-244. Martin v. Knapp, 57-366.
[49] Code, Sec. 2980.
[50] Farr v. Reilly, 58-399.
[51] Brumbaugh v. Zollinger, 59-384.
[52] Code, Sec. 2979.
[53] Farr v. Reilly, 58-399.

FORM OF SELECTING AND PLATTING HOMESTEAD.

I, ———, being a resident of ——— county, Iowa, and the head of a family, and now owning and residing on the following described real estate in said county (here describe land), do hereby select and plat as my homestead the following portion of said land, viz.: Beginning at a point ——— rods due west of the northwest corner of my dwelling house, on the above described land and at the (here insert place in the section) thence north ——— rods, thence east ——— rods, thence south ——— rods, thence west ——— rods to the place of beginning, as will more fully appear in the plat below, wherein the points above described are designated by fixed and visible monuments, and said plat is made a part hereof (here make plat showing location of dwelling house and the lines and distances above mentioned and showing monuments set at points mentioned in above description).

———.

The above form of description sufficiently indicates what is necessary. The plat must be filed and recorded.

FORM OF NOTICE TO PLAT HOMESTEAD.

To (names of owners):

You, and each of you, are hereby notified that by virtue of an execution directed to me from the clerk of the district court of ——— county, Iowa, dated the ——— day of ———, 18—, that I did on the ——— day of ———, 18—, levy upon the following described property situated in ——— county, Iowa, to wit (here describe the land levied on), and I will offer the same for sale at the court house in ———, Iowa, on the ——— day of ———, 18—, and you are requested to select, plat and record a homestead from the above described real estate on or before the ——— day of ——— 18—, and in case you refuse, or neglect so to do, I shall have said homestead selected and platted as provided by law.

Dated at ———, Iowa, the ——— day of ———, 18—.

———, sheriff of ——— county, Iowa.

The application of the creditor to the court to fix and establish the boundaries of the homestead may be in the following form:

FORM OF APPLICATION OF A CREDITOR TO THE DISTRICT COURT TO FIX AND ESTABLISH THE BOUNDARIES OF THE HOMESTEAD.

In the matter of the application of ———, a judgment creditor of ——— and ——— for an order fixing and establishing the boundaries of the homestead in the land of ——— and ———.

Your petitioner shows to the court that the defendants ——— and ——— are the fee simple owners of the following described real estate (here describe it), situated in the county of ———, Iowa, and consisting

of ——— acres. That they are entitled to have a homestead set apart therein. That your petitioner holds a judgment against said ——— and ——— which is in full force and unpaid, and which will be a lien upon all of said land not set apart as a homestead. Petitioner therefore asks that this court fix and establish the boundaries of said homestead in said land and that due notice be given the owners of said land of the time fixed for the hearing of this application. ———,

Attorney for petitioners.

This form can readily be varied in case the petitioner has such other interest as to entitle him to make such an application. The statute does not expressly provide for a notice of the hearing of an application to the court to fix and establish the boundaries of a homestead, but such a notice should be given and the court should fix and determine the time of notice.

Such notice may be in the following form:

FORM OF NOTICE TO OWNERS OF THE HEARING OF AN APPLICATION BY THE DISTRICT COURT TO FIX AND ESTABLISH THE BOUNDARIES OF THE HOMESTEAD.

To (names of owners).

You, and each of you, are hereby notified that ——— (a judgment creditor of yours, or if a person otherwise interested so as to entitle him to make such application, state what said interest is) has made application to the district court of ——— county, Iowa, asking said court to fix and establish the boundaries of your homestead in the (here describe the land) and said application will come on for hearing before said court at the court house in ——— on the ——— day of ———, 18—, at ——— o'clock a. m., at which time and place you can offer such proof as may be proper touching the location of said homestead.

Dated this ——— day of ———, 18—.

———,

Clerk of the district court of ——— County, Iowa.

The entry of judgment fixing and establishing the boundaries of said homestead may be in the following form:

FORM OF ENTRY OF JUDGMENT FIXING AND ESTABLISHING THE BOUNDARIES OF A HOMESTEAD.

In the matter of the application of ———, a judgment creditor of ——— and ——— for fixing and establishing the boundaries of a homestead in the land of ——— and ———.

And now to wit, on this ——— day of ——— 18—, this cause came on to be heard before the court on the application of ——— a creditor of ——— and ——— for the court to fix and establish the boundaries of the

homestead of said ——— and ——— in the following described real estate (here describe the whole tract out of which the homestead is to be carved), and it appearing to the court that due and legal notice has been served of the hearing of said application as directed by the court has been served upon the aforesaid owners of said land, and the court having heard all of the proofs offered by all of the parties, and being fully advised in the premises, it is hereby ordered that the limits of the boundaries of said homestead are fixed and established as follows: (here insert the finding of the court which must accurately describe the homestead as provided in section 2979 of the code.) This entry must be filed and recorded in the recorder's office.

It being perhaps a matter of doubt, as to whether under the present law an officer must plat a homestead in any case before proceeding to levy, I have retained the forms applicable to such cases and also referred to the cases touching that matter.[54]

§ 1061. Of changing the limits of the homestead. —The owner may from time to time change the limits of his homestead by changing the metes and bounds, as well as the record of the plat and description, or may change it entirely or vacate it, but such changes will not prejudice conveyances or liens made or created previously thereto, and no such change of the entire homestead made without the concurrence of the husband or wife, will affect the rights of the one not concurring or those of the children.[55]

The new homestead to the extent in value of the old is exempt from execution in all cases where the old or former homestead would have been exempt, but in no other, nor in any greater degree.[56] A change of homestead by a judgment debtor from one parcel of land to another, can not displace or affect the liens of judgments rendered before such change.[57] It has been held that when a judgment debtor changed his homestead from premises on a town lot to a tract of land not exceeding forty acres, and of no greater value than the former, that

[54] Bradshaw v. Renick, 90-409; Henderson v. Rainbow, 76-320; Smith v. De Kock, 81-535.

[55] Code, Sec. 2981; Pearson v. Minturn, 18-36.

[56] Code, Sec. 2981; Furman v. Dewell, 35-170; Marshall v. Rudick, 28-487; Sargent v. Chubbuck, 19-37; Thompson v. Rogers, 51-333; White v. Kinley, 92-598; Atkinson v. Hancock, 67-452.

[57] Elston v. Robinson, 21-531.

the new homestead was exempt, the lien of the judgment thereon being transferred to the old homestead.[58] Where there is an absolute abandonment of the premises, they become, like other property, subject to be seized and sold under execution. If the homestead is purchased in part with funds derived from the sale of a former one, and partly from other sources, and the new homestead does not exceed in value the old one, the new one will be exempt from debts contracted during and subsequent to the occupancy of the old one.[59] And a reasonable time will be allowed in which to purchase the new homestead.[60] But where the proceeds of an Iowa homestead are invested in one in another State, and it is afterward sold and the proceeds invested in a third homestead in Iowa, it will not be exempt as against a debt contracted before it was purchased, as the homestead fund by the investment in another State loses its distinctive character.[61] And when the debtor holding a homestead exempt from execution for his debts exchanges the same for other property which he procured to be conveyed directly to his wife, such property did not become subject to the payment of his debts and the conveyance to the wife was not fraudulent.[62] Section 2981 of the code applied.[63] Money arising from the sale of a homestead is not exempt from garnishment, unless the sale was in pursuance of a design to purchase another homestead.[64] And the same is true as to the claims of creditors generally on the fund arising from the sale of the homestead.[65] If, however, the proceeds of a homestead are, with the knowledge and consent of the wife, invested in the husband's business, he can not thereafter procure a new homestead which will be exempt from debts already contracted in such business.[66]

[58] Furman v. Dewell, 35-170; see Pearson v. Minturn, 18-36.

[59] Benham v. Chamberlin, 39-358; Lay v. Templeton, 59-684.

[60] Benham v. Chamberlin, 39-358; State v. Geddis, 44-537; Cowgell v. Warrington, 66-666; Mann v. Corrington, 61 N. W., 409.

[61] Rogers v. Raisor, 60-355; Dalton v. Webb, 83-478.

[62] Jones v. Brandt, 59-332.

[63] Atkinson v. Hancock, 67-452.

[64] Huskins v. Hanlon, 72-37.

[65] Schuttloffel v. Collins, 67 N. W., 397.

[66] Peninsular Stove Co. v. Roark, 63 N. W., 326.

§ 1062. Of pleading and practice.—It is incumbent on the party relying on the fact that his homestead was procured with the proceeds of a previous homestead and consequently exempt, to establish such fact. The party seeking to subject it to his claim makes a prima facie case by showing that his claim antedates the purchase of the homestead.[67] And a prima facie case of abandonment is made when the plaintiff avers that the party has abandoned the homestead and is a non-resident, and a resident of another State, and the burden is on the defendant to set up his intention to return, if he has such, in his answer.[68] The homestead exemption pertains to the remedy, and is regulated by the law of such place.[69] When the surrender of the homestead is voluntary, the burden is on the one claiming the homestead to show his intention to return.[70] The admission of evidence regarding surrendering the homestead and its effect in a contest between creditors discussed.[71]

§ 1063. Of dispute as to what constitutes the homestead—How determined.—In case of a disagreement between the owner and any person adversely interested as to whether any lands or buildings are properly a part of the homestead, the sheriff having the execution must, at the request of either party, summon nine disinterested persons, having the qualifications of jurors, and the parties, commencing with the owner of the homestead, must in turn strike off one person each until only three of the nine remain. Should either party fail to do so, the sheriff may act for him.

These three must then proceed as referees to examine and ascertain all the facts of the case, and must report the same, with their opinion thereon, at the next term of the court from which the execution or other process may have issued.[72] The purpose of this is not to make a selection of a homestead, but to enable the court to de-

[67] First Nat'l Bk. v. Baker, 59-197; Paine v. Means, 65-547.
[68] Orman v. Orman, 26-361.
[69] Helfenstein v. Cave, 3-287.
[70] Newman v. Franklin, 69-244.
[71] Van Bogart v. Van Bogart, 46-359.
[72] Code, Secs. 2982-2983.

termine whether certain land, claimed to be exempt, is in fact so.[73] And the section contemplates a case where homestead rights are conceded but there is a controversy as to where the line is to be drawn between what is exempt as a part of the homestead and what is not.[74]

§ 1064. Of the action of the court, etc.—The court to which the report is made may, at its discretion, refer the whole or any part of the matter back to the same, or to other referees selected in the same manner, or as the parties otherwise agree, giving them directions as to the report required of them.[75] The referees should take and subscribe an oath, before proceeding to discharge their duties, which may be in the following form:

FORM OF OATH OF REFEREES.

Title, }
Venue. }

State of Iowa, }
——— County. } ss.

We (here insert names of referees), residents and legal voters in said county, having been duly appointed referees, as provided by law in such cases, do solemnly swear (or affirm) that we will well and faithfully examine and ascertain all the facts in dispute between the parties in the above entitled case, in regard to whether any of the land or buildings levied on (or about to be levied on) by the sheriff under an execution in said cause, are properly a part of the homestead of the defendant therein, and will make due report to said court at the next term thereof.

(It must be signed by all the referees and sworn to.)

When the court is sufficiently advised in the case it must make its decision and may, if expedient, direct the homestead to be marked off anew, or a new plat and description to be made and recorded, and may take such further steps in the premises as in its discretion may appear expedient to attain the objects of the statute; it must also award costs as nearly as may be in accordance with the practice observed in other cases.[76] The extent or appurtenances of the homestead as thus established, may be called in question in like manner whenever a

[73] White v. Rowley, 46-680; McCrackin v. Weitzel, 70-723.
[74] McCrackin v. Weitzel, 70-723.
[75] Code, Sec. 2983.
[76] Code, Sec. 2983.

change in value or circumstances justify such new proceeding.[77] These provisions only apply when more than forty acres is claimed as a homestead.[78]

§ 1065. Of the occupation of the homestead by the survivor, etc.—On the death of either husband or wife, the survivor, whether the owner of the homestead or not, may continue to possess and occupy it until it is otherwise disposed of according to law.[79] But, as has been seen, this right in the widow is that of occupancy alone, the title vesting in the heirs.[80] The right of occupancy carries with it the right to control or dispose of the rents and profits.[81]

Nor does the marriage of a wife with a second husband deprive her of the right conferred, of occupancy and disposing of the rents and profits, or entitle the heirs at law of the first husband to partition.[82] But she can not, in case of such second marriage, when the title was in the deceased husband, abandon, sell, mortgage or convey the homestead; and if she does, the heirs of the deceased are entitled to a partition of it.[83] The surviving husband or wife must elect between the retaining of the homestead and of dower, and the survivor can not have both.[84] Section applied.[85] A judgment against a surviving husband is not a lien on his homestead rights in the real property of his deceased wife, unless he has abandoned the same, nor can he create any valid lien thereon by mortgage.[86] Damages may be allowed the survivor in possession of the homestead for an injury done to her homestead right.[87] The wife's interest in the homestead property is present fixed and substantial,

[77] Code, Sec. 2984.
[78] Green v. Farrer, 53-426.
[79] Code, Sec. 2985; Bournes v. Keas, 21-257; Orman v. Orman, 26-361; Nicholas v. Purczell, 21-265.
[80] Johnson v. Gaylor, 41-362; Stevens v. Stevens, 50-491.
[81] Floyd v. Moser, 1-512.
[82] Nicholas v. Purczell, 21-265; Bournes v. Keas, 21-257; Dodds v. Dodds, 26-311.
[83] Size v. Size, 24-580; see Butterfield v. Wicks, 44-310.
[84] Stevens v. Stevens, 50-491; Whitehead v. Conklin, 48-478; Butterfield v. Wicks, 44-310.
[85] Burdick v. Kent, 52-583; Bradshaw v. Hurst, 57-745; Mahaffy v. Mahaffy, 63-64; Darrah v. Cunningham, 72-123.
[86] Smith v. Eaton, 50-488; see Butterfield v. Wicks, 44-310.
[87] Cain v. C., R. I. & P. R. Co., 54-255.

and generally not affected by any omission, default or neglect of the husband, and within the meaning of a former statute it is real property.[88]

§ 1066. Of the election to hold the homestead in lieu of dower. — The survivor cannot have both dower and homestead.

It is held that the survivor may have a reasonable time in which to make an election whether to retain the homestead or to take the distributive share, and during said time may occupy and possess the homestead and receive the rents and profits thereof.[89] What acts will be treated as sufficient to show an election must depend upon the facts in each case.

It is said that occupancy of the realty as a homestead will be considered as an election to hold it as such.[90]

An occupancy of the homestead for ten years without making any claim to have dower admeasured is regarded as an election to take the homestead.[91] So continued occupancy as a survivor will be deemed an election,[92] at least until the distributive share of such survivor is set apart.[93]

But the survivor cannot be compelled to make an election until the question of the indebtedness of the estate is determined.[94] Nor will the fact of occupancy alone defeat the survivor's right to a distributive share as unless the homestead is disposed of the survivor may continue to occupy it.[95]

Where under the provisions of a will the widow is entitled to a life estate which may include the homestead, occupation of it will not be treated as an election to take it in lieu of dower,[96] and the same is true when the occupancy is in accordance with the provisions of a devise.[97]

[88] Adams v. Beale, 19-61; Chase v. Abbott, 20-154; Eli v. Gridley, 27-376.

[89] Cunningham v. Gamble, 57-46; Egbert v. Egbert, 85-525.

[90] Butterfield v. Wicks, 44-310.

[91] Conn v. Conn, 58-747.

[92] Holbrook v. Perry, 66-286; Stephens v. Hay, 66 N. W., 1048.

[93] McDonald v. McDonald, 76-137; Schlarb v. Holderbaum, 80-394.

[94] Thomas v. Thomas, 73-657.

[95] Whited v. Pearson, 87-513.

[96] Hunter v. Hunter, 64 N. W., 656.

[97] In re Franke's Estate, 66 N. W., 918; Blair v. Wilson, 57-177.

Reference is had to the following cases to determine as to what acts will be held to constitute an election.[98]

The homestead right is not extinguished by any act short of a final order setting off the distributive share.[99]

The survivor electing to retain the homestead relinquishes his distributive share, but such relinquishment applies only to the one-third in case there are children or other descendants entitled to inherit and not to the additional portion which the survivor may be entitled to as an heir at law, when there are no children.[1] If a widow is entitled as an heir at law to one-half of her husband's property, the other heirs cannot, in the partition of the realty, insist that she include the homestead in that share.[2]

If the widow's share is set apart to her she will hold it free from the lien of a judgment which is not prior to the original homestead right.[3] Where the widow elects to occupy the homestead and acquires by inheritance from an heir an undivided share of the reversion, such share of the reversion is subject to execution for her debts.[4]

§ 1067. Of the disposal of the homestead.—The partition or setting off the distributive share of a survivor in the real estate of the deceased is such a disposal of the homestead as is contemplated by section 2985 of the code, but the survivor may elect to retain the homestead for life in lieu of such share in the real estate of the deceased. If there be no survivor, the homestead descends to the issue of either the husband or wife, whichever may have held the legal title, according to the rules of descent, unless otherwise directed by will, and it will be held by such issue exempt from any antecedent debts of their parents, or their own, except those of the owner thereof contracted prior to its acquisition.[5]

[98] Stevens v. Stevens, 50-491; Wilcox v. Wilcox, 89-388; Zwick v. Johns, 89-550.

[99] Hornbeck v. Brown, 91-316.

[1] Smith v. Zuckmeyer, 53-14.

[2] Nicholas v. Purczell, 21-265.

[3] Briggs v. Briggs, 45-318; Knox v. Hanlon, 48-252.

[4] Strong v. Garrett, 90-100.

[5] Code, Sec. 2985; Size v. Size, 24-580; Dodds v. Dodds, 26-311; Lorieux v. Keller, 5-196; Parsons

When the wife died without issue, seized of a homestead, which the husband elected to retain, and afterward abandoned the homestead, he was held entitled to one-sixth of the estate as heir at law.[6] The distributive share of a widow in lands owned by her husband, aside from the homestead, should bear its proportionate share of a mortgage indebtedness thereon made by her husband, and in which she joins.[7] The homestead is not liable in the hands of the survivor, or heirs, for funeral expenses, or expenses of the last sickness of the deceased owner.[8]

§ 1068. Of sale or devise of homestead.—If there be no survivor or issue, the homestead may be sold on execution for the payment of any debts to which it might at that time be subjected, if it had never been held as a homestead.[9] And subject to the rights of the surviving husband or wife, the homestead may be devised as other real estate of the testator.[10]

§ 1069. Of the abandonment of the homestead.—The question of abandonment hinges largely on the intention of the parties, and this must be gathered from the facts in each case.

The following acts have been held not to amount to an abandonment: A temporary removal or absence when an intention to return exists.[11] Length of time of absence while not conclusive as to an abandonment may be an important fact in determining the intention to return, especially in the absence of other acts indicating the intention.[12]

Stronger proof of abandonment is required when the

v. Livingston, 11-104; Bournes v. Keas, 21-257; Colton v. Wood, 25-43.

[6] Smith v. Zuckmeyer, 53-14; see Butterfield v. Wicks, 44-310; Meyer v. Meyer, 23-359; Burdick v. Kent 52-583.

[7] Trowbridge v. Sypher, 55-352.

[8] Knox v. Hanlon, 48-252.

[9] Code, Sec. 2986.

[10] Code, Sec. 2987.

[11] Fyffe v. Beers, 18-4; Orman v. Orman, 26-361; Davis v. Kelley, 14-523; Morris v. Sargent, 18-90; Bradshaw v. Hurst, 57-745; Shirland v. Union Nat'l Bk., 65-96; Griffin v. Sheley, 55-513; Zwick v. Johns, 89-550; Repen v. Davis, 72-548; Boot v. Brewster, 75-631; Benbow v. Boyer, 89-494; Ayres v. Grill, 85-720; Jones v. Blumenstein, 77-361.

[12] Dunton v. Woodbury, 24-74; Newman v. Franklin, 69-244.

lien is claimed to have attached during actual occupancy, than when it arises when the owner of the premises was not in the actual possession of them.[13] A homestead may not be abandoned, though the head of the family goes to another State and acquires property there and intends to remove his family there if the family desire to retain the homestead as such.[14]

A conveyance of the homestead by the husband to the wife will not be an abandonment.[15] Nor is a conveyance of both to a third person in trust to be reconveyed to the wife.[16]

But it might be otherwise if the husband conveyed to a third party, who thereafter conveyed to the wife, the occupancy meantime remaining unchanged.[17] A conveyance in the form of a deed which is in fact a mortgage securing money borrowed of the grantee will not affect the homestead.[18]

In the following cases the facts were held to show an abandonment. Where the wife, holding under a voluntary conveyance from her husband, which was void for fraud as to creditors, dies, and the husband and children abandon the homestead.[19] Where the owner leaves the premises and acquires a new home.[20] Where he removes with no intention of returning.[21] Absence for two years without manifesting any intention to return and meantime offering to sell or to trade the property.[22] Where one left the homestead and moved to a town to pursue his profession, with the intention of staying permanently if he could make a living.[23] Where the husband abandoned the homestead, became a citizen of another state and remained there for years with his wife and family having no definite time or plan of return.[24] Where the owner of the homestead removed permanently to his

[13] Davis v. Kelley, 14-523.
[14] Savings Bk. v. Kennedy, 58-454; Lunt v. Neeley, 67-97.
[15] Green v. Farrar, 53-426.
[16] Hugunin v. Dewey, 20-368.
[17] Jones v. Currier, 65-533.
[18] McClure v. Braniff, 75-38.
[19] Gardner v. Baker, 25-343.
[20] Davis v. Kelley, 14-523.
[21] Newman v. Franklin, 69-244.
[22] Dunton v. Woodbury, 24-74.
[23] Kimball v. Wilson, 59-638.
[24] Perry v. Dillrance, 86-424.

new place of residence.[25] Where one removed from his farm to a city and registered and voted in the city after he had made sale of the farm.[26] When the owner directed the sheriff to sell the homestead which he had left three years before and began his action to set aside the sheriff's deed five years after it had issued.[27] Where after a sale of a homestead under a foreclosure of a mortgage, in which the wife had joined, she joined her husband in leasing the premises.[28] For other cases relating to this subject.[29]

[25] Cotton v. Hamil, 58-594.
[26] Conway v. Nichols, 71 N. W., 183.
[27] Wilson v. Daniels, 79-132.
[28] Bradshaw v. Remick; 90-409.
[29] Stinson v. Richardson, 44-373; Painter v. Steffen, 87-171; Givans v. Dewey, 47-414; Windle v. Brandt, 55-221; Van Bogart v. Van Bogart, 46-359; Parsons v. Cooley, 60-268; Sibley v. Lawrence, 46-563; Ditson v. Ditson, 85-276; Woods v. Davis, 34-264; Stewart v. Brand, 23-477; Leonard v. Ingraham, 58-406; Baker v. Jamison 73-698.

CHAPTER LXVI.

OF INJUNCTIONS.

Sec. 1070. Object and purpose of injunctions.
1071. Granted to abate nuisances relating to manufacture and sale of intoxicating liquors.
1072. How actions to enjoin nuisances relating to manufacture and sale of intoxicating liquors should be brought.
1073. Of the application in such actions.
1074. When an injunction will be granted generally.
1075. When an injunction will be refused.
1076. Of parties to the action.
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1078. Same.
1079. Rules governing the granting of injunctions—Powers of the court.
1080. By whom and when a temporary injunction may be granted.
1081. When not granted without notice.
1082. Form and requisites of the petition.
1083. Of the allowance of the writ.
1084. Of the bond.
1085. Of actions on injunction bonds.
1086. Issuance of the writ.
1087. Of vacation and modification of the injunction.
1088. Of dissolution of the injunction.
1089. Relating to pleading and practice.
1090. Violation of injunction—How punished.
1091. Of amendments.

Section **1070. Object and purpose of injunctions.**—A writ of injunction is defined as a "judicial process, operating in personam, and requiring the person to whom it is directed to do, or to refrain from doing, a particular thing. In its broadest sense the process is restorative as well as preventive, and may be used both in the enforcement of rights and in the prevention of wrongs."[1]

[1] High on Injunctions, Sec. 1; McDonogh v. Calloway, 7 Rob. (La.) 442; Childress v. Perkins. Cooke (Tenn.), 87; 2 Story's Equity, Sec. 861.

§ 1071. Granted to abate nuisances relating to the manufacture and sale of intoxicating liquors.—The manufacture of any intoxicating liquors, except as permitted by law, is a nuisance, and may be enjoined and abated by suit in equity.[2] So if any person not holding a permit to sell intoxicating liquors, by himself, his clerk, servant or agent, shall, directly or indirectly, sell or give to any person such liquors, the building or erection, or the ground on or upon which such sale, or keeping with intent to sell, use, or give away intoxicating liquors, is carried on, continued or exists, and the furniture, fixtures, vessels and contents are declared to be a nuisance, and may be abated by an action in equity.[3] And in case of the mixing of any intoxicating liquors with beer or wine or cider, and the selling of the same by any party, or keeping them for sale as a beverage, the buildings and grounds where such liquor is sold, or kept for sale, and the furniture, fixtures and vessels, and the contents, are a nuisance and may be abated by an action in equity.[4]

The keeping of any intoxicating liquors with intent to sell the same, or permit the same to be sold, in violation of law, the buildings and grounds wherein such liquors are sold or kept for sale, and the furniture, fixtures and vessels, and their contents, is a nuisance, and may be abated by an action in equity,[5] and a violation of the law permitting pharmacists to sell intoxicating liquors is a nuisance and when it exists may be abated by an action in equity.[6]

§ 1072. How actions to enjoin nuisances relating to manufacture and sale of intoxicating liquors should be brought.—Such actions may be brought in the name of the State of Iowa, by the county attorney, and it is made his duty, when such nuisance exists, to institute and prosecute an action for its abatement, after he shall have

[2] Code, Secs. 2382, 2405.
[3] Code, Sec. 2405; State v. Waynick, 45-516; Gray v. Steine, 69-124. Lemen v. Wagner, 68-660; Radford v. Thornell, 81-709.
[4] Code, Secs. 2382, 2405.
[5] Code, Secs. 2382, 2405.
[6] Code, Sec. 2386.

received reasonable notice thereof. And any citizen may institute and prosecute such action, in any case, in his own name.[7]

§ 1073. Of the application in such actions.—If the application for an injunction in such cases be made to the judge or court in vacation, or the court in term time, three days' notice must be given of the hearing, and, at the election of the applicant, the existence of the nuisance may be established by affidavits, depositions or oral testimony, unless the court or judge has otherwise ordered.[8]

Notice of the application may be in the following form:

NOTICE OF AN APPLICATION FOR AN INJUNCTION TO ABATE NUISANCE.

Title, }
Venue. }

To ———, defendant, or to (names of his attorneys, if known):

You are hereby notified that the plaintiff will, on the ——— day of ———, 18—, at ——— o'clock a. m., at ——— Iowa, make application to the honorable ———, judge of the district court of the ——— judicial district of Iowa, at chambers, on the petition and affidavits, copies of which are attached hereto, for an order for a temporary injunction, enjoining and restraining you, by yourself, agents and servants, from in any manner selling, or offering for sale, any intoxicating liquors in your place, in (city or town), Iowa, situated on lot number one, in block number one, in (city or town), in violation of law, and from keeping the same with intent to sell, use or give away, in violation of law, and you can appear at said time, and resist said application, if you desire.

Dated, ———, the ———, 18—.

———, county attorney, in and for ——— county, Iowa.

Code, Section 2405, allowing an injunction to issue to restrain a nuisance relating to illegal sale of intoxicating liquors, is not unconstitutional as depriving a defendant of a right to trial by jury, nor as an attempt to enforce the criminal law by civil action, nor does it become ex post

[7] Code, Secs. 2406, 2405; Littleton v. Fritz, 65-488; Pontius v. Winebrenner, 64-591; Applegate v. Winebrenner, 66-67; Pontius v. Bowman, 66-88; Shermerhorn v. Webber, 67-278; Martin v. Blattner, 68-286; Fuller v. McDonald, 75-220; Littleton v. Harris, 73-167; Shear v. Green, 73-688; Craig v. Hasselman, 74-538; Judge v. Kell, 74-486; Geyer v. Douglass, 85-93; Maloney v. Traverse, 87-306; Wood v. Baer, 91-475; McQuade v. Collins, 61 N. W., 213.

[8] Code, Sec. 2405.

facto in its operation.[9] Nor can one in such an action claim that he is about to be deprived of his property without compensation, in violation of the constitution of the United States, unless he shows that such property was owned by him, or by those under whom he claims, and used for the sale of intoxicating liquors prior to the enactment of the statute of 1855 of this State, which declared the building or place where prohibited liquors were sold or kept a nuisance, and provided for its abatement.[10] Injunctions granted in these cases are binding throughout the judicial district.[11] If two parties are operating the business both must be made defendants in a proceeding to abate the nuisance.[12] As to when an injunction should be granted in such cases.[13] When it should not be granted.[14]

§ 1074. When an injunction will be granted generally.—An injunction may be granted as an independent remedy in any action by equitable proceedings when such relief would have been granted in equity previous to the adoption of the code; and in all cases of breach of contract or other injury, where the party injured is entitled to maintain, and has brought an action by ordinary proceedings, he may, in the same cause, pray and have a writ of injunction against the repetition or continuance of such breach of contract, or other injury, or the commission of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property

[9] Littleton v. Fritz, 65-488; Pontius v. Winebrenner, 65-591; Applegate v. Winebrenner, 66-67; Pontius v. Bowman, 66-88; Shermerhorn v. Webber, 67-278; Martin v. Blattner, 68-286; Jordan v. Circuit Court, 69-177; McLane v. Bonn, 70-752; State v. Jordan, 72-377; and see Radford v. Thornell, 81-709.

[10] McLane v. Leicht, 69-401.

[11] Code, Sec. 2405; McGlasson v. Johnson, 86-477; England v. Johnson, 86-751; see Carter v. Steyer, 61 N. W., 956.

[12] Shear v. Green, 73-688; see Pierson v. Int. Distillery, 72-348.

[13] Bloomer v. Glendy, 70-757; Littleton v. Fritz, 65-488; Judge v. Krebs, 71-183; Tibbetts v. Burster, 76-176; Martin v. Blattner, 68-286; Gray v. Stienes, 69-124; Littleton v. Harris, 73-167; State v. Douglass, 75-432; McQuade v. Collins, 61 N. W., 213; Hamilton v. Baker, 91-100; Carter v. Steyer, 61 N. W., 956; Danner v. Holtz, 74-389; Pearson v. Int. Distillery, 72-348; Farley v. O'Malley, 77-531; Farley v. Hollenfeltz, 79-126.

[14] Gray v. Stienes, 69-124; Shear v. Green, 73-688; Danner v. Holtz, 74-389; State v. Ballingall, 42-87;

or right, and he may also, in the same action, include a claim for damages or other redress.[15]

It may be granted in an action for breach of contract,[16] and in some cases when a trespass is threatened,[17] and also where a trespasser commits an irreparable injury and he is insolvent.[18] It may be granted to stay proceedings at law either before or after judgment.[19] It may

State v. Price, 92-181; State v. Brinkman, 72-698.

[15] Code, Sec. 4354; Elwell v. Greenwood, 26-377; Berger v. Armstrong, 41-447; Hampson v. Weare, 4-13; Dunham v. Collier, 1 G. Gr., 54; Smith v. Short, 11-523; Givens v. Campbell, 20-79; Crawford v. Paine, 19-172; Way v. Lamb, 15-80; Kirchbaum v. Bridges, 1-14; Lash v. Butch, 4-215; Schricker v. Field, 9-366; Haight v. City of Keokuk, 4-199; Key City G. L. & C. Co. v. Munsell, 19-305; Litchfield v. Polk County, 18-70; Humphrey v. Darlington, 15-207; Taggart v. Woods, 20-236; Reno v. Teagarden, 24-144; Crocker v. Robertson, 8-404; Anamosa v. Wurzbacker, 37-25; Chicago & S. W. R. Co. v. Swinney, 38-182; Brigham v. White, 44-677; Stokes v. Scott County, 10-166; Horton v. Hoyt, 11-496; Connelly v. Griswold, 7-416; Iowa College v. Davenport, 7-213; McMahon v. City of Council Bluffs, 12-268; Musser v. Hershey, 42-356; Hougham v. Harvey, 33-203; Zorger v. The Twp. of Rapids et al., 36-175; Rood v. Board, etc., 39-444; Spencer v. Wheaton, 14-38; Langworth v. City of Dubuque, 13-86; Olmstead v. Board, etc., 24-33; Williams v. Peinny, 25-436; Cattell v. Lowery, 45-478; Gibbs v. McFadden, 39-371; Ingham v. The C., D. & M. R. Co., 38-669; Richards v. The D. V. R. Co., 18-260; Henry v. The D. & P. R. Co., 10-540; Hibbs v. The C. & S. W. R. Co., 39-340; Holbert v. The St. Louis, K. C. & N. R. Co., 45-23; City of Council Bluffs v. Stewart, 51-385; Littleton v. Fritz, 65-488; Pontius v. Winebrenner, 65-491; Applegate v. Winebrenner, 66-67; Pontius v. Bowman, 66-88; Shermerhorn v. Webber, 67-278; Martin v. Blattner, 68-286; Morgan v. Miller, 59-481; Dist. Twp. v. Dist Twp., 54-115; Hall v. Crouse, 14-487; Stafford v. Shortreed, 62-524; Hardin v. White, 63-633; Richmond v. The D. & S. C. R. Co. et al., 33-422; Brandriff v. Harrison County, 50-164; Rice v. Smith, 9-570; Macklot v. City of Davenport, 17-379; Collins v. Ripley, 18-129; Sweatt v. Faville, 23-321; Martin v. Davis, 65 N. W., 1001; Thomas v. Farley Mfg. Co., 76-735; Ladd v. Osborne, 79-93; Trulock v. Merte, 72-510; Teabout v. Jaffray, 74-28; Musch v. Burkhart, 83-301; Graves v. Key City Gas Co., 83-714; Moffit v. Brainard, 92-122; Clayton County v. Herwig, 69 N. W., 1035; Harbach v. D., M. & K. C. R. Co., 80-593; Standard Coal Co. v. Ind. Dist., 73-304; Troe v. Larson, 84-649; Brockman v. Creston, 79-587; Snyder v. Foster, 77-638; Searle v. Abraham, 73-507; Wood v. Murray, 85-505; Ellison v. Smythe, 75-570.

[16] Elwell v. Greenwood, 26-377; Berger v. Armstrong, 41-447; Macklot v. The City of Davenport, 17-379; Hall v. Crouse, 14-487; Richmond v. D. & S. C. R. Co., 33-422; Brandriff v. Harrison County, 50-164; Rice v. Smith, 9-570.

[17] Morgan v. Miller, 59-481; Trulock v. Merte, 72-510; Martin v. Davis, 65 N. W., 1001; Ladd v. Osborne, 79-93.

[18] Mills v. Hamilton, 49-105; Bolten v. McShane, 67-207; Davis v. Hull, 67-479; City of Council Bluffs v. Stewart, 51-385; Holbert v. The St. L., K. C. & N. R. Co., 45-23; Gibbs v. McFadden, 39-371; Musch v. Burkhart, 83-301; Graves v. Key City Gas Co., 83-714; see Waterloo v. Waterloo St. R. Co., 71-193.

[19] Hampson v. Weare, 4-13; Dunham v. Collier, 1 G. Greene, 54; Smith v. Short, 11-523; Givens v. Campbell, 20-79; Crawford v.

issue to prevent trespass in violation of a mandate of a court,[20] to restrain the making, indorsement or negotiation of negotiable paper, or bonds,[21] the sale of land, the sailing of a ship, the transfer of stock, or the alienation of a certain chattel, to prevent the wasting of assets or other property pending litigation;[22] to prevent trustees from assigning a legal estate, or assignees from making a dividend;[23] to prevent the removing out of the jurisdiction, marrying or having any intercourse which the court disapproves of, with a ward;[24] to restrain the commission of waste;[25] to protect possession of public lands where there are conflicting entries until an appeal to the secretary of the interior is determined,[26] to restrain official action which would be illegal or unlawful;[27] to prevent the obstruction of the outlet of a lake;[28] to suppress the continuance of a public or private nuisance;[29] to prevent infringements of patents and the violation of copyrights;[30] to restrain the collection of an illegal tax.[31] So one district township may have an injunction to restrain another district township from removing a school house

Paine, 19-172; Way v. Lamb, 15-80; Kriechbaum v. Bridges, 1-14; Lash v. Butch, 4-215; Schricker v. Field, 9-366; Haight v. The City of Keokuk, 4-199; The Key City G. L. & C. Co. v. Munsell, 19-305; Taggart v. Wood, 20-236; Reno v. Teagarden, 24-144; Crocker v. Robinson, 8-404; Anamosa v. Wurzbacker, 37-25; Brigham v. White, 44-677; Ramsdell v. Tama Water Power Co., 84-484; Keokuk & N. W. R. Co. v. Donnell, 77-221.

[20] Ten Eyck v. Sjoburg, 68-625.

[21] Stokes v. Scott County, 10-166; Hull v. County of Marshall, 12-142; Spencer v. Wheaton, 14-38.

[22] Eden on Inj., Chap. 1, pp. 1 and 2; Story Eq. Jur., Sec. 872.

[23] Eden on Inj., Chap. 1, pp. 1 and 2; Story Eq. Jur., Sec. 872.

[24] 2 Story Eq. Jur., Sec. 872.

[25] Cowles v. Shaw et al., 2-496; see Wilson v. Hughell, Mor., 383; Ellison v. Smythe, 75-570.

[26] Wood v. Murray, 85-505.

[27] Searle v. Abraham, 73-507; Snyder v. Foster, 77-638; Brockman v. Creston, 79-587; Hanson v. Hunter, 86-722.

[28] Troe v. Larson, 84-649.

[29] Horton v. Hoyt, 11-496; Iowa College v. City of Davenport, 7-213; Coates v. City of Davenport, 9-227; McMahon v. City of Council Bluffs, 12-268; Musser v. Hershey, 42-356; Ewell v. Greenwood, 26-377; Hougham v. Harvey, 33-203; Bushnell v. Robeson, 62-540; Millhiser v. Willard, 65 N. W., 325.

[30] 2 Story Eq. Jur. Secs. 930 to 959; Eden on Inj., Chap. 1, pp. 1 and 2.

[31] Zorger v. The Twp. of Rapids, 36-175, and cases cited; Rood v. Board Sup., etc., 39-444; Spencer v. Wheaton, 14-38; Langworthy v. City of Dubuque, 13-86; Litchfield v. Polk County, 18-70; Olmstead v. Bd. of Sup., 24-33; Williams v. Peinny, 25-436; Cattell v. Lowery, 45-478; The Iowa, F. & L. C. Ry. Co. v. Cherokee County, 37-483; The Iowa Ry. L. Co. v. Story County, 36-48; Standard Coal Co. v. Ind. Dist., 73-304.

from the territory of the former.[32] So the writ may issue to enjoin a road supervisor from interfering with fences, hedges, watercourses and the like;[33] to prevent a railroad company from condemning lands while pretending to want them for a use for which they were authorized to condemn, when, in fact, they wanted the lands for a purpose for which they could not legally condemn them;[34] to restrain collection of a tax voted to a railroad company after such company has transferred its road, in pursuance of a purpose entertained from the beginning of which public notice was given the voters before election;[35] to restrain a public officer from the commission of an act which would be a public wrong;[36] to restrain the diversion of a street to objects and uses inconsistent with those for which it was granted,[37] and a railroad company may be enjoined from entering on and using land condemned by them for right of way, unless they pay the damages awarded.[38]

It will be granted to enjoin the enforcement of a judgment void for want of jurisdiction;[39] and to restrain a multiplicity of suits; to stop the progress of vexatious litigation;[40] to restrain the opening or vacation of a highway;[41] to restrain the operation of a railway over the streets of a city where it has not paid damages to the abutting property owners;[42] to restrain the wrongful maintenance of a drain which casts an unusual amount of surface water upon one's premises.[43]

A taxpayer and citizen may maintain an action to enjoin the issuance by the county auditor of a warrant in

[32] Dist. Twp. v. Dist. Twp., 54-115.

[33] Bolton v. McShane, 67-207.

[34] Forbes v. Delashmutt, 68-164.

[35] Blunt v. Carpenter, 68-265.

[36] Collins v. Ripley, 8-129; Hanson v. Hunter, 86-722; Brockman v. Creston, 79-587; Snyder v. Foster, 77-638.

[37] Ingham v. The C., D. & M. R. Co., 38-669.

[38] Richards v. The D. V. R. Co., 18-260; Henry v. The D. & P. R. Co., 10-540; Hibbs v. The C. & S. W. R. Co., 39-340.

[39] Connell v. Stelson, 33-147; see Hardin v. White, 63-633.

[40] 2 Story Eq. Jur., Secs. 901, 902, 905, 906, 958.

[41] Moffit v. Brainard, 92-122; Clayton County v. Herwig, 69 N. W., 1035.

[42] Harbach v. D., M. & K. C. R. Co., 80-593.

[43] Holmes v. Calhoun County, 66 N. W., 145.

payment of a refund of taxes illegally ordered by the board of supervisors.[44]

And the statute specially authorizes the issuance of an injunction when application is made to vacate or modify a judgment;[45] to restrain the foreclosure of a chattel mortgage by notice and sale;[46] to enjoin the erection or continuance of a nuisance;[47] and it will lie to restrain the collection of taxes levied without authority of law;[48] to restrain acts likely to cause irreparable injury in certain cases;[49] to restrain a judgment creditor living in this State, from subjecting to the payment of his judgment, in the courts of another State, the exempt wages of the debtor due him from a railroad company doing business in both States; when the judgment debtor is also a resident of this State;[50] to restrain payment of more than a school house is reasonably worth to a contractor to whom the directors are about to pay the contract price, when the building fails to conform to the terms of the contract.[51]

§ 1075. When an injunction will be refused.—In the following cases it has been held that a writ of injunction would be refused: Where a creditor having a lien on real estate of his debtor, before obtaining judgment sought to restrain the sale of the same.[52] When it is sought to determine the right to a public office or franchise.[53] When it is sought to enjoin collection of taxes for mere irregularities in the assessment or where

[44] Hospers v. Wyatt, 63-264.

[45] Code, Sec. 4098.

[46] Code, Sec. 4283; Hamlin v. Parsons, 33-207; Braitch v. Guelick, 37-212; Treanor v. Sheldon Bank, 90-575.

[47] Ewell v. Greenwood, 26-377; Bills v. Belknap, 36-583; Finley v. Hershey, 41-389; State v. Kartee, 35-221; Code, Sec. 4302; Shiras v. Olinger, 50-571; Baker v. Bohannan, 69-62; Miller v. Webster City, 62 N. W., 648; Trulock v. Merte, 72-510; Millheiser v. Willard, 65 N. W., 325.

[48] Olmstead v. Bd. of Sup., etc., 25-33; The I., F. & S. C. Ry. Co. v. Cherokee County, 37-483; The I., R. L. Co. v. Story Co., 36-48; Zorger v. The Twp. of Rapids et al., 36-175, and cases cited, and Standard Coal Co. v. Ind. Dist., 73-304.

[49] Code, Sec. 4356.

[50] Teager v. Landsley, 69-725; Hager v. Adams, 70-746.

[51] Carthan v. Lang, 69-384.

[52] Buchanan v. Marsh, 17-494, and cases cited.

[53] Cochran v. McLeary, 22-75.

an erroneous assessment works no injury.[54] One who is not injured by the fencing up of a street can not restrain its enclosure.[55] Where one sells his business and good will, and enters into bond not to engage in the same business at the same place.[56] Facts not warranting an injunction in aid of landlord's lien.[57] The holder of a senior lien on real estate is not entitled to an injunction to restrain a sale of property for satisfaction of junior lien.[58] So one holding a mortgage on chattels can not have an injunction to restrain sale of same under a senior mortgage on the ground that the property is not covered by such senior mortgage.[59] And in some cases it will not be granted to delay execution on a judgment.[60]

Nor will it lie to restrain the collection of a tax for a new school house on the ground that the district has a house, when it is not shown that the district does not need a new one; and after the house is built, and tax voted, a taxpayer can not restrain its collection on the grounds that the board did not consult with the county superintendent, and no proposals were invited, and the work was not let to lowest bidder, and no bonds were required of the contractors.[61] So one failing to show an interest in lands sold for taxes can not maintain action to restrain the county treasurer from executing a deed to the purchaser.[62] Nor will it be granted to restrain the execution of a judgment regular on its face, when it is not shown that there is a good defense to the claim.[63] Nor to restrain an execution on a judgment, or declare the same invalid because of a defect in the action in which it was rendered, of which plaintiff had no knowledge at

[54] Patterson v. Baumer, 43-477; The C. R. & M. R. R. v. Carroll County, 41-153; Conway v. Younkin, 28-295; The I. R. L. Co. v. Carroll County, 39-151; Same v. Sac Co., 39-124; The S. C. & St. Paul R. Co. v. The County of Osceola, 45-168; Wilson v. Cass County, 69-147.

[55] Prince v. McCoy, 40-533.

[56] Stafford v. Shortreed, 62-524.

[57] Stibbs v. Anger, 65-318; Milner v. Cooper, 65-190.

[58] Wiedner v. Thompson, 66-283.

[59] Rankin v. Rankin, 67-322.

[60] Baker v. Ryan, 67-708.

[61] Casey v. The Ind. Dist. of Nutt, 64-659.

[62] Johnson v. Brett, 64-162.

[63] Taggart v. Wood, 20-236.

the time it was pending.[64] Nor to interfere with proceedings of forcible entry and detainer, when there is no allegation of fraud, mistake, accident or surprise.[65] It will not lie to restrain the board of supervisors from acting in a matter over which they have exclusive jurisdiction.[66] So when by agreement of parties a judgment is to be paid within a time fixed, and the judgment creditor before that time expires issues execution, the judgment debtor can not enjoin proceedings under the execution without first offering to pay the judgment in accordance with the terms of the agreement.[67] Nor will it be granted when the party has a plain, speedy and adequate remedy at law,[68] nor where an injunction has already been granted to attain the same object.[69]

§ 1076. Of parties to the action.—The lessor of a building in which intoxicating liquors are sold may be made a party defendant.[70] So one who is about to receive conveyance of land in consummation of a conspiracy to defraud the true owner, may be made a party defendant, and in such a case it is proper to make the county recorder a party defendant to prevent his recording the conveyance; but no judgment for cost should be rendered against him.[71] So when parties are numerous and it is impracticable to bring them all before the court, and they have a common interest in the subject of the litigation, they holding under a conveyance which defendants fraudulently seek to defeat, one of them may prosecute an action to enjoin the consummation of the fraud for the benefit of all.[72] Where the doing of certain work under the direction of a city council is enjoined,

[64] Wilsey v. Maynard, 21-107.
[65] Lamb v. Drew, 20-15.
[66] Luce v. Feusler, 85-596.
[67] Anamosa v. Wurzbacher, 37-25.
[68] City of Waterloo v. Waterloo Street R. Co., 71-193; Thomas v. Farley Mfg. Co., 76-735; Rockwell v. Bowers, 88-88; Ridley v. Doughty, 77-226; Hanson v. Hunter, 86-722.
[69] Dickenson v. Eichorn, 78-710.
[70] Martin v. Blattner, 68-286.
[71] Palo Alto Bkg., etc., v. Mahar, 65-74; see Brandirff v. Harrison County, 50-164.
[72] Palo Alto Bkg., etc., v. Mahar, 65-74; Brandirff v. Harrison County, 50-164.

the one employed to do the work is a proper party defendant.[73]

§ 1077. How and at what time it may be granted.—The injunction may be applied for and granted as an independent means of relief, or as auxiliary to other proceedings;[74] and it may be either a part of the judgment rendered in the action, or it may, if proper grounds therefor are shown, be granted by order of the court or judge at any stage of the case before judgment, and in the latter case will be known as a temporary injunction.[75]

§ 1078. Same.—When it appears by the petition, which must be supported by affidavit, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission, or continuance, of some act which would produce great or irreparable injury to the plaintiff, or where during litigation it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, or respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. It may also be granted in any case where it is specially provided by statute.[76]

§ 1079. Rules governing the granting of injunctions—Powers of the court.—In an action at law a party applying for a writ of injunction need not bring himself within the rules and usages of a court of chancery. It is sufficient if he comply with the statute.[77] The provisions of the statute authorizing the issuance of an injunction in law actions, do not confer on law courts, general or special chancery jurisdiction, or power to grant new remedies beyond that of issuing and enforcing an injunction against the repetition or continuance of breaches of contract, or other injury, which, under the

[73] Bush v. Dubuque, 69-233.
[74] Code, Sec. 4354.
[75] Code, Sec. 4355.
[76] Code, Sec. 4356; Zorger v. Twp. of Rapids, 36-175; D. & S. C. R. Co. v. Cedar Falls & M. R. Co., 76-702; Price v. Baldauf, 82-669.
[77] Buchanan v. Marsh, 17-494; Hall v. Crouse, 14-487.

statutes, authorize the issuance of the writ.[78] An injunction should not be granted where asked as auxiliary relief by a motion without verification or bond.[79] Nor should it issue in aid of quo warranto proceedings brought in the name of the State.[80]

§ 1080. By whom and when a temporary injunction will be granted.—A temporary injunction may be granted by the court, or judge thereof, in which the action is pending, or is to be brought; or by any judge of the district court of such district, by a superior court in the proper county, and by any judge of the supreme court, or by a judge of any other district court. But in causes where an action is pending, and the writ is applied for to effect the subject-matter of such action, it can only be granted by the court, or judge thereof, in which such action is pending. Nor will it be granted by any other judge of the district court of such district, or by a superior court, unless it satisfactorily appears by affidavit, that the court, or judge thereof, in which the action is brought, can not, for want of time, sickness or other disability, hear the same, or that the residence of the judge is inconvenient, or that it is for some sufficient reason impracticable to make the application to him. Nor will it be granted by any supreme judge, or by a judge of any other district court, unless it be made satisfactorily to appear to such judge by affidavit, that the application can not, for some sufficient reason, be made to either the court, or judge, in which the action is pending, or to some other district judge of that district, if there be any, or to a superior court.[81] The supreme court has no power to grant any injunction upon original proceedings.[82] The writ may be granted in vacation; and by vacation is meant at any time when the court is not actually in session, and it is not restricted to the time between terms.[83]

[78] Richmond v. Dubuque & S. C. R. Co., 33-422.

[79] Pendleton v. Laub, 64 N. W., 653.

[80] State v. Simpkins, 77-676.

[81] Code, Sec. 4357; Cooney v. Moroney, 45-292.

[82] Reed v. Murphy, 2 G. Greene, 568.

[83] Thompson v. Benepe, 67-79; Code, Secs. 4357, 4362.

No injunction will be granted by a judge, after the application therefor has been overruled by the court; nor by a court or judge, when it has been refused by the court, or judge thereof, in which the action is brought. A judge refusing an injunction must, if requested by either party, give him a certificate thereof.[84] The refusal to grant a temporary injunction will not prevent the issuance of an injunction on a subsequent application presenting a different case.[85] If the order is made by the court, the clerk must make an entry therein in the court record, and issue the order accordingly. If made in vacation, the judge must indorse said order upon the petition.[86] But this requirement is directory only, and the order may be made on a separate paper.[87]

§ 1081. When not granted without notice.—An injunction will not be granted against a defendant who has answered, unless he has had notice of the application.[88] An injunction to stop the general and ordinary business of a corporation, or the operations of a railway, or of a municipal corporation, or the erection of any building, or other work, or the board of supervisors of any county, or to restrain a nuisance, can only be granted upon reasonable notice of the time and place of the application to the party to be enjoined, nor can any temporary writ of injunction be allowed by any judge during term time, unless the petition is filed with the clerk and entered upon the calendar of that term, and if granted the order allowing it must also be entered.[89] The notice required by the statute is such notice as the court to whom the application is made direct, and the court may require notice of the application to be given in any case in which he may deem it proper.

§ 1082. Form and requisites of the petition.—The

[84] Code, Sec. 4360.
[85] Graves v. Key City Gas Co., 83-714.
[86] Code, Sec. 4362.
[87] Jordan v. Circuit Court, 69-177.
[88] Code, Sec. 4358.
[89] Code, Sec. 4359; Hughes v. Eckerson, 55-641; Johnston v. C., M. & St. Paul Ry. Co., 58-537.

petition must be sworn to.[90] It must conform to the requirements of a petition in equity,[91] and state the necessary facts showing plaintiff is entitled to the relief sought. The following forms may be changed to conform to the facts in each case:

FORM OF PETITION FOR INJUNCTION TO ABATE NUISANCE RELATING TO THE SALE OF INTOXICATING LIQUORS.

Title, }
Venue. }

Par. 1. This action is instituted and prosecuted in the name of (name of party complaining) for the abatement of a nuisance. The said (name of the party complaining) complaining of the defendant herein, shows to the court:

Par. 2. That said (name of party complaining) prosecutor, is now and for (insert number) years past has been an actual resident, and citizen of ——— county, Iowa, and as such is interested in the peace, welfare and good order of the inhabitants of said county.

Par. 3. That the defendant in the county and State aforesaid has established, and is using, keeping and maintaining, a building, situated on lot No. ——— in block No. ——— in the town (or city) of ——— for the sale of intoxicating liquors as a beverage in violation of law, and as a place for the keeping of such intoxicating liquors, with intent to sell the same as a beverage in violation of law.

Par. 4. That on and after the ——— day of ———, 18—, and prior to the commencement of this action, the said defendant did illegally sell intoxicating liquors, to wit, whisky and brandy, at the place aforesaid, to the following named persons, viz.:

To ——— on the ——— day of ——— 18,—; to ——— on the ——— day of ———, 18— (here insert statement of all sales relied on as illegal), and to numerous other persons whose names are unknown to the prosecutor herein.

Par. 5. That the defendant at the place aforesaid and from the ——— day of ———, 18—, until the ——— day of ——— 18—, has owned and kept in his building aforesaid intoxicating liquors for the purpose, and with the intent on his part to sell the same therein contrary to law.

Par. 6. That unless restrained by this court, the said ——— will continue at said place to illegally keep for sale, and sell, intoxicating liquors, and said building will continue to be a nuisance to the irreparable injury of the plaintiff, this prosecutor, and the citizens of said county. Wherefore plaintiff prays that said nuisance may be abated and enjoined. That said defendant be enjoined by himself, agents or servants from in any manner selling in violation of law, or keeping for sale with intent to sell in violation of law, any intoxicating liquors in said building or any part thereof; that a temporary injunction issue in

[90] Code, Sec. 4356.

[91] See chapter on Petition.

accordance with this prayer and that on final hearing said injunction be made perpetual, and for such other relief as may be deemed equitable in the premises, and for costs, including a reasonable attorney's fee.

———, attorney for plaintiff.

(Add verification.)

FORM OF PETITION FOR INJUNCTION TO RESTRAIN JUDICIAL SALE.

Title, }
Venue. }

The plaintiff states:

Par. 1. That he is the owner in fee simple of the following described real estate, to wit (here describe the land).

Par. 2. That on the ——— day of ——— A. D. 18—, the defendant, ———, obtained a judgment in the (name of the court where the judgment was rendered), against ——— for ——— dollars and costs.

Par. 3. That an execution has been issued on said judgment, at the instance of the said ———, and placed in the hands of the said ———, who is the acting sheriff of ——— county, Iowa, a copy of which is hereto annexed, marked exhibit "A," and made part hereof.

Par. 4. That said defendant, ———, on the ——— day of ——— A. D. 18—, under said writ of execution, levied upon the real estate above described as the property of said ———, and has advertised the same for sale on said execution; a copy of the notice of sale is hereto annexed, marked exhibit "B," and made part hereof.

Par. 5. That the said judgment is not, and at no time has been, a lien upon said real estate, or upon any part thereof, or upon any interest therein.

Par. 6. That a sale of said property under said execution would create a cloud upon the plaintiff's title thereto, and the plaintiff is and will be remediless at law to remove such cloud.

Wherefore, the plaintiff prays that a temporary injunction be issued to restrain said execution sale, and enjoining and restraining said plaintiff from enforcing said judgment against said real estate, or any part thereof; that said judgment be decreed to be no lien on said real estate, and that on final hearing said injunction be made perpetual, and for such other and further relief as shall be adjudged equitable in the premises and for costs.

———, attorney for plaintiff.

(Add the usual verification, and annex the exhibits referred to in the petition.)

In case a mortgagor files his petition in equity, and seeks by injunction to restrain a sale under the mortgage, admitting that something is due thereon, he must plead a tender of, and offer to pay the amount due, be-

fore he can have an injunction.[1] The petition must show that plaintiff has no adequate remedy at law,[2] and, as has been already stated, if it is sought to restrain the collection of a judgment, the petition must show that the plaintiff has a good defense to the action, or that a new trial would result differently.[3] He should show that injustice was done him, and that he could not have availed himself of his defense in a court of law, or that he has been prevented from so doing by fraud or accident, and through no fault or negligence on his part.[4]

§ **1083. Of the allowance of the writ.**—If the order allowing the writ is made in term time during a session of the court, the clerk must make an entry thereof on the record and issue the order; if made in vacation the judge must indorse the order upon the petition.[5] The judge must fix the penalty of the bond so as to be twice the probable amount of liability to be thereby incurred.[6]

The court or judge, before granting the writ, may, if deemed advisable, allow the defendant an opportunity to show cause why such order should not be granted,[7] and if the court so orders, he will fix the time and place of hearing and require the plaintiff to serve notice on defendant. Such notice may be in the following form:

FORM OF NOTICE OF HEARING OF APPLICATION FOR AN INJUNCTION.

Title, }
Venue. }

To ———:

Sir:—You are hereby notified that the above named plaintiff on the ——— day of ———, 18—, filed in the clerk's office of the (name of court) his petition claiming (here state in general terms the nature of the action and the remedy sought); that said plaintiff has applied to the court (or judge) for an order for a temporary injunction as prayed in said petition, and that the (court or judge) will hear said application on the

[1] Stringham v. Brown, 7-33; Sloan v. Coolbaugh, 10-31.
[2] Cowles v. Shaw, 2-496 (Cole's Ed.); see cases cited.
[3] Way v. Lamb, 15-79.
[4] Shricker v. Field, 9-366; Johnson v. Lyon, 14-431.
[5] Code, Sec. 4362.
[6] Code, Sec. 4366; Hardin v. White, 63-633.
[7] Code, Sec. 4367; Curtis v. Crane, 38-460.

(state the time fixed) at (state place of hearing) when and where you may appear and show cause against said application if you think proper.

(Signature of plaintiff or his attorney.)

If on said hearing (or on reading the petition without having a hearing thereon) the court or judge order an injunction to issue, such order may be as follows:

FORM OF ORDER ALLOWING INJUNCTION.

State of Iowa, } ss.
——— County. }

Upon reading the within petition (or hearing the parties) it is ordered: That the writ of injunction therein prayed do issue, upon the filing of a bond in the office of the clerk of the court named in the petition, conditioned as required by law, in the penalty of ——— dollars, with sureties to be approved by said clerk.

Dated this ——— day of ———, 18—.

———, judge of (name of court).

§ 1084. Of the bond.—No injunction can issue (except to restrain nuisances relating to the manufacture and sale of intoxicating liquors), until a bond be filed in the office of the clerk of the court in a penalty which has been fixed in the order directing the writ to issue, with sureties to be approved by the clerk, and conditioned for the payment of all damages which may be adjudged against plaintiff, by reason of the injunction.[8] When proceedings in a civil action, or on a judgment, or final order, are sought to be enjoined, the action must be brought in the county and court in which such action is pending, or the judgment or order was obtained, unless such judgment or final order is obtained in the supreme court in which case the action must be brought in the county and court from which the case was appealed; and in an action to enjoin the proceedings in a civil action, or on a judgment or final order the bond must be further conditioned to pay such judgment or comply with such final order, if the injunction is not made perpetual; or to pay

[8] Code, Sec. 4363; Reece v. Northway, 58-187; Carroll County v. I. R. L. Co., 53-685; Towle v. Leacox, 59-42; Hibbs v. Western Land Co., 81-285.

any judgment that may be ultimately recovered against the party obtaining the injunction, on the cause of action enjoined.[9] If the judgment is void by reason of want of notice an action to cancel it may be brought in any court of competent jurisdiction.[10] The bond may be in the following form:

FORM OF INJUNCTION BOND.

Know all men by these presents:

That we ———, principal, and ——— and ———, sureties, are held and firmly bound unto ——— in the penal sum of ——— dollars, lawful money of the United States, well and truly to be paid to the said ——— and to his heirs, executors and assigns. The condition of the above obligation is such that whereas, the said ——— has this day filed (or the exact day) in the office of the clerk of the district court of the State of Iowa, in and for ——— county, a petition praying the issuance of an injunction to restrain the sale of the following described real estate, to wit (here describe the premises), which on the ——— day of ——— A. D. 18—, was levied upon by the said ———, the acting sheriff of ——— county, under and by virtue of an execution issued from (name of the court), in favor of the said ———, and against one ———; and whereas, on the ——— day of ——— A. D. 18—, the Hon. ———, judge of (name the proper court), made an order on said petition allowing said writ of injunction upon (here recite the terms of the order of allowance). Now, therefore, if the said ——— shall and will pay all the damages which may be adjudged against him by reason of such injunction (if proceedings in a civil action, or on a judgment or final order, are sought to be enjoined, then add the following: "And will also pay the said judgment," if one has been entered; if it is an order, say, "will comply with said order, if the injunction is not made perpetual;" if the action is pending say, "will pay any judgment that may be ultimately recovered against said plaintiff"): then this obligation to be void, otherwise to be and remain in full force and virtue.

Dated this ——— day of ———, 18—.

———, principal,

———, } sureties.
———, }

(Add justification.)

The clerk may require the sureties to justify as in other cases, and must indorse upon the bond his approval of the sureties, and mark the bond filed. It is in the power

[9] Code, Secs. 4364, 4365; Davis v. Bonar, 15-171; Lockwood v. Kitteringham, 42-257; Anderson v. Hall, 48-346; Grattan v. Matteson, 51-622; Hardin v. White, 63-633; Phelan v. Johnson, 80-727.

[10] State Ins. Co. v. Waterhouse, 78-674; Phelan v. Johnson, 80-727.

of the court, in case the litigation is protracted, to require an additional bond for further security to meet such contingency.[11]

§ 1085. Of action on injunction bonds.—Any person for whose security an injunction bond must have been intended may maintain an action thereon, even though it be not payable to such person.[12] An injunction bond is to secure such damages as may be adjudged against the obligor in an action brought to determine whether any damages have been sustained—a question which can not be settled in the injunction case; the value of the attorney's services in procuring a dissolution of the injunction is an element of such damages.[13] And no attorney's fees are recoverable for procuring affidavits on motion to dissolve an injunction when the writ was granted on an insufficient petition. Nor can attorney's fees be allowed for services in the supreme court on an appeal from an order of dissolution.[14] In an action on the bond services of attorneys in securing a dissolution of the injunction may be recovered but not for defending the entire case.[15] Attorney'sfeesmay be recovered when the injunction was the only relief demanded.[16] When defendant on filing his answer averred he did not intend to do the act enjoined, and moved for a dissolution of the injunction, it was held that it appeared that he had not been damaged, and though the motion had been sustained, he could not recover on the bond the expense incurred by him in procur-

[11] Crawford v. Paine, 19-172.

[12] Code, Sec. 3467; Van Gorder v. Lundy, 66-448, and see Pursley v. Hayes, 22-11; Garretson v. Reeder, 23-21; Sheppard v. Collins, 12-570; Huntington v. Fisher, 27-276; Moorman v. Collier, 32-138; Morgan v. Long, 29-434; Strunk v. Ocheltree, 11-158; State v. Fredericks, 8-553; Latham v. Brown, 16-118; Bessinger v. Dickerson, 20-260; Rowley v. Jewett, 56-492; Baker v. Bryan, 64-561; Jordan v. Kavanaugh, 63-152; Wells v. Stomback, 59-376; Allen v. Pratt, 79-113; Cedar Rapids, I. F. & N. R. Co. v. Cowan, 77-535.

[13] Fountain v. West, 68-380.

[14] Elwood Mfg. Co. v. Rankin, 70-403.

[15] Behrens v. McKenzie, 23-333; Langworthy v. McKelvey, 25-48; Leonard v. Capital Ins. Co., 70 N. W., 629; Carroll County v. Iowa R. L. Co., 53-685.

[16] Thomas v. McDonald, 77-301; Bullard v. Harkness, 83-373; Colby v. Meservy, 85-555; Reece v. Northway, 58-187; Ford v. Loomis, 62-586.

ing the dissolution of the injunction,[17] and an action on an injunction bond will not lie until after final hearing on the merits and not on dissolution, on motion before final hearing.[18] In an action on an injunction bond plaintiff makes a prima facie case by showing the dissolution of the temporary injunction and the dismissal of the original suit. The burden is on defendant to show that the injunction rightfully issued.[19] On application for an injunction a hearing was had and a temporary injunction granted, afterwards a supplemental petition was filed and a temporary injunction granted ex parte, after which defendant filed a motion to dissolve both injunctions. It was held that the hearing on the first petition was not equivalent to a hearing on a motion to dissolve or modify under Code Section 4371.[20]

§ 1086. Issuance of the writ.—After the allowance of the writ, and the filing of a bond as heretofore stated, the clerk will issue it as follows:

FORM OF WRIT OF INJUNCTION.

The State of Iowa.

To (name of the defendant or defendants), defendant (or defendants).

Whereas ———, as plaintiff, has this day filed in the office of the clerk of the district court, of the State of Iowa, in and for ——— county, a petition duly sworn to, making ——— and ——— defendants therein, and praying that they be restrained from (state the acts sought to be enjoined). And whereas, the Hon. ———, judge of (name of court), has this day made an order allowing said writ of injunction to issue upon the filing of a bond, with sureties, pursuant to said order. And whereas, said order has been complied with, and such bond filed, and sureties approved:

Now, therefore, you, the said ——— and ———, defendants as aforesaid, are hereby strictly enjoined and restrained from (here set out the acts sought to be enjoined at length), until the further order of our district court in the premises. And this injunction you must strictly observe under the penalties of the law.

Witness ———, clerk of said court, with the seal thereof hereto affixed, this ——— day of ——— A. D. 18—.

[Seal.] ———, clerk.

[17] Bank of Monroe v. Gifford, 70-580.

[18] Bk. of Monroe v. Gifford, 65-648.

[19] Findlay v. Carson, 66 N. W., 759.

[20] Hinkle v. Saddler, 66 N. W., 766.

The service must be made by reading the original to defendants, and giving each of them a copy, and as in all cases, the return should show the time and manner of service. When the sheriff is a party to the action, the writ should be served by the coroner of the county.[21]

§ 1087. Of vacation and modification of the injunction.—If the order is granted without allowing the defendant to show cause, he may, at any time before the next term of court, apply to the judge who made the order to vacate, or modify it, or he may make application to the judge of the court in which the action is pending.[22] Such application must be with notice to the plaintiff and upon the ground that the order was improperly granted, or it may be founded on the answer of defendants and affidavits, and in the latter case the plaintiff may fortify his application by counter affidavits and have reasonable time therefor.

When relief is sought by injunction against fraud, which is the gravamen of the bill, the court will continue the injunction, though the defendant has fully answered the equity set up.[23]

The judge must decide the matter at once, unless good cause is shown for delay. But the vacation of the order will not prevent the action from proceeding, if anything be left to proceed upon,[24] but only one motion to dissolve or modify an injunction upon the whole case will be allowed.[25] The motion to vacate may be in the following form:

MOTION TO VACATE OR MODIFY INJUNCTION.

Title, }
Venue. }

The defendant in the above entitled action moves the court to vacate (or modify, as the case may be) the injunction herein granted, because:

21 Code, Sec. 513.

22 Code, Sec. 4368; Palo Alto Bkg. etc., v. Mahar, 65-74.

23 Code, Sec. 4369; Huskins v. McElroy, 62-508; Johnston v. C., M. & St. Paul Ry. Co., 58-537; Walker v. Stone, 70-103.

24 Code, Sec. 4370.

25 Code, Sec. 4371; Hinkle v. Saddler, 66 N. W., 765.

1. On the face of the petition, the order for an injunction was improperly granted.

2. (State any other ground, or grounds, upon which the motion is based.)

———, attorney for defendant.

§ 1088. Of dissolution of the injunction.—The defendant may move to dissolve the injunction either before or after the filing of the answer.[26] Where the equity of the petition is admitted, or not denied, and the answer sets up new matter in avoidance, or contains matter amounting to a defense, it is equivalent to a denial of plaintiff's equities, and the injunction should be continued till final hearing; and so it should where fraud is the gravamen of the petition.[27] But where motion to dissolve is made after an answer is filed, which plainly and without evasion denies in substance all the facts relied on in the petition, the injunction will be dissolved, unless there are circumstances making the case an exception, as that irreparable mischief will result from a dissolution.[28] But an order dissolving an injunction will not operate to dismiss the action.[29] A temporary injunction, granted by a judge in vacation, is not dissolved at the next term by the failure to procure an order making it perpetual.[30] The motion for dissolution should state specifically the grounds on which it is asked, or it will not be considered.[31]

The motion for dissolution may be in the following form:

MOTION TO DISSOLVE AN INJUNCTION.

Title, }
Venue. }

The defendant in the above entitled action moves the court to dissolve the injunction herein granted, because:

[26] Code, Sec. 4361; Taylor v. Dickinson, 15-483.

[27] Fargo v. Ames, 45-494; Shricker v. Field, 9-366; Judd v. Hatch, 31-491; Huskins v. McElroy, 62-508; Hayes v. Billings, 69-387; Stewart v. Johnson, 44-435; Walker v. Stone, 70-103; Burlington, C. R. & N. R. Co. v. Dey, 82-312.

[28] Taylor v. Dickinson, 15-483; Stevens v. Myers, 11-183; Anderson v. Reed, Id. 177; Russell v. Wilson, 37-377.

[29] Massie v. Mann, 17-131; Waters v. Fredericks, 11-181; Russell v. Wilson, 37-377.

[30] Curtis v. Crane, 38-459.

[31] Hall v. Crouse, 14-487.

1. The answer of the defendant plainly and without evasion denies all the facts stated in the petition.

2. (State any other ground, or grounds, upon which the motion is based.)

———, attorney for defendant.

The case when at issue stands for trial as do other cases of the same kind, and, if possible, the entire case will be disposed of on the trial and the rights of all the parties determined.

§ 1089. Relating to pleading and practice.—The practice with reference to the hearing of an application for temporary injunction has not been, in some respects, uniform, and an indiscriminate use of affidavits is often permitted. While it is conceded that, from the circumstances, liberality should be allowed the parties, yet it is certain that on such hearings there must be an end to the right to use affidavits and counter affidavits, and that it must be a rare case which will justify the court or judge in allowing greater liberality in the matter of affidavits than the statute expressly provides.

Affidavits used on a hearing of an application for a temporary injunction are no part of the record, and will not be considered on appeal from the ruling unless they are preserved by bill of exceptions or certificate of the judge, and filed in the clerk's office.[32] A former acquittal upon a charge of the crime of selling intoxicating liquors contrary to law is not an adjudication that the party is not maintaining a nuisance, and is no bar to the issuance of an injunction to restrain him from continuing such nuisance.[33] A cause of action to enjoin a nuisance caused by the unlawful sale of intoxicating liquors is not removable to the United States circuit court—there is no federal question involved.[34]

The plaintiff in an injunction case can not, for the first time, in the supreme court, make the objection that he had no opportunity to controvert the affidavits made in

[32] Hart v. Foley, 67-407.
[33] Martin v. Blattner, 68-286.
[34] Lemon v. Wagner, 68-660.

support of the answer on which a dissolution was granted.[35] Under section 4368 of code, the defendant may, on answer alone, without affidavits, move for vacation of the injunction, in which case the plaintiff may support his petition by affidavits.[36]

It is held that when petitions for the enjoining and abating of nuisances kept in violation of the prohibitory liquor laws, contained the necessary averments and no answers were filed, the averments of the petition were admitted by operation of law, and no evidence was necessary.[37]

§ 1090. Violation of injunction, how punished.— Any judge of the supreme, district or superior court being furnished with an authenticated copy of the injunction and with satisfactory proof that such injunction has been violated, must issue his precept to the sheriff of the county wherein the violation occurred, or to any other sheriff, naming him, more convenient to all parties concerned, directing him to attach the defendant and bring him forthwith before the same or some other judge, at the place stated in said precept.[38] Said precept may be in the following form:

FORM OF PRECEPT FOR VIOLATION OF INJUNCTION.

Title, }
Venue. }

The State of Iowa.

To the sheriff of ——— (or to some other sheriff named), greeting:

Satisfactory proof having been furnished to the undersigned, judge of the (name of the court of which he is judge), by the plaintiff in the above entitled action, that the writ of injunction therein issued and served has been violated by the defendant (or defendants, naming them).

You are, therefore, hereby commanded and directed to attach the

[35] Casey v. Ind. Dist. of Nutt, 64-659.

[36] Palo Alto Bkg., etc., v. Mahar, 65-74.

[37] Bloomer v. Glendy, 70-757; Code, Sec. 3622; Alexander v. Doran, 13-283; Singer Mfg. Co. v. Billings, 39-347.

[38] Code, Sec. 4372; State v. Myers, 44-580; McLane v. Granger, 74-152; Fisher v. Cass County Dist. Court, 75-232; Silvers v. Traverse, 82-52; Lindsay v. Clayton Dist. Court, 75-509.

said defendant (or defendants), and bring him (or them) before me (or some other judge, naming him), on the ——— day of ——— A. D. 18—, at ———, county of ———, State of Iowa.

———, judge, etc.

When produced he may file his affidavit denying or sufficiently excusing the contempt charged, and the court may hear other evidence, oral or by affidavit, and if satisfied that the defendant is not guilty or that the contempt is sufficiently excused, he will be released and all affidavits will be filed with the clerk of the court for preservation.[39] And in proceedings for the violation of an injunction the court will take judicial notice of its own order granting the injunction.[40]

If the defendant is not so released, the judge may require him to give bond with surety for his appearance at the next term of court, and also for his future obedience to the injunction, which bond should be filed with the clerk.[41] Said bond may be in the following form:

FORM OF BOND FOR APPEARANCE OF DEFENDANTS.

Know all men by these presents, that we, ——— and ——— principals and ——— surety, are held and firmly bound unto the State of Iowa, in the penal sum of ——— dollars, lawful money of the United States, well and truly to be paid.

The condition of the above obligation is such, that whereas the said ——— and ——— have this day been convicted of a contempt of court, before the Hon. ———, judge of the (name the proper court), for violating and disobeying an injunction issued from the district court of the State of Iowa, in and for ——— county, in an action wherein ——— is plaintiff, and the said ——— and ——— are defendants. Now, if the said ——— and ———, and each of them, shall appear at the next term of said district court and abide the order of said court in the premises, and shall in the meantime obey the said injunction, then this obligation to be void, otherwise to remain in full force and virtue.

Dated this ——— day of ——— A. D. 18—.

(Add justification.)

If defendant fails to give security, he may be committed to the jail of the county where the proceedings are pending until the next term of the court, unless he

[39] Code, Sec. 4373.

[40] Jordan v. Circuit Court, 69-177.

[41] Code, Sec. 4374.

gives the bond in the meantime.[42] The warrant of commitment may be in the following form:

FORM OF WARRANT OF COMMITMENT.

The State of Iowa.

To the sheriff of ——— county, greeting:

Whereas, ——— has this day been brought before the undersigned, sole judge of the (name of the court, or judge of the supreme court), upon the precept of (name of judge who issued the precept, or "on my precept,") issued on the ——— day of ——— A. D. 18—, charged with having violated an injunction issued from the (name the court from whence the writ issued) on the ——— day of ——— A. D. 18—, in an action pending in said court, wherein ——— is plaintiff, and the said ——— and ——— are defendants.

And whereas, the said ———, on being produced before me, failed to file his affidavit denying or sufficiently excusing the contempt charged, and the said ——— having been required by me to give a bond in the sum of ——— dollars, with surety, for his appearance at the next term of the court in which said action is pending, and for his future obedience to said injunction, which he has failed to do.

Therefore, you are hereby commanded to take the body of the said ——— into your custody, and him safely keep in the county jail of ——— county, Iowa, until the next term of the district court therein, or until he is otherwise legally discharged.

Witness my hand this ——— day of ——— A. D. 18—.

———, judge, etc.

If the bond is given, the court at the next term will act on the case and punish the contempt, in case it is found to have been committed, in the usual manner.[43] But in some cases the court issuing the injunction may in the same proceeding render a judgment against the one violating it.[44] After a preliminary injunction has been granted restraining the payment of money by public officers, the fact that payment is made in violation of the injunction before the final hearing, will not affect the rights of the plaintiff on such hearing.[45] See chapter on contempts. For the punishment for violation of injunctions in liquor cases consult the cases cited below.[46]

42 Code, Sec. 4375.
43 Code, Sec. 4376.
44 Teager v. Landsley, 69-725; Hager v. Adams, 70-746.
45 Cartham v. Lang, 69-384.
46 Goetz v. Stutsman, 73-693; Fisher v. Cass County Dist. Court, 75-232; State v. Voss, 80-467; Cotant v. Hobson, 67 N. W., 255; Silvers v. Traverse, 82-52; McLane v. Granger, 74-152; Currier v. Mueller, 79-316; State v. District Court,

§ 1091. Of amendments.—The liberal provisions of the code in relation to the subject of amendments are, so far as reasonable and proper, applicable to injunction suits;[47] and the power of the court, or judge, to permit amendments is fully treated of in the chapter on that subject.[48]

84-167; Lindsay v. Clayton Dist. Court, 75-509; McGlasson v. Johnson, 86-477; Lindsay v. Hatch, 85-332.

[47] Des Moines Nav. & R. Co. v. Carpenter, 27-487.

[48] Chapter on Amendments.

CHAPTER LXVII.

OF LANDLORD AND TENANT.

Sec. 1092. To what the lien of the landlord attaches.
1093. When he has no lien.
1094. Concerning the priority of the lien.
1095. When the lien attaches, and its continuance.
1096. Of waiver or loss of the lien.
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Section **1092. To what the lien of the landlord attaches.**—A landlord has a lien for his rent upon all crops grown upon the demised premises, and upon any other personal property of the tenant which has been used or kept on the premises during the term, and not exempt from execution;[1] and it extends to crops grown by a sub-tenant,[2] and to an agreement for mining coal, so as to create the relation of landlord and tenant and give a right to a landlord's lien.[3]

The lien attaches not only in cases of agricultural lands, but also in case of houses and store rooms in cities and towns;[4] and it attaches to property kept upon the

[1] Code, Sec. 2992; Thompson v. Anderson, 86-703; Thompson v. Anderson, 63 N. W., 355.
[2] Houghton v. Bauer, 70-314; Foster v. Reid, 78-205.
[3] Lacey v. Newcomb, 63 N. W., 704.
[4] Grant v. Whitewell, 9-152.

premises for the purpose of sale to customers, though it is not used thereon for any other purpose.[5] So it attaches to crops grown on land rented on shares, the same as if the rent had been payable in money, and if in such cases the lessee fails to gather and deliver to the lessor his share of the crop, and the landlord is compelled to gather it himself, he has a lien for the value of such labor, as a part of the rent the tenant agreed to pay.[6] So it attaches to growing crops.[7]

So it has been held to attach to a span of horses owned by the head of a family, and being the only horses he had, or used, and which were kept for use, and used, on the demised premises.[8]

The landlord's lien attaches to crops raised on the demised premises, and is not divested by their sale by the tenant.[9] The lien extends to all personal property used on the premises and which belongs to the tenant and is not exempt from execution.[10] And when the landlord attaches and removes the tenant's property for rent due, the property is also liable for rent accruing after such attachment and removal.[11]

§ 1093. When he has no lien.—It is said that no lien attaches as against one who purchases a cow in good faith from a tenant, even though she had been used on the farm, it not being shown that she was purchased on the farm;[12] and as to stock kept for agricultural purposes, if the landlord suffers it to be sold, and it is sold bona fide, the purchaser will not be affected by a lien afterward established.[13] It was held not to attach to horses and wagons used by a grocer in connection with

[5] Grant v. Whitewell, 9-152.
[6] Secrest v. Stivers, 35-580.
[7] Rotzler v. Rotzler, 46-189; Foster v. Reid, 78-205.
[8] Richardson v. Petersen, 58-724.
[9] Holden v. Cox, 60-449; Atkins v. Womeldorf, 53-150; Wright v. Dickey Co., 83-464; Evans v. Collins, 62 N. W., 810; Blake v. Counselman, 63 N. W., 679; Frorer v. Hammer, 68 N. W., 564; Kramer v. Adams, 63 N. W., 180; Neeb v. McMillan, 68 N. W., 438.
[10] Wells v. Sequin, 14-143.
[11] Garner v. Cutting, 32-547, and cases cited. But see Code, Sec. 2992.
[12] Nesbitt v. Bartlett, 14-485; see Grant v. Whitewell, 9-152.
[13] Nesbitt v. Bartlett, 14-485.

his business, but not kept on the premises leased for his grocery.[14]

It will not lie in favor of the landlord who proceeds under the general attachment law.[15] Nor can he claim a lien as against a mortgage when he did not, at the time the mortgage was executed, have a subsisting contract by virtue of which the rent claimed was to accrue.[16] Nor will it lie for damages for failure to till land, or by reason of breaches of contract in the agreement of lease, which are not connected with the demise of the land. It can only lie for rent due.[17]

Nor will it attach, it seems, to goods sold before the lien is enforced, where selling goods was the business for which the premises under the lien were used.[18]

The landlord has no lien as against a mortgagee of personal property, when the mortgage is duly recorded before the property is brought on to, or used on the demised premises, even though the mortgagee may know that the property is being used upon leased premises.[19] The lessor of a hotel has no lien for rent on property owned by the lessee's wife, though it is used in furnishing the hotel during the term of the lease.[20] A wife's property cannot be taken under a landlord's attachment for rent not accrued, under a lease of property to the husband.[21]

§ 1094. Concerning the priority of the lien.—The lien of a mortgagee of chattels whose mortgage is duly recorded, is prior to that of a landlord on whose premises they may be afterward used by the mortgagor; although the mortgagee may have knowledge that such chattels were being used upon the leased premises,[22] and the landlord's lien on growing crops of a tenant who is cultivating the land on shares, even though the rent

[14] Van Patten v. Leonard, 55-520.
[15] Clark v. Haynes, 57-96.
[16] Thorpe v. Fowler, 57-541.
[17] Merrit v. Fisher, 19-354.
[18] Grant v. Whitewell, 9-152; see Nesbitt v. Bartlett, 14-485.
[19] Jarchow v. Pickens, 51-381; Rand v. Barrett, 66-731.
[20] Perry v. Waggoner, 68-403; see Jarchow v. Pickens, 51-381.
[21] Shurz v. McMenamy, 82-432.
[22] Jarchow v. Pickens, 51-381; Rand v. Barrett, 66-731.

share has not yet been set apart to the landlord, can not be divested by a creditor of the tenant levying an attachment thereon;[23] and where, during the term of a lease, another lease was made between the same parties covering the same property, it was held that while the execution of the second lease operated as a cancellation of the first as between the parties, yet the landlord's lien for rent under the second lease upon property kept upon the premises at the time of the change, would not be postponed by reason thereof to that of a chattel mortgage made by the lessee prior to such change, and of which the lessor had no knowledge at the time.[24]

So it is said that when a farm tenant who was the head of a family, kept a span of horses upon the leased premises for use, and not for sale, and they were the only horses he owned or used, and the lease was not recorded, nor was there any lien or incumbrance on the horses of record, and prior to the maturity of any rent the tenant traded the horses for another span to a person who had no actual knowledge of the lease, or where the horses were kept, and subsequently absconded with all his property, leaving the rent unpaid, that the horses were subject to the landlord's lien for rent. That the sale of them did not affect the lien, but was subject to it, and that, as the statute which created the lien provides no protection in favor of persons having no notice thereof, the property subject to the lien can not be transferred free from the lien.[25]

So a landlord may follow the crops raised on the premises and on which he has a lien, into the hands of one who buys them;[26] but a landlord can not have a lien prior to that of a mortgage, when, at the time the mortgage was executed, he did not have a subsisting contract by virtue of which rent was to accrue;[27] nor will a land-

[23] Atkins v. Womeldorf, 53-150.
[24] Rollins v. Proctor, 56-326.
[25] Richardson v. Petersen, 58-724.
[26] Holden v. Cox, 60-249; Richardson v. Petersen, 58-724; Evans v. Collins, 62 N. W., 810; Blake v. Counselman, 63-679; Frorer v. Hammer, 68 N. W., 564; Kramer v. Adams, 63 N. W., 180; Neeb v. McMillan, 68 N. W., 438.
[27] Thorpe v. Fowler, 57-541.

lord's lien be prior upon goods used in a hotel to one created by chattel mortgage on them prior to the beginning of the landlord's lease.[28] So he has no lien on property of the wife which is used on the demised premises.[29] A provision in a lease creating a lien on property exempt from execution is in its nature and effect a mortgage and as such must be recorded to be valid against existing creditors or subsequent purchasers without notice.[30]

§ 1095. When the lien attaches, and its continuance.—The lien attaches at the commencement of the term or as soon as the property is brought on the premises,[31] for all rent to become due, or that will accrue during the entire term.[32]

It continues for the period of one year after a year's rent, or the rent of a shorter period claimed, falls due; but it does not, in any case, continue more than six months after the expiration of the term.[33] If a stock of goods or merchandise or a part thereof, subject to a landlord's lien, is sold under judicial process, order of court, or by an assignee under a general assignment for the benefit of creditors, the lien of the landlord will not be enforcible against the stock, or any of it, except for rent due for the term already expired, and for rent to be paid for use of demised premises for a period not exceeding six months after the date of the sale, and this is so regardless of any agreement that the parties may make.[34]

§ 1096. Of waiver or loss of the lien.—It can not be waived or lost by an unauthorized sale by the tenant of property kept for use and not for sale.[35] So the tak-

[28] Rand v. Barrett, 66-731; Manhattan Trust Co. v. S. C. & N. R. Co., 68 Fed. R., 72.

[29] Perry v. Waggoner, 68-403.

[30] Sioux Valley State Bk. v. Honnold, 85-352.

[31] Garner v. Cutting, 32-547; Grant v. Whitewell, 9-152; Carpenter v. Gillespie, 10-592; Martin v. Stearns, 52-345; Gilbert, etc., v. Greenbaum, 56-211; Doane v. Garretson, 24-351.

[32] Garner v. Cutting, 32-547; Grant v. Whitewell, 9-152; Carpenter v. Gillespie, 10-592; Martin v. Stearns, 52-345; Gilbert, etc., v. Greenbaum, 56-211.

[33] Code, Sec. 2992.

[34] Code, Sec. 2992.

[35] Holden v. Cox, 60-447; Rich-

ing of a note for rent and the indorsement of it to another, does not prevent the landlord, who is compelled to take it up as indorser, from enforcing his lien for rent for which the note was given;[36] but proceeding under the general attachment law for rent not due will be a waiver of his lien.[37] The lien being a statutory one and for the benefit of the landlord, he may waive it, and he is presumed to waive his lien as to sales made in the ordinary course of trade.[38] But taking a chattel mortgage, which, on account of a failure to record, he can not enforce, is not a waiver of his lien.[39] But the taking of security or of a mortgage while not conclusive as a waiver is a fact to be considered in determining whether the lien has been waived.[40] If a landlord proceeds under the general attachment law for rent not due, he will be confined to the remedy there given.[41] As to other cases of waiver.[42]

§ 1097. Of injunctions against tenants.—The landlord may have an injunction against the tenant or his assignee to prevent a sale and removal of property on which he has a lien, from the demised premises.[43] But a landlord who has a lien on growing crops, for rent due and unpaid, and which may be enforced by attachment, can not have an injunction to restrain the tenant from removing them from the demised premises.[44] Where a mercantile firm was occupying a leased store room, and the firm was dissolved by the death of one of the partners, the landlord had a lien for rent which would accrue under the lease, but the surviving partner had a right to close out the business in such a manner as he might

ardson v. Petersen, 58-724, and cases cited under section relating to priority of lien.

[36] Farwell v. Grier, 38-83, and see German Bk. v. Schloth, 59-316.

[37] Clark v. Haynes, 57-96.

[38] Grant v. Whitewell, 9-152.

[39] Pitkin v. Fletcher, 47-53.

[40] Rollins v. Proctor, 56-326; Smith v. Dayton, 62 N. W., 650.

[41] Clark v. Haynes, 57-96.

[42] Bergman v. Guthrie, 89-290; Jno. V. Farwell & Co. v. Stick, 61 N. W., 565, and 64 N. W., 614; Lacey v. Newcomb, 63 N. W., 704; Mingus v. Daugherty, 87-56; Smith v. Dayton, 62 N. W., 650; Crill v. Jeffrey, 64 N. W., 625.

[43] Garner v. Cutting, 32-547, and cases cited; Carson v. Electric Light & Power Co., 85-44.

[44] Rotzler v. Rotzler, 46-189.

deem best for the interests of the creditors, the executors of the deceased partner and himself; and in such case the landlord could not have an injunction to compel the surviving partner to hold the goods till the expiration of the term of the lease, or to sell them in the usual course of trade, and especially so when the surviving partner was a man of ample means.[45] When it appears that the relation of landlord and tenant does not exist, an injunction will not lie to prevent an occupant of a store room from recovering his goods.[46]

§ 1098. Of proceedings against third persons to recover for property sold them by tenants and of actions for injuries to the crop.—A landlord has no such interest in the growing crops of his tenant, that he can maintain an action against a third person who injures them.[47]

When the crops of the tenant on which the landlord has a lien are sold by the tenant and the proceeds taken by a third party, an action at law will lie against him for damages for the wrongful conversion of the property; and if such action is brought in equity it should be changed into the proper proceedings and transferred to the proper docket. Error as to the kind of proceedings will not abate the action.[48] If the purchaser of the crop on which such lien has attached has consumed it, an action of damages will lie against him for the value.[49] A failure to bring an action within six months after the expiration of the term against a purchaser from a tenant of property, subject to the lien, will defeat the action.[50] If, however, he assents to the sale of lien covered grain to an innocent purchaser, he will not be permitted to enforce his lien thereon.[51]

[45] Milner v. Cooper, 65-190.

[46] Stibbs v. Agner, 65-318.

[47] Drake v. Chicago, R. I. & P. Ry. Co., 70-59; Townsend v. Isenberger, 45-670; see Howard County v. Kyte et al., 69-309, and cases cited.

[48] Scallan v. Wait, 64-707; see Holden v. Cox, 60-449, and Richardson v. Petersen, 58-724.

[49] Holden v. Cox, 60- 449; Nickelson v. Negley, 71-546; Evans v. Collins, 62 N. W., 810; Blake v. Counselman, 63 N. W., 679; Frorer v. Hammer, 68 N. W., 564; Kramer v. Adams, 63 N. W., 180.

[50] Nickelson v. Negley, 71-546.

[51] Wright v. Dickey Co., 83-464.

§ 1099. Cases in which the landlord may assert his lien.—The landlord may assert his lien for rent when the tenant's property has been taken by one claiming to be owner in an action of replevin.[52] A creditor of a tenant who is cultivating land upon shares can not, by the levy of an attachment upon the growing crop of the tenant, deprive the landlord of his lien thereon.[53]

§ 1100. Of the remedy.—The lien given the landlord is purely a statutory remedy and will be strictly construed. It attaches for rent only and rent is a certain profit, either in money, provisions, chattels or labor, issuing out of lands and tenements as return for their use, hence a landlord does not have a lien for damage for breach of other covenants in the lease.[54] The landlord may maintain an action for rent due without asking for an attachment;[55] or he may, it seems, amend his petition and make the affidavit provided by the statute and then have his writ.[56] He can not claim a landlord's lien if he proceeds under the general attachment law.[57] While the lien attaches for the entire term to property of the tenant brought on and used on the demised premises, yet it may not be enforceable as to rent not due, so long as the tenant conducts and carries on his business in the usual manner, and as contemplated by the terms and conditions of the lease.[58]

§ 1101. Of payments by the mortgagee of rent.—The mortgagee of goods may, after being garnished by a creditor of the mortgagor, pay over out of the surplus in his hands after satisfying the mortgage debt, to the landlord, rents accrued for the use of the building in which the goods were kept, and which was in arrears when the mortgagee took posession.[59]

§ 1102. Of enforcement of the lien.—The lien may be effected or enforced by the commencement of an ac-

52 Edwards v. Cottrell, 43-194.
53 Atkins v. Womeldorf, 53-150.
54 Merrit v. Fisher, 19-354.
55 Bartlett v. Gaines, 11-95.
56 Bartlett v. Gaines, 11-95.
57 Clark v. Haynes, 57-96; see Sec. 1096 and cases cited.
58 Gilbert v. Greenbaum, 56-211.
59 Doane v. Garretson, 24-351.

tion within the time of its continuance for the rent alone, in which action the landlord will be entitled to a writ of attachment, upon filing with the proper clerk a verified petition stating that the action is commenced to recover rent accrued within one year previous thereto upon premises described in the petition. And the procedure will be the same as in other cases of attachment, except that no bond will be required. If a lien for rent is given in a written lease or other instrument, upon additional property, it may be enforced in the same manner and in the same action.[60] When the land is leased on the condition that the third of the crop shall be delivered to the owner in payment of rent, the owner acquires no title to a part of the crop reserved for the rent until it is set apart for him by the tenant.[61] Crops of a sub-tenant can be appropriated under a landlord's attachment in an ordinary action against the original tenant for rent.[62] The action for malicious prosecution in wrongfully suing out a landlord's attachment can not be interposed as a counter claim in an action in which the attachment is sought.[63]

§ 1103. Of the petition.—The petition to enforce a landlord's lien may be in the following form:

FORM OF PETITION FOR LANDLORD'S LIEN.

Title, }
Venue. }

The plaintiff states that on or about the ——— day of———, 18—, by an (oral or written) agreement he leased to the defendant for the term of ——— years from the day of ———, 18—, the following described premises situated in the county of ——— and State of Iowa, to wit: (Here describe premises.)

That the said defendant promised and agreed to pay as rent for said premises the said sum of ——— dollars, payable as follows, to wit: (Here set out how and when rent is payable.)

That the said defendant entered upon and continued in possession of said premises during the term of said lease. and that there is now due

[60] Code, Sec. 2993; Grant v. Whitewell, 9-152; Nickelson v. Negley, 71-546.

[61] Townsend et al. v. Isenberger, 45-670; Rees v. Baker, 4 G. Greene, 461; Atkins v. Womeldorf, 53-150; Howard County v. Kyte, 69-309.

[62] Houghton v. Bauer, 70-314.

[63] Youngerman v. Long, 63 N. W., 674.

and owing from said defendant as rent for said premises the sum of ——— dollars.

That this action is commenced to recover rent accrued within one year previous thereto, upon the premises heretofore described.

Wherefore the plaintiff demands judgment for the sum of ——— dollars, with interest thereon at the rate of ——— per cent. per annum from the ——— day of ———, 18—, and costs of suit, and that a writ of attachment issue for the enforcement of his lien.

———, attorney for plaintiff.

(If the agreement is alleged to be in writing a copy of it should be attached to the petition, and made a part of it.)

(Add verification.)

§ 1104. Of the attachment.—The landlord's attachment may be in the following form:

FORM OF LANDLORD'S ATTACHMENT.

The State of Iowa.

To the sheriff of ——— county, greeting:

Whereas ——— has this day filed his verified petition in the office of the clerk of the district court in and for ——— county, Iowa, claiming of ——— the sum of ——— dollars, with interest thereon as stated in said petition, and has stated in said petition that said action is commenced by him against the said ——— to recover said sum of money and interest as rent accrued, within one year previous thereto, upon the following described premises situated in ——— county, Iowa, to wit: (Here describe premises.)

Now, therefore, you are hereby commanded to attach the crops grown on said premises between the ——— day of ——— 18—, and the ——— day of ———, 18—, and also any other personal property of the said ——— which has been used or kept for sale on said premises between said dates and not exempt from execution, wherever the same may be found in your county, or so much thereof as shall be necessary to satisfy said sum of ——— dollars, and interest and costs of suit, and safely preserve the same to be dealt with according to law.

And of this writ make due service and return of your doings hereunder to our said court on or before the first day of the next term thereof.

In testimony whereof I have hereunto set my hand and caused the seal of said court to be affixed this ——— day of ———, 18—.

[Seal.] ———, clerk

of the district court of ——— county, Iowa.

§ 1105. Of the levy of the writ.—The officer is bound to levy the attachment on any personal property in the possession of, or that he has reason to believe belongs to, the defendant, or on which plaintiff directs him to levy.

But if, after such levy, he receives notice in writing, under oath, from some other person, his agent or attorney, that such property belongs to him, and stating the nature of his interest, and the facts showing how and from whom he acquired such interest, and for what consideration, or from the defendant that the property is exempt from execution, the officer may release the property unless a bond be given; but the officer will be protected from all liability by reason of such levy, until he receives such notice. When the officer receives such notice he must give the plaintiff, his agent or attorney, notice that an indemnifying bond is required. Such bond may thereupon be given by or for the plaintiff, with sureties, to the officer, to the effect that the obligors will protect and indemnify him against the damages he may sustain in consequence of the seizure and sale, and warrant to any purchaser of the property such estate or interest therein as is sold, and thereupon the officer must proceed to subject said property to the attachment, and return the bond to the district court of the county from which the execution issued. If such bond be not given, the officer holding the attachment may, within a reasonable time after demand being made on said officer, restore the property to the person from whose possession it was taken, and the levy will stand discharged.[64] The bond above mentioned may be in the following form:

FORM OF INDEMNIFYING BOND TO SHERIFF.

Know all men by these presents:

That we, ———, principal, and ——— sureties, are held and firmly bound unto ———, sheriff of ——— county, Iowa, in the penal sum of ——— dollars, lawful money of the United States, well and truly to be paid to the said ———, sheriff, as aforesaid, his heirs, executors or assigns.

The conditions of this obligation are such, that whereas, the said ———, sheriff, as aforesaid, has in his hands a certain writ of landlord's attachment issued from the office of the clerk of the district court of ——— county, Iowa, on the ——— day of ———, 18—, for the sum of

[64] Code, Secs. 3906, 3991, 3994, 3993; see chapter on Executions and Exemptions.

——— dollars and costs in favor of ——— and against ———, which said writ is directed to said sheriff.

And whereas, said sheriff has by virtue thereof attached the following described property and now holds the same.

(Here describe property attached.)

And whereas, notice in writing under oath has been duly served on said sheriff that the property so attached belongs to ———, and that his interest therein is that of (absolute owner, or if otherwise state the fact), and that he acquired said interest (here state from whom and how he acquired it), and that he paid for said property the sum of (here state the consideration), and demanding that the said property be released.

And whereas, notice of such claim and notice by the said ——— has been given to ———, plaintiff in said action, that an indemnifying bond is required.

Now, if said obligors shall and will indemnify the said ———, sheriff, against all damages which he may sustain in consequence of the seizure or sale under said writ of the following described personal property, to wit (here describe property attached), and shall and will pay to any claimant of said property all damages he may sustain in consequence of said seizure or sale thereof, and shall and will warrant and make good to the purchaser thereof at said sale all of the estate, and interest which shall be sold therein at said sale, then this obligation to be void, otherwise to remain in full force and virtue.

Dated this ——— day of ———, 18—.

———, principal.

———, } sureties.
———, }

(Add justification by sureties.)

The sheriff taking the bond must approve the same, which approval may be in the following form:

The foregoing bond taken and the sureties therein approved by me this ——— day of ———, 18—.

———, sheriff of ——— county, Iowa.

§ 1106. Of pleading, etc.—The answer should state whatever defense the defendant may have in accordance with the usual rules of pleading. If the answer only takes issue on the indebtedness, and does not controvert the plaintiff's right to a lien, provided an indebtedness is proved evidence tending to show that a large portion of the rent for which the action is brought accrued more than a year prior to its commencement, is not admissible, and in such a case it is only necessary for the jury to pass

upon the issue of indebtedness to authorize the entry of a judgment recognizing the lien.[65]

Where, after an assignment of a lease, the landlord sued out an attachment against the original lessees, and caused it to be levied on property of the assignees, and on the premises, and made service by publication after the proceedings had been amended to make the assignees parties, the levy did not confer jurisdiction, as the assignees were not parties in the writ, and the fact that they afterward replevied the property did not cure the defect.[66] Whether a landlord's lien is assignable.[67] But the lease is assignable and it carries the lien of the landlord with it, as well as all remedies for its enforcement.[68] A sheriff may show that property taken under the writ was delivered to a third person by direction of the attorney of the plaintiff in the attachment and thus avoid liability for the negligence of the receiptor.[69]

[65] Bartlett v. Gaines, 11-95.
[66] Wells, etc., v. Sequin, etc., 14-143.
[67] Farwell v. Grier, 38-83.
[68] Haywood v. O'Brien, 52-537; Lufkin v. Preston, 52-235.
[69] Citizens Nat'l Bk. v. Loomis, 69 N. W., 443.

CHAPTER LXVIII.

OF MANDAMUS.

Sec. 1107. Object and purpose of the order.
1108. By whom issued.
1109. Will not issue to control discretion.
1110. When the order will be issued
1111. When the order will be refused.
1112. On whose petition granted.
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1114. Of the petition.
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1116. Of the order.
1117. Of power of the court.

Section **1107. Object and purpose of the order.**—The object of a writ of mandamus is to maintain an order of a court of competent jurisdiction commanding an inferior tribunal, board, corporation or person, to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station.[1] Formerly and under the code of 1851, the proceeding by mandamus was a prosecution, in the name of the State, commenced by filing an information under oath; and on motion presented in open court, the court ordered an alternative writ to issue, or granted a rule to show cause why an alternative writ should not issue. The defendant made answer to this writ, upon which issues the cause was tried and a peremptory writ granted or refused.[2]

§ **1108. By whom issued.**—The order for a writ of mandamus may be issued by the district or superior court to any inferior tribunal, or to any corporation, officer or person, and by the supreme court to any district or su-

[1] Code, Sec. 4341; State v. County Judge, 12-237, 246; Patterson v. Vail, 43-142; Larkin v. Harris, 36-93.

[2] Chance v. Temple, 1-178.

perior court, if necessary; and also in any other case where it is found necessary for that court to exercise its legitimate power.[3]

§ 1109. Will not issue to control discretion.—When discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but can not control such discretion, even though such discretion be exercised unwisely.[4]

§ 1110. When the order will be issued.—The plaintiff in any action except those brought for the recovery of specific real or personal property, may also as an auxiliary relief have an order of mandamus to compel the performance of a duty established in such action. But if such duty, the performance of which is sought to be compelled, is not one resulting from an office, trust or station, it must be one for the breach of which a legal right to damages is already complete at the commencement of the action, and must also be a duty of which a court of equity would enforce the performance.[5]

It will issue to enforce the discharge of an official duty where the exercise of discretion is not involved;[6] the order may be made to compel the auditor of State to issue his warrant upon the treasurer of State for a sum due a public officer on his salary.[7] So the duty of a city council to levy a tax not exceeding the maximum limit of the power of taxation, for the payment of a judgment against the corporation, upon which an execution has been issued and returned nulla bona, may be enforced by mandamus;[8] and a county treasurer holding money collected

[3] Code, Sec. 4342; Westbrook v. Wicks, 36-382; Brown v. Crego, 29-321.

[4] Code, Sec. 4341; Bryan v. Cattell, 15-538; Clark v. The Board of Directors, etc., 24-266; Jones v. Trustees, etc., 26-594; Scripture v. Burns, 59-70; Bailey v. Ewart, 52-111; Coy v. City Council of Lyons, 17-1; Peters v. Warner, 81-335; Malt Ext. Co. v. C., R. I. & P. R. Co., 73-98.

[5] Brown v. Crego, 29-321; Larkin v. Harris, 36-93; Patterson v. Vail, 43-142.

[6] Code, Sec. 4341; Bryan v. Cattell, 15-538; Case v. Blood, 71-632; Dist. Twp. v. Ind. Dist., 72-687; Newby v. Free, 72-379; Ridley v. Doughty, 77-226; Hancock v. Dist. Twp., 78-550; Ireland v. Hunnel, 90-98.

[7] Bryan v. Cattell, 15-538.

[8] Coy v. The City Council of Lyons, 17-1; State v. County Judge, etc., 12-237; State v. City of Dav-

upon a tax to pay a judgment against the county may by mandamus be compelled to pay the same to the judgment creditor on demand;[9] but in some cases it will not lie against an officer to compel a refunding of a tax,[10] and the directors of a school district refusing to levy a tax to pay a judgment against the district may be compelled by mandamus to do so, notwithstanding the fact that the electors of the district failed and refused to provide therefor by not voting the necessary tax;[11] and the board of supervisors may be compelled by mandamus, when acting as a board of canvassers, to declare elected, and issue a certificate to the person receiving the highest number of votes cast at an election.[12] This action will lie to compel a road supervisor to remove trees standing in and obstructing the highway, when he fails to perform his duty in that respect.[13] So he may be thus compelled to remove a fence or other obstruction improperly placed by him in a highway.[14]

And a municipal corporation, which, in order to avoid the payment of its debts, purposely keeps the valuation and assessment of property in its limits too low, will be compelled by mandamus to make a fair assessment and apply in payment of a judgment against said corporation, of the proceeds arising from the maximum tax levied thereon, such surplus as may remain after deducting the amount required for current expenses,[15] and a railway company may be by mandamus compelled to construct and maintain a private crossing where such duty is imposed by law.[16] A board of school directors refusing to act in a proper case may be compelled to do so by mandamus;[17] and when the electors of a school district have

enport, 12-335; see State v. The Mayor, etc., 18-388.

[9] Brown v. Crego, 32-498.

[10] Eyerly v. Board, 81-189.

[11] Boynton v. The Dist. Twp., 34-510.

[12] Bradfield v. Wait, etc., 36-291; The State v. The County Judge, etc., 7-186; State v. Bailey Co. Judge, 7-390.

[13] Patterson v. Vail, 43-142.

[14] Larkin v. Harris, 36-93.

[15] Coffin v. The City of Davenport, 26-516.

[16] Boggs v. C., B. & Q. R. Co., 54-435.

[17] Albin v. Board of Directors, 58-77; Wood v. Farmer, 69-533.

determined that the school house of the district may at proper times be used for religious meetings and Sunday schools, the duty of the directors to open the house for the purpose may be enforced by mandamus.[18] So it will lie to compel the county treasurer to pay over to a railroad company entitled thereto a tax voted and collected;[19] and a municipal corporation may have an order of mandamus against a public officer after his resignation, to compel him to deliver the books and papers of the corporation, which he wrongfully detains;[20] and the proper county officer may by an order of mandamus be compelled to affix the county seal to county warrants legally issued,[21] and this writ may issue to enforce the collection of a judgment rendered in the United States court;[22] and proceedings may be had by mandamus to compel a municipal corporation to levy a tax to pay a judgment notwithstanding such judgment was also rendered against an individual who has property subject to an execution;[23] and it will lie at the instance of proper parties to compel the directors of a district township to take action with reference to detaching certain territory from said township and adding it to an independent district having acted favorably thereto;[24] and it would seem that an order of mandamus would issue, to compel the appointment of arbitrators to divide assets of a school district, when an independent district has been carved out of a district township, and the parties could not agree on a division;[25] and when a school house has been removed under an order of the directors, which order is reversed by the county and State superintendent, it is the duty of the board to return the school house to its former site, and mandamus will lie to compel them to do so,[26] and to compel a county judge to canvass the votes upon the ques-

[18] Davis v. Boget, 50-11.
[19] The McGregor & S. C. R. Co. v. Birdsall, 30-255; see Eyerly v. Board, 81-189.
[20] Keokuk v. Merriam, 44-432.
[21] Prescott v. Gonser, 34-175.
[22] Ex parte Holman, 28-88.
[23] Palmer v. Stacy, 44-340.
[24] Hightower v. Overhaulser, 65-347.
[25] Case v. Blood, 68-486.
[26] Atkinson v. Hutchinson, 68-161.

tion of removing a county seat;[27] to compel a city to collect and pay over damages to persons injured by laying out streets through their premises.[28]

§ 1111. When the order will be refused.—It will not lie at the instance of a proprietor of a newspaper, to compel the board of supervisors to order publication of their proceedings in his paper;[29] nor in favor of a party aggrieved by the action of a board of school directors, when he has an adequate remedy by appeal to the county superintendent, and from him to the superintendent of public instruction;[30] nor to compel county officers to strike out an assessment alleged to be erroneous;[31] nor in any case where the petition shows that the plaintiff has a plain, speedy and adequate remedy at law;[32] nor against the State;[33] nor can a debt, while it remains in its original form, and not reduced to judgment, be made the basis of an action of mandamus to compel the levy of a tax to pay the same, unless such proceedings were authorized by the law under which it was contracted;[34] nor will it lie to compel a municipal corporation, which requires all the proceeds of a tax which is up to the full limit authorized by law to meet ordinary expenses, to apply a part of such fund to the payment of a judgment against such corporation;[35] nor to compel the board of supervisors to levy a tax to pay a judgment rendered upon warrants issued for ordinary expenses and bridge purposes, when it appears that they have levied the maximum rate allowed by law for such purpose;[36] nor to compel the issuance of a teacher's certificate by the county superintendent, but only to compel him to take some action on the application therefor;[37] nor will it lie to com-

27 Dishon v. Smith, etc., 10-213.
28 State v. City of Keokuk, 9-438.
29 Welch v. The Board, etc., 23-199.
30 Marshall v. Sloan, 35-445.
31 Meyer v. The County of Dubuque, 43-592.
32 Meyer v. The County of Dubuque, 43-592; Smith v. Powell, 55-215.
33 Mills Pub. Co. v. Larrabee, 78-97.
34 Coy v. The City of Lyons, 17-1.
35 Coffin v. The City of Davenport, 26-516.
36 Polk v. Winett, 37-34; The Iowa R. & L. Co. v. Sac Co., 39-126.
37 Bailey v. Ewart, 52-111.

pel an officer to do that which is not within his power to do;[38] nor against a religious corporation, to compel the reinstatement of a member expelled, and inquiring into the rightfulness of such action, no property interest or other valuable civil right being affected;[39] nor to compel the clerk of the courts to issue an execution on a judgment;[40] nor at the instance of a contractor against a school board, when the board, in inviting proposals, said: "The contract will be awarded to the lowest responsible bidder; the board reserves the right to reject any and all bids," and the contractor claimed to be the lowest responsible bidder; he could not compel the board to award him the contract;[41] nor to compel school directors to act in cases when they have met and are unable to agree;[42] nor will it lie to compel school directors to restore territory.[43]

§ 1112. On whose petition granted.—The order of mandamus is granted on the petition of any private party aggrieved, without the concurrence of the prosecutor for the State, or on the petition of the State by the county attorney, when the public interest is concerned, and is in the name of such private party, or of the State, as the case may be in fact brought.[44] It is doubtful if an action by an independent school district against its president to compel him to perform a duty involves the public interest in such a sense as to require the action to be brought in the name of the State.[45]

§ 1113. When action for may be joined with other causes of action.—When the action is brought by a private person it may be joined with a cause of action for such an injunction as may be obtained by ordinary proceedings, or with any action except those brought for recovery of specific real or personal property.[46]

[38] Rice v. Walker, 44-458.
[39] Sale v. First, etc., 62-26.
[40] Pickel v. Owen, 66-485; see Code, Sec. 4344.
[41] Hanlin v. Dist. Twp., 66-69.
[42] Case v. Blood, 68-486.
[43] Barnett v. Ind. Dist., 73, 134.
[44] Code, Sec. 4345; but see Odendahl v. Russell, 86-669; Crane v. C. & N. W. R. Co., 74-330.
[45] Ind. Dist. v. Rhodes, 88-570.
[46] Cooper v. Nelson, 38-440; Code, Sec. 4348.

§ 1114. Of the petition.—As we have seen the order of mandamus is granted on the petition, and this petition must state the claim of the plaintiff, and facts sufficient to constitute cause for such claim; that the plaintiff, if a private individual, is personally interested therein, and that he sustains and may sustain damage by the non-performance thereof, and that performance has been demanded by him and refused or neglected, and must pray for an order of mandamus commanding the defendant to fulfill such duty.[47]

The petition may be in the following form:

FORM OF PETITION IN MANDAMUS TO COMPEL TOWNSHIP TRUSTEES TO CERTIFY TO COUNTY TREASURER THAT THE CONDITIONS ON WHICH A TAX TO A RAILROAD COMPANY WAS VOTED HAVE BEEN COMPLIED WITH.

Title, }
Venue. }

The plaintiff states that the defendants, and each of them, are the duly qualified and acting trustees of ——— township in the county of ———, and State of Iowa.

That at all the times hereinafter mentioned the ——— railway company was a corporation for pecuniary profit, duly organized and existing under the laws of the State of Iowa, and engaged in the building and operation of a line of railway from the city of ———, Iowa, to the city of ———, Iowa, passing through said ——— township.

That on the ——— day of ——— 18—, at a special election, duly and legally called for that purpose, the electors of said ——— township voted a special tax of ——— per cent. upon the taxable property of said township, for the purpose of aiding the said ——— railway company in the construction of its said railway. That said ——— per cent. tax was voted to said ——— railway company upon the following conditions to be performed by said railway company, to wit:

1. That one-half of said tax shall be due and collectible when said road is constructed through the said township, and the other half in the year following.

2. That fifty consecutive miles of said railway shall be completed, passing through said township, and the cars running thereon.

3. That said tax shall become null and void unless said railway shall be completed through said township as above specified, and the cars running thereon by the first day of December, 18—.

4. That said company was to erect and maintain a depot within

[47] Code, Sec. 4346; Coffin v. The City of Davenport, 26-516; Scripture v. Burns, 59-70.

fifteen hundred feet of the wind-mill used by the elevator company at the ——— town of ———, in said township.

5. (Here insert any other conditions on which said tax was voted.)

That said conditions were duly set forth in the notice of the special election at which said tax was voted, and were duly certified by the township clerk of said township, to the county auditor of ——— county, together with the rate of per cent. of tax so voted, the year in which the same was to be collected and an exact copy of the notice under which said election was held, which certificate was duly filed for record in the office of the recorder of deeds of said ——— county, on the ——— day of ———, 18—, and recorded in book ———, on pages ——— of miscellaneous records of ———, Iowa.

That said tax so voted was duly levied by the board of supervisors of said county and placed upon the tax list of said township, in all respects according to law, and a large portion of said tax has been paid to the county treasurer by the taxpayers of said township, to wit, the sum of about ——— thousand dollars, and the same still remains in the hands of said county treasurer.

That the conditions required of the said railway company upon which said tax was voted, were and have been fully complied with and performed on part of said railway company; that said railway company built, constructed and completed its said line of railway for a distance of fifty consecutive miles, the same passing through said township, and operated the same with cars running thereon, before the first day of December, 18—, and erected and maintained a depot within fifteen hundred feet of the wind-mill used by the elevator company at the town of ———, Iowa, in said township, and it thereupon became the duty of the trustees of said township to so certify to the treasurer of said county, as required by law.

That said county treasurer refuses to pay over the said money so collected, in his hands, because said defendants have failed and neglected to make certificate required by law, as above set forth. The plaintiffs are personally and individually interested in having the above mentioned duty of said township trustees performed, and sustained, and will sustain, great damages by the non-performance of said duty, and have been damaged thereby to the sum of ——— thousand dollars by the loss of interest on said taxes and otherwise.

That on the ——— day of ———, 18—, the plaintiffs, in writing, duly demanded of said trustees that they make certificate to the county treasurer, as required by law, showing that the conditions upon which said tax was voted had been fully complied with, a copy of which notice is hereto annexed and marked "Exhibit A," and made part of this petition.

The said township trustees, the defendants above named, disregarding their duty in the premises, have failed and refused, and do still refuse, to make the certificate; for the purpose of unlawfully preventing the said railway company from collecting and receiving from said county any portion of said tax.

Wherefore plaintiffs pray that a peremptory order of mandamus of

this court issue to be directed to said defendants, commanding them forthwith to certify to the said treasurer of said ——— county, Iowa, that the conditions required of said railway company at said special election at which said tax was voted have been fully complied with, and performed, on part of said ——— railway company, and that the plaintiffs have judgment against the defendants, and each of them, for ——— thousand dollars damages, and for costs of this proceeding.

———, attorneys for plaintiff.

(Add verification.)

(A copy of the notice referred to in petition should be attached thereto.)

FORM OF PETITION FOR MANDAMUS.

The plaintiff states:

That (name of corporation) is a civil corporation, organized under the laws of this State; that the defendants are the officers of said corporation authorized by law to levy and collect taxes for and on behalf of said corporation; that on the ——— day of ——— A. D. 18—, the plaintiff recovered a judgment in this court, against said (name of the corporation) upon the ordinary evidence of indebtedness issued by said corporation for the sum of one thousand dollars and costs; that on the ——— day of ——— A. D. 18—, an execution was issued on said judgment and returned wholly unsatisfied, no property of said corporation being found on which to levy the same; that it became the duty of the defendants on or before the ——— day of ——— A. D. 18—, to levy a sufficient tax upon the taxable property of said (city or county) to pay the said judgment, with interest and costs; that on the ——— day of ——— A. D. 18—, the plaintiff requested of, and demanded that the defendants should and would levy such tax; that they have wholly neglected and refused to do so; that plaintiff is personally interested in the collection of the judgment herein referred to, whereby the plaintiff is greatly damaged and hindered in the collection of said judgment.

Wherefore the plaintiff prays that a peremptory order of mandamus issue, commanding said defendants forthwith to levy and collect a sufficient tax to pay the said judgment, with interest and costs, together with the costs of this action, and pay the same to the plaintiff.

———, attorney for plaintiff.

(Add the usual verification.)

§ 1115. Of practice.—The pleadings and other proceedings in any action in which a mandamus is claimed, must be the same in all respects, as nearly as may be, and costs are recoverable by either party, as in an ordinary action for the recovery of damages,[48] nor is it triable de

[48] Code, Sec. 4347; Chance v. Temple, 1-178; Dove v. Ind. Dist. of Keokuk, 41-689; Dist. Twp. v. Ind. Dist., 72-687.

novo in the supreme court.[49] The order of mandamus can not properly be issued as preliminary or intermediate process, but only after hearing and judgment.[50] No counter claim is allowed, and no joinder except as heretofore stated.[51]

§ 1116. **Of the order.**—When the plaintiff recovers judgment the court may include therein a peremptory order of mandamus directed to the defendant commanding him forthwith to perform the duty required, and may award a money judgment for damages and costs, upon which execution may issue.[52] The order must simply command the performance of the duty, and must be directed to the party, and may be issued in term time, or in vacation, and shall be returnable forthwith, and no return except that of compliance will be allowed; but time to return the writ may, upon sufficient grounds, be allowed by the court or judge, either with or without terms, in the exercise of a wise discretion.[53] The writ or order of mandamus may be in the following form:

FORM OF PEREMPTORY ORDER OF MANDAMUS.

The State of Iowa.

To (name of defendant), greeting:

Whereas, on the ——— day of ——— A. D. 18—, in an action then pending in the (name of the court), wherein ——— was plaintiff, and ——— defendant, judgment was rendered by said court that a peremptory order of mandamus issue in said action commanding you, the said defendant, to (insert the thing required to be done, or omitted).

Now, therefore, you are hereby commanded, that immediately on the receipt of this order, you, (here insert the duty to be performed), and forthwith make return to our said court how you have complied with the demands of this order.

Witness, ———, clerk of said court, with the seal thereof hereto affixed, this ——— day of ——— A. D. 18—.

[Seal.] ———, clerk.

§ 1117. **Of the power of the court.**—The court may, upon application of the plaintiff, besides, or instead of proceeding against the defendant by attachment, direct

[49] Dove v. The Ind. Dist. of Keokuk, 41-689.
[50] Wright v. Conner, 34-240.
[51] Code, Sec. 4348.
[52] Code, Sec. 4349.
[53] Code, Sec. 4350.

that the act required to be done, be done by the plaintiff or some other person appointed by the court, at the expense of the defendant; and upon the act being done, the amount of such expense may be ascertained by the court, or by a referee appointed by the court, as the court or judge may order, and the court may render judgment for the amount of such expenses and costs, and enforce payment thereof by execution.[54] During the pendency of the action, the court, or judge in vacation, may make temporary orders for preventing damages or injury to the plaintiff, until the action is decided.[55] When the State is a party it may appeal without security.[56]

[54] Code, Sec. 4351.
[55] Code, Sec. 4352.
[56] Code, Sec. 4353.

CHAPTER LXIX.

OF MECHANICS' LIENS AND CLAIMS.

Sec. 1118. Of claims of sub-contractors of public buildings and improvements.
1119. Same—Manner of making claim.
1120. Same—Adjudication of claim—Release of—Filing prevented, how.
1121. Of liens for opening, developing and operating coal mines.
1122. Who may have a mechanic's lien.
1123. When no lien allowed because collateral security is taken.
1124. Other cases in which the right to a lien is denied.
1125. Of the contract.
1126. Of liens on the wife's property by virtue of contracts made with the husband.
1127. Extent of lien generally.
1128. Of priority of the lien.
1129. When the lien attaches—Its continuance.
1130. Of preserving the lien.
1131. Of the duties of the clerk.
1132. By whom and in what court liens may be enforced.
1133. Who made defendants.
1134. When lien will be forfeited.
1135. Of pleadings, practice, etc.
1136. Of satisfaction of the lien.
1137. Of the petition.
1138. Of judgment.
1139. Of limitation of actions.
1140. Of sub-contractors—Who are.
1141. Of the sub-contractor's lien—How preserved and how discharged.
1142. Of payments made by the owner to the contractor within the thirty days, etc.
1143. Extent of lien of sub-contractor, when claim filed after thirty days.

Section **1118. Of claims of sub-contractors of public buildings and improvements.**—Every mechanic, laborer or other person, who as sub-contractor performs work or labor upon, or furnishes material for the con-

struction of any public building, bridge or other improvement not belonging to the State, has a valid claim against the public corporation constructing such building, bridge or other improvement, for the value of such services and material in an amount not in excess of the contract price, to be paid for the same; but such corporation is not required to pay such claim at any time before, or in any manner different from that provided in the principal contract. The corporation may pay its contractor according to the terms of its contract.

§ 1119. Same—Manner of making claim.—Such claim is made by filing with the public officer through whom the payment is to be made an itemized and sworn statement of the demand within thirty days after the performance of the last work or labor, or the furnishing of the last portion of the material, and such claims have priority in the order in which they are filed, and the statement must show on its face that it is a sworn statement.[1]

§ 1120. Same—Adjudication of claim—Release of —Filing prevented, how.—Any party in interest may cause to be adjudicated the validity of such claim, its priority, the amount due thereon, or the mode and time of payment, by equitable action in the district court, and the court may assess a reasonable attorney's fee against a party failing and in favor of such corporation.[2] The contractor can at any time release such claim by filing with the treasurer of such corporation a bond for the benefit of such claimant, with sufficient penalty and sureties approved by such treasurer, conditioned for the payment of the sum found due claimant, and the contractor may prevent the filing of such claims by filing in like manner a bond conditioned for the payment of persons who may be entitled to file such claims; actions may be brought on such bond by any claimant within one year after the cause of action accrues and judgment rendered

1 Code, Sec. 3102; McGillivray v. Dist. Twp., 65 N. W., 974; Epeneter v. Montgomery County, 67 N. W., 93; Hunt v. King, 66 N. W., 71.

2 Code, Sec. 3103.

thereon against the principal and sureties for any amount found due.[3] It is held that there is no law which will subject the indebtedness of a county to a contractor to the claim of a sub-contractor or laborer for work done on a county building or bridge under the contract, and that if the claim provided for in the statute is not filed within the thirty days, the party filing it can not claim a lien.[4] The bond will not be invalid if executed to the parties interested, instead of to the public corporation, nor because not specifying a penal sum, and in any event it may be good as a common law obligation.[5]

§ 1121. Of liens for opening, developing and operating coal mines.—Every laborer or miner who shall perform labor in opening, developing or operating any coal mine, may have a lien upon all of the property of the person, firm or corporation owning or operating such mine, and used in the construction or operation thereof, including real estate and personal property, for the value of such labor to the full amount thereof, to be secured and enforced in the same manner as are mechanics' liens.[6]

§ 1122. Who may have a mechanic's lien.—A mechanic's lien is a right to a remedy against property and by which means real estate may be subjected to a specific lien for the payment of the claim, and a mechanic's lien is an insurable interest.[7] Every person who does or performs any work or labor upon, or furnishes any materials, machinery or fixtures for any building, erection or other improvement upon land, those engaged in the construction or repair of any work of internal improvement, and those engaged in grading any land or lot, by virtue of any contract with the owner, his agent, trustee, contractor or sub-contractor, upon complying with the requirements of the statute, has, for his work and labor done, or

[3] Code, Sec. 3104.
[4] Breneman v. Harvey, 70-479, and cases cited.
[5] Carnegie v. Hulbert, 70 Fed., 209.
[6] Code, Sec. 3105.
[7] Andrews v. Burdick, 62-714; Carter v. Humboldt Ins. Co., 12-287.

material, machinery or fixtures furnished, a lien upon such building, erection or improvement and upon the land belonging to such owner on which the same is situated, to secure the payment of such work or labor done, or materials, machinery or fixtures furnished.[8] One who performs labor for a contractor in the erection of a building may establish a lien against the building therefor, though no express contract for payment was made.[9] And the fact that such laborer also acts as overseer will not affect his right to a lien.[10] So a lien will attach in favor of one who has furnished labor or material in the erection of lightning rods.[11] A day laborer on a railroad is entitled to a lien for his wages.[12] But such lien can not be enforced against the road if the contractor has fully paid the sub-contractor under whom such laborer worked, the full amount due under his contract, and this is so though the railroad company may owe the contractor a sum exceeding the amount of the laborer's claim against the sub-contractor.[13] One who wrongfully makes improvements on another's land can not defeat a mechanic's lien on such improvements by showing that he had no right to enter upon the land, neither can a purchaser from him of the improvements.[14] One can not have a lien for money paid for the use of another.[15] But a lien will not lie for work or material for a sidewalk upon a street.[16] Nor in favor of one who, under a contract with an adjoining owner, builds a party wall partly on the latter's land.[17] An architect who prepares plans and specifications for the improvement of a building, which improvements are made, may have a lien.[18] Taking an appeal will not affect the lien.[19] Nor will taking a mortgage on the property unless it appears that it was the intention to look to

[8] Code, Sec. 3089.
[9] Fœrder v. Wesner, 56-157.
[10] Same as No. 9.
[11] Harris v. Schultz, 64-539.
[12] Mornan v. Carroll, 35-22.
[13] Utter v. Crane, 37-631.
[14] Lane v. Snow, 66-544.
[15] Stubbs v. Clarinda, etc., 65-513.
[16] Coenen v. Staub, 74-32.
[17] Swift v. Calnan, 71 N. W., 233.
[18] Parsons v. Brown, 66 N. W., 880; see Foster v. Tierney, 91-253.
[19] Julien G. L. Co. v. Hurley, 11-520.

such security alone.[20] Nor will the taking of a note for the amount of the claim.[21]

§ 1123. When no lien is allowed because collateral security is taken.—No person is entitled to a lien who, at the time of executing or making the contract for work, labor or material, or during the progress of the work, erection, building or improvement, takes any collateral security on said contract; but after the work is completed, and the contractor or other person has become entitled to claim or establish a lien, the taking of collateral or other security will not affect the right to such lien unless the new security is by express agreement given and received in lieu of the mechanic's lien.[22] But the taking of a promissory note for the amount due for work done or materials furnished will not affect the right of a party to a lien unless so intended.[23] And the mere promise of a subsequent purchaser of property subject to a mechanic's lien, in consideration of forbearance to pay the claim secured by the lien, is not taking collateral security.[24] The taking of collateral security after the material is furnished, though the building be not completed, will not prevent one from having a lien.[25] And one who takes a negotiable note for the amount of his claim, and negotiates it, but upon its dishonor is compelled as indorser to take it up, may enforce his original right to a lien.[26] And if the right to a mechanic's lien has been forfeited by taking collateral security, such security may be surrendered and the lien by agreement of parties restored, and when so restored it will become valid and effective between the parties or those subsequently acquiring rights in the property as though no security had been taken.[27] The fact that a husband, as agent for his wife,

[20] Gilchrist v. Gottschalk, 39-311.

[21] Green v. Ely, 2 G. Gr., 508; Mix v. Ely, 2 G. Gr., 513; Logan v. Attix, 7-77.

[22] Code, Sec. 3088; Atlantic Trust Co. v. Carbondale Coal Co., 68 N. W., 697.

[23] Logan v. Attix, 7-77; Bonsall v. Taylor, 5-546; Scott v. Ward, 4 G. Gr., 112.

[24] Mervin v. Sherman, 9-331.

[25] Bissell v. Lewis, 56-231.

[26] German Bk. v. Schloth, 59-316; see Howley v. Warde, 4 G. Gr., 36; Scott v. Ward, 4 G. Gr., 112.

[27] Getchell v. Musgrove, 54-744.

contracts for material to be used in the erection of a building on her land, and also binds himself by such contract to pay therefor, will not constitute the taking of collateral security by the material-man, so as to defeat his right to a lien.[28] Nor will the fact that a contract for building a railroad provides that money specified therein should be paid by citizens of a county through which the road is to be built.[29]

§ 1124. Other cases in which the right to a lien is denied.—The lien will attach only for work or labor done and materials furnished.[30] Breaking sod is not such "an improvement" upon land as to entitle the person performing such labor to a mechanic's lien.[31] Nor is the building of a sidewalk in the street.[32] Nor will it lie for the cost of a portion of a partition wall.[33] It has been held that where the contract for work, labor or materials is made with a person having no title to, or interest in the land, the lien could not be enforced.[34] And that mere possession of the realty without right or interest therein was not sufficient.[35]

So it has been held that no lien will lie for improvements voluntarily made on another's land, because there was no contract with the owner of the land.[36] And prior to the enactment of chapter 179, laws of 1884, no lien could be had against a school house,[37] nor against a building owned by the county and used for county purposes,[38] nor against bridges built by the county.[39]

§ 1125. Of the contract.—To entitle a party to a mechanic's lien, the work or labor must have been done or performed, and the material furnished, under a con-

[28] Bissell v. Lewis, 56-231.
[29] Delaware R. C. Co. v. Davenport and St. P. R. Co., 46-406.
[30] Brown v. Rodacker, 65-55.
[31] Brown v. Wyman, 56-452.
[32] Coenen v. Staub, 74-32.
[33] Swift v. Calnan, 71 N. W., 233.
[34] Redman v. Williamson, 2-488.
[35] Reed v. Huston, 12-35; see Lane v. Snow, 66-544.
[36] Wilkins v. Litchfield, 69-465; Littleton Sav. Bk. v. Osceola Land Co., 76-660; Templin v. C., B. & P. R. Co., 73-548.
[37] Charnock v. Dist. Twp., 51-70.
[38] Lewis v. Chickasaw County, 50-234; Whiting v. Story County, 54-81; Breneman v. Harvey, 70-479.
[39] Loring v. Small, 50-271.

tract.[40] There need be no express agreement that the mechanic is to have a lien for his work or materials.[41] The contract need not be in writing, and it would seem, in certain cases at least, it may be implied from knowledge possessed by the parties.[42] If materials are furnished for building purposes in accord with an agreement or understanding with the parties and the materials are so used, the seller may have a lien therefor, but if such materials are sold from time to time in the course of trade and nothing said, and no understanding had as to the purpose for which they are to be used, the seller will not be entitled to a lien.[43] There should be something to show that the materials were furnished especially to be used in or about a building.[44] And it has been held that a lien on improvements may exist without any contract with the owner of the fee; all that is necessary is a contract with the owner of the improvements. If materials are furnished for two buildings, it is not necessary to show that they went into the particular building on which it is sought to establish the lien.[45]

§ 1126. Of liens on the wife's property by virtue of contracts made with the husband.—Where labor was performed on the wife's house under a contract with her husband, as her agent, for her use and benefit, and with her knowledge and consent, and for which both promised to pay, a lien exists against her property.[46] But the agency of the husband will not be presumed from the marital relation alone, nor from the fact that the lumber was purchased by the husband and used by him in the

[40] Code, Sec. 3089; Logan v. Attix, 7-77; Coates v. Shorey, 8-416; Neilson v. Iowa E. R. Co., 51-184; Jones v. Swan, 21-181; Stockwell v. Carpenter, 27-119; Conrad v. Starr, 50-470.

[41] Jones v. Swan, 21-181; Stockwell v. Carpenter, 27-119; Fœrder v. Wesner, 56-157; Carney v. Cook, 80-747.

[42] Neilson v. Iowa E. R. Co., 51-184.

[43] Coates v. Shorey, 8-416.

[44] Coates v. Shorey, 8-416; Jones v. Swan, 21-181; Stockwell v. Carpenter, 27-119; Miller v. Hollingsworth, 33-224.

[45] Lewis v. Saylor, 73-504; Williams v. Judd-Wells Co., 91-378; Bartlett v. Bilger, 92-732; Roose v. Billingsley, etc., Com. Co., 74-51; see Bowman v. Newton, 72-90.

[46] Burdick v. Moore, 24-418; Kidd v. Wilson, 23-464; Frank v. Hollands, 81-164.

erection of a house upon the land of his wife.[47] When property is purchased by the husband to improve the land of the wife, and it is so used with her acquiescence in the enhancement of her separate property, with full knowledge on her part that it is not paid for, and of all the facts, the seller will have an equitable lien on the property for the value of the materials furnished.[48] But if a husband, against his wife's protest, purchases lumber on his own credit and uses it to build an addition to a barn on his wife's land, a lien does not attach to her land nor to the improvements made with such lumber for the price thereof.[49] The property of a married woman is subject to a lien for improvements made under a contract with her, or by any one authorized to contract for and bind her.[50] And it is presumed that such contracts might be ratified by the wife, even though the one making them had no authority so to do.[51] It is said that where a wife owns land and the husband erects a dwelling house thereon, that the establishment of a lien on the building is not inconsistent with her ownership of the land.[52] While mere knowledge of the wife that the husband is purchasing material on credit which is being used in constructing a building on her land will not subject such land to a mechanic's lien therefor.[53] Where the wife furnished the husband with money to buy lumber for a house and he purchased the same with such money from plaintiff, with whom he had a general account for lumber, without directing on whose account the money paid should be applied, the seller can not apply payment on the husband's general account and claim a lien on the property of the wife.[54]

§ 1127. Extent of lien generally.—The entire land upon which such building, erection or other improvement

[47] Miller v. Hollingsworth, 33-224, and 36-163; Price v. Seydel, 46-696; Nelson v. Cover, 47-250.
[48] Miller v. Hollingsworth, 36-163; see Nelson v. Cover, 47-250.
[49] Getty v. Tramel, 67-288.
[50] Greenough v. Wiggington, 2 G. Gr., 435; Bissell v. Lewis, 56-231.
[51] Burdick v. Moulton, 53-761.
[52] Estabrook v. Riley, 81-479.
[53] Young v. Swan, 69 N. W., 566.
[54] Bartlett v. Mahlum, 88-329.

is situated, including as well that part of the land not covered with the building, is subject to the lien to the extent of all the right, title and interest owned therein by the owner thereof, for whose immediate use or benefit the labor was done or performed, or the things were furnished; and when the interest owned in said land by the owner of such building, erection or other improvement is only a leasehold interest, the forfeiture of the lease for the non-payment of rent, or for non-compliance with any of the other stipulations therein, will not forfeit or impair a mechanic's lien, so far as concerns said buildings, erections or improvements, but the same may be sold to satisfy the lien, and may be removed within thirty days after the sale thereof, by the purchaser.[55] So, the lien attaches to a building, for materials furnished for its erection, on land held by the vendee under contract of purchase, and such lien, as to the building, is prior to the vendor's lien for unpaid purchase price, but the vendor's lien is superior on the land.[56]

It attaches to the homestead.[57] It attaches against a party having possession under a bond for a deed, and a subsequent procurement of the full legal title by the holder of the bond will not affect the lien.[58] And it is said the lien may be enforced when, by contract, payment was to be made in land or other property.[59] The lien attaches to the building or improvement erected with the materials furnished, but does not follow the material in the hands of a vendee of the purchaser and attach to a building erected by him out of such material.[60] But a lien will attach to an equitable title and follow it into the hands of any one to whom it may pass, and a mere substitution of another contract for that under which the property is held will not defeat the lien, if the new contract was given as evidence of the same rights which were held under the old.[61] The lien having once attached to land, will remain

[55] Code, Sec. 3090.
[56] Stockwell v. Carpenter, 27-119; Monroe v. West, 12-119.
[57] Code, Sec. 2975.
[58] Same as No. 56.
[59] Riley v. Ward, 4 G. Gr., 21.
[60] Heaton v. Horr, 42-187.
[61] Clark v. Parker, 58-509.

thereon after the improvements have been destroyed or removed.[62] A lien for materials furnished for the erection of a house will not cover a separate house standing on the same undivided lot, but is confined to the house for which the materials were furnished and so much of the lot as is properly appurtenant thereto.[63] Every person for whose immediate use or benefit any building, erection or other improvement was made, having the capacity to contract, including the guardians of minors or other persons, are included in the word "owner."[64] In section 3091 of the code, it is provided that when material has been furnished or labor performed in the construction, repair or equipment of any railroad, canal, viaduct or other similar improvement, the lien therefor shall extend and attach to the erection, excavation, embankment, bridges, road bed and all the land on which the same may be situated, including rolling stock thereto appertaining and belonging, all of which, except the right of way, constitute the building, erection or improvement. Under prior laws it has been held in the case of Bear v. the B., C. R. & M. R. Co., 48 Iowa, 619, that a mechanic's lien does not extend to the whole line of the road, and that the improvements are of such a character that they can not be sold under the lien and removed by the purchaser; that the lien of a mechanic for repairs on a completed railroad is not paramount to the lien of a mortgage executed after the commencement and before the completion of the road, nor when the improvements constituted an integral part of the road; and in the case of Nelson v. The Iowa Eastern R. Co., 51 Iowa, 184, the court held that a mechanic's lien upon a railroad would not embrace the rolling stock thereon; also that a lien for materials furnished for the construction of a road covered only the completed portion of the road; but the fact that the road, as projected when the materials were

[62] Same as No. 61.
[63] Ewing v. Allen, 68 N. W., 702.
[64] Code, Sec. 3096; Stockwell v. Carpenter, 27-119; Monroe v. West, 12-119; Jameson v. Gile, 67 N. W., 396.

furnished, was not fully completed, would not defeat the lien.

§ **1128. Of priority of the lien.**—The lien takes priority as between two or more persons claiming mechanic's liens upon the same property according to the order of the filing of the statements and accounts therefor.[65] They take priority over all garnishments upon the person of the owner for the contract debt made prior or subsequent to the commencement of the furnishing of the material or performance of the labor, without regard to the date of filing the claim for the mechanic's lien.[66]

They will be preferred to all other liens and incumbrances which may attach to or upon such buildings, erections or other improvements, or either of them, and to the land upon which they are situated, made subsequent to the commencement of said buildings, erections or other improvements, provided that the rights of purchasers, incumbrancers and other persons who acquire interests in good faith for a valuable consideration, and without notice, after the expiration of the time for filing claims for liens, shall be prior to the claims of all contractors or sub-contractors who have not, at the time such rights and interests were acquired, filed their claims for mechanic's liens.[67] Liens for material or for work and labor including those for additions, repairs, and betterments attach to the buildings, erections, or improvements for which they were furnished or done, in preference to any prior lien, incumbrance or mortgage upon the land upon which such erection, building or improvement belongs or is erected or put. When such material was furnished or labor performed for the erection or construction of an original and independent building, erection or other improvement commenced since the attaching or execution of such prior lien, incumbrance or mortgage, the court may, in its discretion, order and direct such

[65] Code, Sec. 3095; Robertson v. Barrack, 80-538.

[66] Code, Sec. 3095.

[67] Code, Sec. 3095; see Gilbert v. Tharp, 72-714.

building, erection or improvement separately sold under execution, and the purchaser may remove the same within such reasonable time as the court may fix. But if the court finds that said building should not be separately sold it will take an account and ascertain the separate values of the land, and the erection, or building or other improvement and order the whole sold and distribute the proceeds of sale so as to secure to the prior mortgage, or other lien, priority upon the land, and to the mechanic's lien priority upon the building, erection or other improvement. If the material furnished or labor performed was for an addition to, repairs of or betterments upon buildings, erections or other improvements, the court will take an accounting of the values before such material was furnished or labor performed, and the enhanced value caused by such addition, repairs or betterments, and upon a sale of the premises, distribute the proceeds of the sale so as to secure the prior mortgagee or lien holder priority upon the land and improvements as they existed, prior to the attaching of the mechanic's lien, and to the mechanic's lien holder priority upon the enhanced value caused by such additions, repairs or betterments, and in case the premises do not sell for more than sufficient to pay off the prior mortgage or other lien, the proceeds will be applied on such prior mortgage or other liens.[68] It has been held that a mechanic's lien had priority on the building over the lien of a vendor for the purchase money of the land.[69]

And under a prior statute it was held a mechanic's lien for work or materials furnished in making additions or repairs to a building, would not be a prior lien on the building to a mortgage which had existed on the premises before such mechanic's lien.

But the mechanic's lien would have priority as to an independent structure on the land.[70] And it is said that

[68] Code, Sec. 3095; and German Bk. v. Schloth, 59-316; Curtiss v. Broadwell, 66-662; Miller v. Seal, 71-392.

[69] Stockwell v. Carpenter, 27-119; Frost v. Clark, 82-298; James v. Gile, 67 N. W., 396; and see Townsend v. White, 71 N. W., 337.

[70] Getchell v. Allen, 34-559; Equitable L. Ins. Co. v. Slye, 45-615;

a mechanic's lien attaches from the commencement of the building or improvement, from the furnishing of the first item therefor, and takes precedence over a mortgage executed after that time, although the particular work or material for which the lien was claimed was not done or promised until after the making and recording of the mortgage.[71] That a party furnishing materials or machinery for a building by the filing of his statement and claim for a lien acquires one upon the entire structure, and what he furnishes becomes in turn subject to all liens of his fellow mechanics which attached earlier.[72] A mechanic's lien will have priority over a mortgage executed and recorded within ninety days from the date of the last item of work done or material furnished.[73] Where a mechanic's lien was not filed against a railroad until twenty-six months after the materials were furnished, and a sale of the road made after the ninety days within which the lien should have been filed, held, that the purchaser at such sale took the road discharged of the lien.[74] And in the same case it was held that a mechanic's lien upon a railroad for the construction of a new bridge and abutment in place of an old one was not a paramount lien to a mortgage upon the road previous to the erection of such new bridge, and that the lien of a mechanic for repairs on a completed railway is not paramount and superior to the lien of a mortgage executed after the commencement, and before the completion of the road, nor will the lien of the mechanic upon the particular work performed by him take precedence of such mortgage, when the improvements he has made constitute an integral part of the road.[75] The provisions of paragraph 4

O'Brien v. Pettis, 42-293; see Stockwell v. Carpenter, 27-119; Fletcher v. Kelley, 88-475; Bartlett v. Bilger, 92-732; Luce v. Curtis, 77-347.

[71] Neilson v. Iowa E. R. Co., 44-71; Iowa Mortgage Co. v. Shauquest, 70-124.

[72] Equitable L. Ins. Co. v. Slye, 45-615.

[73] Lamb v. Hanneman, 40-41; Evans v. Gripp, 35-371; see Gilbert v. Tharp, 72-714.

[74] Bear v. B., C. R. & M. R. Co., 48-619.

[75] Bear v. B., C. R. & M. Co., 48-619; (this case was decided on the law as it stood prior to the taking effect of Chapter 8 of Title 15 of the Code.)

of section 3095 of the code, have no application when the mortgage has been foreclosed and the premises sold thereunder before the materials for which the lien is claimed have been furnished. In such case the statutory right to redeem is the only right which can be enforced.[76] Under a prior law it was held that the purchaser of a building sold on a mechanic's lien could only remove the same from the leased premises on the same terms that the tenant could, and if one of the conditions of the lease to the tenant was that he could not remove the building while in arrears for rent, then the purchaser must pay the rent before he can remove it.[77] When plaintiffs under a contract with "W. & Son" furnished materials for the enlargement of a building occupied by them, and afterward "W." mortgaged the premises to "E." plaintiffs, in an action to foreclose their lien, sought to have it established as superior to "E.'s" mortgage, but they failed to show that "W. & Son" had such an interest in the property that a mechanic's lien would attach thereto; it was held the evidence did not warrant a decree making their alleged lien superior to the mortgage.[78]

October 20, 1882, "B." executed a deed of trust upon certain real estate to secure an existing debt. Between November 9, 1882, and April 3, 1883, the plaintiffs furnished "B." materials for the erection of a building on the real estate. June 4, 1883, the property was seized upon an attachment at the suit of "P." v. "B." July 3, 1883, plaintiffs filed their statement for a mechanic's lien; it was held that the deed of trust was superior to the mechanic's lien on land and improvements; that the mechanic's lien was superior to the attachment, because, while the statement for the lien was not filed within ninety days, as required by statute, "P.'s" right accrued before the expiration of the ninety days, and by the express language of the statute, it is only purchasers and incumbrancers in good faith, without notice, whose rights ac-

[76] Shepherdson v. Johnson, 60-239.

[77] Oswold v. Buckholtz, 13-506.

[78] Dierks v. Walrod, 66-354.

crue after ninety days, that are not defeated by the lien in such cases.[79]

As between a party claiming a lien who has not filed his statement until after the expiration of the ninety days, and a prior mortgagee whose mortgage was not executed until after the expiration of such period, the burden of proving that the mortgagee had notice at the time of taking his mortgage, of the existence of the mechanic's lien, is on the one claiming such lien.[80] In a case where the lessees of a mill under verbal lease for five years, put in machinery and fixtures and afterward gave a chattel mortgage thereon, it was held that those furnishing the machinery who filed their statement in time, had a lien upon it prior to the mortgage, even though such fixtures were chattel property.[81] If a contract on which a lien is claimed does not provide for interest, or attorney's fees, the parties can not enter into a contract covering such items which will be binding as against a mortgage executed after the lien attached and prior to the making of such supplemental contract.[82] If one goes into possession of property subject to a vendor's lien, it is prior to a mechanic's lien for materials subsequently furnished.[83] One acquiring a mechanic's lien is charged with notice of all liens effecting the property covered by it, whether they be recorded or not, and such lien holders, not made parties to an action to foreclose a mechanic's lien, will not be concluded by the decree, which is entered after the recording of such lien.[84]

If the holder of a mechanic's lien buys the property covered by it at a judicial sale under a judgment on such lien, the lien will not be merged, so as to render it subordinate to an intervening mortgage, unless such was the intention of the parties.[85] A mechanic's lien for material for improvements on leased premises will be paramount

[79] Curtis v. Broadwell, 66-662.
[80] Hoskins v. Carter, 66-638, and cases cited.
[81] Nordyke v. Hawkeye W. M. Co., 53-521.
[82] Bissell v. Lewis, 56-231.
[83] Logan v. Taylor, 20-297.
[84] Nashua Trust Co. v. W. S. Edwards Mfg. Co., 68 N. W., 587.
[85] Delaware R. C. Co. v. Davenport & St. P. R. Co., 46-406.

to the landlord's lien for rent and to a chatel mortgage taken by the landlord on the improvements before action was begun to establish the mechanic's lien.[86] But a mechanic's lien will be inferior to a mortgage filed for record before work on the improvements began.[87] Further as to questions of priority.[88]

§ 1129. When the lien attaches—Its continuance.—Whatever is done by the mechanic under his contract, dates, as to his lien, from the day he commences work, and not from the time of actual performance of the several parts of the undertaking.[89] And the lien for all materials furnished attaches when the first item is furnished.[90] The lien continues for ninety days after all the work is done, or all the material furnished under the contract.[91] And as between the parties to the contract, the lien may continue for a longer period, and so it may as against one whose rights against the property accrued before the expiration of the ninety days.[92] The doctrine above stated, that the lien attaches when the work first commences, or the first material is furnished, applies when a contract is shown, and the work is done continuously; not to cases where the work is done under different contracts, or where such time intervenes as to raise a presumption that the work had ceased, and the contract been completed.[93]

§ 1130. Of preserving the lien.—The law keeps the lien alive for ninety days after the work under the contract is completed, or the materials are all furnished; but to preserve it after the ninety days, the person claiming the lien, whether contractor or sub-contractor, must file with the clerk of the district court of the county in which the building, erection or improvement to be

[86] National L. Co. v. Bowman, 77-706.

[87] Bartlett v. Bilger, 92-732.

[88] Eagle Iron Works v. Des M. S. R. Co., 70 N. W., 193; Kiene v. Hodge, 90-212; Luce v. Curtis, 77-347; Townsend v. White, 71 N. W., 337; Iowa Mortgage Co. v. Shauquest, 70-124.

[89] Moore v. West, 12-119.

[90] Jones v. Swan, 21-181; Delaware R. C. Co. v. Davenport & St. P. R. Co., 46-406; Conrad v. Starr, 50-470.

[91] Code, Secs. 3092, 3093.

[92] Code, Secs. 3092, 3093; Curtis v. Broadwell, 66-662.

[93] Jones v. Swan, 21-181.

charged with such lien is situated, a just and true statement or account of the demand due him after allowing all credits setting forth the time when such material was furnished or labor performed, and when completed, and containing a correct description of the property to be charged with the lien, and verified by affidavit. Such verified statement must be filed by a principal contractor within ninety days, and by a sub-contractor within thirty days from the date on which the last of the material was furnished or the last of the labor performed. But a failure or omission to file the same within the periods above stated will not defeat the lien except as against purchasers or incumbrancers in good faith without notice, whose rights accrued after the thirty or ninety days, as the case may be, and before any claim for the lien was filed. But when the lien is claimed upon a railway, the sub-contractor has sixty days from the last day of the month in which such labor was done, or material furnished, within which to file his claim therefor.[94] When a mechanic's lien which is junior to a mortgage on the premises is filed before the expiration of the ninety days, it will not be prejudiced by the commencement of a suit, to foreclose the mortgage prior to such filing, nor will such lien-holder be affected by such foreclosure proceeding to which he is not made a party.[95] If the party entitled to the lien fails to file the same until after the lapse of the ninety days, and the property in the meantime passes to an innocent purchaser, the lien can not be enforced against such purchaser, and this is so where the vendee takes the property under a bond for a deed and makes no actual payments thereon, but executes his notes for the purchase price.[96] If a sub-contractor fails to do what is required of him by statute, it will be conclusively presumed that he has waived his right to a lien.[97] Against the holders

[94] Code, Sec. 3092; Sanoval v. Ford, 55-461; Jones v. Swan, 21-181; Ewing v. Folsom, 67-65; Jones, etc., Lumber Co. v. Murphy, 64-165.

[95] Jones v. Hartsock, 42-147.
[96] Weston v. Dunlap, 50-183.
[97] Brown v. Smith, 55-31.

of other existing liens it is not essential to the validity of a mechanic's lien that a statement and claim therefor should be filed with the clerk.[98] A sub-contractor on a railroad to secure a mechanic's lien must file his claim within sixty days from the last day of the calendar month in which the work was performed.

The word "done" in the statute has reference to the time of the performance of the work and not to the time when the work of the sub-contractor is completed, and each month's work for this purpose is considered as separate from that of the other months.[99] It is said that one who has actual notice when taking a conveyance that material has been furnished for a building and has not been paid for, cannot take advantage of the negligence on the part of the claimant who has failed to file his statement for a lien.[1] If a lien is claimed for material furnished for, and used in, a building within ninety days prior to the time it is asserted, such claim cannot be enforced against a purchaser of the property without proof that the material was used in the particular building.[2] The statement filed for the lien must be a statement or account of the demand due the plaintiff and must show the amount of the account on which the demand is founded.[3] Under the revision it was held that the name of the owner of the property against which the lien was claimed, need not be set out in the statement, and when the owner had died before the filing of the statement, it was held sufficient to make out the statement against the estate, though the names of the heirs owning the property were not stated.[4] When a sub-contractor filed a statement and claim for a mechanic's lien and included therein his account for money received and disbursed for his immediate employers, with his account for labor performed by him, and claimed a lien for

[98] Bissell v. Lewis, 56-231.
[99] Sandval v. Ford, 55-461.
[1] Lee v. Hoyt, 70 N. W., 95.
[2] Roose v. Billingsly, etc., Com. Co., 74-51.
[3] Valentine v. Rawson, 57-179; Ewing v. Folsom, 67-65; Hug v. Hintrager, 80-359; Wetmore v. Marsh, 81-677; Novelty Iron Works v. Capital City Oat Meal Co., 88-524.
[4] Welch v. McGrath, 59-519.

a general balance which was greater than the amount actually due him for labor, and such facts appeared on the face of his statement, it was held the claim filed was not a "just and true statement," as required by statute, and he was not entitled to a lien.[5] But see Chase v. Garver Coal & Mining Co., 90 Iowa, 25. As to defective description of the property.[6] As to mistakes in description and the effect thereof.[7] Unintentional mistakes in the account will not defeat the lien, but it would be otherwise if the account was erroneously stated with intent to defraud.[8] If one indebted to a lumber dealer on two accounts for material for two different buildings makes a payment which is first applied by the creditor to one account and afterward to the other, in the absence of mistake, the lien under the first account is released to the extent of such payment.[9] The statement for a lien may be filed by one of the members of a firm, but whether a statement filed after the assignment of the claim but in the name of the assignor, is sufficient, quære.[10] Where, by agreement between the owner and contractor, a claim which the former held against the latter was to be allowed as a payment on the last installment to be paid under the contract, and the sub-contractor's claim for a lien was filed more than thirty days after the last item in his account, it was held he could recover only what remained due from the owner to the contractor after deducting the said claim. Under a prior statute it was held that a mechanic's lien for labor or material held good against intervening incumbrances for ninety days from the date of the last item without filing a statement or claim.

After that time the filing was necessary to preserve the priority of the lien.[11] And it was held under chapter

[5] Stubbs v. Clarinda, etc., 65-513.

[6] Chicago Lumber Co. v. Des M. D. P., 65 N. W., 1017; Roose v. Billingsly, etc., Com. Co., 74-51.

[7] Bissell v. Lewis, 56-231; Gray v. Dunham, 50-170; Nat'l L. Co. v. Bowman, 77-706.

[8] Green Bay Lumber Co. v. Miller, 62 N. W., 742.

[9] Chicago Lumber Co. v. Woods, 53-552.

[10] Ford v. Ind. Dist., 46-294.

[11] Noel v. Temple, 12-276; Jones

49, laws of 1874, that the requirement of that statute that the written settlement with the sub-contracor should be given to the contractor by the laborer claiming the lien, was complied with by filing a settlement with the clerk of the district court within the thirty days allowed for filing the lien.[12] When the statement of the account was made in the name of the plaintiffs and the affidavit for the lien was made by the agent at the place where the material was sold, and stated that he was the agent of plaintiffs, that he sold the material, and there was due him a sum specified, and claimed a lien therefor, it was held that it was a claim for a lien by the plaintiffs and not by the agent.[13]

So if the account is made out against the husband alone when the property is owned by the wife it will not defeat the lien, when notice of the lien filed, correctly described the property and claimed the lien against both husband and wife.[14] The lien as against the owner of the property is not defeated by a failure to file the statement with the clerk of the district court within ninety days from the time the work was done or materials furnished.[15] Below is given a form of account for mechanic's lien which can be varied to suit the circumstances of each particular case; it will be noticed, however, that the affidavit must be substantially the same in all cases.

FORM OF STATEMENT OF ACCOUNT FOR MECHANIC'S LIEN.

———, in account with ———.

1887, Dr.

(1) January 2d, to.....$

(2) February 5th, to.....

(3) March 15th, to.....

$

v. Swan, 21-181; Evans v. Tripp, 35-371; Chicago L. Co. v. D. M. D. P. Co., 65 N. W., 1017.

[12] Bundy v. K. & D. M. R. Co., 49-207.

[13] Lamb v. Hanneman, 40-41.

[14] Burdick v. Moon, 24-418; Kidd v. Wilson, 23-464.

[15] Kidd v. Wilson, 23-464.

Cr.

(4) February 10th, by cash.....$
(5) March 20th, by cash.....
(6) May 1st, by cash.....

$

Balance due .....$

State of Iowa, ——— County. } ss.

———, being duly sworn says, that on the ——— day of ———, 18—, he made a contract with one ——— to furnish materials (or labor, machinery or fixtures, as the case may be) for a certain (building, erection or other improvement, as the case may be) situated upon the following described land of which the said ——— was then and is now (or as the case may be) the owner, in (fee simple, or if it be a less interest state it,) to wit (describe the land); that under and by virtue of said contract the affiant furnished (materials, or labor and machinery or fixtures, as the case may be) for said (building, erection or other improvement) as specified in the above account, at the respective dates, and at and for the respective prices, stated in said account; that said account is a just and true account of the (labor done, or materials, machinery, etc., as the case may be) aforesaid, and there is due and owing him thereon after allowing all credits, the sum of ——— dollars, for which he claims a mechanic's lien upon said (building, erection or improvement, as the case may be) including the land on which the same is situated.

———.

Subscribed and sworn to before me, and in my presence by the said ——— this ——— day of ———, 18—.

[Seal.] ———, notary public, in and for ——— county, Iowa.

§ 1131. Of the duties of the clerk.—It is the duty of the clerk when the account or statement is filed in his office to indorse thereon the date and hour of filing and make an abstract thereof in a book kept by him for that purpose and properly indexed, containing the date and hour of its filing, the name of the person filing the lien, the amount of the lien, the name of the person against whom the lien is filed, and a description of the property to be charged with the lien.[16]

But it was held under the revision, section 1851, which is similar to the provisions of the present law, that the requirement that the clerk's abstract should contain the

[16] Code, Sec. 3100; Welch v. McGrath, 59-519; Ewing v. Folsom, 67-65.

name of the person against whose property the lien was filed, only required that it shall contain the name of the person against whom the account was filed, and the claim for a lien was made, and it did not require that the claim should state the name of the owner of the property against which the lien was claimed; and when the person against whom the claim existed was dead, the claim was properly filed as against the administrator of his estate, without naming the heirs who were the owners of the property against which it was sought to establish the lien.[17] When a claim for a lien was marked "filed," over the signature of one who appeared, from a jurat attached and belonging to the same paper, to be clerk of the district court, it was held that it appeared prima facie that the paper was filed by the clerk of the district court.[18]

§ 1132. By whom and in what court liens may be enforced.—Any person having filed a claim for a mechanic's lien, and being entitled to such lien, may bring an action to enforce the same in the district or superior court of the county wherein the property to be affected by the lien is situated, and a like action may be brought on any bond given in lieu of a lien.[19] Suit to enforce a lien may be brought by one who becomes the owner of the debt by assignment, though the mere inchoate right to a lien is not assignable so as to vest in the assignee the right to file and perfect the same.[20] And in an action in equity to enforce a mechanic's lien the court may render a judgment on the account, though it does not find that plaintiff is entitled to an equitable remedy.[21]

§ 1133. Who made defendants.—In an action to enforce a mechanic's lien, the party against whom it is sought to enforce the contract must, and all other per-

[17] Welsh v. McGrath, 59-519.
[18] Ewing v. Folsom, 67-65.
[19] Code, Sec. 3098.
[20] Brown v. Smith, 55-31; Langan v. Sankey, 55-52; Code, Sec. 3099; Merchant v. Ottumwa, 54-451; First Nat. Bk. v. Day, 52-680, and 64-118.
[21] Green Bay L. Co. v. Miller, 62 N. W., 742.

sons interested in the matter in controversy and in the property charged with the lien may be made parties defendant, and if not made parties, they will not be bound by the proceedings.[22] And the owner of real property, on which a mechanic's lien is sought to be established, is a necessary party to an action for that purpose.[23]

Other incumbrances of the same kind, who hold liens which are junior to the lien of plaintiff, must be made defendants, or they will not be bound by the proceedings; and, while mortgagees and judgment creditors may, at the option of the plaintiff, be made parties, yet the better practice is to make all persons defendants who have or claim liens which are junior to plaintiff's lien.

§ **1134. When lien will be forfeited.**—Upon the written demand of the owner, his agent or contractor, served upon the person claiming the lien, the action for the enforcement of the lien must be commenced within thirty days thereafter or the lien will be forfeited.[24] And where there was an attempt made to commence the action within the thirty days, but the notice served was void because not stating the term at which the defendant was required to appear, it was held that another notice, served after the expiration of the thirty days, to which defendant appeared, was not in compliance with the law, and the lien could not be established.[25]

§ **1135. Of pleadings, practice, etc.**—Actions to enforce mechanic's liens must be prosecuted by equitable proceedings, and no other cause of action can be joined therewith.[26] But it has been held that where several parties commenced actions against a common defendant to enforce mechanic's liens, that it was competent for plaintiffs and defendant, by agreement, to have united therewith an ordinary action at law, prosecuted by or-

[22] Code, Sec. 3462; Shields v. Keys, 24-298; Millard v. West, 50-616.
[23] Keller v. Tracey, 11-530.
[24] Code, Sec. 3099.
[25] Jones, etc., v. Boggs, 63-589.
[26] Code, Sec. 3429; Sweetzer v. Harwick, 67-488.

dinary proceedings.[27] But where there is a misjoinder of causes of action the defect will be waived unless taken advantage of by motion at the proper time.[28] So, where an action at law was begun against one of the defendants on a promissory note, and plaintiffs afterward amended, bringing in other parties and seeking to foreclose and establish a mechanic's lien, the amendment was properly stricken from the files, the plaintiff refusing to elect on which cause of action he would stand.[29] The appearance term is the trial term in actions to enforce mechanic's liens.[30] In an action to foreclose a mechanic's lien, when there is a general denial of the petition, plaintiff must prove that the buildings on which the improvements were made were situated on the land described in the statement and affidavit filed in the clerk's office, and that the defendant was the owner of the land, and such facts are not proved by the introduction in evidence of such statement and affidavit.[31]

As to what interest must be shown in real estate in order to enforce a lien against it.[32] The fact that the contract for the lien is in writing will not exclude evidence to show the purpose for which the materials mentioned in the contract were to be used.[33] The statement filed with the clerk is the limit of plaintiff's recovery only with respect to purchasers and incumbrancers.[34] Under a prior law it was held that the enforcement of a mechanic's lien was an action at law and no equity of redemption existed.[35] This is changed by the existing statute making it a proceeding in equity, and the right of redemption exists from sales made under judgments enforcing mechanic's liens as in other cases.[36]

[27] Hines v. W. Coal & M. Co., 48-296.

[28] Code, Sec. 3548; Flynn v. Des Moines & St. L. R. Co., 63-503; Hines v. Homer, 86-594.

[29] Sweetzer v. Harwick, 67-488.

[30] Code, Sec. 3656.

[31] Hutton v. Maines, 68-650; see Pease v. Thompson, 67-70.

[32] Dierks v. Walrod, 66-354; Lane v. Snow, 66-544.

[33] Neilson v. Iowa E. R. Co., 51-184; and cases cited.

[34] Same as No. 33.

[35] State v. Eads, 15-114, and cases cited.

[36] Code, Sec. 3429; Jones v. Harsock, 42-147; see Phelps v. Pope, 53-691.

But a mechanic's lien before judgment thereon is not of such a character as to entitle the holder to redeem.[37]

If the defendant, having been served with an original notice in an action to enforce a mechanic's lien, fails to appear and plead within the time provided by statute, judgment may be taken by default against him. Where a statement for a lien was filed against a society, and the sheriff was a member of its building committee, the delivery to him for service of a notice of the claim, and the filing thereof, addressed to the society, is not service on the society, it not appearing what the duties of the building committee were or that it was then in existence.[38] On the foreclosure of a lien the claim can not be amended to include land omitted, as against a purchaser in good faith without notice, and after the time for filing liens has expired and before any claims for liens are filed.[39] Under section 3089, of the code, a right to a lien on improvements may exist without any contract with the owner of the fee, but by contract with the owner of improvements.[40]

When a sub-contractor undertakes to enforce a mechanic's lien he should show in his petition such indebtedness from the owner to the contractor as will justify the court in decreeing a lien.[41] A lien will not be decreed when the pleadings fail to show that the material was furnished or work done, upon an improvement, or that anything is due.[42]

§ 1136. Of satisfaction of the lien.—Whenever a lien has been claimed by filing the same in the clerk's office and it is afterward paid, the creditor must acknowledge satisfaction thereof upon the proper book in such office, or otherwise, in writing, and if he neglects to do so for thirty days after demand in writing he will forfeit twenty-five dollars to the owner or contractor and

[37] Code, Sec. 4046.
[38] Steele v. McBurney, 65 N. W., 332.
[39] Chicago Lumber Co. v. D. M. D. P., 65 N. W., 1017; and see McGillivray v. Dist. Twp., 65 N. W., 974.
[40] Lane v. Snow, 66-544.
[41] Martin v. Morgan, 64-270.
[42] Roberts v. Campbell, 59-675.

be liable to any person injured to the extent of his injury.[43] If satisfied on the record, it will be sufficient to state in substance that the amount of the lien has been paid and satisfied; if the satisfaction is evidenced by a separate writing it may be in the following form:

FORM OF ACKNOWLEDGMENT OF SATISFACTION OF MECHANIC'S LIEN.

In consideration of the sum of ——— dollars, in hand paid by ———, of ——— county, Iowa, I hereby release and acknowledge satisfaction in full of a certain mechanic's lien for the sum of ——— dollars, claimed and filed by me in the office of the clerk of the district court within and for ——— county, Iowa, on the ——— day of ———, 18—, on the following described property to wit: (here describe the property.)

Witness my hand this ——— day of ———, 18—.

———.

If satisfaction be thus made it must be filed with the clerk of the district court, who must enter satisfaction of the lien upon the record, or on the margin thereof, in the same manner as the satisfaction of a mortgage is entered.

§ 1137. Of the petition.—The petition for a mechanic's lien may be in the following form:

FORM OF PETITION FOR MECHANIC'S LIEN.

Title, }
Venue. }

Par. 1. Plaintiff states: That on the ——— day of ———, 18—, he made a parol (or written) contract with the defendant to furnish him (here state what, as lumber, etc.), for a certain two-story dwelling house (or barn, or store building, etc.), situated on the following described real estate (here describe the entire tract of land).

Par. 2. That defendant, at the time said contract was made, was, and ever since has been, the owner in fee simple of said land, and the buildings situated thereon (if his interest is less than a fee simple, state what it is).

Par. 3. That under and by virtue of the contract heretofore referred to plaintiff furnished the lumber (or other materials, as the case may be), as set out in exhibit "A," attached hereto and made a part hereof.

Par. 4. That said lumber was furnished for the building aforesaid

[43] Code, Sec. 3101.

at the respective dates, and at and for the respective prices, as is shown in said exhibit "A."

Par. 5. That on the ——— day of ———, 18—, plaintiff filed in the office of the clerk of the district court of ——— county, Iowa, a just and true account of his demand due and owing him from defendant for said lumber (or materials, etc.), furnished as aforesaid, verified by affidavit and claiming a mechanic's lien therefor; copies of said account and affidavit are attached hereto, marked exhibits "A" and "B" respectively, and made a part hereof.

Par. 6. That the defendants ———, have, or claim to have, some lien or interest in or to the real estate heretofore described, but plaintiff avers that such lien or interest, if any, is junior and inferior to plaintiff's said lien.

Par. 7. That there is due plaintiff on said account the sum of ——— dollars with interest thereon from the ——— day of ———, 18—, for which he demands judgment against said defendant ———, with interest and costs, and prays that his mechanic's lien be established and enforced against the building and land aforesaid as provided by law; that the lien of each and all of the defendants in this action to the real estate above described be decreed to be junior and inferior to plaintiff's lien thereon, and that the equity of redemption of each and all of said defendants be forever barred and foreclosed, and that special execution issue for the sale of said premises, or so much thereof as may be necessary to satisfy said judgment, interest and costs, and for such other relief as may be equitable in the premises.

———.

(Add verification and exhibits "A" and "B.")

As the relief which should be prayed for will depend on the circumstances, the above form of prayer will have to be varied to suit the facts in each case. If a note has been taken for the amount of the account the following should be inserted in lieu of the first part of paragraph seven above: "That on the —— day of ——, 18—, the defendant, ——, executed to plaintiff his certain promissory note in words and figures following, for the amount then due on said account (here set out the copy of note). That no part of said account or note has been paid, that it is plaintiff's property, and there is due plaintiff on said note the sum of —— dollars, with —— per cent. interest thereon from —— day of ——, 18—, for which he pays judgment against said defendant and for costs." Then follow with prayer for lien, etc., as above.

§ **1138. Of judgment.**—It is said that when a mechanic's lien is confirmed by judgment, it is binding upon

the parties and all persons who are represented by them and claim under them, or are privy to them, and they are estopped from litigating that which is conclusive upon those with whom they thus stand related.[44] A judgment enforcing a mechanic's lien may be corrected by subsequent proceedings to show that the lien attached at an earlier date, and it is held that the plaintiff is not estopped by the first entry from asserting his precedence over other lien-holders whose liens attached before that entry was made.[45] Whether this could be done against parties whose liens attached after the entry, quære. When the defendant in a mechanic's lien foreclosure is the owner of both land and building, and there is no prior lien on the land, it is error to order a sale of the building alone, as its removal from the land would defeat the owner's right of redemption.[46] Under a prior statute providing for a sale and removal of improvements in certain cases, it was held that if the nature of the improvement was such that it could not be removed, the lien would be postponed to the prior incumbrance on the land.[47] And it was also held erroneous to decree a sale of land and buildings together and the payment of a part of the proceeds to the mechanic's lien holder in case of liens on buildings erected after the giving of a mortgage.[48]

Where a mechanic's lien which misdescribed what was intended to be covered thereby had been foreclosed, the lien did not thereby become merged in the judgment, so that another lien, correctly describing the property, might not be filed.[49]

§ 1139. Of limitation of actions.—Actions to enforce mechanic's liens must be brought within two years from the expiration of the thirty or ninety days, as the case may be, for filing the claims.[50] And the failure of a

[44] State v. Eads, 15-114.
[45] Monroe v. West, 12-119.
[46] Early v. Burt, 67-716.
[47] Conrad v. Starr, 50-470.
[48] Brodt v. Bohkar, 48-36; Wilson v. Reuter, 29-176; see First Nat. Bk. v. Elmore, 52-541.
[49] Gray v. Dunham, 50-170.
[50] Code, Sec. 3447; Sub. 4.

mechanic to file his statement and claim for a lien under the statute will not extend the time within which the action to enforce the lien must be commenced.[51] But a failure to enforce a lien until it is barred by the statute of limitations will not prevent the lien-holder from recovering on his debt against a person bound therefor.[52]

§ 1140. Sub-contractors, who are.—All persons furnishing materials or doing work for which a lien is allowed are considered sub-contractors, except such as have contracts directly with the owner, proprietor, his agent or trustee.[53]

§ 1141. Of the sub-contractor's lien, how preserved and how discharged.—To preserve his lien as against the owner, and to prevent payments by the latter to the principal contractor, or to intermediate sub-contractors, but for no other purpose, the sub-contractor must, after commencing such labor or furnishing such material, and within thirty days after the completion thereof, serve on such owner, his agent or trustee, a written notice of the filing of said claim, which notice may be served by any sheriff or constable, or other person, and if the party to be served, his agent or trustee, is out of the county wherein the property is situated, a return of that fact by the person charged with making such service, will constitute sufficient service from and after the time it is filed with the clerk. But the lien of such sub-contractor may at any time be discharged by the owner, contractor or intermediate sub-contractor filing with the clerk of the district court a bond in twice the amount of the sum for which the claim for the lien is filed, with two or more sureties, to be approved by the clerk, conditioned for the payment of any sums for which the mechanic may obtain judgment upon the demand of which such statement or account has been filed. But if no claim for a lien is filed within the period heretofore

[51] Gilchrist v. Gottschalk, 39-311; Squier v. Parks, 56-407; Dimmick v. Hinckley, 57-757.

[52] Black v. Howell, 56-630.

[53] Code, Sec. 3097.

mentioned, and the notice thereof is not served, or if such things being done, the bond above provided is filed, then the owner or contractor may thereafter proceed to make payments and adjust their claims without regard to the lien of the sub-contractor, and the owner is not required to pay a greater amount, or in any other manner, or at any other time, than is provided in his contract.[54] The notice above mentioned may be in the following form:

NOTICE OF FILING CLAIM BY SUB-CONTRACTOR.

To ———:

You are hereby notified that I did, on the ——— day of ———, 18—, file with the clerk of the district court of ——— county, Iowa, a true statement or account of the amount due me after allowing all credits for materials furnished (or labor performed for the erection of a certain dwelling house, or other building or improvement, as the case may be) on the following described real estate (here describe it); and claiming a mechanic's lien on said building and lands for ——— dollars, the balance due me thereon.

Dated this ——— day of ———, 18—.

———.

The bond above provided for may be in the following form:

FORM OF BOND TO DISCHARGE LIEN OF SUB-CONTRACTOR.

Know all men by these presents, that we ———, principal, and ——— and ———, sureties, all of ——— county, Iowa, parties of the first part, are held and firmly bound to ———, of ——— county, Iowa, party of the second part, and sub-contractor, in the penal sum of (here insert amount, which must be twice the sum claimed by the sub-contractor, etc.,) dollars, lawful money of the United States, well and truly to be paid. The condition of this obligation is this: That whereas ——— as (sub-contractor, or as the case may be,) did, on the ——— day of ———, 18—, file in the office of the clerk of the district court of ——— county, Iowa, a statement of his claim and account due and owing him from ——— and claiming a mechanic's lien therefor on the following real estate described therein, viz.: (here describe the land as in the claim filed.) The condition of this obligation is this: That, if the said parties of the first part shall and will pay to said second party, his heirs, assigns or administrators, any sum of money for which said second party may obtain judgment upon the demand of which said statement

[54] Code, Sec. 3093.

or account has been filed, then this obligation to be void, otherwise it is to be and remain in full force and virtue.

Witness our hands this ——— day of ———, 18—.

———, principal.

———, } sureties.
———, }

(Add justification.)

A written notice of the filing of the claim is required, as the statute recognizes no other as sufficient.[55]

The lien of the sub-contractor attaches only to the extent of the balance due the contractor at the time the notice was given.[56] A sub-contractor who holds an open and unsettled account against his principal contractor, can not bring an action against the owner and establish a lien against his property without adjudicating, or attempting in any way to adjudicate, his claim against his contractor, and if he stands by and sees the owner pay the contractor in full, he is estopped from afterward asserting his claim.[57] If a contractor has received payment in full before making an agreement with a sub-contractor for materials, the sub-contractor can have no lien against the owner.[58] And if the owner has, without knowledge of the claims of sub-contractors, paid the contractor in full, he will not be liable on the claims of sub-contractors.[59] As against a sub-contractor, the owner may pay the contractor in accordance with the provisions of his contract, if he has reserved no power therein to discharge the claims of sub-contractors, and this is so, regardless of any knowledge he may have that labor and material has been furnished by a sub-contractor which has not been paid for.[60] Until the expiration of

[55] Lounsbury v. The I., M. & N. P. R. Co., 49-255; Cutler v. McCormick, 48-406; Jeure v. Perkins, 29-262; Frost v. Rawson, 91-553; Walker v. Queal, 91-704; Steele v. McBurney, 65 N. W., 332; Merritt v. Hopkins, 65 N. W., 1015.

[56] Cutler v. McCormick, 48-406; Utter v. Crane, 37-631; Stubbs v. Clarinda, etc., 62-280; Kilbourne v. Jennings, 38-533; Jones, etc., v. Murphy, 64-165; Stewart v. Wright, 52-335; Robinson v. State Ins. Co., 55-489; Hug v. Hintrager, 80-359; Thompson v. Spencer, 63 N. W., 695; Wickham v. Munroe, 89-666; Hazzard v. Council Bluffs, 87-51.

[57] Vreelan v. Ellsworth, 71-347.

[58] Mallory v. Marion Water Works Co., 77-715.

[59] Parker v. Scott, 82-266.

[60] Epeneter v. Montgomery County, 67 N. W., 93.

the thirty days the owner cannot, as against sub-contractors, pay the contractor except as provided by the terms of the contract.[61]

When the contractor for a building gave to a party furnishing materials an order upon the owner, which was accepted by him conditional upon the performance of the contract, it was held that whatever the contractor became entitled to thereafter must be applied in payment of the order.[62] Sub-contractors on railroads, as well as other sub-contractors, must give notice of their claims within thirty days from the completion of their work, if they expect to preserve their lien.[63] A sub-contractor of a sub-contractor may have a lien.[64]

§ 1142. Of payments made by the owner to the contractor within the thirty days, etc.—When the principal contractor recognizes the fact that there are to be sub-contractors whom the owner may be required to pay, and he knows that certain persons, as sub-contractors, have furnished material, he will be liable to them if their claims are filed and notice served within the thirty days.[65] But it has been held that the owner, who in good faith pays the contractor within thirty days in accordance with the agreement between them, and without knowledge of the claim of a sub-contractor, will be protected. But if he have any knowledge of such claim, and pay within the thirty days, the sub-contractor's lien will be preserved.[66]

This doctrine has been carried to the extent of holding that if the owner pay the contractor during the thirty days and in accordance with the terms of the contract, and without notice of any claims by sub-contractors, he will not be protected in such payment if he could probably, by the exercise of reasonable diligence, have discovered that the sub-contractor was entitled to a lien;

[61] Merritt v. Hopkins, 65 N. W., 1015.
[62] Cutler v. McCormick, 48-406.
[63] Sandval v. Ford, 55-461; Nash v. C., M. & St. P. R. Co., 62-49.
[64] Mears v. Stubbs, 45-675.
[65] Winter v. Hudson, 54-336.
[66] Andrews v. Burdick, 62-714; Fullerton v. Osborn, 72-472.

and in the same case it was held, that if the owner knew the contractor had to purchase his material, and if by inquiry he might have ascertained from whom it was bought, and he did not do so, and it was not paid for, he is not protected.[67] If the owner has knowledge of facts sufficient to put him upon inquiry, he should withhold payment during the thirty days.[68] But it seems that an owner who has not in his contract with his contractor, reserved the right to control funds in the interest of sub-contractors—may pay his contractors in strict accordance with the terms of the contract, regardless of his knowledge as to any claim of any sub-contractor.[69] If, by the terms of the contract, the principal contractor is entitled to compensation in full before the work is completed, and is paid before that time, and without any notice of claims for liens, no liens can be enforced against the owner or the property.[70] Where the owner, within the thirty days, paid certain sub-contractors who had not filed claims, the balance due under the contract, which was more than enough to pay plaintiff's claim, with knowledge that plaintiffs were also sub-contractors, and plaintiffs filed their claims as provided by law, it was held that such owner was not justified in making such payments, but should have retained the same to pay liens in the order of their priority.[71]

And it was also held that a statement filed, which showed the date the contract was made and the date the last work was done, was sufficient as against the owner of the property. Sub-contractors must take notice of the terms of the principal's contract, and the owner is protected in making payments to the principal contractor, in accordance with the terms of such contract, unless notified of the claims of sub-contractors before such

[67] Gilchrist v. Anderson, 59-274; Fay v. Orison, 60-136; Martin v. Morgan, 64-270.

[68] Jones, etc., v. Murphy, 64-165; Chicago Lumber Co. v. Woodside, 71-359.

[69] Epeneter v. Montgomery County, 67 N. W., 93.

[70] Roland v. C., M. & A. R. Co., 61-380.

[71] Othmer v. Clifton, 69-656.

payments are made.[72] Where a building contract provided that sub-contractors should be paid by orders given by the principal contractor, and the owner had knowledge of the furnishing materials by certain sub-contractors, he was liable therefor, although he had made full payment to the principal contractor before notice of claim for lien had been filed and served, it having been filed and served within the thirty days.[73] Where the contractor gave bond for the execution of his contract, and the owner paid him in full before the expiration of the time allowed for filing liens by sub-contractors, and he was afterward compelled to pay additional sums to satisfy such liens, he was not permitted to recover such additional sums from the sureties on the contractor's bond, he being negligent in paying the contractor prior to the expiration of the time for filing liens by sub-contractors.[74]

§ 1143. Extent of lien of sub-contractor when claim filed after thirty days.—A sub-contractor may, at any time after the expiration of the thirty days, file his claim for a mechanic's lien with the clerk of the district court, in the manner before stated, and give written notice thereof to the owner, his agent or trustee, and from and after the service of such notice his lien will have the same force and effect, and may be prosecuted or vacated by bond, as if filed within the thirty days, but will be enforced against the property or upon the bond, if given by the owner, only to the extent of the balance due from the owner to the contractor at the time of the service of such notice upon the owner, his agent or trustee.

But if, in such case, the bond is given by the contractor, or person contracting with the sub-contractor, who files the claim for a lien, such bond will be enforced to

[72] Stewart v. Wright, 52-335; Blanding v. Davenport, I. & D. R. Co., 88-225; Epeneter v. Montgomery Co., 67 N. W., 93.

[73] Winter v. Hudson, 54-336.

[74] Lucas County v. Roberts, 49-159.

the full extent of the amount found due the sub-contractor.[75]

Where, by agreement between the owner and contractor, a claim which the former held against the latter was to be allowed as a payment on the last installment to be paid under the contract, and the sub-contractor's claim for a lien was filed more than thirty days after the last item in his account, it was held he could only recover what remained due from the owner to the contractor after deducting said claim.[76]

[75] Code, Sec. 3094.

[76] Ewing v. Folsom, 67-65.

CHAPTER LXX.

OF REAL ESTATE MORTGAGES.

Sec. 1144. How and where foreclosed.
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Section **1144. How and where foreclosed.**—An action on a note, together with the mortgage or deed of trust for the foreclosure of the same, must be by equitable proceedings in the district court, and in the county in which the property to be affected, or some part thereof, is situated.[1] Under the law providing for the foreclosure of mortgages and deeds of trust, by ordinary proceedings, it was held that in equity the conveyance of land to a trustee for the payment of a debt with power to sell in case of default, should be treated as a mort-

[1] Code, Secs. 3428, 3493, 4284, 4287; Kramer v. Rebman, 9-114; Scott v. Simeral, 9-388; Lomax v. Smith, 50-223; McDowell v. Loyd, 22-448; Chadbourne v. Gilman, 29-181; Iowa L. & T. Co. v. Day, 63-459; Equitable Life Ins. Co. v. Gleason, 56-47; Cole v. Connor, 10-299; Code, Sec. 3496.

gage.[2] And generally it is held that a deed absolute in form will be treated as a mortgage, when it is shown that it was executed for the purpose of securing the payment of a debt existing at the time of its execution.[3] If it is doubtful whether the instrument is a mortgage or a conditional sale, a court of equity will treat it as a mortgage.[4] And equity will regard any conveyance of land intended to operate as security for a debt, or the performance of a contract, as a mortgage.[5]

§ **1145. Of parties.**—The owner of the mortgage or deed of trust sought to be foreclosed must be made plaintiff, but when a mortgage is given to secure the payment of several promissory notes falling due at different times, which notes afterwards become the property of different persons, the several holders of such notes can not unite as plaintiffs in a suit to foreclose the mortgage; for the purposes of suit they stand as independent mortgagees.[6] It is not necessary to make prior mortgagees parties defendant, as, their interest being paramount, they could not be affected by the decree.[7] Nor need subsequent mortgagees be made parties defendant.[8] But they and the purchaser of the mortgaged premises are proper parties defendant.[9] And they should always be made

[2] Newman v. Samuels, 17-528.

[3] Hall v. Savill, 3 G. Gr., 37; Boomer v. Stone, 38-685; Usher v. Livermore, 2-117; Vennum v. Babcock, 13-194; Key v. McCleary, 25-191; Gardner v. Weston, 18-533; Holliday v. Arthur, 25-19; Maple v. Nelson, 31-322; Rosierz v. Van Dam, 16-175; Chase v. Abbott, 20-154; Clinton Nat'l Bk. v. Manwarring, 39-281; Montgomery v. Chadwick, 7-114; Trucks v. Lindsey, 18-504; Green v. Turner, 38-112; Allen v. Kemp, 29-452; N. Y. Piano Co. v. Mueller, 38-552; Allen v. Fogg, 66-229.

[4] Trucks v. Lindsey, 18-504; Scott v. Merwhirter, 49-487; Barthell v. Syverson, 54-160; Hughes v. Sheaff, 19-335; Wilson v. Patrick, 34-362; Bridges v. Linder, 60-190.

[5] Green v. Turner, 38-112; Clinton Nat'l Bk. v. Manwarring, 39-281; N. Y. Piano Co. v. Mueller, 42-467; White v. Lucas, 46-319; Barnett v. Nelson, 46-495; Hensley v. Whiffin, 58-426; Richardson v. Barrick, 16-407; Holliday v. Arthur, 25-19; Crawford v. Taylor, 42-260; Brush v. Peterson, 54-243; Radford v. Folsom, 58-473; see Huston v. Seeley, 27-83.

[6] Ranken v. Major, 9-297; see Kemerer v. Bournes, 53-172.

[7] Heimstreet v. Winnie, 10-430; Standish v. Dow, 21-363.

[8] Street v. Beal, 16-68; Donnelly v. Rusch, 15-99.

[9] Semple v. Lee, 13-304; Porter v. Kilgore, 32-379; Dyer v. Harris, 22-268; Douglass v. Bishop, 27-214; but see Sutherland v. Tyner, 72-232.

parties, as otherwise they will not be affected by the decree, nor will their interest in the premises be divested.[10] In an action to foreclose a mortgage all persons should be made defendants who have any interest in, or lien upon the mortgaged premises, which is, or is claimed to be, junior and inferior to the lien of the plaintiff's mortgage.[11] If a junior incumbrancer is not made a party defendant, the court, on his application showing that he has an interest in the equity of redemption, will permit him to come in as a party.[12] When a married woman joins with her husband in executing a mortgage, she must be made a defendant to bar her right of dower, and so she should be made a party defendant in an action to foreclose a mortgage on the homestead.[13] But it is not necessary to make parties, those who would not be affected by the judgment or decree, nor should those acting only as agents be made parties unless they are charged with fraud.[14] A mortgagor who has conveyed his interest in the mortgaged premises is not a necessary party in a suit to foreclose.[15] But if he has conveyed with a covenant against incumbrances, he may become a defendant on his own application.[16]

When money of one is loaned by another in his own name, the mortgagor and the administrator of the party furnishing the money may be joined in a petition seeking discovery from the administrator and the foreclosure of the mortgage.[17] And an administrator of the mortgagor is a proper party defendant in an action to foreclose, but

[10] Heimstreet v. Winnie, 10-430; Donnelly v. Rusch, 15-99; Davis v. Rogers, 28-413; Porter v. Kilgore, 32-379; Douglass v. Bishop, 27-214; Chase v. Abbott, 20-154; Anson v. Anson, 20-55; Gower v. Winchester, 33-303; but see Sutherland v. Tyner, 72-232.

[11] Bleidorn v. Abel, 6-5; Bunce v. West, 62-80; Brobst v. Thompson, 4 G. Gr., 135; Suiter v. Turner, 10-517; Hogdon v. Heidman, 66-645.

[12] Parrott v. Hughes, 10-459; Donnelly v. Rusch, 15-99; Johnson v. Harmon, 19-56.

[13] Chase v. Abbott, 20-154; Burnap v. Cook, 16-149; see Carson v. Underwood, 12-52.

[14] Lyon v. Tevis, 8-79; Deland v. Mershon, 7-70

[15] Murray v. Catlett, 4 G. Gr., 108; Johnson v. Monell, 13-300; Semple v. Lee, 13-304; Johnson v. Foster, 68-140; Watts v. Creighton, 85-154.

[16] Gifford v. Workman, 15-34; Code, Sec. 3462.

[17] Collier v. Collins, 9-126 .

judgment should not be rendered against him personally.[18] In an action brought by the beneficiary in a deed of trust or mortgage, to a trustee, to secure a debt due the plaintiff, to foreclose the same, the trustee is a necessary party.[19] Persons who should have joined as plaintiffs but have refused to do so, may be made defendants, the reasons therefor being stated in the petition.[20]

§ 1146. Of election—When separate actions are brought on note and mortgage.—If separate actions are brought in the same county on the bond or note, and on the mortgage given to secure it, plaintiff must elect which he will prosecute, and the other will be discontinued at his costs.[21] A mortgage conditioned that the maker of the note described therein shall pay the same when it becomes due, "with interest at the rate of ten per cent. per annum from date, payable annually, according to the tenor and effect of said note" may be foreclosed for interest due before maturity of the note.[22] And a mortgagee may foreclose his mortgage after recovering judgment on the notes.[23] Nor is he confined to the remedy of foreclosure but may sue at law on the note, bond or other obligation secured by the mortgage,[24] or if the covenant for payment is contained in the mortgage itself, that may be made the basis of the law action.[25] Under a prior statute it was held that the mortgagee might, when there were subsequent incumbrancers, proceed in equity to settle the question of their liens, after taking judgment at law on the note against the mortgagor, and before proceeding to a sale of the property, and in such proceeding it was held proper to make the mortgagor a party.[26]

[18] Darlington v. Effey, 13-177; Hodgdon v. Heidman, 66-645.
[19] Tucker v. Silver, 9-261.
[20] Code, Sec. 3463.
[21] Code, Sec. 4288.
[22] Bahr v. Arndt, 9-39.
[23] Wahl v. Philips, 12-81.
[24] Banta v. Woods, 32-469; Brown v. Cascaden, 43-103; Newbury v. Rutter, 38-179.
[25] Morrison v. Morrison, 38-73; Hendershott v. Ping, 24-134; Shearer v. Mills, 35-499; Mathews v. Davis, 61-225; see Wahl v. Philips, 12-81.
[26] Wahl v. Philips, 12-81; Morrison v. Morrison, 38-73.

§ 1147. Of the petition.—The petition in a foreclosure suit may be in the following form:

FORM OF PETITION IN FORECLOSURE.

Title, }
Venue. }

The plaintiff states:

Par. 1. That on or about the ——— day of ———, 18—, the defendant (naming him) made his one certain promissory note in writing to (here insert name of party to whom the note was given) in words and figures following to wit: (here set out copy of note.)

Par. 2. That to secure the payment of said note the said defendants (naming them) made and delivered to the said (naming payee) the certain mortgage deed of said (name of grantors) upon the following described real estate to wit: (here describe real estate as in the mortgage) a copy of which mortgage is hereto annexed marked exhibit "A" and made a part of this petition.

Par. 3. That said mortgage was duly filed for record in the office of the recorder of deeds of ——— county, Iowa, on the ——— day of ———, 18—, at ——— o'clock — m., and duly recorded in book ———, page ———.

Par. 4. That said note is still plaintiff's property, is due and wholly unpaid.

Par. 5. That the defendants (naming defendants who have or claim a lien on the land) have or claim to have some lien upon, or interest in said premises, but the plaintiff alleges that whatever lien or interest the said defendants, or either of them, may have in the said premises, the same is junior and inferior to the lien of plaintiff's said mortgage.

Par. 6. That since the execution of said mortgage and on the ——— day of ———, 18—, plaintiff has paid taxes on said premises, duly levied, amounting to the sum of ——— dollars.

Par. 7. That plaintiff has been to the expense of ——— dollars for an abstract of title to said mortgaged premises preparatory to the foreclosure of said mortgage.

Par. 8. Wherefore plaintiff demands judgment against the said (here insert maker's name) for the amount due upon said promissory note, to wit: The sum of ——— dollars with ——— per cent. interest thereon from its date (or as the case may be) and for the sum of ——— dollars paid to discharge the taxes on the mortgaged premises, with ——— per cent. interest thereon from the time the same were paid, and for ——— dollars paid for abstract of title to said premises and for costs including an attorney's fee of ——— dollars; and plaintiff prays that said judgment may be decreed to be a lien upon said mortgaged premises from the date of said mortgage, to wit: the ——— day of———, 18—; and that the lien of the said defendants, and each of them, upon the said mortgaged premises, may be decreed to be junior and inferior to the plaintiff's mortgage; that the equity of redemption of the said

defendants, and each of them, be forever barred and foreclosed, and that a special execution issue for the sale of said mortgaged premises, or so much thereof as shall be necessary to satisfy said judgment with interest and costs.*

And that the court adjudge and decree that if any part of said mortgaged premises be sold under this decree and not redeemed within one year from the date of sale, that a writ of possession issue under the seal of this court directed to the sheriff of said county, commanding him to put the purchaser under this foreclosure in possession thereof.

———, attorney for plaintiff.

(Add verification.)

In case some of the notes are not yet due, judgment may be had on those due and a sale ordered to pay all of them by making such a rebate on those not due as the court or judge may fix; and this rebate generally consists in stopping the interest on the notes not due at the time judgment is entered.[27] And in such case the following should be inserted in the prayer at the point indicated by the star:

FORM OF ADDITION TO PRAYER WHEN SOME OF THE NOTES SUED ON ARE NOT DUE.

"And that the court may order and decree that if it becomes necessary to sell any part of said mortgaged premises to satisfy said judgment, that a sufficient amount thereof be sold to satisfy not only said judgment but the notes described in said mortgage which are not yet due."

If it is a title bond which is to be foreclosed, the petition may be in the following form:

FORM OF PETITION FOR FORECLOSURE OF A TITLE BOND.

Title, }
Venue. }

The plaintiff states:

Par. 1. That on the ——— day of ———, 18—, he was the owner in fee of the following described real estate (here describe it as in the bond) situated in ——— county, Iowa.

Par. 2. That on the ——— day of ———, 18—, he sold said real estate to the defendant (naming him) at and for the sum of ——— dol-

[27] Carleton v. Byington, 24-172; 4293; Nat'l Bk. v. Dean, 86-656. Stafford v. Maus, 38-133; Code, Sec.

lars, and that said defendant executed to this plaintiff his one certain promissory note therefor, in words and figures following, to wit: (here set out the note.)

Par. 3. That at the time of the execution of said note, this plaintiff executed and delivered to the said defendant his certain title bond to said premises, a copy of which is attached hereto marked exhibit "A" and made a part hereof.

Par. 4. That said bond was duly filed for record in the office of the recorder of deeds of ——— county, Iowa, on the ——— day of ———, 18—, and duly recorded in book ———, page ———.

Par. 5. That said note is plaintiff's property and is due and unpaid.

Par. 6. That the defendants (naming them) have or claim to have some lien upon, or interest in, said premises, but the plaintiff alleges that whatever lien or interest the said defendants, or either of them, may have in said premises, the same is junior and inferior to the lien of plaintiff thereon.

Par. 7. That since the execution of said bond and on the ——— day of ———, 18—, plaintiff paid the taxes on the said premises duly levied, amounting to the sum of ——— dollars.

Par. 8. (Here insert paragraph regarding abstract fees if bond provides therefor, as in previous petition.)

Par. 9. (Here insert paragraph relating to attorney's fee, if bond provides therefor, as in previous petition.)

Par. 10. Wherefore plaintiff demands judgment against the said (here insert the name of maker of the note) for the amount due upon the said promissory note, to wit: ——— dollars with ——— per cent. interest thereon from the ——— day of ———, 18—, and for the sum of ——— dollars paid to discharge the taxes on the premises above described, with ——— per cent. interest thereon from the time the same were paid, and for said abstract of title in the sum of ——— dollars and for costs, including ——— dollars attorney's fee, and asks that the defendant (the purchaser) be required to perform his contract (or that his interest in the property heretofore described be foreclosed and sold). That the lien of the said defendants, and each of them, upon the above described premises, may be decreed to be junior and inferior to plaintiff's lien thereon, and that the equity of redemption of said defendants, and each of them, be forever barred and foreclosed; that a special execution issue, etc. (Conclude as in form of foreclosure of mortgage above given, making such change as is necessary.)

§ 1148. Of the judgment.—On the foreclosure of a mortgage or deed of trust, the court must render judgment for the entire amount found to be due—that is, when the relation of debtor and creditor exists outside of the mortgaged property—and must direct that the mortgaged property, or so much thereof as is necessary, be sold to satisfy the same, with interest and

costs.[28] Where a mortgage provided for semi-annual payment of interest, and stipulated that a failure to pay it within thirty days after the time fixed should render the entire principal due, it was held that on such failure to pay the mortgagee had a right to declare the whole debt due, and foreclose his mortgage therefor.[29] No personal judgment can be rendered against the wife of a mortgagor in a foreclosure proceeding where it is not alleged in the petition that the debt secured by the mortgage is one for which her separate property is liable,[30] unless it appears that she is a party to the note. As between the parties to a mortgage, a judgment at law on the note it secures, is a lien from the date of recording the mortgage; but a judgment on a note secured by mortgage does not attach as a lien upon the mortgaged premises from the date of the mortgage unless the property is described in the judgment, and it is there ordered that it shall be a lien from the date of recording the mortgage.[31] The decree of foreclosure should direct a sale of so much of the mortgaged premises as may be necessary to satisfy the mortgaged debt and costs, and it is error to order a sale of the entire premises, and the payment of the balance remaining after satisfying the debt and costs, into court.[32] A personal judgment can not be rendered against a subsequent purchaser of the mortgaged property who is not a party to the note or mortgage.[33] But where the purchaser of mortgaged premises assumes and agrees to pay the mortgaged debt as a part of the consideration of the purchase, the mortgage may be foreclosed and a personal judgment rendered against him; and parol evidence is admissible to

[28] Code, Sec. 4289; Wood v. Sands, 4 G. Gr., 214; Kennion v. Kelsey, 10-443; Anderson v. Reed, 11-177; Carleton v. Byington, 24-172; Weil v. Churchman, 52-253; Reed v. King, 23-500; Knox v. Moser, 69-341; Johnson v. Foster, 68-140; Crowley v. Harader, 69-83; York v. Boardman, 40-57; Bristol Sav. Bk. v. Stiger, 86-344.

[29] Kramer v. Rebman, 9-114.

[30] McLaughlin v. O'Rouke, 12-459; Knox v. Moser, 69-341.

[31] Banta v. Wood, 32-469; State v. Lake, 17-215; Christy v. Dyer, 14-443.

[32] Malony v. Fortune, 14-417; Trieber v. Shafer, 18-29; see W. S. M. Co. v. Rutledge, 60-39; Pike v. Gleason, 60-150; Code, Sec. 4294.

[33] Carleton v. Byington, 24-172.

prove such an agreement.[34] Where the purchase is subject to a mortgage, and the amount thereof has been retained by the purchaser out of the purchase money he will be held to have assumed the payment of the mortgage, not so, however, where there is an exchange of properties unless there are words in the contract or deed indicating the assumption of a personal liability.[35] If a mortgagor sells only a portion of the real estate covered by a mortgage and retains the ownership of the balance, the portion he retains should be sold first under the foreclosure and the portion in the hands of his grantee should be sold to satisfy any balance remaining after the sale of the property retained by the mortgagor.[36]

A sale of property under a judgment or foreclosure for one installment of the debt, discharges the property sold after redemption, from the lien of the mortgage for other installments.[37] When a mortgagor has disposed of all his interest in the property he is not a necessary party to a foreclosure suit, but in such a case, as against the owner of the property, the amount of the debt should be ascertained by the court and a special execution ordered for the sale of the property.[38] Where a mortgagee pays taxes and other prior claims to protect his own lien, he should only be allowed six per cent. interest on such advances as against a junior incumbrancer in a foreclosure proceeding, though he may have an agreement for ten per cent. with the mortgagor.[39] The form of judgment and decree of foreclosure given below will be found to contain sufficient in most cases:

[34] Bowen v. Kurtz, 37-239; Greither v. Alexander, 15-470; Aufricht v. Northrup, 20-61; Myers v. Bowers, 70-951; Wood v. Smith, 51-156; Ream v. Jack, 44-325; Thompson v. Bertram, 14-476; Ross v. Kennison, 38-396; Lamb v. Tucker, 42-118; Edwards v. Thostenson, 64-680; Hull v. Alexander, 26-569; Iowa L. & T. Co. v. Mowery, 67-113.

[35] Bristol Sav. Bk. v. Stiger, 86-344.

[36] Mickley v. Tomlinson, 79-383.

[37] Esher v. Simmons, 54-269; Todd v. Davey, 60-532; Micklewait v. Raines, 58-605; Poweshiek County v. Dennison, 36-244; Harms v. Palmer, 61-483.

[38] Johnson v. Foster, 68-140, and cases cited.

[39] Butterfield v. Hungerford, 68-249.

FORM OF JUDGMENT AND DECREE OF FORECLOSURE.

Title, }
Venue. }

Be it remembered, that on this ——— day of ———, 18—, it being afternoon of the ——— day of the said ——— term of the district court aforesaid, the above entitled cause came on in its order for hearing (name of plaintiff's attorney), appearing as counsel for plaintiffs (here insert names of plaintiffs), and (name of attorney for defendants), appearing as counsel for defendants (here insert names of defendants), and the court having inspected the original notices and the services thereon, expressly finds that all the foregoing defendants (insert names of defendants served), have been duly and legally served with a sufficient original notice according to law, and in time for this term of court; that the subject-matter of the suit and the person of the defendants are now lawfully in the jurisdiction of this court; therefore, by order of the court, the said defendants (insert names of defendants served), not appearing (if any of the defendants appear state the facts with reference thereto, and that they filed answers, or as the case may be), and on motion of plaintiffs' counsel all of said defendants (or as the case may be) are adjudged of record to be in default. It is therefore ordered that this cause proceed to final determination, and after inspection of the pleadings, the evidence and proofs of the plaintiff (or plaintiff and defendant, as the case may be), and after argument of counsel, the court being duly advised in the premises, it is ordered, adjudged and decreed, that the issues are found for the plaintiff; that the allegations of the petition are true; that the mortgage and notes declared on are genuine, just, due and unpaid; that plaintiff is entitled under the stipulations of said mortgage to ——— dollars for necessary abstracts of title, and to ——— dollars taxes paid out on the premises since the giving of the said mortgage, and to damages upon the notes declared upon in the sum of ——— dollars; therefore, a personal judgment is now rendered against the said defendant (naming him), for the aggregate sum of ——— dollars, the same to draw ——— per cent. interest per annum from this date, and the costs of this action taxed at ——— dollars, including ——— dollars attorney's fees for foreclosing this mortgage, said sums being hereby declared a lien on the mortgaged premises, to wit: (here describe premises as in the petition), from the date of the mortgage to wit (here insert date of mortgage), until fully paid. Said mortgage being recorded in book ———, page ———, in mortgage records of ——— county, Iowa. And it is further ordered, adjudged and decreed, that a special execution issue against the mortgaged premises to make said total sum and costs, and accruing costs (so far as the same is practicable), and that said property, or so much thereof as is necessary, be sold to satisfy the amount due, with interest and costs, thereunder, according to law, and that, at the election of plaintiff, the clerk of this court is authorized to insert in said special execution a clause requiring the sheriff to seize any property of the defendant, not exempt from execution, to satisfy any prospective balance on said judg-

ment after exhausting the mortgaged premises, or that after the return of said special execution, a general execution, if the plaintiffs so elect, shall issue to make any amount then remaining unpaid. And on and after the day of the sale the defendants, and each and all of them, and all persons claiming by, through or under them, are forever barred and foreclosed of all interests and equity in and to said mortgaged premises, except such rights of redemption as are especially provided by law, and that if said real estate be sold and not redeemed, as provided by law, a writ of possession issue to the sheriff of this county, commanding him to put the purchaser at said sale in possession of said premises. (If any of the parties are not served, conclude thus: "and as to the defendant ———, this cause is continued for service.")

§ **1149. Of attorney's fees.**—A stipulation in a note or mortgage for the payment of an attorney's fee in case of collection by suit, is not usurious, and a reasonable fee may be recovered in the action without averring what amount is reasonable,[40] and formerly the attorney's fee might be included in the judgment.[41] Where it is stipulated that "in the event of foreclosure" a certain sum shall be taxed as attorney's fee, it was held that plaintiff could not recover attorney's fees if defendant, before decree of foreclosure was entered, paid or tendered to plaintiff the amount of the mortgage and costs accrued.[42] Attorney's fees are only recoverable by virtue of a written contract agreeing to pay, and when judgment is recovered on a written contract, made since July 4, 1880, containing an agreement to pay an attorney's fee, if the court is satisfied by the affidavit of the attorney engaged in the cause, which must be filed with the original papers at the commencement of the action, that there has been, and is no agreement, express or implied, between the attorney and his client or between the attorney and any other person, except a practicing attorney engaged with him as attorney in the case, for any division or sharing of the fee to be taxed, and that the defendant,

[40] Nelson v. Everett, 29-184; Weatherly v. Smith, 30-131; McGill v. Giffin, 32-445; Williams v. Meeker, 29-292; Sawyer v. Perry, 62-238; Hawley v. Howell, 60-79; Schmidt v. Potter, 35-426; Johnson v. Harder, 45-677; Floyd County v. Morrison, 40-188; Bondurant v. Taylor, 3 G. Gr., 561.

[41] Shugart v. Pattee, 37-422.

[42] Schmidt v. Potter, 35-426.

if a resident of the county, and the suit is not aided by attachment, had information of and a reasonable opportunity to pay the debt before the action was brought, unless it was payable at a particular place and the maker had not tendered the money due at such place, there will be an attorney's fee allowed by the court and taxed as a part of the costs, in an amount not greater than ten per cent., for the first two hundred dollars or fraction thereof, of the amount found due; for the excess of two hundred dollars up to five hundred dollars, five per cent.; for the excess of five hundred dollars up to one thousand dollars, three per cent.; and for all in excess of one thousand dollars, one per cent.

But not to exceed one half of the above fees can be recovered in case payment is made after the commencement of the action and before return day, and in case of payment before judgment and after the return day, plaintiff can not recover to exceed three fourths of the said amounts, and no fee will be allowed if the suit has not been commenced nor any expense incurred, nor if the affidavit herein provided for is not filed with the original papers.[43] If the contract was executed prior to July 4, 1880, and it provides for attorney's fees, such sum may be allowed, as the court, from the evidence offered, may deem reasonable. But in case of default, attorney's fees can not be allowed and taxed, unless evidence is introduced of the value of such services.[44] A defendant in a foreclosure suit who does not seek to redeem, but who claims the land by a superior title, is not in a position to object to the amount of the attorney's fee allowed by the court.[45] The affidavit above mentioned may be in the following form:

[43] Code, Secs. 3869 to 3871; Spiesberger v. Thomas, 59-606; Wilkins v. Troutner, 66-557; Sweney v. Davidson, 68-386; Shenandoah Nat'l Bk. v. Marsh, 89-273; Otcheck v. Hostetter, 77-509; Fletcher v. Kelley, 88-475; Black v. De Camp, 78-718.

[44] First Nat'l Bk. v. Krance, 50-235.

[45] Winnebago County v. Brones, 68-682; but see Cook v. Gilchrist, 82-277.

FORM OF AFFIDAVIT FOR TAXATION OF ATTORNEY'S FEES.

Title, }
Venue. }

State of Iowa, }
——— County. } ss.

I, ———, being duly sworn, on oath depose and say that I am the attorney engaged in the above entitled cause for the plaintiff; that there has been and is no agreement, express or implied, between this affiant and his client, or between this affiant and any other person, except (name of attorney associated with him, if any), who is a practicing attorney engaged with this affiant as attorney in this cause, for any division or sharing of the fee to be taxed herein; that this affiant is a regular attorney, and the fee to be taxed herein is in compensation for services actually rendered in this cause. That this action is not aided by attachment, that the defendant (naming the one against whom personal judgment is sought) has for more than ——— days prior to the commencement of this action had actual notice that said note and mortgage was in my possession for collection at (naming the place) and has during said time repeatedly been urged by me to pay the same.

———.

(Add certificate of officer.)

§ 1150. Of the execution.—A special execution issues for the sale of the mortgaged property, or sufficient to satisfy the debt with interest and costs, and this sale is subject to redemption, as in case of sales made under a general execution.[46] If the mortgaged property does not sell for sufficient to satisfy the execution, a general execution may issue against the mortgagor, unless the parties have stipulated otherwise.[47] But where a mortgage is made by one person to secure the debt of another, the mortgagor not signing a note or bond and becoming liable in no way, except as provided in the mortgage, no general execution can issue against him.[48] A stipulation in the mortgage, that a general execution shall not issue, is a bar to a general judgment on the note,[49] and where an indorsement was made on the note, to the effect that it "is confined to" the mortgage securing it,

[46] Code, Sec. 4289; see chapter on Redemption.

[47] Code, Sec. 4290; Chittenden v. Gossage, 18-157; Anderson v. Reed, 11-177; Weil v. Churchman, 52-253; see Newbury v. Rutter, 38-179.

[48] Chittenden v. Gossage, 18-157; McLaughlin v. O'Rouke, 12-459; but see Newbury v. Rutter, 38-179.

[49] Kenyon v. Kelsey, 10-443.

the payee was confined to his remedy of foreclosure, and was not entitled to a personal judgment.[50] A decree foreclosing a title bond as a mortgage, may provide for the issuance of a general execution, for any balance due after sale of the property on special execution.[51] If a wife joins her husband in executing a deed of trust upon land purchased by her, to secure notes made by the husband alone, for the purchase money, no personal decree can be rendered against her.[52] A decree of foreclosure of a title bond may require that the vendor execute a deed with all the covenants stipulated in the bond, provided the full amount of the note or judgment is realized or paid by the purchaser.[53] The following form of special execution may be used:

FORM OF SPECIAL EXECUTION.

The State of Iowa.

To the sheriff of ——— county, greeting:

Whereas (insert name of plaintiff), filed a petition in the ——— court of ——— county, for the foreclosure of a certain mortgage upon the real estate hereinafter described, making (here insert names of defendants) defendants therein, and whereas the district court at the ——— term thereof A. D. 18—, viz.: On the ——— day of ———, 18—, in said suit rendered judgment in favor of said plaintiff, and against (here insert name of defendant against whom judgment was rendered), for the sum of ——— dollars damages, ——— dollars costs, including attorney's fees, with interest on said damages, at the rate of ——— per cent. per annum from the date of said judgment, and rendered a decree in said suit, forever barring and foreclosing the equity of redemption of said defendants in and to said mortgaged premises, and ordering that the same, or so much thereof as shall be necessary, be sold to satisfy said judgment, with the interest and costs aforesaid, and ordered a special execution to issue. Therefore, you are commanded that of the following described real estate in ——— county, Iowa, viz.: (here describe real estate) or so much thereof as may be necessary by levy and sale, pursuant to the statute in such case made and provided, you cause to be made the sum of ——— dollars debt, and the sum of ——— dollars costs, including attorney's fees, with interest as aforesaid, and all accruing costs, and of this writ make due return to the court within seventy days hereof.

[50] Elmore v. Higgins, 20-250.
[51] Grimmel v. Warner, 21-11.
[52] Anderson v. Reed, 11-177.
[53] Wall v. Ambler, 11-274.

Witness, ———, clerk of the district court of ——— county, and the seal of said court affixed at my office in ———, in said county, this ——— day of ———, 18—.

[Seal.] ———, clerk, etc.

§ 1151. Of assignment to junior incumbrancers.—At any time prior to the sale a person having a lien on the property which is junior to the mortgage, is entitled to an assignment of all the interest of the holder of the mortgage by paying him the amount secured with interest and costs together with the amount of any other liens of the same holder which are paramount to his, and he may then proceed with the foreclosure or discontinue it at his option.[54] And in such case it is sufficient if the junior incumbrancer tender to the mortgagee the amount secured by his mortgage with interest and costs before the foreclosure sale, though the tender be not accepted until after the sale.[55] Under section 4292 of the code the junior mortgagee is only entitled to an assignment of the prior mortgage as to the same land covered by his own mortgage.[56]

§ 1152. Of the surplus arising from the sale.—If there is any surplus remaining after satisfying the mortgage and costs, and if there be no other lien upon the property, such surplus must be paid to the mortgagor.[57] While such surplus, when remaining in the hands of the sheriff or under the control of the court, belongs to subsequent lien-holders in the order of their priority, and should be so awarded by the court; yet when the execution does not direct the disposition of such surplus, and the sheriff, acting in good faith and without knowledge of subsequent liens, applies the money upon other executions in his hands, against the mortgagor, he is not liable therefor to such lien-holders.[58] And when a surplus was realized by the sheriff, from the sale of a homestead under

[54] Code, Sec. 4292; Grant v. Parsons, 67-31; Harbach v. Colvin, 73-638; Sessions v. Kent, 75-601.

[55] Marshall v. Ruddick, 28-487.

[56] Grant v. Parsons, 67-31.

[57] Code, Sec. 4291.

[58] Polk County v. Sypher, 17-358.

special execution, and the defendant permitted the sheriff, without objection, to apply it on other executions, and turn the same over to such execution creditors, the debtor was estopped from recovering such surplus from the sheriff.[59] So a sheriff may apply a surplus on other executions in his hands.[60] And he may be garnished by a creditor of the mortgagor.[61]

§ **1153. Of other liens.**—If there are any other liens on the property sold, or other payments secured by the same mortgage, they must be paid off in their order, and if the money secured by any such lien is not yet due, a suitable rebate of interest, to be fixed by the court, or judge thereof, must be made by the holder thereof, or his lien on the property will be postponed to those of a junior date, and if there are none, such balance must be paid to the mortgagor.[62]

§ **1154. Of the sale, and of satisfaction of the mortgage.**—As far as practicable, only sufficient property can be sold to satisfy the mortgage.[63] And a refusal of the sheriff to sell the property in parcels when it is practicable and when the value of the property exceeds the debt, invalidates the sale.[64] When, under a mortgage made by joint tenants, a part of the property is sold on the execution, upon a plan of division prejudicial to the rights of one of such owners, the validity of such sale is not affected thereby, and the judgment creditor can not complain if the judgment is satisfied by the sale.[65] But in such case the owner who has been wronged may maintain an action against his co-tenant for re-imbursement.[66] Whenever the amount due on any mortgage is paid, the mortgagee or those legally acting for him must acknowledge satisfaction thereof on the margin of the record of the mortgage, or by the execution of

[59] Brumbaugh v. Zollinger, 59-384.
[60] Payne v. Billingham, 10-360.
[61] Hoffman v. Wetherell, 42-89.
[62] Code, Sec. 4293; Nat'l Bk. v. Dean, 86-656.
[63] Code, Sec. 4294; Grapengather v. Fejervary, 9-163.
[64] Grapengather v. Fejervary, 9-163; Lay v. Gibbons, 14-377, and cases cited.
[65] Miller v. Felkner, 42-458.
[66] Same as No. 65.

an instrument in writing, referring to the mortgage, which must be duly acknowledged and recorded, and if he fails to do so within thirty days after being requested in writing, he will forfeit to the mortgagor the sum of twenty-five dollars.[67] No particular form of words is necessary to release a mortgage; no conveyance is necessary to accomplish that purpose; satisfaction may be entered as provided by statute upon the margin of the record of the mortgage, but this method is not exclusive, and when a mortgage is so satisfied the person so satisfying it must be identified and his signature must be witnessed by the recorder or his deputy.[68] It has been held that the penalty for failure to satisfy a mortgage after notice to that effect has been given, is incurred when the mortgagee fails to do so within the time provided by statute after such request; and an entry of satisfaction after that time, even though made before suit is brought for the penalty, will not prevent its recovery by the mortgagor.[69] But the assignee of a mortgage by an assignment not recorded, is not subject to the statutory penalty imposed upon a mortgagee for a failure to enter satisfaction of his mortgage of record when paid.[70] In such a case the satisfaction must be made by the original mortgagee.[71] The notice to a mortgagee to cancel his mortgage may be in the following form:

FORM OF NOTICE TO MORTGAGEE TO CANCEL MORTGAGE.

To (name of mortgagee): You are hereby notified that the mortgage held by you, dated the ——— day of ———, 18—, and executed by (here insert names of mortgagors) to you on the following described real estate, viz.: (here insert description of premises) and which is recorded in book ——— on page ——— of mortgage records of ——— county, Iowa, has been fully paid off and you are required to acknowledge satisfaction thereof properly of record as provided by law, within thirty days from date hereof.

Dated the ——— day of ———, 18—.

———, mortgagor.

[67] Code, Sec. 4295; Deeter v. Crossley, 26-180; Lowe v. Fox, 56-221; Kennedy v. Moore, 91-39.

[68] Code, Sec. 4295; Waters v. Waters, 20-363.

[69] Deeter v. Crossley, 26-180.

[70] Lowe v. Fox, 56-221.

[71] Kennedy v. Moore, 91-39.

§ 1155. Of the duty of the clerk.—Whenever a judgment of foreclosure is entered in any court, the clerk thereof must make upon the margin of the record of the mortgage foreclosed, in the recorder's office, a minute showing that said mortgage has been foreclosed, and in what court, and giving the date of the decree, and when the judgment is fully paid off and satisfied upon the judgment docket of said court, the clerk must enter satisfaction in full upon the margin of such mortgage, for which he is allowed a fee of twenty-five cents to be taxed as costs in the case.[72]

§ 1156. Of foreclosure of title bonds.—An outstanding title bond for the conveyance of lands may be foreclosed like a mortgage when any part of the purchase money remains unpaid after the day fixed for payment, whether time is or is not of the essence of the contract, and in such cases the vendee will be treated as the mortgagor of the property, and his rights foreclosed accordingly. The petition in such case should ask the court to require the purchaser to perform his contract or to foreclose and sell his interest in the property.[73] And in case of a foreclosure of a title bond no tender of conveyance is required.[74]

But the vendor under a title bond is not confined to his remedy by foreclosure. He may proceed at law for the purchase money or any unpaid and matured installment of it.[75] The remedy by foreclosure is one which did not heretofore exist, but it does not prohibit the vendor from declaring a forfeiture of the contract in compliance with its terms.[76] The assignee of a contract for the sale of real estate, by accepting the assignment thereof, becomes a party to the contract and personally liable

[72] Code, Sec. 4296.

[73] Code, Secs. 4297, 4298; Hartman v. Clarke, 11-510; Tupple v. Viers, 14-575; Hershey v. Hershey, 18-24; Pierson v. David, 1-23; Blair v. Marsh, 8-144; Gamut v. Gregg, 37-573; Page v. Cole, 6-153; Rubelman v. Rummel, 72-40.

[74] Stevenson v. Polk, 71-278.

[75] Hershey v. Hershey, 18-24; Page v. Code, 6-153.

[76] Mickelwait v. Leland, 54-662; Iowa R. L. Co. v. Mickel, 41-402; Johnson v. Thornton, 54-144.

thereon for the purchase money unpaid.[77] The vendee to an outstanding title bond can not, by abandoning the contract or offering to surrender it, divest himself of his interest and liability.[78]

Where the vendor proceeds to foreclose and sell the property he loses his lien for any balance of the purchase money not paid by the foreclosure sale.[79] And it seems that the assignee of a vendor of real estate who acquires the note given for the purchase price, with an agreement that he shall have the benefit of the security, may, in case of non-payment, bring action in his own name against the vendee and all persons claiming under him with notice.[80]

§ 1157. Of the cancellation of real estate contracts.—Any contract hereafter made for the sale of real estate in this State and which provided for the forfeiture of the vendee's rights therein on the happening of certain conditions, will not be forfeited or canceled unless thirty days before a declaration of forfeiture is made a written notice be served on the vendee or assignee, notice of whose right as assignee has been conveyed to the vendor and on the party in possession of said real estate, which notice must be served in the same manner and by the same parties authorized to serve original notices, and contain a declaration of an intention to forfeit said contract and the reasons therefor.[81] For the period of thirty days after the service of said notice, the vendee or those claiming under him, may discharge any unpaid payments and costs of service of notice of forfeiture, or perform any condition broken; and, if said payments are made or said conditions broken are performed within said period of thirty days, the right to forfeit for default occurring before said notice is served is terminated.[82] The requirements contained in this section are operative in all cases where the intention of the parties, as gath-

77 Wightman v. Spofford, 56-145.
78 Mullen v. Bloomer, 9-360.
79 Todd v. Davey, 60-532, and cases cited.
80 Blair v. Marsh, 8-144.
81 Code, Sec. 4299.
82 Code, Sec. 4300.

ered from the contract and from the surrounding circumstances, is to sell or agree to sell an interest in real estate, any contract or agreement of the parties to the contrary notwithstanding.[83]

§ 1158. Of pleading, practice, etc.—In a proceeding in equity to enjoin the summary foreclosure of a mortgage under the code of 1851, it was held that the court might decree a foreclosure of the mortgage in favor of the respondent without his filing a cross-petition praying for that relief, or his making such prayer in his answer.[84]

In a proceeding to foreclose a mortgage where the answer admits the execution of the note and mortgage, and does not deny that the amount claimed in the petition is due and owing, there is nothing for the plaintiff to prove.[85] Where the petition to foreclose a mortgage asks a judgment on a note and a foreclosure of the mortgage, there is no mingling of law and equity in one proceeding, and the judgment prayed for is authorized by the statute.[86] No greater relief can be given in a decree of foreclosure than is prayed for in the petition.[87] The mortgagor can not, in a separate action, recover from the purchaser in possession for rents and profits, unless he shows that he was prevented by accident, surprise, fraud or mistake, from considering the rents and profits when he made his offer to redeem.[88] When a court renders a decree of foreclosure on a mortgage and awards a special execution, it can not order a stay of execution for a given time.[89] When a plaintiff has made a junior mortgagee a party defendant in a foreclosure case, he may dismiss his case as to him unless he appear and insist upon an adjustment of his rights by a decree; nor can one defendant object to an order dismissing a co-defendant.[90] When the vendee takes possession of the real estate purchased, with the consent of the vendor, and fails to pay

83 Code, Sec. 4301.
84 Westfall v. Lee, 7-12.
85 Cooley v. Hobart, 8-358.
86 Same as No. 85.
87 McLaughlin v. O'Rouke, 12-459.
88 Barrett v. Blackmar, 47-565.
89 Carroll v. Reddington, 7-386.
90 Heimstreet v. Winnie, 10-430.

the purchase money according to his contract, the vendor may maintain an action against the vendee for the possession without returning such part of the purchase money as has been paid, or tendering back the notes of the vendee given for the balance of the purchase price.[91] An action to foreclose a title bond is local in its nature, and is properly brought in the county where the land is situated.[92] A foreclosure for an installment due, according to the terms of the title bond, before the maturity of the principal amount and the sale of the property thereunder, exhausts the remedy of the creditor in respect to the land, and passes a clear title thereto to the purchaser.[93] Persons not made parties to a foreclosure of a title bond or mortgage are not affected by the decree.[94] In an action at law upon a promissory note, executed for a whole or a part of the purchase price of the land which the payee covenants to convey upon its payment, the grantor can not recover without showing performance on his part; either by tender of a deed, or offer to convey.[95] And in an action on a title bond to recover a balance of the purchase money remaining unpaid, it is error for the court to declare the bond forfeited and the land discharged from the same. In such case judgment should be rendered for the amount due, the bond foreclosed like a mortgage, and the property ordered sold to satisfy the judgment.[96] An action to foreclose a mortgage or title bond, is triable de novo in the supreme court.[97] The burden is on one claiming that a deed absolute on its face was given to secure a loan to establish that fact.[98] It is held that instruments requiring an acknowledgment before an officer ought not to be set aside without clear and satisfactory evidence.[99] In an action to foreclose a mortgage against a subse-

[91] Page v. Cole, 6-153.
[92] John v. Orcutt, 9-350.
[93] Poweshiek County v. Dennison, 36-244; Escher v. Simmons, 54-269; Todd v. Davey, 60-532; Harms v. Palmer, 61-483.
[94] Dukes v. Turner, 44-575.
[95] Zebley v. Sears, 38-507; School Dist. v. Rogers, 8-316; Berryhill v. Byington, 10-223.
[96] Gamut v. Gregg, 37-573.
[97] Wells v. Lawrence, 65-373.
[98] Allen v. Fogg, 66-229.
[99] Herrick v. Musgrove, 67-63.

quent purchaser of the mortgaged premises, who takes a conveyance subject to the mortgage, and agrees to pay off the same as a part of the purchase price, it is a good defense that the mortgagor had no title to the premises, or that his representations respecting the same were false and that the defendant was induced by such false representations to assume the payment of the mortgage.[1] No decree of foreclosure can be legally rendered against a party unless it is properly prayed for in the petition.[2] In all foreclosure cases the decree must be for the sale of "the premises or so much thereof as is necessary to be sold to satisfy the amount due with interests and costs."[3] A judgment on a note secured by a mortgage upon real property against the maker and sureties thereon, will not operate to discharge the lien of the mortgage.[4] Any defense or counter claim may be pleaded to an action for the foreclosure of a mortgage which is good as such.[5] And in the foreclosure of a title bond, it is a sufficient defense by one vendee that he has sold out all his interest to his co-defendant with the knowledge and consent of the plaintiff, and has been discharged from liability on the note by the giving of other security by his co-defendant.[6]

When the mortgaged land, which is not divisible, is sold for the payment of an installment due upon a mortgage and a surplus remains, the court will retain custody thereof and apply it upon the other installments as they become due. After suit is commenced for an installment due, the court retains jurisdiction until the whole debt falls due, and will then order a decree for the same.[7] A certificate of purchase at a mortgage foreclosure sale is not negotiable, but is assignable subject to prior equities, against the assignor.[8] If plaintiff has the notes

[1] Benedict v. Hunt, 32-28.
[2] Ballard v. Koons, 10-534; White v. Watts, 18-75.
[3] Maloney v. Fortune, 14-417; Greiber v. Shafer, 18-29.
[4] Jordan v. Smith, 30-499.
[5] Moberly v. Alexander, 19-162.
[6] Arms v. Stockton, 12-327.
[7] McDowell v. Lloyd, 22-448, and cases cited; see Burroughs v. Ellis, 76-649; Morgan v. Kline, 77-681.
[8] Van Gorder v. Lundy, 66-448.

and mortgage in his possession and introduces them in evidence, it is presumptive evidence of ownership, and generally is sufficient.[9] A mortgage given for a larger sum than the legitimate indebtedness, in the absence of explanation, is a badge of fraud and may be in and of itself sufficient to establish fraudulent intent.[10] A husband made to his wife a mortgage without consideration and she assigned it to plaintiff; a creditor of the wife had an attachment against her alone, levied on the property; it was held that the wife had no interest in the property which could be attached and the attachment created no lien superior to the rights of the assignee of the mortgage.[11] Where mortgaged premises have subsequently been sold in parcels to different purchasers, each must bear or contribute proportionately to the discharge of the incumbrance and not in the inverse order of alienation.[12] The fact that a mortgage was executed to secure the payment of a debt previously contracted will not invalidate it, nor does it make any difference that it was made by one of the members of a partnership and his wife to secure a debt of the firm.[13] In an action to foreclose a mortgage where plaintiff alleges that defendant claims to have a lien thereon, but that it is inferior to the mortgage, and defendant's answer admits the mortgage and sets up his lien, and alleges that it is superior to plaintiff's mortgage, the defendant has the burden of establishing the superiority of his lien.[14]

It is a good defense that the property is so encumbered with judgments against the vendor as to make it impossible for him to fulfill his contract by making a clear title,[15] or that the land has already been sold on a judgment,[16] or that the title has failed.[17] And in an action on notes, given for the purchase money of land, the con-

[9] Same as No. 8.
[10] Taylor v. Wendling, 66-562, and cases cited; Carson v. Byers, 67-606; Lombard v. Dows, 66-243.
[11] Taylor v. Wendling, 66-562.
[12] Barney v. Myers, 28-472; Massie v. Wilson, 16-390; Bates v. Ruddick, 2-423; Griffith v. Lovell, 26-226; Huff v. Farwell, 67-298.
[13] Cooley v. Hobart, 8-358.
[14] Vaughn v. Eckler, 69-332.
[15] Lyon v. O'Kell, 14-233.
[16] Lyon v. Day, 15-469.
[17] Ruddick v. Lloyd, 15-441.

veyance of which was to be made on their payment, it is a good defense that plaintiff has not delievered or tendered a deed.[18] But if a judgment was obtained without tender of a deed being made, and the land was sold on such judgment, such failure to tender a deed would not affect the judgment or impair the title of the purchaser.[19] But this rule requiring tender of a deed does not obtain in equity cases.[20] No receiver can be appointed unless the mortgage creates a lien upon the mortgagor's right of possession and on the rents and profits accruing therefrom.[21]

§ 1159. Of redemption.—An incumbrancer not made a party to a foreclosure proceeding is not cut off from his right to redeem by a sale thereunder.[22] But a purchaser of land at a sale under foreclosure to which a junior lien holder was not made a party may maintain a cross action to compel or bar redemption.[23] And a sale under a decree of foreclosure is subject to redemption as in cases of such sales under general execution.[24] But parties may stipulate away the right of redemption as to themselves.[25] If the land covered by the bond or mortgage has been divided into parcels, each parcel must contribute its share to the payment of the debt in redeeming the same from a foreclosure sale of the whole.[26] The grantee of the mortgagor, becoming such before judgment is rendered, may redeem from sale under judgment of foreclosure for part of the debt, and hold the property free of any lien under the mortgage or under the judgment against his grantor for the balance of the

[18] Berryhill v. Byington, 10-223; School Dist. v. Rogers, 8-316.

[19] Cole v. Gill, 14-527.

[20] Winters v. Sherman, 20-295; Rutherford v. Haven, 11-587, and cases cited.

[21] American Inv. Co. v. Farrar, 87-437.

[22] White v. Watts, 18-74; Heimstreet v. Winnie, 10-430; Street v. Beal, 16-68; Bleidorn v. Abel, 6-5; Parrott v. Hughes, 10-459; Donnelly v. Rusch, 15-99; Johnson v. Harmon, 19-56; but see Schlawig v. Fleckenstein, 80-668.

[23] Anderson v. Wyant, 77-498.

[24] Code, Sec. 4289; Barrett v. Blackmar, 47-565; Am. B. H. Ass'n v. Burlington M. L. Ass'n, 61-464; Newell v. Pennick, 62-123; see chapter on Redemption.

[25] Cook v. McFarland, 78-528.

[26] Dukes v. Turner, 44-575; Barney v. Myers, 28-472.

debt.[27] It is held that where a junior mortgage is assigned, and the assignment is not made of record, a foreclosure of the senior mortgage, to which the junior mortgagee is made a party, is binding upon the assignee of such junior mortgage, and he can only make statutory redemption, although not made a party, when the fact of his interest is not known to the party foreclosing; and the fact that such assignee, pending foreclosure of a senior mortgage, brings an action upon such junior mortgage, will not make it incumbent upon the party foreclosing the senior mortgage to bring such assignee into court as a party to such foreclosure.[28] The statutory redemption provided for does not take away the equitable right of redemption, and it will be enforced in a court of chancery in a proper case until it is taken away by express legislative enactment. So it is held that a junior lien-holder, not having been made a party to the foreclosure of a prior lien, had an equitable right to redeem by action, instead of taking advantage of the provisions of the statute.[29] The holder of a junior judgment has no right to redeem from a sale under a foreclosure of a senior mortgage after the statutory time for redemption has expired, even though he is not made a party to the foreclosure, if his judgment is not indexed at the time of the foreclosure, as third persons are not charged with constructive notice of a judgment unless it is correctly indexed.[30] Reference is made to the cases cited below for a further discussion as to the rights of redemption and the effect of redemption.[31] Under the code of 1851, the sale of mortgaged property by foreclosure barred and cut off all equity of redemption. Re-

[27] Esher v. Simmons, 54-269; Todd v. Davey, 60-532; Harms v. Palmer, 61-483.

[28] Reed v. Wilson, 64-13.

[29] Newell v. Pennick, 62-123; Gower v. Winchester, 33-303; Knowles v. Rablin, 20-101; Spurgin v. Adamson, 62-661; Iowa County v. Beeson, 55-262; Johnson v. Harmon, 19-56; Newcomb v. Dewey, 27-381; Bunce v. West, 62-80.

[30] Sterling Mfg. v. Early, 69-94; see Cummings v. Long, 16-41; Thomas v. Desney, 57-58.

[31] Hutchinson v. Wells, 67-430; Iowa Loan & Trust Co. v. King, 66-322; Dickerman v. Lust, 66-444.

demption could only be made before the sale.[32] The subject of redemption will be found fully discussed in the chapter on that subject.[33]

§ 1160. Of priority of liens—Intervening equities—Indexing, etc.—The law applicable to cases of intervening equities depending on particular facts is discussed in the cases below cited.[34] One who claims a title or right in real estate under another must be presumed to have knowledge of the recitals in a conveyance to his immediate grantor.[35] And one who takes a mortgage from another whose deed recites the existence of a prior mortgage though it is not indexed on the record, yet his lien will be subject thereto.[36] A promissory note executed by a father to his daughter for services in pursuance of an agreement is founded on a good consideration, and a mortgage given to secure it is not fraudulent as to his creditors.[37] When a wife who had joined with her husband in a mortgage on their homestead to secure his debt had entered into a written contract with the mortgagee for the purchase of the debt at a future time at a discount, but the mortgagee in the meantime brought an action to foreclose his mortgage, it was held he was entitled to recover as against a junior incumbrancer the full amount of the note and interest, and not simply the amount which the wife would at that time have been obliged to pay him for the debt under her contract.[38] One dealing with a mortgagee without notice is protected.[39] When "P." conveyed the property in question to "L." and at the same time "L." entered into a written agreement that the contract and convey-

[32] Kramer v. Rebman, 9-114.

[33] Chapter on Redemption.

[34] Crowley v. Harader, 69-83; Weidner v. Thompson, 69-36; Van Gorder v. Lundy, 66-448; Davis v. Lutkiewitz, 72-254; Mather v. Jenswold, 72-550.

[35] State v. Shaw, 28-67; Hall v. Orvis, 35-366; Baker v. Mather, 25 Mich., 51; Reeder v. Barr, 4 Ohio, 446; Bell v. Twilight, 22 N. H., 500; Brush v. Ware, 15 Peters, 93; White v. Foster, 102 Mass., 375; Oliver v. Piatt, 3 How., 332; Clark v. Ballard, 66-747.

[36] Ætna Life Ins. Co. v. Bishop, 69-645; Council Bluffs v. Billups, 67-674.

[37] Chadwick v. Devore, 69-637; see Scully v. Scully, 28-548; Smith v. Johnson, 45-308; Allen v. Bryson, 67-591.

[38] Knox v. Moser, 69-341.

[39] Parmenter v. Oakley, 69-388.

ance might be rescinded at "P.'s" election on certain conditions, which agreement was recorded and indexed in the name of "L." as grantor and of "P." as grantee, held, that one accepting a mortgage from "L." on the property was charged with constructive notice of "P's" rights.[40] Where the mortgagor's title was canceled at the suit of his grantor, upon condition that the grantor pay him a certain sum of money, and the mortgagee was also before the court defending his mortgage, it was held the mortgage should have been held good for the amount of such payment, and the court should have directed the money to be paid to the mortgagee.[41] In Central Trust Company v. Sloan, 65 Iowa, 655, it is held that a mortgagee is bound by a decree to know that a mortgage was an inferior lien. Where one attempted to execute a mortgage on certain lands, but the same were not correctly described, and after the lapse of three years the mistake was discovered, and a new mortgage made to correct the error, but in the meantime the mortgagor had made a second mortgage to another party, which was recorded before the corrected mortgage, but the second mortgage contained an exception in these words, "except one mortgage for $1,200," and there was no prior mortgage on the land, the exception was held to give notice to the mortgagee therein, and to put him on inquiry as to the holder of such mortgage.[42]

As to questions of priority depending on particular facts and the application of the proceeds of sale in certain cases, the reader is referred to cases cited below.[43] One who acquires an attachment or a judgment lien on property intended to be covered by a prior mortgage, but which by reason of a mistake in description is not

[40] Paige v. Lindsey, 69-593.

[41] Same as No. 40.

[42] Clark v. Bullard, 66-747; Council Bluffs v. Billups, 67-674.

[43] Hoffman v. Wilhelm, 69-510; Packard v. Kingman, 11-219; Iowa College v. Fenno, 67-244; Dickerman v. Lust, 66-444; Hoskins v. Carter, 66-638; Hutchinson v. Wells, 67-430; Kellog v. Gutchens, 62-502; Koevenig v. Schmitz, 71-175; see Huff v. Farwell, 67-298; Leavett v. Reynolds, 79-348.

included therein, such mistake being known to such lien-holder, his claim is subject to the equitable rights of the mortgagee.[44] And such mistake may be corrected in equity as against a subsequent mortgagee with notice.[45] Where the indebtedness secured by a mortgage is barred by the statute of limitations, an admission of such indebtedness, sufficient to remove the bar of the statute, restores the lien for the indebtedness, even as against a junior lien.[46] A provision in a mortgage that upon default in the payment of installments of interest or taxes the whole indebtedness shall become due is for the benefit of the mortgagee at his election, and such default will not set the statute of limitations running against the indebtedness in the absence of an election on the part of the mortgagee to take advantage of such provision.[47]

§ **1161. Of release and merger.**—If the release of a mortgage is secured by the fraud of the mortgagor, subsequent attaching creditors obtain no better right than the mortgagor has in the mortgaged property.[48] Where a mortgagee purchases the fee-simple title to the mortgaged premises, no merger of the mortgage will occur, when the intention of the mortgagee is otherwise, and the merger is against his interest.[49] And in the absence of evidence of intention, it will be presumed to accord with his interest.[50] A foreign administrator, executor or guardian, being qualified as provided by law, may release and discharge mortgages.[51] The rendition of a

[44] Duncan v. Miller, 64-223.

[45] Peters v. Ham, 62-656.

[46] Mahon v. Cooley, 36-479; see Kerndt v. Porterfield, 56-412.

[47] Watts v. Creighton, 85-154.

[48] Hoffman v. Wilhelm, 68-510; Vannice v. Bergen, 16-555; Reed v. King, 23-500; see Ellis v. Lindley, 37-334.

[49] Smith v. Swan, 69-412; Patterson v. Mills, 69-755; Simpson v. Pease, 53-572; Wickersham v. Reeves, 1-413; Lyon v. McIlvaine, 24-9; Woodward v. Davis, 53-694; Wilhelmi v. Leonard, 13-330; Rankin v. Wilsey, 17-463; Linscott v. Lamart, 46-312; Bowling v. Cook, 39-200; Johnson v. Walter, 60-315; Byington v. Fountain, 61-512; Hervey v. Savery, 48-313; Delaware R. C. Co. v. D. & St. P. R. Co., 46-406; First Nat'l Bk. v. Elmore, 52-541; Fuller v. Lamar, 53-477; Pike v. Gleason, 60-150; Stimson v. Pease, 53-572.

[50] Patterson v. Mills, 69-755; Woodward v. Davis, 53-694; Nat'l Bk. v. Elmore, 52-541.

[51] Code, Sec. 3308.

judgment or decree of foreclosure, while it merges the debt into a judgment, does not affect the mortgage lien; it continues to exist until the debt is paid or discharged.[52]

Generally, it may be said that nothing but actual payment or express release will discharge the mortgage debt, nor will the lien be affected by taking new notes and mortgage for the debt.[53]

[52] Hendershott v. Ping, 24-134; Shearer v. Mills, 35-499.

[53] Packard v. Kingman, 11-219; Chase v. Abbott, 20-154; Swan v. Yaple, 35-248; Thorpe v. Burbon, 45-192; Port v. Robins, 35-208; Sloan v. Rice, 41-465; Heively v. Matterson, 54-505; Washington Co. v. Slaughter, 54-265; Wilhelmi v. Leonard, 13-330.

CHAPTER LXXI.

OF MOTIONS AND ORDERS.

Sec. 1162. Of the form and requisites of motions, etc.
1163. Of notice of motions.
1164. Of service and return of notice.
1165. Of the hearing.
1166. Of orders.

Section **1163. Of the form and requisites of motions, etc.**—A motion is a written application for an order, addressed to the court, or to a judge in vacation, by any party to an action or proceeding, or by any one interested therein.[1] Several objects may be included in the same motion, if they all grow out of, or are connected with the action or proceeding in which it is made.[2] A decree or judgment is not an order within the meaning of that word as used in the statute.[3] Nor is a motion to instruct a jury to render a verdict such a motion as must be in writing.[4] A motion must be entitled like pleadings, and should include all the relief the party making it is entitled to at the time, and must specify, as particularly as may be, the grounds on which it is based.[5] A motion after a motion, to the same pleading, is not permissible.[6] A paper denominated "synopsis of petition," but which lacks the essential requisites of a petition, may be stricken out on motion.[7] So, it is not error to strike an amended answer, which is filed to conform the

[1] Code, Sec. 3831; Wood v. Bailey, 12-46; Hall v. Crouse, 14-487; see Palmer v. Jones, 49-405; Young v. Burlington Wire Mattress Co., 79-415.
[2] Code, Sec. 3832.
[3] Code, Sec. 3831; Wagner v. Tice, 36-599.
[4] Young v. Burlington Wire Mattress Co., 79-415.
[5] Wood v. Bailey, 12-46; Hall v. Crouse, 14-487.
[6] Riddle v. Backus, 36-430.
[7] Garretson v. Hays, 70-19.

pleadings to the proof, when the same evidence was admissible under the original answer.[8]

The motion may be in the following form:

FORM OF A MOTION.

Title, }
Venue. }

The plaintiff (or defendant, as the case may be) moves the court (here specify all the relief the party making the motion is entitled to), upon the following grounds:

1. That, etc. (here state one ground of the motion).

2. That, etc. (here state another ground, and follow in the same manner until all have been set out).

———, attorney for plaintiff (or defendant).

§ 1163. Of notice of motions.—A party who has appeared in an action, or who has been served with an original notice as provided by law, must take notice of all motions filed during term time, upon the same being filed by the clerk, and entered in the appearance docket.[9] And all motions filed in vacation must be entered on such docket, and served on the opposite party, or his attorney.[10] A motion for a change of venue made in vacation can not be heard without notice be given to the adverse party.[11]

After judgment the defendant is not required to take notice of subsequent proceedings,[12] and is entitled to notice of a motion to set aside a judgment rendered at a prior term.[13] As to when a party may not object to the want of service of notice of a motion.[14]

When notice of a motion is required to be served it must state the names of the parties to the action or proceeding in which it is made, the name of the court or judge before whom it is to be heard, and the place where, and the day on which such hearing is to take place; and if affidavits are to be used on the hearing, the notice must be accompanied with copies thereof, and must be

[8] Hunt v. Higman, 70-406.

[9] Code, Sec. 3834; Wagner v. Tice, 36-599.

[10] Code, Sec. 3834.

[11] Preston v. Winter, 20-265; Loomis v. McKenzie, 31-425.

[12] Adair v. Wright, 16-385; Wright v. LeClaire, 3-221.

[13] Keeney v. Lyon, 21-277.

[14] Rivers v. Olmsted, 66-186; Billings v. Kothe, 49-34.

served such length of time before the hearing, as the court or judge deems reasonable.[15] Such notice may be in the following form:

FORM OF NOTICE OF MOTION.

Title, }
Venue. }

To ——— defendant, or to ———, his attorney:

You are hereby notified that a motion, a copy of which is attached hereto, will be brought on by plaintiff for hearing before the district court of ——— county, Iowa, on the ——— day of ———, 18—, (or before the Honorable ———, judge of said court, on the ——— day of ———, 18—, at ——— o'clock — m., at the chambers of said judge in the city of ———, in ——— county, Iowa).

And that upon the hearing of said motion the plaintiff will use affidavits in support thereof, copies of which are attached hereto, and you can attend at said time and place if you so desire.

———, attorney for plaintiff.

(There must be attached to the notice a copy of the motion and affidavits.)

§ 1164. Of service and return of notice.—The notice and copy of motion referred to in this chapter may be served by any one authorized to serve an original notice.[16] Service must be made on each of the parties adverse to such motion, if more than one, or on an attorney of record of such party or parties.[17] The service may be personal on the party or his attorney, or may be made in the same manner as is provided for the service of the original notice in civil actions, or it may be served on the attorney by being left at his office with any person having the charge thereof.[18] When an officer who is authorized to serve the notice and copy of the motion receives the same for service, it is his duty to serve the same at once and make prompt return thereof to the party who gave it to him, and a failure to do so will be punished as a disobedience of the process of the court.[19] The return or proof of service must state the manner in which such service was made.[20] If the party to be

[15] Code, Sec. 3835.
[16] Code, Sec. 3836.
[17] Code, Sec. 3837.
[18] Code, Sec. 3838
[19] Code, Sec. 3839.
[20] Code, Sec. 3840.

served has no known place of abode in this State and no attorney in the county where the action is pending, or in a case where the parties, plaintiff or defendant, are numerous, the court or judge may direct the mode of serving notice and copies, and on whom they shall be served.[21]

§ **1165. Of the hearing.**—If the adverse party consents to the granting of a motion, ordinarily it will be granted as a matter of course; but if he objects to the granting of the relief asked in the motion he must take advantage of any defects in plaintiff's proceedings or they will be waived. Testimony to sustain or resist a motion on the hearing may be in the form of affidavits, or in such other form as the parties may agree upon, or the court or judge direct; and if by affidavit the person making the same may be required to appear by the court or judge, and submit to a cross-examination. The hearing will occur at the time specified in the notice, if due time has been given, unless for sufficient cause the court or judge adjourn it until some future time.[22] If no ruling appears to have been made on a motion, the presumption is that the m tion was waived.[23] A motion once passed upon will not be reheard at the instance of the unsuccessful party until the ruling has been set aside on his motion, and on notice to the opposite party.[24] In determining questions relating to costs and as to who shall pay them, the court may receive affidavits and decide the matter thereon, or it may order the deponents to be brought before it and examined.[25] Issues of fact may arise upon motion.[26]

§ **1166. Of orders.**—Every direction of a court or judge, made or entered in writing, and not included in a judgment, is an order.[27] But an order is not a judgment in such sense that the statute of limitations applies to

21 Code, Sec. 3841.
22 Code, Secs. 3833, 4678.
23 Cook v. Smith, 50-700.
24 Townsend v. Wisner, 62-672.
25 Packer v. Packer, 24-20.
26 Leare v. Franklin, 84-413.
27 Code, Sec. 3842.

it.[28] A final decree in equity is not an order, but a judgment, within the meaning of section 3842, of the code.[29] The decision of a motion is an order, and an order made in vacation on a hearing of a motion must be filed with, and entered by the clerk on the journal of the court, in the same manner as orders made in term time.[30] For good cause shown, a judge's order may issue in vacation directing any of the officers of the court in relation to the discharge of their duties.[31] Thus the judge in vacation may direct the sheriff to publish a notice of sale in a manner prescribed by law, as declared by the judge.[32] And an order may be issued, directing the clerk as to his duty.[33] But such orders remain in force only during the vacation in which they are granted, and for the first two days of the succeeding term.[34] But this provision does not apply to a temporary injunction, granted in vacation.[35] Nor to an order in a proceeding by habeas corpus.[36] If, for any reason, it is necessary for the order to be kept in force after the second day of the term, application for that purpose must be made before such time expires. The judge granting the order heretofore spoken of, may require the filing of a bond as in cases of injunctions, unless, from the nature of the case, such a requirement would be clearly unnecessary and improper.[37]

[28] Smith v. Shawhan, 37-533, and cases cited.
[29] Wagner v. Tice, 36-599.
[30] Code, Sec. 3846.
[31] Code, Sec. 3843; Pickel v. Owen, 66-485.
[32] Harriman v. Moore, 49-171.
[33] Maynes v. Brockway, 55-457.
[34] Code, Sec. 3844.
[35] Curtis v. Crane, 38-459.
[36] Shaw v. McHenry, 52-182.
[37] Code, Sec. 3845.

CHAPTER LXXII.

OF NUISANCE.

Sec. 1167. Definition of nuisance.
1168. Of the action, and when it will lie.
1169. When the action will not lie.
1170. Of the petition.
1171. Of the abatement of nuisances by parties injured thereby.
1172. Power of municipal corporations to determine what constitutes a nuisance.
1173. Of practice.
1174. Of the order of abatement.

Section **1167. Definition of nuisance.**—A nuisance is defined by our statute as being whatever is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property.[1]

§ **1168. Of the action and when it will lie.**—It is a civil action to be prosecuted by ordinary proceedings, by any person injured thereby, and in the same action the nuisance may be enjoined or abated, and damages also recovered therefor. It will lie to abate obstruction

1 Code, Sec. 4302; Ewell v. Greenwood, 26-377; Morrison v. Marquardt, 24-35; Moffit v. Brewer, 1 G. Greene, 348; McCord v. High, 24-336; Everett v. Council Bluffs, 46-66; Park v. The C. & S. W. R. Co., 43-636; Finley v. Hershey, 41-389; State v. Kaster, 35-221; Cain v. The C., R. I. & P. R. Co., 54-255; see also Cadle v. The Muscatine W. R. Co., 44-11; Firth v. The City of Dubuque, 45-406; Bushnell v. Robeson, 62-540; Richards v. Holt, 61-529; Faucher v. Grass, 60-505; Daniels v. Keokuk Water Works, 61-549; Fuller v. C., R. I. & P. R. Co., 61-125; Miller v. K. & D. M. R. Co., 63-680; Shiras v. Olinger, 50-571; Shively v. C., R. I. F. & N. R. Co., 74-169; Moore v. C., B. & Q. R. Co., 75-263; Harley v. Merrill Brick Co., 83-73; Randolf v. Bloomfield, 77-50; Ferguson v. Firmenich Mfg. Co., 77-576; Churchill v. Burlington Water Co., 62 N. W., 646; Miller v. Webster City, 62 N. W., 648; Platt v. C., B. & Q. R. Co., 74-127; Ottumwa v. Chinn, 75-405; Innis v. C., R. I. F. & N. W. R. Co., 76-165; Kallsen v. Wilson, 80-229; Miller v. Schenck, 78-372; Trulock v. Merte, 72-510; Millhiser v. Willard, 65 N. W., 325; Downing v. Oskaloosa, 86-352.

of a public highway.[2] It will lie in favor of any person whose property is injuriously affected and whose personal enjoyment is lessened by the erection of a nuisance. It will lie at the instance of one who is damaged by the obstruction of a highway leading to his premises.[3] It will lie to prevent the obstruction of a stream by reason of which lands are inundated.[4] It lies for the pollution of a stream of water.[5] It will lie at the instance of a property holder against a railway company where it erects a side-track upon a street in a city in violation of the city ordinances, and where the use thereof constitutes a nuisance which specially damages the complainant.[6] It will lie to abate a slaughter house.[7] It will lie at the instance of one injured in the enjoyment of premises by smoke, but in such a case where the health of himself or family was not affected the court refused to abate the nuisance.[8] It will lie at the instance of municipal corporations to abate nuisances within their limits.[9] When a nuisance is of a permanent nature, all the damages caused thereby, whether past or prospective, accrue at once on its becoming a nuisance against the one doing the injury and not against his grantee.[10] Nor is it necessary that the board of health should have found a nuisance to be such before an action can be maintained. Feed lots and stock yards may be a nuisance.[11] A city is not liable in damages for nuisance on account of the condition of a small stream within its limits, which passes over private property.[12]

§ 1169. When the action will not lie.—It will not

[2] Ewell v. Greenwood, 26-377.
[3] Park v. The C. & S. W. R. Co., 43-636.
[4] Moore v. C., B. & Q. R. Co., 75-263.
[5] Ferguson v. Firmenich Mfg. Co., 77-576.
[6] Cain v. The C., R. I. & P. R. Co., 54-255; see also Cadle v. The Muscatine W. R. Co., 44-11; Firth v. City of Dubuque, 45-406.
[7] Bushnell v. Robeson, 62-540; State v. Kaster, 35-221; Wood on Nuisances, Secs. 504, 505.
[8] Daniels v. Keokuk Water Works, 61-549.
[9] Cole v. Kegler, 64-59; Everett v. City of Council Bluffs, 46-66.
[10] Bizer v. Ottumwa Hydraulic P. Co., 70-145.
[11] Baker v. Bohannan, 69-60; Shively v. C., R. I. F. & N. R. Co., 74-169.
[12] Loughran v. Des Moines, 72-382.

lie to abate trees growing in a highway where they do not obstruct or interefere with public travel.[13] It will not lie in favor of an individual unless he suffers special damage therefrom.[14] It will not lie in favor of a party who is maintaining an equally offensive nuisance on his premises.[15] But it can not be maintained where one improves his lot so as to cast rainwater falling thereon, on a street or alley at an established grade, from whence it flows on the land of another which is below grade.[16] It will not lie against a municipal corporation for doing an authorized act within the scope of the power granted.[17]

§ 1170. Of the petition.—As has been seen, this action is prosecuted by ordinary proceedings and the petition should state the facts constituting the nuisance, and if it is desired to have an injunction issued in the same action, the proper allegation therefor should be set forth. The petition may be in the following form:

FORM OF PETITION FOR DAMAGES FOR OBSTRUCTING A STREET.

Title, }
Venue. }

The plaintiff states: That at and before the time of committing of the injury hereinafter mentioned, there was, and ever since has been, a certain public highway (or street, if in a town or city), called ——— street, for the free passage of all persons on foot, and with their teams, horses and carriages at all times, and that the said defendant, well knowing the premises heretofore, and on the ——— day of ———, 18—, wrongfully caused to be put and placed divers large quantities of dirt, rubbish, stones and other materials (the obstruction should be clearly stated), in said public highway (or street), whereby the plaintiff lawfully passing in and along said highway (or street), in a certain carriage drawn by horses, was then and there, by reason of said rubbish and material so wrongfully placed in said highway (or street), with great force and violence, overturned, without the fault or negligence of the plaintiff, and his said wagon was broken and greatly injured, and he was seriously injured in and about his person, and especially his left leg (state any special damage there may have been), whereby the said

[13] Everett v. The City of Council Bluffs, 46-66; see Bills v. Belknap, 36-583; Patterson v. Vail, 43-142.

[14] Park v. The C. & S. W. R. Co., 43-636; see Harley v. Merrill Brick Co., 83-73.

[15] Cassady v. Cavenor, 37-300; see Randolph v. Bloomfield, 77-50.

[16] Philips v. Waterhouse, 69-199.

[17] Miller v. Webster City, 62 N. W., 648.

plaintiff was put to great expense in curing his said leg, as well as in repairing his said wagon, to wit, the sum of ——— dollars, and was unable to attend to his usual business for the space of ——— months, and to the damage of the plaintiff in ——— dollars, no part of which has been paid. Wherefore, he prays judgment against the said defendant for the said sum of ——— and costs.

———, attorney for plaintiff.

(Where the petition asks for an injunction it must be sworn to, otherwise it need not be.)

FORM OF PETITION FOR ABATEMENT OF NUISANCE.

Title, }
Venue. }

The plaintiff states that he is and at all times hereinafter mentioned was the owner in fee of (here insert description of property), which adjoins the property of the defendant hereinafter described; that on the ——— day of ———, 18—, the defendant erected upon (here describe real estate), a slaughter house, and cattle pens, and furnaces, and vats for making lard and tallow, and thereafter kept in his said pens and slaughtered in the said slaughter house large numbers of cattle and hogs, and made thereat tallow and lard, and thereby caused noxious and offensive smells and loud and offensive noises, and tainted and corrupted the atmosphere so as to render the dwelling house of the plaintiff, situated on the land above described, unfit for habitation; the plaintiff was compelled to remove therefrom and abandon the same; he was thereby prevented from renting or otherwise receiving any income therefrom (if other special damage state it), to the damage of the plaintiff in the sum of ——— dollars, no part of which has been paid.

Wherefore the plaintiff demands judgment against the defendant, that he be restrained by injunction from maintaining said building as a slaughter house or otherwise to the nuisance of the plaintiff, or permitting it to be so used, and that the plaintiff recover from the defendant ——— dollars, damages, and costs of this action.

———, attorney for plaintiff.

(Where a petition as above asks for an injunction it must be verified.)

While the statute, as we have seen, provides that an action for damages caused by a nuisance and for its abatement may be by action of law, yet it is held that such statute did not take away the equitable remedy which still exists.[18]

§ 1171. Of the abatement of nuisances by parties injured thereby.—While our statute provides means

[18] Bushnel v. Robeson, 62-540; Gribben v. Hansen, 69-256; Millhiser v. Willard, 65 N. W., 325.

for the abatement of nuisances, and the recovery of damages for injuries sustained from their existence, yet the law seems to be well settled in this State that a party may with his own hand abate that which to him is a nuisance, but he can not needlessly destroy the property, and if he do more than is necessary to the proper abatement of such nuisance, if one exists, and an injury thereby results to the other party, he will be liable therefor.[19]

Where water flowing through the premises of one was diverted from its natural course by an artificial channel made by a road supervisor in the construction of a highway over the stream, the plaintiff could dam up the artificial channel and thus restore the natural flow of the water over his premises,[20] but in abating a nuisance caused by a pond of water, the one injured has not the right to fill up the bed of the water, but may remove the cause which renders it impure, or restrain the one whose conduct produced the result.[21]

§ 1172. Power of municipal corporations to determine what constitutes a nuisance.—A municipal corporation has no power to declare anything a nuisance which is not such at common law or has not been declared to be such by statute.[22] While such corporations are vested with power to abate nuisances,[23] yet the nuisance must in fact exist, and if the thing abated be not a nuisance, the decision or declaration of the council of such municipality does not make it so, nor is such decision conclusive upon the owner of the property in controversy, but he may test the validity of the action of such council by certiorari, or by action against the municipal corporation or its officers, for damages which he may sustain.[24]

§ 1173. Of practice.—Damages for the maintenance

[19] Morrison v. Marquardt, 24-35; Moffit v. Brewer, 1 G. Greene, 348; Finley v. Hershey, 41-389; State v. Kaster, 35-221; McCord v. High, 24-336.

[20] McCord v. High, 24-336.

[21] Finley v. Hershey, 41-389; State v. Kaster, 35-221.

[22] Everett v. The City of Council Bluffs, 46-66.

[23] Code, Sec. 696.

[24] Cole v. Kegler, 64-59, and cases cited.

of a nuisance may be recovered by individuals specially injured by its erection or continuance, and it has been held that individual property owners may maintain a joint action for injunction, although owning separate property.[25] A party can not be enjoined from transacting or carrying on a business which is not a nuisance per se, but can, in a proper case, be required to transact his business in such a manner, that the same will not amount to a nuisance.[26] So a thing can not be abated as a nuisance unless it exists at the time of the trial,[27] and in an action for damages for a nuisance, the plaintiff is entitled to have a jury assess the same, notwithstanding he may couple with his claim for damages a prayer that the defendants may be enjoined from continuing the nuisance.[28]

And where, in an action to abate a nuisance consisting of the obstruction of a highway, the jury found generally for plaintiff, but the petition failed to locate the alleged obstruction, and to state on whose land it was, it was held a motion in arrest of judgment was properly sustained, as the court could not make the abatement, owing to the uncertainty of the location of the obstruction, nor could it make an order taxing the costs against the defendant.[29] Damages are not in all cases limited to the rental value, but may cover inconveniences suffered, discomfort and the like.[30]

§ 1174. Of the order of abatement.—Where the plaintiff recovers in the action, and in case he asks for an abatement of the nuisance without seeking to have the continuance of the nuisance enjoined pending the litigation, an order of abatement will be issued, and may be in the following form:

[25] Bushnell v. Robeson, 62-540, and cases cited.

[26] Richards v. Holt, 61-529; Faucher v. Grass, 60-505; Shiras v. Olinger, 50-571.

[27] Fuller v. The C., R. I. & P. R. Co., 61-125.

[28] Miller v. K. & D. M. R. Co., 63-680.

[29] Sloan v. Rebman, 66-81; Code, Sec. 5447.

[30] Ferguson v. Firminich Mfg. Co., 77-576; Randolf v. Bloomfield, 77-50; Churchill v. Burlington Water Co., 62 N. W., 646; Foote v. Burlington Water Co., 62 N. W., 648.

FORM OF ORDER FOR ABATEMENT.

Title, }
Venue. }

The State of Iowa.

To the sheriff of ——— county, Iowa:

Whereas, in the above entitled action, it was found that the defendant was maintaining a nuisance on (here describe property on which nuisance exists), by (here set out what the nuisance consists of as in the petition). Now, therefore, you are hereby commanded in the name of the State of Iowa, to forthwith abate said nuisance by (here recite the acts which the officer is directed to do), and make due return hereon to this court of your doings in the premises.

In witness whereof I have hereto affixed my hand and the seal of said court at (place), this ——— day of ——— 18—.

[Seal.] ———, clerk, etc.

Nuisances relating to the sale of intoxicating liquors are treated of in the chapter on injunctions.

CHAPTER LXXIII.

OF PARTITION.

Sec. 1175. Of voluntary partition.
1176. Of partition by suit.
1177. Of parties to the action.
1178. When partition is not the proper remedy.
1179. Of partition of water-power, mills, machinery, dams, etc.
1180. Of the interest of the widow and of the homestead.
1181. Of partition of land owned by a firm.
1182. Of notice.
1183. Of the petition and what it must contain.
1184. Of the answer.
1185. Of minors.
1186. Of disclaimer.
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1188. Of incumbrances.
1189. Of decree.
1190. Of the appointment of referees.
1191. Of directions to referees.
1192. Of the qualification of referees.
1193. When referees need not be appointed.
1194. Of duties of referees where partition of the property is made.
1195. Of the report of referees of partition.
1196. When the report will be set aside.
1197. Of confirmation of the report.
1198. Of bond of referees where a sale is made.
1199. Of notice of sale.
1200. Of the report of sale by referees.
1201. When the sale may be set aside.
1202. Of confirming the sale and of the conveyance.
1203. Effect of such conveyance.
1204. Of investing proceeds of sale.
1205. Of costs and attorney's fees, etc.
1206. Of appeals.
1207. Of the record.

Section **1175. Of voluntary partition.**—Voluntary partition may be made by the owners of an estate conveying or releasing to each other all that part which is to be held by them in severalty. When all the owners of the real estate consent, and none of them are under

any legal disability, they may thus make partition among themselves, and by their own voluntary act, without invoking the aid of the courts. The object of partition is to enable each party having an interest in the land to obtain the title and use for all future time in severalty of some definite portion of the property which is owned in common.[1]

§ 1176. Of partition by suit.—When there are minor heirs, or other parties owning interests in the property sought to be partitioned who are under legal disability, the partition must be made by an action in court, and it must be so made when the owners of the property can not agree among themselves with reference to its division, and the intention is to make a judgment in partition which shall be final and conclusive on all persons interested in the property, or any part of it.[2] The action for partition must be by equitable proceedings, and no joinder or counter claim of any other kind is allowed therein except as hereafter mentioned.[3] The action will not lie to partition land owned in severalty.[4] Where in an action of partition defendant claims a lien on the property because of the payment of a mortgage thereon, plaintiff can ask to have a claim for rent growing out of the occupancy of the land by the defendant adjusted.[5]

§ 1177. Of parties to the action.—All persons having an interest in the property sought to be partitioned should be made parties to the action, either as plaintiffs or defendants; and while it is not absolutely necessary that creditors having a specific or general lien upon the entire property should be made parties, yet the better practice would seem to be to make them parties to the end that the interests of all, whether owners or lien-holders, may be ascertained and finally determined in the one proceeding.[6] Persons having apparent or

[1] McGillivray v. Evans, 27 Cal., 92.
[2] Gates v. Salmon, 35 Cal., 576.
[3] Code, Sec. 4240.
[4] Johnson v. Moser, 72-523.
[5] Wilcke v. Wilcke, 71 N. W., 201.
[6] Code, Sec. 4244; see Hammond v. Perry, 38-217.

contingent interests in the property may be made parties to the proceedings, and the proceeds of the property, or the property itself in case of partition, will be subject to the order of the court until the right becomes fully vested; and the ascertained share of any absent owner will be retained or the proceeds invested for his benefit under an order of the court.[7] Lands assigned to a widow as dower prior to the institution of an action of partition by the heirs are not subject to partition or sale in such action.[8] No person having an interest in the property sought to be partitioned or holding a lien thereon will be bound by the proceedings in the action unless he is made a party thereto.[9]

§ 1178. When partition is not the proper remedy. —In an action to foreclose a title-bond conditioned to convey the undivided half of certain real estate, one holding a part thereof under a deed from the vendee is properly made a defendant, and by a pleading in the nature of a cross-bill may ask a partition and the enforcement of the lien upon the land not claimed by him. Section 4240, of the code, providing for partition, is not applicable to such a case, but equity has jurisdiction and may grant the relief asked.[10] Partition cannot be had of real estate owned in severalty by several owners for the purpose of determining metes and bounds of the several portions.[11] A partition of the lands of an estate should not be ordered until it is determined that the personal estate is sufficient to pay the debts;[12] nor until it is determined that it will not be necessary to sell real estate to pay the debts, but the action may be brought before the question of the liability of the land for debts is settled.[13] And it is held that a decree of partition should not be entered within one year after notice of administration has been given.[14]

§ 1179. Of partition of water-power, mills, ma-

[7] Code, Sec. 4243.
[8] Clark v. Richardson, 32-399.
[9] Lewis v. Atkinson, 15-361.
[10] Hammond v. Perry, 38-217.
[11] Johnson v. Moser, 72-523.
[12] Snyder v. Snyder, 75-255.
[13] Clarity v. Sheridan, 91-304.
[14] Minear v. Hogg, 63 N. W., 444.

chinery, dams, etc.—Partition may be made where parties own in common a water-power, mills, machinery, dams and other appurtenances, and where either party insists upon such partition it must be made regardless of the inconvenience or hardship occasioned thereby.[15] In such cases the rules governing the partition should be certain, definite, and self-adjusting, so that they will readily apply to all conditions of the power; and to effect such partition the lands covered by the water and dam may be divided by metes and bounds, and one of the parts thereof assigned to each party, subject to the charge of keeping the dam in repair by the one to whom the part including it is assigned, and a right to use such portion of the water as may be assigned to each owner, the extent of which may be indicated by some visible monument, or by controlling the flowage of water through the gates.[16] Where a grant of a party of a water-power stipulated that the grantee should have "the right to use water to the amount of the issue of the wheel now in use at said mill, supposed to be about six hundred inches, more or less, of water," it was held that the amount of water which the grantee might use, should be measured by the capacity of the wheel in the mill at the time of the execution of the deed, and that the terms in the deed specifying the amount as six hundred inches were descriptive only, and not a limitation; and that the grantee was not limited to the use of one wheel, but could put in operation any number he pleased, provided they did not use in the aggregate more water than did the one wheel originally in the mill.[17] In an action for the partition of water-power, partition should be made by referees under rules established by the court, and in apportioning the amount of water permitted to be used under a grant a fixed and unvarying measure should be adopted and an allowance of the water requi-

[15] Cooper v. The Cedar Rapids Water-Power Co., 42-398; Doan v. Metcalf, 46-120.

[16] Cooper v. The Cedar Rapids, etc., 42-398; Doan v. Metcalf, 46-120.

[17] Doan v. Metcalf, 46-120.

site to carry two sets of burrs and the necessary machinery for bolting, does not furnish such a measure.[18] If, however, partition in kind can only be effected by means of a large expenditure, it will not be ordered, but a sale will be ordered and a division of the proceeds of such sale made.[19]

§ 1180. Of the interest of the widow and of the homestead.—In case of partition of the real estate of the husband where his widow as his heir at law takes one-half of his estate, she can not be compelled to take the homestead as a part of her share.[20] The homestead may be awarded to the proper owner or tenant without any detriment to his co-tenants.[21] Lands assigned to the widow as dower prior to the institution of an action by the heirs for partition, are not subject to partition or sale in such action, and she has a right to claim and hold the specific property assigned to her as her dower, though the dower be but a life estate.[22] But in case of a sale, or abandonment of the homestead by the survivor, the heirs may have partition thereof.[23] While in an action of partition the widow's share may be set off to her, yet she cannot be compelled to elect between the homestead and her distributive share until it has been determined whether any and, if so, how much of the realty must be sold for the payment of debts.[24]

§ 1181. Of partition of land owned by a firm.—Where plaintiff and defendant entered into a partnership for the purchase and sale of certain lands with defendant's money, plaintiff's service being put against the use of defendant's money, with the understanding that upon the sale of the lands defendant should be reimbursed the money advanced, with interest, and that the profits of the venture should be divided, and the lands were purchased accordingly in defendant's name,

[18] Doan v. Metcalf, 46-120.
[19] Brown v. Cooper, 67 N. W., 378.
[20] Nicholas v. Purczell, 21-265; Code, Sec. 2985; Dodds v. Dodds, 26-311; Burns v. Keas, 21-258.
[21] Thorn v. Thorn, 14-49, 55.
[22] Clark v. Richardson, 32-399.
[23] Size v. Size, 24-580.
[24] Thomas v. Thomas, 73-657.

the lands could not be partitioned until the final settlement.[25]

§ 1182. Of notice.—Original notice must be issued and served the same as in any other case, and where the defendants can not be personally served within this State, service by publication may be made as to them; and when all the parties in interest have been duly notified to appear and answer in either of the ways above mentioned, the proceedings in the action will be binding and conclusive upon all of them.[26]

§ 1183. Of the petition and what it must contain.—The petition must describe the property and the respective interests of the several owners thereof, if known; if any interests or the owners of any interests are unknown, contingent or doubtful, these facts must be set forth with reasonable certainty.[27] The provisions of the code as to what a petition for partition shall contain are mandatory, and partition can not be granted under an insufficient petition.[28] Where a petition is filed by devisees for a partition of real estate which shows that more than four years have elapsed since the testator's death, it is not demurrable, because it fails to allege that the estate has been finally settled and is solvent, as a compliance with the law is presumed.[29]

The plaintiff must attach to his petition, and the defendant to his answer, if he claims title, an abstract of the title relied on, showing from and through whom such title was obtained, together with a statement showing the book and page on which the same appears of record. If such title or any portion thereof is not in writing or does not appear of record, such fact must be stated in the abstract; and either party must furnish the adverse party a copy of any unrecorded conveyances, or with a reasonable excuse for not so doing within a reasonable time after demand therefor.[30] When, however, both parties claim under the same title one cannot ques-

[25] Pennybaker v. Leary, 65-220.
[26] Code, Sec. 3534.
[27] Code, Sec. 4241.
[28] Darr v. Darr, 71 N. W., 419.
[29] Minear v. Hogg, 63 N. W., 444.
[30] Code, Sec. 4242.

tion the right of the other to relief on the ground of an insufficient showing of title.[31]

The petition may be in the following form:

FORM OF PETITION IN PARTITION.

Title, }
Venue. }

Par. 1. The plaintiff states, that on the ——— day of ———, 18—, one ——— died intestate, seized in fee of the following described real estate (here describe premises sought to be partitioned.)

Par. 2. That the said deceased left as his children and only heirs at law the plaintiff and defendants ———. (If any of the heirs have married, their husbands or wives, as the case may be, should be made parties, and the fact of the inter-marriage stated. Here insert names of all the defendants, and if any are minors, state that fact and give their ages.)

Par. 3. That the plaintiffs and defendants are each entitled to an undivided (here state the shares of each, as one-half or one-sixth, as the case may be) of the said real estate.

Par. 4. That the defendant, ———, is the widow of the deceased, and is entitled to an undivided (here state her interest) of the said real estate.

Par. 5. That the several owners of said above described premises are unable to agree mutually upon a division thereof. (Where there are minors, or other parties having an interest in the property who are under legal disability this paragraph may be omitted.)

Par. 6. The plaintiff attaches to his petition an abstract of the title relied upon by him, marked exhibit "A," and made a part hereof (if those holding incumbrances are made parties, insert one of the paragraphs given below here.)

Wherefore, plaintiff demands judgment confirming the shares of the parties as above alleged, in and to said real estate; that partiton thereof be made, or if the same can not be equitably divided, then that a sale of said premises be ordered, and a division of the proceeds be made between them according to their respective shares, and that the sum of ——— dollars be allowed plaintiff's attorney for his fees in said action, and that the same be made a lien upon the respective shares of the parties in the above described premises, in proportion to their said interests, and for costs of this action, and for such other and further relief as may be deemed equitable in the premises.

———, attorney for plaintiff.

(Petition may be verified if desired, also attach exhibit mentioned in petition.)

Where there are incumbrances on any part of the premises, and the holders thereof are made parties, the facts relating to such incumbrances, the names of the holders and a description of their liens, their several

[31] Shane v. McNeill, 76-459.

amounts, and upon what part of the premises they exist, must be stated, and in such case the following averments should be included in the petition:

FORM OF ADDITIONAL PARAGRAPHS WHERE THERE ARE INCUMBRANCES ON THE PROPERTY TO BE PARTITIONED.

Par. 7. That the defendant, ———, holds a judgment recovered in the district court of ——— county, Iowa, on or about the ——— day of ———, 18—, in a certain action then pending in said court, wherein said defendant was plaintiff and said ——— deceased, was defendant, (or if the judgment was recovered by one of the defendants against another defendant, the fact should be stated) for the sum of ——— dollars principal, and ——— dollars costs, which judgment bears interest at ——— per centum per annum, and remains wholly unsatisfied, and is a lien upon all the land described above (or if only a lien on part of it so state and describe that part), and is found in judgment docket ———, page ———, of said court, and in record ———, page ———, of said court.

(If the lien is in the form of a mortgage the following paragraph may be added.)

Par. 8. That the defendant, ———, holds a mortgage upon all of the said real estate given by the deceased during his lifetime (or upon the interest of ———, defendant, as the case may be), for the sum of ——— dollars, payable on the ——— day of ———, 18—, with interest from the ——— day of ———, 18—, at ——— per centum per annum, which said mortgage is recorded in the recorder's office of ——— county, Iowa, in book ——— of mortgages, at page ———, and no part of the same has been paid.

If the liens are set out in petition, the prayer should be in the following form:

"Wherefore the plaintiff prays judgment; confirming the shares of the parties as above set forth in and to said real estate; that partition thereof be made, or, if the same can not be equitably divided, then that said premises be sold and a division of the proceeds made between them according to their respective shares; that the amount of the said several liens above stated may be ascertained; and that if said land is partitioned, said amounts may be decreed to be a lien upon the interests of said parties against whom said liens exist respectively.

"That if said real estate be sold, the funds arising from such sale be divided among the parties according to their respective interests, except that the amount of incumbrance heretofore referred to be deducted from the shares of the parties owing the same, and paid to the respective lien-holders before the proceeds of said sale are paid over."

(Add clause in prayer above relating to attorney's fees, costs, etc.)

It would seem that this action can not be maintained when there are no parties under legal disability, unless the parties can not agree among themselves to a division,

and the fact that they can not so agree should be pleaded.[32]

§ **1184. Of the answer.**—Answers of the defendants must state, among other things, the amount and nature of their respective interests; they may deny the interest of any of the plaintiffs, and by supplementary pleading, if necessary, may deny the interest of any of the other defendants.[33]

Ordinarily it would be better if each defendant answered separately. There must be attached to the answer of any defendant claiming title, the abstract of the title relied on, showing from and through whom such title was obtained, together with the statement showing the book and page on which the same appears of record, and if such title or any portion thereof is not in writing or does not appear of record, such fact must be stated in the abstract.[34] Issues may thereupon be joined and tried between any of the contesting parties, the question of costs, on such issues, being regulated between the contestants as in other cases.[35] Where the answer in an action of partition of a grist-mill set up that rents were due to the defendant, and that the plaintiffs while in possession under a lease allowed the mill to be out of repair to the damage of defendant in the sum of several hundred dollars, for which they are liable under their lease, it was held that the court should have heard the parties upon these allegations.[36]

If the statements in the petition are not contradicted by the answers, and the facts stated in the answers making a new or different claim of title from that stated in the petition are not denied in the reply, or if the statements in the petition and answers are not contradicted by documentary evidence of title, they must be taken as true.[37]

[32] Code, Sec. 4185; Starry v. Starry, 21-254.
[33] Code, Sec. 4245.
[34] Code, Sec. 4242.
[35] Code, Sec. 4246; Finch v. Garrett, 71 N. W., 429.
[36] Metcalf v. Hoopingardner, 45-510.
[37] Code, Sec. 3622.

§ 1185. Of minors.—If any of the defendants are minors, the court must appoint a guardian ad litem to answer for them. No order or judgment can be rendered against a minor until he has been legally served with notice, and an answer by guardian made for him.[38] The answer of the guardian ad litem should be filed before the judgment is entered, and the guardian should be certain that the service on the minor is sufficient.

FORM OF ORDER APPOINTING GUARDIAN AD LITEM.

Title, }
Venue. }

And now at this day, to wit, (the date of the order) this cause coming on to be heard on motion of the plaintiff for the appointment of a guardian ad litem for (name of infant defendants) and it appearing to the court that said defendants are infants, and that they have been legally served with notice of the pendency of this suit, it is therefore ordered that ———, Esq., be and is hereby appointed guardian ad litem herein for said minor defendants.

The guardian ad litem may make such answer as the facts in the case warrant, but he must not make any admissions which, in any event, can prejudice the rights of the infant whom he represents. He is not limited to a mere defense of the action, but may interpose any matter which will defeat the action, to the extent, if necessary, of matter pleaded as a cross-petition.[39]

His answer may be in the following form:

FORM OF ANSWER OF GUARDIAN AD LITEM.

Title, }
Venue. }

———, the duly appointed guardian ad litem herein for (name of minors), says:

Par. 1. That of the truth of no allegation in plaintiff's petition has he knowledge or information sufficient to form a belief.

Par. 2. That of the share or interests to which his wards are entitled in the premises described in plaintiff's petition he has neither knowledge or information sufficient to form a belief.

[38] Code, Secs. 3480, 3482, 3483; Good v. Norley, 28-188; Judd v. Mosley, 30-423; Cavender v. Heirs of Smith, 5-157, and cases cited; Allen v. Saylor, 14-435; see Trieber v. Shafer, 18-29; Drake v. Hanshaw, 47-291; Wickersham v. Timmons, 49-267; Hoover v. Kinsley Plow Co., 55-668; Smith v. Dawley, 92-312; Dohms v. Mann, 76-723; Kavalier v. Machula, 77-121.

[39] Kelsey v. Kelsey, 57-383, 385.

Wherefore he asks that the rights and interests of said minors therein may be duly protected by the court.

———, guardian ad litem, etc.

It is sometimes the case that a guardian ad litem is not fully conversant with the rights of his wards, and when this is so the form above given of an answer will generally be sufficient to protect all their rights; but where the guardian is conversant with all the facts in the case, he should set them out in his answer, as in any other case.

Sometimes the pleader in his petition, by accident or oversight, does not properly set out the shares to which the parties are entitled, and the guardian standing as the representative of the minor should be careful to see that his ward secures all that he is entitled to under the law.

The answer of the guardian ad litem need not in any case be verified.[40]

§ 1186. Of disclaimer.—Any defendant having no interest in the property in controversy may enter a disclaimer, which may be in the following form:

Title, }
Venue. }

Par. 1. The defendant, ———, says: That he disclaims having any interest or title whatever in and to any of the real estate mentioned and described in plaintiff's petition.

Wherefore he asks to be dismissed with his costs.

———, attorney for defendant.

§ 1187. Of practice.—The statute relating to partition has reference alone to real property.[41] Either party is required to furnish the adverse party with a copy of any unrecorded conveyance upon which he relies, or furnish a satisfactory reason for not so doing within a reasonable time after demand therefor, and no written evidence of title can be introduced on the trial, unless it has been sufficiently referred to in the abstract heretofore mentioned, which abstract may on motion be made

40 Code, Sec. 3586.

41 Cooper v. C., R. W. P. Co., 42-398

more specific, and may be amended as other pleadings.[42]

§ 1188. Of incumbrances.—The court, before making any order of sale or partition, may refer the case to a clerk, or referee, to report the nature and amount of general incumbrances by mortgage, judgment or otherwise, if there be any, upon any portion of the property.[43] The referee must give the parties interested at least five days' notice of the time and place when he will receive proof of the amounts of such incumbrances.[44]

The notice provided for may be in the following form:

REFEREE'S NOTICE TO INCUMBRANCERS.

Title, }
Venue. }

To (names of incumbrancers), and each of you:

Whereas, the undersigned was, on the ——— day of ———, 18—, duly appointed by (the name of the court) a referee in the above entitled cause, to report the nature and amount of general incumbrances, if any, upon the real estate involved in said cause, to wit: (Here describe the property.)

You are, therefore, hereby notified that on the ——— day of ———, 18—, between the hours of ——— o'clock a. m., and ——— o'clock p. m., (or as the case may be) I will attend at (name office, or place in town or city) for the purpose of receiving proofs of the amounts of such incumbrances, at which time and place you can attend if you think proper.

Dated ———, etc.

———, referee.

And if any question arise as to the validity or amount of an incumbrance, or the payment of the same, the court may direct an issue to be made up between the incumbrancer and the owner, and an adjudication thereon will be decisive of their respective rights, and upon a sale it may order the money to be retained or invested to await final action in relation to its disposition, and notice thereof to be forthwith given to the incumbrancer, unless he has already been made a party.[45] If the lien is upon one or more undivided interests the holder thereof must be made a party, and the lien will, after partition or sale, remain a charge upon the particular interests, or the proceeds thereof, but the amount of costs is a

[42] Code, Sec. 4242.
[43] Code, Sec. 4247.
[44] Code, Sec. 4248.
[45] Code, Sec. 4249.

charge upon these interests paramount to all their liens.[46]

But proceedings in relation to incumbrances will not delay the distribution of the proceeds of other shares not affected thereby.[47] An agreement by an heir binding him to pay off a certain incumbrance on the property does not create a lien which can be set up against him in a partition proceeding, but taxes which such heir has agreed to pay should be made a lien upon his share.[48]

If a tenant for life or years be entitled as such to a part of the proceeds of sale, and if the parties can not agree upon the sum in gross which they will consider an equivalent for such estate, the court must direct the avails of the incumbered property to be invested, and the proceeds to be paid to the incumbrancer during the life-time of the incumbrance.[49]

Where one tenant in common has made valuable improvements on a homestead, and a sale in partition becomes necessary, it seems the court will see that the value of the homestead or improvements, distinct from the land, will be secured to the party at whose expense and labor they have been made.[50] The court in its discretion may require all or any of the parties before they receive the money arising from any sale in partition proceedings to give satisfactory security to refund such moneys with interest, in case it afterward appears that such parties were not entitled to receive it.[51]

§ **1189. Of decree.**—When the shares and interests of the parties have been settled by a trial of the issues, or by failure to controvert the allegations of the petition, or answers, decree must be rendered establishing the right of the parties, confirming the shares and interests of the owners of the land and directing partition to be

[46] Code, Sec. 4250; Metcalf v. Hoopingardner, 45-510, 512; Aplington v. Nash, 80-488.

[47] Code, Sec. 4251.

[48] Rider v. Clark, 54-292.

[49] Code, Sec. 4271; see Clark v. Richardson, 32-399.

[50] Thorn v. Thorn, 14-49; Killmer v. Wuchner, 79-722; Van Ormer v. Harley, 71 N. W., 241.

[51] Code, Sec. 4270; Clarity v. Sheriden, 91-304.

made accordingly.[52] If jurisdiction was not acquired of all the parties interested the proceedings will not be void or voidable as to those over whom jurisdiction was acquired.[53] As to the effect of the judgment in partition.[54] The decree may be in the following form:

FORM OF DECREE IN PARTITION.

Title, }
Venue. }

And now, on this day, to wit (date of judgment), this cause came on for trial upon the issues joined herein, ———, Esq., appearing for the plaintiff, ———, Esq., appearing for (the adult defendants), and ———, Esq., the duly appointed guardian ad litem for (names of infants), appearing for said minor defendants. And the court having heard and inspected the proofs of the parties, and heard the arguments of counsel, it is found and adjudged by the court, that the plaintiff and the defendants each are the owners in fee simple of the undivided (state the share of each, as one-fourth, as the case may be), of the following described real estate, namely (describe the premises).

It is therefore considered and adjudged that the said shares of the said parties and their said interests respectively in said lands, be, and the same are hereby established and confirmed; and it is further ordered that partition thereof be made accordingly, and that ——— and ——— be, and they are hereby, appointed to make said partition and report the same at (the present or the next) term of this court.

This decree is to be construed by the same rules that apply to ordinary conveyances.[55]

§ 1190. Of the appointment of referees.—Upon entering a decree the court must appoint referees to make partition, unless the parties agree to a sale of the property, or when it is shown that the property cannot be equitably divided into the requisite number of shares, in which case a sale must be ordered. Three referees will be appointed to make partition unless the parties agree to the appointment of a less number, but where it is shown that partition can not be made and a sale is ordered, the court may fix the number of referees. Such referees may be notified of their appointment by the clerk of the court, or by the attorney procuring their appoint-

[52] Code, Sec. 4252.
[53] Williams v. Wescott, 77-332.
[54] Ocheltree v. Hill, 77-721; Burdick v. C., M. & St. P. R. Co., 87-384.
[55] Hoffman v. Stigers, 28-302.

ment.[56] Usually where there is no contest, referees are suggested by the plaintiff in the action, or his attorney, and if they are suitable parties, they are generally appointed. The commission to referees may be in the following form:

FORM OF COMMISSION TO REFEREES.

The State of Iowa.

——— and ———, greeting:

Whereas, on the ——— day of ———, 18—, in an action now pending in the district court of ——— county, Iowa, wherein ——— is plaintiff, and ——— are defendants, it was found by the court that the said plaintiff, and the said defendants, each are the owners in fee simple of the undivided (here state share), of the following described real property, to wit (here particularly describe the premises to be divided), and it was then and there ordered and adjudged by said court, that the said shares, and title of the said parties respectively in and to said real estate be established and confirmed, and that partition thereot between said parties be made by (names of referees).

Now, therefore, you are hereby empowered and commanded to make partition of the real estate above described, between the said (names of all the parties entitled to shares), by assigning to each of them one-fifth in value thereof in severalty (or any other division that may be ordered by the court), according to law. And that you make report in writing of such partition, together with a plat of the premises, on or before the first day of the next term of our said court (or at the present term, as the case may be).

Witness ———, clerk of said court, with the seal thereof hereto affixed, this ——— day of ———, 18—.

[Seal.] ———, clerk, etc.

§ 1191. Of directions to referees.—The court must determine, at the time of entering decree, whether partition of the premises can be made, and if so, make an order to that effect; if not, it must direct the property to be sold.[57] Where a division of the property, though practical, would greatly depreciate its value, the court may order a sale.[58] The commission to the referees must state whether they are to sell the property, or divide it. The court may direct them to allot particular portions of the land to particular individuals, but unless it does so, the shares must be made as nearly as possible of equal value.[59] So, they may be ordered to partition a

[56] Code, Sec. 4253.

[57] Code, Sec. 4253; Metcalf v. Hoopingardner, 45-510.

[58] Branscomb v. Gilliam, 55-235.

[59] Code, Sec. 4256; Thorn v. Thorn, 14-49.

portion and sell a portion, when partition can not be conveniently made of all the property in controversy.[60] Slight deviations by the referees, where it is necessary in the partition of property, are not fatal to the proceedings, and the final judgment may correct any erroneous computation or inaccuracy in their report.[61] They may also be required to report at the term of court at which the order is made, or at a subsequent term; and where lands are directed to be sold, and the court is satisfied that they can be disposed of to better advantage and with less expense at private sale, the referees may be directed to sell the same at private sale, in such manner and on such terms as the court may direct; but in such case the real estate must be duly appraised by three disinterested freeholders, appointed by the court, and sold for not less than the appraised value.[62]

§ 1192. Of the qualifications of referees.—Before entering upon the discharge of their duties, the referees must be sworn. They should make affidavit, which must be filed with the clerk, and may be in the following form:

FORM OF OATH OF REFEREES IN PARTITION.

Title, }
Venue. }

State of Iowa, }
——— County. } ss.

We (names of referees) do severally swear that we will well and faithfully perform the duties of referees in the above entitled cause, and make a just and equitable partition therein, according to the best of our knowledge and ability.

(Signatures of referees.)

(Add certificate of officer before whom they are sworn.)

§ 1193. When referees need not be appointed.—The court need not appoint referees to set apart the shares of the respective parties in a case wherein, from the nature of the property and the character of the partition which the law makes, they can render no aid to the court in the just division of the property.[63]

[60] Code, Sec. 4257.
[61] Wright v. Marsh, 2 G. Gr., 94.
[62] Code, Sec. 4264.
[63] Doan v. Metcalf, 46-120, 128; see Code, Sec. 4253.

§ 1194. Of duties of referees where partition of the property is made.—When a partition is ordered by the court, the referees must mark out the shares by visible monuments, and may employ a competent surveyor and the necessary assistants to aid them in so doing.[64]

And they must allot to each owner his proper share, and where the shares of the parties are equal, each tract set off to the parties should be of equal value as nearly as possible. When the shares are not all equal, the value of the several parcels allotted to the owners must bear the same proportionate value to each other as the shares due to each other.[65]

§ 1195. Of the report of referees of partition.—The report of the referees must be in writing and signed by them; it must describe the respective shares with reasonable particularity, and be accompanied by a plat of the premises.[66] Their report may be in the following form:

FORM OF REPORT OF REFEREES WHERE PARTITION IS MADE.

Title, }
Venue. }

To the court:

In pursuance of an order of this court, made in the above entitled cause, on the ——— day of ———, 18—, by which the undersigned were appointed referees and directed to make partition of the following described real estate, to wit (here describe the land to be divided), we, the said referees, do respectfully report that we have made partition thereof as follows, to wit: To the plaintiff ——— we have allotted the following described parcel of said lands, to wit (here describe the tract allotted to the plaintiff), and designated upon the plat accompanying this report as lot No. 1. To the defendant, ———, we have allotted, etc. (proceed with each share in the same manner as the first).

We further report that we employed (name of surveyor) a competent surveyor, and (names of assistants) as assistants, and with their assistance we have marked out the respective shares of the parties by visible monuments as shown in the plat accompanying this report marked exhibit "A."

We further report that we were each actually employed ——— days

[64] Code, Sec. 4254.
[65] Code, Sec. 4256.
[66] Code, Sec. 4255.

in making the partition aforesaid, and that said surveyor and assistants were each employed ——— days, as aforesaid.

All of which is respectfully submitted.

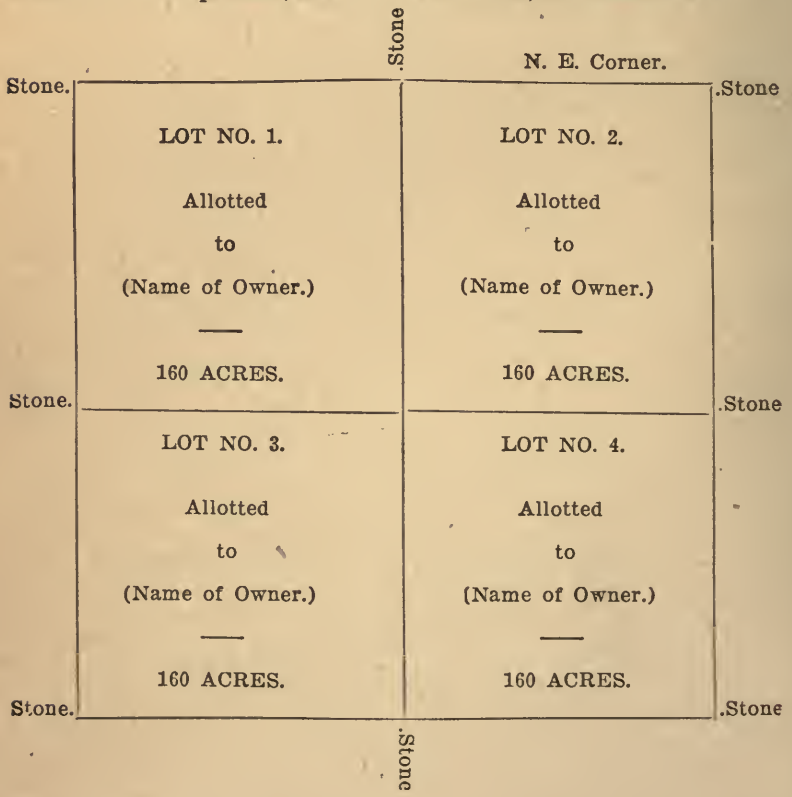
Dated this ——— day of ———, 18—.

(Signatures of referees.)

The plat required by the statute should clearly show the tract allotted to each party, the quantity of land therein, the number of the same, corresponding with a number set out in their report, the name of the party on each tract, and a description of the same by governmental subdivisions, or by metes and bounds, when necessary referring to certain monuments, which should be shown upon the plat. The plat may be in the following form:

(Form of Plat. Exhibit A.)

Plat of partition of lands made in an action in the district court, wherein ——— is plaintiff, and ——— and others, are defendants:



§ 1196. When the report will be set aside. —Where it appears that through the fraud of one of the parties the land was divided and distributed in violation of the rights of the others, as settled by the pleadings and orders of the court, the report will be set aside.[67] When an incumbrance exists upon the property, and final and complete partition can not be made without providing for its payment, and where partition among heirs is made without knowledge of the incumbrance by mortgage on part of the lands, and the mortgage is afterward foreclosed and land sold, the partition will be set aside and a new partition ordered of the remaining lands on the basis of the former one.[68] But fraud in partition proceedings can only be taken advantage of by one who had a prior interest in the estate, not by one who, subsequent to the fraud, purchased an interest in the property.[69]

If the report is unsatisfactory to the parties on good cause shown, it may be set aside and the matter referred to the same or other referees.[70] A final decree in partition procured by fraud of a party will be set aside on a bill of review.[71]

§ 1197. Of confirmation of the report.—If the report of the referees is approved a decree must be rendered thereon confirming the partition and apportioning costs, and a judgment must be entered therefor.[72]

Such decree and judgment may be in the following form:

Title, }
Venue. }

And now at this day, to wit (give date), this cause coming on for further and final hearing upon the report of the referees herein filed, the plaintiff appearing by ———, Esq., his attorney, and the (state the several appearances of the defendants), and it appearing to the court that

[67] Young v. Tucker, 39-596.
[68] Bridges v. Howard, 18-116.
[69] Telford v. Barney, 1 G. Gr., 575; Brace v. Reed, 3 G. Gr., 422; Webster v. Reed, Morris, 369.
[70] Code, Sec. 4258; Doan v. Metcalf, 46-131; Lyons v. Harris, 73-292.
[71] Young v. Tucker, 39-596.
[72] Code, Sec. 4259; Brown v. Cooper, 67 N. W., 378.

partition has been duly made by the referees herein appointed, as follows: (here recite from the report the partition made).

It is therefore considered and adjudged by the court that the said partition be and the same is hereby approved and confirmed (then follow with such orders for costs and attorney's fees as may be deemed proper).

(The record entry should embrace a plat of the partition.)

§ 1198. Of bond of referees where sale is made. —Before making a sale of the premises the referees must give a bond in a penalty to be fixed by the court, payable to the parties who are entitled to the proceeds, with sureties to be approved by the clerk, conditioned for the faithful discharge of their duties, and at any time thereafter the court may require further and additional security; and upon failure of the referees to comply with such orders, they may be removed by the court and others appointed, and they may be removed at any time for satisfactory reasons, and others appointed in their places.[73]

The bond may be in the following form:

FORM OF REFEREE'S BOND.

Know all men by these presents, that we, ——— and ———, principals, and ——— and ———, sureties, are held and firmly bound unto (insert the names of all the parties in the partition action), in the sum of ——— dollars, lawful money of the United States, well and truly to be paid to them, their heirs, executors and assigns.

The condition of the above obligation is such that, whereas, the above named principals were on the ——— day of ———, 18—, by the district court of ——— county, Iowa, duly appointed referees, in a certain action for partition of real property, now pending in said court, wherein ——— is plaintiff, and ——— and others are defendants; and it appearing to the court that the property involved in said action can not be equitably divided into the requisite number of shares, the said court, on the ——— day of ———, 18—, caused an order to be entered directing the said referees to sell the said premises. Now, if the said (name of the referees), shall and will faithfully discharge their duties as such referees, then this obligation to be void, otherwise to remain in full force and virtue.

Dated this ——— day of ———, 18—.

———,
———,
———, } principals.

———,
———, } sureties.

[73] Code, Sec. 4262.

The security in the foregoing bond approved by the court this ——— day of ———, 18—.

———, judge, etc.

(The sureties should justify as required by law.)

§ 1199. Of notice of sale.—The same notice of sale must be given as when lands are sold on execution by the sheriff, and the sale must be conducted in like manner.[74] The notice may be in the following form:

NOTICE OF REFEREE'S SALE.

By virtue of an order of sale directed to the undersigned referees, from the clerk of the ——— court of ——— county, Iowa, on a decree obtained in said court, on the ——— day of ———, 18—, in favor of ———, as plaintiff, and against ——— as defendant, for the partition of the real estate named and described in the said plaintiff's petition, we will, on the ——— day of ———, 18—, offer for sale to the highest bidder the following real estate, to wit (here insert the description of the property):

Terms of sale (here state terms, as fixed by court in order of sale): Said sale to take place in front of the court house door, in ———, at the hour of ——— o'clock, —. M., of said day, when and where due attendance will be given by the undersigned.

Dated at ———, 18—.

———,
———,
———, } Signatures of referees.

§ 1200. The report of sale by referees.—When the sale is completed, the referees must report their proceedings to the court, with a description of the different parcels of land sold to each purchaser, and the price bid therefor, which report must be filed with the clerk.[75]

The report may be in the following form:

FORM OF REPORT OF REFEREE'S SALE.

Title, }
Venue. }

To the court:

In pursuance of an order of this court in the above entitled cause, made on the ——— day of ———, 18—, we (names of referees), to whom the execution thereof was confided, do report: That, having caused four weeks' notice of the time and place of sale of the premises mentioned in said order to be given, by posting up notices thereof at three

[74] Code, Sec. 4263. [75] Code, Sec. 4265.

public places in the county, one of which was the place where the last district court was held, and by causing two publications of said notice to be made in the (name of newspaper), a newspaper printed in ——— county, where said premises are situated, we did, on the ——— day of ———, 18— (that being the time specified in the said notice), attend at (the place of sale), the place therein mentioned, and exposed the said premises to sale, at public auction, to the highest and best bidder, for cash (or according to the terms fixed by the court, as directed by said order).

We further report that the following described parcel of land, to wit (here describe the tract sold), was struck off to (name of purchaser), for the sum of ——— dollars, that being the highest and best bid therefor; and that the following described parcel of said land, to wit (describe the next tract sold), was struck off to (name of purchaser), for the sum of ——— dollars, that being the highest and best bid therefor (and so on with each parcel sold).

We further report that the amount of each of said bids has been paid to us by the respective purchasers (or report according to the directions given by the court as to payments, etc.).

All of which is respectfully submitted.

Dated this ——— day of ———, 18—.

(Signatures of referees.)

§ 1201. When the sale may be set aside.—The sale may be set aside in the discretion of the court, and where it appears that the property was sold for an inadequate price, that alone is sufficient reason for setting it aside; if a sale is disapproved, the money paid and the securities given must be returned to the persons respectively entitled thereto.[76]

§ 1202. Of confirming the sale and of the conveyance.—If the sale be approved and confirmed by the court, an order must be entered directing the referees or any two of them to execute conveyances in pursuance of such sale, but no conveyance can be made until all the money is paid without receiving from the purchaser a mortgage of the land so sold or other equivalent security.[77] The deed of conveyance may be in the following form:

FORM OF CONVEYANCE BY REFEREES IN PARTITION.

This indenture, made the ——— day of ———, 18—, between (names of referees) referees of the first part, and ——— of the second part.

[76] Loyd v. Loyd, 61-243; Code, Sec. 4269.

[77] Code, Sec. 4266.

Witnesseth, That whereas in an action of partition in the (name of the court), wherein ——— was plaintiff, and ——— and (others named) were defendants, the said parties of the first part were, on the ——— day of ———, 18—, duly appointed by said court as referees, to make partition of the following described real estate, to-wit (give a full description of all the lands subject to partition in the case), and it appearing to the court that the said property could not be equitably divided into the requisite number of shares, the court, on the ——— day of ———, 18—, caused an order to be entered directing said referees to sell said premises on the following terms, to-wit (here recite the terms of the sale as fixed by order of the court). And whereas, in pursuance of such order, the said referees caused four weeks' notice of the time and place of said sale to be given, by posting up printed (or written) notices thereof at three public places in ——— county, one of which was at the court house in ———, where the last district court was held, and by causing two publications thereof to be made, in the (name of newspaper) a newspaper printed in said county, immediately before the day of sale. And whereas the said referees in pursuance of said notice and the order of the court, did on the ——— day of ———, 18—, at the hour of ——— o'clock in the ———noon, at the (name the place where sale was held) expose and offer for sale at public auction the aforesaid real estate, and did then and there sell at public auction to (name of purchaser) the following described parcel of said lands (describe the tract of land) for the sum of ——— dollars, he being the highest and best bidder therefor. And whereas, the said ———, party of the second part, has paid to the parties of the first part the said sum of money so bid as aforesaid. And whereas on the ——— day of ———, 18—, the said court approved and confirmed said sale, and by order directed the said parties of the first part to execute to the said party of the second part a conveyance in due form of law for the said parcel of land so sold to him, as aforesaid.

Now, therefore, this indenture witnesseth, that in consideration of the premises, and of the said sum of ——— dollars, so bid and paid by the party of the second part, in conformity with the law and in obedience to the orders of said court, we (names of referees) parties of the first part, do by these presents grant, sell and convey unto the said ———, party of the second part, and to his heirs and assigns, the said parcel of real estate described as follows, to-wit (describe the tract sold); to have and to hold the same to the party of the second part, as fully and absolutely as the said parties of the first part, by virtue of the premises, might and could sell the same.

In witness whereof we have hereunto set our hands the date first above written.

(Signatures of referees.)

(Add acknowledgment.)

§ 1203. Effect of such conveyance.—Conveyances executed as above set forth, and recorded in the county where the premises are situated, are valid against all subsequent purchasers and against all persons interest-

ed at the time, who were made parties to the proceedings as required by law.[78]

§ **1204. Of investing proceeds of sale.**—Where the owner of any share sold has a husband or wife living, and if such husband or wife do not agree as to the disposition that should be made of the proceeds of such sale, the court must direct it to be invested in real estate under the supervision of such person as it may appoint, taking the title in the name of the owner of the share sold as aforesaid.[79]

§ **1205. Of costs and attorney's fees, etc.**—All cost of the proceedings in partition must be paid in the first instance by the plaintiffs, but eventually by all the parties in proportion to their interest, except costs which are created by contest in the action.[80] The contest here spoken of relates to issues made by the pleadings in reference to the respective interests of the parties.[81] But if the action is one to determine title to land and the defense not frivolous, fees can not be taxed.[82]

And in determining whether there was a contest respecting the extent of the share of a party, the court will not be justified in taking a very critical view of the proceedings; the question is, whether there was practically a contest, and if the parties actually engaged in such contest, whether regularly raised in the pleadings or not, that fact is sufficient to control the question of costs.[83] When a decree ordering partition or sale is entered there will be taxed in favor of plaintiff's attorney, as costs in the case, an attorney's fee, not exceeding ten per cent. on the first two hundred dollars or fraction thereof, for the next three hundred dollars five per cent., for the next five hundred dollars three per cent., and for all excess over the said amounts one per cent. of the value of the property partitioned. Such value to be determined by the court or the appraisement, or by the sale when sale

[78] Code, Sec. 4267.
[79] Code, Sec. 4268.
[80] Code, Sec. 4260; see Duncan v. Duncan, 63-150.
[81] Finch v. Garrett, 71 N. W., 429.
[82] McClain v. McClain, 52-272.
[83] Duncan v. Duncan, 63-150.

is ordered.[84] Appraisers and referees will receive such reasonable compensation for their services as the court may allow, which must be taxed as a part of the costs.[85] Attorney's fees will not be taxed in such cases where there is a contest.[86] Where the issue tried was whether defendant owned a certain interest in the land in controversy, and the land was divided by the parties themselves after a decree giving him that interest plaintiff's attorneys are not entitled to have their fees taxed as costs as authorized in an action for partition.[87]

§ **1206. Of appeals.**—An appeal may be taken from a decree settling the rights and interests of the parties; such a decree is in that respect final.[88] And a party who, by the decree, is adjudged to have no interest in the property, may appeal therefrom as a final judgment as to himself.[89] And where an appeal is taken by one of several defendants it will be dismissed unless the co-defendants are served with notice thereof.[90]

§ **1207. Of the record.**—In this action there should be a complete record made of the entire proceedings; the necessity of this is apparent, as by this proceeding the title of real property is determined.

As to approval of conveyances and especially those made in vacation see "Judgments," sections 672, 673.

[84] Code, Sec. 4261.
[85] Code, Sec. 4272.
[86] Finch v. Garrett, 71 N. W., 429.
[87] Everett v. Croskrey, 69 N. W., 1125.
[88] Williams v. Wells, 62-740.
[89] Ramsey v. Abrams, 58-512.
[90] Hunt v. Hawley, 70-183; Code, Sec. 4111.

CHAPTER LXXIV.

OF PRESUMPTION OF REGULARITY OF PROCEEDINGS OF OFFICERS AND COURTS OF INFERIOR JURISDICTION.

Sec. 1208. When proceedings of officers and courts presumed regular.

Section **1208. When proceedings of officers and courts presumed regular.**—The future proceedings of all officers and of all courts of limited and inferior jurisdiction within this State will, like those of general and superior jurisdiction, be presumed regular, except in regard to matters required to be entered of record and except when otherwise expressly declared by statute.[1] When an oath to a pleading is administered by a justice of the peace, it will be presumed he did it in the proper county; and when the record of a sale of real estate of property of a ward by his guardian discloses nothing to render it void, it will be presumed valid.[2] And when the jurisdiction of an inferior tribunal has once attached, every intendment will be made in favor of the validity of its proceedings.[3] And when a magistrate takes bail in a proceeding before him, it will be presumed he had authority so to do.[4] And when the jurisdiction of a justice is, by consent, extended to a sum greater than one hundred dollars, in the absence of a showing to the contrary, it will be presumed such consent was given before

[1] Code, Sec. 4648; Richmond v. Board of Supervisors, 70-627; Pursley v. Hayes, 22-11; Miller v. Corbin, 46-150; State v. Lane, 26-223; Church v. Crossman, 49-444; Goodrich v. Brown, 30-291; Read v. Howe, 39-553; Little v. Sinnett, 7-324; State v. Berry, 12-58; Shawhan v. Loffer, 24-217; Smith v. Eagle, 44-265; Caughlin v. Blake, 55-634; Barney v. Chittenden, 2 G. Greene, 165; Bayard v. Baker, 76-220; American Emigrant Co. v. Fuller, 83-599; see Judgments and Appellate Proceedings.

[2] Pursley v. Hayes, 17-310.

[3] Pursley v. Hayes, 17-310; Haggerty v. Brown, 22-219; see No. 1 above.

[4] State v. Hufford, 23-579.

the suit was commenced.[5] But an affidavit that a person to be served with notice can not be found in the State must appear of record to confer jurisdiction.[6] The supreme court will presume that an inferior court, in making an order for service of notice in a matter within its jurisdiction, complied with the law.[7] But when it appears on the face of the record that an officer or court has not jurisdiction, the presumption of the statute is rebutted.[8]

[5] Hodge v. Ruggles, 36-42.
[6] Bradley v. Jameson, 46-68, and cases cited.
[7] Lees v. Wetmore, 58-170, and cases cited.
[8] Brown v. Davis, 59-641.

CHAPTER LXXV.

OF PROCEEDINGS TO REVERSE, VACATE OR MODIFY JUDGMENTS, OR THE PROCEEDINGS OF BOARDS, OR INDIVIDUALS ACTING JUDICIALLY.

Sec. 1209. When judgments will be modified or vacated.
1210. Same—In case of mistake, neglect or omission of the clerk, etc.
1211. Same—For fraud, etc.
1212. Same—For erroneous proceedings against a minor or person of unsound mind. etc.
1213. Same—For the death of one of the parties before the judgment is rendered.
1214. Same—For unavoidable casualty or misfortune, etc.
1215. Same—For error in a judgment shown by a minor, etc.
1216. Of equitable proceedings.
1217. When the application may be by motion.
1218. When the application must be by petition.
1219. Same—When grounds discovered after term.
1220. Of pleading, practice, etc.
1221. When the judgment will be vacated.
1222. Of injunction to suspend proceedings.
1223. Of judgment.

Section **1209. When judgments will be modified or vacated.**—In addition to the grounds for granting new trials heretofore considered,[1] the district court in which a judgment has been rendered or a final order made, and where the judge of said court has made a final order, has power after the term at which said judgment or order was made, to vacate or modify it in the following cases:

1. For mistake, neglect, or omission of the clerk, or irregularity in obtaining the same.[2]

2. For fraud practiced in obtaining the same.[3]

[1] See chapter on New Trials.

[2] Code, Sec. 4091; Larson v. Williams, 69 N. W., 441.

[3] Code, Sec. 4091; Lumkin v. Snook, 63-515; Miller v. Albaugh, 24-128; Jones v. Leech, 46-186;

3. For erroneous proceedings against a minor or person of unsound mind, when such errors or condition of mind do not appear in the record.[4]

4. When one of the parties has died before the rendition of the judgment or the making of the order if no substitute has been made of the proper representative before the rendition of the judgment or order.[5]

5. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending the action.[6]

6. For error in judgment or order shown by an infant within twelve months after arriving at full age.[7]

§ **1210. Same—In case of mistake, neglect or omission of the clerk, etc.**—When a default and judgment are irregular they may be set aside, or where there has been a mistake of the clerk.[8]

§ **1211. Same—For fraud, etc.**—A judgment obtained by fraud practiced by the successful party may be vacated even though an application for a new trial has been previously made on other grounds, and in such an application to vacate other facts than those connected with the cause may be united, when they constitute a defense to the claim on which the judgment is based.[9] So a judgment obtained by fraud against a school district may be vacated on petition, in an action commenced within one year after judgment was rendered, and the

Brownell v. Storm Lake Bk., 63-754; Dalhoff v. Keenan, 66-679; Brown v. Byam, 59-52; Ind. Dist. v. Schreiner, 46-172; Rush v. Rush, 46-648, and 48-701; State v. Whitcomb, 52-85; Bennett v. Carey, 72-476; Oliver v. Riley, 92-23; Heathcote v. Haskins, 74-566; Bennett v. Carey, 72-476; Seddon v. State; 69 N. W., 671.

[4] Code, Sec. 4091; Bickel v. Erskine, 42-213; Webster v. Paige, 54-461.

[5] Code, Sec. 4091; Gilman v. Donovan, 53-362.

[6] Code, Sec. 4091; Luscomb v. Maloy, 26-444; Brewer v. Holborn, 34-473; Niagara F. Ins. Co. v. Rodecker, 47-162; Irions v. Keystone Mfg. Co., 61-406; Teabout v. Roper, 62-603; Snell v. Iowa Homestead Co., 67-405; Browning v. Gosnell, 91-448; Heathcote v. Haskins, 74-566; Wishard v. McNeil, 78-40; White v. Gray, 92-525; Callanan v. Ætna Nat'l Bk., 84-8; Ennis v. Fourth Street Bldg. Assn., 71 N. W., 426; Mogelberg v. Clevinger, 93-736.

[7] Code, Sec. 4091; Hunt v. Stevens, 26-399; Dahms v. Alston, 72-411; Heathcote v. Haskins, 74-570.

[8] Morgan v. Small, 33-118; Goldsmith v. Clausen, 14-278; Fuller v. Stebbins, 49-376; Shelley v. Smith, 50-543; Partridge v. Barrow, 27-96; Larson v. Williams, 69 N. W., 441.

[9] Reno v. Teagarden, 24-144.

fact that the directors have levied a tax to pay it will not estop the district.[10] Process in a cause served on the agent of an insurance company, in another county than the one where the loss occurred, is not such fraud as will authorize the setting aside the judgment, even though the agent on whom it was served undertook to put the notice where it would be mailed to the general agent of the company, and it never reached him, and he was ignorant of the pendency of the suit.[11] A decree of divorce obtained by fraud may be set aside, notwithstanding the rights of third parties have intervened.[12] And a petition for a new trial on the ground of fraud need not allege it in terms; it will be sufficient if it sets out facts which in law amount to fraud.[13] Fraud and negligence of the party's attorney in not interposing a valid defense is no ground for vacating a judgment.[14] Fraud, in the former trial, being shown, which is sufficient to constitute reasonable grounds to believe that a different result may be anticipated on the re-trial, the judgment should be vacated.[15]

§ 1212. **Same—For erroneous proceedings against a minor, or person of unsound mind, etc.**—When in an action against a minor an attorney appeared for him and was appointed guardian ad litem, it was held, in the absence of a showing of prejudice, the judgment should not be set aside because he did not appear by his regular guardian.[16] A minor cannot after the expiration of the year question the correctness of a judgment against him by collateral proceedings.[17] Other cases in which it was held that a minor was entitled to a new trial.[18]

§ 1213. **Same—For the death of one of the parties before the judgment is rendered.**—Where a judgment is rendered in favor of a party in an action after

[10] Ind. Dist. v. Schreiner, 46-172.
[11] Niagara Ins. Co. v. Roderick, 47-162.
[12] Rush v. Rush, 46-648; Whitcomb v. Whitcomb, 46-437; State v. Whitcomb, 52-85.
[13] Le Fever v. Stone, 55-49.
[14] Jones v. Leech, 46-186.
[15] Brown v. Byam, 59-52.
[16] Webster v. Paige, 54-461; Bickel v. Erskine, 43-213.
[17] Dahms v. Alston, 72-411.
[18] Heathcote v. Haskins, 74-570.

his death, the judgment is voidable only, and will be considered valid unless set aside as provided in this chapter, on an adjudication that there is a valid defense to the action.[19]

§ 1214. **Same—For unavoidable casualty, or misfortune, etc.**—A party intending to appear and defend an action, but being prevented by illness from interposing his defense, which is a valid one, is entitled to have the judgment rendered by default against him vacated.[20] But the mere loss of a note constituting a defense, is not ground for vacating a judgment.[21] And the loss of all the written evidence in a case on which it was tried, occurring after judgment, and appeal to the supreme court, is no ground for a new trial, as it may on proper application be substituted.[22] A married woman, duly served with an original notice, is presumed in the absence of evidence to the contrary to understand its object and purpose, and how the action will affect her rights, and if she neglects to appear and defend, and default and judgment is taken against her, she can not have it set aside on the ground of unavoidable casualty or misfortune.[23] If the defendant is misled, by an error in the copy of the notice served on him, in regard to the time of the commencement of the term of court, it might be a sufficient averment of casualty or misfortune, but in such a case, where it appeared he had taken advice as to the necessity of his appearance, owing to certain allegations in the petition inconsistent with the notice, it was held he was not entitled to relief.[24] Negligence of one's attorney is not a ground for a new trial.[25] Nor is the absence of an attorney on account of other engagements.[26] But negligence of an attorney which is not

[19] Gilman v. Donovan, 53-362.

[20] Luscomb v. Moloy, 26-444; Brewer v. Holborn, 34-473; Teabout v. Roper, 62-603.

[21] Miller v. Albaugh, 24-128; see Brewer v. Holborn, 34-473.

[22] Loomis v. McKenzie, 48-416.

[23] Teabout v. Roper, 62-603.

[24] Irions v. Keystone Mfg. Co., 61-406; Browning v. Gosnell, 91-448.

[25] Jackson v. Gould, 65 N. W., 406; Church v. Lacy, 71 N. W., 338; Mogelberg v. Clevinger, 93-736.

[26] Grove v. Bush, 86-94.

imputable to the client and which amounts to an unavoidable casualty or misfortune may be ground for granting a new trial.[27]

§ **1215. Same—For error in a judgment shown by a minor within twelve months after arriving at full age.**—All of the cases which would come under this subdivision have been fully treated of in this chapter and in the chapter on new trials.[28]

§ **1216. Of equitable proceedings.**—Courts of equity have jurisdiction to grant relief against judgments obtained by fraud in cases where the fraud is not discovered until the expiration of a year from the time of the rendition of the judgment.[29] But the remedy in such cases is defined by the statute, and relief can only be granted on the grounds set out in the statute, and a promise by one seeking to foreclose a mechanic's lien, that he would pay the claim of another person, holding a prior lien on the premises, if the latter would not appear and assert such lien, is not such a fraud as will authorize the setting aside of the judgment, on failure of the promisor to make such payment.[30] A judgment can not be modified in equity when it was rendered for more than the amount due by agreement of the attorney of the party thereto.[31] When a judgment on a note was rendered for a much less sum than was really due, by reason of a mistake of the clerk in making the assessment, and the mistake was not discovered until after the time to correct the error by motion, and not until the case had been appealed to the supreme court and there affirmed on motion of the plaintiff, the appeal not having been perfected, and judgment rendered for the same amount as in the court below it was held the party might maintain an equitable proceeding in the court be-

[27] Ennis v. Fourth Street Bldg. Assn., 71 N. W., 426.

[28] See chapter on New Trials.

[29] Dist. Twp. v. White, 42-608; Bowen v. The Troy, etc., 31-460; Clark v. Ellsworth, 84-525.

[30] Lumpkin v. Snook, 63-515; McConkey v. Lamb, 71-636; Larson v. Williams, 69 N. W., 441; Jackson v. Gould, 65 N. W., 406.

[31] McConkey v. Lamb, 71-636.

low to correct the error.[32] A judgment or decree should not be set aside without notice to the adverse party.[33] An action in equity to set aside a judgment will not lie for errors of the court which might have been corrected on motion or on appeal if they do not affect the jurisdiction.[34]

§ 1217. When the application may be by motion.—The proceedings to correct mistakes or omissions by the clerk, or irregularity in obtaining the judgment or order, must be by motion served on the adverse party or on his attorney in the action, and within one year, and when made to vacate a judgment because of irregularity in obtaining it, the motion must be made on the second day of the succeeding term.[35] A mistake by the clerk in entering a judgment may be corrected by motion even after payment and satisfaction of the erroneous judgment by the defendant.[36] And a judgment prematurely rendered will be set aside on motion.[37] Courts possess the inherent power to enter judgments nunc pro tunc, and the lapse of time will not bar its exercise, but section 4093, of the code, does not apply to an application for a nunc pro tunc order for the entry of judgment when that duty has been omitted by the clerk.[38] Nor to a motion to correct a record made by a party against whom the court, by mistake, rendered a personal judgment without having jurisdiction.[39] Reference is made to the chapter on new trials for the form of the motion there given which may be used with such modifications as may be necessary.[40]

§ 1218. When the application must be by petition.—The proceedings to obtain a new trial where the defendant is served by publication, have already been discussed.[41] In all other cases mentioned in this chap-

[32] Partridge v. Harrow, 27-96.
[33] Throckmorton v. Stout, 3-580; Keeney v. Lyon, 21-277; Yetzer v. Martin, 58-612.
[34] Geyer v. Douglass, 85-93.
[35] Code, Sec. 4093.
[36] Goldsmith v. Clausen, 14-278.
[37] Huebner v. Farmers Ins. Co., 71-20.
[38] Fuller v. Stebbins, 49-376.
[39] Shelley v. Smith, 50-543.
[40] Chapter on New Trials.
[41] Chapter on New Trials.

ter, except those set forth in the preceding section, the party seeking to reverse, vacate or modify a judgment or order must proceed by petition verified, which must set out the judgment or order complained of, the facts or errors constituting a cause for vacating or modifying it, and the facts constituting a defense to the action, if the party applying was a defendant in the judgment; and such petition must be filed within a year after the judgment or order was made, unless the party instituting the proceedings is an infant or person of unsound mind, in which case the petition may be filed within one year after the disability is removed, unless the proceedings are in equity.[42] An objection that an application to vacate a judgment does not state the facts constituting a defense, and is otherwise informal, must be taken advantage of by motion for a more specific statement, or by demurrer, and can not be raised on the trial on the merits, or on an appeal.[43] The provisions of section 4094, of the code, are directory only, and a petition not verified confers jurisdiction on the court which may allow the plaintiff to amend.[44]

§ 1219. Same—When grounds discovered after term.—Where the grounds for a new trial could not, with reasonable diligence, have been discovered until after the term at which the verdict, report of referee or decision was rendered or made, the application must be by petition filed, as in other cases, and not later than the second term after the discovery, and within one year after final judgment was rendered. The notice will be served and returned, and the defendant held to appear as in an original action; the facts stated will be considered denied without answer, and the cause tried by or-

[42] Code, Secs. 4092, 4094; Keeney v. Lyon, 21-277; Arnold v. Hawley, 67-313; Hintrager v. Sumbargo, 54-604; Freeman v. Hart, 61-525; Reno v. Teagarden, 24-144; Dist. Twp. v. White, 42-608; Bond v. Epley, 48-600; Callanan v. Ætna Nat'l Bk., 84-8; Worth v. Wetmore, 87-62; Council Bluffs L. & T. Co. v. Jennings, 81-470; Walker v. Freelove, 79-752: Griffith v. Milwaukee Harv. Co., 92-634.

[43] Turner v. First Nat'l Bk., 30-191.

[44] Rush v. Rush, 46-648.

dinary proceedings.[45] The petition must show diligence to discover the evidence before trial.[46] The petition under this section must be filed and the notice served within a year from the date of the judgment, and the time commences to run from the date of the decree or judgment in the trial court.[47]

§ 1220. Of pleadings, practice, etc.—In the proceedings by petition treated of in this chapter, except as otherwise stated, the party will be brought into court in the same manner, on the same notice as to time, mode of service and return, and the pleadings, issues, and form and manner of trial will be governed by the same rules and all proceedings conducted in the same manner, as near as may be, and with the same right of appeal, as in an original action by ordinary proceedings, except that no new cause of action, or defense can be introduced, and the cause of the petition must be first tried and tried alone. The matters stated in the petition will be taken as denied without answer and the issues will be tried to the court.[48] To entitle a party to a new trial under the second or fifth grounds stated in code, section 4091, he must prove due diligence as well as the existence of good cause.[49] Pending an application for a new trial made subsequent to the trial term, under section 4092, of the code, it has been held a change of venue might be granted for cause shown.[50] But it is held otherwise, under section 4091, subdivision 4, of the code.[51] A

[45] Code, Sec. 4092; Richards v. Nuckolls, 19-555; First Nat'l Bk. v. Murdough, 40-26; see cases last cited; McConkey v. Lamb, 71-636; Heathcote v. Haskins, 74-566; Council Bluffs L. & T. Co. v. Jennings, 81-479; Reed v. Lane, 65 N. W., 380.

[46] Stuckslager v. McKee, 40-212.

[47] Gray v. Coan, 48-424; Bond v. Epley, 43-600.

[48] Code, Secs. 4092, 4095; Niagara Ins. Co. v. Rodecker, 47-162; Carpenter v. Brown, 50-451; Brown v. Byam, 59-52; Darrance v. Preston, 18-396; Bennett v. Carey, 72-476; Mogelberg v. Clevinger, 93-736; Markley v. Owen, 71 N. W., 431; Mortell v. Friel, 85-738; Kruidenier v. Shields, 77-504; Wishard v. McNeil, 78-40; Callanan v. Ætna Nat'l Bk., 84-8; Lundon v. Waddick, 67 N. W., 388.

[49] Miller v. Albaugh, 24-128; Stuckslager v. McKee, 40-212; McConkey v. Lamb, 71-636; Heathcote v. Haskins, 74-566; Council Bluffs L. & T. Co. v. Jennings, 81-480; Reed v. Lane, 65 N. W., 380.

[50] Gibbs v. Buckingham, 48-96; State v. Whitcomb, 52-85.

[51] Gilman v. Donovan, 59-76.

petition under section 4092 for a new trial, which states that the grounds for a new trial could not, with reasonable diligence, have been discovered before, is not demurrable.[52] After a cause has been appealed and is pending in the supreme court, the court below can not make a nunc pro tunc order without notice to the other party.[53] Where an insufficient petition for a new trial is filed within the year, and after the expiration of the year an amended petition is filed, setting up facts which would be sufficient, it was held not to entitle the party to a new trial.[54] A motion to vacate a judgment against a garnishee for failure to answer, when he had notice of the time and place when and where his answer was to be taken, may be made after the term at which judgment was rendered.[55] An appeal lies from a proceeding to vacate a judgment for fraud.[56] But it can not be tried de novo in the supreme court.[57] Laches can not be imputed to one who brings his action within the time required.[58] The error in judgment referred to in subdivision 6, in section 4091, of the code, is error of law only.[59]

It is only error of fact committed by a trial court that can be reviewed by a writ of error coram nobis.[60] An order for a guardian's sale is not a judgment, and the provisions of the law relating to reversing, vacating and modifying judgments, have no application to such a case.[61] The petition in cases under section 4092, of the code, need only show the facts on which the new trial is asked, as in other cases.[62] Under the law providing for new trials it is held when the petition is based on the ground of accident or surprise, petitioner must show that he could not, by reason of the accident or surprise, with reasonable diligence, properly defend the action, or could not by such diligence have discovered the evi-

52 Woodman v. Dutton, 49-398.
53 Turner v. First Nat'l Bk., 30-191.
54 Harnett v. Harnett, 59-401.
55 Thomas v. Hoffman, 62-125.
56 Dryden v. Wyllis, 51-534.
57 Ind. Dist. v. Schreiner, 46-172.
58 Ind. Dist. v. Schreiner, 46-172.
59 Bickel v. Erskine, 43-213.
60 McKinney v. Western Stage Co., 4-420.
61 Bunce v. Bunce, 59-533; see Gilman v. Donovan, 59-76.
62 Stineman v. Beath, 36-73.

dence before the trial.[63] Under code, section 4092, what petitioner did or what facts existed to show diligence is a matter of evidence that need not be stated in the petition, though necessary under subdivision 7 of section 3755, of the code.[64] The fact that an appeal is pending can not be pleaded in bar of a proceeding under section 4092, of the code.[65] Before there can be a new trial, the court must make an order granting it, which should be entered of record.[66] If a party has knowledge of the error complained of under section 4094, of the code, prior to the expiration of the year from the date of rendition of the judgment, and fails to pursue his legal remedy, he will not be given relief in equity.[67] Notice of the motion to set aside the judgment should always be given the adverse party.[68] And the court in which a judgment is rendered may, in a proceeding to set it aside, ascertain if service was made on the defendant.[69]

§ 1221. When the judgment will be vacated.—The judgment will not be vacated on motion or petition until it is determined that there is a cause of action or defense to the action in which the judgment was rendered, and, when a judgment is modified, all liens and securities obtained under it must be preserved to the modified judgment; but a judgment will not be set aside at the instance of one as to matters which he might have contested but did not.[70] Nor will it be set aside at the instance of one not a party.[71] And acting within the statute, it is a matter of discretion with the court to set aside its own judgments.[72] The court may first try and decide upon the grounds to vacate or modify a judgment or order before trying or deciding upon the validity of the

[63] Richards v. Nuckolls, 19-555.
[64] Wooman v. Dutton, 49-398; see Cohal v. Allen, 37-449.
[65] Cook v. Smith, 58-607.
[66] Brown v. Byam, 59-52.
[67] Freeman v. Hart, 61-525.
[68] See cases cited to Sec. 1216.
[69] Newcomb v. Dewey, 27-381; State Ins. Co. v. Granger, 62-272.
[70] Code, Sec. 4096; Piggott v. Addicks, 3 G. Gr., 427; Russell v. Pottawatamie County, 29-256; Coleman v. Case, 66-534; Morton v. Coffin, 29-235; McName v. Malvin, 56-362; Wishard v. McNeil, 78-40.
[71] Wright v. Keithler, 7-92.
[72] Pailey v. Hearn, 3 G. Gr., 415.

defense, or cause of action.[73] Or it may first try the validity of the defense, and, if it be found insufficient, the application must be overruled.[74] The court, without a jury, is to decide upon the question of granting a new trial.[75] If the court finds that there is reasonable ground to believe that a different result will be reached if a new trial is ordered, that is a sufficient showing of a valid defense.[76] The judgment will not be vacated until a recital is had.[77] The petition for a new trial may be in the following form:

FORM OF PETITION TO VACATE OR MODIFY A JUDGMENT.

Title, }
Venue. }

The plaintiff states: That on the ——— day of ———, 18—, the defendant obtained a judgment in this court, in an action then pending, wherein he was plaintiff and this plaintiff was defendant, for the sum of ——— dollars and costs (if the judgment was not for money then state its nature); that there was and is error in said judgment in this (here state the errors complained of, as that the defendant was an infant and no defense by guardian was made for him, or as the case may be); that this plaintiff, at the time of the rendition of said judgment, had, and still has, a good defense to the whole (or a part) of said judgment in this (here set out defense as would be done in an action before judgment), A copy of the record entry of said judgment is hereto attached, marked "A," and made a part hereof. Wherefore plaintiff prays that said judgment be vacated (or modified, as the case may be), at the costs of the defendant herein.

———, attorney for plaintiff.

(Add verification.)

If the petition is based on the ground of accident or surprise, the above form may be used, making the necessary changes therein, and alleging that the plaintiff could not, with reasonable diligence, have discovered the testimony before the former trial, or, in case of accident, setting out the facts fully which rendered it impossible for him to make his defense therein.

[73] Code, Sec. 4097; Niagara Ins. Co. v. Rodecker, 47-162; Worth v. Wetmore, 87-62.

[74] Miracle v. Lancaster, 46-179.

[75] Carpenter v. Brown, 50-451; Bennett v. Carey, 72-476.

[76] Clark v. Ellsworth, 84-525.

[77] Stanbrough v. Cook, 83-705.

§ 1222. Of injunction to suspend proceedings.—The party seeking to vacate or modify a judgment or order, may have an injunction, suspending proceedings on the whole or a part thereof, which may be granted by the court or judge upon its being rendered probable by affidavit or verified petition, or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified.[78]

§ 1223. Of judgment.—In all cases of affirmance of the former judgment or order, when the proceedings thereon have been suspended, judgment must be rendered against the plaintiff in error for the amount of the former judgment, interest and costs, together with damages at the discretion of the court, not exceeding ten per cent. on the amount of the judgment.[79]

[78] Code, Sec. 4098.

[79] Code, Sec. 4099.

CHAPTER LXXVI.

OF QUO WARRANTO.

Sec. 1224. Object and purpose of the writ.
1225. When the action will lie.
1226. When it will not lie.
1227. Of the commencement and prosecution of the action.
1228. Of pleading and practice.
1229. Of the petition.
1230. Of the trial and judgment.
1231. Of the power of the court.

Section **1224. Object and purpose of the writ.**—At common law the writ issued in the name of the State against any person or corporation usurping any franchise or office, commanding the sheriff to summon the defendant to appear before the court from whence the writ was issued, at the time and place therein fixed, and to show by what authority or warrant he claimed the franchise or office mentioned in the writ.[1]

This proceeding is no longer in use in Iowa, but is succeeded by an information of the nature of quo warranto.

§ **1225. When the action will lie.**—It is an action by ordinary proceedings brought in the name of the State as plaintiff in the following cases: Against any person unlawfully holding or exercising any public office or franchise within the State, or any officer in any corporation created by the State; or against any public officer, who has done or suffered any act which works a forfeiture of his office; or against any person acting as a corporation without being authorized by law; or against any corporation doing or omitting acts which amount to

[1] 2 Bouv. Law Dic., 14th Ed., pg. 405: Commonwealth v. Dearborn, 15 Mass., 125.

a forfeiture of their rights and privileges as a corporation, or exercising powers not conferred by law; or against any person claiming under letters patent granted by the proper authorities of the State for the purpose of annulling or vacating the same as having been obtained by fraud, or mistake, or ignorance of a material fact; or where the defendants have done or omitted an act in violation of the terms and conditions on which the letters were granted, or have by any other means forfeited the interest acquired under the same.[2]

It lies to determine the rights to a municipal office.[3] It lies where the office or franchise is being usurped.[4] It lies to determine the right to preside over the proceedings of a city council.[5] It lies to determine the right to an office where the one claiming the same was elected or appointed.[6] To determine the right of an insurance company to do business.[7]

§ 1226. When it will not lie.—This action will not lie to annul a city ordinance passed in the irregular and improper exercise of a power conferred by law.[8]

§ 1227. Of the commencement and prosecution of the action.—This action may be commenced by the county attorney at his discretion, and must be so commenced when directed by the governor, the general assembly or a court of record.[9] If the county attorney on demand neglect or refuse to commence the action, any citizen of the State having an interest in the question may apply to the court in which the action is to be commenced, or to the judge thereof, for leave to do so, and upon obtaining such leave may bring and prosecute the

[2] Code, Sec. 4313; State v. Simpkins, 77-676; State v. Fidelity & Casualty Co., 77-648; State v. Omaha & C. B. R. & B. Co., 91-517; Dickerson v. Cass County Bk., 64 N. W., 395; State v. Gaston, 79-457; State v. Powell, 70 N. W., 592.

[3] State v. Funck, 17-365.

[4] Cochran v. McCleary, 22-75, 90; Desmond v. McCarthy, 17-525, 527; State v. Omaha & C. B. R. & B. Co., 91-517.

[5] Cochran v. McCleary, 22-75, 90.

[6] State v. Minton, 49-591; Ex parte Stahl, 16-369; State v. Simpkins, 77-676.

[7] State v. Fidelity & Casualty Co., 77-648.

[8] State ex rel. v. City of Lyons, 31-432.

[9] Code, Sec. 4315.

action to final judgment.[10] Whether the party has such an interest that he may maintain this action is a question to be determined in the first place by the district court before the action has been commenced, and it has been held in a proceeding to determine the validity of a statute extending the limits of a city that a non-resident owner of lands within the extended city limits had sufficient interest to maintain the action.[11]

If the action is brought upon the relation of a private individual that fact must be stated in the petition, and the order allowing him to prosecute may require that he should be responsible for costs in case they are not adjudged against the defendant; in other cases the payment of costs will be regulated by the same rule as applies in criminal actions.[12] When the defendant is holding an office to which another is claiming the right, the petition must set forth the name of such claimant, and the trial must, if practicable, determine the rights of the contesting parties.[13] When several persons claim to be entitled to the same office, or franchise, the petition may be filed against all, or any portion thereof, in order to determine their respective rights thereto.[14] And under this section procedure may be had against one claiming to be entitled to an office, though he be not in possession of it.[15]

§ **1228. Of pleading and practice.**—In this action there can be no joinder of any other cause of action, nor any counter claim.[16] The petition must contain a plain statement of the facts which constitute the grounds of the proceeding, and, with the notice and all subsequent proceedings and pleadings, must conform to the rules given for procedure in civil actions.[17] If the action is to contest the right of certain persons, claiming to be a corporation, from acting as such, it must be against the in-

[10] Code, Sec. 4316; Scott v. Clark, 1-70.
[11] State v. Des Moines, 65 N. W., 818.
[12] Code, Sec. 4318.
[13] Code, Sec. 4319.
[14] Code, Sec. 4320; see Cochran v. McCleary, 22-75.
[15] State v. Van Beck, 87-569.
[16] Code, Sec. 4314.
[17] Code, Sec. 4317.

dividuals themselves, and not against the corporation. When a corporation is brought in by its corporate name, its existence is admitted.[18]

Where the office, for the recovery of which the action is brought, is one to which no compensation attaches, the court may dismiss the suit at the time of trial, if it appears that the term of office contested for has expired.[19]

It seems where one persists in exercising an office or franchise, having no right to it, and attempts forcibly to insist upon so exercising it, which results in the interruption of public business, and is a detriment to the public interest, that the injunction allowed in law actions will be allowed as auxiliary to the main proceeding.[20]

§ 1229. Of the petition.—The petition in this action may be in the following form:

FORM OF PETITION BY COUNTY ATTORNEY.

Title, }
Venue. }

———, county attorney of ——— county, of the State of Iowa, states to the court (or, "on the relation of A B, states," etc.):

That the defendant is unlawfully holding (or exercising) the office of (name of the office, or, if a corporation is defendant, that fact and the nature and extent of their powers should be shown, and the further facts showing that the defendant has done or omitted acts which amount to a surrender or forfeiture of its franchises, or that it has committed some act not conferred upon it by law, or that the defendant is acting and exercising powers as a corporation, without being authorized by law to do so), in this, namely (here state the facts showing that the defendant is not entitled to hold or exercise the office, or, when he is an officer, state the facts which show he is exercising some power or franchise not belonging to his office, or that he has done or suffered some act which works a forfeiture of his office).

Wherefore the plaintiff prays that the defendant be required to show by what warrant or authority he holds (or exercises) said office (or powers or franchise, as the case may be), and that judgment be rendered that the said defendant be ousted and altogether excluded from such office (or franchise or privileges), and also that he pay the costs of this proceeding.

———, county attorney of ———, Iowa.

[18] State v. The Ind. Dist., etc., 44-227.

[19] State v. Porter, 58-19; State v. Powell, 70 N. W., 592.

[20] Cochran v. McCleary, 22-75; State v. Funck, 17-365.

Where the action is by, or on the relation of, a private person, verification to the petition should be as follows:

State of Iowa, }
——— County. } ss.

I, ———, being duly sworn, say that I am the plaintiff (or relator) in the foregoing petition; that I have heard the same read; that the statements thereof are true, as I believe.

(Add certificate of officer.)

§ 1230. Of the trial and judgment.—Proceedings on the trial will be the same as in civil actions.[21] If by the judgment the defendant is found guilty of unlawful holding or exercising any office, franchise or privilege, or if a corporation be found to have violated the law by which it holds its existence, or is acting contrary to law, or in any manner to have done acts which amount to a surrender or forfeiture of its privileges, judgment will be rendered ousting the defendant and excluding him from such office, franchise or privilege, and also that he pay the costs of the proceeding.[22]

If the defendant be found to have exercised merely certain individual powers and privileges to which he was not entitled, the judgment will be the same as above stated, but only in relation to particulars in which he is thus exceeding the lawful exercise of his rights and privileges.[23]

The person in whose favor such judgment is rendered will proceed to exercise the functions of the office after he is qualified as provided by law.[24] And after such judgment the court will order the defendant to deliver over all books and papers in his custody, or under his control, belonging to said office.[25] The claimant may, at any time within one year thereafter, bring action against the defendant to recover the damages he has sustained by reason of the act of the defendant.[26] Where

21 Code, Sec. 4317; Cochran v. McCleary, 22-75.
22 Code, Sec. 4324.
23 Code, Sec. 4325.
24 Code, Sec. 4321.
25 Code, Sec. 4322.
26 Code, Sec. 4323.

judgment is rendered against a pretended, but not real, corporation, the costs may be collected from any person who has been acting as an officer or proprietor of such pretended corporation.[27]

If a corporation is ousted and dissolved by proceeding of this kind, the court must appoint three disinterested persons as trustees of the creditors and stockholders,[28] who must enter into a bond in such penalty and with such security as the court approves, conditioned for the faithful discharge of their trust;[29] and action may be brought on such bond by any person injured by the negligence or wrongful acts of the trustees in the discharge of their duties.[30]

The trustees, as soon as practicable after their appointment, must make and file an inventory in the office of the clerk of the court, which must be sworn to by each of them, of all the effects, rights and credits, which come to their possession or knowledge.[31]

They must sue for and recover the debts and property of the corporation, and are responsible to creditors and stockholders, respectively, to the extent of the effects which come into their hands.[32]

When a judgment of ouster is rendered against a corporation, on account of misconduct of the corporation, or the directors or officers thereof, such officers will be severally and jointly liable to any one injured thereby.[33]

§1231. Of the power of the court.—If any person without good reason refuse to obey any order of the court in this proceeding, he will be guilty of contempt of court, and fined in any sum not exceeding five thousand dollars, and imprisonment in the county jail until he comply with said order; and he will be liable for the damages resulting to any person on account of his refusal to obey such order.[34]

[27] Code, Sec. 4326.
[28] Code, Sec. 4328.
[29] Code, Sec. 4329.
[30] Code, Sec. 4330.
[31] Code, Sec. 4333.
[32] Code, Sec. 4334.
[33] Code, Sec. 4327.
[34] Code, Sec. 4335.

CHAPTER LXXVII.

OF RECEIVERS.

Sec. 1232. An executive officer.
1233. When power should be exercised.
1234. Appointed in any civil action.
1235. Not appointed for benefit of strangers.
1236. Of the application.
1237. Of notice of the application.
1238. Of the petition.
1239. In cases of partnerships.
1240. In cases of mortgaged property.
1241. In cases of corporations.
1242. Rights of third parties protected.
1243. His qualification.
1244. His powers and duties.
1245. His liability.
1246. His compensation.
1247. He can not be garnished.
1248. Of appeal.

Section **1232. An executive officer.**—A receiver is an indifferent person between the parties to a cause, appointed by the court to receive and preserve the property in litigation pendente lite, when it does not seem reasonable to the court that either party should hold it.[1] He is an officer of the court and the property entrusted to his care is regarded as being in custodia legis, for the benefit of whoever may finally establish title thereto.[2]

§ **1233. When power should be exercised.**—The power to appoint a receiver is an extraordinary one,[3]

[1] High on Receivers, Sec. 1; Booth v. Clark, 17 How., 322; Waters v. Carroll, 9 Yerg., 102; Baker v. Administrator of Bacus, 32 Ill., 79; Devendorf v. Dickinson, 21 How., 275.

[2] Booth v. Clark, 17 How., 322; Hunt v. Wolfe, 2 Daly, 303; Battle v. Davis, 66 N. C., 252; Hooper v. Winston, 24 Ill., 353; Ellicutt v. Warford, 4 Md., 80; Kaiser v. Keller, 21-95.

[3] Crawford v. Ross, 39 Ga., 44; Furlong v. Edwards, 3 Md., 112.

and always to be exercised with the utmost caution and only when the court is satisfied that it is necessary to prevent manifest wrong and injury.[4] But it need not appear that the party applying for a receiver is entitled to recover before such appointment can be made. It is sufficient if it appear from the showing made that he has a probable right to recover,[5] and a receiver will not be appointed unless a showing is made which clearly brings the case within the statute.[6]

Nor, as a general rule, will a receiver be appointed at the instance of one tenant in common, who is out of possession, against one who is in possession, under such circumstances that he is not liable to account.[7]

§ 1234. Appointed in any civil action.—At common law the power to appoint receivers was vested in courts of equity,[8] but under our statute a receiver may be appointed in any civil action or proceeding, whether legal or equitable,[9] where a proper case is made, and on petition of either party to the action, wherein he shows that he has a probable right to, or interest in, any property which is the subject of the controversy, and that such property, or its rents or profits, are in danger of being lost or materially injured or impaired; and on such notice to the adverse party as the court or judge shall prescribe, the court, or, in vacation, the judge thereof, if satisfied that the interests of one or both parties will be thereby promoted and the substantial rights of neither unduly infringed, may appoint a receiver.[10] Where an assignee for the benefit of creditors is enjoined from acting, a receiver may be appointed to take charge of the property.[11]

[4] Crawford v. Ross, 39 Ga., 44.

[5] Code, Sec. 3822; The Des Moines Gas Co. v. West, 44-25; Cofer v. Echerson, 6-505; Saylor v. Mockbie, 9-211; Clark v. Raymond, 84-251; Dickerson v. Cass County Bk., 64 N. W., 395.

[6] Sleeper v. Iselin, 59-380; Wallace v. Pierce-Wallace Pub. Co., 70 N. W., 216.

[7] Varnum v. Leek, 65-753.

[8] High on Receivers, Sec. 40.

[9] Code, Sec. 3822; Jones v. Graves, 20-596; Rabb v. Albright, 93-50; Smith v. Dayton, 62 N. W., 650; Dickerson v. Cass County Bk., 64 N. W., 395.

[10] Code, Sec. 3822.

[11] Walker v. Stone, 70-103.

§ 1235. Not appointed for benefit of strangers.—The party asking for the appointment of a receiver must have an existing interest in the property in controversy. If he has parted with his interest the court will refuse to make the appointment, even though the offense complained of was committed at a time when he had an interest in the subject-matter.[12] So, a stranger to the suit or proceeding, and having no interest therein, can not procure the appointment of a receiver.[13]

§ 1236. Of the application.—The application for the appointment of a receiver may be embodied in the original petition in the cause, or it may be in an amendment to it setting forth facts which, with those stated in the original petition, are sufficient.[14]

If it is in a case where no notice is required,[15] the application is usually heard on the petition of plaintiff and affidavits.[16] If notice is required, then the hearing will be on the petition, and other pleadings, if any, and such other proofs as the court or the judge deems proper.[17] The appointment of a receiver may be made at any stage of the case, even at final hearing.[18] So an appointment may be made in a proper case at any time during the pendency of the action and after an appeal is taken.[19] And one who has no right in the property cannot question the appointment of a receiver.[20]

§ 1237. Of notice of the application.—Formerly notice of the application for the appointment of a receiver was required to be given the opposite party in nearly all cases, before the court would entertain the application,[21] and as a general rule it is held that if the appointment be

[12] Smith v. Wells, 20 How. Pr., 158.

[13] O'Mahoney v. Belmont, 37 N. Y. Supreme Ct. R., 223.

[14] Jones v. Graves, 20-596.

[15] Maish v. Bird, 59-307.

[16] Code, Sec. 3822; French v. Gifford, 30-148; Bisson v. Curry, 35-72, 80; Jones v. Graves, 20-596.

[17] Code, Sec. 3822.

[18] Schulte v. Hoffman, 18 Tex., 678; High on Receivers, Sec. 109.

[19] Mitchell v. Roland, 63 N. W., 606.

[20] Bartlett v. Bilger, 92-732.

[21] Verplank v. Mercantile Ins. Co., 2 Paige, 438; Sanford v. Sinclair, 8 Paige, 373; Field v. Ripley, 20 How. Pr., 26; Blondheim v. Moore, 11 Md., 365; Rogers v. Dougherty, 20 Ga., 271; Whitehead v. Wooten, 43 Miss., 523.

made in vacation and without notice to the adverse party, it is error,[22] unless there are peculiar facts or circumstances set forth in the petition rendering such action proper. Thus it is held that where the adverse party is not within the jurisdiction of the court, and can not be served with notice, or can not be readily served with notice, the court may, under some circumstances, appoint a receiver without notice.[23] So a receiver may be appointed before the defendant has been served with notice of the pendency of the action.[24]

Notice of the application for the appointment of receiver may be in the following form:

FORM OF NOTICE OF APPLICATION FOR APPOINTMENT OF RECEIVER.

Title, }
Venue. }

To ———, defendant, or to ———, his attorney:

You are hereby notified that the plaintiff will on the ——— day of ———, 18—, at the hour of ——— o'clock A. M., at (place), Iowa, make application to the honorable ———, judge of the district court for the ——— judicial district of Iowa, for the appointment of a receiver in the above entitled cause. Said application will be based on the petition of the plaintiff, now on file, and affidavits, copies of which are hereto attached. You can appear and resist said application if you see proper.

Dated ———, 18—.

———, plaintiff,
by ———, his attorney.

If, as is customary, the judge not only fixes the notice which shall be given the adverse party, but also orders copies of the affidavits to be served, such service may be made by an officer who should make proper return, or service may be accepted by the parties on said notice, thus:

FORM OF ACCEPTANCE OF SERVICE.

Due and legal service is hereby accepted of the within notice and copy of affidavits attached.

Dated ———, 18—.

(Signature.)

[22] French v. Gifford, 30-148; Bisson v. Curry, 35-72; Howe v. Jones, 57-130.

[23] Maish v. Bird, 59-307.

[24] Jones v. Graves, 20-596.

§ 1238. **Of the petition.**—The petition for the appointment of a receiver may be in the following form:

FORM OF PETITION FOR THE APPOINTMENT OF A RECEIVER.

Title, }
Venue. }

Par. 1. The plaintiff states that on the ——— day of ———, 18—, he entered into partnership with the defendant under a written agreement, a copy of which is attached hereto marked "A," and made a part hereof.

Par. 2. That on the ——— day of ———, 18—, and during the existence of said partnership, said defendant took exclusive possession of the partnership books and all of the stock and property of said firm and has ever since prevented plaintiff from having any access to the same, and from in any manner participating in the partnership business and refuses to confer with plaintiff regarding said partnership business.

Wherefore plaintiff prays that said partnership may be dissolved, that an accounting may be had under the order of this court of said partnership business, and the amounts due plaintiff and defendant ascertained. That a receiver may be appointed to take possession of and sell said partnership property, and that the proceeds of said partnership property may be applied, first, in payment of the costs of said receivership and, second, in payment of the partnership debts, and the balance be divided between said partners according to their respective rights thereto, and for such other and further relief as may be equitable in the premises and for costs.

———, attorney for plaintiff.

(Add verification and attach exhibit "A" referred to.)

§ 1239. **In cases of partnership.**—Courts are frequently asked to appoint receivers in actions between partners for an account and settlement of their partnership affairs, and to close up the business of the firm; and their jurisdiction to do so in cases where the parties can not agree as to the disposition of the partnership property is well settled.[25] A partnership agreement is binding upon the parties, and they must adhere to its terms. Neither partner is at liberty to recede from it against the will of the other, without a sufficient cause. Mere dissatisfaction by one partner will not justify him in filing a bill for dissolution,[26] where the partnership has not expired by virtue of the articles of agreement. It

[25] Saylor v. Mockbie, 9-209. [26] Henn v. Walsh, 2 Ed. Chy., 159.

must appear that the case is such a one as would authorize a decree for a dissolution of the partnership before the court will interfere by appointing a receiver.[27]

In cases where the right to dissolve the partnership exists, and the articles of co-partnership do not provide for the settlement of the firm affairs, and the partners can not agree with reference thereto, a receiver will be appointed on proper application therefor.[28] So an assignee of a partner who has succeeded to his interest in the firm, may have a receiver appointed in certain cases.[29] While it is the policy of the law and the courts in the appointment of a receiver to wind up the business of the partnership as speedily as possible, yet, when it appears to the court to be for the best interest of the partnership that the business be carried on until the property can be disposed of, it may so direct.[30] The power of the court or the judge under the statute in exercising control over, or ordering the sale of the partnership property or the carrying on of the firm's business, seems to be ample to justify any action which the court, or judge, shall deem for the best interest of the parties.[31] It is a well settled rule that to entitle one claiming to be a partner to the appointment of receiver to wind up the partnership affairs, it must appear that there was a completed partnership at least so as to entitle him to a participation in the profits of the business.[32] If, after the dissolution of the partnership, either partner uses the partnership property inconsistent with the winding up of its affairs, it is a fraud on the other partners, and upon the creditors of the partnership, and on proper application a receiver will be appointed to take charge of the property.[33] The

[27] Jackson v. De Forest, 14 How., 81; Garretson v. Weaver, 3 Edw. Chy., 385; Henn v. Walsh, 2 Ed. Chy., 129.

[28] Law v. Ford, 2 Paige Ch., 310; Henn v. Walsh, 2 Edw. Ch., 129.

[29] Maynard v. Railey, 2 Nev., 313.

[30] Martin v. Van Shaik, 4 Paige Ch., 479; Allen v. Hawley, 6 Fla., 164; Jackson v. De Forest, 14 How. Pr., 81.

[31] Code, Sec. 3822; Saylor v. Mockbie, 9-209.

[32] Goulding v. Bain, 4 Sanf., 716; Kerr v. Potter, 6 Gill., 404; Hobart v. Ballard, 31-521; Dupuy v. Sheak, 57-361.

[33] Gortner v. The Trustees of the Village of Canajoharie, 2 Barb., 625; West v. Chasten, 12 Fla., 315; Harding v. Glover, 18 Ves., 281.

acts of a partner which will justify a court in appointing a receiver at the instance of another partner to take possession and control of partnership property are many, and the following have been held sufficient: When, upon dissolution, one partner prevents or seeks to exclude the other from participation in the management of the firm effects.[34] Where a partner violates the articles of co-partnership, or is guilty of a breach of duty.[35] Where there is a serious and apparently irreconcilable disagreement between the partners both as to the control and disposition of their effects and as to their respective demands against each other.[36]

Where one partner mismanages the firm business, producing insolvency.[37] Where the conduct of the defendant partner has been such as to satisfy the court that he has deliberately resolved to break up and ruin the firm business, and the personal relations between the partners are such that they could not carry on business advantageously together.[38] A partner in possession is not entitled to a receiver in any case;[39] as the object and purpose of appointing a receiver as between partners is only for the protection of the party complaining against the adverse party in possession.

§ 1240. In cases of mortgaged property.—It seems that a receiver will not be appointed on the application of a mortgagee, to take possession of mortgaged premises, unless it clearly appears that the whole premises are insufficient to pay the debt, or that the court should take control of the estate to protect the rights of a party who has a clear and strong claim against it.[40] Nor will a receiver be appointed in an action to foreclose a mortgage when the rents and profits of the land are being applied

[34] Terrell v. Goodard, 18 Ga., 664.
[35] New v. Wright, 44 Miss., 202; Allen v. Hawley, 6 Fla., 164.
[36] Whiteman v. Robinson, 21 Md., 30.
[37] Boyce v. Burchard, 21 Ga., 74.
[38] Sutro v. Wagner, 8 C. E. Gr., 388.
[39] Smith v. Lowe, 1 Edw. Ch., 33.
[40] Callanan v. Shaw, 19-185; Myton v. Davenport, 51-583; White v. Griggs, 54-651; see also Edie v. Applegate, 14-273.

in payment of the mortgagee's debt, and necessary expenses incurred in the care and management of the property.[41] A mortgagee has the right to the appointment of a receiver only as to property, upon which his mortgage is a lien, and then only where there is danger of its being lost or materially injured; he can not have a receiver to take charge of crops on the mortgaged premises during the period of redemption.[42] The appointment of a receiver after a final judgment of foreclosure to take charge of mortgaged premises is unusual, and, if allowable at all, the application should be supported by a strong showing.[43]

Whether a receiver will be appointed in any case to take possession of a homestead pending proceedings to foreclose a mortgage thereon, quære. When a party executed a chattel mortgage on his stock of merchandise to creditors having claims nearly equal in amount to the value of the stock, and the mortgagees have possession thereunder by an agent, and are selling the stock in the ordinary course of trade, and are garnished by an unsecured creditor of the mortgagor, this is no ground for the appointment of a receiver.[44] In cases not covered by this section of the statute the court may appoint a receiver in accordance with the stipulation of the parties made in the contract creating the indebtedness.[45]

The mortgagee of goods, whose debt is not due, but who has taken possession of the property under his mortgage which provided that he might take possession whenever he should choose so to do, and sell the goods at public auction, or so much thereof as should be sufficient to pay the amount due, or to become due, as the case might be, with all reasonable costs pertaining to the sale of the same, and has been garnished by the creditors of the mortgagor, and has instituted his action in equity to foreclose the mortgage, he may have a receiver to take

[41] Myton v. Davenport, 51-583.
[42] White v. Griggs, 54-651; Swan v. Mitchell, 82-307; American Inv. Co. v. Farrar, 87-437.
[43] Adair v. Wright, 16-387.
[44] Silverman v. Kuhn, 53-436.
[45] Hubbell v. Avenue Inv. Co., 66 N. W., 85.

possession of and sell the goods in the ordinary course of business;[46] it might be otherwise were it not for the provisions of the mortgage.[47] The decree rendered in an action for the appointment of a receiver in a foreclosure suit upon the the allegation that the property was inadequate to pay the mortgage debt, constitutes an adjudication upon the right of the receiver to collect the rents and profits of the property.[48] Though the mortgage creates a lien upon the rents and profits and stipulates that a receiver may be appointed, still the mortgagee is not, as a matter of course, entitled to have a receiver appointed after a judgment of foreclosure, if it does not appear that such rents and profits are being wasted or that they are being improperly applied on prior mortgages.[49] And under a mortgage providing that in case of default the mortgagee might take possession and apply the rents and profits to the satisfaction of the mortgage, and when it was not stipulated that a receiver might be appointed it was held error to make such appointment and to take possession of the property during the period of redemption for the benefit of the mortgagee.[50] Nor is a mortgagee entitled to the appointment of a receiver where the mortgage does not give the mortgagee the right of possession before sale, nor pledge the rents and profits.[51] If, however, the mortgage pledges the rents for the payment of the debt, and they are not so applied, and the tenant is a foreign corporation and insolvent and the security is insufficient, and the mortgage authorizes a receiver to be appointed on default, such appointment is proper.[52]

§ **1241. In cases of corporations.**—A receiver may be appointed for a corporation, and the power of courts to appoint receivers is frequently invoked in cases of

[46] Maish v. Bird, 59-307.
[47] Maish v. Bird, 59-307.
[48] Goodhue v. Daniels, 54-19.
[49] Paine v. McElroy, 73-81.
[50] Swan v. Mitchell, 82-307.
[51] American Inv. Co. v. Farrar, 87-437.
[52] Stetson v. Northern Inv. Co., 70 N. W., 595.

railroads.[53] An action resulting in the appointment of a receiver for a corporation is an adjudication of his power to sue for and receive an assessment upon unpaid stock.[54] This statute does not authorize the dissolution of a corporation nor the placing of its property in the hands of a receiver by a court of equity merely because there are dissentions among its stockholders.[55]

§ **1242. Rights of third parties protected.**—While the court will, in a proper case, appoint a receiver, yet if third parties have acquired rights in good faith, the court, or judge, will not order the property into a receiver's hands; such parties' rights can not be adjudicated in this summary and collateral method;[56] but where a receiver had been appointed, and the party made no resistance to the order, and did not appeal from the same, he could not afterward, by an assignment, direct the disposition to be made of any part of the property, as he had no control over the fund; it being in a court of equity he could not interfere in its equitable distribution;[57] and when a receiver has been appointed, and it turns out on a hearing that the property belonged to intervening third parties, unless they be benefited by the appointment, they can not be made to pay any of the receiver's fees and expenses.[58]

§ **1243. His qualification.**—The appointment may be in the following form:

FORM OF APPOINTMENT OF RECEIVER.

Title, }
Venue. }

On reading the pleadings (and the affidavits of A B and C D, if any are filed) herein filed, and on motion of the plaintiff (and having heard defendant's counsel, if a hearing is had).

Ordered: 1. That ——— be, and he is hereby, appointed a receiver of (specify the property with as much particularity as possible).

[53] Cook v. Cole, 55-70; The Bk. of Montreal v. C., C. & W. R. Co., 48-518.

[54] Stewart v. Lay, 45-604; Schoonover v. Hinckley, 48-82.

[55] Wallace v. Pierce-Wallace Pub. Co., 70 N. W., 216.

[56] Levi v. Karrack, 13-344.

[57] Tailor v. Gillen, 25 Tex., 508; McGowan v. Meyers, 66-102.

[58] Howe v. Jones, 66-156.

2. That said ——— hereby appointed, before entering upon the discharge of his duties, shall file a bond, with the clerk, with sureties to be approved by him, in the penalty of ——— dollars, and take the oath prescribed by law.

3. That upon the filing of such bond, and taking of such oath, such receiver shall be vested with the usual rights and powers of receivers under this court (and specify any peculiar powers bestowed, or directions given).

Done this ——— day of ———, 18—.

———, judge, etc.

Before entering on the discharge of his duties he must be sworn faithfully to discharge his trust to the best of his ability and must also file with the clerk a bond with sureties to be by him approved in a penalty to be fixed by the court or judge, and conditioned for the faithful discharge of his duties and that he will obey the order of the court in respect thereto;[59] the bond should be in substantially the following form:

FORM OF BOND OF RECEIVER.

Know all men by these presents that we, ———, principal, and ——— and ———, sureties, are held and firmly bound unto (the parties in the action) in the penal sum of ——— dollars, lawful money of the United States, well and truly to be paid to them, and each of them, and their heirs, executors and assigns.

The condition of this obligation is such that whereas the said ——— was, on the ——— day of ———, A. D. 18—, appointed by the district court of the State of Iowa, in and for ——— county (or by the judge of such court), a receiver in an action commenced (or pending) in said court, wherein ——— is plaintiff and ——— is defendant. Now, if the said (name) shall and will, well and faithfully discharge his duties as such receiver, and obey the orders of the court in respect thereto, then this obligation to be void, otherwise to remain in full force and virtue.

Dated at ———, A. D. 18—.

———, principal.

———, } sureties.
———, }

(Sureties should justify as provided by the statute.)

The clerk must make following indorsement approving the sureties:

[59] Code, Sec. 3823.

FORM OF APPROVAL OF SURETIES.

The sureties in the within bond approved by me, and bond filed in my office, this ——— day of ———, 18—.

———, clerk, district court.

The oath should be in the following form, and either written on the back of the bond or on a separate paper and attached to it:

FORM OF RECEIVER'S OATH.

I, ———, receiver in the case of ——— v. ———, now pending in the district court of ——— county, Iowa, do solemnly swear that I will faithfully discharge my trust as receiver in said cause to the best of my ability. So help me God.

(Signature.)

I hereby certify that the foregoing oath was administered to ——— by me and subscribed by him in my presence this ——— day of ———, 18—.

[Seal.] ———, clerk of the district court.

The receiver, when qualified as above, may enter on his duties.

§ 1244. His powers and duties.—Being an officer of the court the receiver is in some respects but an agent of the court for the transaction of the business pertaining to his trust, subject to the control of the court, or judge; he has power to bring and defend actions; to take and keep possession of property; to collect debts; to receive the rents and profits of real property and generally to do such acts in respect to the property committed to him as may be authorized.[60]

Ordinarily a receiver's powers are derived from the order of appointment, but it would seem that some discretion must be lodged in him as circumstances may arise calling for speedy action in order to preserve the property committed to his care, in which case courts seem inclined to uphold such action of the receiver when it is manifestly necessary to preserve and protect the property. Thus where certain "mills and a block" were committed to the control of a receiver, it was held he

[60] Code, Sec. 3824; Smith v. Dayton, 62 N. W., 650.

might prosecute an action relating to a wharf which was connected therewith, and was originally constructed for the purpose of more conveniently carrying on the mills.[61] He may maintain an action in equity against officers who conceal assets for the purpose of converting them to their own use.[62] Ordinarily he can not act in a foreign State or sue therein.[63] He may take property on account of indebtedness, to be credited as may be approved by the court.[64] And see further as to his rights.[65] In a proceeding under the statute to wind up an insolvent bank the court may, on the application of a receiver, make an ex parte order for an assessment against the stockholders to discharge their liability subject to the right of each stockholder to contest such liability when sued for payment of the assessment. And in such case it is not necessary for the receiver to first exhaust all the assets before enforcing the stockholders' liability.[66]

Where a receiver was appointed and an appeal taken from the order of appointment, and a supersedeas filed, the property did not pass into the custody of the receiver until he actually took possession of it, after an affirmance by the supreme court, and until that time the control of the property remained in the defendant.[67]

The action resulting in the appointment of a receiver is an adjudication of his power to collect rents, or to sue for an assessment on unpaid stock of a corporation.[68] In all cases where the power of a receiver to do an act is in doubt he should, if possible, apply to the court which appointed him for authority to act.

§ 1245. His liability.—As has been seen, the receiver is at all times subject to the orders of the court, or judge, appointing him. If property committed to his

[61] Grant v. City of Davenport, 18-179.

[62] Brandt v. Allen, 76-50.

[63] Ayres v. Siebel, 82-347; Barker v. Lamb, 68 N. W., 686.

[64] Everingham v. Harris, 68 N. W., 804.

[65] Kimball v. Gafford, 78-65; Yetzer v. Applegate, 85-121; Polk v. Garver, 91-570.

[66] State v. Union Stock Yards State Bk., 70 N. W., 752.

[67] Cook v. Cole, 55-70.

[68] Stewart v. Lay, 45-604; Schoonover v. Hinckley, 48-82; Goodhue v. Daniels, 54-19.

care is lost or destroyed by reason of his negligence or dishonesty, he is liable.[69] When he acts in violation of the orders of the court appointing him, he may be liable.[70] Where one was appointed receiver for a railroad which was about to be built, and authorized to do and perform all acts and things necessary to construct and complete the line of road, and to borrow money for such construction, equipment and final completion, and issue certificates therefor which should be a first lien on the road, he was not thereby authorized to issue such certificates for material for said road until the material had been furnished, and such certificates were void.[71] And as such certificates showed on their face that they were issued under the order of the court, the parties were chargeable with notice of the order and the extent of the receiver's power thereunder.[72] He is liable in an action providing for double damages in cases of injuries to stock where a road is not fenced if he is operating a railroad as a receiver.[73] When a railroad was sold under a mortgage foreclosure in which a receiver had been appointed the purchaser took the property free from claims for injuries which had not been reduced to judgment.[74]

He may be sued in a court of law in an action for damages against the corporation of which he is receiver, without the plaintiff obtaining leave to prosecute his action from the court which appointed the receiver.[75] Where a receiver took possession of a railroad, under order of the United States circuit court, and during said time a claim for damages arose in favor of a party and against the receiver on account of personal injuries, and the court ordered the railway to be turned over to defendant on condition that it assumed the liabilities in-

[69] Kaiser v. Kellar, 21-95.

[70] Manning v. Monaghan, 1 Bosw., 459.

[71] The Bank of Montreal v. C., C. & W. R. Co., 48-518.

[72] The Bk. of Montreal v. C., C. & W. R. Co., 48-518; see Tripp v. Boardman, 49-410.

[73] Brockert v. Central Iowa R. Co., 82-369.

[74] Brockert v. Iowa Cent. R. Co., 93-132.

[75] Allen v. Central R. R. Co., 42-683; Kinney v. Crocker, 18 Wis., 74; Paige v. Smith, 99 Mass., 375; Hall v. Parker, 111 Mass., 508.

curred while the road was operated by the receiver, and defendant accepted the property with conditions attached, it became liable to plaintiff on account of his claim for damages.[76] So, a receiver is not required to pay interest upon money received by him in discharge of his official duties, upon the ground that he mingles it with his individual funds, or draws therefrom money for his own use, and this is especially true where there is no evidence that he used the trust funds, or that he was negligent or unfaithful in the discharge of his duties.[77] When the property of any company, corporation, firm or person is seized upon by any process of any court of this State, or when their business is suspended by the action of creditors or put into the hands of a receiver or trustee, the debts owing their laborers or servants which have accrued by reason of their labor or employment to an amount not exceeding one hundred dollars to each employe for work or labor performed within ninety days next preceding the seizure or transfer of such property, are to be treated as preferred and paid in full, and if there are not sufficient funds to pay them in full then the same are to be paid pro rata after paying costs. And if such servant or laborer present this claim under oath as provided by the statute within thirty days after such property has been placed in the hands of a receiver or trustee, the latter must pay said claim or claims to the person or persons entitled thereto (after first paying all costs) out of the proceeds of the sale of the property.[78]

§ **1246. His compensation.**—When the statute is silent regarding the compensation of receivers, it is in the power of the court to fix his compensation.[79] The amount of it will depend on the amount of time, care and skill required in the proper execution of his trust;

[76] Sloan v. Central Ia. Ry. Co., 62-733.

[77] Radford v. Folsom, 55-282; Howe v. Jones, 60-70.

[78] Code, Secs. 4019 to 4022; Reynolds v. Black, 91-1.

[79] Gardner v. Tyler, 3 Keyes, 505; Magee v. Cowperthwaite, 10 Ala., 966; Baldwin v. Eazler, 34 N. Y. Supr. Ct. R., 275.

and generally his compensation is paid out of the fund in his hands; nor can he, in a case where no question was made as to the propriety or legality of his appointment, and after he has closed his business, be compelled to accept as part of his compensation a judgment against the party securing his appointment.[80] Nor can he be compelled to pay the costs of a reference growing out of the settlements of his accounts where no bad faith on his part is claimed.[81] But where the appointment of a receiver was improper, and it is vacated by the court, the compensation to the receiver may be ordered paid, part from the fund and part by the plaintiff, in the discretion of the court.[82] A receiver may correct his report, and may deduct from the funds in his hands such sum as he may have been compelled to pay as attorney's fees and other charges for collecting the funds in his hands, where these disbursements were made in good faith and were necessary to the party entitled to the fund.[83] Where, by agreement of parties, excessive compensation was allowed to a receiver, such allowance will not be set aside on the application of one of the parties made more than six months after the order was entered when no appeal has been taken.[84] Ordinarily, a receiver's compensation should be taken from the funds in controversy.[85]

§ **1247. He can not be garnished.**—The possession of the receiver being regarded as that of the court from which he derived his appointment, he can not be garnished, nor will the court thus permit itself to be made a party to a litigation in another forum; the process of garnishment in such cases will be regarded as a nullity.[86] To permit him to be garnished would defeat the very ends for which he was appointed.[87]

[80] Radford v. Folsom, 55-282.
[81] Radford v. Folsom, 55-282.
[82] French v. Gifford, 31-428.
[83] Howe v. Jones, 60-78.
[84] Russell v. First Nat'l Bk., 65-242.
[85] Jaffray v. Raab, 72-335.
[86] McGowan v. Meyers, 66-99; High on Receivers, Sec. 151; Tailor v. Gillen, 25 Texas, 508; see Noe v. Gibson, 7 Paige Ch., 513.
[87] Field v. Jones, 11 Ga., 413; see Howard County v. Strother, 71-683.

§ 1248. Of appeals.—An appeal will lie from the order appointing or refusing to appoint a receiver.[88] Any irregularity in the proceedings of a receiver must be corrected by the court which appointed him, and can not be reviewed in an action in another forum.[89] While it seems a receiver can not appeal from an order directing him to turn over the property in his hands, yet when the order erroneously fixes the amount of property in his custody, and directs him to turn over more than he has, an appeal should be permitted.[90]

[88] The Des Moines Gas Co. v. West, 44-25.

[89] Stewart v. Lay, 45-604.

[90] Howe v. Jones, 60-78.

CHAPTER LXXVIII.

OF REDEMPTION.

Sec. 1249. What property is subject to redemption.
1250. Of the certificate of sale.
1251. Of redemption made by the defendant.
1252. When redemption may be made by creditors.
1253. Who is a creditor under the statute.
1254. Of redemption by holder of mechanic's lien.
1255. Of redemption in equity.
1256. What law is applicable to the sale.
1257. Of creditors redeeming from each other.
1258. Of computing the time of redemption.
1259. Of the terms of redemption.
1260. Same.
1261. Who obtains the property.
1262. Of the mode of redemption.
1263. Of settling controversies as to the right to redeem or as to the amount to be paid.
1264. Of redemption from sale in parcels, and of the interest of tenants in common.
1265. Of the rights of the purchaser.
1266. Of assigning the right to redeem.
1267. Of the sheriff's deed.
1268. When the deed is constructive notice.
1269. Of the sheriff's return.
1270. Of damages for injury to property, etc.

Section **1249. What property is subject to redemption.**—As has been seen, any estate in real property greater than a leasehold interest, having two years of an unexpired term to run, which is sold on execution or attachment, is redeemable.[1] Yet it is held that a decree of sale without redemption, while erroneous, is not necessarily void.[2]

§ 1250. Of the certificate of sale.—If the property

[1] Code, Sec. 4043.
[2] Traer v. Whitman, 56-443, and see Moore v. Jeffries, 53-202; Gillett v. Edgar, 22-293.

sold be subject to redemption, the sheriff must, at the time of sale, execute to the purchaser a certificate of sale, which must contain a description of the property sold, a statement of the amount of money paid by the purchaser, and it must also state that unless redemption is made within one year thereafter, according to law, he, or his heirs or assignees, will be entitled to a deed of the land, or of the interest sold therein.[3] Such certificate is admissible in evidence, after the proper foundation is laid for the introduction of secondary evidence, as tending to show the existence and contents of the execution under which the sale was made.[4] If land has been irregularly sold under execution, the defendant can not pay off the judgment against him and, having procured the sale to be set aside on the ground of irregularity, compel the purchaser to look to the sheriff, or to the plaintiff, for reimbursement of the amount he paid. The court will, on motion, set aside the credit on the judgment to the extent of the bid, and order a re-sale of the property, for the purpose of indemnifying him, and to prevent such re-sale the defendant must reimburse the purchaser.[5] The certificate may be assigned, and the assignee takes it subject to any equities existing against the assignor.[6] If the purchaser takes a deed at the sale relying on the claim that the other party has no right to redeem, it is not necessary that an offer to redeem be made in order to entitle the execution defendant to maintain an action to set aside the deed.[7] If a creditor pays money to the purchaser by way of redemption, and takes an assignment of the certificate, he thereby acquires the rights of the purchaser although his redemption may not be effectual.[8]

The certificate of sale may be in the following form:

[3] Code, Sec. 4044.

[4] Conger v. Converse, 9-554.

[5] Fleming v. Maddox, 32-493.

[6] Van Gorder v. Lundy, 66-448; see Seevers v. Wood, 12-295; Citizens S. Bk. v. Percival, 61-183; Scribner v. Vandercook, 54-580; Grey v. Dye, 39-360; Hurn v. Hill, 70-38; Wilson v. Conklin, 22-452; Streeter v. First Nat'l Bk., 53-177; Brooks v. Keister, 45-303.

[7] Fitzgerald v. Kelso, 71-731.

[8] Rush v. Mitchell, 71-333; Wilson v. Conklin, 22-452.

FORM OF SHERIFF'S CERTIFICATE OF SALE.

To whom it may concern:

I, ———, sheriff of ——— county, Iowa, hereby certify that by virtue of a general (or special as the case may be) execution to me directed, dated ——— A. D. 18—, and issued out of the clerk's office of the district court of the State of Iowa, in and for ——— county, upon a judgment (or judgment and decree of foreclosure) rendered in said court on the ——— day of ——— A. D. 18—, in favor of ———, and against ———, for the sum of ——— dollars debt, and ——— dollars costs, I did on the ——— day of ——— A. D. 18—, levy upon the following described real estate, to-wit (here describe the land levied on), as the property of the said ——— to satisfy the said execution amounting to ——— dollars debt, and ——— dollars costs, together with interest and accruing costs thereon; that I gave four weeks' notice of the time and place of selling said real property under said execution, by posting up printed (or written) notices thereof at three public places in said county, one of which was at the court house in ——— where the last district court was held, and by causing two publications of said notice to be made in the (name of paper), a newspaper printed at ——— in said county, immediately before the time of sale; that in pursuance of the notice of sale, as aforesaid, in conformity to law and by virtue of said execution, I did on the ——— day of ——— A. D. 18—, at ——— o'clock in the ———noon of said day, at the front door of the court house in ———, in said county, expose and offer the said real estate for sale at public auction, and ——— then and there bid the sum of ——— dollars for the same, (or some part thereof as the case may be), and that being the highest and best bid offered for said real estate (or some part of it) the same was there openly struck off and sold to the said ———, for the said sum of ——— dollars, who then and there paid the amount of his said bid to me in cash. Now, unless redemption is made within one year after the date of said sale, according to law, the said ———, his heirs or assignees, will be entitled to a deed for the said real estate, sold as aforesaid and described as follows, to-wit (here describe the land sold).

In witness whereof, I have set my hand this ——— day of ———, A. D. 18— (same date as the sale).

———, sheriff of ——— county, Iowa.

§ 1251. Of redemption made by the defendant.[9]— In no case where the defendant has taken an appeal from the district or superior court, even though no supersedeas bond has been filed, or when he has stayed execution on the judgment, can he redeem. In such cases the sale is absolute. Subject to the above qualifications the same rights of redemption exist whether the sale is made on a general or special execution.[10]

[9] Harrison v. Wilmering, 72-727.

[10] Code, Sec. 4045; Lombard v. Gregory, 90-682.

Under provisions of prior law it was held that the vendee of an execution defendant whose land is sold on execution sale, as such vendee may redeem, even though his vendor has taken an appeal from the judgment; but in such a case, if such vendee has become the owner of the land and is in possession prior to the sale, he can not redeem.[11]

Where a party stays a judgment before a justice and a transcript is afterward filed in the higher court and an execution issues, and a sale is had thereon, such sale is absolute.[12] The defendant may redeem within one year from the day of the sale.[13] Statutory redemption can only be effected in the manner and within the time fixed by the statute.[14] If the appeal is not perfected until after the sale the right of redemption exists.[15] The grantee of an execution debtor acquiring the interest of his grantor after the right of a junior lien holder to redeem is barred, may redeem without subjecting the property to the claims of such junior lien holder.[16] Redemption by a surviving widow who was a grantee of the heirs of the deceased execution debtor, cuts off the lien of a junior incumbrancer who was a party to the action.[17] Land sold under a judgment against both a principal and surety may be redeemed by the surety.[18] If the debtor's right of redemption is sold under a second execution he may, within the time for redeeming from the first sale, redeem from both sales.[19] Under the code of 1851 the sale of mortgaged property on foreclosure, cut off all right of redemption. Redemption was required to be made before the sale.[20] When a judgment has attached as a lien on real estate and it is sold by the judgment debt-

[11] Thayer v. Coldren, 57-110; Sieben v. Becker, 53-24; Dobbins v. Lusch, 53-304; Brown v. Markley, 58-689; see Munson v. Plummer, 59-120.

[12] Brown v. Markley, 58-689.

[13] Code, Sec. 4045; Webb v. Watson, 18-537; Mayer v. Farmers Bk., 44-212; Hammersham v. Fairall, 44 462; McKissick v. Mill Owners, etc., 50-116; Hughes v. Feeter, 23-547; Bradford v. Bradford, 60-201, and see Fitzgerald v. Kelso, 71-731.

[14] Teabout v. Jaffray, 74-28.

[15] Fitzgerald v. Kelso, 71-731.

[16] Moody v. Funk, 82-1.

[17] Bevans v. Dewey, 82-85.

[18] Bleckman v. Butler, 77-128.

[19] Harrison v. Wilmering, 72-727.

[20] Kramer v. Rebman, 9-114.

or and by him conveyed by deed with covenants against incumbrances and of warranty, after which it is sold on execution issued on the judgment, it is held that the judgment debtor has the right of redemption for one year from the date of sale and the grantee has also the right to redeem as a subsequent purchaser, and one right is no bar to the other.[21] If the defendant in good faith pays, and the clerk receives, prior to the expiration of the time of redemption, an ordinary bank check, upon which he realizes the money, though after the expiration of the period of redemption, the money, being ready to be paid to the holder of the certificate of sale promptly and without trouble to him, the payment is good.[22] When the defendant has no right of redemption a judgment creditor who did not become such until after the sale can not redeem.[23] And a redemption effected by a sub-agent appointed by the agent is valid if ratified by the principal.[24] If on a sale, subject to redemption, the sheriff makes a deed to the purchaser instead of a certificate of sale, it is an irregularity which will not deprive the judgment debtor of his right to redeem.[25] And it was held that when the debtor or his assignee redeemed land from a sale, it again became subject to sale for the satisfaction of any balance of the judgment under which the prior sale was made, which remained unsatisfied.[26] But this is otherwise when the redemption is made by a creditor or purchaser.[27] When a debtor conveyed to his wife his right of redemption and furnished her the money to make redemption with interest, to hinder and delay his creditors, the land so redeemed remained subject to his debts.[28]

The word defendant as used in section 3102 of the code

[21] Harvey v. Spaulding, 16-397.
[22] Webb v. Watson, 18-537.
[23] Brown v. Markley, 28-689.
[24] Teucher v. Hiatt, 23-527.
[25] Olmstead v. Kellogg, 47-460.
[26] Hayes v. Thode, 18-51; Stine v. Chambless, 18-474; Crosby v. Elkader Lodge, 16-397; Curtis v. Milliard, 14-128; Peckenbaugh v. Cook, 61-477.
[27] Clayton v. Ellis, 50-590; Campbell v. McGinnis, 70-589; Harms v. Palmer, 73-446; Hardin v. White, 63-633.
[28] Peckenburgh v. Cook, 61-477.

of 1873 was held to mean the mortgagor.[29] It will be observed that in the present code the word "debtor" is used. The right of a judgment debtor to redeem, it seems, expires within a year from the date of sale, whether a valid deed be then executed or not.[30] The legal estate of the owner is not divested by the sale until the time for redemption has expired and a deed is made to the purchaser; and a judgment recovered against him in the period allowed for redemption is a lien on his interest in the land and, in case he or his assignee redeems from the prior sale, such judgment may be enforced against the property so redeemed, although the holder of the judgment failed to exercise his own rights of redemption.[31] The defendant's right of redemption may be levied on and sold on execution.[32] The right of the defendant to redeem within a year, can not be extended by any act of his, such as a suit to redeem without more.[33]

When a surety does not, as provided in section 4003 of the code, object to a stay of execution being granted, he will be considered as having assented thereto, and if it is taken, he will be held to have waived the right to redeem his property, if sold under such judgment.[34]

A party who is surety in a debt for which a judgment is rendered, but has no interest in the property sold, is not a defendant within the meaning of the law and can not redeem.[35] And where the owner of land who was entitled to redeem the same, paid the clerk the amount which said clerk claimed was necessary to effect a redemption, but by error the sum paid was too small, and afterward, and prior to the expiration of the period of redemption, the grantee of the purchaser at the sale obtained a deed therefor, it was held in an action to cancel the deed and certificate, that they should be canceled and

[29] Miller v. Ayres, 59-424.
[30] Connor v. Long, 63-295; see Curtis v. Millard, 14-128.
[31] Curtis v. Millard, 14-128; see Shimer v. Hammond, 51-401.
[32] Barnes v. Cavanagh, 53-27; Crosby v. Elkader Lodge, 16-399.
[33] Hughes v. Feeter, 23-547.
[34] Chase v. Welty, 57-230; but see Okey v. Sigler, 82-94.
[35] Miller v. Ayres, 59-424; see Brooks v. Keister, 45-303; Bleckman v. Butler, 77-128.

the owner of the land permitted to perfect his redemption by paying the additional sum necessary with ten per cent. interest thereon from date of sale.[36]

The right of the defendant to redeem for the first six months after the sale is exclusive.[37] As to right of possession.[38]

§ 1252. When redemption may be made by creditors.—If no redemption be made by the defendant within the six months from date of sale, then any mortgagee or creditor of the defendant, whose demand is a lien on the land sold, may redeem the same at any time within nine months from the day of sale; nor can the time to redeem be enlarged by the consent of the purchaser.[39] A junior mortgagee, having assigned the mortgage as collateral security for a debt of his own, may redeem from a sale made on foreclosure of a senior mortgage, and such redemption will inure to the benefit of the assignee of the junior mortgage; nor will the action of the assignee in such case, in refusing to ratify the acts of the assignor, affect his rights in respect to redemption.[40] The defendant or purchaser of the land only can object if the redemption is made by a creditor prior to the expiration of six months from the date of sale.[41]

The right of judgment creditors to redeem from sale of land of their debtor, is barred in nine months from the date of the sale unless exercised by some creditor within that time.[42] The restriction on the defendant as to redemption, when he takes a stay of execution, or appeals, does not apply to creditors nor to a vendee of the execution debtor.[43] The owner of a claim which has been allowed and established against the estate of a decedent may redeem by making application to the district court

[36] Wakefield v. Rotherham, 67-444.

[37] Code, Sec. 4045.

[38] Code, Sec. 4045; Swan v. Mitchell, 82-307; American Inv. Co. v. Farrar, 87-437.

[39] Code, Secs. 4045-4046; Newell v. Pennick, 62-123; George v. Hart, 56-706; Hurn v. Hill, 70-38; Lindsay v. Delano, 78-350; Bleckman v. Butler, 77-128; Albee v. Curtis, 77-644.

[40] Manning v. Markel, 19-103.

[41] Wilson v. Conklin, 22-452.

[42] George v. Hart, 56-706; Newell v. Pennick, 62-123.

[43] Sieben v. Becker, 53-24; Thayer v. Coldren, 57-110.

or to any judge of the district where the real estate to be redeemed is situated. Such application will be heard after notice to such parties as said court or judge may direct and must be determined with due regard to the rights of all persons interested.[44]

The holder of a judgment recovered on a debt contracted prior to the acquisition of a homestead, may redeem from a sale of such homestead though the judgment record does not show the facts making the judgment a lien; proof of such facts may be made aliunde.[45] But an execution creditor who has brought in the property under his execution does not have a lien on such property for any unsatisfied balance of his claim, and neither he nor his assignee can redeem under such sale.[46]

A junior lien-holder not made a party to the foreclosure of a prior mortgage may redeem by action in equity. Not so, however, if his judgment has ceased to be a lien.[47] And in such action the lien-holder may have an accounting of the rents and profits, and have them applied in satisfaction of the mortgaged debt from which he seeks to redeem.[48] Where a mortgage is foreclosed for one installment of the mortgaged debt, or for a part of the sum secured by the mortgage, and the land sold therefor, the remedy of the mortgagee is thereby exhausted so far as the land is concerned; and he can not, after redemption of the land by the mortgagor, subject the land to the payment of that part of the debt remaining unsatisfied, and this is so, though the mortgage secured different notes, some of which are assigned to a third party; and the assignee of the mortgagor, prior to redemption, and who afterward redeems, acquires title to the premises free from the lien of the mortgage for any unpaid balance.[49]

[44] Code, Sec. 4046.

[45] Phelps v. Finn, 45-447.

[46] Clayton v. Ellis, 50-590; see Crosby v. Elkader Lodge, 16-399; Barnes v. Cavanagh, 53-27; Peckenbaugh v. Cook, 61-477.

[47] Jones v. Hartsock, 42-147; American Buttonhole, etc., v. Burlington M. L. Assn., 61-464; Ayers v. Adair County, 61-728; Long v. Millet, 63 N. W., 190.

[48] Bunce v. West, 62-80, and cases cited.

[49] Escher v. Simmons, 54-269; Micklewait v. Rains, 58-605; Harms v. Palmer, 61-483.

A creditor who obtained a judgment against a grantor, who had made a fraudulent conveyance, is not entitled to redeem from execution sale of the property fraudulently conveyed, which is made under a decree obtained by other judgment creditors, subjecting such property to the lien of their judgments.[50] And when a party seeking to redeem was one of several plaintiffs at whose suit the property in question was in equity decreed to be subject to their judgments and sold to satisfy the same, he can not redeem.[51] Prior to the change in the statute it was held that the holder of a claim against an estate which had not been allowed by the court was not a creditor so as to be entitled to redeem.[52] After a sale of land on foreclosure on a claim of the mortgagee, he can not redeem therefrom.[53] Nor can an assignee of a portion of the mortgaged debt redeem from a sale on foreclosure of another portion.[54]

§ 1253. Who is a creditor under the statute.—Any creditor whose claim becomes a lien prior to the expiration of the time allowed by law for the redemption by creditors, may redeem, and a mortgagee may thus redeem before or after the debt secured by the mortgage falls due.[55]

And a mortgagee whose mortgage secures a liability which is only contingent and may never ripen into a certainty is, nevertheless, a creditor and entitled to redeem.[56] And where a junior judgment creditor purchases at an execution sale, in satisfaction of a senior judgment, property on which his judgment is a lien, he may, like any other judgment creditor, redeem the property from such sale, though he thereby redeems from himself.[57]

§ 1254. Of redemption by the holder of a me-

50 Howland v. Knox, 59-46.
51 Hayden v. Smith, 58-285; see Clayton v. Ellis, 50-590.
52 Byer v. Healy, 84-1.
53 Todd v. Davy, 60-532, and cases cited.
54 Harms v. Palmer, 61-483.
55 Code, Sec. 4046.
56 Crossen v. White, 19-109.
57 Citizens Sav. Bk., etc., v. Percival, 61-183.

chanic's lien.—A mechanic's lien before judgment is not of such a character as to entitle the holder to redeem.[58] And in proceedings to establish a mechanic's lien upon real property which had been sold under a decree of foreclosure since the claim accrued, where the mortgagor and wife, who had parted with the equity of redemption, were the only parties defendant, it was held that the holder of the mechanic's lien and claim was not entitled to redeem from the foreclosure sale.[59]

§ 1255. Of redemption in equity.—The right of redemption by suit in equity in proper cases is not affected by the provisions of the statute determining when redemption may be made and it has often been held that one holding a junior lien, who is not made a party to the foreclosure of a prior lien, may, by proceedings in equity, be permitted to redeem.[60] But the holder of a junior judgment, who was not made a party to the foreclosure of a prior mortgage, because his judgment was not indexed, and said mortgagee had no actual notice of said judgment can not redeem.[61] Where the judgment debtor in a mortgage foreclosure paid a part of the judgment, but was not credited for it, and the land was sold for the whole judgment, and bid in by the judgment creditor and the judgment debtor did not within the year offer to redeem by paying the balance justly due, it was held he could not invoke the aid of a court of equity.[62] When in an action to redeem from a foreclosure sale of land because of irregularities in the appointment of appraisers, an order was made fixing the time within which plaintiff might redeem, he was not entitled to have brought into court for his use, whether he redeemed or not, a mortgage for the purchase money held by the defendants from one to whom they had sold after their purchase at the foreclosure sale, and who was not shown to have had

[58] Code, Sec. 4046.
[59] Spink v. McCall, 52-432.
[60] American Buttonhole, etc., v. B. M. L. Assn., 68-327; Jones v. Hartsock, 42-147.
[61] Sterling Mfg. Co. v. Earley, 69-94.
[62] McConkey v. Lamb, 71-636.

any notice of the irregularities complained of.[63] One whose land is wrongfully sold without redemption and for an inadequate price may have such sale set aside in equity.[64] Where a junior mortgagee whose mortgage was recorded, was not made a party to the foreclosure of the senior mortgage, the fact that after the foreclosure sale, and before the expiration of the statutory time to redeem therefrom he bought the land at a sale under foreclosure of his own mortgage for the full amount of his judgment will not preclude him from suing in equity to redeem from the sale under the senior mortgage.[65]

§ 1256. What law is applicable to the sale.—A sale of real property after the taking effect of the code of 1873, under a judgment rendered prior to that time, must conform to the law in force at the time the judgment was rendered, which gave the debtor the right to elect whether the property should be appraised before the sale, or sold subject to redemption.[66] And where the judgment was rendered after that code took effect upon a debt contracted before that time, the sale must be made under the provisions of such code.[67]

§ 1257. Of creditors redeeming from each other.—Creditors having the right of redemption may redeem from each other within the time heretofore stated.[68]

Whenever a senior creditor redeems from a junior creditor the latter may in return redeem from the former, and so on, as long as the land is taken from him by virtue of a paramount lien.[69]

After the expiration of nine months from the day of sale, the creditors can no longer redeem from each other, except as herein explained, but the debtor may still redeem at any time within a year from the date of sale.[70]

[63] Hall v. Ellis, 31-86.
[64] Fitzgerald v. Kelso, 71-731.
[65] McCormick Harv. Mch. Co. v. Llewellyn, 65 N. W., 412.
[66] Holland v. Dickerson, 41-367.
[67] Babcock v. Gurney, 42-154; Fonda v. Clark, 43-300.
[68] Code, Sec. 4047; Seevers v. Wood, 12-295; Phelps v. Finn, 45-447.
[69] Code, Sec. 4052.
[70] Code, Sec. 4053.

§ 1258. Of computing the time of redemption.—In computing the time of redemption, the first day, being the day of the sale, should be excluded, and the right of redemption exists until the last moment of the same day of the succeeding year.[71]

§ 1259. Of the terms of redemption.—The terms of redemption when made by a creditor in all cases will be the reimbursement of the amount bid or paid by the holder of the certificate, including all costs, with interest the same as the lien redeemed from bears, on the amount of such bid or payment, from the time thereof, but where a mortgagee whose claim is not yet due is the person from whom the redemption is thus to be made, he shall receive on such mortgage, only the amount of the principal thereby secured with unpaid interest thereon to the time of such redemption. The terms of redemption when made by the title holder will be the payment into the clerk's office of the amount of the certificate and all sums paid by the holder thereof in effecting redemptions, added to the amount of his own lien, or the amount he has credited thereon, if less than the whole, with interest at contract rate on the certificate of sale from its date, and upon sums so paid by way of redemption from date of payment, and upon the amount credited on his own judgment from the time of said credit, in each case including costs.[72] But when a senior creditor thus redeems from his junior he is required to pay off only the amount of those liens which are paramount to his own with interest and costs appertaining to such liens.[73] The holder of a junior mortgage made defendant in a foreclosure proceeding, may redeem after sale from the holder of the senior mortgage, who has bid in the property for less than the mortgage debt by paying the amount bid by such purchaser with interest and costs. He need not pay the whole mortgage debt.[74] But this rule is ap-

[71] Teucher v. Hiatt, 23-527.
[72] Code, Secs. 4050, 4051.
[73] Code, Sec. 4048.
[74] Tuttle v. Dewey, 44-306; Hayes v. Thode, 18-51; Iowa County v. Beeson, 55-262.

plicable only to statutory redemptions, not to those made in equity.[75]

In redeeming from an execution creditor, who has purchased the property at the sale, the debtor need only pay the amount bid by such creditor and any portion of the judgment remaining unsatisfied is not a lien on the property sold.[76] The owner of a homestead mortgaged for the purchase money can not, by redeeming from a foreclosure sale for a part of the judgment only, hold the land free from the lien of the unsatisfied portion thereof.[77] When one redeems from a sale under a judgment which by mistake was rendered for too small a sum he need only tender the amount for which the property was bid off with interest and costs.[78] There is no distinction between the debtor and creditor as to the matter of making redemption, and the terms "his own lien" used in the statute refer to the lien of the holder and not of the redemptioner.[79]

A junior creditor may, in all cases, prevent a redemption by the holder of the paramount lien by paying off that lien, or by leaving with the clerk, beforehand, the amount necessary to do so.[80]

And the junior creditor may redeem from a senior judgment creditor.[81]

A junior judgment creditor, who purchases and takes an assignment of the certificate of sale from his senior creditor, to whom the land has been sold, will be regarded as a redemption creditor within the meaning of the statute, and to entitle a creditor or lien-holder junior to him to redeem the property from such sale, he must pay not only the amount for which it was sold, but also the amount of the other superior judgment liens held by the person thus holding the certificate of sale by assignment.[82] A redemption after six and prior to nine months

[75] Iowa County v. Beeson, 55-262.
[76] Clayton v. Ellis, 50-590; see Barnes v. Cavanagh, 53-27; Crosby v. Elkader Lodge, 16-399.
[77] Campbell v. McGinnis, 70-589.
[78] Day v. Cole, 44-452.
[79] Clayton v. Ellis, 50-590.
[80] Code, Sec. 4049.
[81] Code, Sec. 4049.
[82] Goode v. Cummings, 35-67.

of the sale can be made by the parties without the aid of the clerk and when they do what in law is necessary to constitute a redemption the act will be so treated.[83] What acts will amount to an equitable assignment of the certificate.[84]

§ 1260. Same.—Section 4056 requiring a lien-holder in redeeming to pay the amount necessary to redeem into the clerk's office, applies only to redemptions made after the expiration of nine months from the date of sale, and not to redemptions made within the nine months, which may be made by paying the proper amount directly to the creditor, and taking an assignment of the certificate of sale.[85] The purchaser of a junior judgment, before the formal assignment thereof, and before the expiration of six months from the day of sale, who, intending to redeem, pays to the purchaser of the land the amount of his claim, and takes an assignment of the certificate of sale, though his redemption may be informal, is still entitled to be regarded as a purchaser and holder of the certificate; and a judgment creditor whose lien is inferior to his, in order to redeem, must pay such holder the amount of this certificate as well as the amount of his judgment.[86] The holder of a junior mortgage who is made a defendant in an action to foreclose a senior one, has the right to redeem after sale by paying the amount bid, with interest, within the time allowed by law, notwithstanding the amount so bid is less than the amount of the mortgage debt.[87] The purchaser of real estate under a judgment may redeem from a prior mortgage before its foreclosure.[88] And a purchaser of mortgaged lands, whose deed is recorded at the time of the beginning of the action to foreclose, will not be bound by the foreclosure proceedings unless made a party thereto; but has the right to redeem by paying the mortgaged debt,

[83] Lamb v. Feeley, 71-742; West v. Fitzgerald, 72-306; Lamb v. West, 75-399.

[84] Gilbert v. Husman, 76-241; Byer v. Healy, 84-1.

[85] Goode v. Cummings, 35-67.

[86] Wilson v. Conklin, 22-452; see Rush v. Mitchell, 71-333.

[87] Tuttle v. Dewey, 44-306.

[88] Hammond v. Leavitt, 59-407.

though he is not entitled to a judgment for the possession of the premises.[89]

The amount necessary to redeem in an action by a mortgagor who was not made a party to a foreclosure suit from a sale under such foreclosure, must be determined with reference to both the right to rents and the liability to pay for improvements, and while it is the general rule that such a redemptioner need not pay for permanent improvements, yet it is held that as against a purchaser in possession in good faith, under the belief that he is the sole owner, with the consent, express or implied, of the junior lien-holder, or when the latter has for a considerable time failed to assert his rights to redeem, he must, if he redeems, pay for permanent improvements which have been made.[90] When the judgment in a foreclosure proceeding directed the sale of the property and provided that the proceeds of sale should be applied in satisfaction of the judgment and costs, and that any balance should be applied in satisfaction of notes secured by the same mortgage, but not due, and the tract, eighty acres, was offered en masse, and bid in by the plaintiff in execution for more than sufficient to pay the judgment, but he had not paid the amount into court; the defendant, it was held, could not redeem by paying the amount of the judgment only, but that he must pay the full amount bid at the sale.[91] The subject of redemption as applied to the priority of liens in particular cases, is further discussed in the cases below cited.[92]

§ 1261. Who obtains the property.—Unless the defendant redeems within one year the purchaser or the creditor who last redeemed prior to the expiration of the

[89] Porter v. Kilgore, 32-379.

[90] Barrett v. Blackmar, 47-565; American Buttonhole, etc., v. B. M. L. Assn., 68-326; Montgomery v. Chadwick, 7-114; Mickles v. Dillage, 17 N. Y., 80; Green v. Dixon, 9 Wis., 532; Troost v. Davis, 31 Ind., 34; Bacon v. Cotterell, 13 Minn., 194; Roberts v. Fleming, 53 Ill., 196.

[91] Williams v. Dickerson, 66-105.

[92] Gorder v. Lundy, 66-448; Dickerman v. Lush, 66-444.

nine months from the date of the sale, will hold the property absolutely.[93]

And in case the land is thus held by a redeeming creditor his lien and the claims out of which it arose will be held to be extinguished unless he pursues the following course.[94] If he is unwilling to hold the property and credit the debtor thereon the full amount of his lien, he must state the utmost amount he is willing to credit him with. If the amount paid to the clerk is in excess of the prior bid and liens, he must refund said excess to the party paying the same, and enter each such redemption made by a lien holder upon the sale book, and credit upon the lien, if a judgment in the court of which he is clerk, the full amount thereof, including interest and costs, or such less amount as the lien-holder is willing to credit therein, as shown by the affidavit filed.[95] When a junior judgment creditor redeemed from a sale under a senior judgment, and filed with the clerk within the time required, a statement of the amount he was willing to credit on his judgment, which statement the clerk failed to enter on the sale-book until after ten days from the expiration of nine months after the day of sale, such neglect of the clerk did not invalidate the lien of the junior judgment.[96] When the debtor has actual notice of the filing of the statement he suffers no prejudice from want of constructive notice; no particular form of statement is required. It will be sufficient if it indicate clearly the amount he is willing to credit on his judgment.[97] When a national bank holding a second mortgage procured an assignment of the certificate of purchase issued under a judicial sale of the property under the first mortgage, and at the expiration of the period of redemption took a sheriff's deed, no entry having been made in the sale-book, it was held the transaction was a purchase, and not a redemption.[98] The omission to file the statement above men-

[93] Code, Sec. 4054.
[94] Code, Sec. 4055; Lamb v. Feeley, 71-742.
[95] Code, Sec. 4056.
[96] Craig v. Alcorn, 46-560.
[97] Craig v. Alcorn, 46-560.
[98] Streeter v. First Nat'l Bk., etc., 53-177.

tioned will not prejudice the right of other creditors to redeem, nor defeat the right of the debtor to demand the extinguishment of all claims of the creditor so failing to file his statement.[99] Whether a senior lien-holder may redeem from a junior who has already redeemed from him, quære.[1]

§ 1262. Of the mode of redemption.—The mode of redemption by a lien-holder is by paying into the clerk's office the amount necessary to effect the same, computed as heretofore stated, and filing therein his affidavit or that of his agent or attorney, stating as nearly as practicable the nature of his lien and the amount due and unpaid thereon.[2] If he is unwilling to hold the property and credit the debtor thereon the full amount of his lien, he must state the utmost amount he is willing to credit him with. If the amount paid to the clerk is in excess of the prior bid and liens, he must refund the excess to the party paying the same, and enter each such redemption made by a lien-holder upon the sale book, and credit upon the lien, if a judgment in the court of which he is clerk, the full amount thereof, including interest and costs, or such less amount as the lien-holder is willing to credit therein as shown by the affidavit filed.[3] Except as otherwise provided, redemption has the effect of discharging and satisfying the whole debt and lien under which it is made.[4] And further as to the effect of a failure to credit the amount a redemptioner is willing to allow on his claim.[5] The provision as to the whole of the redemptioner's claim being satisfied unless he pursues the course prescribed by the statute applies to redemptions made prior to the expiration of the nine months as well as to those made after that time.[6] The clerk, on such payment being made and the affidavit filed, when one is required, must give the person making such re-

[99] Goode v. Cummings, 35-67.
[1] Phelps v. Finn, 45-447.
[2] Code, Sec. 4056.
[3] Code, Sec. 4056.
[4] West v. Fitzgerald, 72-306.
[5] Tharp v. Forrest, 76-195; Montpelier Savings Bk. v. Arnold, 81-158.
[6] West v. Fitzgerald, 72-306.

demption a receipt for the money, stating the purpose for which it was paid. A redeeming creditor is entitled to an assignment of the certificate issued by the sheriff to the purchaser at the sale.[7] Payment to the clerk by a bank check, if accepted by him, will be good in redemption.[8]

§ 1263. Of settling controversies as to right to redeem or as to the amount to be paid.—If any question arises as to the right to redeem, or the amount of any lien, the person claiming such right may deposit the necessary amount therefor with the clerk, accompanied with an affidavit as heretofore stated, and also stating therein the nature of such question or objection, which shall be submitted to the court, or a judge thereof as soon as practicable, upon such notice as it or he may prescribe, of the time and place of the hearing of the controversy, at which time and place it will be tried upon such evidence and in such a manner as may be prescribed, and the proper order made and entered of record in the case in which execution issued and the money so paid will be held by the clerk subject to the order thus made.[9]

§ 1264. Of redemption from sale in parcels and of the interests of tenants in common.—When property has been sold in parcels, any distinct portion may be redeemed by itself.[10] In making redemption of a distinct portion of the property sold in parcels, it is necessary to pay the entire amount of the judgment under which the sale was made and which is a lien on the property. One cannot in such a case redeem by paying a proportionate amount of the lien.[11] And when the interests of several tenants in common are sold on execution, the undivided portion of any, or either of them, may be separately redeemed.[12]

§ 1265. Of the rights of the purchaser.—The purchaser of the legal title of land at sheriff's sale takes the

[7] Code, Sec. 4058.
[8] Webb v. Watson, 18-537.
[9] Code, Sec. 4057.
[10] Code, Sec. 4059.
[11] Case v. Fry, 91-132.
[12] Code, Sec. 4060.

land free of any claim or title arising under any unrecorded deed or a mere equity of which he had no actual notice at the time of his purchase and which would be invalid as against an ordinary purchaser, and this is so both at law and in equity; and a judgment creditor purchasing at sheriff's sale, as above stated, is a purchaser within the meaning of code section 2925, and in the absence of equitable circumstances is entitled to the same protection as any other bona fide purchaser.[13]

But the purchaser of chattels at an execution sale takes such title only as the defendant in execution had at the time of the levy.[14] A tenant in possession of land sold on execution under a lease from the execution defendant, has no better right than his lessor and is charged with notice of sale, and can not hold the land after the period of redemption expires for the purpose of reaping a crop.[15]

§ 1266. Of assigning the right to redeem.—The rights of the defendant in relation to redemption are transferable and the assignee has the same rights with reference to redemption that his assignor had prior to the assignment.[16] And the purchaser of property at a sale under a judgment which is junior to a mortgage, may redeem from such mortgage before its foreclosure in the same manner as the debtor might have redeemed.[17]

§ 1267. Of the sheriff's deed.—If the defendant or his assignees fail to redeem, the sheriff then in office must, at the end of the year, execute a deed to the person who is entitled to the certificate, or to his assignee, and if the holder of the certificate is dead the deed must be made to his heirs, but the property will be subject to the

[13] Vannice v. Bergen, 16-555; Code, Sec. 2925; Bell v. Evans, 10-353; Evans v. McGleason, 18-150; Gower v. Doheney, 33-36; Halloway v. Platner, 21-121; Butterfield v. Walsh, 21-97; Wallace v. Bartle, 21-346; Walker v. Elston, 21-529; Jones v. Brandt, 59-332; Curtis v. Millard, 14-128.

[14] Rakestraw v. Hamilton, 13-147.

[15] Wheeler v. Kirkendall, 67-612; Downard v. Groff, 40-597; Martin v. Knapp, 57-336.

[16] Code, Sec. 4061; Stoddard v. Forbes, 13-296; Robertson v. Moline, etc., Wagon Co., 88-463.

[17] Hammond v. Leavitt, 59-407.

payment of the debts of the deceased in the same manner as if acquired during his lifetime.[18] The sheriff in office when a certificate of sale made by his predecessor is presented, is the proper officer to make the deed; it can not be executed by a sheriff whose term of office has expired.[19] As the estate of the debtor is not divested until the execution of the deed, any crops on the premises which are matured do not pass thereby, although they were not matured at the time the purchaser was entitled to his deed; but crops sown by the tenant after the sale, and which can not be harvested before a deed is due, pass to the purchaser of the land.[20] And a purchaser at a sale is entitled to rent accruing after he receives his deed.[21] Deeds executed by the sheriff at a sale on execution are presumptive evidence of the regularity of all previous proceedings in the case, and are admissible in evidence without preliminary proof, nor need the deed recite the execution, and the description in the deed may cure uncertainties in the levy and return.[22]

When the sheriff makes a mistake in the description of the land in a deed, the purchaser, or those claiming under him, may have it corrected in equity.[23] And the sheriff may execute a deed to a person other than the bidder at the sale if authorized so to do by him.[24] A sale under a void judgment will not be validated by recitals in the deed.[25] A sale for costs which have been satisfied under a prior execution is void.[26] If one not entitled to redeem pays money for that purpose and procures an assignment of the certificate of purchase, he is entitled to a deed.[27] The purchaser is by the deed vested with the ownership of the premises and of the crops then grow-

[18] Code, Sec. 4062.
[19] Conger v. Converse, 9-554; Code, Sec. 4062.
[20] Everingham v. Braden, 58-133.
[21] Wheeler v. Kirkendall, 67-612; Townsend v. Isenberger, 45-670; Martis v. Knapp, 57-336.
[22] Code, Sec. 4064; Conger v. Converse, 9-554; Deere v, McConnells, 15-269; Childs v. McChesney, 20-431; Foley v. Kane, 53-64; Humphry v. Beeson, 1 G. Gr., 199; Hopping v. Burnam, 2 G. Gr., 39.
[23] Ehelringer v. Moriarty, 10-78.
[24] Ehelringer v. Moriarty, 10-78.
[25] Cassidy v. Woodward, 77-354.
[26] Soukup v. Union Inv. Co., 84-448.
[27] Rush v. Mitchell, 71-333.

ing thereon and of the right to immediate possession.[28] But the title to matured crops would not pass to the purchaser.[29] The deed will not be held void for uncertainty of description in a suit in equity brought by those claiming adversely thereto to quiet the title to the land in them, when it appears that the land in dispute was the land which was, in fact, sold by the sheriff under his writ, although it was defectively described in the deed; nor will such deed be void because executed by a deputy, or if issued prior to the expiration of the period of redemption; but, if it is absolute in form when it should be a certificate, it will not defeat the right of redemption.[30]

Ordinarily the following form of a deed will be found sufficient:

FORM OF SHERIFF'S DEED.

This Indenture, made on the ——— day of ——— A. D. 18—, by and between ———, sheriff of ——— county, State of Iowa, of the first part, and ———, of the county of ———, State of ———, of the second part, witnesseth:

That whereas, by virtue of a general (or special) execution directed to the sheriff of ——— county, Iowa, and dated the ——— day of ———, 18—, and issued out of the clerk's office of the district court of the State of Iowa, in and for ——— county, under the seal thereof upon a judgment (or judgment and decree of foreclosure) rendered in said district court on the ——— day of ——— A. D. 18—, in favor of ——— and against ——— for the sum of ——— dollars and ——— cents debt, and ——— dollars and ——— cents costs, the said ———, sheriff, as aforesaid, did, on the ——— day of ———, A. D. 18—, levy upon the real estate hereinafter described as the property of the said ———, defendant, to satisfy the said execution, amounting to ——— dollars and ——— cents debt, and ——— dollars and ——— cents costs, together with interest and all accruing costs.

And whereas, the said ———, sheriff, as aforesaid, after the levy upon the within described real estate, gave four weeks' notice of the time and place of selling the same under said execution, by posting up printed (or written) notices thereof at three public places in said ——— county, one of which was at the court house in ———, where the last district court was held, and by causing two publications of said notice

[28] Stanborough v. Cook, 83-705; Wheeler v. Kirkendall, 67-612; Martin v. Knapp, 57-336; Townsend v. Isenberger, 45-670.

[29] Everingham v. Braden, 58-133; Richards v. Knight, 78-69.

[30] Hackworth v. Zollars, 30-433; Olmstead v. Kellogg, 47-460; Warfield v. Woodward, 4 G. Gr., 386.

to be made in the (name of newspaper) a newspaper printed at ———, in said county, immediately preceding the day of sale.

And whereas, the said ———, as sheriff aforesaid, in pursuance of the notice of sale aforesaid, in conformity to law and by virtue of said execution, did, on the ——— day of ——— A. D. 18—, at the hour of ——— o'clock, in the ———noon of said day, at (here state place of sale) in ——— county, Iowa, expose and offer for sale at public auction the real estate hereinafter described, and did then and there sell the same at public auction to ———, for the sum of ——— dollars, he being the highest and best bidder therefor.

Whereupon the said sheriff, after receiving the said sum of money from said purchaser, made and delivered to him a certificate of sale as directed by law. And whereas, the time allowed by law for redeeming said premises having expired without any redemption thereof having been made.

Now, therefore, this indenture witnesseth: That in consideration of the premises and of the said sum of ——— dollars, so bid and paid as aforesaid, the receipt whereof is here acknowledged, I, the said ———, sheriff as aforesaid, party of the first part, do hereby sell and convey unto the said ———, party of the second part, his heirs and assigns forever, the following described real estate situated in ——— county, and State of Iowa (being the same real estate hereinbefore referred to), to-wit (here describe it).

The intention being to sell and convey hereby all the right, title, interest and estate which the said ——— had in and to said premises on the ——— day of ——— A. D. 18—.

To have and to hold the said real estate with all the appurtenances thereunto belonging to the said ———, his heirs and assigns forever, as fully and absolutely as the said party of the first part by virtue of the premises might and could sell and convey the same.

In witness whereof, the said party of the first part has hereunto set his hand this ——— day of ——— A. D. 18—.

———, sheriff of ——— county, Iowa.

State of Iowa, } ss.
——— County. }

Be it remembered, that on this ——— day of ——— A. D. 18—, before me (name of officer), a notary public within and for said county, personally appeared ———, sheriff of ——— county, Iowa, personally to me known to be the identical person whose name is subscribed to the foregoing deed as grantor, and acknowledged the execution thereof to be his voluntary act and deed as said sheriff for the purposes therein mentioned.

Witness my hand and seal the day and year last above written.

[Seal.] ———, notary public, in and for ——— county, Iowa.

If the equity of redemption only has been sold, then the deed may be in the following form:

This indenture made the ——— A. D. 18—, by and between ———, sheriff of ——— county, Iowa, of the first part, and ———, of the county

of ———, in the State of Iowa, of the second part, witnesseth, that whereas by virtue of the general execution directed to the sheriff of ——— county, Iowa, dated the ——— day of ———, 18—, and issued out of the clerk's office of the district court of the State of Iowa, in and for ——— county, under the seal of said court, upon a judgment rendered in said district court on the ——— day of ———, 18—, in favor of ———, and against ———, for the sum of ——— dollars and ——— cents debt, and ——— dollars and ——— cents costs, the said ——— sheriff, as aforesaid, did on the ——— day of ———, 18—, levy upon the real estate hereinafter described, including the right of possession, and the right and equity of redemption of the said ——— in and to said lands (existing under a sale of said lands on the ——— day of ———, 18—, by virtue of an execution against said ——— and in favor of ———, issued out of the office of the clerk of the district court of the State of Iowa, on a judgment rendered in said court, on the ——— day of ———); 18—, as the property of the said ——— defendant, to satisfy the said execution, amounting to ——— dollars and ——— cents debt, and ——— dollars and ——— cents costs, together with interest and accruing costs. And whereas the said ———, sheriff, as aforesaid, gave four weeks' notice of the time and place of selling said real estate under said execution by posting up printed (or written) notices thereof, at three public places in said ——— county, one of which was at the court house in ———, where the last district court was held, and by causing two publications of said notice to be made in the (name of newspaper), a newspaper printed at ———, in said county, immediately preceding the date of sale, and whereas the said ———, as sheriff aforesaid, in pursuance of the notice of sale aforesaid, in conformity to law, and by virtue of said execution, did on the ——— day of ———, 18—, at the hour of ——— o'clock in the ———noon of said day, at the court house in ———, in said county, expose and offer for sale at public auction the real estate hereinafter described, and did then and there sell the same at public auction, to one ———, without redemption, for the sum of ——— dollars, he being the highest and best bidder therefor; now, therefore, this indenture witnesseth that in consideration of the premises, and of the said sum of ——— dollars so bid and paid, as aforesaid, the receipt whereof is hereby acknowledged, I, the said ———, sheriff, as aforesaid, party of the first part, do hereby sell and convey unto the said ———, party of the second part, his heirs and assigns forever, the following described real estate situated in the county of ——— and the State of Iowa, (being the same real estate hereinbefore described, and here describe land, and then follow with the words, "including the right of possession and right and equity of redemption of ———," etc., as in the prior part of this form), to have and to hold the said real estate, with all the appurtenances thereunto belonging to the said ———, his heirs and assigns forever, as fully and absolutely as the said party of the first part, by virtue of the premises, might and could sell and convey the same.

In witness whereof, the said party of the first part has hereunto set his hand this ——— day of ———, 18—.

———, sheriff of ——— county, Iowa.

(Add acknowledgment of previous form.)

And if the sale is of a leasehold interest in land these forms can be readily adapted for use in such a case.

§ **1268. When the deed is constructive notice.**—The purchaser of real estate on execution which is subject to redemption need not place any evidence of his purchase on record until sixty days after the expiration of the full time for redemption, as up to that time the publicity of the proceedings is constructive notice of the rights of the purchaser.[31] The provision requiring notice applies only as against purchasers from the judgment defendant.[32] But one who purchases after the expiration of one year and sixty days, having actual notice, or one who purchases with a fraudulent intent to defeat the title of the purchaser at the execution sale, will not be protected.[33] But the purchaser in good faith, without notice, after the expiration of one year and sixty days will hold the property against the purchaser at the execution sale who has neglected to put his deed on record.[34]

§ **1269. Of the sheriff's return.**—The sheriff must make a full and complete return on every execution which comes into his hands of his doings thereon, and file the same with the clerk of the court out of which the writ issued, within seventy days from the date of writ. But, as has been seen, if the levy has been made within the seventy days, the sale may be completed after that time, and in such cases, as also in cases where the property has been taken from him and his right to its possession is in litigation, he is not required to make his return within the seventy days. Every act of the officer done under the execution must be set out in his return; if he has summoned garnishees or taken their answers,

[31] Code, Sec. 4063; Churchill v. Morse, 23-229; Hultz v. Zollars, 39-589; Wood v. Young, 38-102; Gardner v. Jaques, 42-577.

[32] Lindley v. Mays, 66-265.

[33] Harrison v. Kramer, 3-543; Walker v. Schreiber, 47-529; Rush v. Mitchell, 71-333.

[34] Harrison v. Kramer, 3-543; Churchill v. Morse, 23-229; Hultz v. Zollars, 39-589; Gardner v. Jaques, 42-577; Lindley v. Mays, 66-265; see McGinnis v. Edjell, 39-419; Cushing v. Edwards, 68-145.

or if the property has been taken from him, or if he has been enjoined from selling it, these and other like facts, so far as they exist, should be set out in the return.

Generally the sheriff's return should be in the following form:

FORM OF SHERIFF'S RETURN ON EXECUTION.

I, ——— sheriff of ——— county, Iowa, hereby certify and return that I received the within (or annexed) writ of execution, on the ——— day of ——— A. D. 18—, at ——— o'clock in the ——— noon of said day; that by virtue thereof, I did, on the ——— day of ——— A. D. 18—, (or on the same day) levy upon the property of said ———, the defendant herein, described as follows (here describe the property, each tract of land or each article of personal property), and after making said levy I gave four (or three weeks in case of personal property) weeks' notice of the time and place of selling said (real) property, by posting up written (or printed) notices thereof, in three public places within my county, one of which was at the place where the last district court was held, and by causing two publications of said notice to be made in the (name of newspaper), a newspaper printed at ———, in said county of ———, immediately before said sale; that on the ——— day of ——— A. D. 18—, (twenty days before the day of sale), I served the said ———, who was in the actual possession of said real property, with written notice, stating that I had levied on said real property by virtue of this execution, and mentioning the time and place of said sale, a copy of which is attached hereto marked exhibit "A," and made part of this return. (If the property levied on is personal then say) I further certify and return that for the purpose of ascertaining the value of said property, on the ——— day of ——— A. D. 18—, I caused A B and C D, two disinterested householders of the neighborhood, to be selected, the former by said defendant and the latter by plaintiff (or as the case may be) as appraisers thereof, who then and there made and delivered to me an appraisement of said (personal) property, in writing, signed and sworn to by them, by which they appraised said property (here state the amount of the appraisement on each article of personal property, or by reference say) as shown by said written appraisement, which is hereto annexed marked exhibit "B," and made a part of this return. And I further certify and return, that in pursuance of said notice, I did on the ——— day of ———, 18—, at ——— o'clock in the ———noon of said day, that being the time appointed for said sale, at (here state place of sale) expose to sale at public auction the property aforesaid, to the highest and best bidder, for cash, and then and there sold (the premises or a part thereof, as the case may be; or where personal property is sold, say the goods and chattels to the persons respectively named in schedule "C" hereto annexed and made a part of this return, for the prices therein shown, they being the highest and best bidders therefor) to ——— for the sum of ——— dollars, he being the highest and best bidder therefor

(if the property is personal and does not sell for two-thirds of the appraised value, the return should show that the property was offered for sale at public auction but could not be sold for two-thirds of its value or was sold for one-half the value, as the case may be), who then and there paid to me the said sum of ——— dollars, so bid by him; whereupon I executed to the said ——— a certificate of purchase in due form of law of the said sale, and I return said execution satisfied (or unsatisfied, as the case may be) with the sum of ——— dollars made thereon, less ——— dollars, sheriff's costs on execution retained by me. (See statement in full annexed marked exhibit "D." This statement will be found following the next form.)

———, sheriff of ——— county, Iowa.

If the right of possession and equity of redemption only has been sold, the return should be in the following form:

FORM OF SHERIFF'S RETURN ON EXECUTION.

I, ———, sheriff of ——— county, Iowa, hereby certify and return, that I received the annexed execution on the ——— day of ———, 18—, at ——— o'clock in the ———noon; that by virtue thereof, I did, on the same day (or on the ——— day of ———, 18—), levy upon the property of said defendant ———, therein described, as follows, to-wit (here describe the real estate and follow "including the right of possession and right and equity of redemption of the said ———, existing under a sale of said real estate on the ——— day of ———, 18—, by virtue of an execution against said ———, and in favor of ———, issued out of the office of the clerk of the district court of ——— county, Iowa, on a judgment rendered in said court, on the ——— day of ———, 18—, in favor of ———, and against said ———"). And after making said levy I gave four weeks' notice of the time and place of selling said real property, by posting up printed notices thereof in three public places within my county, one of which was at the place where the last district court was held, and by causing two publications of said notice to be made in the (name of newspaper), a newspaper printed at ———, in said county of ———, immediately before said sale; that on the ——— day of ———, 18—, twenty days before said sale, I served ———, who was in actual possession of said property, with written notice stating that I had levied on said real property, including the right of possession, and the right and equity of redemption, as aforesaid, by virtue of this execution, and mentioning the time and place of said sale, a copy of which is attached hereto marked exhibit "A," and made a part of this return; and I further certify and return, that in pursuance of said notice, I did, on the ——— day of ———, 18—, at ——— o'clock in the ———noon of said day, that being the time appointed for said sale, at the front door of the court house, in ———, Iowa, expose to sale at public auction, as by law required, the property aforesaid (and there being no bidders, I then adjourned said sale for three days, when for like cause I again

adjourned said sale for three days till the ——— day of ———, 18—), when I offered the said property at public outcry in parcels as by law required, to the highest and best bidder, for cash, (if there are no bids for the property in parcels, then the return should state) but receiving no bids for the same in parcels, I then offered the said property en masse, and I then and there sold (here describe land and follow as above, "including, etc.") without redemption, to ———, for the sum of ——— dollars, he being the highest and best bidder therefor, who then and there paid me the sum of ——— dollars, bid by him, whereupon I executed to the said ——— a deed in due form of law for the said real estate, and the right of possession and the equity of redemption therein, and I return this execution satisfied (or unsatisfied, as the case may be), with the sum of ——— dollars, made thereon, less ——— dollars, sheriff's costs of execution retained by me. (See statement in full annexed marked exhibit "D.")

———, sheriff of ——— county, Iowa.

The exhibits referred to in the return on execution should be properly marked and attached to the return and made a part of it. The statement referred to in the forms above given may be as follows:

STATEMENT IN FULL—"D."

Amount of judgment.....18—	.....	$
Interest at——per centum to..18—	.....	
Court costs	.....	
Sheriff's costs	.....	
Amount due .....18—	.....	
Amount paid .....18—	.....	
		$———
Balance due after 1st payment.....	.....	$
Interest to .....18—	.....	
Amount due .....18—	.....	
Amount paid .....18—	.....	
		$———
Balance due after 2d payment....	.....	$
Interest to .....18—	.....	
		$———
Amount due on execution....188--	.....	$
Amount bid by.....	.....	

SHERIFF'S FEES IN FULL.		DISPOSAL OF PROCEEDS.	
Service	$	$	Sheriff's fees retained.
Posting notices			Court costs paid to clerk.
Mileage			Judgment paid to.....
Notice of levy			.....
Notice of sale			.....
Publication			
Notice to choose appraisers.		$	Total amount received.
Notifying appraisers			
Appraisal			
——— day's sale			
——— adjournment			
Certificate			
Sheriff's deed			
Commission			
Total	$		

———, sheriff of ——— county, Iowa.

§ 1270. Of damages for injury to property, etc.— The purchaser of real estate sold on execution, or any person who has succeeded to his interest, may, after his estate becomes absolute, recover damages for any injury to the property committed after the sale, and before possession is delivered under the deed.[35]

[35] Code, Sec. 4065; Miller v. Ayres, 59-424; Flickinger v. Omaha Bridge and Terminal R. Co., 67 N. W., 372.

CHAPTER LXXIX.

OF REVIVOR OF JUDGMENTS.

Sec. 1271. When judgments will be revived.
1272. Of the sheriff's duty.
1273. Of the affidavit.
1274. Of execution against surviving defendants.
1275. When execution may be quashed.
1276. Of proceedings when all the defendants are dead.

Section **1271. When judgment will be revived.**—The death of any or all of the joint owners of a judgment will not prevent an execution being issued thereon, but on such execution the clerk must indorse the fact of the death of those who are dead, and if all are dead, the names of their personal representatives, if the judgment passed to the personal representatives; or the names of the survivor's heirs, if the judgment was for real property.[1] And a levy of an execution after the death of the judgment plaintiff is invalid without such indorsement on the execution and a sale thereunder can be enjoined.[2] So, when an action is brought by mistake in the name of a deceased person, and judgment is rendered, and a sale had thereon, the proceedings are void.[3] A judgment against a decedent may be revived against his administrator,[4] but not by the creditors suing the heirs.[5] Formerly, judgments were revived by suing out a writ of scire facias.[6]

§ **1272. Of the sheriff's duty.**—The sheriff, in acting on an execution indorsed as above provided, must proceed as if the surviving plaintiff or plaintiffs, or the

[1] Code, Sec. 4067.
[2] Meek v. Bunker, 33-169.
[3] White v. Secor, 58-533.
[4] Carnes v. Crandall, 10-377; see Daniels v. Smith, 58-577.
[5] Bridgman v. Miller, 50-392.
[6] Von Puhl v. Rucker, 6-187; Vredenburgh v. Snyder, 6-39.

personal representatives or heirs, were the only owners of the judgment upon which it was issued, and bonds taken by him must be for their benefit.[7]

§ 1273. Of the affidavit.—Before making the indorsements above stated, an affidavit must be filed with the clerk by one of the owners of said judgment, or personal representatives, or heirs, or their attorney, of the death of such owners as are dead, and that the persons named as such are the personal representatives or heirs; and in case of personal representatives, they must also file with the clerk a certificate of their qualification, according to the laws of this State, unless their appointment is by the court from which the execution issues, in which case the record of such appointment will be sufficient evidence of the fact.[8]

§ 1274. Of executions against surviving defendants.—When a part of the joint debtors are dead execution may issue against the survivors and their property.[9] But execution can not be issued against a deceased judgment debtor even though the judgment be rendered in an attachment proceeding and a sale of land on such an execution is void.[10]

§ 1275. When execution may be quashed.—When the names of the personal representatives are not properly stated by the clerk in his indorsement on the execution, any debtor in such judgment may move to quash the execution for that reason, and during the vacation of the court he may obtain an injunction on making it appear that the persons named are not entitled to the judgment on which the execution was issued.[11]

§ 1276. Of proceedings when all the defendants are dead.—If all the defendants are dead, proceedings must be instituted to bring in their personal representatives; and for that purpose plaintiff must file his peti-

[7] Code, Sec. 4068.
[8] Code, Sec. 4069.
[9] Code, Sec. 4071.
[10] Welch v. Battern, 47-147; Boyle v. Maroney, 73-70; Bull v. Gilbert, 79-547.
[11] Code, Sec. 4070; Meek v. Bunker, 33-169.

tion, properly verified, and must set forth therein the rendition of the judgment, that it is unpaid, the amount due thereon, and pray for an execution to issue against the administrators of the deceased.

It may be in the following form:

FORM OF PETITION TO REVIVE JUDGMENT AGAINST AN ADMINISTRATOR.

Title, }
Venue. }

Plaintiff states that on the ——— day of ———, 18—, in an action pending in this court, wherein he was plaintiff and ——— was defendant, the plaintiff recovered a judgment against said defendant for the sum of ——— dollars and costs of suit, taxed at ——— dollars; that said judgment has not, to the plaintiff's knowledge, information or belief, been paid or satisfied, and that there is now due thereon the sum of ——— dollars, debt and interest, and ——— dollars, costs; that the said ——— died intestate on or about the ——— day of ———, 18—, and that the said defendant is administrator of the estate of said decedent.

Wherefore, he demands judgment that execution may issue on said judgment against the goods and chattels of said deceased in the hands of his said administrator and against the lands and tenements of said estate, to satisfy said judgment, with interest and costs.

———, attorney for plaintiff.

(Add verification.)

CHAPTER LXXX.

OF SHERIFF'S SALE.

Sec. 1277. Of notice of the sale.
1278. Of selling without notice.
1279. Of the time and manner of sale.
1280. Of postponing the sale.
1281. Of the surplus arising from the sale.
1282. Of proceedings when property is unsold, etc.
1283. Effect of sale without notice to the defendant.
1284. Of plan of sale by defendant.
1285. When sales will be set aside.
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1287. Sales may be set aside when purchaser fails to pay.
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1295. Of the sheriff's return.
1296. Of the rights of the purchaser, and who may purchase.
1297. Of the return of the purchase money—Canceling satisfaction, etc.

Section **1277. Of notice of the sale.**—The sheriff must give four weeks' notice of the time and place of selling real property, and three weeks' notice in case of the sale of personal property.[1] Notice must be given by posting in at least three public places in the county, one of which must be at the place where the last district court was held, and in addition to the posted notices, in case of sale of real estate, or where personal property to the amount of two hundred dollars or upward is to be sold, there must be two weekly publications of the notice

[1] Code, Sec. 4023.

in some daily or weekly newspaper printed in the county,[2] to be selected by the party causing the notice to be given, and the compensation for such publication will be the same as is provided by law for legal notices. But the proprietor of a newspaper can not, by mandamus, compel the publication of a notice in his paper.[3]

§ 1278. Of selling without notice.—If the sheriff sell without giving the notice prescribed, he will forfeit one hundred dollars to the defendant in execution, and will be liable for all actual damages sustained by either party; but the validity of the sale will not be affected by reason of the sheriff's failing to comply with the law in this respect.[4] The purchaser at a judicial sale is authorized in assuming that the judgment and levy are regular; and other irregularities will not, in the absence of fraud, affect the title acquired by an innocent purchaser.[5] The statute requiring the notice of the sale is directory.[6] If the officer sell without notice, and the property brings a sum equal to its value, and the proceeds of the sale are applied on the execution and costs, it would seem that the plaintiff sustained no actual damages.[7] The penalty provided by statute can only be recovered when actual damages are sustained.[8]

§ 1279. Of the time and manner of sale.—The sale must be at public auction, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon, and the hour of the commencement of the sale must be fixed in the notice.[9] The sheriff, for many purposes, is the agent of both parties, and he is invested, subject to the statute, with a sound discretion as to the time, place and manner of sale.[10] Improper conduct of the sheriff is not alone sufficient to set aside the sale when it is not

[2] Code, Sec. 4024.
[3] Welch v. Board of Supervisors, 23-199.
[4] Code, Sec. 4027.
[5] Cooley v. Wilson, 42-425; see Cavender v. Heirs of Smith, 1-306; Shaffer v. Bolander, 4 G. Gr., 201; Burton v. Emerson, 4 G. Gr., 393; Hopping v. Burnham, 2 G. Gr., 39.
[6] Cooley v. Wilson, 42-425.
[7] Coffey v. Wilson, 65-270; Enfield v. Blyler, 67-295.
[8] Same as No. 7.
[9] Code, Sec. 4028; Swortzell v. Martin, 16-519.
[10] Swortzell v. Martin, 16-519.

shown that the purchaser was connected with such conduct.[11] And it will be presumed, in the absence of evidence to the contrary, that the sale was made as provided by law.[12] The notice of sale may be in the following form:

FORM OF NOTICE OF SHERIFF'S SALE.

Notice is hereby given that by virtue of a general (or special) execution directed to me from the clerk of the district court of ——— county, Iowa, on a judgment rendered in said court on the ——— day of ———, 18—, in favor of ———, as plaintiff, and against (here insert names of all the defendants), as defendants, for the sum of ——— dollars and costs, taxed at ——— dollars and accruing costs, I have levied upon the following described real estate (or personal property), as the property of the said defendant (naming him), to satisfy said execution, to-wit (here describe the property fully). And I will proceed to sell said property, or so much thereof as may be necessary to satisfy said execution, with costs, and accruing costs (if real estate, say subject to redemption), at public auction, to the highest and best bidder, for cash in hand, on the ——— day of ———, 18—, in front of the court house in ———, in ——— county, Iowa, at the hour of ——— o'clock —. M., of said day, when and where due attendance will be given by the undersigned.

Dated the ——— day of ———, 18—.

———, sheriff of ——— county, Iowa.

———, attorney for plaintiff.

§ 1280. Of postponing the sale.—When there are no bidders, or when the amount offered is grossly inadequate, or when, from any cause, the sale is prevented from taking place on the day fixed, or the parties so agree, the sheriff may postpone the sale for not more than three days without giving any further notice of sale; which postponement must be publicly announced at the time the sale was to have been made, but not more than two such adjournments can be made, except by agreement of parties in writing and made a part of the return upon the execution.[13]

The postponement of the sale is a matter largely in the discretion of the sheriff.[14] The fact that there was

[11] Same as No. 10.
[12] Cole v. Porter, 4 G. Gr., 510.
[13] Code, Sec. 4029.
[14] Swortzell v. Martin, 16-519.

one adjournment more than the statute authorized, and that the time was extended beyond a period fixed by law, is an irregularity which can only be taken advantage of when prejudice is shown.[15] But the adjournment of a sale by the plaintiff's attorney is a gross irregularity, and such adjourned sale is void.[16] And when there are no bidders, or the amount bid is grossly inadequate, the sheriff, in the exercise of his discretion, should ordinarily postpone the sale, especially if the debtor so requests, and if he does not postpone it, it may be set aside on proper application, made in due time.[17] A postponement of a sale by agreement of parties, or at the instance and for the benefit of the defendant in execution, will not render the sale afterward made invalid as between the parties.[18] If the sheriff postpones the day of sale, such action must be taken on the day set for the sale, unless the parties otherwise agree.[19]

§ 1281. Of the surplus arising from the sale.— When the property sells for more than the amount required to be collected, the overplus must be paid to the debtor, unless the sheriff has another execution in his hands, on which the overplus may be rightfully applied, or unless there are liens upon the property which ought to be paid therefrom, and the holders thereof make claim to such surplus and demand application thereon, in which case the officer must pay the same into the hands of the clerk of the district court, and it will be applied as the court may order.[20] While the surplus moneys arising from a sale of lands on mortgage foreclosure, in the sheriff's hands or under the control of the court, belong to subsequent lien-holders in the order of their priority, yet, when the execution on which sale is made fails to direct the disposition of the surplus, and the sheriff, acting in good faith and without knowledge of such

[15] Reese v. Dobbins, 51-282.
[16] Wolf v. Van Meter, 27-348.
[17] Same as No. 14.
[18] Corriell v. Ham, 4 G. Gr., 455; Payne v. Billingham, 10-360.
[19] Long v. Valleau, 66 N. W., 195.
[20] Code, Sec. 4030; Payne v. Billingham, 10-360; Downard v. Crenshaw, 49-296.

liens, applies the money on other executions in his hands against the mortgagor, he is not liable therefor.[21]

§ 1282. Of proceedings when property is unsold, etc.—If the property levied on sells for less than is required to satisfy the execution the judgment holder may order out another execution which must be credited with the amount of the previous sale, the proceedings of the sheriff on the second execution will be the same as on the first one.[22] When the property is unsold for want of bidders, and subject to the provisions of code, section 4041, the levy still holds good, and if there be sufficient time it may be again advertised and sold under the same execution, or the execution may be returned and one issued commanding the officer to sell the property, describing it, previously levied on, to which a clause may be added that if such property does not produce a sum sufficient to satisfy such execution the officer shall proceed to make an additional levy on which he must proceed as on other executions, or the plaintiff may, in writing, filed with the clerk, abandon such levy upon paying the costs thereof, in which case execution may issue with the same effect as if none had ever been issued.[23] But such second levy can not be made until the first is disposed of.[24] A sale under an execution which has expired is valid if the levy was made while the execution was in force.[25] This second execution for the sale of property levied on under prior writ is in the nature of a venditioni exponas, and it may be in the following form:

FORM OF VENDITIONI EXPONAS.

The State of Iowa.
To the sheriff of ——— county, greeting:

Whereas by our writ of execution bearing date the ——— day of ———, 18—, issued upon a certain judgment rendered in the district court of ——— county, Iowa, at the ——— term, 18—, thereof, in favor of ——— and against ——— for the sum of ——— dollars damages and

21 Polk County v. Sypher, 17-358.
22 Code, Sec. 4031.
23 Code, Sec. 4042.
24 Downard v. Crenshaw, 49-296.
25 Butterfield v. Walsh, 21-97; Stein v. Chambless, 18-474; Childs v. McChesney, 20-431; Thorington v. Allen, 21-291; Moomey v. Maas, 22-380.

——— dollars costs, you were commanded that of the goods and chattels, lands and tenements, of the said ——— subject to execution you cause to be made the said sums of money with interest and all legally accruing costs, and that you have said moneys before our said court within seventy days from the date of said writ with the return of your doings thereon; and whereas you have returned, that by virtue of said writ to you directed, you have levied upon and taken in execution certain real estate (or goods and chattels, describing them) of the said ——— which remains in your hands unsold for the want of bidders, now, therefore, you are hereby commanded that you expose the said real estate (or goods and chattels) to sale to satisfy said execution with interest and costs, together with all legal costs made by virtue of this writ, and have said moneys in our said court within seventy days from the date hereof (to which the following may be added as provided by statute: "and if such property does not upon the sale thereof under this writ produce a sum of money sufficient to satisfy this execution, you are hereby further commanded to make of the goods and chattels, lands and tenements of the said ——— a sum sufficient to satisfy said balance with interest and accruing costs and have the same," etc.) as the law requires, together with this writ, with a return thereon of your doings under the same.

Witness ———, clerk of said court, with the seal thereof hereto affixed this ——— day of ———, 18—.

[Seal.] ———, clerk, etc.

§ 1283. Effect of sale without notice to the defendant.—When the debtor is in actual personal occupation and possession of the lands levied on, the sheriff having the writ must, at least twenty days previous to the sale, serve him with written notice, stating that the execution has been levied on the land, and also stating the time and place of sale, and if a sale is made without giving this notice, it will be set aside on motion made at the same, or the next term of the court after such sale.[26] And this provision of the statute is applicable to sales under special as well as under general executions.[27] But this notice required to be served on the defendant, need not be given him when the land is in the possession and under the control of an agent.[28] Nor when the property is occupied by tenants.[29] And it will be presumed the

[26] Code, Sec. 4025; Jensen v. Woodbury, 16-516; Fleming v. Maddox, 30-239; Babcock v. Gurney, 42-154; Bennet v. Burton, 44-550.

[27] Jensen v. Woodbury, 16-516; Fleming v. Maddox, 30-239.

[28] Bennet v. Burton, 44-550.

[29] Babcock v. Gurney, 42-154.

proper notice was given unless the contrary appear.[30] Such notice may be in the following form:

FORM OF NOTICE BY SHERIFF TO DEFENDANT IN POSSESSION, OF LEVY AND TIME OF SALE.

State of Iowa, ——— County. } ss.

To ———:

You are hereby notified that by virtue of an execution to me directed, issued out of the clerk's office of the district court of the State of Iowa in and for ——— county, upon a judgment rendered in said court in favor of ——— and against ——— for the sum of ——— dollars debt and ——— dollars costs, I have levied upon the following real estate, to-wit (here describe the land), of which you are in actual occupation and possession. And that on the ——— day of ———, 18—, at the front door of the court house in said county, at ——— o'clock, —. m., of said day I will offer the same for sale to the highest bidder at public auction to satisfy said execution with all legally accruing costs.

Dated this ——— day of ———, 18—.

———, sheriff of ——— county, Iowa.

This notice should have indorsed on it the return of the officer serving it, thus:

FORM OF RETURN OF SERVICE OF NOTICE OF LEVY AND TIME OF SALE.

I hereby certify, that the above notice was served upon ———, who was in actual possession of the above described real estate on the ——— day of ———, 18—.

———, sheriff of ——— county, Iowa.

(This form may be on the same sheet following the notice.)

§ 1284. Of plan of sale by defendant.—At any time before nine o'clock in the forenoon of the day of sale, the debtor may deliver to the sheriff a plan of division of the land levied on, subscribed by him. And in that case the officer must sell according to said plan, so much of the land as may be necessary to satisfy the debt and costs and no more. If no such plan is furnished, the officer may sell without any division.[31] The general execution laws apply to all sales whether made under general or

[30] Coriell v. Doolittle, 2 G. Gr., 385.

[31] Code, Sec. 4032.

special executions.[32] The intention of this provision of the law is to secure sales in separate tracts as the defendant may direct. If, however, the lands cannot be sold in such separate tracts for want of bidders, they may afterwards be offered and sold en masse.[33] But the law relating to selling according to a plan of division furnished by defendant has been supposed to have no application to sales on special execution.[34] But recently it has been held otherwise.[35]

§ 1285. When sales will be set aside.—When the execution covers different tracts of land, or a single tract susceptible of being advantageously divided, a sale of the same in gross is irregular, and will be set aside on motion, by proceedings in equity for that purpose.[36] But it seems it must be shown that the sale en masse worked an injury to the defendant before it will be set aside.[37] A sale to the plaintiff in execution for an inadequate price of a large number of city lots en masse and which were mostly separate from each other, is, at least as to lots still held by the purchaser, voidable, and may be set aside by an action for that purpose by the execution defendant; but such sale will be held valid as to the lots conveyed by the purchaser at sheriff's sale, to third parties, in good faith, and who have improved them, after the lapse of several years.[38] When the officer's return fails to show that lots were separately sold, the presumption is that he did his duty and sold them separately.[39] It is doubtful whether the fact two lots were sold together for a gross sum, can, after the period of redemption has expired, and a sheriff's deed been executed and delivered, be made available to defeat the sale to a third party.[40] If, however, parcels or tracts are first

[32] Same as No. 27, Sec. 1283.
[33] Connecticut Mut. L. Ins. Co. v. Brown, 81-42.
[34] Malone v. Fortune, 14-417.
[35] Taylor v. Trulock, 59-558.
[36] White v. Watts, 18-75; Lay v. Gibbons, 14-377; Boyd v. Ellis, 11-97; Bradford v. Limpus, 13-424; Love v. Cherry, 24-204; King v. Tharp, 26-283.
[37] Cunningham v. Felker, 26-117; Wallace v. Berker, 25-456.
[38] Williams v. Allison, 33-278.
[39] Love v. Cherry, 24-204; Eggers v. Redwood, 50-289.
[40] Love v. Cherry, 24-204; see

offered separately and not sold for want of bidders they may then be offered and sold en masse.[41] And a sale will be set aside where by reason of a mistake or misunderstanding between the officer and one desiring to bid a higher bid than that on which the property was sold on was not recognized by the officer.[42] One holding two judgment liens on real estate who sells it under the junior lien without fraud or misrepresentation is not estopped from thereafter enforcing as against the purchaser of the property the senior lien held by him.[43] If the price is inadequate and the sale is without redemption, the sale should be set aside,[44] and so it should in case only a portion of the land subject to the lien was sold by reason of a technical defect in describing the premises.[45] Sales will be set aside for gross inadequacy of price coupled with other circumstances tending to prove fraud, and where separate parcels are sold in gross, and when a sale is made on a second execution before the return of the first.[46] A combination between the purchaser at the sale and other bidders to prevent competition, will vitiate the sale.[47]

And sales will, in some cases, be set aside for fraud practiced by the officer conducting the sale, or by a purchaser thereat.[48] So sales will be set aside where the levy is excessive.[49] And where there is a mistake of law and fact growing out of representations as to the application of the proceeds.[50]

§ 1286. When sales will not be set aside.—A sher-

Whitney v. Armstrong, 32-9; Hill v. Baker, 32-303.

[41] Lamb v. McConkey, 76-47; Connecticut Mut. L. Ins. Co. v. Brown, 81-42.

[42] Cornoy v. Wetmore, 70 N. W., 178.

[43] Matless v. Sundin, 62 N. W., 662.

[44] Fitzgerald v. Kelso, 71-731.

[45] Harrington v. Fidelity Loan & Trust Co., 91-703.

[46] Wood v. Young, 38-102; Merrit v. Grover, 57-493; Boyd v. Ellis, 11-97; King v. Tharp, 26-283; Cavender v. Smith's Heirs, 1-306; Williams v. Allison, 33-278; Swortzell v. Martin, 16-515; Miller v. Colville, 21-135; Twogood v. Stephens, 19-405; Sioux City, etc., Land Co. v. Walker, 78-476; Lehner v. Loomis, 83-416.

[47] Fleming's Heirs v. Hutchinson, 36-519.

[48] Swortzell v. Martin, 16-513, Fleming's Heirs v. Hutchinson, 36-515; Cooper v. French, 52-531; Wallace v. Berger, 25-456.

[49] Cook v. Jenkins, 30-452.

[50] Bay v. Harnett, 58-344.

iff's sale will not be set aside on motion when the purchaser, who was not a party to the execution, has not been made a party to and received notice of the motion.[51] Nor will a sale be vitiated by the fact that several tracts were sold en masse, if they were first offered separately and no bids received therefor.[52] When a tract embracing several acres was covered by a mortgage and afterward divided into town lots by the owner of the fee, and was sold as a whole and not in parcels, it was held that the sale was not invalid, especially as it was not claimed that the whole tract was worth more than the amount of the debt.[53] Nor will a sale be set aside for inadequacy of price only,[54] as the law presumes that the sale was regularly conducted in accordance with the requirements of the statute.[55] Nor because of an omission to plat the homestead when the sheriff serves a notice on the owner reserving a specified tract as a homestead.[56] Nor because of a misnomer of the plaintiff in the title of the case in execution when the name and character of the action are correctly stated in the body thereof, nor by reason of defects in the notice.[57] Irregularities in the manner of making the sale which do not affect the power of the officer to make it will not render it void.[58] And when the proceedings on a sheriff's sale are with the assent of the judgment debtor, he can not afterward be heard to object to their regularity. And he is estopped from so objecting when he has slept on his rights.[59] And

[51] Osborn v. Cloud, 21-238; Wright v. LeClaire, 3-221; Lyster v. Brewer, 13-461; Polk County v. Sypher, 17-358.

[52] Hill v. Baker, 32-302; Burmeister v. Dewey, 27-468; see Foley v. Kane, 53-64; Lamb v. McConkey, 76-47.

[53] Street v. Beal, 16-68; see Wallace v. Berger, 25-456.

[54] Hill v. Baker, 32-303; Wallace v. Berger, 25-456; see Shine v. Hill, 23-264; Griffith v. Milwaukee Harv. Co., 92-634; Equitable Trust Co. v. Shrope, 73-297.

[55] Childs v. McChesney, 20-431; Johnson v. Carson, 3 G. Gr., 499; Shaffer v. Bolander, 4 G. Gr., 201; Cooley v. Wilson, 42-425; Cavender v. Smith's Heirs, 1-306; Hill v. Baker, 32-302; Davis v. Spaulding, 36-610; Coriell v. Ham, 4 G. Gr., 455; Olmstead v. Kellogg, 47-460, Cole v. Porter, 4 G. Gr., 510.

[56] Smith v. De Kock, 81-535.

[57] Griffith v. Milwaukee Harv. Co., 92-634.

[58] Burmeister v. Dewey, 27-468; Hill v. Baker, 32-302; Davis v. Spaulding, 36-610; Cavender v. Smith's Heirs, 1-306.

[59] Crawford v. Grimm, 35-543; Maquoketa v. Willey, 35-323; Coriell v. Ham, 4 G. Gr., 455; Cooley

in certain special cases it is held an action will not lie to set aside the sale.[60]

§ 1287. Sales may be set aside when purchaser fails to pay.—If the purchaser at the sale fails to pay the money when demanded, the judgment holder, or his attorney, may elect to proceed against him for the amount. If they do not do so, the sheriff may treat the sale as a nullity and may sell the property again on the same day, or after a postponement, as before stated.[61] In such case the sheriff should advertise and sell under a venditioni exponas, as under an ordinary execution. But a sheriff can not treat a bid as a nullity and issue a certificate to the next highest bidder; to do so would be a violation of law. He may disregard the bid and sell again, but if it is accepted, it is valid and binding.[62] If the bidder fails to pay the amount of his bid he cannot complain if the sheriff accepts from the debtor the amount of the judgment.[63] Where the plaintiff in execution is the purchaser at the sale and fails to pay the costs in the case the sheriff may treat the sale as a nullity and adjourn it to another day.[64] If the sheriff treats the sale as complete it will be presumed that the execution plaintiff buying the property paid the costs.[65]

§ 1288. Sale set aside when defendant has no title, etc.—When any person becomes a purchaser at a sheriff's sale of any real estate on which the judgment upon which the execution issued was not a lien at the time of the levy, and which fact was unknown to the purchaser at the time of such sale, the district court, out of which the writ issued, will, on motion, set aside such sale.

v. Wilson, 42-425; Exline v. Lowery, 46-556; Merritt v. Grove, 61-99; Williams v. Allison, 33-287; Chambers v. Cochran, 18-159; Stewart v. Marshall, 4 G. Gr., 75.

[60] Ruthven v. Mast, 55-715; Miller v. Felkner, 42-458; Sigerson v. Sigerson, 71-476.

[61] Code, Sec. 4033; Swortzell v. Martin, 16-519; Reese v. Dobbins, 51-282; Morrison v. Spencer, 72-445.

[62] Swortzell v. Martin, 16-519.

[63] Long v. Valleau, 66 N. W., 195.

[64] Reese v. Dobbins, 51-282; Ritter v. Henshaw, 7-97; Whitney v. Armstrong, 32-9; see Chambers v. Cochran, 18-159.

[65] Haspham v. Worthington, 69 N. W., 535.

Notice having been given to the debtor as in the case of an action, a new execution may be issued to enforce the judgment, and on making the order to set aside the sale, the sheriff or judgment creditor must pay over to the purchaser the purchase money. Such motion may be made by any person having an interest in the land.[66] If the judgment is against principal and surety and the sale is set aside, as hertofore stated, the surety will not be discharged unless he has, by reason of the sale, changed his condition or been prejudiced.[67] So sales will be set aside when property is bid in under a mistake as to the quantity of land sold.[68] Or the property is sold under a wrong description.[69] Or where a portion of the property is not described in the execution.[70] When the sale has been judicially set aside the satisfaction of the judgment which followed the sale and was entered of record by reason thereof, should also be set aside.[71]

§ 1289. Of the rule of caveat emptor.—The sheriff in making a sale undertakes to sell only the interest or estate which the judgment debtor has in the property. His conveyance carries with it no warranty of title. The purchaser is bound to know at his peril of the title of the property purchased by him at such sale, and in the absence of fraud he can not avoid his bid or escape payment of the purchase money by reason of a defective title in the judgment debtor.[72] But a purchaser at such sale, even if he be the plaintiff in execution, is protected against equities and unrecorded instruments of which he had no notice.[73] And a purchaser will not be relieved

[66] Code, Sec. 4034; Hamsmith v. Epsey, 19-444; Chambers v. Cochran, 18-159; Dean v. Morris, 4 G. Gr., 312; Reed v. Crosthwaite, 6-219; Boggs v. Douglass, 89-150.

[67] Chambers v. Cochran, 18-159.

[68] Kellogg v. Decatur County, 38-524.

[69] Latimer v. Jones, 55-503.

[70] Snyder v. Ives, 42-157.

[71] Farmer v. Sasseen, 63-110.

[72] Holtzinger v. Edwards, 51-383; Hamsmith v. Epsey, 29-444; Chambers v. Cochran, 18-159; Chapman v. Coates, 26-288; Thomas v. Kennedy, 24-397; Churchill v. Morse, 23-229; Dean v. Morris, 4 G. Gr., 312; Cameron v. Logan, 8-434; Downard v. Crenshaw, 49-296; Weaver v. Stacy, 93-683; Shaffer v. McCrackin, 90-578.

[73] Hamsmith v. Epsey, 19-44; Evans v. McGlasson, 18-150; Butterfield v. Walsh, 21-97; Wallace v. Bartle, 21-346; Walker v. Elston, 21-529; Gower v. Doheney, 33-36;

against mere uncertainty in the description, where the land sold is, in fact, the same as that levied on.[74] Nor will a sale be set aside because of record incumbrances on the land amounting to more than its value.[75]

§ 1290. Of the disposition of money and choses in action. — When money is levied on it may be appropriated without being advertised and sold, and the same may be done with bank bills, drafts, promissory notes or other papers of like character, if the plaintiff will receive them at their par value as cash, or if the officer can exchange them for cash at that value.[76]

If choses in action can not be thus appropriated, they must be sold, and upon a sale of bills, notes or other writings, the sheriff may make the necessary assignments to pass the title to the purchaser,[77] and the surplus will be disposed of as provided in section 4030 of the code.

§ 1291. Of satisfying judgments against an executor or decedent.—When a judgment has been obtained against the executor of one deceased, or against the decedent in his lifetime, which the personal estate of the deceased is insufficient to satisfy, the plaintiff may file his petition in the office of the clerk of the court, where the judgment is a lien against the executor, the heirs and devisees of the real estate, if there be such, setting forth the facts, and that there is real estate of the deceased, describing its location and extent, and praying the court to award execution against the same.[78] But before this can be done, collection must be first sought out of the personal estate, and for that purpose the judgment must be clearly stated, sworn to and filed as a claim against the estate, the same as any other claim.[79]

Jones v. Brandt, 59-332; Bell v. Evans, 10-353.

[74] Hackworth v. Zollars, 30-433.

[75] McDonald v. Johnson, 48-72.

[76] Code, Sec. 4035.

[77] Hetherington v. Hayden, 11-335; Campbell v. Leonard, 11-489; Earhart v. Grant, 32-481; Ochiltree v. M., I. & N. R. Co., 49-150; Code, Sec. 3971; see chapter on Judgments.

[78] Code, Sec. 4036; Bayless v. Powers, 62-601.

[79] Bayless v. Powers, 62-601.

The petition for the purpose herein mentioned may be in the following form:

FORM OF PETITION TO SUBJECT REAL ESTATE TO THE PAYMENT OF A JUDGMENT AGAINST AN EXECUTOR OR DECEDENT.

Title, }
Venue. }

Plaintiff states that on the ——— day of ———, 18—, he obtained judgment in this court against the defendant, ———, as executor of the last will and testament of ———, deceased (or against deceased, naming him, as the case may be), for the sum of ——— dollars and costs of suit, which judgment remains in full force, and has not been paid (or if part paid, state the fact); that the personal estate of said deceased is insufficient to satisfy the said judgment (in whole or in part, as the case may be); that there is real estate of the deceased within this State, in ——— county, Iowa, described as follows, to-wit (here describe the real estate); that said judgment has been duly stated, sworn to and filed as a claim against the estate of the said ——— (or as the case may be.) Wherefore, he prays the court to award execution against said real estate to satisfy said judgment, with interest and costs.

———, attorney for plaintiff.

(Add verification.)

The person against whom the petition is filed must be notified by the plaintiff to appear on the first day of the term and show cause, if any he has, why execution should not be awarded.[80] The notice must be served and returned in the ordinary manner and the same length of time allowed for appearance as in civil actions, and may be served on a non-resident by publication.[81] Such notice may be in the following form:

FORM OF NOTICE TO EXECUTOR, ETC., OF PROCEEDINGS TO SUBJECT REAL ESTATE TO EXECUTION.

To ———, executor, etc., and (here insert names of all other parties as in petition): You are hereby notified that the plaintiff on the ——— day of ———, 18—, recovered a judgment in this court against the defendant as executor of the last will and testament of ———, deceased, (or against ———, deceased, as the case may be) for the sum of ——— dollars and costs of suit. That said judgment is in full force and unpaid; that it has been stated, sworn to and filed, as a claim against the estate of the said ———, that as the personal estate of said ——— is in-

[80] Code, Sec. 4037. [81] Code, Sec. 4038.

sufficient to pay the same, plaintiff will on the ——— day of ———, 18—, file his petition in the district court of ——— county, Iowa, asking that an execution be awarded against the following described real estate (here describe it), of said ———, that the same may be sold to satisfy said judgment, interest and costs, and the costs of this proceeding, and unless you appear at the next term of court to be begun and holden at the court house in ——— in said county, on the ——— day of ———, 18—, and show cause why said execution should not be awarded, the prayer of said petition will be granted and an execution awarded as prayed.

———, attorney for plaintiff.

Unless good cause be shown to the contrary, the court at the proper time will award execution,[82] and the nonage of the heirs or devisees is not sufficient cause.[83] But a showing that the judgment had not been stated, sworn to and filed, as a claim against the estate, would be good cause for refusing to award execution against the real estate.[84] As would also the fact, if it is so found, that there is sufficient personal property to satisfy the judgment.[85]

§ **1292. Of setting off mutual judgments.**—Mutual judgments, the executions on which are in the hands of the same officer, may be set off, the one against the other, except that the costs can not be set off, unless the balance of cash actually collected on the larger judgment is sufficient to pay the costs of both judgments, in which case the costs must be paid from such balance of cash in the sheriff's hands.[86] And when a judgment has been fraudulently assigned by the party in whose favor it was rendered, for the purpose of preventing a set-off, a court of equity will interpose and effect such set-off.[87] Under sections 4040 and 3465 of the code, an execution issued on a judgment in favor of a sole plaintiff may be set off against an execution issued on a judgment in which such sole plaintiff is a joint defendant.[88] Ordinarily the sheriff has power only to set off executions in his hands when

[82] Code, Sec. 4039.
[83] Code, Sec. 4039.
[84] Bayless v. Powers, 62-601.
[85] Code, Sec. 4036.
[86] Code, Sec. 4040.
[87] Hurst v. Sheets, 14-322.
[88] Ballinger v. Tarbell, 16-491.

the parties to the judgments upon which they are issued are in both cases the same, and when the judgments are the property of the parties thereto.[89] The fact that a judgment has been assigned to the attorney in the case to secure his lien will not prevent the opposite party from setting off against it a judgment in his favor for costs in the same action.[90]

§ 1293. Of sale of leasehold interest, etc.—When real property has been levied on, if the estate of the defendant therein is less than a leasehold interest having two years of an unexpired term, the sale is absolute.[91] When the estate is of a larger amount or interest, the property is redeemable as hereinafter stated.[92] A judgment is a lien on the debtor's leasehold interest in land and it follows the leasehold, though it be conveyed to other persons.[93]

And such leasehold may be sold on execution after conveyance without the aid of a court of equity, and an action in equity can not be maintained for the purpose.[94]

Real property is sold without appraisement.

§ 1294. Of the appraisement of personal property.—Personal property and leasehold interests in real property having less than two years of an unexpired term, levied on and advertised for sale on execution, must be appraised before sale by two disinterested householders of the neighborhood, one of whom must be chosen by the execution debtor, and the other by the plaintiff, or in case of the absence of either party, or if either or both such parties refuse or neglect to make such choice, the officer making the levy must choose one or both, as the case may be, who must forthwith proceed to return to said officer a just and true appraisement under oath of said property, if they can agree, and in case they can not

[89] Bell v. Perry, 43-368.
[90] Tiffany v. Stewart, 60-207; Benson v. Haywood, 86-107.
[91] Code, Sec. 4043.
[92] Code, Sec. 4043; chapter on Redemption.
[93] First Nat'l Bk. v. Bennett, 40-537, and cases cited.
[94] Sweezy v. Jones, 65-272.

agree, they must choose another disinterested householder and with his assistance complete said appraisement, and the property can not upon the first offer be sold for less than two-thirds of such valuation, provided, the same must be offered for three successive days at the same place and hour of the day as advertised, and if no bid is received equal to two-thirds of the appraised value thereof, then it may be sold for one-half the valuation.[95]

But it has been held that contracts made prior to the taking effect of the appraisement law of 1860 were not affected thereby, even though enforced after the law took effect.[96] And under the revision, section 3362, it was held that the fact that one of the appraisers was not a householder, as required by law, did not render the sale void.[97] But in such a case, when lands were appraised at less than one-half their real value, the debtor was allowed to redeem from the judgment creditor.[98] And it was further held that a sale for a less proportion of the appraised value than the law then authorized would be invalid, at least as between the parties.[99] When it appears that the sheriff in appointing an appraiser did not show in his return that the party for whom he acted in making such appointment was absent, or refused to act, such fact will not render the sale void, nor will the fact that the deputy sheriff selected one of the appraisers.[1] Notice must be given to the parties, their agents or attorneys, of the levy, and it must require each of them to choose one appraiser.[2] It may be served in the ordinary manner, or if the parties are present when the levy is made, they may choose appraisers without formal written notice. The debtor cannot by stipulation in a mortgage, or otherwise, waive the provision of the law requiring an appraisement.[3] The notice may be in the following form:

[95] Code, Sec. 4041.
[96] Olmstead v. Kellogg, 47-460; Rosier v. Hale, 10-470.
[97] Hill v. Baker, 32-302.
[98] Woods v. Cochran, 38-484.
[99] Maple v. Nelson, 31-322.
[1] Preston v. Wright, 66-351; Davis v. Spaulding, 36-610.
[2] Code, Secs. 4023, 4024.
[3] Minneapolis Threshing Mch. Co. v. Beck, 64 N. W., 637.

FORM OF NOTICE TO CHOOSE APPRAISERS.

Venue. }
Title, }

To ——— (or his agent or attorney, as the case may be):

You are hereby notified that by virtue of an execution issued from the office of the clerk of the district court of ——— county, Iowa, in the above entitled action, I have levied upon the following personal property as the property of said ———, viz. (here describe the property), and that I will have said property appraised on (day of the week), the ——— day of ———, 18—. And you are required to select one disinterested householder of the neighborhood within three days to act as an appraiser on your behalf, to value said property and report the same to me, as required by law.

Dated the ——— day of ———, 18—.

———, sheriff of ——— county, Iowa.

The sheriff, after the appraisers have been selected as provided by law, may issue to them the following appointment:

FORM OF APPOINTMENT OF APPRAISERS.

Title, }
Venue. }

To (here insert names of appraisers), appraisers:

On an execution issued from the office of the clerk of the district court of said county, on a judgment rendered in the above entitled action on the ——— day of ———, 18—, against the defendant (or plaintiff), for (amount) and ——— per cent. interest and costs, I have levied on the following described property, to-wit (here describe property). You are, therefore, hereby notified that you are appointed appraisers to appraise under oath the present cash value of the above described personal property, and having performed that duty you will return a written report thereof as soon as practicable.

Dated this ——— day of ———, 18—.

———, sheriff of ——— county, Iowa.

The appraisers must be sworn as follows:

FORM OF OATH OF APPRAISERS.

State of Iowa, }
——— County. } ss.

We (names of appraisers), do each solemnly swear that to the best of our knowledge and ability, we will faithfully and impartially appraise the present cash value of the property described in the above appointment.

———,
———,
———,

(Add certificate of officer.)

After making the appraisement the appraisers should make the following return to the sheriff:

FORM OF APPRAISEMENT.

To the sheriff of ——— county, Iowa:

We, the undersigned, having performed the duties assigned us in the foregoing appointment, respectfully report that we have thoroughly examined the property, described in our written appointment, and under oath have appraised the present cash value of said property, at ——— dollars (or if the articles of property are numerous, say, as shown in schedule "A" attached hereto, attaching a schedule with a description of each article of property, and its value set opposite).

Witness our hands this ——— day of ———, 18—.

———,
———,
———, } appraisers.

These three forms may properly be put on one sheet. The revision required that when the property offered for sale under the writ was subject to prior liens, the amount bid should be the balance after deducting the amount of such prior liens from two-thirds of the appraised value.[4] Nothing is said in the code with reference to deducting prior liens in making the appraisement, and it would seem that they are not to be considered.[5] For further discussion of the subject of appraisement, which, as to sales of real estate, is almost obsolete, the reader is referred to cases below.[6]

§ 1295. Of the sheriff's return.—After the sale the sheriff must make his return of the execution with a statement of his doings thereunder, together with the notice of appointment of appraisers, oath of appraisers, and appraisement of the property, which return should affirmatively show a compliance with the statute. But a failure of the officer to make return of a sale before the expiration of a year from the date of it will not invalidate the sale.[7]

[4] Revision, Sec. 3360; Sargent v. Pittman, 16-469; Brown v. Butters, 40-544; Barber v. Tryon, 41-349; McDonald v. Johnson, 48-72.

[5] Van Slyck v. Mills, 34-375.

[6] Fonda v. Clark, 43-300; McDonald v. Johnson, 48-72; Shaffer v. Bolander, 4 G. Gr., 201; Johnson v. Casson, 3 G. Gr., 499; Burton v. Emerson, 4 G. Gr., 393; Holland v. Dickerson, 41-367; Babcock v. Gurney, 42-154.

[7] Cooper v. French, 52-531.

§ 1296. Of the rights of the purchaser, and who may purchase. — In treating of redemption we have spoken of the rights of the purchaser with reference to recording his deed; we now consider briefly the rights acquired by the purchaser generally at execution sale. If one purchases personal property at an execution sale his rights are only those of a judgment defendant at the time of the levy, being subject to the rights of prior purchasers.[8] And generally it may be said that a purchaser at an execution sale acquires no title when it is apparent from the record that the debtor had no interest in or title to the property.[9] In order to affect the right of a purchaser at an execution sale it must appear that the conveyance under which the adverse party claims was in fact made before the deed was filed for record.[10] But the purchaser at an execution sale will not obtain priority over a purchaser at a previous sale of the same property under a mortgage executed and recorded prior to such sale.[11] A sheriff's deed under a sale on execution transfers the premises sold and also relates back to the time the judgment became a lien on the land.[12] An attorney of an execution plaintiff who purchases at execution sale property levied on by attachment, will not be deemed an innocent purchaser, but he and his heirs are chargeable with equities or with illegalities in the proceedings.[13] But an execution plaintiff who purchases in good faith and before notice of appeal, will be protected the same as a stranger.[14] A judgment creditor who purchases at an execution sale an equitable interest in land, takes the premises subject to prior equities of third parties, of which he had no notice.[15] It is held that the plaintiff in execution, who purchases at the sale, is protected against outstanding equities of which he had no notice, actual or constructive, before the sale.[16] One of

[8] Rakestraw v. Hamilton, 14-147; Thomas v. Hillhouse, 17-67.
[9] Stuart v. Hines, 33-60.
[10] Brown v. Wade, 42-647; see Bonnell v. Allerton, 51-166.
[11] Bell v. Hall, 4 G. Gr., 68.
[12] Kane v. Mink, 64-84.
[13] Cook v. Jenkins, 30-452.
[14] Frazier v. Craft, 40-110.
[15] Wallace v. Bartle, 21-346.
[16] Butterfield v. Walsh, 36-534,

several execution defendants may purchase at an execution sale the property of another defendant,[17] and a bid made at such sale may be transferred to another by consent of the court, and such other person will then be considered the purchaser.[18]

§ 1297. Of return of the purchase money canceling satisfaction, etc.—When a sale has been judicially set aside, the satisfaction of the judgment which followed the sale should be set aside.[19] And the proceeding to set aside the sale should be brought in the court wherein the judgment was rendered.[20] One seeking to have a sheriff's sale set aside, must return or offer to return the property or, if he has sold it, its proceeds.[21] A purchaser at an execution sale who pays his money without knowledge of any irregularities therein, is entitled, on the sale being set aside, to have the money he has paid refunded to him, and for such purpose may be subrogated to the rights of the execution plaintiff.[22] But the purchaser of premises under a foreclosure sale which is afterward set aside, is not liable for rent or waste accruing between the time of sale and the time it was set aside, if possession was taken by another without his knowledge and he was not connected with the acts of the tenant.[23] To establish title under a sale on execution the purchaser may give in evidence the judgment and execution under which the property was sold and prove the sale by the sheriff's deed or the return on the execution.[24] A purchaser of property held under execution issued on a void judgment may maintain an action against the officer for selling the property.[25] One acting as a public officer in making a sale can not be heard to object that he was not an officer de jure.[26]

and cases cited; see Bear v. Burlington, C. R. & M. R. Co., 48-619.

17 Winde v. Brandt, 55-221.

18 Gilman v. Des Moines V. R. Co., 42-495.

19 Farmer v. Sasseen, 63-110; see Parks v. Davis, 16-20; State Bk. v. Harrow, 26-426.

20 White v. Hampton, 14-66.

21 First Nat'l Bk. v. Conger, 37-474; Williams v. Allison, 33-278.

22 Fleming v. Maddox, 32-493; see Cotter v. O'Connell, 48-552; Osborn v. Cloud, 23-104.

23 Vulgamore v. Stoddard, 21-115.

24 Lepage v. McNamara, 5-124.

25 Gates v. Neimeyer, 54-110.

26 State v. Stone, 40-547.

CHAPTER LXXXI.

OF SUMMARY PROCEEDINGS.

Sec. 1298. When allowed.
1299. Of the form of proceeding.
1300. Of notice.
1301. Of the hearing.

Section **1298. When allowed.**—Judgments or final orders may be obtained, on motion, by sureties against their principals; by sureties against their co-sureties, for the recovery of money due them on account of payments made by them as such; by clients against attorneys; plaintiffs in execution against sheriffs, constables and other officers, for the recovery of money or property collected by them, and for damages.[1] The court may make an order against a clerk to compel payment of money received by him on a judgment.[2] But sureties on official bonds are not included in this statute; they must be regularly brought into court as defendants, and have an opportunity to contest the claim made by the plaintiff.[3]

§ **1299. Of the form of the proceeding.**—The proceeding is instituted by motion of the party entitled thereto setting forth the grounds on which he asks the judgment or order of the court, and may be in the following form:

FORM OF MOTION FOR SUMMARY PROCEEDINGS.

Title, }
Venue. }

The plaintiff states:

1. That on the ——— day of ———, 18—, judgment was duly ren-

[1] Code, Sec. 3826; Cross v. Ackley, 40-493; Hawk v. Evans, 76-593; State v. Morgan, 80-413.

[2] Elliott v. Jones, 47-124; Peterson v. Hays, 85-14; Logan v. McCahan, 71 N. W., 252.

[3] Code, Sec. 3826; Bitting v. Moore, 53-593.

dered in this court in his favor against ——— for the sum of ——— dollars and costs.

2. That the said ———, the defendant herein, was attorney for this plaintiff in the suit when said judgment was rendered.

3. That on or about the ——— day of ———, 18—, said defendant as such attorney for plaintiff herein received of the clerk of the district court of ——— county, Iowa, the sum of ——— dollars in full of said judgment and the interest thereon.

4. That this plaintiff is not indebted to defendant, and defendant neglects and refuses to pay said sum over to plaintiff though it has been demanded of him.

Wherefore plaintiff moves for judgment against the said ———, defendant, as aforesaid, for the sum of ——— dollars with damages and costs.

———, attorney for plaintiff.

The form must be changed to suit the circumstances of each case. Thus, if the proceeding is against a sheriff who has collected funds on execution and refuses to pay over to the party entitled thereto, divisions 2, 3 and 4 of above form should be omitted and the following inserted in lieu thereof:

FORM OF MOTION WHEN THE ACTION IS AGAINST AN OFFICER. FOR REFUSING TO PAY OVER.

2. That on the ——— day of ———, 18—, an execution was issued on said judgment directed to and placed in the hands of said ———, the then acting sheriff of ——— county, Iowa.

3. That the said ——— has collected on said execution the sum of ——— dollars, which he neglects and refuses to pay over either to this plaintiff or to the clerk of this court, though such payment has often been demanded.

The motion must state the facts fully in each case, showing the right of the party to make the motion and to have judgment, and the relationship of the party making the motion to the one against whom it is directed must be shown, and the facts out of which the obligaion of the latter arises in favor of the plaintiff; thus if it is made by a client against his attorney it must state the facts showing the existence of such relation, and that the attorney has collected the money, and refuses to pay it over, or if a case of surety against principal it must show

that relation, and the fact the surety has paid money for his principal and has not been reimbursed.

§ 1300. Of notice.—Notice of the motion must be served on the party against whom the judgment or order is sought, at least ten days before the motion is made.[4] The notice must state in plain and ordinary language the nature and grounds of the motion and the day on which it will be made.[5] And unless the motion is made and filed with the case on or before the day named in the notice it will be considered as abandoned.[6] The notice may be in the following form:

FORM OF NOTICE OF MOTION IN SUMMARY PROCEEDINGS.

Title, }
Venue. }

To ———:

You are hereby notified that on the ——— day of ———, 18—, the plaintiff will move the court for a summary judgment (or order, as the case may be) against you on the following grounds:

1. That (here set out the grounds of the motion). And unless you appear and show cause to the contrary judgment will be rendered against you accordingly.

———, attorney for plaintiff.

§ 1301. Of the hearing.—The motion will be heard and determined without written pleadings and judgment given according to law and the rules of equity.[7] Where money of a third party is paid to the clerk in pursuance of a decree of court, such third party has no right to object to the disposition of such money on the ground that he had no notice of the action in which the decree was rendered; if the decree is invalid it can not be attacked in that manner.[8] In the absence of a demand for a trial of the issues at law and for a jury it is not error to try the case to the court as an equitable proceeding.[9]

[4] Code, Sec. 3827.
[5] Code, Sec. 3828; see Mansfield v. Wilkerson, 26-482.
[6] Code, Sec. 3829; Mansfield v. Wilkerson, 26-482.
[7] Code, Sec. 3830; Mansfield v. Wilkerson, 26-482.
[8] Elliott v. Jones, 47-124.
[9] Lothian v. Lothian, 88-396.

CHAPTER LXXXII.

OF TRESPASS.

Sec. 1302. What is trespass.
1303. When the action will lie.
1304. Who may maintain the action.
1305. When the action will not lie.
1306. Of the petition.
1307. Of practice.

Section **1302. What is trespass.**—Trespass is an unlawful act committed with violence vie et armis to the personal property or relative rights of another.[1]

§ **1303. When the action will lie.**—It will lie for wilfully injuring any timber, tree, or shrub on the land of another; or in the street, or highway, in front of another's cultivated grounds, yard, or town lot, and on the public grounds of any town, or on land held by the State of Iowa for any purpose whatever.[2] So it will lie against one who drives his cattle upon another's land through a breach in the fence.[3] Or when one enters on the land of another and digs a ditch.[4] And it will lie against one who without leave raises a crop on another's land and removes it.[5]

§ **1304. Who may maintain the action.**—The suit may be instituted in the name of any person entitled to protect or enjoy the property trespassed upon, and if recovery be had the perpetrator must pay treble damages.[6]

It may be maintained by the owner of an estate in

[1] 2 Bouv. Law Dic., 14th Ed., pg. 608.
[2] Code, Sec. 4306; Wilson v. Gunning, 80-331; Werner v. Flies, 91-146.
[3] Erbes v. Wehmeyer, 69-85.
[4] Williams v. Mills Co., 71-367.
[5] Kiernan v. Heaton, 69-136; Schmidt v. Williams, 72-317.
[6] Code, Sec. 4306.

remainder, or reversion, for an injury to the inheritance.[7] So an heir, whether a minor or of full age, may maintain the action for injuries done in the time of his ancestor, as well as in his own time, unless barred by the statute of limitations.[8] And a purchaser at execution sale may maintain the action.[9] But this would not prevent the person occupying the land during the period of redemption from using it in the ordinary course of husbandry, or from using timber for the purpose of making proper repairs thereon.[10]

So the owner of a treasurer's certificate who purchases the land sold for taxes, may recover treble damages of one wilfully committing trespass thereon,[11] but the moneys recovered in such case will be paid by the officer collecting the same, to the county auditor of the county in which the lands are situated, and held by him and an entry made in a book kept for that purpose, until such lands are redeemed and a treasurer's deed shall have been executed to the holder of the certificate. If redemption be made, the money will be paid to the owner of the land; if not redeemed, to the person to whom such deed is executed.[12]

The tenant in possession may also have an action for such injuries.[13] So it is held when one is in constructive possession he can maintain the action of trespass.[14] The owner of real property, though it be actually occupied by a tenant, can maintain an action against a trespasser for injuries to the premises.[15]

§ 1305. When the action will not lie.—The action will not lie against a person who is settled upon and occupying any portion of the public lands held by the State of Iowa, where he is improving or cultivating said land in the ordinary course of husbandry, and not taking or

7 Code, Sec. 4307.
8 Code, Sec. 4308.
9 Code, Sec. 4309.
10 Code, Sec. 4309.
11 Code, Sec. 4311.
12 Code, Sec. 4312.
13 Elliott v. Foster, 33-216.
14 Terpenning v. Gallup, 8-74; Mann v. Lewis, 4 G. Gr., 494; Dorcey v. Patterson, 7-420.
15 Printz v. Cheney, 11-469; see Brown v. Bridges, 31-138.

using timber, or other materials, growing or being on said land, except as the same are necessary properly to enable him to suitably cultivate and improve the same.[16]

§ 1306. Of the petition.

FORM OF PETITION IN AN ACTION OF TRESPASS ON REAL PROPERTY.

Title, }
Venue. }

The plaintiff states:

That on or about the ——— day of ———, 18—, ———, said plaintiff, was the owner of the following described real estate in the county of ——— aforesaid, and ever since that time has been the owner of the same (here describe the premises); that said premises are the cultivated grounds (yard or town lot) of the plaintiff; that on said day and divers other days between that day and the commencement of this suit, the defendant unlawfully did enter upon said premises, and then and there cut down ——— sugar trees standing and growing on said premises, and of the value of ——— dollars each, and converted the same to his own use, and no part of said sum has been paid plaintiff. Wherefore plaintiff prays judgment against the defendant for the sum of ——— dollars and costs.

———, attorney for plaintiff.

(Prayer for judgment should be for three times the amount of damages sustained.)

§ 1307. Of practice.—In order to maintain an action the plaintiff need not be in actual possession of the land at time of the commission of the trespass, provided he is the owner thereof, and there was no adverse possession in another.[17] But where a plaintiff in an action for trespass does not allege that he was in possession, but relies wholly on ownership, he must show, in order to recover, that he or his grantors obtained title from the general government.[18]

And a deed constituting a necessary link in the chain of such title it admissible in evidence, although the description of the premises is defective; the defect may be cured by other competent evidence.[19] Trespass will

[16] Code, Sec. 4310.

[17] Terpenning v. Gallup, 8-74; Mann v. Lewis, 4 G. Greene, 494; Dorcey v. Patterson, 7-420; see Brown v. Bridges, 31-138; Printz v. Cheney, 11-46.

[18] Heinrichs v. Terrell, 65-25.

[19] Heinrichs v. Terrell, 65-25.

not be restrained by injunction when the injury is not irreparable, and the trespasser is solvent, and adequate damage may be recovered at law.[20] But an injunction will be granted to prevent the continuance of a trespass in defiance of the mandate of court.[21] A trespasser on a railroad track who is struck and injured by a train can not recover on account of negligence of the company, except negligence of the employes in not trying to avoid the injury after discovery of the danger.[22]

And one who, without license, walks or stops to play or loiter on a railway track is a trespasser.[23] If a defendant in answering does not set up title in himself, in the premises on which the alleged trespass was committed, he will not be permitted to give evidence of such title.[24] It is held that an appraisement made by two of the township trustees under the provisions of the code, for damage of trespassing animals is void if no notice was given the third trustee.[25]

[20] Bolton v. McShane, 67-207.
[21] Ten Eyck v. Sjoburg, 68-625.
[22] Morris v. C., B. & Q. R. Co., 45-29; Masser v. C., R. I. & P. R. Co., 68-602.
[23] Masser v. C., R. I. & P. R. Co., 68-602.
[24] Dyson v. Ream, 9-51; Fidler v. Smith, 10-587.
[25] Barrett v. Dolan, 71-94.

CHAPTER LXXXIII.

OF WASTE.

Sec. 1308. Waste defined.
1309. Of the commission of waste.
1310. Of the judgment.
1311. When a person will be deemed to have committed waste.
1312. Of the petition.

Section **1308. Waste defined.**—Waste is said by Mr. Justice Blackstone to be "a spoil or destruction in houses, gardens, trees or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee simple or fee tail."

§ **1309. Of the commission of waste.**—If a guardian, tenant for life or years, joint tenant or tenant in common of real property, commit waste thereon, he is liable to pay three times the damages which have resulted from such waste, to the person who is entitled to sue therefor.[1] The provisions of this section do not apply to an action against a tenant under a mining lease for mining coal outside of the limits specified in the lease.[2]

§ **1310. Of the judgment.**—Judgment of forfeiture and eviction may be rendered against the defendant, whenever the amount of damage so recovered is more than two-thirds the value of the interest such defendant has in the property injured, and when the action is brought by the person entitled to the reversion.[3]

§ **1311. When a person will be deemed to have committed waste.**—A person whose duty it is to prevent waste and who fails to use reasonable and ordinary care to avert the same, is deemed to have committed it.[4]

1 Code, Sec. 4303.
2 Oskaloosa College v. Western Union Fuel Co., 90-380.
3 Code, Sec. 4304.
4 Code, Sec. 4305.

§ 1312. Of the petition.—The petition in an action for waste may be in the following form:

Title,
Venue. }

The plaintiff states that he was, on the ——— day of ———, 18—, and ever since has been, seized in fee simple of following described premises (here describe premises), and that on said date he leased to the defendant the premises above described for the term of ——— years by written lease at the yearly rent of ——— dollars, payable ——— (state as in lease) a copy of which is hereto annexed marked "A" and made a part hereof. That the said defendant in said lease covenanted with the said plaintiff that he, the said defendant (here set out the covenant in relation to keeping buildings and premises in repair), and said plaintiff says that the said defendant took possession of said premises under and by virtue of said lease and still keeps the same; that when he took possession of said premises they were in good repair and condition, and that during the period of said occupancy and on the ——— day of ———, 18—, and at divers times between that day and the commencement of this action, the said defendant spoiled and wasted said premises by (permitting the roofs of the building thereon to become open and leaky or by breaking down the doors, here state any other acts of waste) and has otherwise committed waste and destruction in and upon said premises, whereby the plaintiff has been damaged in the sum of ——— dollars, no part of which has been paid, and the said defendant has and does threaten to commit further and other obstruction and waste on said premises in this, that he threatens to (here state what defendant threatens to do, which is claimed to be waste). Plaintiff, therefore, prays judgment against the said defendant for the sum of ——— dollars and costs.

———, attorney for plaintiff.

Where the above form of petition is in an action where it is sought to enjoin the continuance of the commission of waste before the final determination of the suit, the prayer for damages should be three times the amount which has resulted from such waste.[5]

[5] Cowles v. Shaw, 2-496; Wilson v. Henzel, Morris, 461.

CHAPTER LXXXIV.

OF APPELLATE PROCEEDINGS.

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Section **1313. Of time of taking an appeal.**—Appeals may be taken from the superior and district courts to the supreme court at any time within six months from the rendition of the judgment or order appealed from.[1]

1 Code, Sec. 4110; Rules, Sec. 9; Oppenheimer v. Barr, 71-525.

In computing the six months within which an appeal may be taken, the day on which the judgment was rendered will be excluded, and the corresponding day at the end of the time included.[2] The record must show that the appeal was taken in time.[3] The time of taking an appeal is jurisdictional and must affirmatively appear or the appeal will be dismissed.[4] A failure to comply with the statute as to the service of notice of appeal will not be excused because the notice could not be served within the time required.[5] The time for taking an appeal must be computed from the time the decree or judgment is entered not from the time of making a subsequent order correcting mere formal defects.[6] It is not necessary that the notice of appeal be filed with the clerk within six months,[7] nor that the clerk's fees for a transcript be paid or secured within that time.[8] But the appeal need not be perfected within the six months, thus shorthand notes are not required in all cases to be filed within that time.[9] An appeal from the final judgment in due time will raise the objections to all previous proceedings in the case, although more than six months have elapsed since such proceedings were had.[10] If the judgment was, by agreement, rendered in vacation, as of the preceding term, the time for taking an appeal will begin to run from the time the decision was, in fact, made.[11] But an appeal taken within six months from a decision of the court on a petition for a new trial, but more than six months from the rendition of the judgment on the verdict, will only bring up for review the action of the court relating to the petition for new trial.[12] And an appeal in

[2] Carleton v. Byington, 16-588; Parkhill v. Brighton, 61-103; Ritchey v. Fisher, 85-560.

[3] Gleason v. Collett, 77-448; Wambach v. Grand Lodge, 88-313; Taylor v. Taylor, 63 N. W., 180.

[4] Wambach v. Grand Lodge, 88-313; Taylor v. Taylor, 63 N. W., 180.

[5] McNider v. Sirrine, 84-58.

[6] Calef v. Cole, 93-679.

[7] Baldwin v. Tuttle, 23-66.

[8] Fairburn v. Goldsmith, 56-347; see Loomis v. McKenzie, 57-77.

[9] Hammond v. Wolf, 78-227.

[10] Halladay v. Johnson, 12-563; Lesure Lumber Co. v. Mutual F. Ins. Co., 70 N. W., 761.

[11] Carter v. Sherman, 63-689; Kendall v. Lucas County, 26-395; McMurray v. Day, 70-671; see Williams v. Wells, 62-747.

[12] Cohol v. Allen, 37-449; Carpenter v. Brown, 50-451; see Pat-

an equity case, taken more than six months after the rendition of judgment, will not bring up for the consideration of the supreme court any of the proceedings prior to the filing of the motion for a new trial, and the court can not try the case de novo.[13] The right of an appeal must, in all cases, be determined by the law in force when the judgment is rendered.[14] Sometimes the judgment relates back to a term of court in which case the time for taking the appeal is computed from the date the judgment was in fact entered.[15]

§ 1314. When an appeal lies.—An appeal lies from the removal or suspension of an attorney.[16] The supreme court has appellate jurisdiction over all judgments and decisions of all other courts of record, as well in civil actions as in proceedings of a special or independent character.[17] Under Code Section 4100 an appeal will lie by a city or its board of equalization in its behalf from a judgment canceling an assessment rendered on appeal from the board, though the city or board had no right to appeal in the first instance to the district court. And an appeal lies from the following orders: An order made affecting a substantial right in an action, when it, in effect, determines the action, and prevents a judgment from being taken; a final order made in special proceedings affecting a substantial right therein, and made on a summary application in an action after judgment; when an order grants or refuses, continues or modifies a provisional remedy, or grants, refuses, dissolves or refuses to dissolve an injunction or attachment; when it grants or refuses a new trial; when it sustains or overrules a demurrer; an intermediate order involving the merits and materially affecting the final decision;

terson v. Jack, 59-632; Wishard v. McNeil, 78-40.

[13] Bosch v. Bosch, 66-701.

[14] Rivers v. Cole, 38-677; Davenport v. Davenport, etc., 37-624.

[15] Carter v. Sherman, 63-689; Kendall v. Lucas County, 26-395, and see Carter v. Davidson, 73-45.

[16] Code, Sec. 329.

[17] Code, Sec. 4100; Rules, Sec. 3; Chicago, R. I. & P. R. Co. v. Dey, 76-278; In re Breese, 82-573; Farmers L. & T. Co. v. Newton, 66 N. W., 784; State v. Van Beek, 87-569; Hodges v. Tama County, 91-578.

an order or judgment in habeas corpus.[18] If any of the above orders or judgments are made or rendered by a judge the same may be reviewed as if made by the court.[19] An appeal lies from an order declaring a bail-bond forfeited,[20] from a decree of partition,[21] from a decree for an accounting,[22] from an order denying the district attorney the right to appear for the county,[23] and from a decree though a cross-bill is pending,[24] and from a final order vacating a judgment,[25] and from a certiorari proceeding,[26] and from an order revoking a permit to sell liquor.[27] An appeal will only lie from an intermediate order when it affects the merits of the case.[28] But in such cases it has been held that an appeal would lie from a ruling sustaining a motion to set aside an order made in a case directing the payment of a sum of money from one party to another,[29] and in some instances from a ruling on a motion to change the venue of a case.[30] So an appeal lies from a ruling on demurrer,[31] and from a ruling on a motion striking matter from a petition, thereby preventing the introduction of evidence,[32] and from a ruling striking a petition of intervention from the files,[33] and from a decision overruling a motion to set aside a verdict in an ad quod damnum proceeding,[34] and from an order dissolving or sustaining an attachment,[35] and from a

[18] Code, Sec. 4101; Rules, Sec. 4; Coffin v. Eisiminger, 75-30; In re Estate of Pyle, 82-144; Price v. Ætna Ins. Co., 80-408; Hawk v. Evans, 76-593; Blair v. Blair, 74-311; Nat'l Bk. v. Chase, 71-120; Clark v. Raymond, 84-251; Guthrie v. Guthrie, 71-744; Kell v. Lund, 68 N. W., 593; Weiser v. McDowell, 93-772; Sieffert & Wise L. Co. v. Hartwell, 63 N. W., 333; Bradley v. Miller, 69 N. W., 426; Bicklin v. Kendall, 72-490; Mahaska County State Bk. v. Christ, 82-56; Baldwin v. Foss, 71-389; Kay v. Pruden, 69 N. W., 1137.

[19] Code, Sec. 4102; Rules, Sec. 5.

[20] State v. Connehan, 57-351.

[21] Williams v. Wells, 62-747.

[22] McMurray v. Day, 70-671.

[23] Clark v. Lyon County, 37-469.

[24] Lucas v. Pickel, 20-490.

[25] Dryden v. Wyllis, 51-534; Code, Sec. 4100.

[26] Iske v. Newton, 54-586.

[27] State v. Schmidtz, 65-556.

[28] Richards v. Burden, 31-305.

[29] Guthrie v. Guthrie, 71-744.

[30] Lucas County v. Wilson, 59-354.

[31] Cowen v. Boone, 48-350; Hampton v. Jones, 58-317; Arnold v. Kreutzer, 67-214; Code, Sec. 4101; Seippel v. Blake, 80-143; Thorpe v. Smith, 86-410; Weiser v. McDowell, 93-772; Bradley v. Miller, 69 N. W., 426.

[32] Stanley v. Davenport, 54-463.

[33] First Nat'l Bk. v. Gill, 50-425; Bicklin v. Kendall, 72-490.

[34] Burnham v. Thompson, 35-421.

[35] Johnson v. Butler, 1-459; Berry v. Gravel, 11-135.

judgment against a garnishee,[36] and from an order directing a guardian to pay a judgment,[37] and from an order of a probate court in a special proceeding for the discovery of assets,[38] and from an order transferring or refusing to transfer a cause to the equity docket,[39] and from an order dismissing a special proceeding to compel an attorney to pay over money,[40] and from an order expunging a final order,[41] and on final judgment from an order upon a motion for a change of venue[42] and sometimes from a ruling on a motion to strike,[43] and from an order striking out an amendment to a petition which added another defendant and alleged that he was jointly liable with the original defendant and which set up ground for attachment against him,[44] and from an order allowing, refusing or dissolving an injunction,[45] and from an order appointing or refusing to appoint a receiver,[46] and from an order recommitting a cause to arbitrators,[47] and from an order releasing the original defendants and substituting other defendants,[48] and from an order dismissing an appeal from justice's court,[49] and from a judgment rendered without authority,[50] and from a judgment by confession,[51] and from a judgment by default or a decree pro confesso,[52] and from a decree determining a material issue,[53] and from an order quashing an original notice,[54] and from the action of the district or superior court in reference to violation of the law regulating railway com-

[36] Bebb v. Preston, 1-460; Sinard v. Gleason, 19-165; National Bk. v. Chase, 71-120.
[37] Coffin v. Eisiminger, 75-30.
[38] In re Estate of Pyle, 82-144.
[39] Price v. Ætna Ins. Co., 80-408.
[40] Hawk v. Evans, 76-593.
[41] Guthrie v. Guthrie, 71-744.
[42] Kell v. Lund, 68 N. W., 593.
[43] Seiffert & Wise L. Co. v. Hartwell, 63 N. W., 333.
[44] Hay v. Pruden, 69 N. W., 1137.
[45] Trustees v. Davenport, 7-213; Bennett v. Hetherington, 41-142.
[46] Callanan v. Shaw, 19-183; Clark v. Raymond, 84-251.
[47] Brown v. Harper, 54-546.
[48] Sunberg v. District Court, 61-597.
[49] Curran v. Excelsior C. Co., 63-94.
[50] Petty v. Durall, 4 G. Gr., 120.
[51] Troxel v. Clarke, 9-201; Edgar v. Greer, 7-136.
[52] Woodward v. Whitescarver, 6-1; Harris v. Kramer, 3-543; Carr v. Kopp, 3-80; Byington v. Crosthwait, 1-148.
[53] Lucas v. Pickel, 20-490.
[54] Elliott v. Corbin, 4-564; Worster v. Oliver, 4-345.

panies,[55] and from an order granting or refusing a new trial,[56] and in cases of mandamus.[57]

§ 1315. When an appeal will not lie.—Except as otherwise stated, an appeal will not lie unless it appears that a judgment has been rendered.[58] Thus, an appeal will not lie from a verdict.[59] Nor will an appeal lie when the party complaining has accepted the benefit of an adjudication;[60] nor when the judgment appealed from has been voluntarily paid;[61] nor from an order arresting judgment;[62] nor from an order punishing for contempt;[63] nor from an order requiring a paper showing an acceptance under the provisions of a will to be put on record;[64] nor from an order granting a rule to produce books and papers;[65] nor from rulings not affecting substantial rights nor involving the merits of the case;[66] nor as a rule from an order or ruling on a motion to strike allegations as irrelevant or redundant,[67] but it is otherwise as to a motion to strike a cross-petition from the files.[68] In case of certain intermediate orders it is held an appeal will not lie until final judgment is rendered. Of this class are orders permitting the introduction of further testimony in an equity case, after it has been remanded by the supreme court,[69] and a finding of facts,[70] and rulings on a motion to supress depositions,[71] and generally orders granting or refusing a change of venue.[72]

[55] Code, Sec. 2137.

[56] Newell v. Sanford, 10-396; Caffery v. Groom, 10-548; Baldwin v. Foss, 71-389.

[57] Dist. Twp. v. Ind. Dist., 72-657.

[58] Green v. Rouen, 59-83; Groves v. Richmond, 58-54.

[59] Heath v. Groce, 10-591; Pittman v. Pittman, 56-769.

[60] Buena Vista County v. I., F. & S. C. R. Co., 55-157; Ind. Dist. v. Dist. Twp., 44-201; M. & M. R. Co. v. Byington, 14-572.

[61] Borgalthous v. Farmers, etc., 36-250; Hipp v. Crenshaw, 64-404.

[62] Wallis v. Sparks, Morris, 20.

[63] Code, Sec. 4468; Dunham v. State, 6-245; First Cong. Ch. v. Muscatine, 2-69.

[64] In re Estate of Slauson, 82-366.

[65] Cook v. Chicago, R. I. & P. R. Co., 75-169.

[66] Quinn v. Capital Ins. Co., 82-550; Chicago, R. I. & P. R. Co. v. Dey, 76-278; Roberts v. Malloy, 69 N. W., 674; State v. Arns, 72-555; Ida County v. Woods, 79-148.

[67] Allen v. Church, 70 N. W., 127; Allen v. Cook, 71 N. W., 534; Specht v. Spangesberg, 70-488.

[68] Mahaska County State Bk. v. Christ, 82-56.

[69] Garmoe v. Thompson, 65-323.

[70] Boyce v. Wabash R. Co., 63-70.

[71] Baldwin v. Mayne, 40-687.

[72] Allerton v. Eldridge, 56-709; Groves v. Richmond, 58-54; Horak v. Horak, 68-49; Edgerly v. Stewart, 86-87.

Nor will an appeal lie from an order overruling a motion to dismiss proceedings under a writ of habeas corpus;[73] nor from an order sustaining exceptions to interrogatories to be answered by the mother of a child in a bastardy proceeding.[74]

In the following cases it seems no appeal will lie: When a party procured the judgment from which he seeks to appeal.[75] When a stay of execution is taken,[76] or from an order of continuance,[77] or when the court refuses to compel a member of the bar to prosecute a disbarment proceeding,[78] or from an order requiring security for costs,[79] or when an intermediate order is one not contemplated by law.[80] Ordinarily error in intermediate orders upon questions of practice, the admission of evidence and the like, from which a direct appeal can not be prosecuted, may be urged upon an appeal from the final judgment, except as stated in this section;[81] but to be thus raised the record must show that a final judgment was rendered.[82] And it seems one may elect, in cases where an appeal is allowed from an intermediate order, to appeal at the time therefrom, or to do so on appeal from the final judgment.[83]

An appeal from the final judgment brings up for review all intermediate rulings to which exceptions are properly taken.[84] A direct appeal will not lie from a ruling refusing to strike out part of a petition.[85]

§ 1316. What will amount to a waiver of the right to appeal.—The right to appeal, when such right exists, may be waived by the acts of the party entitled thereto. Thus when a party after perfecting his appeal from a judgment, consents to the transfer of the cause to

[73] Smith v. Bigelow, 19-459.
[74] State v. Arns, 72-555.
[75] Hughes v. Feeter, 23-547.
[76] Code, Sec. 3998; Seachrist v. Newman, 19-323.
[77] Jaffray v. Thompson, 65-323.
[78] Byington v. Moore, 70-206; Code, Sec. 4101.
[79] Des Moines Valley, etc., v. Henderson, 38-446.
[80] Battle v. Lowery, 46-49.
[81] Richards v. Burden, 31-305.
[82] Shannon v. Scott, 40-629; Jordan v. Henderson, 19-565.
[83] Jones v. Chicago & N. W. R. Co., 36-68.
[84] Palmer v. Rogers, 70-383; Lesure Lumber Co. v. Mut. Fire Ins. Co., 70 N. W., 761.
[85] Specht v. Spangenberg, 70-488.

another court for trial he waives his appeal.[86] And he waives such right to appeal from a judgment when he brings an action in equity to enjoin its collection.[87] And an error in dismissing a former action is waived by bringing a new action for the same indebtedness.[88] But the fact that there is another remedy for the error complained of will not take away the right of appeal from an erroneous judgment or decision in any case where such appeal is authorized.[89] Nor will the acceptance of a portion of the judgment admitted to be due prevent an appeal from that part of it claimed to be erroneous.[90] Nor will the acceptance by the county treasurer of a fine imposed by a justice of the peace, deprive the State of the right to appeal.[91] Nor will the involuntary payment of a judgment estop the party from appealing.[92] So the acceptance of a tender, in some cases, will not waive the right of appeal.[93] Nor will the issuing of an execution (even after transcript is filed in the supreme court) when nothing is realized thereon.[94] Nor will the filing of a transcript of the judgment in another county.[95] If the right of appeal has been waived the appeal will be dismissed on motion.[96] An agreement not to appeal from a judgment in consideration of a reduction thereof is not contrary to public policy.[97]

§ 1317. Of the amount in controversy—How determined.—No appeal can be taken in any case in which the amount in controversy between the parties as shown by the pleadings does not exceed one hundred dollars, unless the trial judge certifies during the term in which the judgment is entered that the cause is one in which an appeal should be allowed, and upon such certificate

[86] Lillie v. Skinner, 46-329.
[87] Gordon v. Ellison, 9-317.
[88] Liebrick v. Stahle, 66-749, and No. 87.
[89] Wilson v. Shorick, 21-332.
[90] Upton Mfg. Co. v. Huiske, 69-557.
[91] State v. Tait, 22-140.
[92] Grim v. Semple, 39-570; Burrows v. Stryker, 45-700.
[93] Dudman v. Earl, 49-37; see Jewell v. Reddington, 57-92.
[94] Hornish v. Peck, 53-157.
[95] Tama County v. Melendy, 55-395.
[96] Ind. Dist. v. Dist. Twp., 44-201; see Crane v. Guthrie, 48-693
[97] Lundon v. Waddick, 67 N. W., 388.

being filed the same is appealable regardless of the amount in controversy. But this limitation does not affect the right of appeal in cases which involve any interest in real property.[98] Nor is the right of appeal affected by the remission of any part of the verdict or judgment returned or rendered. It will be seen it must appear from the pleadings that it was possible for the court properly to render judgment against one of the parties for more than one hundred dollars.[99] And in determining the amount the allegations of the pleadings and not the prayer will govern,[1] and when a part of the claim is conceded the amount in controversy is the balance,[2] and this is so when by tender the claim is reduced below one hundred dollars,[3] and the amounts of an original claim and of a counter claim can not be added together to determine the amount in controversy.[4] If plaintiff's claim is admitted and a counter claim pleaded, it determines the amount in controversy.[5] If the defendant claims a credit for more than one hundred dollars on a claim of less than that amount, but interposes no counter claim, the amount in controversy is the amount of plaintiff's claim.[6] When the plaintiff claims more than one hundred dollars, but introduces no evidence in support of part of it, such part will be deemed abandoned and not considered in determining the amount in controversy.[7]

[98] Code, Sec. 4110; Van Sickle v. Downs, 72-624; Chilton v. C., R. I. & P. R. Co., 72-689; Dist. Twp. v. Ind. Dist., 72-657; Rules, Sec. 9; Thurston v. Lamb, 90-363; Buckland v. Shephard, 77-329; Schultz v. Holbrook, 86-569; Fillmore v. Hintz, 90-758; Central City v. Treat, 70 N. W., 110; Hiatt v. Nelson, 69 N. W., 553; Thompson v. Jackson, 93-376; Tuthill Spring Co. v. Smith, 90-331; Brock v. Barr, 70-399; Edwards v. Cosgro, 71-296; Koltz v. Messenbrink, 74-242; Griffin v. Harriman, 74-436; State v. McCullough, 77-450; Dist. Twp. v. Ind. Dist., 72-687; Farley v. Geisheker, 78-453; Geyer v. Douglass, 85-93; Democrat Pub. Co. v. Lewis, 90-304.

[99] Madison v. Spitznogle, 58-369; Ormsby v. Nolan, 69-130; Harrington v. Pierce, 38-260; Babcock v. Board, etc., 65-110; Henkle v. Keota, 68-334; Ruiter v. Plate, 77-17; Buckland v. Shephard, 77-329; Schultz v. Holbrook, 86-569; Fillmore v. Hintz, 90-758; Thompson v. Jackson, 93-376.

[1] Cooper v. Dillon, 56-367; Incorporated town, etc., v. Treat, 70 N. W., 110; Fullerton v. Cedar Rapids & M. C. R. Co., 70 N. W., 106; Hiatt v. Nelson, 69 N. W., 553.

[2] Thompson v. French, 57-559.

[3] Marlow v. Marlow, 56-299.

[4] Madison v. Spitznogle, 58-369; Fox v. Duneau, 60-321.

[5] Alsip v. Hard, 38-697.

[6] Kuntz v. Hoffman, 65-260.

[7] Same as No. 6.

In case an appeal from a justice's court is consolidated with an action in the district court and the aggregate amount in controversy exceeds one hundred dollars, an appeal will lie.[8] Whether interest will be taken into consideration in determining the amount will depend on circumstances,[9] and costs will not be taken into consideration in determining the amount in controversy.[10] In replevin, where the defendant only claims an interest in the property less than one hundred dollars in value, such interest determines the amount in controversy.[11]

§ 1318. Of the form and requisites of the certificate.—The change in the statute renders all decisions construing that part of the old statute touching setting out the questions of law which it was desired to have decided of no further use and they have therefore been omitted. The provisions of the statute under consideration are constitutional.[12]

§ 1319. Of the time of making the certificate, etc.—The certificate must be made before the adjournment of the term of court at which the judgment was entered.[13] The certificate can not, by agreement, be made in vacation.[14] It can not be made until the case is finally disposed of.[15] If, however, it appears that the certificate was signed in time, it will be presumed, in the absence of anything to the contrary, that it was filed within the proper time.[16] The obtaining of the certificate is not a matter of right.[17] The appellant can not question the

[8] Brock v. Barr, 70-399; Edwards v. Cosgro, 71-296; and see Tuthill Spring Co. v. Smith, 90-331.

[9] Dryden v. Wyllis, 51-534; Holmes v. Hull, 48-177; Hays v. C., B. & Q. R. Co., 64-593; Klotze v. Messenbrink, 74-242; Griffin v. Harriman, 74-436.

[10] Hakes v. Dott, 54-17; Bradenberger v. Rigler, 68-300; Ardery v. C., B. & Q. R. Co., 65-723; but see State v. McCullough, 77-450.

[11] Mohme v. Livingstone, 54-458; Davis v. Upright, 54-752.

[12] Andrews v. Burdick, 62-714.

[13] Code, Sec. 4110; Fallon v. Dist. Twp., 51-206; Independence v. Purdy, 48-675; Rose v. Wheeler, 49-52; Lomax v. Fletcher, 40-705; Rivers v. Cole, 38-677; Hershfield v. First Nat'l Bk., 39-699; Nicely v. Rogers, 39-441; Hinesley v. Mahaska County, 69-511; Morrison v. Ross, 90-524; Sayles v. Smith, 71-241; Rules, Sec. 9.

[14] Fallon v. Dist. Twp., 51-206.

[15] Hickok v. Buell, 51-655.

[16] Long v. C., M. & St. P. R. Co., 64-541.

[17] Meeker v. C., M. & St. P. R. Co., 64-631.

correctness of the certificate signed by the judge,[18] but its sufficiency is a jurisdictional matter, and will be taken notice of by the court.[19] The cases cited are to be read in the light of the requirement of the present statute which permits the certificate to be made during the term.

§ 1320. Of questions involving an interest in real estate.—An action to foreclose a mechanic's lien was held not to be a question involving an interest in real estate.[20] Nor does the fact that it is sought to establish a lien, special or general, upon real estate, make the case one involving an interest in real property.[21] But when there is involved the question of the right of the public to occupy and use real estate as a highway, the case comes within the exception provided by the statute, and is appealable regardless of the amount in controversy.[22] An action to quiet title as against a sheriff's deed on the ground that the property was a homestead involves an interest in real estate.[23]

§ 1321. Of notice of appeal.—An appeal is taken and perfected by the service of a notice in writing on the adverse party, his agent, or any attorney who appeared for him in the cause in the court below, and also upon the clerk of the court wherein the proceedings were had, stating the appeal from the same, or from some specific part thereof, defining such part.[24] But if the appeal be from part of an order, or from one of the judgments of a final adjudication, or from part of a judgment, it will not disturb, delay or affect the rights of any party to any judgment, or part of a judgment, or order, not appealed from, but the same will proceed as if no appeal had been taken.[25]

The notice may be in the following form:

[18] Hager v. Adams, 70-746.

[19] White v. Beatty, 64-331; Beach v. Donovan, 74-543.

[20] Andrews v. Burdick, 62-714.

[21] Colyar v. Pettit, 63-97; Johns v. Pattee, 61-393; Brown v. Smith, 76-315.

[22] McBurney v. Graves, 66-314.

[23] Jones v. Blumenstein, 77-361.

[24] Kennedy v. Rosier, 71-671; Weiser v. Day, 77-25; Searles v. Lux, 86-61; Geyer v. Douglass, 85-93; Lesure Lumber Co. v. Mutual F. Ins. Co., 70 N. W., 761; Code, Sec. 4114; Rules, Sec. 13.

[25] Code, Sec. 4113.

FORM OF NOTICE OF APPEAL.

Title, }
Venue. }

To the above named plaintiff, or to ———, his attorney, and to ———, clerk of said court:

You are hereby notified that the defendant in said action has appealed from the judgment (or some specified part thereof, or from some specified order made in the cause), of the (name of court), rendered in favor of plaintiff, at the ——— term thereof, on the ——— day of ———, 18—, to the supreme court of Iowa, and that said appeal will come on for hearing and trial in said court at the ——— term thereof, to be held at Des Moines, commencing on the ——— day of ———, 18—.

———, attorney for defendant.

This notice of appeal must be served at least thirty days, and the cause filed and docketed at least fifteen days before the first day of the next term of the court to which the appeal is taken, or the case will not be submitted at that term, unless by consent of parties.[26] And if the appeal is taken less than thirty days before the term, it must be so filed and docketed before the next succeeding term.[27]

§ 1322. **Of service of the notice—Perfecting the appeal.**—An appeal is not perfected until the notice above stated is served upon both the party and the clerk.[28] A notice not signed is not good.[29] A failure to specify the term of court will not be fatal.[30]

The service of the notice is essential to give the supreme court jurisdiction.[31] The service of all notices of appeal, is the same as is provided for an original notice in the district court, and they may be served by the same person and returned in the same manner, and the original notice of the appeal must be returned immediately after service to the office of the clerk of the district court where the suit is pending.[32] All other notices con-

[26] Code, Sec. 4116; Rules, Sec. 15.

[27] Code, Sec. 4116; Rules, Sec. 15; Mickley v. Tomlinson, 79-383.

[28] Code, Sec. 4114; Rules, Sec. 13; Phillips v. Follett, 69-39.

[29] Doerr v. Southwestern Mut. L. Assn., 92-39.

[30] Geyer v. Douglass, 85-93.

[31] McClellan v. McClellan, 2-312; Lewis v. Miller, 4 G. Gr., 95; Hunt v. Clark, 46-291; see Horst v. Wagner, 43-373; Phillips v. Follett, 69-39.

[32] Code, Sec. 4115; Rules, Sec. 14; Littleton Sav. Bk. v. Osceola Land

nected with or growing out of the appeal must be served and the return made in like manner, and filed in the office of the clerk of the supreme court, and all notices when filed become a part of the record. Service of the notice can not be made by a party to the action.[33] Under the law there is no provision for making service of such a notice by leaving a copy with a member of the party's family,[34] and service of the notice upon the wife of the attorney for the appellee is not good.[35] Service may be made by a written acknowledgment made by the person on whom it is served.[36] Service on a guardian ad litem of an insane person has been held good.[37] Cases of service on attorney.[38] In an action against a city and the board of equalization, notice of appeal served on the mayor or city clerk is sufficient.[39]

And it may be made by taking an acceptance of service signed by the party. Such acceptance signed by the deputy clerk with the name of his principal by him as deputy, is a good service.[40]

Such acceptance may be in the following form:

FORM OF ACCEPTANCE OF SERVICE OF NOTICE OF APPEAL.

Due and legal service of the within notice of appeal is hereby acknowledged and a copy of the same received this ——— day of ———, 18—.

———, attorney for plaintiff.

So, in a proper case service may be made by publication as in other cases; and if the party is a non-resident, but has an agent residing in this State, service may be made on him, and will take the place of service by publication, and the proof of such service must be made in the manner provided for the proof of service of original notice

Co., 76-660; Brundage v. Chenoworth, 70 N. W., 211; Christie v. Life Indemnity, etc., Co., 82-360.

[33] Draper v. Taylor, 47-407; Marion County v. Stanfield, 8-406.

[34] Draper v. Taylor, 47-407.

[35] Webster v. Carson, 69-243.

[36] Sanxey v. Iowa City, etc., 68-542.

[37] Shoemake v. Smith, 80-655.

[38] Goodwin v. Hilliard, 76-555; Bruner v. Wade, 85-666.

[39] Farmers Loan & Trust Co. v. City of Newton, 66 N. W., 784.

[40] Same as No. 36.

on non-resident defendants.[41] If service is not made on the clerk the appeal will be dismissed.[42]

§ 1323. Of filing the notice—Waiving irregularities, etc.—While the notice should at once after service be filed with the clerk, yet it is not necessary.[43] When four years intervened between the taking of the appeal and the filing of the transcript, it was held that an additional notice must be served on the appellee.[44]

Where an appeal was had from an order substituting a third party in place of the sheriff against whom the action was brought, it was held that the appeal might be prosecuted against the sheriff without notice being served upon the substituted party, such party having joined the sheriff in asking for such substitution.[45] A notice of appeal from a judgment brings up all the objections properly saved on the trial including the motion for a new trial.[46] An appearance in the supreme court waives all irregularities in taking the appeal.[47] But it will not give jurisdiction when the court below had none.[48] Nor will such appearance by filing an abstract waive objection on account of want of notice, if such appearance is made before the expiration of the time for serving notice.[49] Nor will it waive the giving of notice of an appeal.[50] Service of notice of appeal is jurisdictional and the record must show such service or the case will be dismissed.[51] Where a board of supervisors is

[41] Code, Sec. 4115; Rules, Sec. 14; McClellan v. McClellan, 2-312.

[42] Ind. Dist. v. Apperle, 76-238; McManus v. Smith, 76-576; Redhead v. Baker, 80-162; State v. Clossner, 84-401; Merchant v. Soleman, 63 N. W., 464; Wheeler & Wilson Mfg. Co. v. Sterrett, 62 N. W., 675; Ainslie v. Wynn, 65 N. W., 401.

[43] Baldwin v. Tuttle, 23-66; Brier v. C., B. & P. R. Co., 66-602; Littleton Sav. Bk. v. Osceola Land Co., 76-660.

[44] Byington v. Robinson, 16-591.

[45] Sunberg v. Babcock, 61-601.

[46] Gulliher v. C., R. I. & P. R. Co., 59-416.

[47] Romaine v. Commissioners, Morris, 357; Morrow v. Carpenter, 1 G. Gr., 469.

[48] Long v. Long, Morris, 381.

[49] Brier v. C., B. & P. R. Co., 66-602.

[50] Plummer v. People's Nat'l Bk., 73-752; Ash v. Ash, 90-229.

[51] Michel v. Michel, 74-577; Bowman v. Day, 86-746; Norwegian Plow Co. v. Bruning, 65 N. W., 984; Brandenburg v. Keller, 69 N. W., 448; Kimball v. Barngrover, 80-768; Talbot v. Noble, 75-167; Smith v. Des Moines, 84-685; Names v. Names, 74-213; Roundy v. Kent, 75-662; McManus v. Swift, 76-576; Whitton v. Fuller, 77-599;

sued notice served upon the county auditor will not be good.[52]

§ **1324. Of the supersedeas bond.**—An appeal will not stay proceedings on the judgment or order, or any part thereof, unless the appellant causes to be executed, before the clerk of the court which rendered the judgment or order, by one or more sufficient sureties, to be approved by such clerk, a bond to the effect that the appellant will pay to the appellee all costs and damages that shall be adjudged against the appellant on the appeal; also, that he will satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the supreme court may render or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents or damages to property, during the pendency of the appeal, out of the possession of which the appellee is kept by reason of the appeal. If the bond is intended to stay proceedings on only a part of the judgment or order, it must be varied so as to secure the part stayed alone. When such bond has been approved by the clerk and filed, he must issue a written order, requiring the appellee and all others to stay all proceedings under such judgment or order, or so much thereof as is superseded, as the case may be.[53] In cases wherein the appellant has perfected his appeal to the supreme court, and the clerk of the lower court has refused for any reason to approve the appeal bond offered, or makes the penalty, therein too large, or the conditions thereof unjust, the appellant may apply to the district court or to

State v. Closner, 84-401; First Nat'l Bk. v. City Council of Albia, 86-28; Farrell v. Muscatine, 85-753; Mandel v. Friedman, 85-734; Donnelly v. Cedar County, 75-536; Schooley v. Globe Ins. Co., 76-78; Iowa City v. Johnson County, 68 N. W., 815; State v. McNamara, 66 N. W., 192; Flagler v. Cameron, 68 N. W., 580; State v. Benard, 68 N. W., 433; State v. Foresythe, 64 N. W., 265; State v. Dolezal, 68 N. W., 917; Swigart v. Jackson County, 66 N. W., 881; Sanger v. Skidmore, 66 N. W., 176.

[52] Polk v. Foster, 71-26.

[53] Code, Sec. 4128; Rules, Sec. 32; Phelan v. Johnson, 80-727; Lindsay v. Clayton District Court, 75-509; Allen v. Church, 70 N. W., 127; Allen v. Cook, 71 N. W., 534.

a judge thereof, who shall fix the amount and conditions of the bond and approve the same.[54] The application verified by the affidavit of the appellant or his attorney must contain a brief statement of the nature of the action in which the appeal was taken, of the judgment or order appealed from, of the steps taken by the appellant with reference to his appeal, and of his giving, or offering to give, an appeal bond, of the action of the clerk of the court below with reference to such bond, and wherein he has acted wrongfully. Pending the disposition thereof the judge may, by a written order, recall and stay all proceedings under the order or judgment appealed from until the decision of the application.[54] The bond when approved must be filed with the clerk who must issue a written order to stay proceedings.[55] Such bond may be in the following form:

FORM OF SUPERSEDEAS BOND.

Know all men by these presents that we, ———, principal, and ——— and ———, sureties, are held and firmly bound unto ———, in the sum of ——— dollars, lawful money of the United States, well and truly to be paid to the said ———, his heirs, executors and assigns.

The condition of this obligation is such that whereas, the said ——— has appealed from the judgment (or order, identifying it) of the district court of the State of Iowa, in and for ——— county, rendered on the ——— day of ———, 18—, in an action then pending in said court, wherein said ——— was plaintiff and the said ——— was defendant.

Now, if the said appellant shall pay to the said appellee all costs and damages that shall be adjudged against said appellant on said appeal, and shall also satisfy and perform the said judgment (or order) appealed from, in case it shall be affirmed, and any judgment or order which the supreme court may render or order to be rendered by the said district court, and all rents, or damages to the property during the pendency of the appeal out of the possession of which the appellee is kept by reason of the appeal, then this obligation to be void, otherwise to remain in full force and virtue.

Dated this ——— day of ———, 18—.

———, } principal.
———, } sureties.
———, }

(Add justification.)

[54] Code, Sec. 4132; Rules, Sec. 33. [55] Code, Sec. 4132; Rules, Sec. 33.

Said bond must be approved in form heretofore given, and the sureties must justify as provided by law. When the judgment or order to be stayed is for the payment of money, the penalty should be at least twice the amount of the judgment and costs, but in other cases the condition must be to save the appellee harmless from the consequences of the appeal. In no case can the penalty be less than one hundred dollars.[56] The appeal is not perfected by the filing of the supersedeas bond alone; the notice must also be served, and until it is served on the clerk he need not recall an execution, or issue an order to stay proceedings thereunder.[57] The bond, though irregular in form, may still be sufficient,[58] and may be amended.[59] An order of discharge in a habeas corpus proceeding cannot be suspended by the giving of a supersedeas bond.[60]

§ 1325. Of proceedings when bond is defective.—Of the supersedeas.—The appellee may move the court rendering the judgment or making the order appealed from or the supreme court or a judge of either court, if in vacation, upon ten days' notice in writing to appellant to discharge the bond on account of defect in substance or insufficiency in security, which motion, if well taken, must be sustained, unless appellant shall, within a day to be fixed in the order made and filed therein, give a new and sufficient bond as required by said order. If the new bond is not given, proceedings shall be had in the lower court as though no bond had been given in the first instance.[61]

But another supersedeas may be issued by the clerk upon the execution before him of a new and lawful bond with sufficient sureties.[62] The supersedeas may be in the following form:

[56] Code, Sec. 4134; Rules, Sec. 35. Flynn v. Des Moines & St. L. R. Co., 62-521.

[57] Pratt v. Western Stage Co., 26-241.

[58] Field v. Schricher, 14-119; Whitehead v. Thorp, 22-425.

[59] Mitchell v. Goff, 18-424.

[60] State v. Kirkpatrick, 54-373.

[61] Code, Sec. 4133; Rules, Sec. 34.

[62] Code, Sec. 4133; Rules, Sec. 34.

FORM OF SUPERSEDEAS.

The State of Iowa.
To ———, greeting:

Whereas ——— has appealed from the judgment (or order, identifying it) of the district court of ——— county, Iowa, rendered on the ——— day of ———, 18—, in an action then pending wherein ——— was plaintiff and ——— was defendant; and whereas the said ——— has filed in my office this day a supersedeas bond in said cause with sureties approved by me.

Now, therefore, you are hereby commanded and required to stay any and all proceedings in said cause (or on the part superseded) from and after the date hereof, and until said appeal is finally disposed of and determined.

Witness ——— clerk of said court, with the seal thereof hereto affixed, this ——— day of ———, 18—.

[Seal.] ———, clerk, etc.

The taking of an appeal from a part of a judgment or order and the filing the bond does not cause a stay of execution as to that part of the judgment or order not appealed from.[63] If an execution has issued prior to the filing of the bond the clerk must countermand the same.[64] Property levied on and not sold at the time the countermand is received by the sheriff must forthwith be delivered to the judgment debtor.[65]

Such countermand may be in the following form:

FORM OF COUNTERMAND.

The State of Iowa.
To ———, sheriff of ——— county, Iowa.

Whereas, ——— has appealed from the judgment (or order) of the district court in and for ——— county, Iowa, rendered on the ——— day of ———, 18—, in an action then pending in said court wherein ——— was plaintiff and ——— was defendant; and whereas, on the ——— day of ———, 18—, and after the delivery to you of the execution issued on said judgment, the said ——— filed in my office a supersedeas bond in said cause with sureties approved by me.

Now you are hereby commanded to forthwith return said execution without proceeding further thereunder.

Witness, etc. (as in last form).

On receipt of the above the sheriff should return the

[63] Code, Sec. 4129.
[64] Code, Sec. 4130; Rules, Sec. 32.
[65] Code, Sec. 4131; Swift v. Conboy, 12-444.

execution, stating his acts done under it, and that it was countermanded.

§ 1326. Who may appeal.—In order to appeal, one must be a party to the record.[66] Nor are the parties for whose benefit an action is brought or defended parties in such a sense as to be entitled to appeal.[67] Nor will an appeal lie in behalf of one who has stayed execution on the judgment.[68] A part of several co-parties may appeal, but in such case they must serve notice of the appeal upon those not joining therein, and file the proof thereof with the clerk of the supreme court.[69] If this notice is not served in such cases, the appellate court will dismiss the appeal. The co-parties, on being served, may elect to join in the appeal, in which case they are entitled to all the benefits of the same, and may file an assignment of errors, and may argue the case.[70] Nor can a defendant appealing complain of errors affecting only his co-defendant.[71] The co-defendant who is notified of an appeal is presumed to join in the appeal, unless he refuses so to do, and will be liable for his due proportion of the costs.[72] And co-parties refusing to join in the appeal can not afterward appeal, nor can they derive any benefit from the appeal, unless from the necessity of the case.[73] No appeal can be taken by a deceased party.[74] A party not appealing can have no relief.[75]

[66] Borgalthous v. Farmers, etc., 36-250; Ferguson v. Board, etc., 44-701; State v. Jones County Judge, 11-11; Phillips v. Shelton, 6-545; see Webster v. C., R. & St. P. R. Co., 27-315; Yarish v. C. R., I. F. & N. W. R. Co., 72-556.

[67] Code, Sec. 3464; Fleming v. Mershon, 36-413; Fuller v. Unknown, etc., 9-430; see White v. Hampton, 13-259; In re Estate of Bagger, 78-171.

[68] Waterford v. Eads, 10-592.

[69] Code, Sec. 4111; Rules, Secs. 10, 11; Hunt v. Hawley, 70-183; Moore v. Held, 73-538; Wright v. Mahaffey, 76-96; Kellog v. Colby, 83-513; Soukup v. Union Inv. Co., 84-448; Payne v. Ranbuisk, 82-587; Day v. Hawkeye Ins. Co., 77-343; Laprell v. Janosh, 83-753; Fisher v. Chaffee, 64 N. W., 662; Brundage v. Chenoworth, 70 N. W., 211; Ash v. Ash, 90-229; Marshall County v. Knoll, 69 N. W., 1146; Epeneter v. Montgomery County, 67 N. W., 93.

[70] Barlow v. Scott, 12-63; see Moore v. Held, 73-538.

[71] Eyre v. Cook, 9-185.

[72] Code, Sec. 4112; Rules, Sec. 11.

[73] Code, Sec. 4112; Rules, Sec. 11; Alexander v. Buffington, 66-360; Devoe v. Hall, 60-749; Butter v. Barkley, 67-491.

[74] Tracy v. Roberts, 59-624.

[75] Huff v. Olmstead, 67-598; Lamb v. Council Bluffs Ins. Co., 70-238.

§ 1327. Of the certification of the record, when necessary, and how obtained.—No transcript is necessary in the absence of a denial of the abstract or of a correction of the same by an amended abstract. No certification of the record is required unless ordered by the supreme court or a judge thereof, which order must be made upon an application in writing or by motion, designating the matters and things of record desired to be included therein, and showing the necessity therefor. The order, if granted, must contain similar designations and show the parts to be given by an abstract of the original record and the portions to be by transcript, and may require any or all the matters to be presented by an amended abstract. The application and order made must be filed in the office of the clerk of the supreme court, who must transmit the order to the clerk of the lower court and send a notice or a copy thereof to the appellant or to his attorney. The order must be attached to and returned with the record certified, and be submitted with the papers in the case. The appellant, upon a notice or copy of the order being received by him, or his attorney, must, within five days, unless otherwise ordered, pay or secure to the satisfaction of the clerk of the lower court, his fees and expenses for preparing and forwarding the record ordered, and upon failure to do so, the appeal, upon motion, may be dismissed or the judgment affirmed as the appellee may elect.[76] When certification of the record is required, the designated papers, notices, depositions, exhibits identified as evidence, notice of appeal with return or acceptance of service thereon, and any other paper filed in the case, or any part thereof, may be transmitted to the supreme court in the original form, or by a transcript of the same, excepting that the short-hand reporter's translation of his re-

[76] Code, Sec. 4122; Rules, Sec. 23; Simplot v. Dubuque, 49-630; Van Ormer v. Harley, 71 N. W., 241; Hampton v. Moorehead, 62-91; Austin v. Bremer County, 44-155; Goll & Frank Co. v. Miller, 87-426; Winter v. Central Iowa R. Co., 80-443; Taylor v. C. M. & St. P. R. Co., 80-431.

port shall be transmitted in its original form, but all entries of record must be certified by transcript. The clerk of the trial court must verify his return whether it be of the record or transcription thereof by his certificate, under seal, distinguishing between originals and transcripts, and such certification so made will constitute a part of the record in the supreme court.[77]

FORM OF APPLICATION FOR AN ORDER OF CERTIFICATION OF THE RECORD.

In the Supreme Court of Iowa, ——— Term, 18—.

———, appellant,
v.
———, appellee.

Motion for an order of certification of the record.

To the Honorable Supreme Court of the State of Iowa (or to ———, judge of the supreme court of the State of Iowa).

The above named appellant states that on the ——— day of ———, 18—, he filed with the clerk of this court a full, complete and correct abstract of record in this case, embracing the evidence therein. That on the ——— day of ———, 18—, the appellee in said cause served upon this appellant's counsel, an amended abstract in said cause alleging that this appellant's abstract was unfair and setting forth therein a large amount of evidence which appellee claims was offered and introduced on the trial of said cause. That on the ——— day of ———, 18—, appellant filed in this court a printed denial of appellee's amended abstract alleging therein that said appellee's amended abstract is unfair and untrue, and that the evidence therein set forth as having been offered and introduced in evidence was never offered or introduced in evidence.

Said pretended evidence so set out in appellee's amended abstract would, if true, be very material in the determination of said cause.

Appellant therefore moves the court for an order for the certification of the record in the case from the ——— district court, the said certification to embrace the following matters and things of record to wit: (here set out specifically just what part of the record it is desired to have certified).

Appellant alleges that said certification of the record is necessary as said record will fully sustain appellant's denial of appellee's amended abstract.

———, attorneys for appellant.

Upon examination of the application the court (or judge) will, if a proper showing is made, make an order

[77] Code, Sec. 4123; Rules, Sec. 24; Cox v. Macy, 76-316; Pilkey v. Gleason, 1-85; Conrad v. Baldwin, 3-207; Blanchard v. Devoe, 80-521; McArthur v. Shultz, 78-364; State v. Hall, 79-674.

in pursuance of rule 23, which may be endorsed upon the application, and may be in the following form:

FORM OF ORDER FOR CERTIFICATION OF THE RECORD.

On examination of the within application it is ordered that the clerk of the district court of ——— county, Iowa, certify to this court (here follow with a specific description of the parts of the record desired to be certified and designate what part shall be by abstract and what by a transcript of the original record).

———, chief justice.

(or ———, judge, as the case may be.)

§ 1328. Of denials of the transcript, and the perfection of the record.—A transcript may be denied; and when such denial is made it must be as specific as the case will permit. The trial court, the supreme court, or a judge of either court, may make any orders necessary to secure a perfect record or transcript thereof, upon a showing by affidavit or otherwise and upon such notice as the court or judge may prescribe.[78] The decisions below cited were made under the old statute which was much different from the present law. Under the prior law it was held that matters not appearing in the transcript or record would not be considered, nor could they be made a part thereof by affidavits, this is the case as to improper remarks of counsel, and misconduct of the jury;[79] or in an action tried by ordinary proceedings by a mere certificate of the clerk.[80] Nor can the record or

[78] Code, Sec. 4120; Rules, Sec. 26.

[79] Bell v. Pierson, Morris, 21; Powell v. Spaulding, 3 G. Gr., 417; Perkins v. Testerment, 3 G. Gr., 207; Pilkey v. Gleason, 1-85; Musgrave v. Brady, Morris, 456; Blanchard v. Devoe, 80-521; McArthur v. Shultz, 78-364; State v. Hall, 79-674; State v. Clemons, 78-123; Knoebel v. Wilson, 92-536; Little Sioux Sav. Bk. v. Freeman, 93-426; Nelson v. C., M. & St. P. R. Co., 77-405; Rosenbaum v. Partch, 85-409; Pitts v. Lewis, 81-51; Barber v. Scott, 92-52; Ford v. Easley, 88-603; State v. Black, 89-737; Light v. Chicago, M. & St. P. R. Co., 93-83; State v. Kennedy, 77-208; Cox v. Macy, 76-316; Lookabill v. Faulks, 83-423; Neitz v. Hilker, 84-459; Underwood v. Lombard Inv. Co., 84-25; Foster v. Hinson, 75-291; Short v. C., M. & St. P. R. Co., 79-73; Jameson v. Weaver, 84-611; Garrettson v. Ferrall, 92-728; Ruth v. Zimbleman, 68 N. W., 895; State v. Louderbeck, 65 N. W., 158; Eldridge v. Stewart, 66 N. W., 891; State v. Helm, 66 N. W., 751.

[80] Jordan v. Quick, 11-9; Garber v. Morrison, 5-476; State v. Jones County, 11-11; Harmon v. Chandler, 3-150; Daniels v. Gower, 54-319; Keller v. Killion, 9-329; Patter v. Wooster, 10-334; Knight v. Kelly, 10-104; Holmes v. Budd, 11-186; McArthur v. Shultz, 78-364; Barber v. Scott, 92-52; Ford v.

the recitals in a bill of exceptions be contradicted by a certificate of the judge.[81]

The bill of exceptions in an action tried by ordinary proceedings should be brought to the supreme court by copy, but an error in that respect will only work a continuance in order to obtain a corrected transcript.[82] But a bill of exceptions not embraced in the record, nor properly certified as a part of it, will not be considered.[83] No transcript is necessary in any case where it is waived by the parties, nor unless the parties in their abstracts fail to agree as to the record, nor unless the correctness of appellant's abstract is denied, in which case the question in controversy must be determined by an inspection of the transcript, which must be ordered by the court or some judge thereof.[84] And as abstracts are required in all cases, the court will not examine a transcript where no exceptions are taken to the abstract.[85] In practice transcripts are not often required, as the parties usually agree on an abstract embodying all of the record that they wish to take up. As to what is a part of the record, and when a bill of exceptions is necessary reference is made to the chapter on exceptions and bills of exceptions.

§ 1329. Of certifying the records in an equity case. —Papers properly certified by the clerk will be presumed to have been filed in the case.[86] If the evidence is not certified or identified it will be stricken out on motion.[87] Nor will the court try the case anew where the certificate does not properly identify the evidence.[88] As

Easley, 88-603; State v. Black. 89-737; Neitz v. Hilker, 85-459; Jameson v. Weaver, 84-611; Corlis v. Connable, 74-58.

[81] Pearson v. Maxfield, 47-135; Dedric v. Hopson, 62-562; Connor v. Long, 63-295; McArthur v. Shultz, 78-364; Cox v. Macy, 76-315.

[82] Fernow v. D. & S. R. Co., 22-528.

[83] State v. Leis, 11-416; Wadsworth v. First Nat'l Bk., 73-425.

[84] Rules, Secs. 23, 24, 26; Hampton v. Moorhead, 62-91; Austin v. Bremer County, 44-155.

[85] Montgomery County v. Am. Em. Co., 47-91; Barnes v. Ind. Dist., 51-700; State v. Smouse, 49-634; Holmes v. Lucas County, 53-211.

[86] Mays v. Deaver, 1-216.

[87] Brackett v. Belknap, 41-592; see Shear v. Brinkman, 72-698.

[88] Wetherell v. Goodrich, 22-583; Davenport v. Ells, 22-296; Grant v. Grant, 46-478; Teague v. Fortsch,

to what is a sufficient certification.[89] As to the manner of making matters of record and especially as to the reporter's notes and how they and the translation of them must be certified, and when filed, and how exhibits must be identified therein consult the following cases, also chapter on exceptions and bills of exceptions.[90] The certificates referred to in this section may be in the following forms:

FORM OF CERTIFICATE TO DEPOSITIONS WHEN THE ORIGINAL DEPOSITION IS SENT UP.

State of Iowa, } ss.
——— County. }

I, ———, clerk of the district court of the State of Iowa in and for said county, hereby certify that the within (or foregoing) depositions being the original depositions filed in said cause (or other papers) were (or was) read in evidence on the part of the plaintiff, (or defendant) on the trial of (give title of cause) before said court, at the ——— term thereof, 18—.

[Seal.] ———, clerk, etc.

FORM OF CERTIFICATE TO A TRANSCRIPTION OF THE RECORD IN AN EQUITY CASE.

State of Iowa, } ss.
——— County. }

I, ———, clerk of the district court of the State of Iowa, in and for ——— county, hereby certify, that the foregoing is a full, true and perfect transcript of the record in the above entitled cause, as fully as the same remains on file and of record in my office; and I further certify that the transcript of the depositions and papers certified by me as having been used in evidence on the trial of said cause, marked respectively, exhibits A, B, C, etc., constitutes a complete transcript of all the evidence offered, received or used in said cause on the trial thereof in said court.

Witness, etc. (as in preceding form).

§ 1330. Of the form of the transcript.—When a transcript is required it may be in the following form:

66 N. W., 1056; Runge v. Hahn, 75-733.

[89] Ticonic Bk. v. Harvey, 16-141: Davenport v. Ells, 22-296; Grant v. Grant, 46-478; Cross v. B. & S. W. R. Co., 58-62; Chambers v. Ingham, 25-222; Teague v. Fortsch, 66 N. W., 1056; Runge v. Hahn, 75-733

[90] Gaylord v. Taft, 53-756; Lowe v. Lowe, 40-220; Richards v. Lounesbury, 65-587; De Long v. Lee, 73-53; Lutz v. Aylesworth, 66-629; Royer v. Foster, 62-321; Johnston v. McPherran, 81-230; Blanchard v. Devoe, 80-521; Neitz v. Helker, 85-743; Hammond v. Wolf, 78-227; Richardson v. Gray, 85-149; Fleming v. Stearns, 79-256.

State of Iowa,
County of ——— } ss.

In the district (or superior) court of Iowa, at a term begun and holden in the county of ——— on the ——— day of ———, A. D. 18—, before J. H. G., judge of the ——— judicial district (or judge of the ——— (superior court) of the State of Iowa.

A. B.
vs.
C. D.

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

(Here insert the petition in full.)

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

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

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

(Here insert the notice in full.)

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

Upon which (or attached to which) was a return as follows: (Copy the officer's return, with all indorsements in full; if the suit be by attachment, copy the petition or affidavit, writ or attachment, bond, notice, return, etc.)

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

(Here insert answer in full.)

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

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

A. B.
vs.
C. D.

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

(Here insert the demurrer in full.)

(If a party files more than one pleading at the same time, they should be numbered in their legal order, as for instance a demurrer, and answer, and the transcript may say (stating the date), ——— the

said C. D. (or defendant) filed his demurrer, plea and answer, which are filed subject to the rule.)

A. B.
vs.
C. D.

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

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

(Here set out reply in full.)

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

(Here set out copy of motion and affidavit.)

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

In the district (or superior) court, ——— county.

A. B.
vs.
C. D.

——— Term, A. D. 18—.

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

(Here insert in full the verdict as rendered.)

(Or if the jury does not return until the next day.)

A. B.
vs.
C. D.

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

(Here insert in full the verdict as rendered.)

A. B.
vs.
C. D.

And afterward, on the ——— day of ———, A. D. 18—, being the ——— day of said term, the shorthand reporter filed his report in writing, or in shorthand (as the case may be) certified as required by law, the translation of which, duly certified, was filed on the ——— day of

———, A. D. 18—, and is as follows: (Here attach the original translation unless otherwise directed by order of the supreme court, or a judge thereof.)

A. B.
vs.
C. D.

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

(Here insert in full the motion for a new trial.)

A. B.
vs.
C. D.

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

(Then add the final entries of record, comprising final judgment, etc., and certificate of clerk.)

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

When the order made by this court, or a judge thereof, pursuant to rules 21, 22 and 23, requires but a part of the record to be transcripted, the foregoing form should be so modified as that it will include only those matters directed to be certified. All others, except the mere formal parts, must be omitted.

The certificate to the foregoing transcript may be as follows:

FORM OF CERTIFICATE TO TRANSCRIPT.

State of Iowa,
——— County. } ss.

I, ———, clerk of the district court of the State of Iowa, in and for ——— county, hereby certify that the foregoing is a true and perfect transcript of the record in the above entitled cause (or so much thereof as is required to be certified), as fully as the same remains of record in my office.

In witness whereof, etc.

§ 1331. Of correction of the record, etc.—Mistakes or omissions in the record, if any, must be corrected by

proper proceedings. The lower court, the supreme court, or any judge of either court may make necessary orders to secure a perfect record or a transcript thereof, upon a proper showing and on such notice as may be prescribed.[1] And the written evidence in an equity case being lost may be supplied by substitution.[2] And the court below, after an appeal is taken, has jurisdiction and power to order a lost record substituted, or correct its record by supplying omissions, or to do any other act necessary to enable the appellate court to review the alleged errors of the trial court.[3] Evidence may be stricken from the record when not properly certified.[4] If the record, though partial, is sufficient to clearly show the ruling appealed from, the question raised will be decided.[5] Where appellant's counsel, without leave, removed certain exhibits from the transcript after it had been used by the court below, but the transcript as certified appears to contain all of such exhibits, and no application was made below to correct the record, a motion to strike out the evidence because of the alleged mutilation of the record will be denied.[6]

§ 1332. Of inspection of original papers.—When a view of an original paper or exhibit in an action may be important to a correct decision of an appeal, the court may order the clerk of the court below to transmit the same, which he must do in the manner provided for the transmission of certifications of the record.[7]

[1] Mahaffy v. Mahaffy, 63-55; Brier v. C., B. & P. R. Co., 66-602; Campbell v. Long, 20-382; Stiles v. Botkin's Estate, 30-60; Dobbins v. Lusch, 53-304; Morris v. Steele, 62-228; Tomlinson v. Funston, 1 G. Gr., 544; Tasker v. Marshall, 4-544; Bartle v. Des Moines, 37-635; Hughes v. Stanley, 45-622; Code, Sec. 4093; Rule, Sec. 26; Reynolds v. Sutliff, 71-549; De Wolfe v. Taylor, 71-648; Code, Sec. 4127.

[2] Loomis v. McKenzie, 48-416; Steiner v. Steiner, 49-70; State v. Dillard, 52-479; Coffeen v. Hammond, 3 G. Gr., 241.

[3] Becker v. Becker, 50-139; Maxon v. C., M. & St. P. R. Co., 67-226; Buckwalter v. Craig, 24-215; Tiffany v. Henderson, 57-490; Goff v. Hawkeye, etc., 62-691; Eno v. Hunt, 8-436.

[4] Brackett v. Belknap, 40-704; Alexander v. McGrew, 57-287.

[5] Hall v. Smith, 15-584; see Balm v. Nunn, 63-641.

[6] Van Ormer v. Harley, 71 N. W., 241.

[7] Code, Secs. 4122, 4125; Rules, Sec. 25; Wing v. Stewart, 68-13.

§ 1333. Of the form and requisites of the abstract. —All causes will be submitted upon abstracts of the parties except when a controversy arises as to the record.[8] The fact that the paper filed and intended as an abstract is not so entitled or designated will not prevent its being so considered.[9] It should not include questions and answers without regard to their materiality.[10] Nor should writs, services and other writings not material to the case be set out in it.[11] But it should show the fact of service of the notice of appeal, and it must show the name of the judge presiding at the trial.[12] If the evidence is not abridged in the abstract as required by the rules of the supreme court, or when such abstract includes matters not properly a part of the record, the costs so improperly made will not be taxed up in favor of the party making them though he be successful.[13] At least thirty days before the day assigned for the hearing of a cause, the appellant must serve upon the attorney for each appellee a printed copy of so much of the abstract of the record as may be necessary to a full understanding of the questions presented for decision, which must be prepared as required by rules 67, 68 and 69 of the supreme court. He must also, fifteen days before the first day of the term for which the cause is to be docketed for trial, file with the clerk twelve copies of said abstract, and no cause will be heard until thirty days after such service and fifteen days after such filing with the

[8] Rules, Secs. 20, 21, 22, 23, 24, 25, 26, 27, 28; Code, Sec. 4118.

[9] Noble v. Des Moines & St. L. R. Co., 61-637.

[10] Vaughn v. Smith, 58-553; Tootle v. Taylor, 64-629.

[11] Tootle v. Taylor, 64-629.

[12] Rules, Secs. 66, 68, 117; Phillips v. Follett, 69-39; Kissinger v. Council Bluffs, 72-471.

[13] Byerlee v. Mendel, 39-382; Dye v. Young, 55-433; Poole v. Hintrager, 60-180; Donahue v. McCosh, 70-733; Chandler v. Freemont County, 42-58; Macomber v. Peck, 39-351; Martin v. Cole, 38-699; York v. Clemens, 41-95; Brown v. Byam, 59-52; Baldwin v. Foss, 71-389; Jons v. Campbell, 84-557; McDermott v. Iowa Falls & S. C. R. Co., 85-180; Schneitman v. Noble, 75-120; King v. Mahaska County, 75-329; Albrosky v. Iowa City, 76-301; Comes v. C., M. & St. P. R. Co., 78-391; Benton County Bk. v. Walker, 85-728; Meyer v. Houck, 85-319; Reed v. Lane, 65 N. W., 380; Boggs v. Douglass, 89-150; Lindsay v. Carpenter, 90-529; Fillmore v. Hintz, 90-758; Burke v. Dillon, 92-557; Gutherless v. Ripley, 67 N. W., 109; Fitzgerald v. Nolan, 71 N. W., 224; Rules, Sec. 95; Code, Secs. 4118, 4120.

clerk, unless advanced by order of the court; nor will the cause be docketed unless this and other rules are complied with. In case of cross-appeals, the party first giving notice of appeal will be considered the appellant.[14] If it appear from an inspection of the abstract that the appellant has negligently, or intentionally, failed to comply with the rule requiring only so much of the record as may be necessary to a full understanding of the question presented for decision to be included therein, the court may, in its discretion, order a new abstract prepared in conformity with such rule or affirm the judgment of the lower court without considering the appeal.[15]

The abstract so filed will be presumed to contain the record unless denied or corrected by a subsequent abstract.

Every denial must point out as specifically as the case will permit the defects alleged to exist in the abstract. A denial by the appellee will be taken as true unless the appellant sustains his abstract by a certification of the record. Should the appellee deem the appellant's abstract incorrect or unfair, he may prepare such additional abstract as he deems necessary to a full understanding of the questions presented to the court for decision. A denial of the appellant of such additional abstract, if not confessed, will be disregarded unless sustained by a certification of the record. The appellee must serve one printed copy of his additional abstract or denial on each appellant or his attorney, and deliver twelve printed copies thereof to the clerk within ten days after receiving the appellant's abstract, and a denial by the appellant must be served on the appellee, and twelve printed copies thereof delivered to the clerk within five days after service of the additional abstract.[16] Under prior statutes and rules it was held that a failure to file an abstract or argument within the time re-

[14] Rule, Sec. 20.
[15] Code, Sec. 4118; Rule, Sec. 21.
[16] Code, Secs. 4118, 4120; Rule, Sec. 22.

quired by the rules would not be ground for striking it from the files and taxing costs to such failing party when the submission of the cause was not delayed thereby, or the other party had not been prejudiced.[17] An abstract and argument filed after the submission of the case on a transcript of the record will not be considered except on a proper showing.[18]

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

The first page of the abstract, denial, brief or argument, must show the title of the cause, designating the appellant and the appellee, the term of the supreme court to which the appeal is brought, the court from which the appeal is taken, the name of the judge who presided at the trial, and the names of the attorneys for both the appellant and appellee.

The abstract must be accompanied by a complete index of its contents.[19]

Abstracts of record must be made substantially in the following form:

IN THE SUPREME COURT OF IOWA,

January Term, 18—.

John Doe, appellant,
vs.
Richard Roe, appellee.

} Appellant's Abstract of Record.
("In Equity" or "At Law.")

[17] Palo Alto County v. Harrison, 68-81; Doolittle v. Doolittle, 78-691; Wilson v. Daniels, 79-132; Spencer v. Moran, 80-374; Lathrop v. Doty, 82-272; Thomas v. McDonald, 77-126; Scholl v. Bradstreet, 85-551; Citizens State Bk. v. Council Bluffs Fuel Co., 89-618; Aultman & Taylor Co. v. Shelton, 90-288; Briggs v. Coffin, 91-329; Bowman v Western Fur Mfg. Co., 64 N. W., 775; Foley v. Tipton Hotel Assn., 71 N. W., 236; Peck v. Hutchinson, 88-320; Boggs v. Douglass, 89-150; Doerr v. Southwestern Mutual L. Ins. Co., 92-39; Croddy v. C., R. I. & P. R. Co., 91-598; Gregg v. Spencer, 65 N. W., 411; Taylor v. C., M. & St. P. R. Co., 80-431; McDivitt v. Des Moines St. Ry. Co., 68 N. W., 595.

[18] State v. Windahl, 64 N. W., 420.

[19] State v. Abegglen, 69 N. W., 256.

Appeal from VanBuren District Court.
John Smith, Judge.[20]

J. C. K. for the appellant.
H. H. S. for the appellee.

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

PETITION

stating his cause of action as follows:

(Set out all of petition necessary to an understanding of the questions to be presented to this court, and no more. In setting out exhibits, omit all merely formal irrelevant parts, as, for example,—if the exhibit be a deed or mortgage and no question is raised as to the acknowledgment, omit the acknowledgment. When the defendant has appeared it is useless to encumber the record with the original notice or the return of the officer.)

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

DEMURRER

to said petition setting up the following grounds:

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

And on the ——— day of ———, 18—, the same was submitted to the court, and the court made the following rulings thereon: (Here set out the ruling.)

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

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

ANSWER

to the petition, setting up the following defenses:

(Here set out the defenses, omitting all formal parts. If motions or demurrers were interposed to this pleading, proceed as directed with reference to the petition. Frame the record so that it will properly present all questions to be reviewed and raised before issue is joined. When the abstract shows issues joined, proceed.)

BILL OF EXCEPTIONS.

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

[20] Pitkin v. Peet, 64 N. W., 793.

(Here set out so much of the evidence and proceedings as is necessary to show the rulings of the court to which exceptions were taken during the progress of the trial.)

INSTRUCTIONS.

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

(Set out the instructions referred to, and continue.)

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

(Set out the instructions.)

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

VERDICT.

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

(Set out the verdict.)

MOTION FOR NEW TRIAL.

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

(Set out the grounds aforesaid for the new trial.)

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

(Set out the record of the ruling.)

JUDGMENT.

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

(Set out the judgment entry appealed from.)

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

(If supersedeas bond was filed, state the fact.)

ASSIGNMENT OF ERRORS.

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

(Set out the errors assigned.)[21]

[21] Rules, Secs. 66, 67, 68.

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

The opinion of the trial judge is a proper, though not an essential part of the record on appeal.[22]

§ 1334. Of the construction and modification of rules.— When, by reason of peculiar circumstances, the foregoing rules relating to the abstract, preparation, and argument of causes, ought to be waived or modified in any case, the party desiring such waiver or modification may, upon reasonable notice to the adverse party, apply to any judge of this court in vacation, or to the court in term time, for an order directing the waiver or modification desired. The application must be in writing, and set out the peculiar facts relied upon by the applicant, and be verified by the party, or a person having knowledge of the facts, and certified by counsel as being true and made in good faith. The order upon such application must be in writing, and be filed with the clerk of this court.

In no case will the rules be waived or modified upon agreement of counsel alone.[23]

§ 1335. When the appeal will be dismissed or the judgment affirmed.— If an abstract of the record is not filed by appellant thirty days before the second term after the appeal was taken, unless further time is given by the court, or a judge thereof, for cause shown, the appellee may file an abstract of such matters of record as are necessary, or may file a copy of the final judgment or order appealed from, notice of appeal and return of service thereof, certified by the clerk of the trial court, and

[22] Gregg v. Spencer, 65 N. W., 411; Mellerup v. Travelers Ins. Co., 63 N. W., 665; McLean v. Ficke, 62 N. W., 753.

[23] Rules, Sec. 90.

cause the case to be docketed, and the appeal upon motion will be dismissed, or the judgment or order affirmed.[24] If errors are not assigned and filed with the clerk of the supreme court, and a copy of the same served on the appellee or his attorney ten days before the first day of the trial term, the appellee may have the appeal dismissed or the judgment or order affirmed, unless good cause for such failure is shown.[25] Under the code of 1873 it was provided that no appeal will be dismissed or the judgment of the court below affirmed, because the cause was not docketed, or transcript or abstract filed, if it is made to appear that the appeal was taken in good faith and not for delay, or if, from the conduct of the appellee or his counsel, appellant was induced to believe that no motion to dismiss or affirm would be made.[26] This provision is not retained in the present code. The objection that appellant has not filed a transcript must be raised by motion, and not after submission upon argument.[27] Where there is an issue as to the sufficiency of the abstract the burden is on appellant to produce a transcript of the record, and if he fails to do so, the appeal will be dismissed.[28] Under prior statutes it was held that if the appellee is served with the abstract and does not then or within a reasonable time thereafter indicate to appellant that he desires a transcript, but insists thereon at the term when the cause is to be submitted by filing a motion to dismiss or affirm, time will be given the appellant to procure a transcript, and a continuance, if necessary, will be granted for that purpose.[29] And that an appeal would not be dismissed on motion for failure to file a transcript, but the court would order it filed, and

[24] Code, Sec. 4120; Rules, Sec. 28.

[25] Code, Sec. 4237; Rules, 37; Engleken v. Schultz, 40-703; Connor v. Long, 63-295; Ind. Dist. v. Ind. Dist., 48-206; Betts v. Glenwood, 52-124; Wise v. Ury, 72-74; Exchange Bk. v. Pottorfe, 65 N. W., 312; Smith v. Hill, 83-684.

[26] Code of 1873, Sec. 4412; old Rules, No. 21; Engleken v. Schultz, 40-703.

[27] Simplot v. Dubuque, 49-630; Holmes v. Hull, 48-177.

[28] Cord v. Barry, 71 N. W., 228; Pratt v. Pratt, 69 N. W., 1128.

[29] White v. Savery, 49-197; Artz v. Culbertson, 71-366.

continue the case until it could be done.[30] The motion to dismiss the appeal may be overruled pro forma in order that it may be left for determination in the final submission of the cause, and such action will not prevent its consideration at that time.[31] And an appeal may be dismissed when it appears that appellant is no longer entitled to prosecute it.[32] So it may be dismissed when no judgment was rendered in the court below.[33] But a cause will not be affirmed or dismissed on motion on the ground that the case is not triable de novo, and there is no assignment of errors,[34] nor because it is claimed that the record does not sustain the errors assigned.[35] If, pending an appeal in a divorce case, one of the parties dies, the action abates.[36] A second motion to dismiss an appeal may be made upon a new and more perfect record.[37] An appeal may be dismissed by the State when it does not appear that it will prejudice the rights of the appellee.[38] But it would seem that an appeal could only be dismissed by the real party interested.[39] The supreme court may order a judgment of the lower court affirmed without prejudice.[40] When the supreme court can not determine from the pleadings what the issues are, they may remand the cause so that the parties may plead further.[41] An appeal may be dismissed if an appellant fails to pay or secure the clerk's fees for a certification of the record.[42] The cases below referred to were decided under the old statute. Under prior law the appeal was not perfected until the fees for a tran-

[30] Manson v. Ware, 63-345; Aldrich v. Price, 57-151.

[31] Green v. Rouen, 62-89.

[32] Ind. Dist. v. Dist. Twp., 44-201; Stanley v. Davenport, 54-463; Simonson v. C., R. I. & P. R. Co., 48-19; Faucher v. Grass, 60-505; Gresham v. Chantry, 69-728; Long v. Smith, 67-22; Code, Sec. 4151; Rules, Sec. 30; Root v. Heil, 78-436; Price v. Baldaref, 90-205; West v. Fitzgerald, 72-306; Trulock v. Friendship Lodge, K. P., 75-381; Chicago, R. I. & P. R. Co. v. Dey, 76-278.

[33] Martin v. State F. Ins. Co., 58-609; Warder v. Schwartz, 65-170; Beiter v. Shadle, 70 N. W., 722.

[34] White v. Savery, 49-197.

[35] Balm v. Nunn, 63-641.

[36] Barney v. Barney, 14-189.

[37] Seacrest v. Newman, 19-323.

[38] State v. Moriarty, 20-595.

[39] State v. Cavers, 22-343; see Marshall County v. Knoll, 69 N. W., 1146.

[40] White v. Poorman, 24-108; Van Orman v. Spafford, 20-215.

[41] Lyon v. Tevis, 8-79.

[42] Loomis v. McKenzie, 57-77; Fairburn v. Goldsmith, 56-347.

script were paid or secured.[42] But the fees need not be paid until a transcript was required.[43] And no time was fixed by statute within which such fees must be paid.[44]

§ 1336. When the abstract will be deemed true. —The abstract filed by the appellant, if no denial or additional abstract is filed by the appellee, will constitute the record and be regarded as a verity. It takes the place of the transcript and can not be impeached or contradicted in any other manner or to any greater extent than the transcript.[45] Nor can it be impeached by statements of counsel.[46] Nor can the abstract be impeached by a certificate of the clerk or judge, nor by affidavits, nor by a denial in an argument only.[47] And when an abstract purports to contain a copy of a paper which is a part of the record, it will be presumed that the whole paper is set out, unless the contrary is shown.[48] And when appellant's abstract states that an exception was taken, and it is not denied in an amended abstract, it will be presumed it was taken as stated.[49] If an abstract claims to be an abstract of all of the evidence and that statement is denied in appellee's abstract, the statement of appellee will be deemed true in the absence of a denial by the appellant.[50] If the appellee files an amended

[42] Code, Sec. 4122; Rules, Sec. 29; Day v. Hawkeye Ins. Co., 72-597; Fitzgerald v. Kelso, 71-731; State v. Rogers, 71-753; Moore v. Held, 73-538; Loomis v. McKenzie, 57-77; Fairburn v. Goldsmith, 56-347; Slone v. Berlin, 88-205; Bruner v. Wade, 85-666; Searles v. Lux, 86-61; Peterson v. Hays, 85-14.

[43] Slone v. Berlin, 88-205.

[44] Bruner v. Wade, 85-666.

[45] Code, Sec. 4118; Rules, Sec. 22; White v. Savery, 49-197; Kearney v. Ferguson, 50-72; Hardy v. Moore, 62-65; Eldridge v. Bell, 64-125; State v. Seery, 64 N. W., 631; Jamison v. Weaver, 87-72.

[46] Farmer v. Sasseen, 63-110; Weaver v. Kintzley, 58-191; Kendrick v. Eggleston, 56-128; Van Winkle v. Iowa, etc., 56-245; Rankin v. Miller, 43-11.

[47] Holmes v. Lucas County, 53-211; Kunz v. Young, 66 N. W., 879; McFarland v. City of Muscatine, 67 N. W., 233.

[48] Baird v. C., R. I. & P. R. Co., 61-359.

[49] Palmer v. Rogers, 70-381.

[50] Kearney v. Ferguson, 50-72; Rules, Sec. 22; State v. Seery, 64 N. W., 631; Jamison v. Weaver, 87-72; Love v. Donaldson, 63-631; Wilmering v. Western Union Tel. Co., 63 N. W., 677; Hopkins v. C., R. I. & P. R. Co., 64 N. W., 603; Clark v. Tracy, 68 N. W., 435; Hart v. Jackson, 57-75; Ham v. Wisconsin I. & N. R. Co., 61-716; Lucas v. Jones, 44-298; Daniels v. Langdon, 52-741; Cole v. Croskery, 63-526; Maxwell v. La Brune, 68-689; Brooks v. C., M. & St. P. R. Co., 73-179; Richardson v. Hoyt, 60-68; Burkhart v. Ball, 59-629; Kearney v. Ferguson, 50-72; Foley v. Hef-

abstract and the matters therein stated are not denied, they will be taken as true, and a denial, not confessed, will be disregarded if not sustained by a certification of the record.[51] But if appellant files a further abstract denying such matters with a certification of the record to sustain his original abstract the court will resort to the transcript to ascertain the facts.[52] By filing an additional abstract purporting to supply omissions in the original abstract, the party admits that the two abstracts contain all the evidence given on the trial, unless he also denies that the two abstracts contain all the evidence.[53] And this is true, though the original abstract does not state that it contains all the evidence, if the appellee files an amended abstract, setting out evidence alleged to have been omitted from the original, unless he states that with the additions made by him the abstracts do not contain all of the evidence.[54] If the appellee contends that the two abstracts do not contain all of the evidence, such statement will be deemed true in the absence of a denial, or amended abstract accompanied or sustained by a certification of the record by the appellant.[55] If the abstract of the appellant does not pur-

feron, 70-572; Cleveland v. Atkinson, 63 N. W., 465; Capitol City State Bk. v. Hammer, 70 N. W., 89; Avery Planter Co. v. Martz, 65 N. W., 989; Deere v. Allen, 64 N. W., 682; State v. Seery, 64 N. W., 631.

[51] Shattuck v. Burlington Ins. Co., 78-377; Furenes v. Severtson, 66 N. W., 918; Kunz v. Young, 66 N. W., 879; Knight v. C., R. I. & P. R. Co., 81-310; Cox v. Mason City & Ft. D. R. Co., 77-20; Crawford v. Berryhill, 66 N. W., 876; Rieglemann v. Todd, 77-696; Brooke v. C., R. I. & P. R. Co., 81-504; Harper v. Gleyslein, 85-709; Harrison v. Snair, 76-558; Prescott v. Riverside Park R. Co., 68 N. W., 831; Pioneer Impt. Co. v. Sterling Mfg. Co., 71 N. W., 409; Hiatt v. Nelson, 69 N. W., 553; Bowman v. Western Fur Mfg. Co., 64 N. W., 775; Dungan v. Railway, 64 N. W., 762; Hendricks v. City of Council Bluffs, 62 N. W., 675; Smith v. Allen, 70 N. W., 694.

[52] White v. Savery, 49-197; Zimmerman v. Merchants & Bankers Ins. Co., 77-350.

[53] Wells v. B., C. R. & N. R. Co., 66-520; Wilson v. Palo Alto County, 65-18; see Cross v. B. & S. W. R. Co., 51-683; Connors v. Burlington C. R. & N. R. Co., 74-383; In re Estate of Bagger, 78-171.

[54] Van Sandt v. Cramer, 60-424; Starr v. Burlington, 45-87; Ferguson v. Davis County, 51-220; Cummings v. Browne, 61-385; Balm v. Nunn, 63-641; O'Brien v. Harrison, 59-686.

[55] Love v. Donaldson, 63-631; Brainard v. Simmons, 58-464; Rules, Sec. 22; Wilmering v. Western Union Tel. Co., 63 N. W., 677; Hopkins v. C., R. I. & P. R. Co., 64 N. W., 603; Clark v. Tracy, 68 N. W., 435; Barber v. Scott, 92-52; Hoffman v. Fritz, 91-733.

port to contain all of the evidence, appellee may set forth in an amended abstract other portions of the evidence with a denial that both abstracts contain all of the evidence, and such denial will be taken as true in the absence of anything further from the appellant.[56] And generally it may be said that unless an additional or amended abstract is denied or amended and said denial or amendment sustained by a certification of the record, it will be presumed to present the record correctly, and will prevail against the original abstract, even though it seeks to eliminate something from the appellant's abstract.[57]

§ 1337. When the abstract may be attacked by motion.— If the abstract sets out evidence not in the record it may be stricken therefrom on motion of the appellee.[58] And where the evidence is thus stricken out from the transcript and abstract, and a perfect transcript is afterward filed but no new abstract, the court will only consider the original abstract as it is left after the evidence is stricken out.[59] But the court will not take a statement of the appellee in his abstract, that no bill of exceptions was filed, to be true, and on his motion strike out the evidence without referring to the transcript to determine the truth of the allegation.[60] But it seems it may do so if appellee's statement is not denied or avoided by the appellant.[61]

§ 1338. Of the filing and service of amended and additional abstracts.— We have already referred to the provisions of the statute and rules of court providing for the filing and service of abstracts and amended abstracts. An amended abstract served thirty days before the case is submitted, will not be stricken

[56] Cartwright v. Copess, 60-195; Hall v. Harris, 61-500; Howe v. Jones, 66-156; Hassett v. Hassett, 66-304; Alexander v. McGrew, 57-287; Hunter v. Des Moines, 74-215.

[57] Hart v. Jackson, 57-75; Ham v. W. I. & N. R. Co., 61-716; Lucas v. Jones, 44-298; Daniels v. Langdon, 52-741; Cole v. Croskery, 63-526; Maxwell v. La Brune, 68-689; Richardson v. Hoyt, 60-68; Burkhart v. Ball, 59-629; Kearney v. Ferguson, 50-72; Rules, Sec. 22.

[58] Mudge v. Agnew, 56-297.

[59] Weider v. Overton, 47-538.

[60] Wilson v. First Presb. Ch., 60-112.

[61] Armstrong v. Killen, 70-51.

from the files because not served within the time fixed by the rules when no prejudice resulted from the delay.[62] And it has been held that an additional abstract filed by the appellant three months before the case was submitted, but after the filing of appellee's abstract, might, under the circumstances, be considered.[63] Nor will an amended abstract be stricken out because filed without leave or notice,[64] if the submission of the case is not thereby delayed.[65] An amendment can not be filed long after the case has been fully submitted.[66] An amendment to appellant's abstract, rendered necessary by reason of a motion in the court below, after the record was made up, will not be stricken from the files because it was not served on the appellee.[67]

A party may be allowed to amend his abstract when the original does not fully present his case; but it should be done before the case is submitted, and, if application is made for leave to do so after the submission of the cause, it must be accompanied by a motion to set aside the submission.[68] Nor can the appellant file an additional abstract with his argument in reply except to controvert the correctness of appellee's additional abstract.[69] An amendment of appellant's abstract filed without leave after appellee's argument is filed, may be stricken out on motion.[70] Where a motion was submitted with the case to strike out an amended abstract and argument because not filed within the time agreed upon by the parties, and the motion was overruled; no costs were taxed to the unsuccessful party for printing such abstract and argument.[71] And generally as to the right to

[62] Green v. Rouen, 62-89; see Davidson v. Carter, 55-117.

[63] Palo Alto County v. Harrison, 68-81.

[64] Frost v. Parker, 65-178; Harl v. Pottawattamie County Mut. F. Ins. Co., 74-39.

[65] Cason v. Ottumwa, 71 N. W., 192.

[66] Hopper v. C., M. & St. P. R. Co., 91-639; State v. Thompson, 64 N. W., 419; State v. Windahl, 64 N. W., 420.

[67] Peterson v. Adamson, 67-739.

[68] Wells v. B., C. R. & N. R. Co., 56-520; State v. Hamilton, 57-596; and see Fletcher v. Terrell, 50-267; Rogers v. Carman, 54-715.

[69] Johnson v. C., R. I. & P. R. Co., 51-25.

[70] In re Caywood's Will, 56-301.

[71] Keegan v. Malone's Estate, 62-208.

amend an abstract. And when costs will be allowed therefor and taxed.[72]

§ 1339. When the abstract must contain all the evidence or all of the instructions.—The court will not take the abstractor's statement of a fact when it does not appear of record.[73] There are some cases where the abstract must contain all of the evidence introduced on the trial in the lower court. Such is the case when it is sought to have reviewed a finding of facts made by a court, jury or referee.[74] And when it is claimed that the judgment is against the evidence.[75] And when it is claimed that the damages are excessive.[76] And when it is claimed that the instructions are not applicable to the evidence.[77] And when it is contended that the verdict is contrary to the evidence or instructions.[78] And in all equity cases triable de novo in the supreme court the abstract must state that it contains all the evidence offered or received.[79] And if it is claimed that the in-

[72] Bowman v. Western Fur Co., 64 N. W., 775; Groneweg v. Kusworm, 75-237; Fitzgerald v. Nolan, 71 N. W., 224; Gutherless v. Ripley, 67 N. W., 109.

[73] Dickerman v. Lubiens, 70-345; Anderson v. Leaverich, 70-741.

[74] Andrews v. Kerr, 49-680; Walker v. Plummer, 41-697; Van Riper v. Baker, 44-450; Commercial Bk. v. King, 47-64; Price v. Burlington, C. R. & N. R. Co., 42-16; Rice v. Plymouth County, 53-635; Wisconsin, I. & N. R. Co. v. Secor, 70-647; Kearney v. Ferguson, 50-72; Andrews v. Kerr, 49-680; Parsons v. Parsons, 66-754; Pioneer Impt. Co. v. Sterling Mfg. Co., 71 N. W., 409.

[75] Wormley v. Dist. Twp., 45-666; Enix v. Miller, 54-551; see Holwig v. Rowler, 50-96; Price v. B., C. R. & M. R. Co., 42-16; In re Estate of Holderbaum, 82-69; Shattuck v. Burlington Ins. Co., 78-377; Neitz v. Hilker, 84-459; Brooks v. C., M. & St. P. R. Co., 73-179; Davis v. Campbell, 93-524.

[76] Brant v. Lyons, 60-172.

[77] Blackburn v. Powers, 40-681; Gantz v. Clark, 31-254; Rice v. Des Moines, 40-638; State v. Hemrick, 62-514; Wallace v. Robb, 37-192; see State v. Postlewait, 14-446; McIntosh v. Kilbourne, 37-420; Laughlin v. Main, 63-580; George v. Swafford, 75-491; Blaul v. Tharp, 83-665; Lyman v. Landerbaugh, 75-481; Van Winkle v. C., M. & St. P. R. Co., 93-509; Wilson v. Phelps, 86-735; Stein v. Council Bluffs, 72-180; Griffith v. B., C. R. & N. R. Co., 72-645; Evringham v. Lee, 78-630; Trapnell v. Red Oak Junction, 76-744; Elder v. Stuart, 85-690; Herring v. Herring's Estate, 62 N. W., 666.

[78] Rice v. Plymouth County, 33-635; Caffery v. Groome, 10-548; Briggs v. Hartman, 10-63; Beal v. Stone, 22-447; Howell v. Snyder, 39-610; Bowman v. Western Fur Mfg. Co., 64 N. W., 775; Gray v. C., M. & St. P. R. Co., 75-100; Harrison v. Snair, 76-558; Kinser v. Soap Creek Coal Co., 85-26; In re Estate of Holderbaum, 82-69; Thill v. Pohlman, 76-638; State v. Grossheim, 79-75; Neitz v. Hilker, 84-459; Chapel v. Wadsworth, 85-742; Wertz v. Ind. Dist., 79-423.

[79] Britton v. Central R. Co., 39-390; Britt v. Case, 58-757; Greer v. Dickey, 53-755; Goodykoonts v.

structions, or some of them, are erroneous, they should all be set out, and the same is true when it is claimed the court erred in refusing an instruction asked.[80]

When it is claimed the court erred in the admission or exclusion of evidence, all of the evidence should be set out, or at least sufficient to make the error complained of apparent.[81] If the court is asked to review the action of the lower court in ruling upon a motion for a new trial on the ground of the misconduct of jurors or of counsel, the record must show that it contains all of the evidence upon the question which was considered by the trial court.[82]

§ 1340. What is sufficient to show that the abstract contains all the evidence.—The statement in the abstract to show that it contains all the evidence (in cases where it is necessary) will be sufficient if it fairly apprises the opposite party and the court that the appellant claims that he has presented an abstract of all the evidence.[83] When the abstract contains a statement that it is an abstract of all the evidence, it will be presumed, unless it appear to the contrary, that such is the fact, and that it was properly made a part of the record.[84] A statement that "the foregoing evidence is

Ringland, 52-732; Overholt v. Esmay, 54-748; Wilson v. Blair, 55-745; Green v. Rouen, 59-83; Endersby v. Endersby, 49-694; Andrews v. Kerr, 49-680; Taylor v. Kier, 54-645; Underwood v. Lombard Ins. Co., 84-25; Giltrap v. Walters, 77-149; Reed v. Larrison, 77-399; Second Nat. Bk. v. Ash, 85-74; Carlton v. Brock, 91-710; Walrod v. Flanigan, 75-365; Parks v. Garner, 77-154; Peoria Steam Marble Works v. Linesenmeyer, 80-253; Bailey v. Green, 80-616; Shattuck v. Burlington Ins. Co., 78-377; Harper v. Gleyslein, 85-709; Miller v. Terkeldsen, 80-476.

[80] State v. Nichols, 38-110; State v. Williamson, 68-351; Moody v. St. P. & S. C. R. Co., 41-284; State v. Stanley, 48-221; State v. Johnson, 19-230; Bower v. Stewart, 30-579; Chase v. Scott, 33-309; Huff v. Aultman, 69-71; Kreuger v. Sylvester, 69 N. W., 1059.

[81] Chase v. Scott, 33-309; Cook v. S. C. & P. R. Co., 37-426; State v. O'Brien, 81-93; Peddicord v. Kile, 83-542; Paddleford v. Cook, 74-433; Deere v. Bagley, 80-197; Hirschl v. Case Threshing Mch. Co., 85-451; Bener v. Edington, 76-105; State v. Row, 81-138; Kuhn v. Gustafson, 73-633.

[82] State v. Bigelow, 70 N. W., 600; Grannis v. Chicago, St. P. & K. C. R. Co., 81-444.

[83] Miller v. Wolf, 63-233; Bailey v. Mut. Benefit Ass'n, 71-689; Guinn v. Phoenix Ins. Co., 80-346; Shattuck v. Burlington Ins. Co., 78-377.

[84] Alexander v. McGraw, 57-287.

by the court duly certified to be all the evidence offered by either party on the trial of the cause," is sufficient.[85] And when the abstract stated that it was all the evidence, and that within the proper time a bill of exceptions was filed, embracing in the record the testimony set out, it was held sufficient.[86] And when it stated that it was all the evidence, and that it was taken down in writing by order of the court, and made a part of the record, it was held the case was triable de novo.[87] Where certain depositions were referred to by the judge in his certificate as being marked, but the abstract did not identify them as being thus referred to in the certificate, but it was alleged in an amended abstract that all the evidence offered, introduced or used on the trial was embraced in the original and amended abstracts, which allegation was not denied, it was held that the court would presume it had all the evidence before it.[88]

It is not sufficient that it appears from the abstract that all the evidence was reported and certified to by the reporter and judge, nor is it sufficient to set out such certificates; the abstract must state that the abstract is an abstract of all the evidence.[89] A statement in the bill of exceptions that it contains all of the evidence does not show that the abstract contains all of the evidence.[90] Nor will the fact that the abstract contains a copy of the certificate of the reporter and of the bill of exceptions signed by the judge.[91] An agreement for the submission of a case on the abstracts does not admit that all of the evidence is contained therein.[92] A statement that the

[85] Macleod v. Geyer, 53-615.
[86] Deere v. Needles, 65-101.
[87] Stoddard v. Hardwick, 46-160.
[88] Paine v. Means, 65-547.
[89] Cassady v. Spofford, 57-237; Ward v. Snook, 61-610; Hall v. Harris, 61-500; Phoenix Ins. Co. v. Findley, 59-591; Ohrt v. Ober, 51-540; Conwell v. House, 57-754; Porter v. Stone, 62-442; Wisconsin, I. & N. R. Co. v. Secor, 70-647; Fulliam v. Muscatine, 70-436; Woodrum v. Carraher, 69-145; Hasner v. Patterson, 70-681; Huff v. Farwell, 67-298; Rice v. Plymouth County, 53-635; Wisconsin, I. & N. R. Co. v. Secor, 70-647; Drake v. Kaiser, 73-703; Polk County v. Nelson, 75-648; Ainslee v. Wynn, 65 N. W., 401; Capital City State Bk. v. Hammer, 70 N. W., 89; Collins v. Wilson, 68 N. W., 916.
[90] Wicke v. Iowa State Ins. Co., 90-4.
[91] State v. Strohbehn, 65 N. W., 304.
[92] Koster v. Seney, 69 N. W., 868;

abstract contains "substantially" all the evidence, or that the evidence was "essentially as follows," or that it was "all the evidence bearing upon or introduced to sustain the issues and findings as to which plaintiff appealed," or that it contains "the evidence," is not sufficient.[93] Ordinarily it is not necessary to set out in full the certificate of the judge in the abstract.[94] In the following cases the sufficiency of the abstract is further discussed.[95] Stipulations waiving a transcript and agreeing that a cause shall be heard upon the abstract will not be a waiver of the statutory requirements as to appeals, nor of the objection that the abstract did not contain all the evidence.[96]

§ 1341. Assignment of errors when necessary.— The abstract, except in cases triable de novo, must contain an assignment of errors; such assignment need follow no stated form, but must clearly and specifically indicate the very error complained of. Among several points in a demurrer, or in a motion, or instructions or rulings on an exception, the one, or those relied upon, must be separately stated, and the court will only consider errors assigned with the required exactness; but the court must decide on each error thus assigned.[97] When such assignment is necessary, it must be served on the appellee or his attorney ten days before the first day of the trial term. Unless good cause for the delay be shown the appellee may have the appeal dismissed or the judgment affirmed.[98]

Assignments of error are always necessary in a law

but see Westervelt v. Huiskamp, 70 N. W., 125.

[93] Britt v. Case, 58-757; Blohm v. Sweeney, 66-604; Roe v. Wilmot, 51-689; Parsons v. Parsons, 66-754.

[94] Yant v. Harvey, 55-421.

[95] Van Winkle v. Iowa, etc., 56-245; Higgins v. Mendenhall, 51-135.

[96] Lewis v. Pearson, 50-702; Allen v. Hull, 56-767.

[97] Code, Sec. 4136; Rules, Sec. 36; Shakman v. Potter, 66 N. W., 1045; Casey v. Ballon Banking Co., 67 N. W., 98; Dean v. Zenor, 65 N. W., 410; Boyd v. Watson, 70 N. W., 120.

[98] Code, Sec. 4137; Rules, Sec. 37; Conner v. Long, 63-295; Ind. Dist. v. Ind. Dist., 48-206; Betts v. Glenwood, 52-124; Wise v. Usry, 72-74; Russell v. Johnston, 67-279; Exchange Bk. v. Pottorfe, 65 N. W., 312; Lundon v. Waddick, 67 N. W., 388.

action,[99] and they are necessary in equity cases when the case is not in proper form for trial de novo.[1] And they are necessary when the appeal is taken in an equity case from a ruling on a motion or demurrer.[2] But the failure to assign errors in time may be waived.[3] And sometimes an assignment will not be stricken.[4] And an assignment of errors may be amended.[5] But costs may be taxed to the party filing such amended assignment.[6] But such assignments are not necessary in an equity action which is triable de novo in the supreme court.[7]

§ 1342. Of the sufficiency of the assignment of errors.— As has been seen, assignments of error must specify the very error complained of; and in the following cases assignments have been held insufficient in that respect: "That the court erred in its action in regard to the jury."[8] That "the court erred in overruling the defendant's exceptions to the report of the referee and entering judgment against defendant."[9] "That the court erred in rendering judgment for appellee."[10] That "the court erred in admitting certain evidence of the defendant against plaintiff's objection,"[11] and assignments that "the verdict is contrary to law." "That the court erred in admitting testimony on the trial." That "the

[99] Barnhart v. Farr, 55-366; Wood v. Whitton, 66-295; Roberts v. Cass, 27-225; Borland v. McNally, 48-440; Boyd v. Watson, 70 N. W., 120.

[1] Schmeltz v. Schmeltz, 52-512; Cross v. B. & S. W. R. Co., 51-683; Jordan v. Wimer, 46-65; Lutz v. Kelley, 47-307; Lynch v. Lynch, 28-326; Jones v. Clark, 37-586; Mallory v. Luscombe, 31-269; Reed v. Larrison, 77-399; Giltrap v. Walters, 77-149.

[2] Powers v. O'Brien Co., 54-501; Patterson v. Jack, 59-632; Bank v. Pottorfe, 65 N. W., 312; see last reference.

[3] Exchange Bk. v. Pottorfe, 65 N. W., 312; Andrews v. Burdick, 62-714; University of Des Moines v. Livingstone, 57-307; Smith v. Hill, 83-684.

[4] Ingersoll v. Hayward, 92-159; Lundon v. Waddick, 67 N. W., 388.

[5] Stanley v. Barringer, 74-34; Loughran v. Des Moines, 72-382; Kendig v. Overhulser, 58-195; Brown v. Rose, 55-734.

[6] Stanley v. Barringer, 74-34.

[7] Hackworth v. Zollars, 30-433; Sherwood v. Sherwood, 44-192; Early v. Burt, 68-716; Code, Sec. 4136; Clark v. Raymond, 84-251.

[8] Hannon v. Chandler, 3-150; see Garrett v. Wells, 63-256.

[9] Hoefer v. Burlington, 59-281.

[10] Tomblin v. Ball, 46-190; Klotz v. James, 64 N. W., 648.

[11] Merchants U. B. W. Co. v. Rice, 70-14.

court erred in excluding testimony" on the trial, or "in overruling defendant's motion in arrest of judgment and for a new trial," are all insufficient.[12] And in the cases cited below assignments were held insufficient.[13] If the assignment is as to error in instructions it will be disregarded unless it point out the particular matter complained of.[14] And in the following cases it was held that the error was pointed out with sufficient certainty.[15] An assignment to the giving of instructions designating them by number and saying that the court erred in giving them and each one of them is sufficiently specific.[16] If a motion is made upon a statutory ground and the overruling of it is assigned as error, it will be sufficient.[17] It will be otherwise as to a motion containing several grounds. An assignment of errors in overruling a motion for a new trial will not be good unless it points out the specific grounds of the objection.[18] And an assign-

[12] Wood v. Hallowell, 68-377; Armstrong v. Killen, 70-51; Code, Sec. 4136; Hamilton Buggy Co. v. Iowa Buggy Co., 88-364; Mara v. Bucknell, 90-757.

[13] Hawes v. Twogood, 12-582; Wilson v. Hillhouse, 14-199; Morris v. C., B. & Q. R. Co., 45-29; Oschner v. Schunk, 46-293; Bardwell v. Clare, 47-297; McCormick v. C., R. I. & P. R. Co., 47-345; Nockles v. Eggspieler, 47-400; Moffatt v. Fisher, 47-473; Benton v. Nichols, 47-698; Belts v. Glenwood, 52-124; Black v. Boyd, 52-719; Brown v. Rose, 55-734; Wilson v. Klokenteger, 56-764; Low v. Fox, 56-221; Vanderberg v. Camp, 68-212; Waller v. Waller, 76-513; Wadsworth v. First Nat. Bk., 73-425; McMurray v. Capital Ins. Co., 87-453; Shroeder v. Webster, 88-627; see Duncombe v. Powers, 78-185; Albroskey v. Iowa City, 76-301; Kaufman v. Farley Mfg. Co., 78-679; Farmers Sav. Bk. v. Wilcka, 71 N. W., 200; Keokuk Stove Works v. Hammond, 63 N. W., 563; Burnside v. Eaton, 64 N. W., 786.

[14] Peck v. Hendershott, 14-40; Brewington v. Patton, 1-121; Blair v. Madison County, 81-313; Wicke v. Iowa State Ins. Co., 90-4.

[15] Sherwood v. Snow, 46-481; Kendig v. Overhulser, 58-195; Clark v. Ralls, 50-275; Hammer v. C., R. I. & P. R. Co., 70-623; Hathaway v. State Ins. Co., 64-229; Shaefert v. C., M. & St. P. R. Co., 62-624; Ludwig v. Blackshere, 71 N. W., 356.

[16] Kendig v. Overhulser, 58-195; Clark v. Ralls, 50-275; Wood v. Whitton, 66-295; Hammer v. C., R. I. & P. R. Co., 70-623; Hathaway v. State Ins. Co., 64-229; Koenig v. C., M. & St. P. R. Co., 65 N. W., 314.

[17] Thomas v. Hoffman, 62-125; see Nichols v. Wood, 66-225; Peterson v. Walter A. Wood, etc., 66 N. W., 96; Moffit v Albert, 66 N. W., 162.

[18] Leekins v. Nordyke, etc., 66-471; Reilly v. Ringland, 44-422; Richardson v. McCormick, 47-80; Stevens v. Brown, 60-403; Marsel v. Bowman, 62-57; Terry v. Taylor, 64-35; McCormick v. C., R. I. & P. R. Co., 47-345; Oschner v. Schunk, 46-293; Foley v. Kirkland, 66-227; Hasner v. Patterson, 70-681; Morris v. C., B. & Q. R. Co., 45-29; see Kitterman v. C., M. & St. P. R. Co., 69-440; State v. Harbach, 78-475; Koenig v. C., M. & St. P. R. Co., 65 N. W., 314; Duncombe v. Powers, 75-185.

ment of error in a ruling of the court sustaining several demurrers of different defendants is not sufficiently specific.[19] An assignment of error that the court erred in his rulings on the objections to the questions, where the questions and objections are set out in the foregoing abstract, is too general to be considered.[20] Assignments that the court erred in sustaining defendant's demurrer and in entering judgment against plaintiff for costs, and in dismissing plaintiff's petition, are defective, in not pointing out any particular ground as error.[21] An assignment of error that the court erred in sustaining a demurrer and an assignment that the court erred in sustaining a motion for default and judgment and to strike an amended and substituted petition is not sufficiently specific.[22] An assignment which states that "The court erred in admitting testimony objected to by the defendant and in excluding testimony offered by defendant," is too indefinite.[23] An assignment of error presenting a question as to the correctness of a ruling based upon evidence will not be considered where the record does not show that it contains all of the evidence.[24] An assignment of error in overruling objections thereto, "each of the following questions and answers," followed by page of printed questions and answers without objections, is not sufficiently specific.[25] And an assignment of error that the court erred in rendering judgment will be valid only where the court rendered its decision in writing, stating the facts found and the conclusions of law thereon, or where the case was tried by the court and the evidence was all brought up by a bill of exceptions.[26] Under proper circumstances an assignment of errors may be amended.[27]

[19] Bradley v. Johnson, 67-614.

[20] Dungan v. Railway, 64 N. W., 762.

[21] Esty v. McGee, 62 N. W., 673.

[22] Guyar v. Minnesota Thresher Mfg. Co., 66 N. W., 83.

[23] Buford v. De Voe, 65 N. W., 413.

[24] Collins v. Wilson, 68 N. W., 916.

[25] Latimer v. State Bk., 71 N. W., 225.

[26] Dean v. White, 5-266; Klotz v. James, 64 N. W., 648.

[27] Hall v. Chicago, R. I. & P. R. Co., 84-311; Bunyan v. Loftus, 90-

§ 1343. Of service and filing the assignment of errors.— If the assignment is filed at the time required it can not be stricken from the files, though not served or filed until after appellee's argument is filed.[28] But it has been held that the appeal will be dismissed if the assignment is not served in time.[29] And an assignment presented by the appellant with his reply to appellee's argument will not be considered.[30] Nor will it be when it is not filed within ten days before the first day of the term, and not until appellant's argument is filed.[31] An objection to an assignment will be deemed waived if not made before final submission.[32] An amended assignment filed more than ten days before the term at which the cause is submitted, will be considered.[33] And an assignment at the end of appellant's argument, which is not objected to by appellee until after the filing of his argument, and within two days of the submission of the cause, is sufficient.[34]

§ 1344. Of the form of the assignment and of the effect of failing to argue assignments.—Assignments of error, though properly made, if not argued, will not be considered, and will be deemed waived.[35]

The assignment may be in the following form:

FORM OF ASSIGNMENT OF ERRORS.

Title, }
Venue. }

Appellant assigns the following errors:

1. The court erred in admitting in evidence the deed (here designate it).

122; Buhlman v. Humphrey, 86-597; Stanley v. Barringer, 74-34.

[28] Connor v. Long, 63-295.

[29] Ind. Dist. v. Ind. Dist., 48-206.

[30] Betts v. Glenwood, 52-124.

[31] Russell v. Johnston, 67-279; Code, Sec. 4137; Wise v. Usry, 72-74.

[32] Andrews v. Burdick, 62-714.

[33] Kendig v. Overhulser, 53-195; Brown v. Rose, 55-734.

[34] University of Des Moines v. Livingston, 57-307.

[35] Renwick v. D. & N. W. R. Co., 49-664; Parsons v. Parsons, 66-754; Marker v. Dunn, 68-720; Goodnow v. Wells, 67-654; Manning v. B., C. R. & N. R. Co., 64-240; Patterson v. Seaton, 70-689; Wood v. Hallowell, 68-377; Marsh v. C., R. I. & P. R. Co., 79-332; Estabrook v. Riley, 81-479; Hull v. Ind. Dist., 82-686; Young v. Omaha & St. L. R. Co., 92-583; Niemeyer v. Weyerhaeuser, 64 N. W., 416; Duncombe v. Powers, 75-185; Manning v. B., C. R. & N. R. Co., 64-240; Cason v. Ottumwa, 71 N. W., 192; McCandless v. Hazen, 67 N. W., 256.

2. The court erred in giving instruction number 1 asked by plaintiff, in this, that (here point out the error).

3. The court erred in giving to the jury paragraph 1 of its charge to the jury in this (here point out the error).

4. The court erred in refusing to give instruction number 1, asked by the defendant.

5. The court erred, etc. (set out in the same manner any other errors complained of).

While it is possible that the above form may require a more specific statement than is in all cases necessary, yet one can hardly be too specific in pointing out the errors of which he complains.

§ 1345. Of the argument.—The printed brief and argument must state in divisions thereof properly numbered, the several propositions of law claimed by the party making such brief or argument to be involved in the case before the supreme court, and the authorities relied upon in support of the same. When an authority cited is an adjudicated case, the brief or argument must show the name of the parties, the volume in which it is reported, and the page or pages containing the matter to which the attorney desires to call the attention of the court. When the reference is a text book, the number or date of the edition must be stated, with the number of the volume and page.[36]

When the appeal presents to the court only questions of law upon rulings of the court below, the appellant must open and close the argument, and must, at least thirty days before the day assigned for the hearing of the case, serve upon an attorney for each appellee copies of his brief of points and authorities or argument.

If appellee desires to be heard he must, at least ten days prior to the hearing, serve upon an attorney for each appellant, copies of his brief or argument; and the reply, if in print, must be served at least three days before the case is to be finally submitted. If the trial in the supreme court is de novo, and the appellant has the burden, he must observe the foregoing rules. But if appellee has the burden he may waive his right to open the argument by serving notice in writing of his intention to do so upon

[36] Rules, Sec. 69.

appellant or his attorney at least thirty days before the day assigned for the hearing of the cause. Appellant will then be entitled to open the argument, and must serve copies of his argument upon an attorney for each appellee ten days before the hearing. Appellee may then, and at least three days before the submission, serve upon an attorney for each appellant, copies of his argument, which must be strictly confined to matters in reply to appellant's argument.

A failure to comply with the above requirements will entitle the party not in default, unless the court shall, for sufficient cause, otherwise order, to a continuance, or to have the case submitted at his option upon the brief and arguments on file when the default occurred.[37] In a case triable de novo the party having the burden of proof in the case is entitled to the opening and closing of the argument. All printed briefs and arguments must be prepared as required by section 66 of the rules, and each party must file with the clerk twelve printed copies of each brief or argument, together with proper evidence of service of the same upon opposing attorneys.

The clerk will note upon his docket the date of the service and filing of all manuscripts and arguments, and no brief or argument not served or filed within the time prescribed by the rules will be transmitted to the judges or considered by them in disposing of the case. No cause will be entered as submitted until the arguments are finally and actually concluded.[38] Under the prior rules arguments were sometimes filed after the opinion in a case had been written and the court was finally compelled to refuse to take the submission of causes until they had been fully argued. Notice in writing or in print of intention to argue a case orally, must be served upon an attorney for the adverse party and filed with the clerk fifteen days before the first day of the term, and the party who fails to so serve

[37] Rules, Sec. 39; Steel v. Fife, 48-99; Alexander v. McGrew, 57-287; Devore v. Adams, 68-385.

[38] Rules, Sec. 40.

and file such notice will not be entitled to argue orally, except in reply to an oral argument for the adverse party.[39] If appellant has given the notice, he is entitled to open and close the argument, unless the cause is triable de novo and the appellee has the burden.

If the notice was given by appellee only, he is entitled to the opening, and the appellant must confine his remarks to a reply, unless the cause is triable de novo. If the cause is triable de novo and appellee has the burden, he may, if he has given the requisite notice, open and close the argument.[40]

No oral argument can exceed one hour in length, unless an extension of time is granted before the argument of the case is commenced. Only two attorneys will be heard on each side, but in case no oral argument is made on one side, only one attorney will be heard for the other.[41]

A failure to file an argument will be considered an abandonment of the appeal, and in such case the decision of the lower court will be affirmed.[42] But a case not argued by the appellee will be reversed if the court reaches the conclusion that it ought to be reversed on any ground.[43] In an equity case if the appellee is plaintiff and files an argument and none is filed for the appellant the appeal will be treated as abandoned.[44] The court will not decide questions not argued by both sides unless it be absolutely necessary so to do.[45] An argument will not be stricken out because not filed in time, but costs may be taxed to the party filing it.[46] But where a party has improperly filed the opening argument it may be

[39] Rules, Sec. 41.
[40] Rules, Sec. 42.
[41] Rules, Sec. 43.
[42] Mores v. Hanchett, 54-747; Dining v. Bement, 54-156; Cline v. Phipps, 62-759; Lamp v. Sievers, 66-85; Devore v. Adams, 68-385; McKern v. Albia, 69-447; Raynor v. Raynor, 77-282; State v. Price, 64 N. W., 596.
[43] Deeds v. C., R. I. & P. R. Co., 69-164; Gilfeather v. Council Bluffs, 69-310; Russell v. Torbett, 81-754.
[44] Beams v. Crawford, 86-753.
[45] McKern v. Albia, 69-447; Deeds v. C., R. I. & P. R. Co., 69-164; Gilfeather v. Council Bluffs, 69-310; Humphrey v. Walker, 75-408; Dodd v. Scott, 81-319; State v. Semotan, 85-57.
[46] Bartle v. Des Moines, 37-635; Renwick v. Bancroft, 59-116; Smith v. McFadden, 56-482; Cox v. F. C.

stricken from the files.[47] Where a cause has been regularly submitted, it will not be remanded on the mere statement of opposing counsel in a petition for a rehearing, that the argument was not properly served.[48] Points raised in oral argument which are not made in the printed briefs will not be considered.[49]

It is not proper for an attorney in his argument to state facts outside the record impeaching the judicial conduct of the trial judge.[50] Reference in the argument to the abstract must give the pages where the matter referred to can be found.[51]

§ **1346. Of the duty of the clerk.**—The clerk of the supreme court must docket the causes as the same are filed in his office, and arrange and set a proper number for trial each day of the term, placing together those from the same judicial district, and must cause notice thereof to be published and distributed in such manner as the court may direct. No cause will be docketed unless the abstract required by the rules is filed fifteen days before the first day of the term at which the cause is set down for trial, nor unless the docket fee is paid.[52] A cause will be docketed as it was in the court below and the party taking the appeal will be called the appellant, and the other party the appellee.[53] Causes not filed in time will go to the next term. The clerk, immediately after the time expires during which causes may be docketed for trial at a term of court, must make and cause to be printed without delay, the docket for the term, which must give all the causes, whether continuances or appearances, for trial at such term, and shall designate the number, the party appealing, the court and county from which the appeal is brought, the counsel of the parties, the day each cause is assigned for trial and such other

& S. R. Co., 66-289; Kellam v. McAlpine, 63-251.

[47] Devore v. Adams, 68-385.

[48] Hall v. Harris, 61-500.

[49] Iowa H. Co. v. Des Moines N. Co., 63-285.

[50] Paine v. Frost, 67-282; see Sax v. Drake, 69-760; Cassidy v. Palo Alto County, 58-125.

[51] Herriatt v. Kersey, 69-111.

[52] Code, Secs. 4117, 4121; Rules, Secs. 15, 17.

[53] Rules, Sec. 16.

matter for information of the court and attorneys as may be conveniently given. He must forward to each judge of the court, to each attorney having causes at the term and to the clerk of the district and superior courts of each county a copy of said docket.[54] The clerk must with as little delay as possible, send to each judge of the court a copy of the abstracts, denials of abstracts, briefs and arguments, and other printed matter filed in each case docketed or set down for trial upon the docket of the term.[55]

§ **1347. Of motions.**—In addition to what has heretofore been said regarding motions it may be remarked that all motions made in a cause after judgment, or after the time assigned for the hearing of causes from the district from which it was appealed, will be heard only upon proof of service of reasonable notice of such motion upon the adverse party.[56] All motions must be in writing, filed with the clerk, and entered upon the motion book, and served by copy of the same and of all affidavits or documents upon which they are based, upon the opposite party or attorney, ten days before the morning on which the causes for the district are set for hearing. Such opposite party will then have five days to file papers in resistance to the same, copies of which must be served upon the other party or attorney, and no papers will be regarded which do not appear to have been so served; but this rule does not apply to motions the causes whereof arise after the filing of the abstract, but in such cases timely notice of such motions must be given to the opposite attorneys, nor does this rule apply as to time of service of motions for a continuance.[57] If service is not made as required the motion will not be considered,[58] and the same is true if no proof of service is on file.[59] Arguments in support of motions, if any, must be filed in writ-

[54] Rules, Sec. 18.
[55] Rules, Sec. 91.
[56] Rules, Sec. 38; Subd. 3.
[57] Code, Sec. 4138; Rules, Sec. 38; Subd. 1 and 2.
[58] Morrison v. Springfield Engine, etc., Co., 84-637; Wicke v. Iowa State Ins. Co., 90-4.
[59] Blasser v. Moats, 81-460.

ing or print before the morning of the day set for hearing of the cause, and served by copy upon the opposite party or attorney when the motion is served. And arguments in resistance, if any, must be filed in writing or print before the morning of the day set for hearing of the cause, and served by copy on the opposite party or attorney when the papers in resistance are served.[60]

The death of one or all of the parties will not cause the proceedings to abate, but the names of the proper persons may be substituted, as is provided in such cases in the district court, and the cause may proceed. The court may also grant a continuance when such a course will be calculated to promote the ends of justice.[61] When the appellant has no right, or no further right, to prosecute the appeal, the appellee may move to dismiss the appeal, and if the grounds of the motion do not appear in the record, or by a writing purporting to have been signed by the appellant and filed, they must be verified by affidavit.[62] The appellee may, by answer or abstract, filed and verified by himself, agent or attorney, plead any facts which render the taking of the appeal improper or destroy the appellant's right of further prosecuting the same, to which answer the appellant may file a reply or abstract, likewise verified by himself, his agent or attorney, and the question of law or fact therein will be determined by the court upon evidence in the form of affidavits unless otherwise ordered.[63] When the appellant has accepted the benefit of the judgment, or has settled or lost his interest in the subject matter of the appeal, or is not the real party in interest and never authorized the appeal it will be dismissed.[64] Also in other cases.[65]

[60] Rules, Sec. 38; Subd. 4.

[61] Code, Sec. 4150; Rules, Sec. 12; Geyer v. Douglass, 85-93; see Barney v. Barney, 14-189; Kinney v. Kinney, 63 N. W., 452.

[62] Code, Sec. 4151; Rules, Sec. 30; West v. Fitzgerald, 72-306; Trulock v. Friendship Lodge, etc., 75-381; Chicago, R. I. & P. R. Co. v. Dey, 76-278.

[63] Code, Sec. 4152; Rules, Sec. 31.

[64] Root v. Heil, 78-436; Simonson v. C., R. I. & P. R. Co., 48-19; Lewis v. Tilton, 62-100; Price v. Baldaref, 90-205; Faucher v. Grass, 60-505; Gresham v. Chantry, 69-728; Long v. Smith, 67-22; West v. Fitzgerald, 72-306.

[65] Stanley v. Davenport, 54-463; Trulock v. Friendship Lodge K. P.,

§ 1348. Of affirmance of cases in the supreme court.—At the commencement of each term all the causes included in the assignment will be called in their order, but no case will be submitted on first call if any party object thereto.[66] The court will hear all causes included in the assignment, and take submissions thereof in the order in which they are assigned, excepting those which have been continued or otherwise disposed of by direction of the court.[67] The supreme court may reverse, modify or affirm the judgment, decree or order appealed from, or may render such judgment or order as the inferior court should have done, according as it may think proper.[68] A party may urge new reasons in support of his points in the supreme court, and such court may affirm the judgment on other grounds than those on which the court below acted.[69]

The supreme court, when it affirms a judgment, must also, if the appellee asks or moves therefor, render judgment against the appellant and his sureties on appeal bond for the amount of the judgment, damages and costs referred to therein, in case such damages can be accurately known to the court without an issue and trial.[70] Upon the affirmance of any judgment or order for the payment of money, the collection of which, in whole or in part, has been stayed by an appeal bond, the court may award to the appellee damages upon the amount so stayed, and, if satisfied by the record that the appeal was taken for delay only, may award as damages, not exceeding fifteen per cent. thereon.[71] If the supreme court affirm the judgment or order, it may send the cause to the district court to have the same carried into effect, or it may itself issue the necessary process for the purpose,

75-381; Chicago, R. I. & P. R. Co. v. Dey, 76-278.

[66] Code, Sec. 4139; Rules, Sec. 44.

[67] Code, Sec. 4139; Rules, Sec. 44.

[68] Code, Sec. 4139; Rules, Sec. 45.

[69] Bond v. Wabash, St. L. & P. R. Co., 67-712; Richman v. Board, etc., 70-627.

[70] Rules, Sec. 50; Code, Sec. 4140; Swift v. Conboy, 12-444; see Cole v. Edwards, 93-477.

[71] Rules, Sec. 51; Code, Sec. 4141; Berryhill v. Keilmeyer, 33-20; Ragan v. Day, 46-239; Branscombe v. Gillian, 55-235.

and direct such process to the sheriff of the proper county, according as the party thereto may require.[72] If, by the decision of the supreme court, the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of such judgment or order, either the supreme court or the court below may direct execution or writ of restitution to issue for the purpose of restoring to him his property, or its value.[73] Where the judgment of the court below is correct it will be affirmed, though the reasons given be erroneous.[74] The only grounds on which a case can be affirmed are those on which the appeal is taken.[75] The affirmance of a general judgment is an affirmance with respect to all the issues decided thereby, although the opinion is based only on one of such issues,[76] and where the judgment is entire, it will be affirmed or reversed as to all the parties appealing.[77] When a demurrer was submitted without stipulation for either party to amend or plead over, and the action of the court in overruling the demurrer was excepted to, and judgment entered for the other party, it was held that an affirmance of the ruling on the demurrer was final.[78] When special findings were inconsistent with the general verdict, in so far as the latter included an allowance on one count of the petition, it was held the court could modify the judgment by striking therefrom the amount allowed on that count and affirm it as to the balance.[79] To entitle the appellee to an affirmance in the supreme court, he must file a certified transcript of the judgment, but he need

[72] Rules, Sec. 55; Code, Sec. 4143.

[73] Rules, Sec. 57; Code, Sec. 4145; Hanschild v. Stafford, 27-301; Lombard v. Atwater, 46-501; Munson v. Plummer, 58-736; Zimmerman v. National Bank, 56-133; Fort Madison Lumber Co. v. Batavian Bank, 77-393; see Weaver v. Stacey, 93-683.

[74] Whiting v. Root, 52-292; Jamison v. Perry, 38-14; Hoag v. Madden, 70-612; Wise v. Wilds, 77-586; Arnold v. Wilds, 77-593.

[75] Collins v. Brazill, 63-432; see Dist. Twp. v. Ind. Dist., 63-188.

[76] Finch v. Hollinger, 46-216.

[77] Cavender v. Smith's Heirs, 5-157.

[78] Grimes v. Hamilton County, 37-290; Dunlap v. Cody, 31-260; Tyler v. Langworthy, 37-555.

[79] Cobb v. Illinois C. R. Co., 38-601.

not do so in cases where affirmance is sought because the printed abstract is not filed.[80]

§ 1349. Of reversal of cases in the supreme court. —One against whom no judgment has been rendered in the court below can not question the correctness of the proceedings in the lower court, and if the judgment is reversed, so far as it is in his favor, he should not be bound thereby, so far as the proceedings are adverse to him, but should be given an opportunity for a new trial.[81]

When a judgment contains two adjudications, one in favor of a party and one against him, and he appeals from the entire judgment, it will be presumed he appeals from that portion adverse to him, and in such case the judgment will not be interfered with in behalf of the party not appealing.[82] If the error is committed as to only one of two counts upon which plaintiff recovered, but it does not clearly appear as to the amount recovered on each count, the entire judgment will be reversed.[83]

It is only when the facts are settled by agreement of the parties, or by the finding of a court or referee, or by the special verdict of a jury, that, upon reversal in the supreme court in an action triable by ordinary proceedings, it can render final judgment for the party unsuccessful in the lower court; in other cases a new trial must be awarded.[84] And when the facts are not thus determined, and the cause is reversed and remanded to the lower court, judgment should not be rendered in such court without a re-trial.[85] The supreme court can not render a final judgment in reversing a case on the ground that a new trial should have been granted,[86] nor when the case is reversed for error in the refusal to admit testi-

[80] Hunger v. Patterson, 37-501; but see Rules 28, 29 and 37.

[81] Boyce v. Wabash R. Co., 63-70.

[82] Hintrager v. Hennessey, 46-600.

[83] S. C. & P. R. Co. v. Walker, 49-273; Bond v. W., St. L. & P. R. Co., 67-712; see Nevada v. Hutchins, 59-506.

[84] Artz v. C., R. I. & P. R. Co., 38-293; Gray v. Regan, 37-688; Harwood v. Case, 37-692; In re Bresee, 82-573; but see Union Mer. Co. v. Chandler, 90-650.

[85] Harwood v. Case, 37-692; Gray v. Regan, 37-688; see Union Mer. Co. v. Chandler, 90-650.

[86] Payne v. C., R. I. & P. R. Co., 47-605.

mony.[87] When the defendant has not had an opportunity to defend in the court below, as in the case of default upon service by publication, the appellate court, in reversing the action of the lower court, can only remand the case for the purpose of allowing a defense to be made in the lower court.[88] Where defendant in the lower court stands on his demurrer, which is overruled, and he appeals, and the ruling is reversed, he can not have judgment in the supreme court, but the case must be remanded, with leave to the plaintiff to amend.[89]

The reversal on appeal of an order directing the issuance of a writ of possession, on the ground that it is irregular merely, will not entitle the adverse party on motion to an order for a writ of restitution.[90] If a judgment upon a special verdict is reversed on an error of the lower court, the supreme court may render such a judgment as should have been rendered in the lower court.[91] If the judgment is reversed on the ground that upon the finding of facts made by the court, the judgment is erroneous as a matter of law, final judgment may be rendered in the supreme court, but it may remand the cause for the entry of such judgment in the trial court.[92] But final judgment can not be rendered in the supreme court when one has sued under a statute authorizing the recovery of treble damages, and judgment has been rendered in his favor, which is held erroneous on appeal.[93]

When a judgment is reversed because the verdict is inconsistent with the instructions of the court and the special findings, the supreme court will not render judgment on the special findings but will remand the case.[94]

When the judgment will affect title to real estate, the case will be remanded to the lower court for judgment.[95]

[87] Mendel v. C. & N. W. R. Co., 20-9.
[88] Doolittle v. Shelton, 1 G. Gr., 272.
[89] Ware v. Thompson, 29-65.
[90] Lombach v. Atwater, 46-501.
[91] Gilmore v. Ferguson, 28-422.
[92] Shaw v. Nachtwey, 43-653; Roberts v. Corbin, 28-355; Drafahl v. Tuttle, 42-177.
[93] Bond v. Wabash, St. L. & P. R. Co., 67-712.
[94] Baird v. C., R. I. & P. R. Co., 55-121, and 61-359.
[95] Hart v. Ensign, 61-724.

If final judgment is rendered in the supreme court on appeal, it is the judgment of that court which constitutes the final adjudication of the cause, and not the judgment of the court below.[96] And when the supreme court has reversed the case and remanded it for a new trial, it will not, at a subsequent term, on motion, affirm a judgment rendered in favor of the appellant.[97] The supreme court has power, even aside from statutory provision, to correct or cancel judgments improperly entered through mistake or oversight.[98]

§ 1350. Of the effect of judgment in supreme court and of remitting part of judgment, etc.—If the appellee takes a new judgment in the supreme court against the appellant and his sureties on the appeal bond, it is a merger of the former judgment.[99] If there is no money judgment in the court below there can be none rendered in the supreme court on the appeal bond.[1] It is held that where usury is pleaded, that on appeal plaintiff might remit the usury and that judgment might be rendered in the supreme court for plaintiff for the principal and for the school fund for such usury.[2] When plaintiff, in an action to recover damages in the lower court for injury to his stock killed on defendant's railroad, recovered double damages in the lower court, but on appeal it was held that he was only entitled to single damages, a judgment might be rendered for him for such damages in the appellate court, he to pay the costs of appeal.[3] And a judgment may be modified when excessive if a party consents thereto.[4] So, in some cases when the appellant offers to remit an erroneous excess of a judgment, judgment will be rendered in the appellate court for the proper amount.[5] When the supreme court

[96] Griffin v. Seymour, 15-30.
[97] Roberts v. Corbin, 26-315.
[98] Drake v. Smythe, 44-410.
[99] Swift v. Conboy, 12-444.
[1] Berryhill v. Keilneyer, 33-20; Branscomb v. Gillian, 55-235; see Ragan v. Day, 46-239.
[2] Thompson v. Purnell, 10-205; see Hyde v. M. L. Co., 53-243.
[3] Keyser v. K. C., St. J. & C. B. R. Co., 56-440.
[4] Pelley v. Walker, 79-142.
[5] Bayless v. Hennessey, 54-11; Sanney v. I. C. G. Co., 68-542; Payne v. Billingham, 10-360; Moutelins v. Wood, 56-254; Gere v. C. B. Ins. Co., 67-272; Brentner v. C., M. & St. P. R. Co., 68-530; see

deems the amount of the verdict excessive it will, on appeal, reduce it.[6]

§ 1351. Of the effect of a prior decision on a second appeal.—A decision on appeal constitutes the law of the case and will not, on a subsequent appeal of the same case, be overruled or re-examined, unless the issues have been changed.[7]

§ 1352. Of proceedings in the lower court after a cause is reversed and remanded.—After a cause is reversed with directions that a certain judgment be entered, no fact existing prior to the first trial can be interposed against the entry of such judgment.[8] If a case is reversed because the court below erred in overruling a motion to strike depositions from the files, and the cause is remanded, the lower court must try the case again.[9] But when the case is reversed on one point, other points passed on by the supreme court will in some cases be regarded as finally determined by the appeal.[10] But if the action of the court below in overruling a motion for a new trial is reversed, the lower court must proceed to try the case, if anything is left to try.[11] If the reversal is for error of law in entering judgment on a finding of facts, and the case is remanded, judgment should be entered in the trial court at once.[12] But such is not the rule where a motion for a verdict on the evidence is overruled in the lower court and such ruling is reversed in the appellate

Howe v. Sutherland, 39-484; Waggoner v. Turner, 69-127; Cooper v. Mills County, 69-350; Kaufman v. Dostal, 73-691.

[6] McKinley v. C. & N. W. R. Co., 44-314; Lombard v. C., R. I. & P. R. Co., 47-494; Noel v. Dubuque, B. & M. R. Co., 44-293; Small v. C., R. I. & P. R. Co., 55-582; Dickey v. Harmon, 26-501.

[7] Adams v. B. & M. R. Co., 55-94; Barton v. Thompson, 56-571; Simplot v. Dubuque, 56-639; Star Wagon Co. v. Swezey, 63-520; Ellis v. State Ins. Co., 68-578; Dist. Twp. v. Ind. Dist., 69-88; Raridan v. C. I. R. Co., 69-527; Drake v. C., R. I. & P. R. Co., 70-59; Davis v. Curtis, 70-398; M. L. O. Co. v. Montague, 65-67; Lewis v. Burlington Ins. Co., 80-259; Heffner v. Brownell, 75-341; Burlington, C. R. & N. R. Co. v. Dey, 89-13; Larkin v. Burlington, C. R. & N. R. Co., 91-654; Garrettson v. Merchants & Bankers Ins. Co., 92-293; Smith v. Foster, 85-705.

[8] Lord v. Ellis, 11-170.

[9] Kershman v. Swehla, 62-654.

[10] Croup v. Morton, 53-599.

[11] Pomroy v. Parmlee, 10-154; Dryden v. Wyllis, 53-390.

[12] Roberts v. Corbin, 28-355; Drefahl v. Tuttle, 42-177.

court, in such case further evidence may be introduced.[13] The court below on the filing of a procedendo directing it to enter judgment in accordance with its opinion must proceed to enter such judgment irrespective of notice to the adverse party or his intention to file a petition for a rehearing.[14] If, after the judgment of the supreme court, there is nothing left for the court below to act upon, the case therein should be dismissed,[15] or a judgment entered as may be proper under the facts and in such a case another trial is not necessary.[16] The fact that a case is remanded does not prevent the granting of additional relief, but parties will not be permitted to plead a new cause of action.[17] The reversal on appeal of a cause in which a motion for change of venue has been overruled will not necessitate a re-trial of the motion for a change of venue where the ruling thereon was correct.[18] When the appellate court remands a cause to be carried into effect by the court below, such decision and the order of the court being certified thereto, and entered on the records of the court below, has the same force and effect as if made and entered during the session of such lower court.[19] See cases cited below.[20]

A cause may be remanded for a new trial as to a cross-action alone.[21]

§ 1353. Of power of supreme court and of executions therefrom—Restoration of property.—The supreme court has power to prescribe rules for allowing appeals, on such other intermediate orders and decisions as are expedient, and for permitting the same to be taken and tried during the progress of the trial in the court below; but such intermediate appeals must not retard pro-

[13] Meadows v. Hawkeye Ins. Co., 67-57.

[14] Fenton v. Way, 44-438.

[15] Edgar v. Greer, 14-211.

[16] City Bank v. Radtke, 92-207; Howe v. Jones, 71-92; Garmor v. Windle, 76-239; Lombard v. Gregory, 88-431.

[17] Leech v. Germania Building Ass'n, 70 N. W., 1090.

[18] Stevens v. Ellsworth, 64 N. W., 668.

[19] Code, Sec. 4144; Rules, Sec. 56.

[20] Miller v. Corbin, 48-525; Bates v. Kemp, 13-223.

[21] McAfferty v. Hale, 24-355.

ceedings in the trial in chief in the court below.[22] And it has power to enforce its mandates upon inferior courts and officers by fine and imprisonment, which imprisonment may continue until the mandates are obeyed.[23] And it may issue all writs and processes necessary for the exercise and enforcement of its appellate jurisdiction.[24] Executions issued from the supreme court shall be the same as those from the district court, attended with the same consequences, and returnable in the same time.[25] In cases in which the judgment below is affirmed in the supreme court, the party in whose favor judgment is affirmed may have execution either from the supreme court or the court below. In case of an execution from the supreme court, if the process of garnishment is served upon the execution defendant, either principal or surety, the sheriff, in addition to his return, must return a copy of the execution and his returns to the district or superior court from which the cause was appealed, and all issues of fact which may arise in such garnishment process, must be tried by that court.[26] The court may require the appellants to give security for costs under the same circumstances and upon the same showing as plaintiffs in civil actions in the court below.[27]

Where an execution has been issued from the supreme court, and a levy on real property made under it, the district court of the county in which the levy is made may enjoin the sale of the land levied on.[28] Restoration of property taken under a judgment appealed from can not, in case of reversal, be given as a summary remedy when such property has, by voluntary sale, or by seizure and sale, passed to an innocent purchaser, or has in the bona fide discharge of a trust pursuant to an order of the court been turned over to another.[29] But where a judg-

[22] Code, Sec. 4103; Rules, Secs. 3, 6.
[23] Code, Sec. 4147; Rules, Sec. 7.
[24] Code, Sec. 4109; Rules, Sec. 6.
[25] Code, Sec. 4153; Rules, Sec. 58.
[26] Rules, Sec. 59.
[27] Code, Sec. 4135; Rules, Sec. 93.
[28] Davis v. Bonar, 15-171; Massie v. Mann, 17-131.
[29] Hanschild v. Stafford, 27-301; see Munson v. Plummer, 58-736.

ment under which the successful party has acted is reversed, it is his legal duty to restore to the other party all the property, or its value, taken under the judgment, and, on a failure to do so, action may be brought against him therefor without making a demand.[30]

A purchase at sheriff's sale by the plaintiff in execution, or his attorney, with actual knowledge of a pending appeal, is at the peril of such purchaser,[31] nor will one be protected who purchases at such a sale and has not paid the consideration.[32] The statute authorizes the supreme court, or the court below, to direct execution or a writ of restitution to issue to restore to appellant the property or its value which he may be entitled to by reason of the decision of the supreme court, and which was taken from him by the judgment or order of the lower court,[33] and property acquired by a purchaser in good faith, under a judgment subsequently reversed, will not be affected by such reversal.[34] But the provisions of the law for the protection of purchasers at judicial sales as against subsequent reversals of the judgment are not designed for parties claiming under a distinct title.[35] If a judgment creditor purchase before notice of appeal, and he again recovers in another trial, his title will not be affected.[36] And when plaintiff, in an action to ascertain which of two persons was entitled to certain money due on real property, paid it into court, and it was paid over to one defendant on an adjudication of the court, and on an appeal by the other defendant it was adjudged to belong to him, he could not recover it from the plaintiff,[37] and see.[38]

§ 1354. Of opinions of the court—Rules.—At the commencement of each term the causes will be called in

[30] Zimmerman v. Nat. Bk., 56-133.
[31] Twogood v. Franklin, 27-239.
[32] O'Brien v. Harrison, 59-686.
[33] Code, Sec. 4145; Rule, Sec. 57; Ft. Madison Lumber Co. v. Batavian Bank, 77-393; Weaver v. Stacy, 93-683.
[34] Code, Sec. 4146; O'Brien v. Harrison, 59-686.
[35] Wood v. Young, 38-102.
[36] Frazier v. Crafts, 40-110.
[37] White v. Butt, 32-335.
[38] Davis v. Bonar, 15-171.

their order, but no cause will be submitted on the first call if any party object thereto.[39] The court will hear all cases docketed when not continued by consent or for cause shown by the party unless otherwise directed by the court or the judges thereof, and the party may be heard orally or otherwise, in his discretion.[40]

No cause is decided until a decision in writing is filed with the clerk.[41] The decisions of the court on all questions passed upon by it, including motions and points of practice, shall be specifically stated, and shall be accompanied by an opinion upon all such matters as are deemed of sufficient importance, together with any dissent therefrom, which dissent may be stated with or without an opinion; and all decisions and opinions, including dissents, shall be in writing and be filed with the clerk except rulings on motions which may be entered upon the announcement book.

If the decision is not accompanied with an opinion, it shall briefly state the title of the case, the county from which the case was appealed, and the name of the presiding judge, the nature of the action, the names of counsel appearing on either side, and the conclusions reached.

When the court is equally divided in opinion the judgment of the court below will stand affirmed, but the decision is of no further force or authority. In case of such division, opinions may be filed at the option of the court. If no opinion is filed a written announcement must be made of the division of the court upon the questions presented, and that the judgment is affirmed by operation of law.

The records and reports must in all cases show whether the decision was made by a full bench, and whether either, and if so, which of the judges dissented from the decision.[42]

If a case is reversed upon errors in instructions and

[39] Rules, Sec. 44.
[40] Code, Sec. 4139; Rules, Sec. 44.
[41] Code, Sec. 4139; Rules, Sec. 46.
[42] Code, Secs. 198, 199; Rules, Secs. 46, 47 and 48.

sent back for a new trial, the court will not express its opinion as to errors claimed to have been made in the admission or exclusion of evidence.[43] The rules of practice in the supreme court will be framed and interpreted with a view to the submission of causes on their merits,[44] and such rules have the force and effect of laws duly enacted.[45]

§ 1355. Cases where no motion for a new trial is necessary, etc.—The supreme court will review any of the orders from which the law allows an appeal to be taken, if excepted to at the time, without a motion for a new trial being made on that ground in the court below.[46] A mistake of the clerk will not be ground for an appeal until the same has been presented and acted upon by the court below.[47] A judgment or order will not be reversed for an error which can be corrected on motion in an inferior court, until such motion has been made and there overruled.[48]

§ 1356. Of the lien of the judgment of the supreme court, etc.—When a judgment is affirmed in the supreme court, and a procedendo issues, the lien of the judgment on real estate attaches and continues from the date on which the judgment was rendered in the court below; but when a judgment is rendered in the appellate court against the appellant and the sureties on

[43] Gould v. C., B. & Q. R. Co., 66-590; see Baker v. Kerr, 13-384.

[44] Palo Alto County v. Harrison, 68-81; Poole v. Seney, 70-275.

[45] State v. O'Day, 68-213.

[46] Rindskoff v. Lyman, 16-260; Code, Sec. 4106; see Code, Sec. 4107; Brown v. Rosie, 55-734; Doefahl v. Tuttle, 42-177; Beems v. Chicago, R. I. & P. R. Co., 58-150; Hunt v. Iowa Cent. R. Co., 86-15; Kaufman v. Farley Mfg. Co., 78-679.

[47] Code, Sec. 4104.

[48] Code, Sec. 4105; Garvin v. Cannon, 53-716; Smith v. Warren County, 49-336; Black v. Boyd, 52-719; Dickey v. Harmon, 26-501; Finch v. Billings, 22-228; Keller v. Jackson, 58-629; Carmichael v. Vandebur, 50-651; Ottumwa Sav. Bk. v. Ottumwa, 63 N. W., 672; Wilson v. Riddick, 69 N. W., 1039; Bull v. Keenan, 69 N. W., 433; Shelley v. Smith, 66 N. W., 172; Weis v. Morris, 71 N. W., 208; Richman v. Board, etc., 70-627; Kirk v. Litterest, 71-71; Rising v. Teabout, 73-419; British-American Ins. Co. v. Neil, 76-645; Gray v. Wolf, 77-630; Ash v. Scott, 76-27; Fish v. Chicago, R. I. & P. R. Co., 81-280; Reynolds v. Iowa & N. Ins. Co., 80-563; Yancey v. Tatlock, 93-386; Ketchum v. Larkin, 88-215; Cox v. Mason City & Ft. D. R. Co., 77-20; Allen v. Seaward, 86-718; Snell v. Dubuque & S. C. R. Co., 88-442; Sayles v. Delubrey, 64-109; Shipley v. Reasoner, 80-548.

the supersedeas bond, the judgment of the court below is merged therein and the lien thereof discharged; and in such case the lien of the judgment in the supreme court dates from the time of its rendition only.[49] The effect of the appeal is to deprive the lower court of jurisdiction over the case.[50]

§ 1357. Of the procedendo — Of decrees, withdrawing papers.—The procedendo may be in the following form:

FORM OF PROCEDENDO.

State of Iowa, } ss.
——— County. }

The State of Iowa, to the district court in and for ——— county.

Whereas the supreme court of said State being lately certified of the record and proceedings in a certain cause which was in the district court of the county of ——— aforesaid, wherein ——— was plaintiff and ——— was defendant, from which judgment so rendered the said defendant appealed to the said supreme court of Iowa, and said court having duly examined the record and proceedings aforesaid in the premises, on the ——— day of ———, 18—, did affirm the judgment aforesaid, as rendered by the court below.

You are hereby commanded, that with the speed which of right and according to law you may, you proceed in the same manner as if no appeal had been taken to and prosecuted in this court, anything in the record or proceedings aforesaid heretofore certified to the contrary, notwithstanding.

Witness ———, clerk of the said supreme court, with the seal of court hereto affixed, at Des Moines, this ——— day of ———, 18—.

[Seal.] ———, clerk, etc.

No procedendo, except in criminal cases, and in cases where petitions for rehearing have been overruled, will issue in any case until the expiration of thirty days from the filing of the opinion in the case, except upon order of one of the judges of the court, upon cause shown.[51] A procedendo is not necessary to authorize the court below to redocket and proceed with the case in a proper manner, which may be done on proper notice to the adverse party, at any time after the time for rehearing has ex-

[49] Code, Secs. 3801, 4128; Swift v. Conboy, 12-444.

[50] Levi v. Karrick, 15-444; McLaughlin v. O'Rouke, 12-459.

[51] Rules, Sec. 54.

pired.[52] Decrees to be entered in the supreme court must be prepared by the attorney of the parties in whose favor they are rendered. Copies must be served on the opposite attorney and filed in the court within twenty days after the attorney preparing them shall have received notice of the decision in the cause in which they are entered.[53] And when, by the decision of the supreme court, a decree is to be entered in such court at the option of either party, such option must be declared and a decree furnished as above stated, within twenty days from the date at which the attorney required to prepare the decree received notice of the decision.[54] If a new trial is granted, the clerk, as soon as the cause is at an end in the supreme court, must transmit to the clerk of the court below, all original papers or exhibits certified up from said court; if a new trial is not awarded, or if the cause is triable de novo, either party desiring to withdraw the same may, by motion, showing proper grounds therefor, and upon five days' notice to the other party, or his attorney, secure an order from this court or a judge thereof, allowing him to do so, upon filing a receipt for the same with the clerk of this court.[55]

§ 1358. When causes will be tried de novo in the supreme court.—A cause treated as an equitable one in the lower court will be so treated in the supreme court.[56] And all equity cases tried by the method provided by statute must, on appeal, be tried de novo.[57] Cases held not triable de novo.[58] We have considered elsewhere when equity cases may be tried on errors assigned, in

[52] State v. Knouse, 33-365; Becker v. Becker, 50-139.

[53] Rules, Sec. 52.

[54] Rules, Sec. 53.

[55] Rules, Sec. 92.

[56] Hintrager v. Sumbargo, 54-604; Balch v. Ashton, 54-123; Manchester v. Hoag, 66-649; Fritzler v. Robinson, 70-500; Taylor v. Kier, 54-645; Baldwin v. Davis, 63-231; Dove v. Ind. Dist., 41-689; Bryant v. Fink, 75-516; Frank v. Hollands, 81-164.

[57] Blough v. Van Hoorbeke, 48-40; Sherwood v. Sherwood, 44-192; Chambers v. Ingham, 25-222; Cooper v. Skell, 14-578; Howe Mch. Co. v. Wooley, 50-549; McClain v. McClain, 57-167; First Nat. Bk. v. City Council of Albia, 86-28.

[58] Bohull v. Neiwalt, 75-109; Yocum v. Haskins, 81-436; Lawrence v. Thomas, 84-362; Smith v. Knight, 77-540; Chase v. Weston, 75-159.

case the proper steps have not been taken to have them tried de novo.

§ 1359. Of regulations as to the method of trial.—While the legislature can not take away the right of trial de novo on appeal in equity cases, yet it may regulate the manner of the exercise of such right.[59] And when a divorce case was not tried in open court below, it was held it could not be tried de novo in the supreme court.[60]

§ 1360. What must appear of record to warrant a trial de novo.—The evidence offered, as well as that received, must all be embodied in the record in order to try a case de novo in the supreme court.[61] If it is not, it will be presumed the action of the court below was correct.[62] Nor will it be sufficient simply to set out in the records the facts found by the court.[63] And if there is a stipulation as to the facts, it must appear that the cause was, in fact, tried on such facts.[64] A trial de novo will not, however, be defeated if it clearly appears from the evidence that the evidence omitted was irrelevant or immaterial.[65] But an appellee can not be heard to object that evidence admitted against his objection is not contained in the abstract.[66] We have omitted a reference to the decisions under prior statutes of certain steps formerly necessary to insure a trial de novo, as they are

[59] Richards v. Hintrager, 45-253; Sisters of Visitation v. Glass, 45-154; Andrews v. Burdick, 62-714.

[60] Hobart v. Hobart, 45-501.

[61] Krappel v. Pfiffner, 24-176; Maxwell v. Lundy, 19-576; Van Orman v. Spafford, 16-186; Anderson v. Easton, 16-56; Kellogg v. Kelsey, 16-388; Muslon v. Turner, 20-294; Pickett v. Hawes, 20-335; Wetherell v. Goodrich, 22-583; Lillie v. Skinner, 46-329; Cook v. Woodbury County, 13-21; Shear v. Brinkman, 72-698; Wise v. Usry, 72-74; Moody v. Edwards, 72-456; Underwood v. Lombard Inv. Co., 84-25; Giltrap v. Walters, 77-149; Reed v. Larrison, 77-399; Second Nat. Bk. v. Ash, 85-74; Carlton v. Brock, 91-710; Wolrod v. Flanigan, 75-365; Parks v. Garner, 77-154; Peoria Steam Marble Works v. Linesenmeyer, 80-253; Bailey v. Green, 80-616; Shattuck v. Burlington Ins. Co., 78-377; Harper v. Gleyslein, 85-709; Miller v. Terkeldson, 80-476; Ainslee v. Wynn, 65 N. W., 401; Wallick v. Pierce, 71 N. W., 429.

[62] State v. Orwig, 27-528; Garner v. Pomroy, 11-149.

[63] Robb v. Dougherty, 14-379.

[64] Davenport v. Ellis, 22-296.

[65] Palo Alto County v. Harrison, 68-81.

[66] Clinton L. Co. v. Mitchell, 61-132.

of no practical utility under the present law. Elsewhere, when treating of abstracts, we have considered fully what the abstract must contain in equity cases.

§ 1361. Of the judge's certificate to the evidence, its requisites and when it must be filed.—All the evidence must be taken in writing at the trial, or by deposition, and must be certified by the judge within the six months allowed for an appeal;[67] and it must affirmatively appear that the certificate was signed within the statutory time.[68] Nor can this requirement of the statute be waived by act of the parties.[69] But this certificate, if made in time, will not be affected by the fact that it was made after the appeal was taken.[70] It has been held that where the certificate of the clerk is sufficient to enable the court to try the case de novo, the requirements of the statute as to the time of the making of the judge's certificate are not applicable.[71] But see Teague v. Fortsch, 66 N. W., 1056, where the Cross case is overruled. If the court orders the evidence taken down in shorthand, and it is so taken and properly certified at the time, and is afterward transcribed, that is a sufficient taking down in writing.[72] The evidence must be certified by the judge.[73] But it has been held that if the judge's certificate is made in due form to the reporter's original notes as filed, it might be considered as so connected with the transcript when made and filed in time, as to constitute, with the reporter's certificate, a sufficient certificate of the evidence; but the certificate would

[67] Code, Sec. 3652; Mitchell v. Lamb, 59-36; Paige County v. Am. Em. Co., 61-246; Marshalltown v. Forney, 61-578; Preston v. Hale, 65-409; Hartnett v. Sioux City, 66-253; Wisconsin, I. & N. R. Co. v. Braham, 71-484; Burnett v. Loughbridge, 87-324; Yetzer v. Wiles, 91-478; Baldwin v. Ryder, 85-251; Jamison v. Weaver, 84-611; Kavalier v. Machula, 77-121; Thomas v. McDonald, 77-126; State v. Boyd, 85-740; Teague v. Fortsch, 66 N. W., 1056; Runge v. Hahn, 75-733; Lewis v. Markle, 71-652.

[68] Russell v. Johnston, 67-279; Mitchell v. Laub, 59-36.

[69] Hartnett v. Sioux City, 66-253.

[70] Goff v. Hawkeye P., etc., 62-691.

[71] Cross v. B. & S. W. R. Co., 58-62.

[72] Ross v. Loomis, 64-432; Howe v. Jones, 66-156.

[73] Carskaddon v. Bartlett, 63-180; Blanchard v. Devoe, 80-521; see No. 67 above.

not be deemed complete until the transcript is made and certified by the reporter.[74] It is no objection to the trial of a case de novo that the evidence was not taken down by the reporter when it is tried on written evidence.[75] The judge's certificate has been held insufficient when not attached to any evidence or referring to any testimony as having been taken in writing.[76] But when, on a trial of an issue as to one defendant, he introduced the same evidence that was used on the hearing of the case as to another defendant, it was held that the evidence having been certified as introduced on the first trial, it need not be again certified.[77]

The judge actually trying the case is the one to make the certificate, even though he is holding the court in exchange with the regular judge.[78] It cannot be made by his successor in office.[79] But the statute now authorizes such signing by the successor.[80] The certificate of the judge must show that all the evidence offered is before the court; that it is all the evidence "introduced," is not sufficient.[81] Nor is a certificate that it was all the evidence "used"[82] or "adduced."[83] But a certificate that it was all the evidence "offered, adduced and introduced," is sufficient,[84] and so is one that it "is all the evidence offered in said trial, as well as the evidence introduced and admitted and used in the trial,"[85] or that it is "all the evidence submitted in said cause."[86]

If a judgment appealed from is rendered on a referee's report it is not sufficient that the evidence is certified by such referee; it must also be certified by the judge.[87] Under the present statute, if the parties agree on the

[74] Merrill v. Bowe, 69-653.
[75] Gately v. Kniss, 64-537.
[76] Alexander v. McGrew, 57-287; see Palo Alto County v. Harrison, 68-81.
[77] Ætna L. Ins. Co. v. Bishop, 69-645.
[78] Howe v. Jones, 66-156.
[79] Teague v. Fortsch, 66 N. W., 1056.
[80] Code, Sec. 3749.
[81] Taylor v. Kier, 54-645; see Groneweg v. Barnum, 70-763; Polk v. Sturgeon, 71-395; Second Nat. Bk. v. Ash, 85-74; Baldwin v. Ryder, 85-251.
[82] Hart v. Jackson, 57-75.
[83] Tuttle v. Story County, 56-316.
[84] Marshalltown v. Forney, 61-578.
[85] Wood v. Wood, 61-256.
[86] Miller v. Wolf, 63-233.
[87] Porter v. Everett, 66-278; Young v. Scoville, 63 N. W., 607.

facts and reduce them to writing, such statement takes the place of depositions or of oral testimony reduced to writing, and becomes the evidence in the case, and upon such evidence the case may be tried de novo.[88]

FORM OF CERTIFICATE OF SHORTHAND REPORTER TO HIS STENOGRAPHIC NOTES.

Title, }
Venue. }

I, ———, being the official shorthand reporter of the district court in and for the ——— judicial district of Iowa, which district embraces the county of ———, do hereby certify that the above entitled cause was on the ——— day of ———, 18—, tried before his honor (name of trial judge), at (name place) that I took down in shorthand the entire proceedings upon said trial, except the arguments of counsel, and that the shorthand notes to which this certificate is attached, embrace and contain, together with the exhibits, depositions and documentary evidence therein referred to and identified, all the evidence offered, received or introduced upon said trial, all objections to evidence offered as well as to that introduced; all rulings upon the same and all exceptions thereto, and all proceedings had and done upon said trial, except the arguments of counsel.

Dated this ——— day of ———, 18—. (Signature.)
Official shorthand reporter of the ——— judicial district of Iowa.

This certificate should be filed attached to the notes and filed with the same at the conclusion of the trial.

It is well also to at the same time have the trial judge certify to the notes.

Such certificate may be in the following form:

FORM OF CERTIFICATE OF TRIAL JUDGE TO SHORTHAND NOTES.

Title, }
Venue. }

I, ———, judge of the ——— judicial district of Iowa, do certify that the shorthand notes above certified by ———, who is the official shorthand reporter of this judicial district, and to which this certificate is also attached do, together with the exhibits, depositions and documentary evidence therein referred to and identified, embrace all of the evidence offered, received or introduced upon the trial of the above entitled cause, all objections thereto, all rulings on the same and all exceptions taken thereto, and all proceedings had and done on said trial

[88] Williams v. Wells, 62-740.

except the arguments of counsel, and the same are hereby made a part of the record in the case as provided by law.

Dated this ——— day of ———, 18—. (Signature.)
Judge of the ——— Judicial District of Iowa.

This certificate should be made as soon as the trial is concluded, and be attached to said notes, together with the reporter's certificate, and filed at once with the clerk. When the notes are transcribed into long hand the following form of certificate may be used:

FORM OF REPORTER'S CERTIFICATE TO TRANSLATION OF HIS SHORTHAND NOTES.

Title, }
Venue. }

I, ———, the official shorthand reporter of the ——— judicial district of Iowa, hereby certify that the above entitled cause was on the ——— day of ———, 18—, tried before the honorable (name of judge) at (name the place); that I took down on said trial, in shorthand, the entire proceedings had therein, except the arguments of counsel, and that the above and foregoing is a correct translation of my said shorthand notes and that said translation to which this certificate is attached embraces, together with the exhibits, depositions and documentary evidence therein referred to and identified, all the evidence offered, received or introduced upon said trial, all objections to evidence offered, as well as to that introduced; all rulings upon the same, and all exceptions thereto, and all proceedings had and done upon said trial, except the arguments of counsel.

Dated this ——— day of ———, 18—. (Signature.)
Official shorthand reporter of the ——— judicial district of Iowa.

To this should be attached the judge's certificate, when the paper should be filed.

From the foregoing forms a judge's certificate to the translation of the notes can readily be drawn.

If evidence is adduced upon some interlocutory matter, as on a motion for a change of venue, a challenge to the panel of jurors, motion for a new trial, based upon misconduct of court, counsel, or jury, or in other like cases, the record must show that the supreme court has all of the evidence before it upon which the trial court acted. In such cases such evidence should be embodied in the bill of exceptions, which should clearly state that it contains all of the evidence relating to any such matter which it is desired to have the supreme court pass upon,

else such question will not be considered. Of course the bill must be properly certified. See chapter on bills of exceptions.

If it is desired to raise any question on the arguments of counsel and the above forms are used they should be so changed as to embrace the arguments.

§ 1362. Of the clerk's certificate.—The certificate of the clerk that the transcript contains all the evidence on file does not sufficiently show that it was all the evidence used in the trial in the court below.[89] A certificate by the clerk that the printed abstract is an abstract of all the evidence as shown by the transcript made by the official reporter does not show that the record contains all the evidence.[90]

§ 1363. Of the hearing and determination of appeals in equitable actions.—On an appeal in an equitable action triable de novo, the court will inquire into the merits of the case, for the purpose of administering justice, guided only by the universal principles of equity jurisprudence. It will not be confined to errors apparent of record.[91] It will review and pass upon the facts, as well as the law of the case,[92] and will render such a judgment as the lower court should have rendered on the law and facts.[93] But it can only act on the testimony presented and considered by the court below.[94]

§ 1364. Of questions as to the admissibility of evidence.— On the trial of cases de novo on appeal, questions as to the competency of testimony, admissibility of depositions, and the like, come up as original questions upon the objections made in the court below, and upon their decision the testimony is considered or rejected, as the case may be. If such testimony is found competent and admissible, it is considered, although excluded by the lower court; but the decision will not be thereby re-

[89] Grant v. Grant, 46-478; Davenport v. Ells, 22-296; see Teague v. Fortsch, 66 N. W., 1056.

[90] Collins v. Wilson, 68 N. W., 916.

[91] Austin v. Carpenter, 2 G. Gr., 131.

[92] Pierce v. Wilson, 2-20.

[93] Sherwood v. Sherwood, 44-192.

[94] Walker v. Ayres, 1-449; McGregor v. Gardner, 16-538.

versed, unless the consideration of such testimony makes a different conclusion necessary.[95] Nor will a case be reversed for error in the admission of evidence.[96] The proper practice in the trial of such actions in the court below is to admit all of the evidence offered subject to the objection, or at least to have it made a part of the record, even though objections thereto are sustained; if this is not done, the cause may sometimes be remanded, or the defeated party will be compelled to have a review of the questions which are not permitted to be answered on error.[97] It was held in the trial of an equitable action where a deposition was erroneously stricken from the files, that the supreme court would not try the case de novo, considering such deposition, but would remand the case for a new trial to enable the party to introduce further evidence.[98] All questions may be presented in the supreme court which legitimately arise on the record, whether urged or relied on in argument in the lower court or not.[1] Alleged errors in interlocutory proceedings will not be considered, but the case will be tried on its merits.[2]

§ **1365. When the case will be remanded.**—The decree of the lower court will be reversed when it is apparent from the record that there is not sufficient evidence to sustain it, but if the record entry recites that there was other evidence which would be sufficient, and which may have been lost, the case will be remanded for a re-trial.[3] But ordinarily it is not the duty of the court to remand the case when the evidence is not sufficient to support the judgment of the court below.[4] When, for want of proper steps being taken, the case, though equit-

[95] Blough v. Van Hoorebeke, 48-40; see Van Bogart v. Van Bogart, 46-359; Putney v. O'Brien, 53-117; Redhead v. Pratt, 72-99; Grafton v. Moorman, 88-736.

[96] Hasner v. Patterson, 70-681; see Hanks v. Van Garden, 59-179.

[97] Blough v. Van Hoorebeke, 48-40; Clinton Lumber Co. v. Mitchell, 61-132; Donnell v. Braden, 70-551.

[98] Sweet v. Brown, 61-69.

[1] Seymour v. Shea, 62-708.

[2] Hackworth v. Zollars, 30-433; State v. Orwig, 27-528.

[3] Webster County v. Taylor, 19-117.

[4] Wickersham v. Reeves, 1-413; Butterfield v. Wilton Collegiate Inst., 85-404.

able, is not triable de novo and is tried on errors assigned, it must be remanded for further proceedings in the lower court.[5] So a cause may be remanded to make necessary parties thereto.[6]

§ 1366. Of the decree in a cause triable de novo—A decree will not be so modified as to render it more favorable to the party not appealing.[7] Where the record does not show that the appeal was taken for delay, and the judgment of the lower court is affirmed after the expiration of the time fixed therein for performance by the unsuccessful party, the time of performance will be so extended as to permit him to perform.[8] Where the case is tried anew, and the action of the court below held erroneous, the successful party is entitled to have such a decree as is proper on the record as made in the court below entered up in the supreme court;[9] yet there are exceptions to this rule.[10]

§ 1367. Of proceedings in the lower court in an equitable action after it is remanded.—After the case is tried and remanded for decree in accordance with the decision of the supreme court, the pleadings can not be so amended as to present a defense which existed when the case was tried, except in rare cases.[11] But when a cause is thus remanded, it is in the discretion of the lower court to admit evidence omitted by inadvertence, or additional or amended pleadings may be permitted to be filed.[12] But material evidence discovered since the original trial, and matters arising since such trial which affect the merits of the case, may be shown after a cause is remanded, and the pleadings may be amended accordingly.[13] If the cause is remanded merely for judgment, it must be rendered as a matter of course, and upon mo-

[5] Jordan v. Wisner, 48-180; Kershman v. Swehla, 62-654.
[6] Postlewait v. Howes, 3-365.
[7] Smith v. Wolf, 55-555.
[8] Daniels v. St. L., K. C. & N. R. Co., 56-192.
[9] First Nat. Bk. v. Baker, 60-132.
[10] White v. Farlie, 67-628, and cases cited.
[11] Sexton v. Henderson, 47-131; see No. 12.
[12] Adams County v. B. & M. R. R. Co., 44-335.
[13] Sanxey v. Iowa C. G. Co., 68-542.

tion, unless the unsuccessful party brings himself within some recognized rule entitling him to a new trial.[14] Where decree in partition allowed plaintiff for rents up to time of trial was modified as to some of the interests of the parties and remanded and a supplemental petition filed in the lower court claiming rents for the property after the trial, it was held that it did not set up a new cause of action, and the relief so demanded was properly given on final decree.[15] The statement in an opinion on appeal as to a question of fact is not conclusive on the lower court on a second trial of the case.[16]

§ 1368. Questions not raised in court below will not be considered on appeal.—We have before stated that the supreme court will not review or pass upon questions not raised in the court below; nor will it correct errors which could have been corrected in the court below, until after a motion has been made in such court and overruled.[17] No useful purpose could be subserved by citing all of the cases applicable to the above proposition, but the following cases are stated wherein it has been applied, viz.: To cases where new issues and new objections are first made in the appellate court.[18] When it is sought to sustain an erroneous ruling on a ground not urged below.[19] Objections to the service of the notice not made below.[20] Where objection is first made in the supreme court to the jurisdiction of the lower

[14] Austin v. Wilson, 57-586.

[15] Leach v. Germania Building Ass'n, 70 N. W., 1090.

[16] Baxter v. Rollins, 68 N. W., 721.

[17] Garvin v. Cannon, 53-716.

[18] Patterson v. Stiles, 6-54; McGregor v. Gardner, 16-568; Adams County v. B. & M. Co., 44-335; Oliver v. Depew, 14-490; Garland v. Wholebau, 20-271; Brazelton v. Jenkins, Morris, 15; Lower v. Lower, 46-525; Hinkle v. Saddler, 66 N. W., 765 Chase v. Kaynor, 78-449; Brandt v. Allen, 76-50; Pence v. Chicago, R. I. & P. R. Co., 79-389; Gate City Land Co. v. Heilman, 80-477; Benjamin v. Shea, 83-392; Zabel v. Nyenhuis, 83-756; Shuck v. Chicago, R. I. & P. R. Co., 73-333; Crill v. Jeffreys, 64 N. W., 625; Leick v. Tritz, 62 N. W., 855; Logan v. McCahan, 71 N. W., 252; Wilson v. Reddick, 69 N. W., 1039; Bull v. Keenan, 69 N. W., 433; Boos v. Dulin, 68 N. W., 707; Means v. Yeager, 65 N. W., 993; Casey v. Ballow Banking Co., 67 N. W., 98; Moore v. Graves, 65 N. W., 1008; Klotz v. James, 64 N. W., 648; Tyler v. Coulthard, 64 N. W., 681; State v. Seery, 64 N. W., 631; Hoffman v. Smith, 63 N. W., 182.

[19] Knapp v. Sioux C. & P. R. Co., 65-91.

[20] Des Moines v. Layman, 21-153.

court.[21] Unless it appears that the trial court had no jurisdiction.[22] Objections to pleadings not raised by motion or demurrer below.[23] Objections that the relief granted was not asked for in the pleadings.[24] A defense not pleaded in the court below will be disregarded.[25] The question of variance between pleadings and proofs can not be first raised in the supreme court.[26] Nor can the fact that the jury was not sworn.[27]

Objections to evidence can not be first made in the appellate court.[28] Nor to the form of the judgment.[29] Nor can a motion to vacate an injunction be first made after appeal;[30] and a question which can only be raised by a motion for judgment non obstante verdicto can not be first raised on appeal.[31] Nor can objections which might have been corrected below by a motion in arrest of judgment.[32] Nor objections that the judgment was excessive.[33] Nor an objection that the judgment was improperly entered.[34] Nor will a judgment by default be reviewed until a motion has been made in the lower court to set it aside, and overruled.[35] Nor an error in the taxa-

[21] Bridgman v. Wilcut, 4 G. Gr., 563; Davenport v. C., R. I. & P. R. Co., 38-633; Spelman v. Gill, 75-717; Corey v. Sherman, 64 N. W., 828.

[22] Gould v. Hurto, 61-45; Grover v. Richmond, 53-570; St. Joseph Mfg. Co. v. Harrington, 53-380.

[23] Ruddick v. Patterson, 9-103; Williams v. Sill, 12-511; Davis v. Burt, 7-56; Gifford v. Ferguson, 19-166; McCoy v. Connell, 40-457; Moser v. Risdon, 46-251; Davis v. Walter, 70-465; Wilson v. Harris, 68-443; Dubuque & S. C. R. Co. v. Cedar Falls & M. R. Co., 76-702; Garrett v. Polk County, 78-108; Scott v. Chicago, M. & St. P. R. Co., 78-199; Adams County v. Hunter, 78-328; Mann v. Taylor, 78-355; Winkleman v. Winkleman, 79-319.

[24] Iowa L. Co. v. Foster, 49-25; Williams v. Wilcox, 66-65; see Hoyt v. Hoyt, 68-703.

[25] Thompson v. Lee County, 22-206; Barlow v. Brock, 25-308; Pierce v. Early, 79-199.

[26] Singer v. Given, 61-93; Ressler v. Baxley, 81-750; Ætna Iron Works v. Firmenich Mfg. Co., 90-390.

[27] State v. Schlagel, 19-169.

[28] Johnson v. Miller, 69-562; State v. McLaughlin, 44-82; Council Bluffs L. v. Billups, 67-674; Luke v. Bruner, 15-3; Iowa H. Co. v. Duncombe, 51-525; Childs v. McChesney, 20-431; Lines v. Lines, 54-600; Davidson v. Dwyer, 62-332; Sawin v. Union Building & Sav. Ass'n, 64 N. W., 401.

[29] Barlow v. Brock, 25-308; Robinson v. Keith, 25-321.

[30] Bishop v. Carter, 29-165.

[31] Coonrod v. Benson, 2 G. Gr., 179.

[32] Smith v. Warren County, 49-336.

[33] Black v. Boyd, 52-719; Dickey v. Harmon, 26-501; Finch v. Billings, 22-228; Keller v. Jackson, 58-629.

[34] Carmichael v. Vandebur, 50-561.

[35] Hunt v. Stevens, 25-261; Sav-

tion of costs until a motion to re-tax has been made and overruled below.[36] Nor can mistakes of the clerk be first urged in the supreme court.[37] And the following objections can not be first raised in the supreme court. An objection to the sufficiency of an affidavit for an attachment on motion to dissolve.[38] An objection to the form in which instructions were given, not made at the time they were given.[39] An objection not based on an exception taken on the trial in the lower court.[40] An objection to the action of the court in transferring a cause to the equity docket.[41] An objection to the form of an issue presented to the jury in an equity case.[42] To the allowance of interest upon the verdict of a jury from the time of the commencement of the action.[43] To an assessment of damages on an injunction long after its dissolution.[44] To a decree of costs against defendants without specifying which one should pay them.[45] An objection to the sufficiency of newly discovered evidence and to the affidavits embodying the same, not made in the court below.[46] For a misjoinder of parties not made below.[47] No appeal can be based on a ruling subsequently changed or set aside by the court.[48]

§ 1369. Of the presumptions which obtain with reference to the regularity of the proceedings of the court below. — Every reasonable presumption will be entertained in favor of the ruling of the lower court, until overcome by something appearing of record, and

ings Bk. v. Horn, 41-55; Pigman v. Denney, 12-396; McKinley v. Bechtel, 12-561; Van Vark v. Van Dam, 14-232; Downing v. Harmon, 13-535; Pratt v. Western S. Co., 27-363.

[36] Hemphill v. Sallady, 1 G. Gr., 301; Yeager v. Circle, 1 G. Gr., 438.

[37] Daniels v. Claflin, 15-152.

[38] Berry v. Gravel, 11-135.

[39] Davenport v. Cummings, 15-219.

[40] Spelman v. Gill, 75-717; State v. Reasby, 69 N. W., 451; Dean v. Zenor, 65 N. W., 410; Nat. Horse Impt. Co. v. Novak, 64 N. W., 616; Corn Exchange Bank v. Schuttleworth, 68 N. W., 827; Kelley v. Inc. Town of West Bend, 70 N. W., 726; State v. Lee, 64 N. W., 284.

[41] Gate City Land Co. v. Heilman, 80-477.

[42] Chamberlin v. Juppiers, 11-513.

[43] Wadsworth v. Harrison, 14-272.

[44] Woods v. Irish, 14-427.

[45] Martin v. Jones, 15-240.

[46] Darrance v. Preston, 18-398.

[47] Evans v. Hawley, 35-83.

[48] Thompson v. Burnham, 35-411.

error must be made affirmatively to appear.[49] Thus it will be presumed that there was sufficient testimony to support the judgment, unless the contrary appears.[50] And in favor of the finding of the court, it will be presumed that there was lawful evidence on which to base it.[51] Nor will the appellate court presume that the proof in a case established a state of facts which would render the decision of the court below erroneous, if a state of facts can be supposed under which such decision would be correct.[52] Where no finding of facts is made, the presumption is that the court found such facts as justified its conclusions of law, unless the contrary appears.[53] If a judgment is based on an authentication of a judgment from another State, which is insufficient, it will be presumed that there was other evidence showing the judgment.[54] If attorney's fees are taxed after the rendition of a judgment in the case, it will be presumed such taxation was made upon proper evidence,[55] and the same

[49] Davis v. Moffitt, 4 G. Gr., 92; Hendrie v. Rippey, 9-351; David v. Leslie, 14-84; Morris v. Steele, 62-228; Hintrager v. Kiene, 62-605; Brobst v. Thompson, 4 G. Gr., 135; Speers v. Fortner, 6-553; Scofield v. Ford, 56-370; Bower v. Webber, 69-286; Hunt v. Highman, 70-406; State v. Hopkins, 67-285; Holland v. Union County, 68-56; Keys v. Francis, 28-321; Fouts v. Pierce, 64-71; Dixon v. State, 3-416; Isett v. Oglevie, 9-313; Stewart v. Bishop, 33-584; State v. Foster, 40-303; Thompson v. Winnebago County, 48-155; Pottawattamie County v. Marshall County, 56-410; State v. Ross, 21-467; Ward's Heirs v. Cochran, 36-432; Johnson v. Mantz, 69-710; State v. Gibbs, 39-318; Worthington v. Olden, 31-419; Calder v. Smalley, 66-219; State v. Saunders, 30-582; Mills County Bk. v. Perry, 72-15; In re Will of Norman, 72-84; Arneson v. Thorstad, 72-145; Nat. State Bk. v. Delahaye, 82-34; Pierce v. Herrold, 83-764; Smith v. Yager, 85-706; Minnesota Stone Ware Co. v. Knapp, 75-561; Donnelly v. Burkett, 75-613; Foster v. Hinson, 76-714; Pingery v. C. & D. R. Co., 78-438; Ellis v. Butler, 78-632; Short v. C., M. & St. P. R. Co., 79-73; Ida County v. Woods, 79-148; State v. Coppock, 79-482; Ecklund v. Talbot, 80-569; Gavin v. Bishoff, 80-605; Blair v. Madison County, 81-313; Pickerell v. Hiatt, 81-537; Nat. State Bk. v. Boesch, 90-47; Wright v. Farmers Mut. Live Stock Ins. Ass'n, 65 N. W., 308; McVey v. Johnson, 75-165; Read v. Divilbliss, 77-88; Cahalan v. Cahalan, 82-416; State v. Potts, 83-317; Wightman v. Butler County, 83-691; Bruner v. Wade, 84-698; Donnelly v. Cedar County, 75-536; Winey v. C., M. & St. P. R. Co., 92-622.

[50] Brady v. Malone, 4-146; Hefferman v. Burt, 7-320; Jennings v. Conn, 11-542; Willett v. Millman, 61-123; Phillipps v. Phillipps, 46-703; Ida County v. Woods, 79-148.

[51] Henry v. Evans, 58-560; Buford v. DeVoe, 65 N. W., 413; Watkins v. Powell, 68 N. W., 597; City of Burlington v. Unterkircher, 68 N. W., 795.

[52] Crane v. Ellis, 31-510.

[53] Oskaloosa v. Pinkerton, 51-697.

[54] Clemmer v. Cooper, 24-185.

[55] Kelso v. Fitzgerald, 67-266.

presumption exists to justify a finding that the defendant was duly and legally served with process.[56] So it will be presumed that there was evidence to support a default.[57] And if a decree recites that certain matters essential to the jurisdiction of the court were made to appear, it will be presumed such was the fact.[58] And when the record showed that the trial was not had to a jury, it will be presumed that a jury was waived.[59] The error must not only affirmatively appear, but it must do so with reasonable certainty.[60]

The same presumption exists in favor of a record,[61] and as to pleadings,[62] and as to incidental rulings of the court during the trial.[63]

When it appears that a motion or demurrer was filed, but the record is silent as to any ruling thereon, it will be presumed it was waived.[64] If no ground can be discovered or pointed out upon which the action of the court can be upheld, the presumption of regularity will be overcome.[65] If objection to the evidence is sustained, and the record does not show the ground of the objection, if the evidence is vulnerable to any objection, it will be presumed that one was made and sustained.[66] Nor will it be presumed that the action of the court was based on anything not appearing of record when no other evidence than that of record could have been introduced in the court below.[67] The same presumptions as to regularity obtain with reference to the instructions given by the court below.[68]

[56] Kent v. Coquillard, 67-500.
[57] Semple v. Lee, 13-304.
[58] Jewett v. Miller, 12-85.
[59] Hawkins v. Rice, 40-435.
[60] Randolph Bk. v. Armstrong, 11-515; Gantz v. Clark, 31-254.
[61] Mahaska County v. Ruan, 45-328; Mackemer v. Benner, 1 G. Gr., 157.
[62] Hervey v. Savery, 48-313.
[63] Clinton Nat. Bk. v. Torry, 30-85; Thompson v. Burnham, 35-411; McCue v. Wapello County, 56-698.
[64] Sigler v. Woods, 1-177; Busick v. Bumm, 3-63; Boardman v. Beckwith, 18-292; State v. Ross, 21-467; First Nat. Bk. v. Carpenter, 41-518; Moore v. Gilbert, 46-508; Payne v. Dicus, 88-423; Schroeder v. Webster, 88-627; Corey v. Gillespie, 62 N. W., 837; Langhammer v. Manchester, 68 N. W., 688.
[65] Baird v. C., R. I. & P. R. Co., 61-359; see Emery v. Emery, 54-106.
[66] Hoben v. B. & M. R. R. Co., 20-562.
[67] McGovern v. Keokuk L. Co., 61-265.
[68] Stier v. Oskaloosa, 41-353; Moody v. St. P. & S. C. R. Co., 41-

§ 1370. Same—When the evidence is not all before the court.—If the evidence is not all before the court it will be presumed that there was evidence sufficient to support the verdict.[69] So it will be presumed that a sufficient showing was made to justify the court in dissolving an injunction,[70] and that there was evidence warranting the giving of the instructions which were given.[71] When the abstract only obtains a small part of the evidence an instruction can not be reviewed where the evidence must be consulted in order to determine its correctness.[72] Where instructions clearly relate to a matter of law, as shown by the pleadings, they will be considered on appeal in the absence of the evidence.[73] The same presumptions of regularity obtain in actions in equity, as at law.[74]

§ 1371. What is error without prejudice—Generally.—The statute has wisely provided that no exception shall be regarded in the supreme court unless the ruling has been on a material point, and the effect thereof prejudicial to the rights of the party excepting.[75]

284; State v. Stanley, 48-221; Warbassee v. Card, 74-306.

[69] State v. Pittman, 38-252; Wicke v. Iowa State Ins. Co., 90-4; State v. Drorsky, 73-484.

[70] Gray v. Montgomery, 17-66.

[71] Blackburn v. Powers, 40-681; Gantz v. Clark, 31-254; Rice v. Des Moines, 40-638; State v. Hemrick, 62-414; Wallace v. Roff, 37-192.

[72] Molony v. Railway, 63 N. W., 690.

[73] Seevers v. Cabel, 62 N. W., 669.

[74] Garner v. Pomory, 11-149.

[75] Code, Sec. 3754; Hawkeye Ins. Co. v. Brainard, 72-130; Moses v. Penquit, 72-611; Potts v. Tuttle, 79-253; Chicago, R. I. & P. R. Co. v. Dey, 76-278; Schoenhofel Brewing Co. v. Armstrong, 89-673; Whitney v. Brownell, 71-251; Deere v. Wolf, 77-115; Mayne v. Council Bluffs Sav. Bk., 80-710; Farmers Bank v. Arthur, 75-129; Carruthers v. McMurray, 75-173; Coleman v. Reel, 75-304; King v. Mahaska County, 75-329; McIntire v. Eastman, 76-455; State v. Row, 81-138; Churchill v. Groneweg, 81-449; Fisk v. C., M. & St. P. R. Co., 83-253; Hagan v. Merchants, etc., Ins. Co., 81-321; Flanigan v. B. & O. R. Co., 83-639; Phelps v. Walkey, 84-120; Croddy v. C., R. I. & P. R. Co., 91-598; Trulock v. Donahue, 85-748; Seska v. C., M. & St. P. R. Co., 77-137; Bever v. Spangler, 93-576; Ft. Madison L. Co. v. Batavian Bank, 77-393; Chase v. Kaynor, 78-449; Rappleye v. Cook, 79-564; Worden v. H. & S. R. Co., 76-310; Edergly v. Stewart, 86-87; Hathaway v. B., C. R. & N. R. Co., 66 N. W., 892; Jones v. Cooper, 65 N. W., 1000; Mellerup v. Travelers Ins. Co., 63 N. W., 665; White v. Byam, 64 N. W., 765; Richardson v. McLaughlin, 92-393; Ida County v. Woods, 79-148.

And it has been very often decided that a cause would not be reversed on account of error committed by the court below, unless such error has, in fact, prejudiced the case of the one complaining, and, generally, that fact must be shown by the appellant.[76] But sometimes it is held that if the error appears it will be presumed to have been prejudicial.[77] Error will be regarded as without prejudice when it appears that justice has been done and that a new trial would result in the same verdict or judgment.[78] And this is so, though the jury failed to give nominal damages.[79] And error which would be ground for reversal of a cause may be waived by the act of the party complaining; thus rulings on motions to strike out evidence not having been made or insisted on, error in admitting the evidence is waived.[80] So subsequent acts of the court may cure errors previously com-

[76] Bremer County Bk. v. Eastman, 34-392; Tuck v. Singer Mfg. Co., 67-576; Hoadley v. Hammond, 63-599; Boyce v. Wabash R. Co., 63-70; Wilson v. McAdams, 10-590; Hoy v. Cowgill, 52-711; State v. Woodson, 41-425; Union, etc., v. Neill, 31-95; Will v. Wright, 32-451; Hamilton v. Floyd, 20-598; Crawford v. Paine, 19-172; Hamilton v. Thorn, 66 N. W., 166; White v. Byam, 64 N. W., 765; see cases last above cited.

[77] Smith v. Johnson, 45-308; Potter v. C., R. I. & P. R. Co., 46-399; Strobel v. Moser, 70-126; Carlin v. C., R. I. & P. R. Co., 31-370; Bland v. Hixenbaugh, 39-532; Roby v. Appanoose County, 63-113; Harrison v. Charlton, 37-134; George v. K. & D. M. R. Co., 53-503; Ferguson v. Davis County, 51-220; Moore v. C., St. P. & K. C. R. Co., 93-484; Neville v. C. & N. W. R. Co., 79-232; State v. Adams, 78-292.

[78] Dawson v. Wisner, 11-6; Braddy v. Lumery, 11-29; Allison v. King, 25-56; McNally v. Shobe, 22-49; Cooper v. Central R. of Ia., 44-134; Jamieson v. Perry, 38-14; Whiting v. Root, 52-292; Callanan v. Shaw, 24-441; Keokuk County v. Howard, 42-29; Blair Town Lot & Land Co. v. Hillis, 76-246; Newell v. Martin, 81-238; Rappleye v. Cook, 79-564; Van Gorder v. Sherman, 81-403; Ellithorpe v. Reidessell, 88-729; Ady v. Freeman, 90-402.

[79] Watson v. Van Meter, 43-76; Rowley v. Jewett, 56-492; Phœnix Ins. Co. v. Findley, 59-591; Case, etc., v. Haven, 65-359; Watson v. Moeller, 63-161; Wire v. Foster, 62-114; Norman v. Winch, 65-263; Madison County v. Tullis, 69-720; Thorpe v. Bradley, 75-50; Stuart v. Trotter, 75-96; Cook v. C., M. & St. P. R. Co., 83-278; Harwood v. Lee, 85-622; Schwartz v. Davis, 90-324; Tank v. Rohweder, 67 N. W., 106; Crawford v. Bergen, 91-675; Williams v. Brown, 76-643; Faulkner v. Closter, 79-15; Fleming v. Stearns, 79-256.

[80] State v. Stickley, 41-232; Prichard v. Hopkins, 52-120; Rock v. Wallace, 15-379; Wilson v. McAdams, 10-590; Tyler v. Langworthy, 37-555; Anderson v. Cahill, 65-252; Putney v. O'Brien, 53-117; Henderson v. C., R. I. & P. R. Co., 48-216; State v. Eifert, 65 N. W., 309; Langhammer v. City of Manchester, 68 N. W., 688.

mitted.[81] And subsequent circumstances may render error without prejudice to the complainant.[82]

§ 1372. When rulings upon demurrer or with reference to pleadings will be without prejudice.—If a demurrer is based on an insufficient ground and sustained, it will be without prejudice if it appears that there could have been no recovery upon the count to which the demurrer was directed;[83] and where the action is determined in favor of the party complaining, error in sustaining a demurrer to a portion of the petition will be without prejudice,[84] and the same is true when the issue presented and ruled out on demurrer, is elsewhere presented and submitted to the jury.[85] And when the party amends after a demurrer is sustained;[86] and when a demurrer is overruled, but under the instructions the issue presented in the demurrer was excluded from the jury.[87] Error in striking an answer from the files is cured by permitting the defendant to prove the defense set up therein when the evidence fails to establish it,[88] and refusing to permit an amended answer to be filed will be error without prejudice, when the facts alleged therein might have been proved under the original answer.[89]

§ 1373. Of error without prejudice in rulings upon the evidence, etc.—If the error in the admission or rejection of testimony has worked no prejudice to the party complaining, the cause will not be reversed on account of such error.[90] The exclusion of evidence is error

[81] Williams v. Brown, 28-247; Van Horn v Overman, 75-421; Amos v. Buck, 75-651; Way v. C. & N. W. R. Co., 76-393; Seekel v. Norman, 78-254; State v. Shank, 79-47; In re Assignment of Rea, 82-231; Cahalan v. Cahalan, 82-416; Rea v. Scully, 76-343; State v. Craig, 78-637; Hurlbut v. Hardenbrook, 85-606.

[82] State v. Waterloo Sav. Bk., 39-706; Cutcomp v. Utt, 60-156; Hammitt v. Coffin, 3 G. Gr., 205; Witmore v. Burgan, 70-161; State v. Powell, 70 N. W., 592.

[83] Childs v. Dobbins, 61-109.

[84] Scott v. Union County, 63-583.

[85] McKeever v. Jenks, 59-300.

[86] Gillis v. Matthews, 4 G. Gr., 254.

[87] Flannagan v. McWilliams, 52-148; see Dist. Twp. v. Ind. Dist., 63-188.

[88] McNamara v. Estes, 22-246.

[89] Hough v. Housel, 20-19; see Tabor v. Foy, 56-539.

[90] Woodward v. Horst, 10-120; Quinton v. Van Tuyl, 30-554; Cooper v. Mills County, 69-350; Andrews v. Woodcock, 14-397; Drath

without prejudice when the witness is afterward allowed to testify fully as to the matters called for and objected to.[91] And error in allowing the introduction of only a portion of a deposition is cured if the entire deposition is afterward introduced.[92]

And error in overruling a motion to suppress a deposition will be without prejudice when the witness testifies in person, and his testimony is more favorable to the party complaining than that in the deposition.[93] Nor will it be reversible error to admit evidence to establish a fact when it is sufficiently established by other competent evidence.[94] And error in rejecting evidence will be without prejudice where the facts sought to be proved by such evidence are otherwise fully established.[95] A cause will not be reversed on account of a mere abstract error which could have worked no prejudice.[96] And

v. Deitz, 15-436; Pelamourges v. Clark, 9-1; Chambers v. Grout, 63-342; McKenzie v. Kilter, 27-254; Curl v. C., R. I. & P. R. Co., 63-417; Weitz v. Ewen, 50-34; Walsh v. Ætna L. Ins. Co., 30-133; Murray v. Wells, 57-26; Robinson v. Keith, 25-321; Kelley v. Ford, 4-140; State v. Hallett, 63-259; Brayley v. Ross, 33-505; Courtwright v. Strickler, 37-382; Jaques v. Sax, 39-367; Holt v. Brown, 63-319; Barker v. Kuhn, 38-392; State v. Smith, 46-670; Langford v. Ottumwa W. P. Co., 59-283; Amsden v. D. & S. C. R. Co., 13-132; Asbach v. C., B. & Q. R. Co., 86-101; Bever v. Spangler, 93-576; State v. Smith, 68 N. W., 428; Ludwig v. Blackshere, 71 N. W., 356; Hauser v. Griffith, 71 N. W., 223.

[91] Keough v. Scott County, 28-337; State v. Geddis, 42-264; Allison v. C. & N. R. Co., 42-274; Ham v. W., I. & N. R. Co., 61-716; Reed v. C., R. I. & P. R. Co., 57-23; Abell v. Cross, 17-171; State v. Nelson, 58-208; Belair v. C. & N. W. R. Co., 43-662; Sprague v. Atlee, 81-1; Miller v. James, 86-242; Brown v. S. C. & P. R. Co., 62 N. W., 737; Rosenthal v. Miller, 79-130; Bailey v. Bailey, 63 N. W., 341; Nagle v. Fulner, 67 N. W., 369; Kelly v. Stone, 62 N. W., 842; Orr v. Railway, 62 N. W., 851; Trimble v. Tantlinger, 69 N. W., 145; Strong v. Railway, 62-799.

[92] Bixby v. Cascaddon, 63-164; Langhammer v. City of Manchester, 68 N. W., 688.

[93] Curry v. Allen, 60-387.

[94] McCrary v. Deming, 38-527; Le Grand Q. Co. v. Reichard, 40-161; Wallace v. Wallace, 62-651; Jackson v. Boyles, 64-428; Stone v. Ballingall, 41-291; Des Moines v. Cassady, 21-570; Key v. Des Moines Ins. Co., 77-174; Seltz v. Hawkeye Ins. Co., 71-710; Morgan v. Wifley, 71-212; but see Oppenheimer v. Barr, 71-525; Muir v. Miller, 82-700; Bartlett v. Foremans Fund Ins. Co., 77-155; State v. Black, 59-390; Darnell v. Bennett, 67 N. W., 273; Ward v. Railroad, 65 N. W., 999.

[95] State v. Woodson, 41-425; Hoadley v. Hammond, 63-599; State v. Pratt, 40-631; Bartlett v. Foremans Fund Ins. Co., 77-155; Parcell v. Reynolds, 71-623; Blotcky v. Caplan, 91-352.

[96] Hubbard v. Mason City, 60-400; see Brown v. Hendrickson, 69-749; State v. Middleham, 62-150; State v. Graham, 51-72; Cook Mfg. Co. v. Randall, 62-244.

error in the admission of evidence may be cured by the court instructing the jury plainly to disregard it.[97] The admission of incompetent evidence as to speculative damages is without prejudice where the verdict is for nominal damages only.[98] The admission of incompetent testimony is not prejudicial where it is subsequently stricken out on motion.[99] Where on a trial by the court incompetent evidence is admitted, subject to plaintiff's objection, and judgment is rendered for plaintiff, it will be presumed on appeal that the trial court gave the evidence no consideration.[1] A party can not complain of evidence elicited by himself.[2]

§ 1374. Of error without prejudice in the giving of instructions. — Causes will not be reversed for the giving of erroneous instructions which could have worked no prejudice to the one complaining.[3] And such erroneous instructions will be without prejudice when the verdict is in favor of the party complaining, or it is apparent that the jury were not influenced by them.[4] Error in general instructions to the jury as to matters of law will be deemed without prejudice where the verdict of the jury is special.[5] The error complained of, to justify a reversal, must be shown to have resulted in prejudice.[6]

§ 1375. Of the discretion of the court below, etc. —This subject has been treated of to a considerable ex-

[97] Cook v. Robinson, 42-474.

[98] De Goey v. Van Wyk, 66 N. W., 787.

[99] State v. Oden, 69 N. W., 270.

[1] Wright v. Farmers, etc., 65 N. W., 308.

[2] Nagle v. Fulher, 67 N. W., 369.

[3] McKay v. Leonard, 17-569; Clagett v. Conlee, 16-487; Ocheltree v. Carl, 23-394; Hunt v. C. & N. W. R. Co., 26-363; Horr v. Reed, 20-591; Thompson v. Blanchard, 2-44; Blackburn v. Powers, 40-681; State v. Hart, 67-142; Sullivan v. Finn, 4 G. Gr., 544; Farwell v. Salpaugh, 32-582; Cedar F. & M. R. Co. v. Rich, 33-113; Olson v. Neal, 63-214; Martin v. Algona, 40-390; Clinton Nat. Bk. v. Graves, 48-228; McGregor v. Armill, 2-30; First Nat. Bk. v. Breese, 39-640; Gwinn v. Crawford, 42-63; Peake v. Conlan, 43-297; Parkhurst v. Masteller, 57-474; Chlein v. Kabat, 72-291.

[4] Dunham v. Dennis, 9-543; Hall v. Stewart, 58-681; Hall v. Ballou, 58-585; Lathrop v. C. I. R. Co., 69-105; Brentner v. C., M. & St. P. R. Co., 68-530; Myers v. Wright, 44-38; see Tuck v. Singer Mfg. Co., 67-576.

[5] Wilkinson v. Conn. M. L. Ins. Co., 30-119; Boals v. George, 30-601.

[6] Shannon v. Scott, 40-629; Eyser v. Weissgerber, 2-463; cases heretofore cited.

tent in several chapters, and we shall now refer to a few of the cases only. Generally it may be said that motions for new trials are addressed to the sound discretion of the court, and its action will not be interfered with unless it is manifest that it has abused such discretion.[7] The supreme court will not, on appeal, disturb the verdict of a jury when the evidence is conflicting, unless it appears to be the result of passion or prejudice.[8] And a finding which has support in the evidence and where the evidence is conflicting will not be disturbed on appeal.[9] A verdict will be set aside on appeal when a manifest injustice would be done by permitting it to stand.[10]

§ 1376. Of the petition for rehearing—When filed—What confined to.—No petition for rehearing can be filed after sixty days from the filing of the opinion or decision of the supreme court.[11] Written notice of the intention to petition for a rehearing must be served on the opposite party, or his attorney, and the clerk of the supreme court within thirty days after the filing of the opinion or decision, and if no such notice is served the petition for rehearing can not be filed after the expiration of thirty days from the time the opinion is filed.[12]

If a petition for a rehearing is filed it will suspend the decision or procedendo, if the court on its presentation,

[7] Pickering v. Kirkpatrick, 32-163; N. Y. P. Co. v. Muller, 38-552; Donahue v. Lannan, 70-73; Chambers v. Brown, 69-213; Shermer v. Gendt, 52-742; Hill v. Denslinger, 61-640; Latton v. C., R. I. & P. R. Co., 69-338; Moran v. Harris, 63-390; Rogers v. Winch, 65-168; Primmer v. Primmer, 75-415; Saar v. Finken, 79-61; Bever v. Spangler, 93-576; Rogers v. Winch, 76-546; Dalhoff v. Bennett, 77-140; Taylor v. C., M. & St. P. R. Co., 80-431; Fulliam v. Hagens, 83-763; Arctic King Ref. Co. v. Kelley, 63 N. W., 676; Murray v. Weber, 92-757; Lyons v. Harris, 73-292.

[8] Harger v. Spofford, 46-11; Witter v. Little, 66-431; Maxon v. C., M. & St. P. R. Co., 67-226; Melhop v. Doan, 36-630; French v. Real, 70-122; State v. Lauderbeck, 65 N. W., 158; Farmers Co-Operative Soc., etc., v. German Ins. Co., 66 N. W., 878; Leek v. Chesley, 67 N. W., 580; Duer v. Allen, 64 N. W., 682; Taylor v. Western Union Tel. Co., 64 N. W., 660; Schultz v. Klatt, 62 N. W., 784; Bever v. Spangler, 61 N. W., 1072.

[9] McConkie v. Babcock, 70 N. W., 103; Creamery Pkg. Co. v. Union Bk. of Wilton, 69 N. W., 676; Phillips v. Lund, 70 N. W., 1130; Bussard v. Bullit, 64 N. W., 658; Missouri K. & T. Trust Co. v. Gantt, 62 N. W., 794.

[10] Chicago Cottage Organ Co. v. Caldwell, 63 N. W., 336.

[11] Rules, Sec. 60; Code, Sec. 4149.

[12] Code, Sec. 4149; Rules, Sec. 61.

or one of the judges shall so order, in either of which cases such decision and procedendo will be suspended until the final determination of the petition.[13] Matters which were not in the original case can not be insisted upon in the petition for a rehearing, nor can the petitioner make a new case.[14] Nor can the court consider an additional abstract or amended record not before the court on the first hearing.[15] The discovery of additional evidence since the trial in the court below is no ground for a rehearing.[16] The case must be heard on the petition on the same record as on the former trial.[17] A failure of the abstract to show service of notice of appeal cannot be cured on rehearing.[18] No particular form is necessary for a petition for a rehearing. The petition for rehearing must be printed and, with proof of service thereof on the opposite party, or his attorney, be filed with the clerk of the court within sixty days after the opinion is filed, and may be made the argument or brief of authorities relied upon for a rehearing. It must include a copy of the opinion or decision of the court to which objection is made, or a reference to the volume and page of the Northwestern Reporter in which it has been printed. The adverse party may file an argument in response.[19] If this is not done the petition for rehearing will be stricken from the files.[20]

§ 1377. Of the argument.—A copy of the petition must be served upon the attorney of the adverse party, and if there be more than one, upon the attorney of each of them, within sixty days after the opinion or decision is filed; and twelve copies must be delivered to the clerk of the court. If there be a printed argument in resistance of the petition, a copy thereof must be served upon the attorney for the petitioner ten days before the day

[13] Code, Sec. 4148; Rules, Sec. 65.
[14] Hintrager v. Hennessy, 46-600; Mann v. S. C. & P. R. Co., 46-637.
[15] Cramer v. Burlington, 45-627; Nixon v. Downey, 49-166; Parsons v. Parsons, 66-754; Simplot v. Dubuque, 49-630; McDermott v. Iowa Falls & S. C. R. Co., 85-180; Barber v. Scott, 92-52.
[16] Zuver v. Lyons, 40-510.
[17] Martin v. Cole, 38-141.
[18] Iowa City v. Johnson County, 68 N. W., 815.
[19] Code, Sec. 4149; Rules, Sec. 62.
[20] Kervick v. Mitchell, 68-273.

fixed for the hearing of the cause, and twelve copies must be delivered to the clerk of the court. The cause will be placed on the docket and assigned for hearing at the next term, the first day of which must not be less than twenty days after the filing of the petition. If the party applying for a rehearing gives notice of oral argument in his petition, both parties will be entitled to be heard orally, unless the party giving notice waive oral argument.[21] The court will not grant a rehearing at the instance of a party who failed to file or make an argument when the cause was submitted, but may, on its own motion, order a rehearing to correct an error.[22] After the opposite party has filed a reply to a petition for rehearing, no further argument can be filed.[23] The statute does not authorize the filing of a bill of review.[24]

§ 1378. Of the action of the court.—If a curative act is passed while a case in which the defect sought to be cured is raised is pending in the supreme court on rehearing, the case will be treated as if no opinion had been previously filed, and the defect will be deemed cured.[25] Where the judgment on appeal stands affirmed by reason of a divided court, such affirmance is subject to reconsideration on rehearing. If, on rehearing of a cause, the court is equally divided as to whether the former opinion should be adhered to, the cause will stand as if the court had been equally divided on the first hearing, and the judgment will be affirmed.[26] When, after the decision of a cause by the supreme court, a procedendo was filed in the court below, and the proper steps taken to remove the cause to the federal court, after which, and within the proper time, a petition for rehearing was filed in the supreme court and allowed, it was held on a motion to dismiss in the supreme court that the cause was pending there and had not been removed.[27] When a re-

[21] Code, Sec. 4149; Rules, Secs. 63, 64.

[22] Wachendorf v. Lancaster, 61-509.

[23] Webster County v. Hutchinson, 60-721.

[24] McGregor v. Gardner, 16-538.

[25] Iowa R. L. Co. v. Sac County, 39-124.

[26] Zeigler v. Vance, 3-528; Richards v. Burden, 59-723.

[27] McKinley v. C. & N. W. R.

hearing is ordered the first opinion is suspended and has no further effect except as it may be incorporated in or approved by the opinion finally filed after the rehearing.[28] Where error for which judgment is reversed involves a possible excess of two hundred dollars in the amount of plaintiff's recovery, his offer in the petition for rehearing to remit that amount, if former opinion is adhered to, will be acted on and the judgment so modified will be affirmed.[29]

Co., 44-314; Railroad Co. v. McKinley, 99 U. S. S. Ct. Rep., 147.

[28] Pitkin v. Peet, 64 N. W., 793; Stewart v. Stewart, 65 N. W., 976; In re Peets Estate, 68 N. W., 705.

[29] Irlbeck v. Bierl, 70 N. W., 206.

CHAPTER LXXXV.

STATUTES AND RULES REGULATING THE PRACTICE IN THE SUPREME COURT.

Sec. 1379. Of the adoption of the rules.
1380. Of the organization.
1381. Of the jurisdiction.
1382. Of the terms.
1383. Of appeals.
1384. Of docketing causes.
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Section **1379. Of the adoption of the rules.**—The last legislature passed a joint resolution requesting the judges of the supreme court to revise the rules of the court. In view of the adoption of a new code, wherein some material changes are made in the practice, the request was timely. A committee consisting of three members of the court was appointed to make the revision and report to the full court. They completed their work and reported at the May term, 1897, rules which, after

some slight modifications, were adopted by the court. It seems quite proper in a work like this to set out in full the rules. It was the author's intention to annotate these rules, as, however, many of them have already been referred to and annotated in prior chapters, it is deemed best to refer to such prior annotations without repeating them. Where it appears necessary, comments are made in addition to what has been heretofore said. These rules took effect on the first day of October, 1897, and are printed below exactly as they appear in the official edition.

§ 1380. Of the organization. — "Section 1. The supreme court shall consist of six judges, four of whom constitute a quorum for the transaction of business, but one alone may adjourn from day to day, or to a particular day, or until the next term. [Code, § 193.]

Sec. 2. The judge whose term first expires shall be the chief justice, and so on in rotation. [Const., art. V, § 3.]"[1]

§ 1381. Of the jurisdiction. — "Sec. 3. The supreme court has appellate jurisdiction over all judgments and decisions of all courts of record, except as otherwise provided by law. [Code, § 4100.][2]

Sec. 4. An appeal may also be taken to the supreme court from:

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

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

3. An order which grants or refuses, continues or modifies a provisional remedy; grants or refuses, dissolves, or refuses to dissolve an injunction or attachment; or grants or refuses a new trial; or sustains or overrules a demurrer;

[1] Sec. 17.

[2] Secs. 1314, 1315, 1353.

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

5. An order or judgment on habeas corpus. [Code, § 4101.][3]

Sec. 5. If any of the above orders or judgments are made or rendered by a judge, the same are reviewable, the same as if made by a court. [Code, § 4102.][4]

Sec. 6. The supreme court has power to issue all writs and processes necessary to secure justice to parties, and to enforce its appellate jurisdiction; and it may exercise supervisory control over all inferior judicial tribunals. [Const., art. V., § 4; Code, § 4109.]

Sec. 7. It may enforce its mandates upon inferior courts and officers by fine and imprisonment, which imprisonment may continue until its mandates are obeyed. [Code, § 4147.]"

§ **1382. Of the terms.**—"Sec. 8. The supreme court shall be held at the seat of government, and shall convene and hold three terms each year, one of which shall commence on the third Tuesday in January, one on the second Tuesday in May, and one on the first Tuesday in October. Each of said terms of court shall be for the submission and determination of causes and for the transaction of such other business as shall properly come before the court. All causes on the docket shall be heard at each term unless continued or otherwise disposed of by order of the court. The court shall remain in session so far as practicable until it is determined what the opinion of the court shall be in all causes submitted to it, except in causes where a re-argument is ordered. Judgments of affirmance, rulings and orders in causes submitted, and orders authorized by law may be made and entered by the court at any time regardless of the terms of court. [Code, § 192.]"[5]

§ **1383. Of appeals.**—"Sec. 9. Appeals from the superior and district courts may be taken to the su-

[3] Sec. 1314.
[4] Secs. 22, 1314.
[5] Sec. 18.

preme court at any time within six months from the rendition of the judgment or order appealed from, and not afterward. No appeal shall be taken in any cause in which the amount in controversy between the parties, as shown by the pleadings, does not exceed one hundred dollars, unless the trial judge shall, during the term in which judgment is entered, certify that the cause is one in which the appeal should be allowed, and upon such certificate being filed the same shall be appealable regardless of the amount in controversy, but this limitation shall not affect the right of appeal in any action in which an interest in real estate is involved, nor shall the right of appeal be affected by the remission of any part of the verdict or judgment returned or rendered. [Code, § 4110.][6]

Sec. 10. A part of several co-parties may appeal; but in such case they must serve notice of the appeal upon those not joining therein and file proof thereof with the clerk of the supreme court. [Code, § 4111.][7]

Sec. 11. Co-parties refusing to join in an appeal cannot afterwards appeal or derive any benefit therefrom, unless from the necessity of the case, but they shall be held to have joined, and be liable for their proportion of the costs unless they appear and object thereto. [Code, § 4112.][8]

Sec. 12. The death of one or all of the parties shall not cause the proceedings to abate, but the names of the proper persons shall be substituted, as is provided in such cases in the district court, and the case may proceed. The court may also, in such case, grant a continuance when such a course will be calculated to promote the ends of justice. [Code, § 4150.][9]

Sec. 13. An appeal is taken and perfected by the service of a notice in writing on the adverse party, his agent, or any attorney who appeared for him in the case in the court below, and also upon the clerk of the court

[6] Secs. 22, 1313, 1316, 1319.
[7] Sec. 1326.
[8] Sec. 1326.
[9] Sec. 1347.

wherein the proceedings were had, stating the appeal from the same, or from some specific part thereof, defining such part. [Code, § 4114.][10]

Sec. 14. A notice of appeal shall be served and return made thereon in the same manner as an original notice in a civil action and filed in the office of the clerk in which the judgment or order appealed from was rendered or made. All other notices connected with or growing out of the appeal shall be served and the return made in like manner and filed in the office of the clerk of the supreme court and all notices provided for in this section become a part of the record in the case on being filed. [Code, § 4115.]"[11]

§ 1384. Of docketing causes.—"Sec. 15. A notice of appeal must be served thirty, and the cause filed and docketed fifteen, days before the first day of the next term of the supreme court, or the same shall not be submitted at that term, unless the parties consent thereto. If the appeal is taken less than thirty days before the term, it must be so filed and docketed for the next succeeding term. [Code, § 4116.][12]

Sec. 16. The cause on appeal shall be docketed as it was in the court below, and the party taking the appeal shall be called the appellant, and the other party the appellee. No case shall be docketed until the fees provided by law therefor have been paid. [Code, §§ 4108, 4121.][13]

Sec. 17. The clerk shall docket the causes as they are filed in his office, and shall arrange and set a proper number for trial for each day of the term, placing together those from the same judicial district. No cause shall be docketed unless the abstract is filed fifteen days before the first day of the term at which the cause is set down for trial unless otherwise ordered by the court. If the abstract is not so filed, the case shall be docketed

[10] Sec. 1321.
[11] Sec. 1322.
[12] Secs. 1321, 1322.
[13] Sec. 1346.

for the next succeeding term. [Code, §§ 4117, 4119; Old Rules, § 114.][14]

Sec. 18. Immediately after the time expires during which causes may be docketed for trial at a term of court, the clerk shall make and cause to be printed, without delay, the docket for the term, which shall give all causes, whether continuances or appearances, for trial at such term, which shall designate the number, the party appealing, the court and county from which the appeal is brought, the counsel of the parties, the day each cause is assigned for trial, and such other matter for information of the court and attorneys as may be conveniently given. He shall forward to each judge of the court, to each attorney having causes at the term, and to the clerk of the district and superior courts of each county, a copy of said docket. [Old Rules, § 115.]"[15]

§ 1385. Of advancing causes.—"Sec. 19. If a cause involves the decision of a question of public importance, or rights which are likely to be lost or greatly impaired by delay, the court will, in its discretion, upon motion supported by affidavit, order the submission of the cause at a term in advance of that at which it would otherwise be submitted."

Prior to the adoption of the above rule causes had been advanced when such action seemed necessary.

It is not possible to frame a rule upon this subject which will be explicit and state just what causes may be advanced. Heretofore causes have been advanced which involved a contest over a public office; or of the collection of public taxes where many persons were interested; or where the constitutionality or legality of a public statute was involved; or where a right of redemption would expire before a cause could be heard and decided.

§ 1386. Of abstracts, transcripts and records.—"Sec. 20. At least thirty days before the day assigned

[14] Sec. 1346. [15] Sec. 1346.

for the hearing of a cause, the appellant shall serve upon each appellee, or his attorney, a printed copy of so much of the abstract of record as may be necessary to a full understanding of the questions presented for decision, which abstract shall be prepared as required by §§ 67, 68 and 69 of these rules. The appellant shall also, fifteen days before the first day of the term for which the cause is to be docketed for trial, file with the clerk twelve copies of said abstract. No cause shall be heard until thirty days after such service and fifteen days after such filing with the clerk, unless advanced by order of the court. In case of cross-appeals, the party first giving notice of appeal shall, under this rule, be considered the appellant. [Old Rules, § 18.][16]

Sec. 21. If it appear from an inspection of the abstract that the appellant has negligently or intentionally failed to comply with the rule requiring only so much of the record as may be necessary to a full understanding of the question presented for decision to be included therein, the court may, in its discretion, order a new abstract prepared in conformity with such rule or affirm the judgment of the lower court without considering the appeal.[17]

Sec. 22. The abstract so filed will be presumed to contain the record unless denied or corrected by a subsequent abstract. Every denial shall point out as specifically as the case will permit the defects alleged to exist in the abstract. A denial by the appellee shall be taken as true unless the appellant sustains his abstract by a certification of the record. Should the appellee deem the appellant's abstract incorrect or unfair he may prepare such additional abstract as he shall deem necessary to a full understanding of the questions presented to the court for decision. A denial by the appellant of such additional abstract, if not confessed, will be disregarded unless sustained by a certification of the record. The appellee shall serve one printed copy of his

[16] Sec. 1333. [17] Sec. 1333.

additional abstract or denial on each appellant or his attorney and deliver twelve printed copies thereof to the clerk within ten days after receiving the appellant's abstract, and a denial by the appellant shall be served on the appellee and twelve printed copies thereof delivered to the clerk within five days after service of the additional abstract. [Code, §§ 4118, 4120.][18]

Sec. 23. No certification of the record shall be required unless ordered by the supreme court, or a judge thereof, which order must be made upon an application in writing or by motion, designating the matters and things of record desired to be included therein, and showing the necessity therefor. The order, if granted, shall contain similar designations and show the parts to be given by an abstract of the original record and the portions to be by transcript, and may require any or all the matters to be presented by an amended abstract. The application and the order made shall be filed in the office of the clerk of the supreme court, who shall transmit the order to the clerk of the lower court, and send a notice or copy thereof to the appellant or his attorney. The order shall be attached to and returned with the record certified, and be submitted with the papers in the case. The appellant, upon notice or copy of the order being received by him or his attorney, shall, within five days, unless otherwise ordered, pay or secure to the satisfaction of the clerk of the lower court his fees and expenses for preparing and forwarding the record ordered. [Code, § 4122; Old Rules, § 12.][19]

Sec. 24. When certification of the record is required the designated papers, notices, depositions, exhibits identified as evidence, notice of appeal with return or acceptance of service thereon, and any other papers filed in the case, or any part thereof, may be transmitted to the supreme court in the original form or by a transcript of the same, excepting that the shorthand reporter's translation of his report shall be transmitted in its or-

[18] Secs. 1333, 1336.

[19] Secs. 1327, 1333.

iginal form, but all entries of record must be certified by transcript. The clerk of the trial court shall verify his return, whether it be of the record or transcription thereof, by his certificate, under seal, distinguishing between originals and transcripts, and such certification so made shall constitute a part of the record in the supreme court. [Code, § 4123; Old Rules, § 20.][20]

Sec. 25. Where a view of an original paper or exhibit in the action may be important to a correct decision of the appeal, the court may order the clerk of the court below to transmit the same, which he shall do in the manner provided for the transmission of certificates of the record. [Code, § 4124.][21]

Sec. 26. A transcript may be denied; and when such denial is made it shall be as specific as the case will permit. The trial court, the supreme court, or a judge of either court may make any orders necessary to secure a perfect record or transcript thereof, upon a showing by affidavit or otherwise, and upon such notice as the court or judge may prescribe. [Code, § 4120.][22]

Sec. 27. The transcript of any paper or exhibit required for use in the supreme court may be transmitted thereto by the clerk of the trial court, by express or other safe and speedy method, but not by a party or any attorney of a party. [Code, § 4125.][23]

Sec. 28. If an abstract of the record is not filed by appellant thirty days before the second term after the appeal was taken, unless further time is given by the court, or a judge thereof, for cause shown, the appellee may file an abstract of such matters of record as are necessary, or may file a copy of the final judgment or order appealed from, notice of appeal and return of service thereof, certified by the clerk of the trial court, and cause the case to be docketed, and the appeal upon motion shall be dismissed, or the judgment or order affirmed. [Code, § 4120; Old Rules, § 21.][24]

[20] Secs. 1327, 1333.
[21] Sec. 1332.
[22] Secs. 1328, 1331, 1333.
[23] Sec. 1332.
[24] Secs. 1333, 1335.

Sec. 29. If the appellant fail to promptly pay or secure to the satisfaction of the clerk of the trial court, his fees and expenses for preparing and forwarding to the clerk of the supreme court any record ordered to be certified by the supreme court, or a judge thereof, upon receiving notice thereof or copy of the order therefor, the appeal, upon motion supported by proof of the facts, may be dismissed or the judgment affirmed as the appellee may elect. [Code, § 4122.][25]

Sec. 30. Where appellant has no right, or no further right to prosecute the appeal, the appellee may move to dismiss it, and if the grounds of the motion do not appear in the record, or by a writing purporting to have been signed by the appellant and filed, they must be verified by affidavit. [Code, § 4151.][26]

Sec. 31. The appellee may, by answer or abstract filed and verified by himself, agent or attorney, plead any facts which render the taking of the appeal improper or destroy the appellant's right of further prosecuting the same, to which the appellant may file a reply or abstract likewise verified by himself, his agent or attorney, and the question of law or fact therein shall be determined by the court, upon evidence in the form of affidavits unless otherwise ordered. [Code, § 4152; Old Rules, § 27.]"[27]

It will be observed that the above rules make new provisions with reference to obtaining a transcript of the record.

Under prior rules parties were free to procure a transcript wherever they saw fit. Now the transcript can only be had upon the order of the court or of one of the judges thereof after the full showing required by the rules. This is quite a radical change in the practice which imposes much additional labor upon counsel and the court and its judges. The object no doubt was to

[25] Sec. 1335.
[26] Sec. 1347.
[27] Sec. 1347.

prevent sending up transcripts in cases where they were not necessary.

§ 1387. Of supersedeas bonds.—"Sec. 32. No proceedings under a judgment or order, nor any part thereof, shall be stayed by an appeal unless the appellant executes a bond with one or more sureties to be filed with and approved by the clerk of the court in which the judgment or order was rendered or made, to the effect that he will pay to the appellee all costs and damages that shall be adjudged against him on the appeal, and will satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the supreme court may render or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents of or damages to property during the pendency of the appeal out of the possession of which the appellee is kept by reason of the appeal. If the bond is intended to stay proceedings on only a part of the judgment or order, it shall be varied, so as to secure the part stayed alone. When thus filed and approved, the clerk shall issue a written order requiring the appellee and all others to stay all proceedings under such judgment or order, or so much thereof as is superseded thereby, but no appeal or stay shall vacate or affect such judgment or order. [Code, § 4128.][28]

Sec. 33. If a party has perfected his appeal and the clerk of the lower court refuses for any reason to approve the bond or requires an excessive penalty or unjust or improper conditions, he may apply to the district court or judge thereof, who shall fix the amount and conditions of the bond and approve the same. Pending the application, the judge may, by a written order, recall and stay all proceedings under the order or judgment appealed from, until the decision of the application. The bond thus approved shall be filed with the

[28] Secs. 1324, 1325.

clerk, who shall issue a written order to stay proceedings. [Code, § 4132.][29]

Sec. 34. The appellee may move the court rendering the judgment or making the order appealed from, or the supreme court, or a judge of either court, if in vacation, upon ten days' notice in writing to appellant, to discharge the bond on account of defect in substance or insufficiency in security, which motion, if well taken, shall be sustained, unless appellant shall, within a day to be fixed in the order made and filed therein, give a new and sufficient bond as required by said order. If the new bond is not given, proceedings shall be had in the lower court as though no bond had been given, but a new and sufficient bond may be given at any time with like effect and results as though given in the first instance. [Code, § 4133.][30]

Sec. 35. If the judgment or order is for the payment of money, the penalty shall be in at least twice the amount of the judgment and costs. If not for the payment of money, the condition shall be to save the appellee harmless from the consequences of taking the appeal, but in no case shall the penalty be less than one hundred dollars. [Code, § 4134.]"[31]

§ 1388. Of the trial, decision and execution.—"Sec. 36. Except in actions triable de novo no question shall be considered by the supreme court unless pointed out by an assignment of error, which need follow no stated form, but must clearly and specifically indicate the very error complained of, and among several points made in demurrer, motion, instructions or rulings, the one, or those relied upon, must be separately stated. The court need consider only such errors as are thus assigned but must decide upon each one that is. [Code, § 4136.][32]

Sec. 37. If errors are not assigned and filed, and a copy thereof served on the appellee or his attorney ten days before the first day of the trial term, unless good

[29] Sec. 1324.
[30] Sec. 1325.
[31] Sec. 1324.
[32] Sec. 1341.

cause for the failure be shown, the appellee may have the appeal dismissed or the judgment or order affirmed. [Code, § 4137.]" [33]

§ **1389. Of motions.**—"Sec. 38. (1.) All motions must be in writing, filed with the clerk and entered upon the motion book. No motion shall be submitted without being publicly called by the court, unless the parties otherwise agree.

(2.) All motions must be served by copy of the same and of all affidavits or documents upon which they are based, upon the opposite party or attorney, ten days before the morning on which the causes for the district are set for hearing. Such opposite party shall then have five days to file papers in resistance to the same, copies of which must be served upon the other party or attorney, and no papers will be regarded which do not appear to have been so served. This rule shall not apply to motions the causes whereof arise after the filing of the abstract, but in such cases timely notice of such motions shall be given to the opposite attorneys. Nor shall this rule apply, as to time of service, to motions for continuance.

(3.) Motions made in a cause after judgment rendered by the supreme court, or after the time assigned for the hearing of causes from the district from which it was appealed, will be heard only upon proof of service of reasonable notice of such motion upon the adverse party or attorney.

(4.) Arguments in support of motions, if any, must be in writing or print, and shall be filed before the morning of the day set for the hearing of the cause, and served by copy upon the opposite party or attorney when the motion is served; and arguments in resistance, if any, must be in writing or print and filed before the morning of the day set for the hearing of the cause, and served by copy on the opposite party or attorney when the papers in resistance are served. [Code, § 4138; Old Rules, § 52.]" [34]

[33] Secs. 1335, 1341.

[34] Sec. 1347.

Counsel are not always careful to see that notice of motions are served, or if served it is often the case that no return of service has been made when the time arrives for deciding upon the motion. Cases are often continued for service of the notice, or of the showing in support of the motion, or of the resistance.

§ 1390. Of briefs and arguments.—"Sec. 39. When the appeal presents to the court only questions of law upon rulings of the court below, the appellant shall open and close the argument, and must, at least thirty days before the day assigned for the hearing of the case, serve upon an attorney for each appellee copies of his brief of points and authorities or argument. If appellee desires to be heard, he shall, at least ten days prior to the hearing, serve upon an attorney for each appellant copies of his brief or argument; and the reply, if in print, shall be served at least three days before the case is to be finally submitted. If the trial in the supreme court is de novo, and the appellant has the burden, he shall observe the foregoing rules. But if appellee has the burden, he may waive his right to open the argument by serving notice in writing of his intention to do so upon appellant or his attorney at least thirty days before the day assigned for the hearing of the cause. Appellant will then be entitled to open the argument, and must serve copies of his argument upon an attorney for each appellee ten days before the hearing. Appellee may then, and at least three days before the submission, serve upon an attorney for each appellant copies of his argument, which must be strictly confined to matters in reply to appellant's argument. A failure to comply with the above requirements will entitle the party not in default, unless the court shall, for sufficient cause, otherwise order, to a continuance or to have the case submitted at his option upon the brief and arguments on file when the default occurred. [Code, § 4139; Old Rules, §§ 53, 57.][35]

Sec. 40. All printed briefs and arguments shall be

[35] Sec. 1345.

prepared as required by § 66 hereof, and each party shall file with the clerk twelve printed copies of each brief or argument, together with proper evidence of service of the same upon opposing attorneys. The clerk shall note upon his docket the date of the service and filing of all manuscripts and arguments, and no brief or argument not served or filed within the time prescribed by these rules will be transmitted to the judges or considered by them in disposing of the case. No cause will be entered as submitted until the arguments are finally and actually concluded. [Old Rules, §§ 53, 54.][36]

Sec. 41. Notice in writing or in print of intention to argue a case orally, shall be served upon an attorney for the adverse party and filed with the clerk fifteen days before the first day of the term, and the party who fails to so serve and file such notice shall not be entitled to argue orally, except in reply to an oral argument for the adverse party. [Old Rules, § 55.][37]

Sec. 42. If appellant has given the notice, he is entitled to open and close the argument, unless the cause is triable de novo and the appellee has the burden. If the notice was given by appellee only, he is entitled to the opening, and the appellant must confine his remarks to a reply, unless the cause is triable de novo. If the cause is triable de novo and appellee has the burden, he may, if he has given the requisite notice, open and close the argument. [Old Rules, § 57.][38]

Sec. 43. No oral argument shall exceed one hour in length unless an extension of time be granted before the argument of the case is commenced. Only two attorneys will be heard on each side, but in case no oral argument is made on one side, only one attorney shall be heard for the other. [Old Rules, § 56.][39]

Sec. 44. At the commencement of each assignment for the term all causes included in the assignment will be called, but the submission of a cause will not be taken

[36] Sec. 1345.
[37] Sec. 1345.
[38] Sec. 1345.
[39] Sec. 1345.

on the first call if any party thereto object. The court will hear all causes included in the assignment and take the submissions thereof in the order in which they are assigned, excepting those which have been continued or otherwise disposed of by direction of court. [Code, § 4139; Old Rules, §§ 58, 68.]"[40]

A careful study of the above rules will avoid much trouble, which has heretofore arisen, as to when counsel were entitled to be heard orally, and who should open and close the argument. Counsel sometimes seem to forget that with the vast amount of business before the court it is impossible to frequently extend the time for oral argument. A good oral argument, that is one directed to the real points of contention, upon the law of the case, is always appreciated by the judges, and is very helpful, but an oral argument on fact questions can not, as a rule, be regarded as aiding the court, as in any event resort must be had to the record to settle disputed questions of fact.

Taking the submission of over five hundred cases a year and deciding them, it will be seen that it would be about impossible for the judges to retain the points of an argument on the facts and have them in mind when the case is considered and decided.

It is not often that the time allowed for oral argument is extended. In nearly all cases which are argued orally it is found that the time allowed by the rules insures a better presentation of the case than is usual when the time is extended.

§ 1391. Of decisions and opinions.—"Sec. 45. The court may reverse, modify or affirm the judgment, decree or order appealed from, or render such as the inferior court should have done. [Code, § 4139.]

Sec. 46. No cause will be considered as decided until a written decision is filed with the clerk. The decisions of the court on all questions passed upon by it, including motions and points of practice, shall be specifically

[40] Secs. 1348, 1354.

stated, and shall be accompanied by an opinion upon all such matters as are deemed of sufficient importance, together with any dissent therefrom, which dissent may be stated with or without an opinion; and all decisions and opinions, including dissents, shall be in writing and be filed with the clerk except rulings on motions which may be entered upon the announcement book. If the decision is not accompanied with an opinion, it shall briefly state the title of the case, the county from which the case was appealed, the name of the presiding judge, the nature of the action, the names of counsel appearing on either side, and the conclusions reached. [Code, §§ 198, 4139.][41]

Sec. 47. When the court is equally divided in opinion the judgment of the court below shall stand affirmed, but the decision is of no further force or authority. In case of such division, opinions may be filed at the option of the court. If no opinion is filed a written announcement shall be made of the division of the court upon the questions presented, and that the judgment is affirmed by operation of law. [Code, §§ 195, 198.]"[42]

The change in the statute and in the rules contemplates that cases may be decided without writing out an opinion. Heretofore a written opinion had to be filed in every case. Under the above provisions it is likely that no opinion will be written in at least one-third of the cases submitted. In all cases of affirmance, which involve no new question, they can, and no doubt will be disposed of under the provisions of the last clause of rule 46 above.

This will greatly facilitate the business of the court, while working no injustice to litigants or their counsel.

§ **1392. Of records and reports.**—"Sec. 48. The records and reports must in all cases show whether a decision was made by a full bench, and whether either, and if so, which of the judges dissented from the decision. [Code, § 199.]

41 Sec. 1354.

42 Sec. 1354.

Sec. 49. All decisions and opinions of the court shall be published in the official reports, except such as the court may think unimportant. Decisions and opinions which are not to be included will be marked, 'Not to be officially reported,' and when so marked they shall not be included in the reports. [Code, § 200; Old Rules, § 60.]"

§ 1393. Of judgments and decrees.—"Sec. 50. The supreme court, if it affirms the judgment, shall also, if the appellee asks or moves therefor, render judgment against the appellant and his sureties on the appeal bond for the amount of the judgment, damages and costs referred to therein, in case such damages can be accurately known to the court without an issue and trial. [Code, § 4140.][43]

Sec. 51. Upon the affirmance of any judgment or order for the payment of money, the collection of which in whole or part has been stayed by an appeal bond, the court may award to the appellee damages upon the amount so stayed; and, if satisfied by the record that the appeal was taken for delay only, may award as damages a sum not exceeding fifteen per cent. thereon. [Code, § 4141.][44]

Sec. 52. Decrees to be entered in this court shall be prepared by the attorney of the parties in whose favor they are rendered. Copies shall be served on the opposite attorney and filed in the court within twenty days after the attorney preparing them shall have received notice of the decision in the cause in which they are entered. [Old Rules, § 71.][45]

Sec. 53. When, by the decision, a decree is to be entered in this court at the option of either party, such option shall be declared and a decree furnished under the above rule within twenty days from the date at which the attorney required to prepare the decree received notice of the decision. [Old Rules, § 72.][46]

[43] Sec. 1348.
[44] Sec. 1348.
[45] Sec. 1357.
[46] Sec. 1357.

Sec. 54. No procedendo, except in criminal cases and in cases where petitions for rehearing have been overruled, shall issue in any case until the expiration of thirty days from the filing of the opinion in the case, except upon an order of one of the judges of the court, upon cause shown. [Old Rules, § 70.]"[47]

§ 1394. Of executions.—"Sec. 55. If the supreme court affirms the judgment or order it may send the cause to the court below to have the same carried into effect, or may issue the necessary process for this purpose, directed to the sheriff of the proper county, as the party may require. [Code, § 4143.][48]

Sec. 56. If remanded to the inferior court to be carried into effect, such decision and the order of the court thereon, being certified thereto and entered on the records thereof, shall have the same force and effect as if made and entered during the session of that court. [Code, § 4144.][49]

Sec. 57. If by the decision of the supreme court, the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of such judgment or order, either the supreme court or the court below may direct execution or writ of restitution to issue for the purpose of restoring to him such property or its value. [Code, § 4145.][50]

Sec. 58. Executions issued from the supreme court shall be like those from the district court, attended with the same consequences, and returnable in the same time. [Code, § 4153.][51]

Sec. 59. In cases in which the judgment below is affirmed in this court, the parties in whose favor the judgment is affirmed may have execution either from this court or the court below. In case of an execution from this court, if a process of garnishment is served upon the execution defendant, either principal or surety, the sher-

47 Sec. 1357.
48 Sec. 1348.
49 Sec. 1352.
50 Secs. 1348, 1353.
51 Sec. 1353.

iff, in addition to his return, shall return a copy of the execution and his returns to the district or superior court from which the cause was appealed, and all issues of fact which may arise in said garnishment process shall be tried by that court. [Old Rules, § 67.]"[52]

§ 1395. Of rehearings.—"Sec. 60. No petition for rehearing shall be filed after sixty days from the filing of the opinion or decision of the supreme court. [Code, § 4149; Old Rules, § 88.][53]

Sec. 61. Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney, and the clerk of the court, within thirty days after the filing of the opinion or decision, and if no such notice is served, the petition for rehearing shall not be filed after the expiration of such thirty days. [Code, § 4149; Old Rules, § 89.][54]

Sec. 62. The petition for rehearing shall be printed and, with proof of service thereof on the opposite party, or his attorney, shall be filed with the clerk of the court within sixty days after the opinion is filed, and may be made the argument or brief of authorities relied upon for a rehearing. It shall include a copy of the opinion or decision of the court to which objection is made, or a reference to the volume and page of the Northwestern Reporter in which it has been printed. The adverse party may file an argument in response. [Code, § 4149; Old Rules, §§ 90, 92.][55]

Sec. 63. A copy of the petition shall be served upon the attorney of the adverse party, and if there be more than one, upon the attorney of each of them, within sixty days after the opinion or decision is filed; and twelve copies shall be delivered to the clerk of the court. If there be a printed argument in resistance of the petition, a copy thereof shall be served upon the attorney for the petitioner ten days before the day fixed for the hearing of

[52] Sec. 1353.
[53] Sec. 1376.
[54] Sec. 1376.
[55] Sec. 1376.

the cause, and twelve copies shall be delivered to the clerk of the court. [Code, § 4149; Old Rules, §§ 90, 91.][56]

Sec. 64. The cause shall be placed on the docket and assigned for hearing at the next term, the first day of which shall not be less than twenty days after the filing of the petition. If the party applying for a rehearing shall give notice of oral argument in his petition, both parties shall be entitled to be heard orally, unless the party giving notice waive oral argument. [Code, § 4149; Old Rules, § 90.][57]

Sec. 65. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing. [Code, § 4148.]" [58]

§ 1396. Of preparing and printing abstracts, transcripts, briefs, arguments and petitions for rehearing.—"Sec. 66. All abstracts, denials of abstracts, briefs, arguments and petitions for rehearing shall be printed upon unruled writing paper, with type commonly known as small pica, leaded lines, the printed page to be four inches wide by seven inches long, with a margin of two inches; but the type in which extracts are printed may be small pica solid, or brevier with leaded lines. The first page of the abstract, denial, brief or argument, shall show the title of the cause, designating the appellant and the appellee, the term of the supreme court to which the appeal is brought, the court from which the appeal is taken, the name of the judge who presided at the trial, and the names of the attorneys for both the appellant and appellee. [Old Rules, § 96.][59]

Sec. 67. The abstract must be accompanied by a complete index of its contents. [Old Rules, § 97.][60]

Sec. 68. Abstracts of record shall be made substantially in the following form:

[56] Sec. 1377.
[57] Secs. 1333, 1377.
[58] Secs. 1333, 1376.
[59] Sec. 1333.
[60] Sec. 1333.

IN THE SUPREME COURT OF IOWA.

January Term, 18——.

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

Appeal from Van Buren District Court.

JOHN SMITH, Judge.

J. C. K., for the Appellant.
H. H. S., for the Appellee.

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

PETITION

stating his cause of action as follows:

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

When the defendant has appeared it is useless to encumber the record with the original notice, or the return of the officer.]

On the ——— day of ———, 18—, the defendant filed a

DEMURRER

to said petition setting up the following grounds:

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

And on the ——— day of ———, 18—, the same was submitted to the court, and the court made the following rulings thereon: [Here set out the ruling. In every instance let the abstract be made in the chronological order of the events in the case—let each ruling appear in the proper connection. If the defendant pleaded over, and thereby waived his right to appeal from these rulings, no mention of them should be made in the abstract, but it should continue.]

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

ANSWER

to the petition, setting up the following defenses:

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

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

BILL OF EXCEPTIONS.

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

[Here set out so much of the evidence and proceedings as is necessary to show the rulings of the court to which exceptions were taken during the progress of the trial.]

INSTRUCTIONS.

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

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

Which the court refused as to each instruction, to which several rulings the plaintiff (or defendant) excepted at the time, and thereupon the court gave the following instructions to the jury:

[Set out the instructions.]

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

VERDICT.

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

[Set out the verdict.]

MOTION FOR NEW TRIAL.

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

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

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

[Set out the record of the ruling.]

To which the plaintiff (or defendant) at the time excepted.

JUDGMENT.

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

[Set out the judgment entry appealed from.]

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

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

ASSIGNMENT OF ERRORS.

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

[Set out the errors assigned.]

This outline is presented for the purpose of indicating the character of the abstract contemplated by the rule, which, like all the rules, is to be substantially complied with. Of course, no formula can be laid down applicable to all cases. The rule to be observed in abstracting a case is: Preserve everything material to the questions to be decided, and omit everything else. [Code, §§ 3675, 3749; Old Rules, § 98.][61]

Sec. 69. The printed brief and argument shall state in divisions thereof, properly numbered, the several propositions of law claimed by the party making such brief or argument to be involved in the case before the supreme court, and authorities relied upon in support of the same. When an authority cited is an adjudicated case, the brief or argument must show the names of the parties, the volume in which it is reported, and the page or pages containing the matter to which the attorney desires to call the attention of the court. When the reference is a text-book, the number or date of the edition must be stated, with the number of the volume and page. [Old Rules, § 99.][62]

Sec. 70. Transcripts of the record, when required by the supreme court, or a judge thereof, may be made substantially in the manner following, viz.:

State of Iowa, }
County of——— }

In the district (or superior) court of Iowa, at a term begun and holden in the county of ———, on the ——— day of ———, A. D. 18—, before J. H. G., judge of the ——— judicial district (or judge of the ——— superior court) of the State of Iowa.

N. P. }
v. }
C. D. }

Be it remembered that heretofore, to wit, on the ——— day of

61 Sec. 1333.

62 Sec. 1345.

———, A. D. 18—, a petition was filed in the office of the clerk of the district (or superior) court, in and for the county of ——— in words and figures following, to-wit:

[Here insert the petition in full.]

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

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

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

[Here insert the notice in full.]

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

Upon which (or attached to which) was a return as follows: (Copy the officer's return, with all indorsements in full; if the suit be by attachment, copy the petition or affidavit, writ or attachment, bond, notice, return, etc.]

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

[Here insert answer in full.]

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

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

A. B. }
v. }
C. D. }

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

[Here insert demurrer in full.]

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

A. B. }
v. }
C. D. }

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

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

[Here set out reply in full.]

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

[Here set out copy of motion and affidavit.]

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

In the district (or superior) court, ——— county.

A. B.
v.
C. D. } ———term, A. D. 18—.

And now, on this ——— day of ———, it being the ——— day of said term, this cause coming on for trial, came a jury, to-wit:———

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twelve good and lawful men, who were sworn well and truly to try the issue between the said parties, and a true verdict render, according to the law and evidence given them in court. The jury retired to consider on their verdict, and afterward, on the same day, the jury returned into court and rendered its verdict, as follows:

[Here insert in full the verdict as rendered.]

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

A. B.
v.
C. D.

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

[Here insert in full the verdict as rendered.]

A. B.
v.
C. D.

And afterward, on the ——— day of ———, A. D. 18—, being the ——— day of said term, the shorthand reporter filed his report in writing, or in shorthand (as the case may be) certified as required by law, the translation of which, duly certified, was filed on the ——— day of ———, A. D. 18—, and is as follows: [Here attach the original translation unless otherwise directed by order of the supreme court, or a judge thereof.]

A. B.
v.
C. D.

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

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

A. B.
v.
C. D.

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

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

The foregoing form is only an example, and is to be varied according to the circumstances. The actual facts of the case will dictate what is to be done, but in all cases it is to be done substantially in like manner with the above, giving the proper order and date of the filing of papers and incorporating them at the proper date into the proceedings of the court. When the order made by this court, or a judge thereof, pursuant to rules 22, 23 and 24, requires but a part of the record to be transcribed, the foregoing form should be so modified as that it will include only those matters directed to be certified. All other, except the mere formal parts, must be omitted. [Code, §§ 3675, 3749, 4122, 4123; Old Rules, § 100.]" [63]

§ 1397. Of appeals in criminal actions.—"Sec. 71. The mode of reviewing in the supreme court any judgment, action, or decision of the district court in a criminal case, is by appeal. An appeal can only be taken from the final judgment and within one year thereafter. Either the defendant or State may appeal. [Code, § 5448.]

Sec. 72. An appeal is taken and perfected by the party or his attorney serving on the adverse party or his attorney of record in the district court at the time of the rendition of the judgment, and on the clerk of such court, a notice in writing of the taking of the appeal, and filing the same with such clerk with evidence of service thereof indorsed thereon or annexed thereto. [Code, § 5449.]

Sec. 73. When several defendants are indicted and

[63] Secs. 1327, 1328.

tried jointly, any one or more of them may join in taking the appeal, but those of their co-defendants who do not join shall take no benefit therefrom, yet they may appeal afterwards. [Code, § 5451.]

Sec. 74. When an appeal is taken, it is the duty of the clerk of the court in which the judgment was rendered to forthwith prepare and transmit to the attorney-general a certified copy of the notice of appeal in the case, with the date of service thereof, and, without unnecessary delay, to make out a full and perfect transcript of all papers in the case on file in his office, except the papers returned by the examining magistrate on the preliminary examination, where there has been one, and of all entries made in the record-book, certify the same under the seal of the court, and transmit the same to the clerk of the supreme court. [Code, § 5450.]

Sec. 75. An appeal taken by the State in no case stays the operation of a judgment in favor of the defendant. [Code, § 5452.]

Sec. 76. An appeal taken by the defendant does not stay the execution of the judgment, unless bail is put in; but where the judgment is imprisonment in the penitentiary, and an appeal is taken within ninety days after judgment is rendered, and the defendant is unable to give bail, and that fact is satisfactorily shown to the court, or judge thereof, it may, in its discretion, order the sheriff or officer having the defendant in custody to detain him in custody, without taking him to the penitentiary, to abide the judgment on the appeal, if the defendant desires it. [Code, § 5453.]

Sec. 77. When an appeal is taken by the defendant, and bail is given, the clerk must give to the defendant, or his attorney, a certificate under the seal of the court that an appeal has been taken and bail given, and the sheriff or other officer having the defendant in custody must, upon receiving it, discharge the defendant from custody and cease all further proceedings in execution thereof, and forthwith return to the clerk of the court

who issued it the execution under which he acted, with his return thereon, and if it has not been issued, it shall not be until after final judgment on the appeal. [Code, § 5454.]

Sec. 78. The party appearing is the appellant, the adverse party the appellee, but the title of the action shall not be changed on the appeal, and the cause shall be so docketed at the commencement of the period assigned for trying causes from the judicial district from which the appeal comes, which causes shall take precedence of all other business, be tried at the term at which the transcript is filed, unless continued for cause or by consent of the parties, and be decided, if practicable, at the same term. [Code, § 5455.]

Sec. 79. The personal appearance of the defendant in the supreme court on the trial of an appeal is in no case necessary. [Code, § 5456.]

Sec. 80. An appeal shall not be dismissed for any informality or defect in taking it, if corrected in a reasonable time, and the supreme court must direct how it shall be corrected. [Code, § 5457.]

Sec. 81. No assignment of error is necessary. [Code, § 5458.]

Sec. 82. Criminal actions shall be presented in the supreme court, by printed abstracts, denials, arguments and petitions for rehearing, as required by the rules applicable to civil actions, provided that the defendant shall be entitled to close the argument. The provisions of the code and the rules of the court in civil procedure relating to the printing, serving and filing of abstracts, denials, arguments, petitions for rehearing, notice thereof and of oral arguments, motions and resistances thereto, the certification of the record and the filing of decisions and opinions, shall apply in criminal cases. [Code, §§ 5459, 5461.]

Sec. 83. If the appeal is taken by the defendant the supreme court must examine the record, without regard to technical errors or defects which do not affect the sub-

stantial rights of the parties, and render such judgment on the record as the law demands; it may affirm, reverse, or modify the judgment, or render such judgment as the district court should have done, or order a new trial, or reduce the punishment, but cannot increase it. And in case the judgment of the trial court is reversed or modified in favor of the defendant on the appeal of the defendant, he shall be entitled to recover the cost of printing abstract and briefs not exceeding one dollar for each page thereof, to be paid by the county from which the appeal was taken. [Code, § 5462.]

Sec. 84. If the state appeals the supreme court cannot reverse or modify the judgment so as to increase the punishment, but may affirm it, and shall point out any error in the proceedings, or in the measure of punishment, and its decision shall be obligatory at law. [Code, § 5463.]

Sec. 85. If a judgment against the defendant is reversed without ordering a new trial, the supreme court must direct that the defendant be discharged and his bail exonerated, or if money be deposited instead, that it be refunded to him. [Code, § 5464.]

Sec. 86. On a judgment of affirmance against the defendant, the original judgment shall be carried into execution as the supreme court shall direct, except as otherwise provided. [Code, § 5465.]

Sec. 87. The decision of the supreme court, with any opinion filed, or judgment rendered, must be recorded by its clerk and after the expiration of the period allowed for a rehearing or as ordered by the court, or provided by its rules, a certified copy of the decision and opinion shall be transmitted to the clerk of the trial court, filed and entered of record by him, and thereafter the jurisdiction of the supreme court shall cease and all proceedings necessary for executing the judgment shall be had in the trial court, or by its clerk. [Code, § 5466.]

Sec. 88. Unless some proceeding in the district court

is directed, a copy of the judgment of the trial court and decision on appeal, or of the judgment and decision on appeal, certified by the clerk of the trial court, shall be delivered to the sheriff, or other proper officer, as an execution, and shall authorize him to execute the judgment of the court, or take any steps required to bring the action to a conclusion. [Code, § 5467.]

Sec. 89. If a defendant, imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court, is again convicted, the period of his former imprisonment shall be deducted from the period of imprisonment to be fixed on the last verdict of conviction. [Code, § 5468.]"

§ 1398. Of the construction and modification of the rules.—"Sec. 90. When, by reason of peculiar circumstances, the foregoing rules relating to the abstract, preparation and argument of causes, ought to be waived or modified in any case the party desiring such waiver or modification may, upon reasonable notice to the adverse party, apply to any judge of this court in vacation, or to the court in term time, for an order directing the waiver or modification desired. The application shall be in writing, shall set out the peculiar facts relied upon by the applicant, and shall be verified by the party, or a person having knowledge of the facts, and certified by counsel as being true and made in good faith. The order upon such application shall be in writing, and shall be filed with the clerk of this court. In no case will these rules be waived or modified upon agreement of counsel alone. [Old Rules, § 101.]" [64]

§ 1399. Of the distribution of printed matter.—"Sec. 91. The clerk shall make the following distribution, of all printed abstracts, denials of abstracts, briefs and arguments received under the foregoing rules: One copy to each judge of the court, one copy to the State library, two copies to the law department of the State university, and the remainder shall be placed in his office,

[64] Sec. 1334.

one copy of which shall remain permanently among the files. [Old Rules, § 102.]" [65]

§ **1400. Of the return of papers and exhibits.**—"Sec. 92. If a new trial is granted, the clerk, as soon as the cause is at an end in the supreme court, shall transmit to the clerk of the court below all original papers or exhibits certified up from said court; if a new trial is not awarded, or if the cause is triable de novo, either party desiring to withdraw the same may, by motion, showing proper grounds therefor, and upon five days' notice to the other party or his attorney, secure an order from the court or a judge thereof, allowing him to do so, upon filing a receipt for the same with the clerk of this court. [Code, § 4126; Old Rules, § 113.]" [66]

§ **1401. Of costs.**—"Sec. 93. The appellant may be required to give security for costs, under the same circumstances and upon the same showing as plaintiffs in civil actions in the inferior courts may be. [Code, § 4135.][67]

Sec. 94. When the parties, or their attorneys, shall furnish printed abstracts, denials of abstracts, briefs, arguments or petitions for rehearing in conformity to the rules of this court, the clerk will tax the actual cost of printing the same, which shall not exceed the sum of one dollar for every five hundred words, embraced in a single copy thereof, against the unsuccessful party not furnishing the document, to be collected and paid to the successful party as other costs. It will be the duty of any party who files any printed matter to state, either on the title page or at the end of the document, in writing or in print, and have certified by his attorney as being correct, the actual cost of the printing of the same, and no costs will be taxed for such printing unless this statement is made. [Code, § 4142; Old Rules, § 95.]

Sec. 95. If any denial of the abstracts, transcripts or records is made, or if an additional abstract is filed, with-

[65] Sec. 1346.
[66] Sec. 1357.
[67] Sec. 1353.

out good and sufficient cause, the costs of the same, or any unnecessary part thereof, and of any transcript thereby made necessary, shall be taxed to the party causing the same; and when any unnecessary costs have been made by either party the court will, upon application, tax the same to the party making them without reference to the disposition of the case. [Code, §§ 4118, 4120; Old Rules, § 95.][68]

Sec. 96. Whenever the translation of the shorthand notes is required to be filed in this court, the clerk shall tax as part of the costs in the case, the expense of procuring the same, which shall not exceed the rate of five cents per hundred words. If the amount paid or agreed to be paid is not stated in the translation so filed, the clerk shall tax at the statutory rate. [Code, § 4142.]

Sec. 97. All other taxable fees and costs shall abide the result of the appeal and be taxed to the unsuccessful party unless otherwise ordered. [Code, §§ 3853, 4142.]"

§ 1402. Of the admission of attorneys.—"Sec. 98. Examinations of applicants for admission to the bar will be held at each regular term of court, commencing on the first day of the term. [Old Rules, § 103.]

Sec. 99. Each applicant for admission shall, at least five days before the first day of the term at which he asks to be examined, file with the clerk a written request for examination in his own handwriting and signed by himself, accompanied with proofs of his qualifications as to age, residence, and character and time of study, as required by Code, § 310, all prepared and presented in the manner prescribed by these rules. [Old Rules, § 104.]

Sec. 100. Proof of qualification as to age, character, place of residence, and time and place of study, shall be by affidavit made before some officer authorized to administer oaths. When made before an officer not having a seal, other than a judge of the supreme, district or superior courts of this State, his official character and signature shall be authenticated by a proper certificate

[68] Sec. 1333.

attested by the seal of the clerk of a court of record. Proof of the applicant's character, residence and age shall be by affidavits from at least two witnesses, and the applicant shall also make affidavit as to his age and place of residence. Proof of his term of study shall be by affidavit of the member of the bar, or judge, with whom he pursued his studies; and when he has studied at a law school, such fact and his term of study shall be shown by the affidavit of one or more of the professors or instructors of such school. Such affidavits must show that the applicant has actually and in good faith pursued the study of the law in the manner and for the time prescribed by the statute; and must also show that the affiant is a practicing lawyer, judge of a court of record, or professor or instructor in a law school at which the applicant studied. [Code, § 315; Old Rules, § 108.]

Sec. 101. In estimating the time of study, a school year of thirty-six weeks spent at a reputable law school in the United States shall be equivalent to a full year spent in an office, and a fraction of a school year spent in such law school shall be considered the equivalent of the same fraction of a full year spent in the office of an attorney or judge. [Code, § 310; Old Rules, § 112.]

Sec. 102. On the morning of the first day appointed for the examination, the court will appoint a committee of not less than three members of the bar, who, with the attorney-general, as ex officio chairman of the committee, will assist in the examination of applicants for admission. [Old Rules, § 105.]

Sec. 103. The court will also prepare not less than thirty printed questions to be submitted to each applicant, which he shall answer in writing. While engaged in answering these questions he shall not have access to books or papers, nor will he communicate with any one upon the subject of the examination. The printed questions will be varied at each term. [Old Rules, § 106.]

Sec. 104. Upon consideration of the proofs as to qualification and of the oral and written examinations, the

court will admit or reject the candidate. [Old Rules, § 107.]

Sec. 105. Students in the law department of the university who are recommended by the faculty of said department as candidates for graduation, and as persons of good moral character who have actually and in good faith studied law for the time and in the manner required by statute, at least one year of such study having been as a student in said department, may be examined at the university by a committee composed of not less than three persons, members of the bar, or judges of courts of record, appointed by the supreme court for that purpose, and upon the certificate of such committee that such candidates possess the learning and skill requisite for the practice of law, they shall be admitted without further examination. [Code, § 312.]

Sec. 106. The chief justice or any judge of this court may administer the oath prescribed by the statute at Iowa City to each and every person recommended by the examining committee appointed to examine students of the law department, and the person so administering the oath shall report to the clerk of this court the names and postoffice addresses of the persons so admitted. The clerk will thereupon enter of record the fact of their admission, and upon payment of the requisite fee will issue to each of the persons so reported, a certificate of admission to the bar. [Old Rules, § 110.]

Sec. 107. Any person who becomes a resident of this State after having been admitted to the bar of any other of the United States in which he has previously resided, upon satisfactory proof that he is at least twenty-one years of age, of good moral character and an inhabitant of this State, and that he has practiced law regularly for not less than one year in the State from which he came, may be admitted to practice in this State, without examination or proof of the period of study required of other applicants. Proof of admission to the bar in another State may be made by the original certificate of admis-

sion, or by a duly authenticated copy of the record showing his admission to the bar, proved as records of sister States must be when admitted in evidence in the courts of this State. Proof of other qualifications must be made in the same manner as the showing required of applicants for examination. [Code, § 313; Old Rules, § 109.]

Sec. 108. Any member of the bar of another State actually engaged in any cause or matter pending in this court may appear in and conduct such cause or matter, while retaining his residence in such other State, without being admitted to practice under the foregoing provisions. [Code, § 316.]"

Any young man applying for admission to the bar should study these rules so that he may in all respects comply with them. It should be understood that they are rigidly enforced, and every term of court applicants are prevented from taking the examination because they have failed in some particular to comply with the requirements of the rules.

The examinations are thorough and exhaustive, and no applicant should apply for examination unless thoroughly prepared.

CHAPTER LXXXVI.

OF THE UNWRITTEN PRACTICE OF THE SUPREME COURT.*

Sec. 1403. Preliminary statement.
1404. Of advancing causes.
1405. Of oral arguments.
1406. Of the submission of causes.
1407. Of setting aside submissions.
1408. Of restraining orders.
1409. Of alimony in divorce proceedings.
1410. Of attorney's fees.
1411. Of costs.

Section **1403. Preliminary statement.**—The statutes and written rules which relate to the practice in the supreme court, although comprehensive, do not show fully the practice in all cases. Rules have been established by usage and are recognized and habitually applied by the court, which are in the nature of additions to the written rules, or are entirely independent of them, and concerning which the published reports of the court give but little information. Some of these rules are stated and the practice under them considered in this chapter.

§ **1404. Of advancing causes.**—Section 19 of the statutes and rules regulating practice in the supreme court is as follows: "If a cause involves the decision of a question of public importance, or rights which are likely to be lost or greatly impaired by delay, the court will, in its discretion, upon motion supported by affidavit, order the submission of the cause at a term in advance of that at which it would otherwise be submitted."

This rule was designed to state in a formal manner a well established practice of the court to set down for sub-

* This chapter was written at the request of the author by Judge G. S. Robinson, of the supreme bench of this State.

mission in advance of its regular order causes which involve questions of public and general importance, as the interpretation of a statute of the general assembly or an ordinance of a city or town which affects the current business interests of many people, especially if it be of a penal nature. A cause which involves a controversy in regard to real property which has been sold at judicial or tax sale, where the right of redemption is likely to expire and be lost before the cause can be submitted and determined in its regular order may be advanced. A cause which involves a question of controlling importance, common to several cases which may be disposed of by a determination of the question, may also be advanced, not necessarily because of the amount of interests involved, but in part to diminish litigation. If, in any case, valuable rights are likely to be lost or greatly impaired by delay, the cause will be advanced. This has been done frequently in cases involving the right to hold a public office where a claimant has been excluded from the office and the term is likely to end before his case can be determined in its regular order.

Criminal causes are always advanced without application therefor, and take precedence of all other business from the judicial district from which they are appealed.[1]

Doubtless causes will be advanced for other reasons than those given. The power to advance is exercised by the court in the interest of justice, but with due regard to the rights of all litigants who have claims upon the time of the court.

Ordinarily a cause will not be advanced merely because it involves a large amount of money or other property, nor because numerous persons are interested in it. A cause can not be advanced by agreement of parties alone, unless it be of a character to justify its advancement, under the rule the agreement of parties to advance it will not be given effect.

The application to advance a cause should be made by

[1] Rules, Sec. 78.

motion supported by affidavits or by statements based upon the record before the court, and should show clearly the grounds upon which an advancement is asked. Due notice of the application should be given to the adverse party, and resistance thereto may be made as in other cases. When a cause is advanced it is determined at the earliest date practicable after submission.

§ **1405. Of oral arguments.**—Sections 39 to 44 inclusive of the printed rules prescribe the time and method of preparing, serving and filing printed arguments and the notice of oral arguments and the time and order in which they may be made, with sufficient fullness for most cases. But questions frequently arise for which the rules do not in terms provide, but which are determined by the settled practice of the court.

Proceedings by certiorari may be, and frequently are, instituted in the supreme court, and are prepared for submission in the same manner, so far as is practicable, as are other cases. Printed arguments must be served and filed under the rules, and the failure to serve and file them is attended with the same consequences as it would be in other cases.

Oral arguments on motions are not permitted, but arguments in writing or in print are invited and desired, not only in support but also in resistance of the motion. It is good practice, when practicable, to submit a motion with the case, when that is submitted for final determination, and to argue the motion in the printed briefs. Of course that can not be done when a determination of the motion is required before the case is submitted, but in such cases written or printed arguments are desired.

Parties are not permitted to change the order in which oral arguments shall be made, nor to fix the time for oral argument at a date not included in the time of the assignment in which the cause appears, without the consent of the court and that is given rarely, and only for reason of unusual importance. If the business of the

court justified such an order, a cause would be set down for oral argument at a time not included in the assignment to which the cause belongs; and in rare cases, involving matters of controlling and urgent importance, cases have been assigned for oral argument in advance of the assignment in which they would regularly appear. But such cases are exceptional, and the orderly administration of the business of the court and the interests of all parties who have business in it, require that the rules in regard to the presentation and submission of causes be habitually followed.

If a cause is not ready for submission when it is reached in its order, it is passed to the foot of the assignment, but the right to submit it on oral argument is not thereby waived. All parties who have given due notice of oral argument are entitled to be heard before any oral argument in the next assignment is made, even though the time of the assignment, to which the case to be argued orally belongs, is insufficient, and time included in the next assignment is required for the oral argument. An agreement of parties to submit a cause without oral argument on a later date than the one assigned for it will be given effect by the court.

§ **1406. Of the submission of causes.**—It is the duty of the clerk of the court to arrange and set a proper number of causes for trial for each day of a term of court, placing together those from the same judicial district.[2] A preliminary call of all the causes included in each assignment is made when the assignment is reached. When that call is made all cases in which there is an argument for each party which has been duly served and in which no notice of oral argument has been given and in which there is no objection to a submission called to the attention of the court, are submitted without any personal appearance or request therefor by either party. On the next, or peremptory, call of the assignment, if there be an argument for but one party to an action, and

[2] Rules, Sec. 17.

it is the first term at which the cause could have been submitted, and there is no demand for a submission, the cause is passed, and if no demand for a submission is made during the term the cause is continued, but if it be the second term at which the cause has been assigned for submission, and an argument for the appellant has been duly served and filed, the cause is submitted. The submission of a civil cause for determination on the merits is not taken unless there be an argument for the appellant, even though the burden of showing a cause of action be upon the appellee, and there is an argument for him on file. In such a case the appellant will be deemed to have abandoned his appeal and the judgment of the trial court will be affirmed or the appeal will be dismissed without regard to the merits of the case.[3] That would not be true where the appellee has also appealed and has duly served and filed a printed argument. In such a case the questions involved in the appeal of the appellee would be considered, and, so far as necessary, determined.

The rules requiring arguments are not strictly followed in criminal cases, and such cases are usually considered on their merits even though no printed argument be filed, notwithstanding the fact that the general rules which govern the submission of causes apply in criminal as well as in civil causes.

Oral arguments are permitted on a petition for rehearing, when the party applying therefor gives notice thereof in his petition,[4] but if a petition be sustained the cause is then set down for submission on printed arguments, and no further oral argument is permitted.

If a party do not desire to make an oral argument it is rarely necessary for him to be present in court when his case is called. If it appear to be ready for submission and no objection is made a submission is taken. If the appellee has not served and filed a printed argument but

[3] Raynor v. Raynor, 77 Iowa, 282.

[4] Rules, Sec. 64.

the appellant nevertheless desires a submission of the cause and appears to be entitled to and demands it, in the absence of a showing by the appellee for a continuance the submission will be taken. Ordinarily it will be sufficient for a party to inform the clerk of his desire for the submission of a cause which is ready on his part for submission, and if the parties agree to a continuance or other proper disposition of the cause it will be sufficient in most cases to notify the clerk of the fact, and it will then be brought to the attention of the court and proper action be taken. If either party has failed to serve his argument the length of time required by the rules before the cause is reached in its order, the adverse party is entitled to a continuance of the cause.

§ 1407. Of setting aside submission.—It sometimes happens that after the submission of a cause a party thereto discovers some omission or defect in the record. In such a case he may apply by motion before the case is decided to have the submission set aside in order to cure the defect, and if a proper showing of care and diligence on his part be made the submission will be set aside and the desired amendments be permitted. It is ordinarily too late to correct a defect in the record after the case has been decided as rehearings are not granted, especially in civil cases, to give an opportunity to correct the record.[5] That rule has been somewhat relaxed in criminal cases in which amendments to the record have sometimes been permitted on rehearing on a showing that the defendant was free from negligence.[6]

Notice of an application to set aside the submission of a cause should be served on the adverse party and resistance thereto may be made as provided in the rules which relate to motions.

If the printed arguments contain scurrilous or other improper matter, as unwarranted attacks upon the trial court or attorney for the adverse party, they may be

[5] McDermott v. Iowa Falls & S. C. R. Co., 85 Iowa, 191.

[6] State v. Proctor, 86 Iowa, 699.

stricken from the files by the court either with or without a motion, or other measures, as the taxing of costs against the offending party may be taken to punish the abuse and prevent its repetition.

§ **1408. Of restraining orders.**—In most cases the taking of an appeal and the filing of a supersedeas bond stays proceedings on the judgment or order of the trial court until the appeal is determined. But that is not always true of self-executing judgments and orders where no act of a ministerial officer is necessary to make it effectual.[7] In some cases of that kind the supreme court has interfered by an order restraining proceedings on the judgment or order pending an appeal therefrom. The purpose of such an order is to protect the jurisdiction of the supreme court to prevent irreparable injury and the failure of justice, and it will not be granted if there be any other adequate remedy.

The power to make such orders is exercised under the provision of the constitution of this State which provides that the supreme court shall have "power to issue all writs and process necessary to secure justice to parties, and exercise a supervisory control over all inferior judicial tribunals throughout the State,"[8] and it may be that the power is inherent in the court, not necessarily depending upon the constitutional provision cited. Although the power has been exercised occasionally for many years the method of procedure to invoke it is not well settled, nor can all the cases in which it may be exercised be enumerated. It has been used to restrain proceedings on a petition to a board of supervisors asking the relocation of a county seat.[9] It has also been used where a temporary injunction was dissolved, restraining pending an appeal from the order of dissolution, the doing of the acts which the injunction dissolved had prohibited. It has also been used to restrain, pending an appeal, the enforcement of a judgment rendered in pro-

[7] Elliott's Appellate Procedure, Sec. 292.

[8] Court of Iowa, Art. V., Sec. 4.

[9] Luce v. Fensler, 85 Iowa, 596.

ceedings by certiorari. The order is sometimes granted by a judge of the court, with leave to apply to the court in a summary manner for a review of the order. Although that practice has prevailed for a considerable number of years the court has not had occasion to determine whether it is authorized, and its validity may be regarded as unsettled.

§ 1409. Of alimony in divorce proceedings. — Section 3177 of the code relates to actions for divorce and alimony, and provides that: "The court may order either party to pay the clerk a sum of money for the separate support and maintenance of the adverse party and the children, and to enable such party to prosecute or defend the action."

It is the practice of the supreme court to grant the relief contemplated by that section in actions for divorce and alimony pending an appeal in that court. Upon a proper showing allowance will be made for the temporary support of the husband or wife, for the temporary support of their children, for the expenses necessary to procure a transcript of the record, to print the abstract and arguments, to pay for the services of an attorney, and for any other expense necessary to a proper submission of the cause in the supreme court.[10] The application for such an allowance is ordinarily made by motion supported by affidavits, and in some cases by reference to the record in the case, and may be resisted by counter-affidavits. The application should show that a judgment has been rendered or an order made by the trial court from which an appeal has been taken, and facts which show that the allowance asked is not only proper but necessary, as, for example, that the applicant is without sufficient means to maintain herself and to prosecute the appeal, that the cost of maintenance and of prosecuting the appeal will be specific sums which should be stated, and that the adverse party has sufficient money or property for the payment of the allowance asked. The

[10] Doolittle v. Doolittle, 78 Iowa, 695.

averments of fact should be sufficiently full to enable the court to judge of the merits of the application and should show when the payments asked are required. The resistance may set out any facts which would tend to show that no allowance should be made or that it should be for a smaller sum than that asked. The application for an allowance for temporary support and for the expenses of prosecuting the appeal is usually made before the cause is ready for submission in the supreme court, but may be made and submitted with the cause for determination when the cause is decided.

When the application is submitted the court will investigate the showing made and determine what allowance, if any, is demanded, and make an order to enforce its conclusions.

§ 1410. Of attorney's fees.—Section 1 of chapter 66 of the acts of the Twenty-first General Assembly provided that in actions to enjoin nuisances committed by keeping for sale and selling intoxicating liquors in violation of law the plaintiff, if successful in the action, should be entitled to an attorney's fee of not less than twenty-five dollars, to be taxed and collected as costs against the defendant. It was the practice of the supreme court, under that chapter, to tax an attorney's fee for services rendered in that court, and also for services rendered in the court below, if no allowance had been made for such services, as, in case when the plaintiff had failed in the lower court but had succeeded in the supreme court.[11]

Section 2406 of the code provides that if the plaintiff is successful in an action of the character described "an attorney's fee of twenty-five dollars shall be taxed as costs in his favor." Section 2429 provides for an allowance to the attorney who prosecutes the case, of a reasonable sum for his services, and in case a fine is assessed, for ten per cent. of the fine collected. Whether there is any conflict between these sections so far as they provide

[11] Hamilton v. Baker, 91 Iowa, 101; Farr v. Seaward, 82 Id., 222; Farley v. O'Malley, 77, Id., 532.

for the allowance of an attorney's fee in actions in equity to enjoin and abate nuisances is a question not yet determined. But in view of the practice of the court under prior statutes it can be said with reasonable certainty that the court will allow the fee authorized by law in a case tried on appeal, even though it was not allowed by the court below.

§ **1411. Of costs.**—It is the practice of the court, when proper application is made, to tax all unauthorized costs to the party responsible for them, without regard to the final disposition made of the cause.[12] Thus, if the abstract contain matter not material to the determination of any question presented by the appeal,[13] or if it set out the testimony of witnesses by questions and answers unnecessarily instead of in a condensed narrative form,[14] costs of the matter improperly abstracted will be taxed to the appellant. In a case where an amendment to an assignment of errors was filed during the term of court at which the cause was submitted all costs incurred prior to the filing of the amendment were taxed to the appellant.[15]

If the appellee deny the correctness or sufficiency of an abstract upon insufficient grounds and a transcript is thereby made necessary the cost of the denial and of the transcript will be taxed to the appellee.[16] And if the appellee set out in an additional abstract matter which was already properly shown in the abstract of the appellant, or if he insert in the additional abstract any immaterial matter, or set out material matter at greater length than is reasonably necessary, the cost of the improper part of the abstract will be taxed to the appellee.[17] In some cases, as where the appellant succeeds as to a part only

[12] Rules, Sec. 95.

[13] Bigelow v. Hoover, 85 Iowa, 164; Boardman v. Willard, 73 Id., 23.

[14] Jons v. Campbell, 84 Iowa, 561.

[15] Stanley v. Barringer. 74 Iowa, 37.

[16] Taylor v. Chicago, M. & St. P. R. Co., 80 Iowa, 433; Bucknell v. Deering, 68 N. W. Rep., 827.

[17] Bowman v. Western Fur Mfg. Co., 64 N. W. Rep., 778.

of several separate and distinct issues, the costs may be apportioned between the parties to the action.

Application for taxing costs is ordinarily made by motion, which may be submitted with the cause or presented after the cause has been determined. When a party asks that costs improperly caused or incurred in preparing the case for submission, be taxed to the adverse party, it is proper and the best practice to submit a motion therefor with the case. The facts are then fully investigated when the record is examined for a determination of the case on the merits, and a correct conclusion is most easily reached.

CHAPTER LXXXVII.

OF THE FORCIBLE ENTRY AND DETENTION OF REAL PROPERTY.

Sec. 1412. Of jurisdiction of the action.
1413. When the action lies.
1414. Parties to the action.
1415. Of the notice to quit.
1416. Of the petition.
1417. Of service of notice, appearance, etc.
1418. Of trial—When by equitable proceedings.
1419. When actions barred, etc.
1420. Of the judgment.

Section **1412. Of jurisdiction of the action.**—Heretofore this action could be brought only in a justice's court. Now the district and superior courts within the county, and justices of the peace within the township where the subject matter of the action is situated, have concurrent original jurisdiction, and the court first acquiring jurisdiction will retain it until judgment, unless the cause is transferred from a justice's court to a superior court or to the district court, or from a superior court to the district court, which may be done by the agreement of the parties. In cases where a judgment is rendered in a justice's court an appeal may be taken to the district or superior court.[1] On such an appeal an amendment to the petition which more particularly describes the property, but does not change the issue, is permissible.[2]

§ **1413. When the action lies.**—The action may be brought when:

1. The defendant has by force, intimidation, fraud or

[1] Code, Sec. 4211.

[2] Kuhn v. Kuhn, 70-682.

stealth, entered upon the prior actual possession of another in real property, and detains the same.

2. Where a lessee holds over after a termination or contrary to the terms of his lease.

3. Where the defendant continues in possession after a sale by foreclosure of a mortgage, or on execution, unless he claims by a title paramount to the lien by virtue of which the sale was made, or by title derived from the purchaser at the sale; in either of which cases such title must be clearly and concisely pleaded by the defendant.

4. For the non-payment of rent, when due.[3] Under a prior corresponding provision it was held that threats sufficient to induce fear of violent ouster would bring the case within the statute.[4] Fraud in the execution of a lease under which a defendant holds possession cannot be set up by him to justify his holding over after the expiration of such lease.[5] The tenant of property sold under execution may be ousted under this statute after the purchaser's right to possession is complete, although such tenant has planted or sowed crops which have not matured.[6]

The question involved is the fact of possession alone, not the right of possession, hence one may render himself liable to this action by entering his own premises, by force, fraud or stealth.[7] Possession in fact may exist as to unenclosed or unimproved land which will be protected in this action.[8] An assault and battery is not justifiable when made for the purpose of taking possession of property of which another is in peaceable possession.[9] And an owner who forcibly enters upon the possession of one in possession is liable for trespass, regardless of the title of the one in possession.[10] And a writ against a person claiming as a tenant will not be valid as against another person claiming as an under lessee

[3] Code, Sec. 4208.
[4] Harrow v. Baker, 2 G. Gr., 201.
[5] Simons v. Marshall, 3 G. Gr., 502.
[6] Wheeler v. Kirkendall, 67-612.
[7] Stephens v. McCloy, 36-659; Emsley v. Bennett, 37-15; Lorimier v. Lewis, Mor., 253.
[8] Langworthy v. Myers, 4-18.
[9] State v. McKinley, 82-445.
[10] Kimball v. Shoemaker, 82-459.

from such tenant if such under lessee was in possession before the proceeding was commenced.[11]

If it is claimed that the defendant entered into possession by force, fraud or stealth, the latter may show possession for years under a lease from the party seeking possession.[12]

§ 1414. Parties to the action. — The legal representatives of a person who, if alive, might have been plaintiff, may bring this action after his death. And by legal representatives is meant the executor or administrator.[13]

§ 1415. Of the notice to quit.—Before an action can be brought in any except the first of the above classes of cases, three days' notice to quit must be given the defendant in writing.[14] This notice may be in the following form:

FORM OF NOTICE TO TENANT TO QUIT.

To ———.

You are hereby notified that I demand that you quit and surrender to me the possession of the following described premises situated in the city of ———, county of ———, Iowa, now used and occupied by you as a dwelling house (or as the case may be), to-wit: (describe the property as accurately as possible), and if you fail to do so within ——— days (or within such time as the tenant may be entitled to) after the service of this notice on you, I shall take the necessary legal steps to obtain possession of said premises.

Dated this ——— day of ———, 18—.

(Signature.)

This notice may be given before the expiration of the tenant's term and more than three days before the action is brought.[15] The service of the notice is not the commencement of the action, and if the time fixed therein for the surrender of possession is after the expiration of thirty days, peaceable possession, as provided

11 State v. Smith, 70 N. W., 604.
12 Peddicord v. Kile, 83-542.
13 Code, Sec. 4209; Beezley v. Burgett, 15-192.
14 Code, Sec. 4210; Gifford v. King, 54-525.
15 McLain v. Calkins, 77-468; Drain v. Jacks, 77-629.

in code, section 4217, the action will be ineffectual.[16] The service of the notice being an eviction, the tenant upon whom it is served may relinquish possession and sue the landlord for damages in case the eviction is unlawful.[17] If instead of serving the three days' notice to quit, service is made of a thirty days' notice to terminate a tenancy at will, as authorized under section 2991 of the code, the case being one where such thirty days' notice was unnecessary, the proceedings under such notice, after the expiration of the thirty days from its service, will not be void, but it will be an irregularity only.[18]

The notice, being the basis of a private right must be proved as any other matter in pais.[19]

§ 1416. Of the petition. — The petition must be sworn to, and will be sufficient if it conforms to the requirements of the statute.[20]

The petition may be in the following form:

FORM OF PETITION IN FORCIBLE ENTRY AND DETAINER.

Title, }
Venue. }

The plaintiff states: that on the ——— day of ———, 18—, he leased, by written contract to the defendant, the following described real property (here describe it) situated in the county of ——— and State of Iowa, a copy of said contract being hereto attached marked exhibit "A" and made a part of this petition. That by the terms of said contract plaintiff leased said property to the defendant for one year from the ——— day of ———, 18—, to and including the ——— day of ———, 18—. That plaintiff was when said lease was made and ever since has been the fee simple owner of said premises, and is now, and ever has been the owner and holder of said lease. That on the ——— day of ———, 18— (three days or more before the expiration of the term of the lease), plaintiff caused to be served upon the defendant a written notice to quit and surrender the possession of said premises a copy of the same being attached hereto marked exhibit "B" and made a part hereof.

That disregarding said notice and the terms of his said lease, the defendant holds and retains possession of said premises contrary there-

[16] Heiple v. Reinhart, 69 N. W., 871.
[17] Tarpy v Blume, 70 N. W., 620.
[18] Shriver v. Klinkenberg, 67-544.
[19] Hollingsworth v. Snyder, 2-435.
[20] Code, Sec. 4212; Simons v. Marshall, 3 G. Gr., 502.

to, and in violation of the terms of said lease, his said term having expired on the ——— day of ———, 18—.

Wherefore plaintiff prays for judgment against the defendant removing him from the premises and that plaintiff be put in possession thereof, that an execution issue accordingly and for costs.

———, attorney for plaintiff.

(Add verification and attach exhibits referred to.)

§ 1417. Of service of notice—Appearance, etc.—The action is commenced by the service of an original notice, as in other cases. If it is made to appear by affidavit that personal service of the original notice cannot be made upon the defendant within this state, the same may be made by publication.[21] The time for appearance and pleading is the same as in other cases.[22]

§ 1418. Of trial—When by equitable proceedings.—When title is put in issue the cause must be tried by equitable proceedings. The appearance term will be the trial term, and no continuance will be granted for the purpose of taking the testimony in writing. Nothing in this chapter will prevent a party from suing for trespass or from testing the right of property in any other manner.[23]

§ 1419. When action barred, etc.—Thirty days' peaceable possession with the knowledge of the plaintiff after the cause of action accrues is a bar to this proceeding.[24] This action cannot be brought in connection with any other, nor can it be made the subject of counter claim.[25]

§ 1420. Of the judgment.—If the defendant is found guilty, judgment will be entered that he be removed from the premises, and that the plaintiff be put in possession thereof, and an execution for the defendant's removal will issue to which should be added a clause commanding the officer to collect the costs as in other cases.[26] Said execution may be in the following form:

[21] Code, Sec. 4213.
[22] Code, Sec. 4214.
[23] Code, Sec. 4216.
[24] Code, Sec. 4217: Heiple v. Reinhart, 69 N. W., 871.
[25] Code, Sec. 4218.
[26] Code, Sec. 4221.

FORM OF EXECUTION FOR REMOVAL OF DEFENDANT.

State of Iowa, }
——— County. } ss.

The State of Iowa to the sheriff of ——— county, greeting:

Whereas by the judgment of the district (or superior) court of ——— county, Iowa, rendered in an action wherein ——— was plaintiff and ——— was defendant, it was adjudged that the plaintiff was entitled to the immediate possession of the following described premises situated in said county, and which are now wrongfully detained by, and in the possession of the said defendant, to-wit: (here describe the premises as in the petition), and whereas it was adjudged and determined by said court that the said defendant be removed from said premises and the plaintiff be put in possession thereof, and that an execution should issue accordingly, and that plaintiff have and recover his costs of the said defendant, which were taxed at the sum of ——— dollars.

Now, therefore, in the name of the State of Iowa, we command you to remove the said defendant from said premises, and to put the plaintiff in possession of the same and to remove from said premises all persons claiming to hold the same or any part thereof under or by virtue of the authority or permission of said defendant.

And you are further commanded and required to make the amount of said judgment for costs, to-wit: the sum of ——— dollars, together with all accrued costs of the goods and chattels of the said defendant (except such as are by law exempt from execution) by levy and sale thereof according to law.

And of this writ make due service and return.

Witness my hand and the seal of said court this ——— day of ———, 18—.

[Seal.] ———,

Clerk of the district court of ——— county, Iowa.

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by one not a party, agent or attorney, 336.