1928

1926 Code 1928 Supplement

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1928 SUPPLEMENT
to
THE GEORGIA CODE
of 1926

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1928 SUPPLEMENT

TO

THE GEORGIA CODE

1926

CONTAINING ALL THE GENERAL LAWS

OF 1927

WITH FULL ANNOTATIONS

UNDER THE EDITORIAL SUPERVISION

OF

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ASSISTED BY

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Preface

This compilation constitutes a complete supplement to the Georgia Code of 1926. It contains all of the general laws of the Legislature enacted during the 1927 session. The annotations are full and comprehensive. They cover volumes 161 to 163 of the Georgia Reports, both inclusive, and volumes 34 to 36 of the Georgia Appeals Reports, both inclusive. The Federal Reports and United States Supreme Court Reports to the date of publication are also included in the Supplement.

The same standard of skillful editorial work which contributed to the popularity of the Georgia Code of 1926 is maintained throughout this volume. Special attention is directed to the editors' notes, pointing out the changes effected by the Acts of 1927. It is believed that these notes will prove invaluable in saving the lawyer from laborious comparisons.

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CODE OF GEORGIA---SUPPLEMENT

PRELIMINARY PROVISIONS

§ 4 (§ 4.) Construction of statutes.

Not a Question for Jury.—It should not be left to the jury to determine whether a party could or could not substantially comply with the code or amendatory laws. Lime-Cola Bottling Co. v. Atlanta, etc., R. Co., 34 Ga. App. 103, 128 S. E. 226.

Reasonable Care Insufficient.—Where a substantial compliance with a statute by a railway company would be sufficient, the duty of compliance to that extent would be absolute, and the company would not have discharged the duty merely by the exercise of reasonable care to that end. Lime-Cola Bottling Co. v. Atlanta, etc., R. Co., 34 Ga. App. 103, 128 S. E. 226.

When Last Day Falls on Sunday—Bill of Exceptions.—When the last day numerically for presenting the bill of exceptions for certification falls on Sunday, the presentation of the bill of exceptions to the trial judge for certification upon the next day, Monday, is not too late. Maryland Casualty Co. v. England, 34 Ga. App. 354, 129 S. E. 446.

Service of Process.—The giving of "five days notice of the time and place of hearing," required by section 5154, of a petition for discharge filed by a defendant in a suit in trover, who is held in imprisonment in default of bail, is not complied with by serving the plaintiff, on the first day of May, with notice that the time of hearing the petition will be on the fifth day of May following. From the first day of May to the fifth day of May is only four days. Hardin v. Mutual Clothing Co., 34 Ga. App. 466, 129 S. E. 907.

§ 10 (§ 10.) Waiver of law.

Failure to Object to Motion for New Trial.—Any point of practice which, if sound, would be fatal to a motion for a new trial should be presented to the trial court by a motion to dismiss the application for a new trial, and, if not so presented, will be considered as having been waived. Walker v. Neil, 117 Ga. 733, 45 S. E. 387; Hopkins v. Jackson, 147 Ga. 821, 822, 95 S. E. 675; Fairburn v. Brantley, 161 Ga. 199, 130 S. E. 67.

Waiving Process.—A person is entitled to legal service, but may waive service of the original suit by appearing and pleading to the merits. Failure to serve a motion for new trial will afford ground upon which the motion must be dismissed, but the failure may be waived. Fairburn v. Brantley, 161 Ga. 199, 130 S. E. 67.

§ 13 (§ 13.) Bonds taken by officers.

Failing as Statutory Bond—Good as Common Law Bond.—Where a bond was made payable to the levying officer and was conditioned to deliver the property at the time and place of sale but no affidavit of illegality was ever filed or attempted to be filed, the bond taken is a good and valid obligation as a common-law bond and recovery on it can be had. Mulllis v. Kennedy, 143 Ga. 618, 85 S. E. 845, cited and approved. Garmany v. Loach, 34 Ga. App. 722, 724, 131 S. E. 108.

THE POLITICAL CODE

FIRST TITLE

Divisions; of the Boundary, Sovereignty and Jurisdiction of the State

CHAPTER 3

Jurisdiction Ceded to the United States Over Certain Land

§ 26(1). Land for other public buildings.—The consent of the State of Georgia is hereby given in accordance with the 17th clause, 8th section, and of the first article of the Constitution of the United States, to the acquisition by the United States by purchase, condemnation, or otherwise, any land in this State which has been or may hereafter be acquired for custom-houses, post offices, arsenals, other public buildings whatever, or for any other government purposes. Acts 1927, p. 352.

§ 26(2). Same—Jurisdiction; exemption from taxation.—The exclusive jurisdiction in and over any land so acquired by the United States shall be and the same is hereby ceded to the United States for all purposes, except that the state retains the right to serve thereon all civil and criminal processes issued under authority of the state; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.

The jurisdiction hereby ceded shall not vest until the United States shall have acquired the title to the said lands by purchase, condemnation or otherwise; and so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all state, county, and municipal taxation, assessment, or other charges which may be levied or imposed under authority of the state.

SECOND TITLE

Elections by the People

CHAPTER 1

Qualification of Voters

§ 34 (§ 32.) Qualification of voters.

Failure to Make Return of Taxes.—The failure of a tax payer to make a return of his taxes as required by law is not, without more, a ground for disqualifying him as a voter for members of the General Assembly. As to taxes, it is only non-payment which will disqualify the voter, and even then the exception in paragraph 3 must be considered. Daniel v. Claxton, 35 Ga. App. 107, 132 S. E. 411.

CHAPTER 2

Registration of Voters

ARTICLE 2

Method of Registering on Voters' Book

§ 42 (§ 42.) Oath to be read or repeated at request of applicant.

Signature Required.—One can not lawfully register as a voter without signing his name in the voters' book in person or by making his mark as prescribed by this section. Turk v. Royal, 34 Ga. App. 717, 131 S. E. 119.

ARTICLE 3

Ballots, by Whom and Where Cast

§ 71. Voter changing residence.

Must Apply to Registrars.—One who had moved from another county to that wherein an election was held, and, by application to the tax-collector of the latter county, had had his name transferred and entered upon the voters' book of that county, but at no time had made any application to the registrars thereof for such transfer, and had offered no proof before them as to his qualifications to vote, was not qualified to vote in such bond election. Turk v. Royal, 34 Ga. App. 717, 131 S. E. 119.

CHAPTER 3
Elections for Members of the General Assembly

ARTICLE 3
Elections; When and How Held

§ 80(b). In certain counties.—In all counties in the State of Georgia, having, by the United States census of 1920 or any future census, a population of not less than 14,501 and not more than 14,505 inhabitants, all election precincts which are located as a whole or in part in an incorporated city or town having a population of 1,000 or more according to the 1920 census of the United States, shall remain open on all election days, whether general, special, primary or otherwise, from 7:00 o'clock a. m. to 6:00 o'clock p. m.; provided however, that the provisions of this section shall not apply to elections that are held by the municipal authorities or the local board of education. Acts 1927, p. 130.

§ 82 (§ 72.) Manner of conducting elections.

Superintendents Cannot Recount Ballots.—Under the provisions of this paragraph, superintendents of election have neither power nor authority to examine or recount ballots cast in a county election for the purpose of correcting errors, whether the same be due to mistake or fraud as prescribed by this and the next paragraph of the section. Bacon v. Black, 162 Ga. 222, 133 S. E. 251.

ARTICLE 4
Penalty for Managers' Default

§ 84 (§ 74.) In case superintendents make false return, etc.

Superintendent also Liable under Penal Code.—If the number of votes is knowingly and falsely misstated by a superintendent of an election, he has failed to discharge a duty imposed upon him by law, and he is liable to be prosecuted, under section 658 of the Penal Code, for a misdemeanor although this section also applies. Black v. State, 36 Ga. App. 286, 136 S. E. 334.

CHAPTER 7
Contested Elections

ARTICLE 3
Other Contested Elections

§ 125 (§ 111.) Contests in other elections.

Jurisdiction of Ordinary—Mandamus to Compel Hearing.—Where on the hearing of a contested election case before an ordinary, the contestee filed a demurrer to the petition, which demurrer was sustained and the ordinary dismissed the contest proceedings, and the contestant filed a petition against the ordinary for a writ of mandamus to compel the ordinary to hear and determine such election contest, alleging that the ordinary had failed and refused to perform his legal duty in the premises; the court did not err, in granting an order making the mandamus absolute, and requiring the ordinary to hear and determine such contest. Morgan v. Wason, 162 Ga. 360, 133 S. E. 921.

ARTICLE 4
Elections Not Set Aside for Formal Defects, When

§ 126 (§ 112.) Election not void by reason of formal defects.

Violation of Directory Provision Harmless.—An election was not invalid because it did not appear that the mayor and council had published the names of the election managers in accordance with a certain provision of the city charter, for this provision is directory. Edwards v. Clarkesville, 35 Ga. App. 306, 133 S. E. 45.

Ballots Improperly Marked.—That the notice to the voters provided that the ballots should have written or printed thereon the words "for school bonds" or "against school bonds," and that such ballots may have been used, did not invalidate the election, notwithstanding the ordinance calling the election prescribed that the ballots should bear the words "for public school bonds for schoolhouse" or "against public school bonds for schoolhouse." Edwards v. Clarkesville, 35 Ga. App. 306, 133 S. E. 45. For similar holding as to vote for local taxation in school district, see notes to § 1551(133) of the Georgia Code of 1926.

Specifying "Australian Ballot System."—Even in the absence of all provisions therefor, to say merely that the election was to be held or was held under some system indefinitely described as the "Australian ballot system" would not affirmatively disclose that the election was void. Edwards v. Clarkesville, 35 Ga. App. 306, 312, 133 S. E. 45.

CHAPTER 8
Primary Elections

§ 138(7½). Nominations for General Assembly members and Superior Court Judges in certain counties; specification of incumbent opposed; plurality.—Candidates for the General Assembly in all counties having within its borders a city or a part of a city of population of 200,000 or more and candidates for Judges of the Superior Court in all judicial circuits having a county or counties of population of 200,000 or more, according to the last or any future census of the United States, shall, when qualifying for a primary, specify the particular incumbent which said candidate desires to oppose or succeed, and all ballots shall be prepared accordingly. The candidate receiving a plurality of the votes cast for candidates for such office shall be declared the nominee therefor. Acts 1925, p. 205; 1927, p. 246.

Editor's Note.—The amendment of 1927 limited the provision as to candidates for the General Assembly, to counties "having within their borders a city or a part of a city."

THIRD TITLE

CHAPTER 2
The Secretary of State, Treasurer, Comptroller-General, and Attorney-General

SECTION 10
Bond Commissioner

§ 232. State treasurer ex-officio Bond Commissioner.—The State Treasurer shall be ex-officio Bond Commissioner of this State, and as such he shall receive a salary of $1,200.00 per annum; and he is hereby authorized to appoint the chief clerk in the treasury department, or some other fit and competent person, to be Assistant Commissioner, and said assistant shall receive a salary of $1,200.00 per annum; and said Bond Commissioner shall be allowed such sum as may be necessary, not to exceed the sum of $10,000.00 per annum, for clerical assistance in performing the duties of his office, which said sum, together with the salaries of the Bond Commissioner and the Assistant Bond Commissioner, shall be paid from the State Treasury; it shall be the duty of the Bond Commissioner and his assistant to receive, file, record, care and provide for the deposit of bonds or other securities offered for deposit as the law may direct. Acts 1909, p. 145; 1923, p. 132; 1927, p. 131.

Editor's Note.—The amendment of 1927 wrought many changes in the phraseology of this section. The substantial innovations consist of the provision for a $12,000 salary for both the Bond Commissioner and the Assistant Bond Commissioner, and the provision for allowance of $10,000 for clerical assistance, and the source of its payment.

§ 233. Fees of commissioner.—Each and every depositing corporation or individual of whatever name or class, which now has or may hereafter have on deposit bonds or other securities, as the law provides, is hereby required, within sixty days from and after August 14th, 1909, and thereafter on or before January 15th of each year, to pay the said bond commissioner the following schedules of fees, namely: Bonds or other securities aggregating not over $5,000.00, $2.00; not over $10,000.00, $3.75; not over $25,000.00, $7.50; not over $50,000.00, $12.50; not over $100,000.00, $20.00; more than $100,000.00, $25.00; provided, however, that the W. & A. R. R. lessees shall be exempt from the operation of this section. All fees collected as aforesaid shall be paid into the general funds of the state treasury. In default of the payment of the fees herein prescribed, the bond commissioner shall refuse to accept the deposits required by law to be made, and shall not certify their acceptance until the fee is fully paid each year as herein provided, but shall report said default to the insurance commissioner, who shall suspend or revoke the license of said delinquent company or individual until the fee required under this section is fully paid. Acts 1927, p. 131.

FOURTH TITLE

General Regulations as to All Officers and Offices

CHAPTER 1

Of Eligibility, Qualification, and Commissions of Officers, and Vacation of Officers

ARTICLE 1

Eligibility and Qualification

§ 258 (§ 223.) Persons ineligible; de facto officers.

Prior Removal for Misconduct.—The conviction of an officer for misbehavior and misconduct in office in the illegal appropriation of public funds, and his removal from office, are equivalent to an adjudication that he is ineligible to hold said office for and during the remainder of the term for which he was elected. McClellan v. Pearson, 163 Ga. 492, 136 S. E. 429.

§ 261 (§ 226.) Officers of this State must reside therein, hold until successor is qualified, and keep seal.

Liability on Bond Continues.—The effect of this section is to extend the term of office under the original appointment until a successor has been qualified, with the further effect that liability on an official bond continues where an official elected for a fixed period thereafter holds over, after its expiration, until his successor is appointed. Elberton v. Jones, 35 Ga. App. 536, 133 S. E. 745.

CHAPTER 3

Official Bonds and Sureties Thereon

ARTICLE 5

Bonds; How Far and for What Binding

§ 291 (§ 256.) Official bonds obligatory.

Color of office is defined in Fidelity, etc., Company v. Smith, 35 Ga. App. 744, 748, 134 S. E. 801, quoting Luther v. Banks, 111 Ga. 374, 36 S. E. 626.

When Acts Colore Officii—Illustration.—An officer shooting at the occupants of an automobile who have fled from an attempted arrest for a misdemeanor (illegal transportation of liquor) commits a wrongful act under color of his office. Copeland v. Dunehoo, 36 Ga. App. 817, 138 S. E. 267.

Acts Entirely Unauthorized Not Breach of Bond.—A tax-collector, having no authority of law whatever to make levies and sales under tax fi. fas., issued a fi. fa. purporting to be for taxes due, and placed it in the hands of another as his deputy, who, "armed" with the fi. fa. and acting under the instructions of the tax-collector, seized property of the alleged taxpayer and sold it, to the owner's damage. It was held that such acts constituted no breach of the tax-collector's bond and the surety on the bond was not liable therefor. Fidelity, etc., Co. v. Smith, 35 Ga. App. 744, 134 S. E. 801.

ARTICLE 10

Measure of Damages on Bonds

§ 299 (§ 264.) Measure of damages.

Meaning of "Smart-Money."—The term "smart-money," as employed in this section seems to be substantially synonymous with "punitive damages." Copeland v. Dunehoo, 36 Ga. App. 817, 821, 138 S. E. 267. Thus this section seems to be an exception to section 4393. Id.

What Amounts to Bad Faith.—Any arbitrary omission by the officer to do that which is required of him by law, or any conscious disregard of the limitation upon his authority, would amount to bad faith within the meaning of that term as employed in this section. Copeland v. Dunehoo, 36 Ga. App. 817, 824, 138 S. E. 267. See note of this case under sec. 2549.

Statement of Injury.—In an action for damages because of the alleged breach of the official bond of a former clerk of a city court, it not appearing from the petition that any actual injury was sustained by the plaintiff by reason of the alleged breach, the petition did not set out a cause of action. Donaldson v. Walker, 35 Ga. App. 224, 132 S. E. 649.

CHAPTER 4

Powers of Public Officers Limited

§ 303 (§ 268.) Powers of public officers.

As to liability on unauthorized acts of school trustees, see note to sec. 1551(141).

When Public Is Estopped—Statements Without Authority.—In Gill v. Cox. 163 Ga. 618, 137 S. E. 40, it was held that the state is not estopped by statements made by the state veterinarian, said statements not being made in the exercise of any legal authority.

FIFTH TITLE

Legislative Department

CHAPTER 1

Of the General Assembly

ARTICLE 8

Pay of Members

§ 354 (§ 312.) Accounts of members and officers, how audited.

In General.—By this section a method is provided for determining what compensation, including per diem, is due to the members of the General Assembly. This statute establishes a special tribunal for the determination of the matter in question. There certainly should be no judicial interference with this method and this tribunal, before any action is taken by this special tribunal, by assuming that it will certify per diem to which members are not entitled under the constitution. Speer v. Martin, 163 Ga. 535, 537, 136 S. E. 425.

SIXTH TITLE

County Organization

CHAPTER 2

Incorporation of Counties, County Contracts, Property, and Claims

ARTICLE 1

Counties Are Corporate Bodies

§ 383 (§ 340.) Each county a body corporate.

Construed with Section 384.—Sections 383 and 384 must be construed together, and they must receive a reasonable construction. Decatur County v. Praytor, etc., Co., 163 Ga. 929, 931, 137 S. E. 247.

Extent of Power Conferred. — This section subjects the counties of this State to suit, but not to suits upon all causes of action. It does not make them generally liable to suits, like individuals or as municipal corporations. Being political subdivisions of the State, they can not be sued unless made subject to suit expressly or by necessary implication. Decatur County v. Praytor, etc., Co., 163 Ga. 929, 931, 137 S. E. 247.

A county can always be sued upon any liability against it created by statute, or for breach of any valid contract which it is authorized by law to make. Decatur County v. Praytor, etc., Co., 163 Ga. 929, 935, 137 S. E. 247. See sec. 384 and the notes thereto.

ARTICLE 2

Suits against Counties

§ 384 (§ 341.) County, when liable to suit.

Editor's Note.—This section was codified from the decisions of the court in the cases of Hammond v. Richmond, 72 Ga. 188, and Smith v. Wilkes & McDuffie Counties, 79 Ga. 125, 4 S. E. 20, and it must be construed in the light of these decisions. See Decatur County v. Praytor, etc., Co., 163 Ga. 929, 932, 137 S. E. 247.

Broad Terms.—Language could not be broader or more comprehensive, or more free from doubt, than the words of this section. When it says the county shall not be liable for any cause of action, it expressly negatives the idea of exceptions other than provided therein, to wit, "unless made so by statute." Wood v. Floyd County, 161 Ga. 743, 745, 131 S. E. 882.

General Rule.—Whenever a county is by statute made liable for a given demand, an action against it will lie therefor, though the statute does not in express terms authorize or provide for the bringing of such an action. Decatur County v. Praytor, etc., Co., 163 Ga. 929, 933, 137 S. E. 247, citing numerous cases.

Liability in Case of Bridges.—A county is liable to suit by contractors for breach of a valid and binding contract for the building of a bridge over a river in such county, upon the assumption that the difference between the representations in the plans and specifications as to the facts and conditions under the bed of the river, and the actual facts and conditons thereof, amounted to a breach of the contract by the county. Decatur County v. Praytor, etc., Co., 163 Ga. 929, 137 S. E. 247.

When County Officials Exceed Powers.—"When public officers, in discharging duties imposed upon them by law, undertake other duties not imposed by law, although intending it to be a benefit to the public, the latter, as represented by county governments, can not be made responsible for torts or ultra vires contracts." Wood v. Floyd County, 161 Ga. 743, 748, 131 S. E. 882.

ARTICLE 3

Contracts, How Made by Counties, Competition in Bidding

§ 389 (1). Contract for public work void without bond.

What Constitutes "Doing Work."—An employee of the contractor is not doing work "under and for the purpose of" the contract where he is engaged only in "winding up the affairs" of his employer in the particular location, such as collecting and looking after the machinery and "shipping it to the next work they were going to do," all of this being done after the work had been fully completed and after the municipality has formally and finally accepted the same as a compliance with the contract between it and the contractor. Southern Surety Co. v. Williams, 36 Ga. App. 692, 137 S. E. 851.

Bond Protects Two Classes.—The bond required by this section is for the use of two classes of persons: first, the municipality, and second, "all persons doing work or furnishing skill, tools, machinery, or materials under or for the purpose of such contract." Both classes of persons are entitled to protection under the bond. Southern Surety Co. v. Dawes, 161 Ga. 207, 212, 130 S. E. 577.

Necessity of Stating "Use" in Bond.—In an action by the trustees of a school district "for the use" of a materialman, who furnished material used in the construction of a school building, against a bonding company as surety upon the bond given by the contractor, where the bond contained no provision that it was given "for the use of the obligee and of all persons doing work or furnishing skill, tools, machinery or materials under or for the purpose of such contract," nor any similar clause, but specifically provided that "no right of action shall accrue for the use or benefit of any other than the obligee," the trustees can have no recovery on the bond merely "for the use" of the materialman. Massachusetts Bonding, etc. Co. v. Hoffman, 34 Ga. App. 565, 130 S. E. 375.

A bond which does not use the words "for the use of," but the expressed obligation is to both "the City of Thomasville" and "all persons doing work or furnishing skilled labor, tools, machinery, or materials under or for the contract," is a sufficient statutory bond under the section, notwithstanding it does not expressly employ the words "for the use of" the municipality or the members of the other class. Being such statutory bond, a materialman, coming under the second class of obligees can in his own name bring a suit on a certified copy thereof, as is expressly provided in section 389 par. 4. Southern Surety Co. v. Dawes, 161 Ga. 207, 211, 130 S. E. 577.

Bond Covering Two Principals.—Where a bond specifies two corporations as principal and a surety company as security, and a suit is brought on the bond by a person of the second class, who alleges in the petition that certain materials for which he seeks a recovery were furnished by him to one of the corporations named as principal, and that only one of such principals contracted with the municipality, such allegation would not alone operate to discharge the surety on the bond. In the absence of fraud, accident, or mistake inducing the surety to excute the bond, he will be bound by his contract as surety for both of the corporations named as principals in the bond, and will not be relieved by mere allegation in the petition that only one of the named principals to whom the materials were alleged to have been furnished was a contractor with the municipality. Southern Surety Co. v. Dawes, 161 Ga. 207, 213, 130 S. E. 577.

Liability of County for Failure to Take Bond.—A county which has failed to take from the contractor the statutory bond required under this act, is liable to any person furnishing material to the contractor for the purpose of the contract, for any loss resulting to such person from the failure of the county to take the required bond. Decatur County v. Southern Clay Mfg. Co., 34 Ga. App. 305, 129 S. E. 290; Ty Ty Consol. School Dist. v. Colquitt Lumber Co., 153 Ga. 426, 112 S. E. 561, and Hannah v. Lovelace-Young Lumber Co., 159 Ga. 856, 127 S. E. 225, were cited in this case. Ed. Note.

Same—Necessity for Work to Be Completed.—It is not essential to the county's liability under this act that the work for which the county contracted shall have been completed. Decatur County v. Southern Clay Mfg. Co., 34 Ga. App. 305, 129 S. E. 290.

Notice as Affecting Liability of Public Body.—A public body can not, by notice to a materialman of its intention to pay direct to the contractor all bills for material which may be furnished to the contractor by the materialman for the purpose of the contract, and that it will not be liable to the materialman for such material, relieve itself of the statutory liability imposed upon it by this act, for loss to a materialman resulting from the failure of the public body to take the bond required. Nor will such notice to the materialman operate to estop him from asserting his right, under the statute, to hold the public body liable. Board v. United States Supply Co., 34 Ga. App. 581, 131 S. E. 292.

Suit on Bond by Materialman, Workers, etc.—A materialman furnishing material to the contractor in making the improvements specified in the contract can in his own name, where the city fails to sue in the time prescribed by the act, maintain an action on the bond, although the bond does not expressly state that it is "for the use of" persons furnishing material for construction of the improvement. Southern Surety Co. v. Dawes, 161 Ga. 207, 130 S. E. 577.

Substitutions of Parties Plaintiff.—Where a materialman improperly brought suit in his own name against the surety, and it appeared that under the terms of the bond no indemnity was provided in behalf of the materialman, an amendment was not allowable making the suit proceed in the name of the county for the use and benefit of the materialman. American Surety Co. v. Bibb, 162 Ga. 388, 134 S. E. 100.

§ 389 (2). Approval and filing of bond.

Trustees Not Surety Liable.—The liability of the trustees under this section, if existing, would not be one in which the surety on the bond actually taken would be concerned where

the bond contained no provision for the assumption of it. In other words, if it could be said that the trustees had subjected themselves to liability to the materialman in failing to take a proper bond, the resulting damage to them would flow from their own default, and not from the failure of the contractor to perform his contract. The surety on the bond which they actually obtained would not ordinarily be liable for damage suffered by them because of their failure to comply with the law and take a bond of different character. Massachusetts Bonding, etc., Co. v. Hoffman, 34 Ga. App. 565, 568, 130 S. E. 375.

§ 389 (4). Action on bond.

In General.—This section specifies the order in which each class may sue on the bond. The municipality primarily may bring a suit on the bond, in which event the remedy of any person in the second class is by intervention in such suit; but if the municipality does not bring a suit within 90 days after the completion of the contract and acceptance by the municipality, any person of the second class may bring a suit upon the bond for the enforcement of any right concerning which the bond affords him protection. Southern Surety Co. v. Dawes, 161 Ga. 207, 212, 130 S. E. 577.

This section is express authority for a person of the second class who has furnished material to a contractor for making a public improvement, to bring an individual suit upon the bond for his own benefit. Southern Surety Co. v. Dawes, 161 Ga. 207, 215, 130 S. E. 577.

Purpose of Provision for Certified Copy of Bond.—The provision for the obtainment of a certified copy of the bond and the basing of a suit thereon is for convenience of persons entitled to sue on the bond, and is not to be construed as requiring a suit to be based on such certified copy rather than upon the original bond. To make such requirement would place the certified copy above the original bond, with no reason for making any such technical distinction. The cause of action, if any, arises from the contract embodied in the bond, not from the primary or secondary character of the paper that might be set out in a petition suing on the bond. Southern Surety Co. v. Dawes, 161 Ga. 207, 212, 130 S. E. 577.

ARTICLE 6

Claims against Counties

§ 411 (§ 362.) Claims to be presented, when.

In General.—Under this section a cause of action against a county such as can be recovered upon does not exist unless the claim has been presented within twelve months after its accrual. Atlantic Coast Line R. Co. v. Mitchell County, 36 Ga. App. 47, 48, 135 S. E. 223.

Allegation of Time.—An action against a county, brought in 1923, to recover taxes alleged to have been illegally levied and collected in 1919, and alleging that a month before the filing of the suit a demand that the taxes so collected be refunded was made upon the county authorities and refused, was barred, under this section. Atlantic Coast Line R. Co. v. Mitchell County, 36 Ga. App. 47, 135 S. E. 223.

County Warrants.—County warrants are not such claims as are required by this section to be presented within twelve months after they accrue for the statute of limitations does not begin to run against county warrants until a demand for payment is repudiated or a fund out of which they can be paid is provided. Central, etc., R. Co. v. Wright, 35 Ga. App. 144, 132 S. E. 449.

Claim of Payee of Void Note.—A claim against a county by a payee of a void note for money used by the county and paid out on outstanding valid warrants, even if enforceable against the county, was barred under this section, where not presented within 12 months after accrual. Farmer's Loan, etc. Co. v. Wilcox County, Ga., 2 Fed. (2d), 465.

Salary of Commissioner.—This section is not applicable to allowances for salary of the road commissioner under a local law as his salary is an allowance provided by law for the benefit of the commissioner as a public officer, and has no reference to contract or breach of duty. Sammons v Glascock County, 161 Ga. 893, 131 S. E. 881.

ARTICLE 11A

Co-operation of Counties with Municipalities for Improvements

§ 431 (1). Co-Operation lawful.

Cited in Decatur County v. Praytor, etc., Contracting Co., 163 Ga. 929, 935, 137 S. E. 247.

ARTICLE 11B

Residue of Bond Issue Used for Improvements

§ 431 (4). Use of balance of proceeds of bond issue, to pay warrants in certain counties.—The ordinaries or boards of county commissioners, or other county authorities in this State where such boards exist, and who have the management of the revenues of the counties, in all the counties in this State having a population of not less than 11,170 nor more than 11,200 according to the 1920 census, are hereby authorized and empowered, whenever the purposes of a county bond issue has been accomplished, which fact is to be judged of by said county authorities in their discretion, and there remains a balance of the proceeds of said bond issue on hand, to use said balance in the satisfaction of outstanding warrants representing the costs of permanent county improvements, or in making permanent county improvements. Acts 1927, p. 215.

ARTICLE 12

System of Drainage

§ 439 (34). Bonds for drainage, how issued and collected.

Sale of Bonds as Prerequisite to Validity of Contract.—A contract is not in any wise invalid by reason of the fact that there has been no actual sale of drainage bonds, assessments for the improvements having been previously made to an amount exceeding the total amount of the drainage contract. Board v. Williams, 34 Ga. App. 731, 732, 131 S. E. 911.

Effect of Collection upon Validity of Contract. — Where the total liability under the drainage contract was within the total amount of assessments, the contract was not thereafter rendered invalid by reason of the fact that such assessments were not collected or enforced, or by reason of the fact that the full par value of all the drainage bonds sold did not come into the district treasury, as this act requires. Board v. Williams, 34 Ga. App. 731, 733, 131 S. E. 911.

Redemption of Land Sold.—This law does not expressly give the right to redeem where land is sold under execution issued for an assessment to meet principal or interest, or the cost of draining the land, in a drainage district. Sigmon-Reinhardt Co. v. Atkins Nat. Bank, 163 Ga. 136, 135 S. E. 720.

The only language of this section bearing upon exemptions simply means that executions issued to collect an assessment are collected in the same manner as tax executions are collected. The procedure for their collection is the same as the procedure for the collection of tax executions. This is a different thing from giving to any lienholder, or person having an interest in the land, the right to redeem. Sigmon-Reinhardt Co. v. Atkins Nat. Bank, 163 Ga. 136, 138, 135 S. E. 720.

CHAPTER 3

County and Municipal Bonds and Debts—Sinking Funds

ARTICLE 1

Election on Issue of Bonds or Incurring New Debt

§ 440 (§ 377). Notice of election on issue of bonds.

I. IN GENERAL.

Issue of Bonds in Installments.—Nothing in the constitution or this section is inconsistent with authorization of an issue of bonds in installments and the levy of the tax for the payment of each installment in the year of its issue. Brady v. Atlanta, 17 Fed. (2d), 764.

II. SUFFICIENCY OF NOTICE.

Publication—For Thirty Days.—Where it appeared that an election was held on Saturday, January 23, 1926, and that notice thereof had been published in the proper newspaper once a week for six weeks, beginning on Friday, December 18, 1925, and ending on Friday, January 22, 1926, since the notice was inserted the first time at least 30 days before the date of the election and as nearly that precise number of days immediately preceding such date as was possible under the circumstances, the fact that the publication began more than 30 days prior to such date was immaterial and afforded taxpayers no cause for attacking the validity of the notice. Clark v. Union School Dist., 36 Ga. App. 80, 135 S. E. 318.

Notice Affecting Custodian of Funds.—In Bank v. Hagedom Const. Co., 162 Ga. 488, 134 S. E. 310, it was held that a bank as custodian of the proceeds of county bonds is chargeable with the notice given under this section as to the purpose of the bond issue and must not permit the funds to be used for other purposes.

§ 444 (1). Bonds of municipalities to be issued without referendum.

By the act of 1921, p. 212, the certificate of the chief of construction, that the petition was signed by the owners of more than fifty per cent of the property abutting on the street or portion of the street sought to be paved, is made prima facie evidence of this fact. The act of 1919 makes this prima facie presumption conclusive, if the owners do not file objections to the passage of the preliminary ordinance providing for the payment. Montgomery v. Atlanta, 162 Ga. 534, 545, 134 S. E. 152.

ARTICLE 2

Bonds, How Validated

§ 446. Duties of the attorney-general or solicitor-general.

Sufficiency of Petition.—It is necessary, of course, to state the facts, and this should be done with sufficient particularity to meet the requirements of good pleading. A petition which fails to show, except by a bare conclusion, that the election resulted prima facie in favor of the issuance of the bonds is fatally defective and subject to general demurrer. Edwards v. Clarkesville, 35 Ga. App. 306, 310, 133 S. E. 45.

Same—Unnecessary Allegations.—The law does not require an allegation as to publication of the notice to the voters, or as to the furnishing of the list of the registered voters (it being sufficient merely to show the number of such voters), or as to the city's indebtedness not exceeding the limit allowed by the constitution. Edwards v. Clarkesville, 35 Ga. App. 306, 310, 133 S. E. 45.

§ 447. Trial of the case and bill of exceptions.

Court Can Determine Validity of Votes.—In a proceeding to validate bonds, it is within the power and jurisdiction of the superior court, upon proper pleadings and sufficient evidence, to pass upon the validity of any votes cast in the election, and to eliminate such votes as are shown by the pleadings and the evidence to be illegal. Turk v. Royal, 34 Ga. App. 717, 131 S. E. 119.

Burden on State to Prove Material Facts.—See Clay v. Austell School Dist., 35 Ga. App. 109, 132 S. E. 127, quoting the paragraph set out under this catchline in the Georgia Code of 1926.

Final Judgment Prerequisite to Bill of Exceptions.—Where an answer filed by intervenors is dismissed as being insufficient to prevent validation, but the order of dismissal provides merely that the petitioners "may take an order confirming and validating," it does not constitute a final judgment "confirming and validating the issuance of the bonds" from which a bill of exceptions will lie, as provided by this section. Veal v. Deepstep Consol. School Dist., 34 Ga. App. 67, 128 S. E. 223.

§ 461. Bonds for refunding or paying off prior issue.—Any county or municipality, desiring to validate any issue of bonds proposed to be issued for the purpose of refunding or paying off and discharging a prior issue of bonds issued by such county or municipality, may have the same validated before issuing, in the manner hereinbefore provided, by presenting a petition to the solicitor-general of the circuit in which said county or municipality is located, or to the attorney-general of the State of Georgia when the solicitor-general is absent from his circuit, setting forth a full description of the bonds to be issued, as well as the bonds to be paid off by such refunding issue, with a full copy of the resolution and all proceedings authorizing the original issue of said bonds sought to be paid off by the refunding issue, also resolutions and proceedings authorizing the refunding issue of bonds. Such petition being presented to the solicitor-general, or the attorney-general, as the case may be, it shall be the duty of such officer to bring proceedings for the validation of such issue of refunding bonds in the matter hereinbefore provided, save and except that in such cases the county or municipality seeking the validation of such bonds shall pay all court costs, and the fee of $25.00 to the solicitor-general. But no bonds shall be allowed validated hereunder that have been issued for a bonded debt created since the Constitution of 1877. Acts 1927, p. 135.

Editor's Note.—Prior to the amendment of 1927 only bonds issued between the adoption of the Constitution of 1887 and the passage of the Act of 1897 could be validated by the operation of this section.

CHAPTER 4

Change of County Lines

§ 471(1). Election in town of 400 to 500 population.—Whenever the boundary lines of one or more of the counties of this State shall lie within the corporate lines of any town or city having a population of not less than four hundred or more than five hundred inhabitants, according to the census of 1920 or any future census, and it is desired to change the county lines and bring the said town or city wholly within the limits of one county only; the change of such county lines shall be effected in the following manner:

Whenever a petition, signed by not less than thirty qualified voters of said town or city shall be addressed to the governing authorities of said town or city asking that an election shall be held as in this Act prescribed, provided that there shall be not less than fifteen petitioners from each of the counties whose boundary lines lie within the corporate limits of said town or city, and said petition be approved by a majority of the members of the governing board of said town or city, it shall be the duty of said governing authorities to submit the matter, as herein provided, to the lawful voters of said municipality at any general election therein, or at any special election held for that purpose, after advertising the same in either case once a week for four weeks in the public gazette in which sheriff's advertisements are published in each of the counties whose boundary lines lie within the limits of said municipality, and also in the public gazette in said municipality if there be one published therein. Said special election shall not be held earlier than thirty days after the publication of first notice, and shall be held under the same rules and regulations as provided for the election of members of the General Assembly. At any such general or special election, the question shall be submitted in such manner as to enable each voter to say whether he desires a

change in existing boundary lines so as to bring the municipality wholly within the line of one of the adjacent counties, and which of the adjacent counties he desires the municipality to be included within. Whenever at such general or special election, a majority of the votes cast shall be in favor of changing the county lines so as to bring the municipality wholly within the line of one of the adjacent counties, and a majority of the votes cast shall be in favor of one of said adjacent counties, the mayor and clerk of said town or city shall within thirty days certify and declare the result of said election to the ordinaries or board of county commissioners or other officers having the control of the county business in each of the county [counties] affected. The said municipal and county authorities shall thereupon proceed to readjust and change the lines of the counties affected, in such manner as to include the said municipality wholly within the limits of the particular county fixed upon by said election, and shall cause a description and map of the new line to be filed and recorded in the office of the clerks of the Superior Courts of each county affected, and shall cause an official notice of the change and description to be published once a week for four weeks in a public gazette in their respective counties; and thereupon the new line or lines shall be held to be established in lieu of the original line or lines. The costs of said proceedings shall be paid by the said town or city desiring the same. Acts 1927, p. 209.

CHAPTER 7

County Revenue

ARTICLE 1

From Taxation

SECTION 1

Special and Extra Tax

§ 504. (§ 395.) Extra tax, how levied.

Public Improvements.—The object stated in paragraph 2 of section 513, although for a county purpose, is held not to be within the purview of section 508; consequently, a tax "to build or repair courthouses or jails, bridges or ferries, or other public improvements, according to contract" does not require the recommendation of a grand jury. Seaboard Air Line R. Co. v. Wright, 34 Ga. App. 88, 90, 128 S. E. 234. See note of this case under § 507.

§ 507. (§ 398.) Tax not sufficient.

Gives County Four Years.—This section clearly provides that the county under certain contingencies may have four years in which to pay its accumulated debt. Central, etc., R. Co. v. Wright, 35 Ga. App. 144, 153, 132 S. E. 449.

Nature of Tax.—See Seaboard Air-Line R. Co. v. Wright, 34 Ga. App. 88, 89, 128 S. E. 234, which contains the same holding set out under this catchline in the Georgia Code of 1926.

Same—Editor's Note.—The question as to the amount of the tax which the county authorities can levy under this section to pay current expenses seems to be at present somewhat in doubt. By the holding in Southwestern R. Co. v. Wright, 156 Ga. 1, 118 S. E. 552 and Central of Ga. R. Co. v. Wright, 156 Ga. 13, 118 S. E. 709 the authorities may legally levy a tax not exceeding 100 per cent of the state tax to pay accumulated debts or current expenses or either. This is by virtue of this section. However in Seaboard Air Line v. Wright, 161 Ga. 136, 129 S. E. 646, it was held that the levy of a tax for the purposes specified in section 508 cannot exceed 50 per cent of the state tax and that this limit extends to current expenses. This decision seems in direct conflict with the holding in the two cases, supra, but the court did not refer to them. The same question arose in Central, etc. R. Co. v. Wright, 36 Ga. App. 386, 137 S. E. 93 and the Court of Appeals after considering both cases declined to follow the Seaboard Case, supra, and upheld the power to levy the 100 per cent tax.

In considering Central, etc., R. Co. v. Wright, 36 Ga. App. 386, 137 S. E. 93, it should be noted that in this case certiorari was granted by the Supreme Court and also that there is another case between the same parties and involving the same point before that court at the present time.

"Current Expenses."—It may be said generally that "current expenses" include the ordinary expenses of the county arising during the year for which the tax is levied, and "county purposes" include all purposes for which county taxation may be levied; that is, the ordinary expenses of the county and the unusual and extraordinary expenses as well. Seaboard Air-Line R. Co. v. Wright, 34 Ga. App. 88, 90, 128 S. E. 234. This case also adopts the holding set out in the first and second paragraphs under this catchline in the Georgia Code of 1926.

§ 508. (§ 399.) Tax for county purposes.

County Purposes.—See note "Current Expenses" under section 507. See, also, note under section 504.

Same—Includes Current Expenses.—The levy of a tax for the purposes specified in this section can not exceed fifty per cent of the State tax. This limit extends to current expenses. Seaboard Air-Line R. Co. v. Wright, 161 Ga. 136, 129 S. E. 646.

SECTION 3

Purposes for Which County Tax May Be Assessed

§ 513. (§ 404.) Objects of county tax.

In General.—This section names nine purposes for which taxes may be levied, and when a tax is levied for any one of these nine purposes it includes all items named in that purpose. Central, etc., R. Co. v. Wright, 35 Ga. App. 144, 132 S. E. 449.

Paragraph 1—Accumulated Indebtedness.—Under the terms "due" and "past due" is embraced, necessarily, the "accumulated indebtedness" of the county. Indebtedness of the county "due" or "past due" may possibly be more extensive, in the last analysis of those expressions, than "accumulated indebtedness," but "accumulated indebtedness" can not be more extensive than the aggregate of the indebtedness which is due and that which is past due. And consequently a tax for the purpose of paying "accumulated indebtedness" is provided for exclusively under this section. Central, etc., R. Co. v. Wright, 35 Ga. App. 144, 153, 132 S. E. 449.

And it follows that a tax for the purpose of paying accumulated indebtedness, as allowed under section 507, can not be lawfully levied under item 9 of section 513, which authorizes a levy "to pay any other lawful charge against the county." Central of Ga. R. Co. v. Wright, 35 Ga. App. 144, 153, 132 S. E. 449.

Paragraph 2.—See notes to §§ 504, 507.

SECTION 4

Assessment and Collection of Taxes

§ 523. (§ 414.) On failure to pay.

Execution against Sheriff.—An execution could not be legally issued under this section against the sheriff of a county on the bond given by the sheriff of a city court of the county, although both offices may have been filled by the same individual. Martin v. Decatur County, 34 Ga. App. 816, 131 S. E. 302.

§ 526. (§ 417.) County tax may be remitted.

As to when claims against county are barred, see section 411 and note.

ARTICLE 2

From Other Sources

§ 530. (§ 421.) Licenses, exhibitions, etc.

Test for Local Ordinance.—In determining whether the

occupation tax imposed by a local ordinance upon peddlers is reasonable, the courts should take into consideration the occupation taxes imposed by this section. Landham v. LaGrange, 163 Ga. 570, 576, 136 S. E. 514.

ARTICLE 4

Paupers

§ 554. (§ 439.) Parents and children bound to support each other.

When Mother Must Support Children.—On the death of a father the duty of supporting the children devolves upon the mother, where the mother has the ability, and the infant child is without means, and is unable to earn a maintenance. Thompson v. Georgia R., etc., Co., 163 Ga. 598, 603, 136 S. E. 895.

CHAPTER 9A

County Manager Form of Government

§ 615 (24). Uniform county manager form of government provided; operation of act.—This act shall be a general law to provide a uniform county commissioner's law for all such counties in this State as may require a commission form of county government composed of a board of county commissioners of roads and revenues for such county, with a county manager as the chief executive officer thereof, to be known as the county-manager form of government, and shall not prevent any county in this State from having a county commissioner's form of county government by local Act as now provided by law, provided such local Act shall not provide a county-manager form of government for such county; and this Act shall not go into effect in any county of this State except upon a majority vote of the qualified voters of the county, and the operation of this Act in any county adopting the same shall be suspended and terminated in like manner upon a majority vote of the qualified voters of the county; and upon the suspension of the operation of this Act in any county, the local Act of force in such county shall automatically be revived and shall have full force and effect in such county, as if its operation had not been suspended in such county by the adoption of this Act by such county; provided, however, that this provision shall not affect a county in this State having a population of 44,051 by the 1920 census taken by the United States government, and this Act shall go into force and effect in a county of this State having a population of 44,051 by the 1920 census taken by the United States government, and the operation of this Act in such county adopting the same shall be suspended and terminated only upon an election called for the purpose of submitting to the qualified voters of the county the question whether the county-manager form of county government shall be established or abolished in such county as provided in this Act. If a majority of the qualified voters of such county, voting in such election, shall vote in favor of establishing the county-manager form of county government in and for such county, this Act shall thereupon become of full force and effect in such county; and if a majority of the qualified voters of such county voting in such election shall vote in favor of abolishing the county-manager form of county government in such county, such form of county government shall thereupon be suspended and terminated in such county; and upon the suspension of the operation of this Act in such county, the local Act of force in such county shall automatically be revived and shall have full force and effect in such county as if its operation had not been suspended in such county by the adoption of this Act by such county; provided, however, that the members of the board of commissioners of such county, in office under the provisions of this Act at the time of the suspension of the operation of this Act in such county, shall hold office and act as the commissioners of such county under the provisions of such local Act of such county until the expiration or their respective terms of office under the provisions of this Act, and until their successors shall be elected and qualified under the provisions of such Act for such county; provided, further, that the operation of this Act in any county of this State shall not be suspended and terminated by any election held within two full years after this Act shall be put into effect in such county. If the ordinary of the county shall be in charge of the affairs of such county at the time of the adoption of this Act in such county, the ordinary shall take charge of the affairs of such county upon the supervision of the operation of this Act in such county, as now provided by law for counties having no county commissioners. Acts 1922, pp. 83, 93, 94; 1927, p. 211.

Editor's Note.—The first proviso and all the provisions that follow it down to the second proviso, were inserted by the amendment of 1927.

CHAPTER 12

Roads, Bridges, Ferries, Turnpikes, Causeways, Crossings, etc.

ARTICLE 1

Public Roads

SECTION 1

Classification of Roads and Districts

§ 629 (1). Post roads deemed public roads; maintenance.

Effect upon Classification of Roads.—This section does not prohibit the county authorities from classifying the road as a first, second, or third-class road as provided by law. Browne v. Benson, 163 Ga. 707, 137 S. E. 626. See section 631.

§ 631. (§ 511). Roads may be classified.

The road commissioners mentioned in this section are provided for in section 724. Browne v. Benson, 163 Ga. 707, 137 S. E. 626.

Effect of Section 694.—The provision of this section, with regard to "concurrence of the majority of the road commissioners" (such commissioners as are provided in section 724), is inconsistent with the exclusive power granted to county commissioners of roads and revenues in section 694 et seq. This ruling is based upon the theory that the provision for "concurrence of the majority of road commissioners," found in section 631, also applies to the establishment of third-class roads. In fact section 633, codified from Ga. Laws 1894, p. 100, does not mention road "commissioners." The act did authorize classification of third-class roads. Buchanan v. James, 130 Ga. 546, at page 549. The act merely amends the road laws so as to provide for third-class roads and how such roads shall be worked. Section 724 provides for district road commissioners, and their duties are specified in section 729. All of these duties, where the alterna-

tive road law is operative, are reposed solely in the county board of roads and revenues. Browne v. Benson, 163, Ga. 707, 137 S. E. 626.

§ 633. (§ 513). Third-class roads.

See note under section 631.

SECTION 3

Roads; How Laid Out, Altered, or Discontinued

§ 640. (§ 520). Public roads, how laid out or altered.

Method Not Exclusive as to Establishing.—It has several times been ruled that sections 640 et seq., is a general law, providing a method of establishing roads. It is not the only method, but is cumulative, and it has also been held that the establishment of a public road without compliance with sections 640 et seq. is illegal. Shore v. Banks County, 162 Ga. 185, 132 S. E. 753, citing numerous cases.

Does Not Apply to Question of Classification.—This section applies to "any new road, or alternation in an old road," but has no application to the question of whether county commissioners alone have authority to classify public roads into first, second, and third-class as provided in section 631. Browne v. Benson, 163 Ga. 707, 137 S. E. 626. See note to sec. 631.

Adoption of Alternative Road Law.—When the alternative road law is adopted by the recommendation of the grand jury, road commissioners cease to exist in that county, and an exercise of any judicial functions whatever by those persons who may previously have been road commissioners becomes legally impossible. Varner v. Thompson, 3 Ga. App. 415, 60 S. E. 216. Browne v. Benson, 163 Ga. 707, 137 S. E. 626.

State Highway Department Cannot Proceed Hereunder.—This section provides a method applicable alone for the condemnation of rights of way for public roads to be laid out by the proper county authorities and the state highway department cannot proceed by virtue of this section to condemn rights of way for State-aid roads. McCallum v. McCallum, 162 Ga. 84, 132 S. E. 755.

Who May Be Appointed Commissioners. — Anderson v. Howard, 34 Ga. App. 292, 129 S. E. 567, following Brown v. Sams, 119 Ga. 22, 45 S. E. 719, as set out in first paragraph under this catchline in the Georgia Code of 1926.

Same—Presumptions of Validity.—In the absence of anything to the contrary, the presumption would be that the appointment was properly made. Anderson v. Howard, 34 Ga. App. 292, 129 S. E. 567.

Description of Road.—Where it was objected that the road commissioners, or reviewers, did not physically "mark out" the road as required by this section, and the evidence was that they did not actually stake or mark out the road on the ground, or designate its location in any other way except on paper, but they did attach to and make a part of their report a map or plat containing all the information and data necessary for the definite location of the proposed road, this was held a sufficient compliance. Anderson v. Howard, 34 Ga. App. 292, 297, 129 S. E. 567.

§ 642. (§ 522). Persons in possession to be notified.

Notice Signed by Majority Sufficient.—It is not necessary that the notice served on the objectors should be signed by all the commissioners. A majority is sufficient. Anderson v. Howard, 34 Ga. App. 292, 129 S. E. 567.

Clerical Error in Notice.—The words in a notice, "said road to be fifty feet in length," clearly appeared to be a clerical error, and, the length of the road otherwise appearing therein, it was proper to overrule a motion to dismiss the proceeding, based on the ground that the notice showed that the road was to be only fifty feet long, and for that reason could not be of public utility. Anderson v. Howard, 34 Ga. App. 292, 129 S. E. 567.

Failure to Serve All Parties.—Where the citation was published as required by sec. 641, a plaintiff cannot object to the proceedings on the ground that certain other persons, through whose land the road would pass, had not been served with written notice as required by this section. Anderson v. Howard, 34 Ga. App. 292, 296, 129 S. E. 567.

SECTION 9

Damages, How Assessed

§ 678. (§ 557). Landowners aggrieved, how redressed.

Meaning of "Vicinage."—The word "vicinage," in this section means the neighborhood, or surrounding or adjoining district; and its extent does not depend upon an arbitrary rule of distance or topography, but varies according to the sparseness or density of settlement in county or city districts. Graves v. Colquitt County, 34 Ga. App, 271, 129 S. E. 166.

ARTICLE 2

Alternative Road Law

§ 694. (§ 573). County authorities to lay out roads.

Does Not Include Roads Inside of Cities.—The word "road," wherever used in these sections, seems clearly to indicate that roads lying outside the municipalities only are included in the term itself. Especially is this true when sections 695 and 696 are considered; for the residents of cities are not affected by the provisions of section 695, declaring who shall be subject to road duty, nor are they subject to the payment of the commutation tax provided for in section 696. Mitchell County v. Cochran, 162 Ga. 810, 817, 134 S. E. 768.

Classification under Alternative Road Law.—The alternative road law having been adopted in Muscogee County, the commissioners of roads and revenues of that county had the exclusive right to classify the roads of that county at any time, in their discretion. Browne v. Benson, 163 Ga. 707, 137 S. E. 626. See in connection with classification of roads section 631 and notes.

ARTICLE 6

Commissioners of Public Roads

SECTION 1

Appointment and Obligation to Serve

§ 724. (§ 584). Three commissioners for each district, two may act.

See sec. 631 and notes thereto.

ARTICLE 12

Private Ways

§ 808. (§ 662). Not more than fifteen feet wide.

See note "Prescriptive use Unnecessary" under section 819.

§ 819. (§ 673). Can not be closed after one year without notice.

Way Need Not Be Established.—This section, properly construed, means that notwithstanding a road may not be a private way within the meaning of the law, yet if persons have used it—traveled it—for as long as a year as though it were such in fact, the owner can not obtruct or close it without first giving the prescribed notice. It is not the purpose of this section to enable the user of the road to hold the owner at bay until the road may become a private way by prescription, but its clear intent is that if the owner sits by and for a year or more permits another to travel a road over his land as though it were a private way, such conduct on his part speaks of a necessity for the way to the extent that the law will preserve the status for 30 days in order that the parties using the road may take steps to have it made permanent by condemnation. Barnes v. Holcomb, 35 Ga. App. 713, 716, 134 S. E. 628, citing Neal v. Neal, 122 Ga. 804, 50 S. E. 929.

Prescriptive Use Unnecessary.—The provisions of the present section were in the earler codes, and, what is more, the article in which they appeared in each of such earlier codes was devoted exclusively to the acquisition of private ways by express grant and by condemnation. It is thus seen that the right definied in this section was not dependent upon such use as could ultimately have resulted in prescription. These facts regarding the history of this section apply equally to the history of section 808. Barnes v. Holcomb, 35 Ga. App. 713, 719, 134 S. E. 628.

Necessary Allegations.—An application to prevent closing a road until the thirty days notice is given will be sufficient to show the jurisdiction of the ordinary where it de-

scribes the road with reasonable certainty, and alleges that the road has been used by the applicant as a private way for as much as a year, and that the owner of the land over which it passes has obstructed or closed it without first giving the 30-days notice in writing. In such a case it is not necessary to make the allegations required in an application for the removal of obstructions from a private way claimed by prescription under the provisions of section 824. Barnes v. Holcomb, 35 Ga. App. 713, 716, 134 S. E. 628.

ARTICLE 13

State Highway Department. Reorganization.

SECTION 1

Reorganization, Assent to Federal Law and Membership of Department

§ 828 (1). State Highway Department reorganized.

As to construction through municipality without consent of local authorities, see note to sec. 828(31).

SECTION 6

Powers and Duties of Highway Department

§ 828 (18). Control of road work, etc.

Effect of Section upon Rights to Condemn.—The provision that no road or portion thereof shall become a part of the system of State-aid roads until so designated by the State highway board does not prevent that board from instituting condemnation proceeding to acquire right-of-way. On the contrary, the law authorizes this proceeding. Cook v. State Highway Board, 162 Ga. 84, 97, 132 S. E. 902.

§ 828 (22). Labor, contracts for construction, etc.; condemnation of right of way.

As to liability of county where state condemns right-of-way, see note to sec. 828(27).

As to necessity of designating road as part of system as prerequisite to condemnation proceedings, see note to § 828(18).

Power of Condemnation Exercised by State.—This law prescribes a full and complete State method of laying out, constructing, and maintaining State-aid roads. The State highway board is given full authority and power to condemn rights of way for these roads. This power was so exercised in the case at bar and it can not be said that the proceeding was brought for and in behalf of the county and not in behalf of the State. Cook v. State Highway Board, 162 Ga. 84, 98, 132 S. E. 902.

§ 828 (27). Rights of way, counties to give.

Condemnation by State—Liability of County.—The fact that the proper county authorities are required to furnish rights of way, free to the State highway board, does not prevent that board from condemning rights of way for State-aid roads whenever the county authorities fail or refuse to furnish said rights of way. This provision may make the counties liable for expenditures incurred by the State highway board in acquiring these rights of way; but it does not bar this board from proceeding to condemn rights of way. Cook v. State Highway Board, 162 Ga. 84, 97, 132 S. E. 902.

SECTION 7

Construction of Roads by County

§ 828 (31). Reimbursement of counties for expenditures.

Construction by State Through Municipality—Liability for Damages.—The decision in Lee County v. Smithville, 154 Ga. 550, 115 S. E. 107, to the effect that the State highway department, in conjunction with the county authorities, may construct a "State-aid road" through a municipality without its consent and even against its will, can have no application so as to preclude a liability against the municipality for damage done to private property by a change in a grade of one of its streets which the municipality knowingly permitted to be made where such street is not part of the highway being constructed or repaired but is entirely disconnected therefrom and is graded merely for the purpose of obtaining dirt with which to widen another street or road which is occupied as a part of the highway. Cleveland v. Kimsey, 34 Ga. App. 480, 130 S. E. 159.

The municipal authorities in such a case having power to prevent such change in the grade of the street may be held liable for damages to private property resulting therefrom where they knowingly permit the work to be done. Cleveland v. Kimsey, 34 Ga. App. 480, 130 S. E. 159.

Power of County to Construct Municipal Roads.—County authorities are not authorized to expend the proceeds of the sale of bonds issued by the county for the purpose of raising money with which to pave and grade the public roads in that county, for the pavement or grading or improvement of streets in a municipality located in the county; and the court did not err in granting an injunction to restrain them from so doing. Mitchell County v. Cochran, 162 Ga. 810, 134 S. E. 768.

§ 828 (33). Power to sue and to condemn rights of way.

As to liability for payment, see note to § 828(27).

CHAPTER 14

County Police, Election, and Maintenance

§ 855 (1). Policemen of good character to be appointed.

County Policeman Not an Employee under Compensation Act.—See note under this catchline under section 3154(2) subdivision (b).

SEVENTH TITLE

Municipal Corporations

ARTICLE 1

Assessors

§ 862. (§ 717.) Tax assessors for city.

Effect upon Existing Power.—As stated in the proviso of the section, the charter powers conferred upon the mayor and aldermen of Savannah as assessors were not taken away by the subsequent enactment of this section. Tietjen v. Mayor, 161 Ga. 125, 130, 129 S. E. 653.

ARTICLE 3

Assessments for Street and Other Improvements

§ 869. (§ 723). Municipalities may issue executions for paving, etc.

Similar to a Tax Fi. Fa.—A fi. fa. issued by a city under this section is in the nature of a tax fi. fa. and governed by the same procedure, and must be taken to be subject to the same period of limitation. Lewis v. Moultrie Banking Co., 36 Ga. App. 347, 348, 136 S. E. 554. See Brunswick v. Gordon Realty Co., 163 Ga. 636, 136 S. E. 898.

ARTICLE 3

Limitation of Powers of City and Its Officers

§ 894. (§ 745). Obstructions in street.

Use of Streets Not Absolute.—The use of streets and highways is not absolute and unrestricted, but is subject to reasonable regulation. Schlesinger v. Atlanta, 161 Ga. 148, 129 S. E. 861.

Same—Restriction of Busses.—The use of streets by common carriers for the purpose of gain is extraordinary and may be conditioned or prohibited as the legislature or municipality deems proper. Hence, if the State or city determines that the use of streets by busses should be restricted or prohibited there is nothing in the Constitution of the United States or this State which prohibits such action. Schlesinger v. Atlanta, 161 Ga. 148, 161, 129 S. E. 861, citing numerous authorities.

§ 898. (§ 749). Municipal corporations liable for injuries, when.

General Rule.—Stated in Atlanta v. Robertson, 36 Ga. App. 66, 135 S. E. 445, as set out under this catchline in the Georgia Code of 1926.

Proximate Cause.—Irrespective of whether a municipal corporation is exercising a "governmental function" in allowing a part of its sewerage system to become worn and in a bad state of repair, where a traveler upon a public street in a city is injured in consequence of a dangerous condition under the surface of a street, of which the city knew or should have known in time to repair it or to give warning of its existence before the injury, the city can not escape liability upon the ground that such condition of the streets was due to its failure to repair its sewerage system. Atlanta v. Robertson, 36 Ga. App. 66, 135 S. E. 445.

§ 899. (§ 750). Municipal property not subject to levy.

Property Cannot Be Encumbered.—A city board of education has no authority to place an incumbrance upon articles which it had unconditionally purchased on account several months previously, and which it had installed as necessary to the operation of the schools. Southern School Supply Co. v. Abbeville, 34 Ga. App. 93, 101, 128 S. E. 231, and cases cited.

§ 900. (§ 751). Voting when personally interested.

Effect on Contract.—A contract between the City of Atlanta and a construction company, in which a member of council is a large stockholder, is null and void, although such member of council did not vote for the ordinance authorizing such contract, and did not use his influence in procuring other members of council to approve and authorize the making of such contract, and although such contract is fair and free from fraud. Montgomery v. Atlanta, 162 Ga. 534, 134 S. E. 152.

Where such an illegal contract has been made, it cannot subsequently be ratified by the resignation of the interested councilman and the confirmation of the contract by the council. Montgomery v. Atlanta, 162 Ga. 534, 547, 134 S. E. 152.

CHAPTER 11

Repeal or Amendment of Municipal Charters

§ 913(19). Referendum, when necessary.—No local law seeking a repeal of a municipal charter of cities of less than fifty thousand inhabitants, or an amendment to any municipal charter of cities of less than fifty thousand inhabitants, which amendment materially changes the form of government of a municipality or seeks to substitute other officers for municipal control other than those in control under existing charter, shall become effective until such repeal or amendment shall be voted upon by the qualified voters of the municipality to be affected as hereinafter provided. Acts 1925, p. 136; 1927, p. 245.

Editor's Note.—Prior to the amendment of 1927, this section applied to repeal or amendment of charters of cities which have a population of less than two hundred thousand. The present section is limited to cities with a population of less than fifty thousand.

CHAPTER 12

Street Improvements in Certain Cities

§ 913(23). Definitions.—In this Act the term "municipality" means any city or town in the State of Georgia now or hereafter incorporated, having a population of six hundred or more.

"Governing body" includes mayor and council, board of aldermen, board of commissioners, or other chief legislative body of a municipality.

The words "improve" and "improvement" include the grading, regrading, paving, repaving, macadamizing, and remacadamizing of streets, alleys, sidewalks, or other public places or ways, and the construction, reconstruction, and altering of curbing, gutting, storm-sewers, turnouts, water-mains, and water, gas, or sewer connections therein.

The word "streets" include streets, avenues, alleys, sidewalks and other public places or ways.

The word "pave" shall include storm drainings, paving, macadamizing, and grading.

"Frontage" means that side or limit of the lot or parcel of land in question which abuts on the improvement. Acts 1927, p. 322.

§ 913(24). Referendum as to adoption of this Act.—The governing body of any municipality in the State of Georgia is hereby authorized and empowered to hold an election (or elections), at such time and under such conditions as may be determined by said governing body, for the purpose of adopting the provisions of this chapter; and when such election has been duly held and a majority of the qualified electors voting therein shall have voted in favor of such adoption, and the election managers shall have duly certified the results of such election to the governing body, and the same shall have been adopted and entered on the minutes thereof, then the aforesaid governing body of such municipality shall be and is hereby authorized and empowered to improve any street or streets in such municipality whenever in the judgment of its governing body the public welfare or convenience may require such improvement, subject only to the conditions and limitations herein prescribed. Acts 1927, p. 322.

§ 913(25). Resolution declaring improvement necessary; publication; protest; contract assessment; etc.—Whenever the said governing body shall deem it necessary to improve any street or any part thereof either in length or width, within the limits of said municipality, and said governing body shall by resolution declare such improvement necessary to be done, and publish such resolution once a week for at least three consecutive weeks in the newspaper in which the sheriff's advertisements of the county in which such municipality is located are published, and if the owners of a majority of the lineal feet of frontage of the lands abutting on said improvement shall not in fifteen days after the last day of publication of such resolution file with the clerk of said city their protest in writing against such improvement, then said governing body shall have power to cause said improvement to be made, and to contract therefor, and to make assessments and fix liens as provided for herein. Any number of steets or any part or parts thereof to be so improved may be included in one resolution, but any protest or objection shall be made as to each street separately; provided, however, that if the owners of a majority of the lineal feet or frontage of the land liable to assessment for such improvement shall petition the governing body for such improvement, citing this chapter and designating by general description the improvement to be undertaken and the street or streets or part thereof to be improved, it shall thereupon be the duty of said governing body to proceed, as hereinafter provided, to cause said improvements to be made

in accordance with the prayers of said petition and their own best judgment, and in such cases the resolution hereinbefore mentioned shall not be required. The petition shall be lodged with the clerk of the municipality, who shall investigate the sufficiency thereof, submit the petition to the governing body, and certify the result of his investigation. Acts 1927, p. 323.

§ 913 (26). Assessment on basis of frontage; intersecting streets.—Each lot or parcel of land abutting upon said improvement shall be charged on a basis of lineal-foot frontage at an equal rate per foot of such frontage with its just pro rata of the entire cost of said improvement, less any amounts paid by street or steam railways or others; provided, however, that the cost of the sidewalks, curbs, and gutters shall be charged entirely to the lots or parcels of land abutting on that side of the street upon which the same are constructed. The frontage of intersecting streets shall be assessed as real estate abutting upon the improvement, and the municipality, for all purposes of this chapter, shall be deemed to the owner thereof, and the mayor or chairman of the board of commissioners shall have authority to sign the petition or file objections provided for herein; and the governing body of the municipality shall pay from the city treasury, as other current bills are paid, its just pro rata of the entire cost of said improvement, unless the owners of a majority of the aforesaid frontage in the petition hereinbefore provided for shall agree to pay the entire cost of said improvement, or unless in the resolution hereinbefore provided for it shall be stated that the entire cost of the improvement is to be paid by the abutting property owners. Acts 1927, p. 324.

§ 913(27). Railroads.—Any railroad or street railway having tracks located in a street at the time of the proposed improvement as provided herein shall be required by the governing body to pave the width of its tracks and two feet on each side thereof, and, except as hereinafter provided, with the same material and in the same manner as the rest of the street is to be paved, and such work shall be performed under the supervision and subject to the approval of the city's engineer, and if such railway shall not, within a period of thirty days after receipt by such railway of the notice to do such work, agree in writing to comply with such order, or if the work is not completed to the satisfaction of the city's engineer within such time as may be described by the governing body, said governing body may have such work done and charge the cost and expense thereof to such railway company located in the municipality and said lien shall have the same rank and priority and shall be enforced in the same manner as the liens provide for in section 913(31). The governing body may, however, require such paving to be of a different material and manner of construction, when, in its judgment such is rendered necessary by the railway uses of the street. Acts 1927, p. 324.

§ 913(28). Powers as to ordinances.—Whenever the petition provided for in section 913(25) is presented, or when the said governing body shall have determined to improve any street, and shall have passed the resolution provided for in said section 913(25), the said governing body shall then have the power to enact all ordinances and to establish all such rules and regulations as may be necessary to require the owners of all the property abutting on the improvement and of any railway in said street to pay the cost of such improvement, and to cause to be put in and constructed all water, gas, or sewer-pipe connections to connect with any existing water, gas, or sewer-pipes in and underneath the streets where such improvement is to be made, and all cost and expense of making such connections shall be taxed solely against such property, but shall be included and made a part of the general assessment to cover the cost of such improvement. Acts 1927, p. 325.

§ 913(29). Resolution as to kind and extent of improvement; contracts; bonds; etc.—After the expiration of the time for objection or protest on the part of the property owners, if no sufficient protest is filed, or on receipt of a petition for such improvement signed by the owners of a majority of the frontage of the land to be assessed, if such petition be found to be in proper form and properly executed, the governing body shall adopt a resolution reciting that no protest has been filed, or the filing of such petition, as the case may be, and expressing the determination of said governing body to proceed with the said improvement, stating the kind of improvement and defining the extent and character of the same, and other such matters as may be necessary to instruct the engineer employed by said municipality in the performance of his duties in preparing for such improvement the necessary plans, plats, profiles, specifications, and estimates. Said resolution shall set forth any and all such reasonable terms and conditions as said governing body shall deem proper to impose with reference to the letting of the contract and the provisions thereof; and said governing body shall by said resolution provide that the contractor shall execute to the city a good and sufficient bond as provided in the Act entitled "Contractors of Public Work Bonded," approved August 19, 1916, and may require a bond in an amount to be stated in such resolution for the maintenance of good condition of such improvements for a period of not less than five (5) years from the time of its completion, or both, in the discretion of said governing body. Said resolution shall also direct the clerk of said municipality to advertise for sealed proposals for furnishing the materials and performing the work necessary in making such improvements. The notice of such proposals shall be published in at least six consecutive issues of a daily paper, or at least two of a weekly paper, having a general circulation in said municipality, and shall state the street or streets to be improved, the kinds of improvements proposd, what, if any, bond or bonds will be required to be executed by the contractor aforesaid, and shall state the time when and the place where such sealed proposals shall be filed and when and where the same will be considered by said governing body. At the time and place specified in such notice the governing body shall examine all bids received, and without unnecessary delay award the contract to the lowest and best bidder, who will perform the work

and furnish the materials which may be selected and perform all the conditions imposed by said governing body as prescribed in such resolutions and notice for proposals, and the said governing body shall have the right to reject any and all bids and readvertise for other bids when the bids submitted are not, in its judgment, satisfactory. Acts 1927, p. 326.

§ 913(30). Appraisers to apportion cost to abutting land.—After the said contract is let and the cost for such improvement, which shall include all other expenses incurred by the city incident to said improvement in addition to the contract price for the work and materials, is ascertained, the said governing body shall by resolution appoint a board of appraisers consisting of three members to appraise and apportion the cost and expense of the same to the several tracts of land abutting on said improvement as hereinbefore provided. Within thirty days from the date of the resolution appointing said board, it shall file with the clerk of the municipality a written report of the appraisal and the assessment and cost upon the several lots and tracts of land abutting on said street, or upon the property of any street or steam railway whose tracks are located in such street where such railway has failed or refused to do the paving provided herein when and as required by the governing body. When said report shall have been returned and filed, the said governing body shall appoint a time for the holding of a session, or shall designate a regular meeting of their body for the hearing of any complaints or objections that may be made concerning the said appraisement, apportionment, and assessment by any person interested, and notice of such session for the said hearing shall be published by the clerk of the governing body once a week for two weeks in a newspaper having a general circulation in said municipality, and said notice shall provide for an inspection of such return by any property owner or other party interested in such return. The time fixed for said hearing shall not be less than five nor more than ten days from the date of the last publication. The said governing body at said session shall have power, and it shall be its duty, to review and correct said appraisement, apportionment, and assessment, and to hear objections to the same, and to confirm the same either as made by said board or as corrected by said governing body. The said governing body shall by ordinance fix the assessments in accordance with said appraisement and apportionment, as so confirmed, against the several tracts of land liable therefor; provided, however, that the rate of interest to be taxed shall not exceed one per cent per annum over and above the rate of interest stipulated in the bonds herein provided for. Assessment in conformity to said appraisement and apportionment as confirmed by said municipality shall be payable to the treasurer of such municipality in cash, and, if paid within thirty days from the date of the passage of said ordinance, without interest; provided however, that in the event the owner of the land or of any street railway so assessed shall, within thirty days from the passage of the ordinance making the assessment final, file with the clerk of the said municipality his or its written request asking that the assessments be payable in installments in accordance with the provisions hereof, the same shall thereupon be and become payable in ten equal annual installments and shall bear interest at the rate of not exceeding seven per cent per annum until paid, and each installment together with the interest on the entire amount remaining unpaid shall be payable each year at such time and place as shall be provided by resolution of the governing body. Acts 1927, p. 327.

§ 913(31). Lien of assessment; date of lien.—Such special assessment and each installment thereof, and the interest thereon and the expense of collection, are hereby declared to be a lien against the lots and tracts of land so assessed from the date of the ordinance levying the same, coequal with the lien of other taxes and prior to and superior to all other liens against such lots or tracts, and such lien shall continue until such assessment and interest thereon shall be fully paid, and shall be enforced in the same manner as are liens for city taxes. Acts 1927, p. 328.

§ 913(32). Bonds.—The said governing body, after the expiration of thirty days from the passage of said ordinance confirming and levying said assessment, shall by resolution provide for the issuance of bonds in the aggregate amount of such assessments remaining unpaid, bearing date not more than thirty days after the passage of the ordinance fixing the said assessment and of such denomination as the said governing body shall determine, which bond or bonds, unless authority is hereafter granted and exercised for making the same a direct obligation of the municipality, shall in no event become a liability of the municipality or of the governing body of the municipality issuing same. One tenth in amount of any such series of bonds with interest upon the whole series to date, shall be payable on such day and at such place as may be determined by the governing body, and one tenth thereof with the yearly interest upon the whole amount remaining unpaid shall be payable on the same day in each succeeding year until all shall be paid. Such bonds shall bear interest at a rate not exceeding six per cent per annum from their date until maturity, payable annually, and shall be designated as "street-improvement bonds," and shall on the face thereof recite the street or streets, part of street or streets, or other public places for the improvement of which they have issued, and, unless authority is hereafter granted and exercised for making the same a direct obligation of the municipality, that they are payable solely from assessments which have been fixed upon the lots or tracts of land benefited by said improvement under authority of this chapter. Said bonds shall be signed by the mayor or chairman of the board of commissioners, and attested by the clerk of the governing body, and shall have the impression of the corporate seal of such municipality thereon, and shall have interest coupons attached, and all bonds issued by authority of this chapter shall be payable at such place either within or without the State of Georgia as shall be designated by said governing body. Said bonds shall be sold by said governing body at not less than par, and the proceeds thereof applied to the pay-

ment of the contract price and other expenses incurred pursuant to the provisions of this chapter, or such bonds in the amount that shall be necessary for that purpose may be turned over and delivered to the contractor at par value in payment of the amount due him on his contract, and the portion thereof which shall be necessary to pay other expenses incident to and incurred in providing for said improvements shall be sold or otherwise disposed of as the said governing body shall direct. Any proceeds from the sale of said bonds remaining in the hands of the treasurer after the payment hereinbefore provided for shall go into the treasury of the municipality as compensation for the services to be rendered by it as contemplated herein. Acts 1927, p. 329.

§ 913 (33). Treasurer's duty as to collection; sales to pay assessment; affidavit of illegality.—The assessment provided for and levied under the provisions of this chapter shall be payable as the several installments become due, together with the interest thereon, to the treasurer of the municipality, who shall keep an accurate account of all such collections by him made, and such collections shall be kept in a special fund to be used and applied for the payment of such bonds and the interest thereon and expenses incurred incident thereto, and for no other purpose, until all said bonds are paid in full; and said treasurer shall give bond in amount to be fixed by the governing body, conditioned upon the faithful performance by him of the duties imposed herein. It shall be the duty of said treasurer, not less than thirty days and not more than fifty days before the maturity of any installment of such assessments, to publish at least one time, in a newspaper having a general circulation in said municipality a notice advising the owner of the property affected by such assessment of the date when such installment and interest will be due, and designating the street or streets or other public places for the improvement of which such assessments have been levied, and that, unless the same shall be promptly paid, proceedings will be taken to collect said installment and interest, or in lieu thereof to mail such notice within the time limits aforesaid to the owners of record of the property affected, at their last known address. And it shall be the duty of said treasurer, promptly within fifteen days after the date of the maturity of any such installment or assessment or interest, to issue an execution against the lot or tract of land assessed for such improvement, or against the party or person owning the same for the amount of such assessment or interest, and shall turn over the same to the marshal or chief of police of the municipality or his deputy, who shall levy the same upon the abutting real estate liable for such assessment and previously assessed for such improvements, and after advertisement and other proceedings as in case of sales for city taxes the same shall be sold at public outcry to the highest bidder, and such sales shall vest an absolute title in the purchaser, subject to the lien of the remaining unpaid installments with interest, and also subject to the right of redemption as provided in section 880, 1169, 1170, 1171, and 1172 of the Code of Georgia; provided that the defendant shall have the right to file an affidavit denying that the whole or any part of the amount for which said execution issued is due, and stating what amount he admits to be due, which amount so admitted to be due shall be paid and collected before the affidavit is received, and the affidavit received for the balance. All affidavits (and the foregoing and following provisions shall apply to the railroads or street railways against whom execution shall be issued for the cost and expense of paving) shall set out in detail the reasons why the affidavit claims the amount is not due, and, when received by the city marshal or chief of police, shall be returned to the superior court of the county wherein the municipality is located, and there be tried and the issue determined as in cases of illegality, subject to all the pains and penalties provided for in other cases of illegality for delay under the Code of Georgia. The failure of said treasurer or clerk to publish or mail said notice of maturity of any installment of said assessment and interest shall in no wise effect the validity of the assessment and interest and the execution issued therefor. Acts 1927, p. 330.

§ 913(34). Suit to enjoin assessment, etc.; time limit.—No suit shall be sustained to set aside any such assessment, or to enjoin the said governing body from making or fixing or collecting the same or issuing or levying executions therefor or issuing such bonds or providing for their payment as herein authorized, or contesting the validity thereof on any grounds or for any reason other than the failure of the governing body to adopt and publish the preliminary resolution provided for in section 913(25) in cases requiring such resolution and its publication, or to give notice of the hearing of the return of the appraisers as herein provided for, unless such suit shall be commenced within thirty days after the passage of the ordinance making such assessment final; provided, that in the event any special assessment shall be found to be invalid or insufficient in whole or in part for any reason whatsoever, the said governing body may at any time, in the manner provided for the making of an original assessment, proceed to cause a new assessment to be made and fixed, which shall have like force and effect as an original assessment. Acts 1927, p. 332.

§ 913(35) Assessment where county is land owner.—Whenever the abutting-land owners of any street of said municipality petition the governing body as herein set out, or said governing body pass the resolution provided for in section 913(25) for the improvement of any street where the county is owner of property on said street, and the governing body of such county has assented to the proposed improvement and has provided funds to pay in cash its proportionate part of the cost of said improvement, the frontage so owned is to be counted as if owned by an individual, for all the purposes of this chapter and the chairman of the board of commissioners of such county is authorized to sign the aforesaid petition or file objections in behalf of the county. Acts 1927, p. 332.

§ 913 (36) Special laws not repealed. — This chapter shall not be construed to repeal any special

or local law, or affect any proceedings under such for the making of improvements hereby authorized or for raising the funds therefor, but shall be deemed to be additional and independent legislation for such purposes and to provide an alternative method of procedure for such purposes, and to be a complete Act not subject to any limitations or restrictions contained in any other public or private law or laws except as herein otherwise provided. Act 1927, p. 332.

§ 913(37) Payment of part by municipality.—Where the municipality desires to pay any portion of the cost of the improvements contemplated herein, in addition to the amounts hereinbefore provided for, the balance may be assessed against the abutting property or the owners thereof, or the owners of any street or steam railway therein, as hereinbefore provided for. Acts 1927, p. 333.

§ 913(38) Proceeding to validate lien.—Any time within sixty days after the assessments are finally determined and fixed as hereinbefore provided for, it shall be lawful for the municipality to file a petition in the superior court of the county in which the said municipality is situated, wherein shall be alleged the fact of the passage and approval of the ordinance, and a copy thereof, the street or part of a street affected thereby, the character of paving or other improvement intended, and the approximate estimate of the cost. Said petition shall allege that the ordinance is authorized by law, and that it will create a lien on all real property abutting on such street or part of a street, for the payment by the owner of each lot or parcel of land so abutting, of the pro rata share of expense assessed to each said lot or parcel of land, as well as on any street or other railroad therein, if any such there be, and shall pray for a judgment by the court declaring such ordinance valid, legal, and binding, and that the liens be set up as alleged. It shall not be necessary in such petition to allege the names of the owners of the abutting property of railroads to be affected, but shall be sufficient to describe the street or portion thereof to be improved, and to indicate, as hereinbefore provided, that the property on said street is to be charged with the expense. At or before the filing of such petition, the same shall be presented to the judge of said court, who shall thereupon pass an order calling upon all persons owning or interested in the real estate abutting on said street, or on the designated part thereof, to show cause, at a time and place to be in said order named, why the prayer of the petition should not be granted and the ordinance and assessments declared valid and the liens be fixed as legal and binding, which time shall not be less than thirty nor more than sixty days later and either in term time or vacation, and either in open court or at chambers. It shall thereupon be the duty of the clerk to publish once a week for four weeks in the official organ of the county, a statement of the case and a copy of said order. At the time and place named, or at such other time and place as the hearing may be adjourned to, any person interested shall be heard to show cause in writing, which writing shall be filed with the clerk, why the prayer should not be granted. The court shall hear all questions of law or fact, and all competent evidence may be offered as in other cases; and the court shall thereupon pass an appropriate order finding and adjudging that said ordinance is lawful and valid and said liens legal and binding, or otherwise, as the law and facts may warrant. The municipality or any person appearing, and who may be dissatisfied with said judgment, may within ten days file a bill of exceptions and carry the matter up to the Supreme Court or the Court of Appeals, as the case may be, for review as in cases of interlocutory injunction. If the final judgment of the superior court shall be in favor of the validity of the ordinance and of the liens claimed, the same shall forever be conclusive, and said matters so determined shall never be thereafter drawn in question in any court. Bonds issued under the provisions of this chapter after such judgment shall have written or stamped thereon the words "Validated and Confirmed by judgment of the Superior Court," specifying also the date when such judgment was rendered and the court wherein it was rendered, which shall be signed by the clerk of the said superior court, and said entry shall be original prima facie evidence of the fact of such judgment, and receivable as such in any court of this State. In any case in which similar bonds have been heretofore issued by any municipality under the authority of particular local Acts, it shall be lawful to validate the same and fix the assessments by final judgment of the superior court under like proceedings and with like effect; provided, however, that before the municipality shall institute such proceedings in such cases, the holder or holders of such bonds or any part thereof shall give to the municipality good and sufficient bond and security to indemnify and hold harmless the municipality against any court costs or other expenses incident to such validating proceedings, the sufficiency of such bond and the security to be approved by the chief executive officer of the municipality. Acts 1927, p. 333.

EIGHTH TITLE

Public Revenue

CHAPTER 1

Taxation

ARTICLE 1

Ad Valorem, and Occupation Taxes

§ 993 (4). Poll tax; exemptions; registered female voters.

Registration as Prerequisite to Tax.—A female more than 21 years of age, by the provisions of the act of 1923, properly construed, is not required to pay poll-tax except for those years in which she may be registered as a voter. Hawthorne v. Turkey Creek School Dist., 162 Ga. 462, 134 S. E. 103.

Poll Tax Prior to 1922.—Females in this State, who were otherwise qualified to vote, might have voted at any time between August 26, 1920, and December 20, 1922, without paying poll-tax prior to such voting. Davis v. Warde, 155 Ga. 748, 118 S. E. 378. Thus there was no poll-tax required of females prior to December of 1922. Hawthorne v. Turkey Creek School Dist., 162 Ga. 462, 468, 134 S. E. 103.

§ 993 (24). Cars operated for hire.

Effect upon Municipal Taxation.—The imposition of a tax under this act and its payment by jitney owners does not confer upon them the right to operate their jitneys on the streets of a city so that the latter can not prohibit their operation. Schlesinger v. Atlanta, 161 Ga. 148, 163, 129 S. E. 861.

§ 993 (49). Coal, coke, wood and lumber.

Constitutionality.—This section as amended in 1924, is not unconstitutional and void because it violates the commerce clause of the Federal Constitution, or the uniform-tax provision of the State Constitution. Georgia-Carolina Lumber Co. v. Wright, 161 Ga. 281, 131 S. E. 173.

§ 993 (54). Foreign corporations.

Effect of Failure to Pay upon Contract.—The failure on the part of the corporation to register with the comptroller-general and pay the tax required by this act, does not render the contracts of the corporation void and unenforceable, since the purpose of the general tax act, as defined by its caption, is merely to raise revenue, and it can not be taken to impliedly nullify contracts made in the absence of compliance with its provisions. Toole v. Wiregrass Development Co., 142 Ga. 57, 82 S. E. 514; Morris v. Moore, 143 Ga. 512, 85 S. E. 635; McLamb v. Phillips, 34 Ga. App. 210, 129 S. E. 570; Alston v. New York Contract Purchase Corp., 36 Ga. App. 777, 138 S. E. 270.

§ 993 (65). Travelling horse traders or gypsies.

Taxation under This Section and Section 993(80). — The plaintiff, a Georgia corporation, having a fixed and permanent place of business, and being a bona fide resident of the State, and having paid the occupation tax imposed by section 993(80), to the tax-collector (who issued his certificate showing the payment, etc.) was not subject to the tax imposed under this section. Fulton Trading Co. v. Baggett, 161 Ga. 669, 131 S. E. 358.

§ 993 (69). Travelling, etc., agents of assessment, etc., companies.

Industrial Life Insurance Agents.—Because of section 2507, this section is not applicable to industrial life insurance agents. Hoover v. Pate, 162 Ga. 206, 132 S. E. 763.

§ 993 (80). Live stock dealers.

As to payment under both this section and section 993(65), see note to section 993(65).

§ 993 (149). Cigarette and cigar dealers; "wholesale" and "retail" dealer defined.

Number of Sales to Constitute One Dealer.—Where the evidence shows only one sale and no attempt at others or intent to engage in retail trade, it is not sufficient to classify the seller as a dealer under the definition of this section. Lichtenstein v. State, 34 Ga. App. 138, 128 S. E. 704.

§ 993 (169). Specific and occupation taxes.—In addition to the ad valorem tax on real estate and personal property, as required by the Constitution and now provided for by law, the following specific and occupation taxes shall be levied and collected each year after the passage of this Act, beginning in 1928. In all cases in this Act where population controls the amounts of tax or license fee to be paid, the last census report of the Federal government shall govern. Acts 1927, p. 57.

§ 993 (170). Poll tax; exemptions.—Upon each and every inhabitant of the State between the ages of twenty-one and sixty years, on the day fixed for the return of property for taxation a poll tax of ($1.00) one dollar, which shall be for educational purposes in instructing children in the elementary branches of an English education only. Provided, this shall not be demanded of blind persons, nor crippled, maimed, or disabled Confederate veterans relieved of such taxes under and by authority of section 766, volume 1, of the Code of 1895, nor shall this tax be required or demanded of female inhabitants of the state who do not register for voting.

§ 993 (171). Ad valorem tax for sinking fund for retirement of State Bonds.—The governor, by and with the assistance of the Comptroller-General, is authorized and empowered annually to levy and assess a tax on the ad valorem value of the taxable property of this State, such rate as may be sufficient to raise a net amount of $100,000.00 as a sinking-fund to pay off and retire the valid outstanding bonds of the State as they fall due, as required by article 7, section 14, paragraph 1, of the Constitution. The tax above authorized shall be specially levied and collected, and separate accounts of the same shall be kept by the Treasurer, and the money arising therefrom shall be applied to paying off the valid bonds of the State as they mature. The said amount so received each year shall be applied to paying off and retiring the valid bonds of the State, maturing in their order continuously. All bonds retired under the provisions of this Act shall be cancelled and stamped with the words "sinking funds," by the Treasurer, and filed in his office. In addition to the foregoing levy, the Governor, by and with the assistance of the Comptroller-General, shall also levy and assess such additional rate of tax on the taxable property of this State as may be necessary to meet the appropriations of the General Assembly of Georgia for each succeeding year. The aggregate ad valorem tax levy in any one year not to exceed the tax-rate limit fixed by the Constitution of this State.

§ 993 (172). Professional tax.—Upon each and every practitioner of law, medicine, osteopathy, chiropractic, chiropodist, dentistry, and upon each and every veterinary surgeon, optician, optometrist, masseur, public accountant, or embalmer, and upon every civil, mechanical, hydraulic, or electrical engineer, or architect, charging for their services as such, $15.00, and the validity of their licenses is made contingent upon the payment of the tax herein provided. And no municipal corporation or county authority shall levy or collect an additional tax on the professions, businesses, or occupations enumerated above, which shall be returned to the tax-receiver of the county of his residence by any person engaged therein on the first day of January, and entered by the receiver on the digest of the county.

§ 993(173). Presidents and officials of corporations.—Upon the president of each express, telegraph, telephone, railroad, street-railroad, steamboat or navigation company, electric light, gas company, water company, sleeping-car company, palace car-company, building and loan association, and investment and loan company, doing business in this State, $25.00. Provided, said tax shall not apply to local building and loan associations fostered as a civic undertaking and not conducted for financial gain or profit. In case the president of any of the companies enumerated in the preceding paragraph does not reside in this State, then in each case the general agent, superintendent, or other person or official in charge of the business of such companies, residing in this State, shall be required to pay the tax of $25.00 hereby imposed; and no municipal corporation, or county

authorities shall levy or collect an additional tax on the officials enumerated above, either as a license, tax, or fee. The president or other officials herein named, of the companies enumerated above are required to make a return as such to the tax-receiver of the county of his residence as of January 1st, which return shall be entered on the digest by said receiver.

§ 993(174). Advertising agents. — Upon each person, firm, or corporation conducting business of an advertising agency using other means than billboards, $50.00; upon each person, firm, or corporation conducting the business of advertising by signs painted, pasted, or printed on billboards or other places where space is leased, rented, or sold, in each county where located, one dollar ($1.00) for each location, and a location is defined to be 75 lineal feet or fractional part thereof; and provided further, that before painting or posting such locations or fractional part thereof, it shall be the duty of the person or persons so advertising to register with the ordinary and tax-collector of said county as required by law, and in case of any increase of advertising said ordinary shall in each instance be notified as to the number of locations.

§ 993 (175). Agencies, collecting, commercial, and mercantile.—Upon each person, firm, or corporation engaged in business as a collecting, commercial, mercantile, or any other agency of like character, $200.00 in every county in the State where they have an office or branch office.

§ 993(176). Detective agencies. — Upon each person, firm, or corporation operating a detective agency or doing detective work for hire or compensation, for each office established in this State, in or near cities or towns of 25,000 or more inhabitants, $200.00; in or near cities or towns from 10,000 to 25,000 inhabitants, $50.00; and in or near cities or towns of less than 10,000 inhabitant, $25.00.

§ 993 (177). Amusement parks. — Upon each person, firm, or corporation running, leasing, or operating an amusement park, other than baseball, football, or bicycle parks, hereinafter mentioned, where two or more amusement devices, resorts, or attractions are operated, and an admission fee is charged for any one or more of the exhibits, resorts, or attractions, $250.00. Provided, this paragraph shall not be construed to exempt or relieve any individual device, resort, amusement, or attraction located in said park from paying any specific or license tax herein imposed.

§ 993 (178). Athletic clubs. — Upon every athletic club, and upon every association or person giving boxing or sparring or wrestling exhibitions where an admission of 50 cents to $1.00 is charged $50.00 for each exhibition; where admission charged is $1.00 to $1.50, $100.00; and where the admission charged is $1.50 and over, $200.00 for each exhibition.

§ 993 (179). Auctioneers.—Upon each and every auctioneer selling by auction in this State jewelry, junk, furniture and household goods, live stock farm implements and produce, and real estate, $100.00 in each county in which he conducts said business. Provided that this section shall not apply to sheriffs and the parties acting as auctioneers for executors, administrators, guardians, and commissioners conducting sales by virtue of the order of any court of this State. Provided that the foregoing provision shall not apply to auctioneers of tobacco or other farm products, nor to attorneys at law conducting sales under power of sale, or other legal sale for their clients.

§ 993 (180). Automobile and truck dealers.—Upon every agent of, upon every dealer in, and upon every person soliciting orders for retail sale of automobiles or trucks, not including wholesale dealers or distributors soliciting or canvassing for local dealers, the sum set out below, viz. In each county with a population of less than 20,000, $25.00; in each county with a population of between 20,000 and 30,000, $55.00; in each county with a population of between 30,000 and 50,000, $85.00; in each county with a population between 50,000 and 75,000, $110.00; in each county with a population between 75,000 and 100,000, $165.00; in each county with a population between 100,000 and 150,000, $220.00; in each county with a population exceeding 150,000, $275.00. Provided, however, that nothing in this Act shall conflict with the provisions fixing a license upon exclusive dealers in used cars. Such dealer, agent, or solicitor selling or offering for sale automobiles or trucks at retail shall be required to pay one license fee only in each county, so as to provide that all persons soliciting orders, or selling automobiles or trucks at retail, shall pay a license to become a dealer or agent, and such license shall entitle such dealer to sell any makes of new or second-hand automobiles or trucks; and shall entitle said dealers to operate, in connection with said business, a service-station in said county in which said license is paid; any dealer having paid such tax to be allowed any number of employees for the purpose of selling cars within the county wherein such tax has been paid. The service-station under this paragraph includes work done only on the makes of cars sold by the dealer under this tax.

§ 993 (181). Dealers in used cars.—Upon every person, firm, or corporation dealing exclusively in used automobiles or trucks, or second-hand automobiles or trucks, the following sums, viz: In each county with a population of less than 20,000, $25.00; in each county with a population of over 20,000 and not over 50,000, $50.00; in each county with a population exceeding 50,000, $100.00.

§ 993 (182). Automobile tires or accessories; (Wholesale).—Upon every wholesale dealer in automobile tires or automobile accessories of any kind whatsoever, the sum of $100.00 for each place of business.

§ 993 (183). Automobile tires or accessories (Retail).—Upon every retail dealer in automobile tires or automobile accessories of any kind whatsoever, the sum of $10.00 for each place of business.

§ 993 (184). Automobile assembling; plants. — Upon every agent or representative of any foreign or non-resident corporation, said agent or representative having an office in this State, operating

an automobile assembling-plant, $300.00 in each county.

§ 993 (185). Automobile truck assembling-plants.—Upon each person, firm, or corporation operating an automobile truck assembling-plant, $300.00 in each county.

§ 993 (186). Automobile garages.—Upon each person, firm, or corporation carrying on the business of operating garages, either for storage or repairing automobiles, in cities of more than 85,000 inhabitants, $75.00; in cities between 20,000 and 35,000 inhabitants, $50.00; in cities between 10,000 and 20,000 inhabitants, $25.00; in cities and towns of 1,000 to 10,000 inhabitants, $15.00; in cities and towns of less than 1,000 inhabitants, $5.00; and persons operating such garages within one mile of the limits of all incorporated cities, $5.00.

§ 993(187). Automobile parking-places.—Upon each person, firm, or corporation operating what is commonly known as automobile parking-places, said parking-places being located on vacant lots, in cities or towns with a population of 50,000 or more inhabitants, $50.00; cities or towns of 25,000 to 50,000, $25.00; in cities or towns with a population of less than 25,000 inhabitants, $15.00, for each location where cars are parked for hire.

§ 993 (188). Awning and tent makers.—Upon all awning and tent makers, $15.00 in each county.

§ 993 (189). Bagatelle, billiard, jenny lind, pool or tivoli tables.—Upon each person, firm, or corporation operating for public use and charging for the use thereof, any billiard, bagatelle, jenny lind, pool or tivoli tables, for each table, a tax according to the following scales: In cities of 100,000 inhabitants or more, $100.00; in cities of 50,000 to 100,000 inhabitants, $75.00; in cities of 25,000 to 50,000 inhabitants, $50.00; in cities of 10,000 to 25,000 inhabitants, $30.00; in cities or towns of less than 10,000 inhabitants, $20.00.

§ 993 (190). Ball and racing parks.—Upon each person, firm, or corporation owning, leasing, or operating any park or place where baseball, football, or other similar game is played, or where automobile, motorcycle, horse, or bicycle races or contests are held, and where admission fees are charged, in cities of more than 50,000 inhabitants, or within five miles thereof, $200.00; in cities with 20,000 to 50,000 inhabitants, or within five miles thereof, $100.00; in cities with 10,000 to 20,000 inhabitants, or within five miles thereof, $50.00; in cities or towns of less than 10,000 inhabitants, or within five miles thereof, $20.00. Provided that this tax shall apply only to those parks and places wherein professional games are played or professional contests are held.

§ 993 (191). Barber-Shops.—Upon every barber-shop the sum of $5.00 for each chair in use, except that in cities or towns of less than 5,000 inhabitants the amount shall be $2.50 for each chair in use.

§ 993 (192). Barber supplies.—Upon all agents for barber supplies, $50.00 for each place of business.

§ 993 (193). Beauty parlors.—Upon each beauty parlor or shop, or manicure shop, $25.00 for each place of business. Provided, that this tax shall not apply to manicure shops operated in connection with barber-shops.

§ 993 (194). Bicycle dealers. — Upon every bicycle dealer selling or dealing in bicycles, either at wholesale or retail, for themselves or upon commissions or consignments, $10.00 for each place of business. All unsold bicycles belonging to dealer shall be liable to seizure and sale for payment of such tax.

§ 993 (195). Bill distributors. — Upon all bill distributors and parties engaged in the business for profit in towns or cities, $25.00; provided, this tax is limited to cities of 15,000 population or more.

§ 993(196). Book agents.—Upon each agent or canvasser for books, maps, or lithographic prints, in each county in which he shall do business, $5.00. Provided this shall not apply to bona fide students earning their way through school or college, or to persons selling Bibles only.

§ 993(197). Bottlers (non-resident). — Upon each non-resident person, firm, or corporation delivering for sale by truck or trucks any carbonated beverages in this State, $150.00.

§ 993 (198). Brokers; stocks and bonds. — Upon each person, firm, or corporation dealing in bonds or stocks, either exclusively or in connection with other business, the sum of $100.00 for each town or city in which such persons, firms, or corporations maintain an office

§ 993(199). Brokers; real estate.—Upon each person, firm, or corporation engaged in the business of buying or selling real estate on commission, or as agents renting real estate, in cities of 50,000 or more inhabitants, $50.00; in cities of 25,000 to 50,000 inhabitants, $30.00; in cities of 10,000 to 25,000 inhabitants, $20.00; in cities or towns of less than 10,000 inhabitants, $15.00. And if such person shall engage in auctioneering or selling property at public outcry or by auction sales, he shall also be liable for and required to pay the tax required of real estate auctioneers by paragraph 10 of this section, to wit: $100.00 in each county.

§ 993 (200). Burglar-Alarms. — Upon all burglar alarm companies, or agents therefor, the sum of $25.00 for each agency or place of business in each county.

§ 993 (201). Cafes and restaurants. — Upon every person, firm, or corporation, except hotels, operating any cafe, restaurant, or lunch-room with fifty or more tables, $100.00; twenty-five to fifty tables, $50.00; ten to twenty-five tables, $25.00; five to ten tables, $10.00; less than five tables, $5.00. Provided, that four seats or stools at tables or counters shall be construed on the same basis as a table.

§ 993 (202). Carbonic acid gas.—Each person, firm, or corporation engaged in the business of manufacturing or vending soft drinks made of or containing carbonic acid gas or any substitute therefor shall pay, as a privilege license to carry on such business, 4 cents on each pound of carbonic acid gas, or any substitute

therefor so used. Provided, that bottled drinks on which this license shall have paid may be resold in original packages without the payment of any further license, under this schedule. Each person, firm, or corporation engaged in such business shall keep accurate books and invoices showing the quantity of carbonic acid gas or any substitute therefor used in such business, and such other information relating to the business as may be required by the Comptroller-General, to enable the State tax officials to check up the returns herein required. At the end of each calendar quarterly period every person, firm, or corporation engaged in such business shall make a report to the Comptroller-General on blanks to be furnished by the Comptroller-General, showing the amount of carbonic acid gas or other substitute therefor consumed during the preceding quarter, and such other information as the Comptroller-General may require, verified by affidavit, and shall with the report remit the license herein provided for each pound of carbonic acid gas or other substitute therefor consumed, as shown by the report, and such remittance shall be paid into the State Treasury. If such report or remittance is not made within fifteen days after the end of the calendar quarter, there shall be added to the sum due for such license for the preceding quarter 10% additional license. The tax officials of the State shall have authority to examine the books and papers of any one engaged in such business, for the purpose of ascertaining the correctness of all reports and remittances. Any person wilfully failing or refusing to make the reports and remittances herein required shall be guilty of a misdemeanor, and any person wilfully making a false affidavit as to any report herein required shall be guilty of perjury.

§ 993 (203). Cars operated for hire.—Upon each person, firm, or corporation operating or keeping automobiles for hire, whether in connection with a garage or not, a tax according to the following scale, whether in or outside of the corporate limits of any city or town, for each automobile so operated in or near cities or towns with less than 1,000 inhabitants, $5.00; in or near cities with 1,000 to 5,000 inhabitants, $10.00; in or near cities with 5,000 to 15,000 inhabitants, $15.00; in or near cities with 15,000 to 30,000 inhabitants, $20.00; in or near cities with 30,000 to 50,000 inhabitants, $25.00; in or near cities with more than 50,000 inhabitants, $40.00.

§ 993 (204). Cars operated for hire over fixed routes.—Upon every person, firm, or corporation operating automobiles for transportation of passengers upon a regular fixed route, commonly known as jitneys, for a uniform fare, for each five passenger car or less, $15.00; and for each car carrying more than five passengers, $25.00.

§ 993 (205). Cars for hire; "Drive-It-Yourself." — Upon each person, firm, or corporation operating or keeping for hire automobiles, commonly known as "Drive-It-Yourself" business, or automobiles without drivers for hire, $150.00 for each place of business. Provided that the tax fixed herein shall not exceed $10.00 for each car operated.

§ 993 (206). Coal and coke. — Upon each person, firm, or corporation dealing in coal and coke, whether for themselves or as agents or as brokers, in cities of more than 1,000 inhabitants and not more than 10,000, $10.00; in cities of more than 10,000 and not more than 20,000 inhabitants, $50.00; in cities of more than 20,000 inhabitants, $100.00 for each place of business.

§ 993 (207). Cemetery companies. — Upon all cemetery companies, agencies, offices, etc., $100.00 in each county.

§ 993 (208). Circuses.—Upon each circus company or other company or companies giving such exhibition beneath or within a canvas enclosure, advertised in print or parade in any manner whatsoever as a circus, menagerie, hippodrome, spectacle, or show implying circus, the following tax measured by the number of railroad-cars, automobiles, trucks, or wagons used in transporting said circus—railroad cars, automobiles, trucks and wagons hereinafter referred to as cars. A circus requiring more than 80 cars, $1,000.00 per day; 40 to 80 cars, $500.00 per day; 20 to 40 cars, $100.00 per day; 10 to 20 cars, $50.00 per day; less than 10 cars, $25.00 per day, for each day it may exhibit in the State of Georgia.

§ 993 (209). Circus side-shows. — Upon each side-show accompanying a circus company in any county having a town or city of 5,000 population or more, $50.00 per day; and in all other countries, $25.00 per day.

§ 993 (210). Concerts, shows, and exhibitions.—Upon all concerts, shows, and exhibitions charging an admission, in or near cities of less than 5,000 inhabitants, $25.00; in or near cities of more than 5,000 and not more than 20,000, $50.00; in or near cities of more than 20,000 and not more than 50,000, $75.00; in or near cities of more than 50,000, $100.00 for each day. Provided, that this section shall not apply to exhibitions given by local performers, nor to exhibitions the entire proceeds of which are for charitable, benevolent purposes, nor to entertainments commonly known as chautauquas. Provided further, this section shall not apply to histrionic, dramatic, and operatic performances given in regular licensed theaters and opera houses, but upon each such theater or opera house, in towns of less than 2,000 inhabitants, $2.50 per month; in cities from 2,000 to 5,000 inhabitants, $4.00 per month; in cities from 5,000 to 10,000 inhabitants, $7.00 per month; in cities from 10,000 to 25,000 inhabitants, $10.00 per month; in cities of over 25,000 inhabitants, $12.50 per month.

§ 993 (211). Commercial reporting agencies.—Upon each person, firm, or corporation engaged in the business of a commercial reporting agency, in each county in the State where they have an office or branch office, $125.00.

§ 993 (212). Street carnivals.—Upon every midway combination of small shows, or street fair or street carnival, the sum of $25.00 each week or fractional part thereof, for each separate tent, enclosure, or place where an admission fee is charged or collected, either directly or indirectly, to witness or hear any performance, or where anything may be exhibited for admission or ticket; and upon every merry-go-round or flying horse accompanying any midway combination, street fair or street carnival, in each city or town

in this State in which it does business, or in each county where they may operate outside of the limits of any city or town in this State, $25.00. Provided, that should the said midway combination, or any of them specified above, be held in connection with county, district, or State agricultural fairs of this State and under the direction of, and within the grounds at the time of holding said fairs, the whole amount of said tax for said attraction when so held shall be $25.00 per week or fractional part thereof.

§ 993 (213). Corporations, domestic.—All corporations incorporated under the laws of Georgia shall, except those that are not organized for pecuniary gain or profit and those that neither charge nor contemplate charging the public for services rendered, in addition to all other taxes now required of them by law, are hereby required to pay each year annual license or occupation tax as specified in the following scale:

Corporations with capital not exceeding $10,000, $10.00.

Corporations with capital over $10,000, and not over $25,000, $15.00.

Corporations with capital over $25,000, and not over $50,000, $20.00.

Corporations with capital over $50,000 and not over $75,000, $30.00.

Corporations with capital over $75,000, and not over $100,000, $50.00.

Corporations with capital over $100,000 and not over $300,000, $100.00.

Corporations with capital over $300,000 and not over $500,000, $200.00.

Corporations with capital over $500,000 and not over $1,000,000, $300.00.

Corporations with capital over $1,000,000 and not over $2,000,000, $500.00.

Corporations with capital over $2,000,000 and not over $3,000,000, $600.00.

Corporations with capital over $3,000,000, and not over $4,000,000. $700.00.

Corporations with capital over $4,000,000, and not over $5,000,000, $800.00.

Corporations wth capital over $5,000,000, and not over $6,000,000, $900.00.

Corporations with capital over $6,000,000, $1,000.00.

Tax required by this paragraph to be paid to the tax-collector of the county where such corporation has its home office of business, and the payment of this tax will relieve such corporation from the payment of said tax in any other county in which it does business, and to that end the tax-collector shall furnish such duplicate receipts as may be needed for authorized agents of the corporaton in other counties of this State.

§ 993 (214). Corporations, foreign. — Upon every agent or representative of any foreign or non-resident corporation, said agent or representative having a place of business or office in this State, in addition to all other taxes now required of them by law, shall be and they are hereby required to pay each year an annual license or occupation tax fixed in accordance with the capital stock of the corporation represented by them, as specified in the preceding paragraph of this section (wherein is fixed the license or occupation tax required of corporations chartered under the laws of Georgia), per schedule or scale therein set forth. Provided, that if such foreign or non-resident corporations shall pay to the Comptroller-General of this State the amount of the occupation or license tax prescribed as per said schedule for resident corporations, then the agents of such foreign or non-resident corporations shall be relieved from said occupation tax. And to this end said foreign corporations shall register their name, capital stock, and the names of their agents with the Comptroller-General at the beginning of each year; and upon said license or occupation tax being paid, it shall be the duty of the Comptroller-General to furnish said corporation a certificate or duplicate receipt for each agent that said tax has been paid, and the presentation of such certificate or duplicate receipt by such agent to the tax-collector of his county shall be sufficient evidence of such payment and authorized the agent to be relieved of said tax. The payment of this tax shall not be construed so as to relieve the corporation or agent of any other license or occu pation tax whatever. Provided, that this and paragraph 44 of this section shall not apply to insurance companies, or to sewing-machine companies, which are separately taxed by other provisions of this Act. Provided further, that all returns by corporations, resident or non-resident, must be made under oath; and when any corporation paying this license or occupation tax requires or demands more than two duplicate certificates for agents, then such corporation shall be required to pay an additional fee of $1.00 for each duplicate certificate or receipt over and above the first two mentioned.

§ 993(215). Dance halls.—Upon each person or persons operating public dance halls where dancing is permitted or taught for hire, $100.00 for each place of business.

§ 993(216). Devices, bowling and ten-pin alleys, cane racks, shooting galleries, etc.—Upon each person, firm, or corporation operating for gain a bowling, box-ball, ten-pin alley or alley of like character, shooting galleries, or booth where firearms are used for firing at a target, and upon persons operating for gain any table, stand, machine, or place for performance of games not prohibited by law, and any rack or booth or place for pitching or throwing rings at canes, knives, or other things of value, or any table or stand for rolling balls for play or for sale or disposition of prizes, for each stand, table, alley, gallery, machine, rack, booth, or other place put in use at each place of business in this State, the sum of $50.00; provided this paragraph shall include automatic baseball games of all kinds.

§ 993 (217). Directories. — Upon each person, firm, or corporation compiling a city directory or directories of any character, and selling or supplying the same on subscription, the sum of $25.00 for each county in which a directory is published. The above tax shall not be construed to apply to telephone companies issuing directories for use in the telephone exchanges.

§ 993 (218). Dry-Cleaning.—Upon all persons, firms, or corporations, engaged in dry-cleaning, $25.00 for each place of business. Provided, this paragraph shall not apply to laundries paying the tax imposed by paragraph 62 of this Act, nor to pressing-clubs paying the tax imposed by paragraph 89 of this Act.

§ 993(219). Electrical contractors.—Upon all electrical contractors, $25.00 for each county.

§ 993(220). Emigrant agents.—Upon each emigrant agent, and upon each employee of such agents, doing business in this State, $1,000.00 for each county in which such agents or employee may do or offer to do business. Provided, that no emigrant agent or employee shall take from this State or attempt to take from this State any person until after first giving a bond to be accepted and approved by the Commissioner of Commerce and Labor, conditioned to pay any valid debt owing by said person to any citizen of this State.

§ 993(221). Employment agencies. — Upon all employment agencies or bureaus doing business in this State, $50.00 for each county.

§ 993(222). Fire-Engines and apparatus.—Upon each dealer in fire-engines and apparatus or either of them, $100.00 for each place of business.

§ 993(223). Fish dealers.—Upon each person, firm, or corporation engaged in the business of packing or shipping oysters, shrimp, or fish, $50.00 for each county.

§ 993(224). Hotels.—Upon every person, firm, or corporation operating a hotel, in counties of over 30,000 inhabitants, a tax of $1.00 for each sleeping-room per annum, and in counties of less than 30,000 inhabitants, 50 cents per annum for each sleeping-room.

§ 993(225). Horse-Traders (traveling) or gypsies.—Upon each company of traveling horse-traders, or traveling gypsies, or traveling companies or other transients, traveling persons or firms, engaged in trading or selling merchandise of live stock of any kind, or clairvoyant, or persons engaged in fortune-telling, phrenology, or palmistry, $250.00, to be collected by the tax collector in each county and distributed as follows: To the county where collected $125.00; to the State $125.00. This tax to be collected in each county where they carry on either kind of business herein mentioned. This tax shall apply to any person, firm, or corporation, who themselves or by their agents travel through the State carrying live stock and carrying with them cooking utensils, and live in tents or travel in covered wagons and automobiles, and who may be a resident of some county or who reside without the State, and who are commonly called traveling horse-traders and gypsies, and such persons or corporations shall be liable to pay this tax. Such tax shall constitute a lien on any live stock owned by such traveling persons or firms. Provided, that no Confederate Soldier, indigent, or any other person, firm, or corporation shall be exempted from the tax provided under this section. Provided, that nothing herein shall prevent any municipality, by proper ordinance, from prohibiting the practice of fortune-telling, phrenology, palmistry, or like practices within its limits.

§ 993(226). Ice cream dealers.—Upon each person, firm, or corporation manufacturing ice cream or selling same at wholesale, in or near cities of more than 50,000 inhabitants, $100.00; in or near cities from 20,000 to 50,000 inhabitants, $75.00; in or near cities from 10,000 to 20,000 inhabitants, $50.00; and in or near cities of less than 10,000 inhabitants, $10.00.

§ 993(227). Insurance agents.—(a) Upon each and every local insurance agent, and upon each and every solicitor or subagent, for any resident or non-resident life, fire, marine, accident, casualty, liability, indemnity, fidelity, bonding or surety insurance company doing business in this State, $10.00, payable to the Insurance Commissioner, for each county in which said agent, solicitor, or subagent shall transact or solicit business.

(b) Upon each and every local insurance agent, and upon each and every solicitor or subagent, for any resident or non-resident assessment life-insurance company, or industrial life, accident, or sick-benefit insurance company, live-stock insurance company or fire and storm co-operative assessment fire-insurance companies doing business in this State, $10.00 payable to the Insurance Commissioner, for each county in which said agent, solicitor, or subagent shall transact or solicit business.

(c) Upon each and every general, special, traveling, state, or district agent, or manager, or assistant manager, by whatever name he may be designated in his contract, of any resident or non-resident life, fire, marine, accident, casualty, liability, indemnity, fidelity, bonding or surety insurance company, doing business in this State, $100.00 payable to the Insurance Commissioner, whose receipt shall authorize the person named therein to go into any county in the State without the payment of an additional tax.

(d) Upon each and every general, special, traveling, state, or district agent, manager, district manager, assistant manager, superintendent, or assistant superintendent, by whatever name he may be designated in his contract, of any resident or non-resident assessment life-insurance company, or industrial life, accident, or sick-benefit insurance company, or live-stock insurance company, doing business in this State, $100.00 payable to the Insurance Commissioner, whose receipt shall authorize the person named therein to go into any county in the State without the payment of an additional tax.

(e) Upon all adjustment bureaus employing adjustors, a tax of $50.00 for each person who adjusts any loss, said tax payable to the Insurance Commissioner, whose receipt shall authorize the person named therein to go into any county in the State.

(f) Upon each and every person not connected with an adjustment bureau, who adjusts insurance losses. $50.00 payable to the Insurance Commissioner, whose receipt shall authorize the person named therein to go into any county in the State. Provided, that this tax shall not apply to local insurance agents who adjust losses without remuneration.

(g) The occupation taxes imposed by this paragraph must be paid in advance by said agents to the Insurance Commissioner, for the fiscal year for which they are levied, before said agent shall be authorized to act as agent for any insurance company. Provided, that railroad-ticket agents selling accident tickets shall not be deemed insurance agents in the sense of this paragraph.

§ 993 (228). Junk dealers.—Upon each person, firm, or corporation engaged in the business of dealing in junk, in or near cities of over 50,000 inhabitants, $100.00; in or near cities of from 10,000

to 50,000 inhabitants, $50,00; in or near cities of from 3,000 to 10,000 inhabitants, $25.00; in cities or towns under 3,000 or within ten miles thereof, $10.00. Each junk dealer, his clerk, agent, or employee shall keep a book, open to inspection, in which he shall make entries of all railroad iron, brass, pieces of machinery, plumbing materials, unused farm implements, automobile parts, fixtures, or accessories purchased by him, together with the name of the party from whom purchased; and upon failure to keep such books or record and produce it on demand, the said dealer shall forfeit his license.

§ 993 (229). Legerdemain and sleight of hand.— Upon each exhibition of feats of legerdemain or sleight of hand, or other exhibition and entertainment of like kind, $25.00 in each county.

§ 993 (230). Legislative agents. — Upon each person registered under the Act of the General Assembly approved August 11, 1911 (see Acts 1911, page 151), the sum of $250.00 for every person, firm, or corporation represented by said agent.

§ 993 (231). Laundries. — Upon each person, firm, or corporation operating a laundry or dyeing establishment, $100.00 if employing ten or more persons; $50.00 if employing five and not more than ten persons; $25.00, if not employing more than five persons.

§ 993 (232). Lighting systems. — Upon each person, firm, or corporation selling, whether as manufacturer, agent, or dealer in any lighting system, whether gas, gasoline, or electrical, $25.00 in each county.

§ 993 (233). Lightning-rods. — Upon each person, firm, or corporation who may contract for or engage in the business of fitting up or erecting lightning-rods in this State, the sum of $10.00 for each county in which he may contract for, or erect, or put in place any lightning-rod or rods upon any structure or building therein; and it shall be the duty of the tax-collector to whom the tax is paid to issue the person paying such tax a license receipt showing such payment. When a license for erecting a certain brand or make or rod has been issued for a county, additional licenses for erecting the same brand or make shall be issued upon the payment of $5.00 each.

§ 993 (234). Live-stock dealers. — Upon each person, firm, or corporation dealing in live stock, having a fixed place of business, in or near cities of more than 50,000 inhabitants, $25.00; in or near cities of from 10,000 to 50,000 inhabitants, $15.00; in or near cities or towns of less than 10,000 inhabitants, $10.00 for each place of business.

§ 993 (235). Lumber dealers. — Upon every person, firm, or corporation engaged in the manufacture of lumber products of any character or dealing in lumber or lumber products, whether for themselves or as agents or brokers, in or near cities of 1,000 inhabitants and not more than 10,000, $10.00; in or near cities of more than 10,000 and not more than 20,000 inhabitants, $50.00; in or near cities of more than 20,000 inhabitants, $100.00 for each place of business.

§ 993 (236). Machines (Store cash registers).— Upon each manufacturer or wholesale dealer in, or agent for the sale of, any cash or account register, $100.00 for each place of business in this State.

§ 993 (237). Machines (Weighing or calculating). — Upon each manufacturer or wholesale or retail dealer in, or agent for the manufacturer of, any weighing scale or scales for calculating weight or prices of commodities, $25.00 for each place of business in this State.

§ 993 (238). Machines (Adding machines). — Upon every manufacturer of, or wholesaler or retail dealer in, or agent for the sale of any adding or calculating machine, check-protector, and domestic ice machines retailing for more than ten dollars, $25.00 for each place of business in counties of 20,000 population or under; $50.00 in counties of a population of over 20,000 and under 50,000; and $100.00 in counties of over 50,000, for each place of business in this State.

§ 993 (239). Machines (Typewriters). — Upon every manufacturer of, or wholesaler or retail dealer in, or agent for the sale of any typewriter or typewriting machine, $25.00 for each place of business in counties of 20,000 population or under; $50.00 in counties of over 20,000 population and under 50,000; $100.00 in counties of over 50,000; this tax to be paid for each place of business in the various counties of this State.

§ 993 (240). Machines (Slot). — Upon every machine, punchboard, or other device, operated, used, or kept in this State, wherein is kept any article to be purchased by depositing therein or paid therefor any coin or thing of value, and for which may be had any article of merchandise whatsoever, where there is no chance incurred by reason thereof, and where the deposit of coin or other thing of value does not exceed one cent per operation, $2.00 for each machine, punchboard, or other device for each county where kept, set up, used, or operated.

(b). Upon each slot-machine wherein may be seen any picture or music may be heard by depositing in said machine any coin or thing of value, and each weighing machine or scale, and every machine making stencils by use of contrivances operated by slot, wherein coin or other thing of value is to be deposited or used, the deposit of coin or other thing of value not exceeding one cent per operation, $1.00 for each machine where kept, set up, used, or operated. On all other machines described in this paragraph, charging more than one cent per operation, $5.00 for each machine where kept, set up, used, or operated. Provided further, that no machine described in this paragraph shall be subject to more than one tax.

§ 993 (241). Machinery and equipment.—Upon every manufacturer of reaping, mowing, binding, or thrashing machines, gas, electrical, or oil engines, agricultural machinery propelled by gas, and road-building machinery propelled by gas or oil, culverts, road-machines and road-graders, selling or dealing in such machinery by itself or its agents in this State, and all wholesale and retail dealers in the above-mentioned machinery, selling such machinery manufactured by companies that have not paid the tax thereon named, shall pay $100.00 annually to the Comptroller-

General on the first of January of each year or at the time of commencement of business, same to be known as a license fee for the privilege of doing business in this State. All companies and others paying this license fee shall, at the time of payment, furnish the Comptroller-General with a list of all agents authorized to sell the aforesaid machinery of their manufacture, or under their control, and shall pay to said Comptroller-General the sum of $10.00 for each of said agents, for the fiscal year or fractional part thereof, for each county in which the said agents may do business. Upon the payment of $10.00 the Comptroller-General shall issue to each of said agents a certificate of authority to transact business in this State. Before commencing business in this State all such agents shall be required to register their names with the Ordinaries of those counties in which they intend to do business, and shall exhibit to said ordinaries their license from the Comptroller-General; wholesale and retail dealers in the above-mentioned machinery shall be required to pay tax provided herein for manufacturers of the above machines sold by them, unless said manufacturers, have paid the tax required by this Act. All unsold machinery belonging to manufacturers, dealers, or other agents, or in their possession or the possession of others, shall be liable to seizure and sale for the payment of such fees, license, or tax. None of the provisions of this paragraph shall apply to licensed auctioneers selling second-hand machinery, or to officers of the law under legal process, or to merchants buying or selling said machinery on which a license tax has been paid as herein provided, and who keep the same and sell and deliver them from their place of business. Any person who shall violate the provisions of this paragraph shall be liable to prosecution for a misdemeanor, and on conviction shall be punished as prescribed in section 1065, volume 2 of the Code of 1910.

§ 993(242). Merry-Go-Rounds. — Upon the owner, manager, keeper, or lessee of any merry-go-round or flying horses, or flying swings, or human roulettes, or scenic devices run by machinery, or of an elevated railway or scenic railway, similar contrivance kept for gain, either directly or indirectly, for each place of business in this State, and for each place where operated, in counties in which there is a city of 50,000 or more inhabitants, $50.00; in all counties in which there are cities between 10,000 and 50,000 inhabitants, $30.00; in counties having a city between 5,000 and 10,000 inhabitants, $20.00; in all other counties, $10.00.

§ 993 (243). Monument dealers. — Upon each person, firm, or corporation selling monuments or tombstones, $25.00 in each county in which they shall have a place of business.

§ 993 (244). Motor-Buses.—Upon every person, firm, or corporation, operating a motor-bus for the transportation of passengers upon a regular or fixed route, $25.00 for each bus of a passenger capacity of seven or less, and on each bus of more than said capacity the sum of $50.00; provided they shall be exempt from local municipal license tax; provided further, that this section shall not apply to passenger buses transporting school children exclusively.

§ 993 (245). Motor-Trucks and trailers.—Upon every person, firm, or corporation engaged in the operation of motor-trucks or trailers for the transportation of freight for hire, $25.00 for each truck or trailer. Provided, this section shall not apply to persons, firms, or corporations hauling farm produce, livestock, and fertilizers exclusively. Provided, that the width of load of trucks and trailers shall not be more than eight feet.

§ 993 (246). Motorcycle dealers.—Upon every person, firm, or corporation selling or dealing in motorcycles or motor attachments for bicycles, whether in connection with the business of selling bicycles or automobiles or otherwise $25.00 for each place of business.

§ 993 (247). Moving pictures.—Upon each and every electric show or exhibition of moving pictures, or illustrated songs, except where given for educational purposes, for each place of business in or near cities or towns of less than 2,000 inhabitants, $2.00 per month; in or near cities or towns of from 2,000 to 5,000 inhabitants, $3.00 per month; in or near cities of from 5,000 to 10,000 inhabitants, $7.00 per month; in or near cities of from 10,000 to 25,000 inhabitants, $10.00 per month; in or near cities of from 25,000 to 50,000 inhabitants, $12.50 per month; in cities of 50,000 or more inhabitants, $25.00 per month, except in suburbs of cities of more than 50,000 inhabitants where the tax shall be $12.50 per month.

§ 993 (248). Motion picture supply houses. — Upon all motion-picture supply-houses, or film-distributing agencies, $100.00 for each place of business.

993(249). Musical instruments, graphophones, organs, phonograph pianos, and victrolos, radios or radio supplies.—Upon each person, firm, or corporation engaged in the business of selling or renting, as agents or dealers, any of the above or similar instruments, in or near cities of more than 50,000 inhabitants, $100.00; in or near cities from 25,000 to 50,000 inhabitants, $50.00; in or near cities of from 10,000 to 25,000 inhabitants, $25.00; in or near cities or towns of less than 10,000 inhabitants, $10.00 for each place of business.

§ 993 (250). News dealers.—Upon each person, firm, or corporation carrying on the business of selling books, magazines, papers, fruits, confections, or other merchandise on the railroad-trains in this State, $500.00. No county or municipality shall have authority to levy any additional tax for the privilege of carrying on said business.

§ 993 (251). Packing-Houses.—Upon every individual agent or firm of agents of any packing-house, and upon any and every individual agent or firm of agents of any person, firm, or corporation dealing in any packing-house products or goods, doing business in this State, for each place of business in each county having a city situated therein with a population of 30,000 or more, $300.00; for each place of business in each county with a population of from 15,000 to 30,000, $150.00; for each place of business in each county with a population of from 5,000 to 15,000, $50.00; for each place of business in each county with a population of less than 5,000, $25.00.

§ 993 (252). Patent rights.—Upon each person,

firm, or corporation selling patent rights in Georgia, the sum of $50.00 for each county in which said business is carried on.

§ 993(253). Selling in baseball parks. — Upon each person, firm, or corporation, in cities having a population of 40,000 or more inhabitants, carrying on the business of selling papers, fruits, drinks, or other articles of merchandise in base-ball-parks, $100.00.

§ 993 (254). Pawnbrokers.—Upon each person, firm, or corporation carrying on the business of pawnbrokers, for each place of business in this State, $200.00. If any pawnbroker shall sell, or offer for sale, or expose in his place of business any pistol, pistol or rifle cartridges, dirk, bowie-knife, or metal knucks, whether sold as unredeemed pledges or otherwise, he shall also be held subject to and required to pay the license-tax required of the dealers in such articles by section 993 (257).

§ 993 (255). Peddlers.—Upon every peddler or traveling vendor of any patent or proprietary medicine or remedies, or appliances of any kind, or special nostrum, or jewelry, or stationery, or drugs, or soap, or of any kind of merchandise or commodity whatsoever (whether herein enumerated or not), peddling or selling any such goods or articles or other merchandise, in each county where the same or any of them are peddled, sold or offered for sale, $50.00. Provided, that no vendor or peddler of perishable farm products raised on Georgia farms shall be required, under this paragraph or any other of this Act, to pay any license fee or tax, State, county or municipal, when same is accompanied by affidavit that such farm product is exclusively Georgia grown. And provided further, that any person qualifying under this papagraph and under sections 1886 et sequitur of Civil Code of Georgia, 1910, to peddle, shall be entitled to one helper only to assist him in carrying on his business as a peddler.

(b) Upon every peddler of stoves or ranges for cooking purposes or clocks or albums, or picture-frames, for each county wherein he may sell or offer for sale either of said articles, $25.00.

(c) Upon any traveling vendor of any patent churn, or patented fence, or patented agricultural implements, or tools, or other patented articles, $25.00 for each county in which he may sell or offer to sell either of the enumerated articles.

(d) Upon every traveling vendor using boats, barges, or other water-craft for the purpose of selling goods of any kind, not prohibited by law, on the rivers or waters within the limits of this State, for each county where he may sell such wares, goods, or merchandise, $50.00. The tax shall be a lien upon the boat, barge, or other water-craft, and its contents, without regard to the ownership thereof.

(e) The term "peddler" is hereby defined as follows, to wit: Any person carrying goods, wares or merchandise of any description with him, other than farm products, either in a pack or vehicle of any character whatever, and who makes delivery of goods ordered on the day of taking orders, shall be held and deemed a peddler, whether such sales are for consumption or resale.

§ 993(256). Pictures and picture-frames.—Upon every person, firm, or corporaton who, in person or through its agents, sells and delivers photographs or pictures of any character, or picture-frames, whether they make charge for such frames or not, $15.00 in each county in which this business is done. Provided, this shall not apply to regular merchants dealing in such goods at their usual place of business.

§ 993 (257). Pistols. — Upon each and every dealer in pistols or in toy pistols which shoot cartridges, or who deals in pistol cartridges, or rifle cartridges, dirks, bowie-knives, or metal knucks, for each place of business in this State, in or near towns or cities of 10,000 or less inhabitants, $50.00; in or near cities of over 10,000 inhabitants, $100.00, provided further, that no person shall be exempted from the payment of this tax.

§ 993 (258). Playing-Cards.—Upon each dealer in playing-cards, $10.00 for each place of business.

§ 993 (259). Photographers. — Upon every daguerrean, ambrotype, photographic, and similar artists carrying on the business of making pictures, $10.00 in each county.

§ 993 (260). Pressing-Clubs. — Upon each person, firm, or corporation operating a pressing-club, $5.00 for each place of business. Provided, that if such person, firm, or corporation shall engage any dry-cleaning business, he shall in addition pay the sum provided for in section 993(218). herein.

§ 993 (261). Practioners (Itinerant). — Upon every intinerant doctor, dentist, optician, optometrist, veterinary surgeon, osteopath, chiropractor, or specialist of any kind, doing business in this State, $25.00 for each county in which they may practice or do business. Provided, that if any one said itinerant specialists shall peddle or sell any drug, medicine, remedy, appliance, spectacles, glasses, or other goods in connection with the practice of his profession, he or they shall be subject to the tax required of peddlers, or traveling vendors of patent or proprietary medicine, nostrums, etc., by section 993(225), $50.00 in each county where they may offer to sell such articles. Provided further, that the provisions ot this paragraph shall not apply to persons whose fixed place of business is in any county of this State, and who have paid the professional tax required by section 993(172).

§ 993 (262). Rinks (Skating). — Upon the owner, manager, keeper, or lessee of any skating-rink in this State, where any fee or charge is made for admission, for the use of skates or skating, in counties having a population of more than 100,000, the sum of $100.00; in counties having a population of 50,000 and not over 100,000, the sum of $50.00; in counties having a population less than 50,000, the sum of $25.00 for each place of business.

§ 993(263). Salary and wage buyers.—Upon each person, firm, or corporation or partnership buying salary or wage accounts and all negotiable papers, $100.00 for each office or place of business maintained.

§ 993(264). Safes and vaults.—Upon each person, firm, or corporation or agent thereof selling

safes or vaults, or vault doors or other vault fixtures, $100.00 for each place of business.

§ 993(265). Sanitariums.—Upon hospitals and sanitoriums, or institutions of like character, whether incorporated or not, conducted for gain, in or near cities of more than 20,000 population, $100.00. In or near cities or towns of less than 20,000, $25.00. Provided, that the above tax shall not apply to public hospitals maintained by municipal corporations for charitable purposes only.

§ 993(266). Shows (Dog and pony.)—Upon each dog, pony, or horse show, where the entire show is exclusively an exhibition of trained dogs, ponies, or horses and monkeys, or a combination of any of them, beneath a tent, canvas, or enclosure, where an admission fee of fifteen cents or more is charged, the sum of $50.00 for each day it may exhibit; and upon such shows with an admission fee of less than fifteen cents, the sum of $30.00 for each day it may exhibit in this State.

§ 993 (267). Shows (Vaudeville).—Upon each person, firm, or corporation operating vaudeville shows which are given under tents or places other than regular licensed theaters, in or near cities or towns of less than 1,000 inhabitants, $2.50 per week; in or near cities or towns of 1,000 to 5,000 inhabitants, $5.00 per week; in or near cities or towns of 5,000 to 10,000 inhabitants, $7.50 per week; in or near cities or towns of 10,000 to 25,000 inhabitants, $10.00 per week; in or near cities or towns of 25,000 to 50,000 inhabitants, $20.00 per week; in or near cities or towns of more than 50,000 inhabitants, $50.00 per week.

§ 993(268). Sprinklers (Automatic).—Upon all automatic sprinkler companies, or agents therefor, the sum of $25.00 for each agency or place of business in each county.

§ 993 (269). Soda-Fountains.—Upon each person, firm, or corporation running or operating soda-fountains in this State, having one draught arm or similar device used in drawing carbonated water, $5.00; and for each additional arm or device, $5.00.

§ 993 (270). Soft-Drink syrups.—Upon all persons and companies carrying on, in this State, the business of manufacturing or selling, by wholesale or retail, or distributing from any depot, car, or warehouse or agency, any carbonated waters or syrups or other articles to be used in corbonated water, or intended to be fixed with or blended with corbonated water to be sold as soft drinks (not including imitations of beer, wine, whiskey, or other intoxicating liquor), as an occupation tax for the privilege of carrying on said business, an amount payable at the end of each quarter, equal to one half one per cent (½%) of the gross receipts from said business for said quarter in this State. Within three days from the end of each quarter of the calendar year each person or company engaged in said kind of business shall make returns under oath to the Comptroller-General of this State, showing the amount of said gross receipts, with a detailed statement of the parties from whom said receipts are received. In case of a corporation, the return shall be made under oath by the president, if a resident of this State; and if the president is not such resident, by the officer or person in charge of the business of said corporation in this State. Upon failure of any person required by this paragraph to make such returns within ten days after the expiration of such quarter, he shall be quilty of a misdemeanor, and shall be liable to prosecution and be punished as now provided in cases of misdemeanor. Upon the making of such returns, the person or company liable to said tax shall pay the same to the Comptroller-General, and upon failure to pay the same the Comptroller-General shall issue an execution for said tax against the property of the person or company liable to said tax. If no returns be made or if the Comptroller-General believes said returns are false, the Comptroller-General shall ascertain the amount of said gross receipts from the best information in his power, and assess the tax according, after giving the company or person liable to said tax at least five day's notice of the time of assessing said tax, and issue his execution accordingly against the person or corporation carrying on said business. Any person, company, or agent carrying on any kind of business specified in this paragraph, after failure to pay the tax herein levied for any preceding quarter during which he or it was liable to tax, shall be guilty of a misdemeanor. It is hereby enacted that all of said taxes received or collected under this paragraph shall be paid into the State treasury. It is also enacted that any person or company paying the tax herein levied shall be relieved of any and all occupation tax or license fees to the State under existing laws on or for the kind of business specified in this paragraph. Provided, however, that said tax shall be collected upon said syrup or corbonated water only once, and shall be paid by the wholesale dealer in said syrup if sold within the confines of this State by such wholesale dealer; and if said syrup or carbonated water shall be purchased by the retail dealer without the limits of this State and shall be shipped to a point within the limits of this State, the same shall be taxed in the hands of such retail dealer, and for the purposes of this tax the price paid for such syrup or carbonated water shall determine the receipts for the same.

§ 993 (271). Swimming-Pools.—Upon each and every person, firm, or corporation operating a swimming-pool where admission fees are charged, or upon persons, firms, or corporations keeping and renting bathing-suits for hire, $20.00 in counties of over 50,000 population, and $10.00 in counties of under the 50,000 population; upon persons, firms, or corporations conducting or operating a bathing resort in or near the ocean and ocean and gulf front of this State, for hire, the sum of $200.00 in each county where such bathing resort is located.

§ 993 (272). Toll-Bridges and ferries.—Upon all persons or corporations operating ferries, $15.00. Upon all persons or corporations operating toll-bridges, $100.00, said tax to be paid to the tax-collector of the county in which the bridge is located or situated. Provided, that this tax shall not be required of any ferry or toll-bridge the receipts from which do not amount to more than $500.00 per annum. And provided further, that the pro-

visions of this paragraph shall apply to line bridges as well as bridges wholly within the confines of this State.

§ 993 (273). Trucks (Gasoline or Oil).—Upon each person, firm, or corporation selling oil or gasoline from a wagon or truck, $10.00 for each wagon or truck.

§ 993(274). Undertakers.—Upon each person, firm, or corporation whose business is that of burying the dead and charging for same, commonly known as undertakers, in, or within a radius of fifteen miles of the corporate or town limits of cities of more than 50,000 inhabitants, $200.00; in or near cities from 10,000 to 50,000 inhabitants, $100.00; in or near cities from 5,000 to 10,000 inhabitants, $50.00; in or near cities or towns of from 2,500 to 5,000 inhabitants, $20.00; in or near towns of less than 2,500 inhabitants, $10.00 for each place of business.

§ 993 (275). Warehouses (Cotton).—Upon each person, firm, or corporation operating a warehouse or yard for the storage and handling of cotten for compensation, license-tax is as follows: Where 500 to 5,000 bales are handled in one year, $10.00; where 5,000 to 10,000 bales are handled in one year, $25.00; where 10,000 to 20,000 bales are handled in one year, $50.00; where 20,000 to 30,000 bales are handled in one year, $100.00; where more than 30,000 bales are handled in one year, $200.00.

§ 993 (276). Warehouse (Merchandise, etc).—Upon each person, firm, or corporation operating a warehouse or yard for storage of goods, wares, or merchandise and farm products other than cotten, and charging for the same, $25.00. Provided, that any warehouse that pays taxes as provided in section 993 (275) shall not be subject to the tax required by this paragraph.

§ 993 (277). Wood dealers.—Any person, firm, or corporation dealing in wood shall pay a tax of $10.00 for each place of business.

§ 993 (278). Plumbing, heating, steam-fitting and tinning contractors.—Upon every plumbing, heating, steam-fitting and tinning contractor, in counties having a city with a population over 50,000 the sum of $25.00; in counties having a city with a population less than 50,000 and over 15,000, the sum of $15.00; in counties having a city or towns less than 15,000 the sum of $10.00.

§ 993 (279). Malt syrups. — Upon all persons and companies carrying on in this State the business of manufacturing or selling, by wholesale or retail, any and all malt syrups, as an occupation tax for the privilege of carrying on said business, an amount payable at the end of each quarter, equal to one half of one per cent (½%) of the gross receipts from said business in this State. Within three days from the end of each quarter of the calendar year each person or company engaged in said kind of business shall make returns under oath to the Comptroller-General of this State, showing the amount of said gross receipts, with a detailed statement of the parties from whom said receipts are received. Provided that said malt syrups shall not be additionally taxed under section 993 (270).

§ 993 (280). Chain of stores. — Upon every person, firm, or corporation, owning, operating, maintaining, or controlling a chain of stores consisting of more than five stores, the sum of $250.00 for each store in excess of five. "Chain of Stores" as used herein shall mean and include five or more stores owned, operated, maintained, or controlled by the same firm, person, or corporation in which goods, wares, or merchandise of any kind are sold at retail in the State of Georgia. Provided, that the provisions of this paragraph shall apply to wholesale chain-stores as well as retail chain-stores, and in no event shall be construed to apply to persons, firms, or corporations engaged in the sale of gasoline, motor oils, and kindred lines when not sold in grocery stores. That the enforcement of the provisions of this section is hereby delegated to the department of revenue.

§ 933 (281). Fish and sea food peddlers; non-resident.—Upon each non-resident firm or individual engaged in peddling fish, oysters, shrimp, or other sea food, ten ($10.00) dollars for each vehicle operated in each county in the State.

§ 993 (282). Dogs.—All dogs are hereby made personal property, and shall be given in and taxed as other property of this State is given in and taxed, such tax be enforced by levy and sale as other taxes are collected, and not to interfere with the imposition and collection of any municipal taxes on dogs, whether such dog or dogs be owned by the taxpayer, his wife or minor children.

§ 993 (283). Sewing-Machines. — Upon every sewing-machine [company] selling or dealing in sewing machines by itself or its agents in this State, and all wholesale and retail dealers in sewing-machines, selling machines manufactured by companies that have not paid the tax herein, $400.00 for each fiscal year or fraction thereof, to be paid to the Comptroller-General at the time of commencement of business, and said companies or dealers shall furnish the Comptroller-General with a list of agents authorized to sell machines of their manufacture or under their control, and shall pay to said Comptroller-General the sum of $10.00 for each of said agents for the fiscal year or fractional part thereof, for each county in which said agents do business for said company. Upon the payment of said additional sum the Comptroller-General shall issue to each of said agents a certificate of authority to transact business in this State. Before doing business under this Act, all sewing-machine agents shall be required to register their names with the ordinaries of those counties in which they intend to operate, and exhibit to said ordinaries their license from the Comptroller-General, and to keep such license posted on their vehicles, or at their place of business. Wholesale and retail dealers in sewing-machines shall be required to pay the tax provided herein for each manufacturer of sewing-machines sold by them, except where the tax required by this Act has been paid by said manufacturer. All unsold sewing-machines belonging to sewing-machine companies, dealers, or their agents, in possession of said companies, dealers, their agents or others, shall be liable to seizure and sale for payment of such fees, license, or tax.

Any person who shall violate the provisions of this section shall be guilty of a misdemeanor, and on conviction shall be punished as prescribed in Section 1065, Volume 2, of the Code of 1910. None of the provisions of this section shall apply to licensed auctioneers selling second-hand sewing-machines, or to officers of the law under legal process, or to merchants buying and selling machines on which a license tax has been paid as herein provided, and who keep the machines and sell and deliver them at their place of business, such sales not being on commission. Provided, that if said merchant shall employ an agent or agents to deliver or sell the machines, the provisions of this Act shall apply to said agent or agents.

§ 993 (284). Taxes, how returned.—The tax provided for in section 993 (291), requires return made to the Comptroller-General in accordance with the law of Georgia. The tax required by §§ 993 (172), 993 (173) shall be returned to the receiver of tax returns in the county of the residence of the person liable to such tax, and shall be entered by the receiver upon the digest of taxable property. In the case of the tax imposed upon foreign corporations by § 993 (212), and the tax imposed by § 993 (241) upon manufacturers of machinery and implements, upon soft-drink syrups by § 993 (270), and upon carbonic acid gas by § 993 (200), the return is required to be made and the tax paid to the Comptroller-General. The tax imposed by § 993 (227) on Insurance Agents is required to be paid to the Insurance Commissioner. The tax imposed upon legislative agents by § 993 (230) shall be paid to the Secretary of State when each person registers, and he shall not be allowed to register until such tax is paid. All other taxes enumerated and set forth in § 993 (169) to § 993 (281) shall be returned and paid to the tax collector of the county where such vocations are carried on. Provided, however, that nothing in this section shall be construed as changing any other provision in this Act as to whom any tax shall be paid.

Editor's Note.—Note that the Act of 1927 from which this section is taken refers to paragraph 111 of section 2 of the act. But paragraph 110, section 993(281) is the last paragraph of said section.

§ 993 (285). Taxes, how paid.—Be it further enacted by the authority aforesaid, that the taxes provided for in this Act shall be paid in full for the fiscal year for which they are levied; and except where otherwise provided, said taxes shall be paid to the tax-collectors of the counties where such vocations are carried on, at the time of commencing to do business. Before any person shall be authorized to open up or carry on said business, they shall go before the ordinary of the county in which they propose to do business and register their names, the business they propose to engage in, the place where it is to be conducted; and they shall then proceed to pay the tax to the collector, and it shall be the duty of the said ordinary to immediately notify the tax-collector, of such registration, and at the end of each quarter to furnish the Comptroller-General with a report of such special tax registration in his office. Any person failing to register with the ordinary or, having registered, failing to pay the special tax as herein required, shall be guilty of a misdemeanor, and on conviction shall be fined not less than double the tax, or be imprisoned, as prescribed by Section 1065 of Volume 2 of the Code of 1910, or both in the discretion of the court; one-half of said fine shall be applied to the payment of the tax and the other to the fund of fines and forfeitures for the use of the officers of the court. Provided, however, that in all counties of this State where the officers of the Superior Court, or city court, are now or may hereafter be upon the salary basis, the other half of the fine shall be paid into the treasury of such counties and shall become the property of such counties.

§ 993 (286). Insurance companies.—(1) All foreign and domestic insurance companies doing business in this State shall pay one and one-half (1½%) per cent. upon gross premiums received by them in this State for the year, with no deductions for dividends, whether returned in cash or allowed in payment or reduction of premiums, or for additional insurance; nor shall any deduction be allowed for premium abatements of any kind or character, or for reinsurance, except companies doing business in Georgia, or for cash surrender values paid, or for losses or expenses of any kind, said tax being imposed upon gross premiums without any deductions whatever except for premiums returned on change of rate and cancelled policies and on reinsurance as above provided. Provided, that local organizations known as Farmers' Mutual Insurance Companies, operating in not more than four counties, shall not be subject to this tax. Provided, further, that mutual fire insurance companies chartered by this State, which require their members to make premium deposits to provide for losses and expenses, and which premium deposits are used wholly for the payment of losses and expenses and returned to the policyholders or held to pay losses and expenses and as reinsurance reserves, shall not be subject to this tax.

(2) Every insurance company incorporated under the laws of this State, and doing business on the legal-reserve plan, shall be required to return for taxation all of its real estate as other real estate is returned, and all of the personal property owned by it shall be ascertained in the following manner: From the total value of the assets held by the company, both real and personal, shall be deducted the assessed value of all real estate owned by the company in this State, the non-taxable funds deposited by the company with the State Treasurer, and the amount of the reserve or net value of the policies required by law to be held by the company for its policyholders, and which belong to such policyholders; the remainder shall be the value of the personal property owned by and taxable against such companies.

(3) That whenever any insurance company doing business in this State shall make it appear by proof to the Insurance Commissioner that one-fourth of the total assets are invested in any or all of the following securities or property, to wit: Bonds of this State or of any county or municipality of this State, property situated in this State and taxable therein, loans secured by liens on real

estate situated in this State, or policy loans by insurance policies issued by such company on lives of persons resident of this State, then the premium tax levied by the first paragraph of this section shall be abated or reduced to one per centum upon the gross receipts of such company; and if the amounts so invested by any such company shall be as much as three fourths of the total assets of such company, then said premium tax shall be abated or reduced to three fourths of one per centum upon such gross receipts of such company.

§ 993 (287). Manufacturing companies.—Be it further enacted by the authority aforesaid, That the president, superintendent, or agents of all manufacturing and other companies, whether incorporated or not (other than railroad, telegraph, telephone, express, sleeping and palace-car companies, and such other companies as are required to make return of the value of their franchise to the Comptroller-General under the provisions of the Act approved December 17th, 1902, entitled an Act to provide for and require the payment of taxes on franchises, and to provide the method for the return and payment of said taxes), and all persons and companies conducting business enterprises of every nature whatsoever, shall return for taxation at its true market value of all their real estate to the tax-receiver of the county wherein said real estate is located. Provided, That if the real estate, upon which said manufacturing or other business enterprise of whatsoever nature is carried on, lies on or across the county line, or county lines, and in two or more counties, said real estate shall be returned to the tax-receiver of the county wherein are located the main buildings containing the machinery, or most of the main buildings. Provided further, that all persons, companies, and corporations not excepted above, conducting any business enterprise upon realty not taxable in the county in which such persons reside or the office of the company or corporation is located, shall return for taxation their stock of merchandise, raw materials, machinery, live stock, and all other personalty employed in the operation of such business enterprises, together with the manufactured goods and all other property of such business enterprises and notes and accounts made and the money used in the prosecution of such business enterprises on hand at the time for the estimation of property for taxation, including all personalty of whatsoever kind connected with or used in such enterprises in any manner whatsoever, in the county in which is taxable the realty wherein such business enterprises are located or carried on. Provided further, that the agent in this State of any person, firm, or corporation resident without this State, who shall have on hand and for sale, storage, or otherwise, as such agents, merchandise or other property, including money, notes, accounts, bonds, stocks, etc., shall return the same for taxation to the tax-receiver of the county wherein the same may be taxed for State and county purposes as other property in this State is taxed. The word "merchandise" shall be held to include guano, commercial fertilizer, save and except that all canal and slackwater navigation companies shall make, through their respective executive officers or stockholders in possession of the same, returns to the tax-receiver of each county in which the same is located, or through which the same shall pass in whole or in part, of the right-of-way, locks, and dams, toll-houses, structures, and all other real estate owned by or used by the company or stockholders thereof. Provided, that this Act shall not make subject to taxation any property of canal or navigation companies which is not subject to taxation by the laws of this State now existing. The president of every manufacturing company in this State, and agent, general manager, or person in possession or charge of the business and property in this State of any non-resident persons, firm, or corporation, shall be required to answer under oath, in addition to those provided by law, the following questions:

1. What is the true market value of the real estate of the company you represent, including the buildings thereon?
2. What is the true market value of your machinery of every kind?
3. What is the true market value of real estate not [now?] used in the conduct of the business of your company?
4. What is the true market value of raw materials on hand on the day fixed for return of property for taxation?
5. What is the true market value of manufactured goods or articles on hand on the day for the return of property for taxation, whether at your principal office or in the hands of agents, commission merchants, or others?
6. How much money did your company have on hand the day fixed for the return of property for taxation, whether within or without the State?
7. State separately the true market value of the notes, bonds, and other obligations for money or property of every kind on hand on the day fixed for the return of property for taxation. And such company shall be taxed upon its entire property so ascertained, and the Comptroller-General is authorized to frame and have propounded any other questions which in his judgment will produce a fuller return.

§ 993 (288). Railroads; return, to whom made.—(1). All railroad companies, street and suburban railroads, or sleeping-car companies, or persons or companies operating railroads or street-railroads or suburban railroads or sleeping-cars in this State, all express companies, including railroad companies doing express, telephone, or telegraph business, and all telephone and telegraph companies, person or persons doing an express, telephone, or telegraph business; all gas, water, electric light or power, hydro-electric power, steam heat, refrigerated air, dockage or cranage, canal, toll-road, toll-bridges, railroad equipment, and navigation companies, person or persons doing a gas, water, electric light or power, hydro-electric power, steam heat, refrigerated air, dockage or cranage, canal, toll-road, toll-bridge, railroad equipment, or navigation business, through their president, general manager, owner, or agent having control of the company's offices in this State, shall be required to make annual tax returns of all property of said company located in this State, to the Comptroller-General; and the laws

now in force providing for the taxation of railroads in this State, shall be applicable to the assessments of taxes from said businesses as above stated. Provided, that small telephone companies, or person or persons doing a telephone business, whose capital stock or property is of less value than ($5,000.00) five thousand dollars, shall be required to make returns to the tax-receivers of the counties in which such property is located, instead of making returns to the Comptroller-General.

(2). Sleeeping car companies. That each non-resident person or company whose sleeping-cars are run in this State shall be taxed as follows: Ascertain the whole number of miles of railroads over which sleeping cars are run, and ascertain the entire value of all sleeping cars of such person or company, then tax such sleeping cars at the regular tax rate imposed upon the property in this State in the same proportion to the entire value of such sleeping-cars that the length of lines in this State over which such cars are run bear to the length of lines of all railroads over which such sleeping-cars are run. The returns shall be made to the Comptroller-General by the president, general agent, agent or person in control of such cars in this State. The Comptroller-General shall frame such questions as will elicit the information sought, and answers thereto shall be made under oath. If the officers above referred to in control of said sleeping-cars shall fail or refuse to answer, under oath, the questions propounded, the Comptroller-General shall obtain the information from such sources as he may, and he shall assess a double tax on such sleeping-cars. If the taxes herein provided for are not paid, the Comptroller-General shall issue executions against the owners of such cars, which may be levied by the sheriffs or any county in this State upon the sleeping-car or cars of the owners, who have failed to pay the taxes.

(3). Railroad equipment companies. Any person or persons, copartnership, company, or corporations, wherever organized or incorporated, owning or leasing or furnishing or operating any kind of railroad cars except dining, buffet, chair, parlor, palace, or sleeping-cars, which cars are operated, or leased or hired to be operated, on any railroad in this State, shall be deemed an equipment company. Every equipment company, as herein defined, shall be required to make returns to the Comptroller-General, and shall be taxed as follows: Ascertain the total number and the value of all cars of such equipment company, the total car-wheel mileage made by said cars in the United States, and the total car-wheel mileage in Georgia. Then tax such cars at the regular rate imposed upon property of this State in the same proportion to the entire value of such cars that the car-wheel mileage made in Georgia bears to the entire car-wheel mileage of said cars in the United States. The returns shall be made to the Comptroller-General by the president, general manager, agent, or person in control of such cars; and the Comptroller-General shall frame questions as will elicit the information and answers thereto shall be made under oath. If the officers above referred to in control of said cars shall fail or refuse to answer under oath the questions propounded, the Comptroller-General shall obtain the information from such sources as he may, and he shall assess a double tax on such cars. If the taxes herein provided are not paid, the Comptroller-General shall issue executions against said equipment company, which may be levied by the sheriff of any county in this State upon any car or cars owned, leased, or operated by the company failing to pay the tax.

§ 993 (289). Railroad returns and by whom made.—The presidents of all railroad companies doing business in this State shall make returns to the Comptroller-General in the manner provided by law for the taxation of the property or the gross receipts or net income of such railroads, and shall pay the Comptroller-General the tax to which such property or gross receipts or net income may be subject according to the provisions of this Act and the laws now in force relating to the tax on railroads; and on failure to make returns or refusals to pay tax, said company shall be liable to all the penalties now provided by law, and the Comptroller-General is hereby required, upon failure of such companies to make returns, or if made and not satisfactory to said officer, to proceed against such companies as provided in Section 1050 of the Code of 1910, Volume 2.

§ 993 (290). Banks.—No tax shall be assessed upon the capital of banks or banking associations organized under the authority of this State, or the United States, located within this State, but the shares of the stockholders of the banks or banking associations, whether resident or non-resident owners, shall be taxed in the county where the bank or banking association are located, and not elsewhere, at their full market value, including surplus and undivided profits, at the same rate provided in this Act for the taxation of other property in the hands of private individuals. Provided, that nothing in this section contained shall be construed to relieve such banks or banking associations from the tax on real estate held or owned by them, but they shall return said real estate at its true market value in the county where located. Provided further, that where real estate is fully paid for, the value at which it is returned for taxation may be deducted from the market value of their shares; and if said real estate is not fully paid for, only the value at which the equity owned by them therein is returned for taxation shall be deducted from the market value of their shares. The bank or banking associations themselves shall make the returns of the property and the shares therein mentioned and pay the taxes herein provided. Branch banks shall be taxed on the value of the capital employed in their operation, in the counties, municipalities, and districts in which they are located, and the parent bank shall be relieved of taxation to the extent of the capital set aside for the exclusive use of such branches.

§ 993 (291). Building and loan associations.—Be it further enacted by the authority aforesaid, that mutual building and loan associations operating only in the county of their charter, and limiting their loans to members, shall not be assessed on their capital loaned to stockholders or members

thereof. All other building and loan associations or other association of like character shall be required to return, to the tax-receiver of the county where such associations are located, all real and personal property of every kind and character belonging to such associations, except the real property located in another county shall be returned to the tax-receiver of that county.

§ 993 (292). Return by resident agents.—Be it further enacted by the authority aforesaid, that the president and principal agents of all incorporated companies herein mentioned, except such as are required to make returns to tax-receivers of the counties, shall make returns to the Comptroller-General under the rules and regulations provided by law for such returns and subject to the same penalties and modes of procedure for the enforcement of taxes from companies or persons required by law to make returns to the Comptroller-General.

§ 993 (293). Duties of tax-collectors, sheriffs, etc.—It shall be the duty of the sheriffs, their deputies and constables of this State to look carefully after the collection of all taxes that may be due the State of Georgia under this Act, or any other special taxes due the State of Georgia. It shall be the duty of all tax-collectors and sheriffs and constables of this State to direct and see that all persons, firms, or corporations violating this Act or any of the tax Acts of this State shall be prosecuted for all violations of the tax laws; and every person convicted for a violation of this Act or any of the special tax laws of Georgia, upon the information of any citizen of this State, one fourth of the fine imposed upon any person for violation of the tax laws shall, by order of said court, be paid to such informant or prosecutor.

§ 993 (294). "In towns and cities" defined.—Whenever in any section or paragraph of this Act the words "in towns or cities" occur, the same shall be construed to mean "within one mile of villages, towns, or cities," unless otherwise specified.

§ 993 (295). Fuel distributors; terms defined.—The terms used in §§ 993 (295) to 993 (302) shall be construed as follows: "Fuels" shall include gasoline, benzol, naptha, and other fuels used in internal combustion engines, but shall not include any such articles which, under a distillation test conducted as prescribed by the bureau of mines of the United States Government for gasoline, will show distillation of the first drop at a temperature of not less than 200 degrees Fahrenheit, and shall not include kerosene oil, or the distillates commonly known as crude fuel oils. "Kerosene" as used in this Act shall include the ordinary household petrolem oil used with wick burners for illuminating, heating, and cooking purposes.

"Distributor" shall include any person, association of persons, firm, corporation, and political subdivision of this State, (a) That imports or causes to be imported, and sells at wholesale or retail or otherwise within this State, any of the fuels or kerosene as specified above; or (b) That imports or causes to be imported, and withdraws for use within this State, by himself or others, any of such fuels or kerosene from the tank-car or other original container or package in which imported into this State; or (c) That manufacturers, refines, produces, or compounds any of such fuels or kerosene within this State, and sells the same at wholesale or retail or otherwise within this State for use or consumption within this State.

The term "distributor" shall not include any retail dealer in such fuels or kerosene, or operator or proprietor of a gasoline filling-station or public garage or other place at which such fuels are sold, where such dealer or other person procures his entire supply thereof from a "distributor" as above defined, who has qualified, as such as hereinafter provided. Act 1927, p. 104.

§ 993 (296). Fuel distributors; amount of tax.—Each distributor of fuels who engages in such business in this State shall pay an occupation tax of four cents per gallon, for each and every gallon of such fuels (1) imported and sold within this State, or (2) imported and withdrawn for use within this State, or (3) manufactured, refined, produced, or compounded within this State and sold for use or consumption within this State, or used and consumed within this State by the manufacturer, refiner, producer or compounder. Nothing in this Act contained shall be so construed as to cause double taxation on any of the products specified herein. Where kerosene or fuels are manufactured or refined in this State and shipped out of this State, and are brought back into this State and used or consumed, the respective taxes herein fixed shall be paid on such kerosene and fuels. Any manufacturer or refiner in this State may sell to any duly licensed distributor under the terms of this Act, and require the purchasing distributor to pay the tax herein imposed; provided, such manufacturer or refiner shall report all such sales to the Comptroller-General not later than the next business day after the shipment was made, giving full details of the sale, including quantity, the car initials and number if a carload shipment, date of shipment, and name and address of consignee. That the proceeds derived from said tax shall be distributed as follows: Two and one-half (2½) cents per gallon to the State-aid fund for use in construction on the State aid system of roads, and one (1) cent per gallon to the several counties of this State, as now provided by law. The ½ cent of said gas tax not allocated under the terms of this bill is hereby set aside to the public schools of said State for an equalization school fund.

§ 993(297). Fuel distributors; tax on kerosene distributors.—Each distributor of kerosene who engages in such business in this State shall pay an occupation tax of one (1) cent per gallon; the proceeds of such tax to be covered into the general treasury. All of the subsequent regulatory provisions of this Act, except the rate of tax, shall apply to distributors of kerosene. The (1) cent of kerosene oil tax levied under this section is hereby set aside to the public schools of said State for an equalization school fund.

§ 993 (298). Fuel distributors; registration. —Every such distributor shall register with the Comptroller-General of this State on or before September 1st, 1927, and on or before the same day

of the same month of each succeeding year, giving his or its name, place of business, and post-office address; and shall obtain from said Comptroller-General a license to do business as a distributor of motor-fuels and kerosene in this State. The Comptroller-General shall keep a well-bound book to be used for the purpose of registration as herein described.

§ 993 (299). Fuel distributor; invoices and bills.—Be it further enacted by the authority aforesaid, that such distributor shall keep and preserve all invoices of bills of fuels and kerosene sold for the period of one year, and submit the same to the Comptroller-General of this State, whenever required by him.

§ 993 (300). Fuel distributors; monthly reports.—All distributors of fuels and kerosene in this State shall make a monthly report, to the Comptroller-General of this State, of all fuels and kerosene sold or used by them. The first such return or report shall be made on or before October 20, 1927, and shall embrace and include all fuels and kerosene sold or used during the month of September, 1927, and a similar return or report shall be made on or before the 20th of each month thereafter, and shall embrace and include all fuels and kerosene sold or used during the immediately preceding calendar month. Said report or return shall show the number of gallons sold or used, and shall be sworn to before an officer of this State duly authorized to administer oaths.

§ 993(301). Payment to Comptroller-General.—Each distributor of fuels and kerosene engaged in such business in this State shall pay the occupation tax of four cents per gallon on fuels and one cent per gallon on kerosene, as herein provided, to the Comptroller-General of this State. The first such payment shall be made on or before October 20, 1927, and shall embrace and include the tax for all fuels and kerosene sold or used during the month of September, 1927; and on or before the 20th of each month thereafter he shall pay to the Comptroller-General said occupation tax on all fuels and kerosene sold or used during the immediately preceding calendar month.

§ 993 (302). Fuel distributors; bond by distributor.—From and after the passage of this Act each distributor of motor fuels and kerosene engaged in such business in this State shall give a good and sufficient indemnifying bond, payable to the State of Georgia, in a sum not less than $25,000.00. Said bond shall be for the payment of the occupation tax, the making of the monthly report and the annual registration as hereinbefore set forth, and for the full, complete and faithful performance of all the requirements of this Act. Said bond shall be made by a surety company authorized to do business in this State, and the cost of same shall be paid by the distributor. Provided further, that when a distributor collects less than $25,000.00 per month in taxes due the State, his bond shall be fixed in the discretion of the Comptroller-General of the State.

ARTICLE 3

Exemption of Property

§ 998. (§ 762). Property exempt from taxation.

Productive Property Taxable.—Under the constitution of this state, productive property is taxable, even though the income be used for charitable purposes. Atlanta Masonic Temple Co. v. Atlanta, 162 Ga. 244, 133 S. E. 864.

Illustration—Masonic Lodge.—A masonic company furnishing various city lodges with quarters, by renting and maintaining a building, is not a purely charitable institution within the meaning of this section, although the lodges occupying the building may be institutions of such character. Atlanta Masonic Temple Co. v. Atlanta, 162 Ga. 244, 133 S. E. 864.

ARTICLE 4

Persons and Property Subject to Taxation.

§ 1003. Property shall be returned at its value.

Power under City Charter.—The power to "lay" and "enforce the payment" of "such taxes on the inhabitants" of, and "those who hold taxable property" in, a city as the "corporate authorities may deem expedient," conferred upon the city by its charter, is not taken away by this section or section 1004. Tietjen v. Mayor, 161 Ga. 125, 129 S. E. 653.

§ 1004. "Fair market value," meaning of.

See note under section 1003.

In General.—This section merely states a rule to be applied by municipalities in arriving at the value at which taxable property shall be assessed for the purposes of taxation, and does not purport to limit investigations or the manner or agencies by which the municipal authorities shall inquire into such value of taxable property. Tietjen v. Mayor, 161 Ga. 125, 131, 129 S. E. 653.

ARTICLE 7

County Taxation of Railroads

§ 1041. Affidavit of illegality.—If any railroad company shall dispute the liability to such county tax, it may be done by an affidavit of illegality, to be made by the president of said railroad, or other officer thereof having knowledge of the facts, in the same manner as other affidavits of illegality are made, and shall be returned for trial to the superior court of the county where such tax is claimed to be owing and where it is sought to be collected, where such cases shall be given precedence for trial over all other cases, except tax cases in which the State shall be a party. Acts 1889, p. 29; 1916, p. 34; 1927, p. 137.

Editor's Note.—By the amendment of 1927 other officers than the President having knowledge of the facts, may make the affidavit prescribed by this section.

ARTICLE 8

Estate and Inheritance Taxes

§ 1041(1). Federal Estate Tax return; duplicate to be filed with State Tax Commissioner.—It shall be the duty of the legal representative of the estate of any person who may hereafter die a resident of this State, and whose estate is subject to the payment of a Federal Estate Tax, to file a duplicate of the return which he is required to make to the Federal authorities, for the purpose of having the estate taxes determined, with the State Tax Commissioner. When such duplicate is filed with the said official, he shall compute the amount that would be due upon said return as Federal Estate Taxes under the Act of Congress relating to the levy and collection of Federal Estate Taxes upon the property of said estate taxable in Geor-

gia, and assess against said estate as State inheritance taxes eighty per centum of the amount found to be due for Federal Estate Taxes. Provided, that if after the filing of a duplicate return and the assessment of the State inheritance taxes the Federal authorities shall increase or decrease the amount of the Federal Estate tax, an amended return shall be filed with the State Tax Commissioner, showing all changes made in the original return and the amount of increase or decrease in the Federal Estate tax and such official shall assess against said estate 80 per cent of the additional amount found to be due for Federal Estate tax. In the event of a decrease in the Federal Estate tax, the State shall refund to said estate its proportion of said decrease. Acts 1925, p. 63; Ex. Sess. 1926, p. 15, 16; 1927, p. 103.

Editor's Note.—Supplemental to the Editor's Note under this section in the Code of 1926, the court pointed out in McAlpin v. Davant, 163 Ga. 309, 136 S. E. 83, that the act of 1925 does not specifically mention the act of 1913 as amended, and does not expressly repeal that law.

The act of 1925 operates only in the future, and does not conflict with the pre-existing act of 1913 as amended, in so far as that law imposed an inheritance tax upon estates left by decedents who died prior to passage of the act. Consequently the act of 1925 does not authorize the assessment and collection of the inheritance tax therein provided for from estates that were left by decedents who died prior to the passage of the act. McAlpin v. Davant, 163 Ga. 309, 136 S. E. 83.

The amendment of 1926 inserted the word "hereafter" near the beginning of the section, and raised the percentage of the state inheritance taxes from 25% to 80% of the amount of the Federal Estate Taxes. Subsequently, the amendment of 1927 added the proviso, with all that follows it, to the end of the section.

Assessment of Estates Left Prior to 1925.—Where there was no assessment or collection of any inheritance tax upon such estate prior to the passage of the act of 1925, the estate was subject to have an inheritance tax assessed and collected therefrom under the act of 1913 as amended, unaffected by the passage of the act of 1925, and was not subject to a tax under the act of 1925. McAlpin v. Davant, 163 Ga. 309, 136 S. E. 83.

§ 1041(2). Duties of County Ordinaries.—When the amount of the of the inheritance taxes to be paid by any estate has been determined, as provided for in § 1041(1), it shall be the duty of said State official to certify the same to the Ordinary of the county where said estate is being administered, who shall enter the same upon the minutes of his Court, and notify the executor or administrator of the amount found to be due, which shall be a charge against the estate and not the several distributive shares. The ordinary shall receive for his services the sum of $3.00 to be taxed as a part of the cost of administration. The tax assessed under the terms of this Act shall be paid direct to the Comptroller-General. Acts 1925, p. 63; 1927, p. 104.

Editor's Note.—By the amendment of 1927, the provision as to the compensation for the services of the ordinary was inserted; and the tax assessed was made payable to the comptroller general instead of to the county tax collector.

Note that while the act of 1927 purports to amend section 2 and 4 of the act of 1926 it is obvious that 1925 was inserted—Query as to constitutionality.

§ 1041(4). Failure to pay; executions.—Whenever the legal representative of any estate taxable under this Act fails to pay the amount assessed against said estate, within six months after notice from proper authority as to the amount, to be paid it shall be the duty of the Comptroller-General to issue execution for the amount of such tax, against said estate, which execution shall be enforced by levy and sale. Acts 1925, p. 63; 1927, p. 104.

Editor's Note.—The provision as to the enforcement of the execution was added, and the duty formally resting upon the county collector was imposed upon the comptroller general, by the amendment of 1927. See Editor's Note to § 1041(2).

§ 1041(17). Tax on transfer of property of non-resident decedent.—A tax of two per centum of its actual value is hereby imposed upon the transfer of the following property of a non-resident decedent:

a. Real or personal property or any interest therein within this State.

b. Shares of stock or registered or coupon bonds or certificates of interest of corporations organized under the laws of this State, or of national banking associations located in this State, or joint stock companies or associations organized under laws of this State.

c. Such tax shall not apply to bonds of this State or any of its subdivisions, or on money deposited in a bank, trust company or other similar institution in this State, if such deposit is owned by a non-resident decedent. Acts 1927, p. 101.

§ 1041(18). Valuation, how made. —The value of any property taxable under the provisions of this Act and the amount of tax imposed thereon shall be determined by the State Tax Commissioner, who shall give notice and an opportunity to be heard to the transferor, administrator, trustee, or other person liable for the payment thereof. The tax shall be imposed upon the transfer of the property situated within this State, and not upon the persons to whom the property is transferred. No deduction shall be allowed from the value of any property taxable under this Act, except an incumbrance upon real property in this State or personal property held within this State as collateral or security for a loan.

§ 1041(19). Time for payments; discount interest.—All taxes imposed by this Act shall be due and payable at the time of the transfer, and shall be paid to the Comptroller-General of the State. If such tax is paid within six months of the death of the decedent a discount of five per centum shall be allowed and deducted therefrom. If such tax is not paid within eighteen months from date of death, interest shall be charged and collected at the rate of ten per centum from the date of death. The tax herein imposed shall be and remain a lien upon the property transferred until paid, and the transferor, executor, administrator, or trustee of the estate shall be personally liable for such tax.

§ 1041(20). Authority to prescribe rules and forms.—The State Tax Commissioner, with the approval of the Comptroller-General, shall have the power to prescribe such rules and regulations and forms not inconsistent with the terms of this Act as may be necessary to carry out the provisions of this Act.

§ 1041(21). Exemption.—The tax imposed by this Act on personal property (except tangible personal property having an actual situs in this State) shall not be payable if the laws of the State of residence of the descendent at the time of his

death exempted residents of this State from transfer taxes or death taxes on such property.

CHAPTER 2

Taxes, How Returned and Collected

ARTICLE 2

Returns to Receiver of Tax Returns

SECTION 9

Double Tax, When Collected

§ 1105. (§ 847). Defaulters to be doubly taxed.

Land Assessed for Owner.—Where the owner of land fails to return it for taxation, under the authority of this section it may be assessed for him. Wiley v. Martin, 163 Ga. 381, 382, 136 S. E. 151.

§ 1106. (§ 848). Property not returned to be doubly taxed.

Assessed as Unreturned Property.—If the owner of land fails to return it for taxation, and if the owner is unknown, under the authority of this section it is to be assessed as unreturned property. Wiley v. Martin, 163 Ga. 381, 382, 136 S. E. 151.

SECTION 15

Colored Taxpayers' Returns

§ 1116(11). Meeting of board; duties.

Effect of Failure to Give Notice.—It is proper to direct a verdict for the plaintiffs in an action to enjoin the collection of taxes where the returns of the plaintiffs were raised without giving the required notice, the plaintiff tendering the amount admitted due. Smith v. Shackelford, 163 Ga. 835, 137 S. E. 255.

Abandonment of Demand for Arbitration.—Where the contestant and his arbitrator fail to appear at the place and time fixed for the arbitration the demand for arbitration will be considered as abandoned. Rogers v. Hamby, 163 Ga. 771, 137 S. E. 231.

Who May Be Arbitrators.—As to the effect of not objecting to a third arbitrator known by the contestant to be related to the tax collector, see Rogers v. Hamby, 163 Ga. 771, 137 S. E. 231.

ARTICLE 5

Tax Fi Fas. and Sales

SECTION 1

Lien of Tax Fi. Fas.

§ 1140. (§ 883). Taxes to be first paid.

When Lein Takes Effect.—Property returned or held at the time of giving in is subject to the lien of the State, and can not be divested by sale. Bibb National Bank v. Colson, 162 Ga. 471, 473, 134 S. E. 85.

SECTION 3

Transfer of Tax Fi. Fas.

§ 1145. (§ 888). Transfer of tax fi. fas.

Recordation—As to Defendant.—The ground that the transfer of a tax fi. fa. to its present owner was not entered of record as provided for by this section is without merit, since such recording is not necessary to make it binding on the property of the taxpayer; nor is such recording necessary to preserve its priority, except as to subsequent bona fide purchasers for value. Lewis v. Moultrie Bkg. Co., 36 Ga. App. 347, 136 S. E. 554.

SECTION 4

Dormancy of Tax Fi Fas

§ 1147. (§ 890). Tax fi. fa. dormant, when.

No Contractual Lien to Prevent Bar.—In cases of tax fi. fas. there is no contractual lien, fixing a period of limitation different from that provided by the statute, to fall back on, so as to prevent the bar of the dormant-judgment act. Lewis v. Moultrie Bkg. Co., 36 Ga. App. 347, 350, 136 S. E. 554.

SECTION 15

Redemption of Property Sold for Taxes

§ 1169. Land sold may be redeemed.

The Premium.—This section and section 1173 show that the legislature had in mind a difference between interest at a stated rate per annum and a premium in the form of a lump sum to be paid within the time in which the different classes of property could be redeemed, and that it so declared. Reynolds v. Bickers-Goodwin Co., 161 Ga. 378, 379, 131 S. E. 55. Section 1173 specifically states that the interest shall be at a stated rate per annum, the absence of such a provision in this section negatives the assumption that payment should be in the same manner. Id.

Same—Time of Payment.—The premium provided for means payment of ten per cent in addition to the amount of purchase-money, without regard to the time elapsing between the sale and the redemption. Reynolds v. Bickers-Goodwin Co., 161 Ga. 378, 131 S. E. 55.

Execution to Meet Interest, Principal, or Cost of Draining.—The right of redemption is not given where land is sold under execution issued for an assessment to meet interest or principal, or the cost of draining the land in a drainage district. Sigmon-Reinhardt Co. v. Atkins Nat. Bank, 163 Ga. 136, 137, 135 S. E. 720.

§ 1172. Quitclaim deed by purchaser.

Execution to Pay Interest, Principal, or Costs of Draining.—Where land is sold under execution issued for an assessment to meet interest, principal, or costs of draining the land in a drainage district, the vendee will not be required to execute and deliver a quitclaim deed, as provided in this section. Sigmon-Reinhardt Co. v. Atkins Nat. Bank, 163 Ga. 136, 135 S. E. 720.

§ 1173. (§ 910). How redeemed.

See notes to section 1169.

CHAPTER 3

Delinquent Tax Receivers and Collectors

ARTICLE 2

Execution Against Defaulting Receiver or Collector or Sureties

§ 1187. (§ 924.) Comptroller to issue executions vs. collector and sureties on default.

Quoted and applied in State v. Bank, 162 Ga. 292, 133 S. E. 248.

§ 1190. (§ 927.) Lien on property of principles and sureties, bound.

Superiority of State's Lien.—The State's lien is superior to a security deed for money borrowed by the collector to pay a prior shortage. State v. Bank, 162 Ga. 292, 133 S. E. 248.

Subrogation of Securities. — A bank, lending money to a collector to cover a shortage, is not entitled to a superior lien on account of subrogation to the rights of the State. State v. Bank, 162 N. C. 292, 133 S. E. 248.

ARTICLE 5

Tax Collectors

SECTION 7

Collector, When Ex Officio Sheriff

§ 1225. Collector ex-officio sheriff in some coun-

ties.—The tax-collectors of counties which contain a population of one hundred and twenty-five thousand or more and the tax-collectors of counties having a population of not less than 26,133 and not more than 26,200, according to the census of 1920 or any future census, and the tax-collectors of counties which contain within their borders the whole or a part of a city having a population of two hundred thousand or more, according to the census of 1920 or any future census, shall be ex-officio sheriffs in so far as to enable them to collect the taxes due the State and county, by levy and sale under tax executions; and said tax-collectors shall not turn over any tax executions to the sheriffs or to any other levying officials of the said State, except when it may become necessary, for the purpose of enforcing the same, to send said executions to any other county or counties than that in which issued; but said tax-collectors, by virtue of their office, shall have full power and authority to levy all tax executions heretofore or hereafter to be issued by them in their respective counties; and the compensation of said tax-collectors shall not exceed fifty cents for issuing each fi. fa., and for levying and selling the same fees as are now allowed by law to the sheriffs of said State; and said tax-collectors shall have full power to bring property to sale, and sales made by them be valid, and shall convey the title to property thus sold as fully and completely as if made by the sheriffs of said counties. Acts 1890-1, p. 101; 1915, p. 11; 1927, p. 138, 139.

Editor's Note.—Prior to the amendment of 1927, the tax collectors of only the counties which contain a population of one hundred and twenty five thousand or more, fell within the scope of this section.

Note that this section is twice amended by the Acts of 1927—the latter amendment taking no account of the former.

Judicial Notice of Population.—The courts will take judicial cognizance of the population of counties for the purpose of determining whether this section is applicable therein. Fidelity, etc., Co. v. Smith, 35 Ga. App. 744, 746, 134 S. E. 801, citing the following authorities: Leadbetter v. Price, 102 Ore. 159 (199 Pac. 633, 17 A. L. R. 218); Standard Oil Co. v. Kearney, 106 Neb. 558 (18 A. L. R. 95, 184 N. W. 109); 15 R. C. L. 1129.

§ 1227(1). Counties with populations of 7,320.—All tax-collectors of such counties of the State of Georgia as have a population of not less than 7,320, nor more than 7,330, according to the census of the United States for the year 1924, shall be ex-officio sheriffs of their respective counties, in so far only as to give them full power and authority to collect all taxes due the State of Georgia in their respective counties, and all other taxes required to be collected by them, by levy and sale under tax executions, and that said tax-collectors be vested with full power and authority to levy any and all fi. fas. issued by them, whether prior to or subsequent to the passage of this Act, and that the compensation to be received by said tax-collectors for rendering services as such ex-officio sheriffs shall be the same as that now allowed by law to sheriffs for the same or like services; that said tax-collectors shall have the powers of sheriffs to bring all property to sale that is subject to said fi. fas., and shall have full authority to execute any and all necessary conveyances or bills of sale or other instruments required by law of sheriffs to be given to the purchasers at public sales, and shall have authority to do and perform all other Acts and to exercise all other powers vested in sheriffs with respect to the levy of said fi. fas., the sale of property thereunder, and the execution of conveyances therefor, or with respect to any other feature connected with the collection of said fi. fas. by levy and sale, and all sales made by them as ex-officio shall pass title and be as valid in all respects as if made by the sheriffs of the respective counties. Acts 1927, p. 335.

§ 1227(2). Same—Advertisements of sales.—In the levy of said fi. fas., and in the making of the sales thereunder, in the advertisement of said sales, said tax-collectors shall in all respects conform to the provision of the law governing such sales by the sheriffs of this State, and all advertisements of sales required to be inserted in a newspaper shall be published in the newspaper in which the sheriff's advertisements for said county are published, and shall be published for the same period of time.

§ 1227(3). Same—Deputies.—Said tax-collectors shall have powers to appoint one or more deputies under the provision of this Act, and all deputies thus appointed shall be vested with all of the powers herein granted unto the tax-collectors, and said tax-collectors shall be responsible for the Acts of their said deputies as sheriffs are liable for the Acts of their deputies, and the compensation of such deputies shall be paid by said tax-collector.

§ 1227(4). Counties with population of 15,160.—All tax-collectors of such counties of the State of Georgia as have a population of not less than 15,150 and not more than 15,160, according to the census of the United States for the year 1920, shall be ex-officio sheriffs of their respective counties in so far only as to give them full power and authority to collect all taxes due the State of Georgia in their respective counties, and all other taxes required to be collected by them, by levy and sale under tax executions, and that said tax-collectors be vested with full power and authority to levy any and all fi. fas. issued by them, whether prior to or subsequent to the passage of this Act, and that the compensation to be received by said tax-collectors for rendering services as such ex-officio sheriffs shall be the same as that now allowed by law to sheriffs for the same or like services; that said tax-collectors shall have the powers of sheriffs to bring all property to sale that is subject to said fi. fas., and shall have full authority to execute any and all necessary conveyances or bills of sale or other instruments required by law of sheriffs to be given to the purchasers at public sales, and shall have authority to do and perform all other Acts and to exercise all other powers vested in sheriffs with respect to the levy of said fi. fas., the sale of property thereunder, and the execution of conveyances therefor, or with respect to any other feature connected with the collection of said fi. fas., by levy and sale, and all sales made by them as ex-officio sheriffs shall pass title and be as valid in all respects as if made by the sheriffs of the respective counties. Acts 1927, p. 337.

§ 1227(5). Advertisements of sales.—In the levy of said fi. fas., and in the making of the sales thereunder, in the advertisement of said sales, said tax-collectors shall in all respects conform to the provisions of the law governing such sales by the sheriffs of this State, and all advertisements of

sales required to be inserted in a newspaper shall be published in the newspaper in which the sheriff's advertisements for said county are published, and shall be published for the same period of time.

§ 1227(6). Same—Deputies. — Said tax-collectors shall have power to appoint one or more deputies under the provision of this Act, and all deputies thus appointed shall be vested with all of the powers herein granted unto the tax-collectors, and said tax-collectors shall be responsible for the Acts of their said deputies as sheriffs are liable for the Acts of their deputies, and the compensation of such deputies shall be paid by the said tax-collectors.

CHAPTER 4A

Payment of Revenue into Treasury

§ 1248(1). Money collected by departments, etc., for maintenance, to be paid into State treasury.—It shall be the duty of every department, commission, bureau, and other branch or agency of the government of this State, and of every official head of every department, commission, bureau, and other branch or agency of the government of this State created by special Act, the support and maintenance of which has been provided by special Act and not by direct appropriations of the General Assembly, to collect and forthwith to pay into the State treasury all moneys, fees, commissions, penalties, or other charges which they are authorized by law to collect for the support and maintenance of such department, commission, bureau, or other branch or agency of the State Government. Acts 1927, p. 311.

§ 1248(2). Expenses of maintenance to be paid from treasury.—The costs and expenses of the maintenance and support of every department, commission, bureau, and other branch or agency of the State government shall be paid out of funds in the State treasury by warrant of the Governor drawn on appropriations duly made by the General Assembly.

§ 1248(3). Exceptions.—The provisions of this Act shall not apply to boards and fees collected by the educational institutions of this State; and such funds as may be derived from sale of farm products, nor funds collected from sale of farm produce equipment or other material derived from the expenditure of Federal research funds, nor to funds received by the Health Department for sale of medical supplies, nor fees received by health institutions, nor to gifts, donations and internal income received by said educational institutions; nor shall the provisions of this Act apply to the Court of Appeals or Supreme Court.

§ 1248(4). Exception of funds collected to match Federal aid funds.—Wherever by Act of Congress conditions have been or may be prescribed for matching Federal aid by State funds, and such conditions are in conflict with the provisions of this Act, then the department or bureau or agency of this State having to do with such Federal aid and collecting funds with which to match such Federal aid may and it is hereby authorized to withhold from depositing in the Treasury an amount sufficient for matching such Federal aid; but all other funds belonging to the State collected by such department, bureau, or agency of the State shall be paid into the State Treasury, as hereinbefore provided.

§ 1248(5). Time of payment to treasury.—It shall be and it is hereby made the duty of each and every official head described in section 1248(1) to pay over and to deposit in the State Treasury, on or before January 1, 1928, all sums remaining in their hands, collected before said date, and remaining undisbursed under existing laws.

§ 1248(6). Appropriation or allocation of certain funds not affected.—Nothing in this Act shall be construed to affect the appropriation or allocation of the motor-vehicle fees and licenses and pro rata of gasoline taxes to the State Highway Department; nor shall it be construed to affect the appropriation or allocation of the pro rata of gasoline taxes to the counties of this State; nor shall it be construed to affect the appropriation or allocation of the proceeds of the cigar and cigarette taxes to the payment of pensions. Nor shall this Act be construed to affect either the appropriation and allocation of the proceeds of the tax on lumber dealer or dealers in other forest products to the State forestry fund, or the allocation of the proceeds of fees and penalties to State game and fish protection fund; and provided further, that as to those departments, branches, agencies, commissions, and bureaus of State government who under the law can only assess a sufficient amount of fees, licenses, penalties, etc., to support such department, commission, board, bureau, agency, or branch of government, all assessments levied for such support shall be the maintenance appropriation of such department, board, bureau, agency, or branch for each year. None of the provisions of this section shall be construed to exempt or except any of the funds, taxes, monies, fees, commissions, penalties, or other charges received, collected, or paid into any of the agencies named in this section from the requirement of section 1248(1) that they shall all be paid into the State Treasury.

§ 1248(7). Penalty for violation of Act. — Should the official head of any department, commission, bureau, or other branch or agency of the State government violate any of the provisions hereof, he or she shall, upon conviction, be deemed guilty of a misdemeanor and punished as provided therefor, and in addition thereto shall be thereafter ineligible to hold such office.

CHAPTER 5

State Depositories

§ 1249. (§ 982.) State depositories provided for in various cities.—Buchanan, Glennville and the town of Dexter were added to the list of depositories by the Acts of 1927, pp. 140, 141, 142.

ELEVENTH TITLE

Education

CHAPTER 1

The University of Georgia and Its Organization

ARTICLE 2

Branches of the University

§ 1397 (§ 1300). Branches of the University.

The name of the State Normal School was changed to The Georgia State Teacher's College by the acts of 1927, p. 171. A college of agricultural and mechanical arts, to be known as the Middle Georgia Agricultural and Mechanical Junior College was added as a branch by the acts of 1927, p. 161.

CHAPTER 4

Public School System

ARTICLE 5

County Boards of Education

§ 1551(84½). Compensation of members in certain counties.—Members of the county boards of education, in counties having above 200,000 population according to the last or any future United States census, may be paid a salary of fifty dollars ($50.00) per month each; and their accounts for service shall be submitted for approval each month to the county superintendent of schools, and they shall not receive any other compensation for said service. Acts 1927, p. 156.

§ 1551 (89). School terms; schools property; separation of races.

Editor's Note.—The Supreme Court in Dominy v. Stanley, 162 Ga. 211, 216, 133 S. E. 245, in construing section 1484 of the Civil Code, which forms that part of this section beginning "The said boards are invested with the title" etc., and ending with the words "according to the order of the board," used the following language: "This section, however, confers no authority upon the board of education of the county to control or to sell and dispose of the land in question, which was given by private parties for a specific purpose [i e., a charitable trust]. Moreover, we do not think that the doctrine of cy pres can be so extended as to allow the trustees, who have no title to this property, to sell the same or cut down the timber on the same for the purpose of building up an entirely different institution in an entirely different neighborhood."

It will be noticed that in this case the court was construing a section of the old law contained in sections 1532-1551 of the Civil Code, which sections are superseded by section 1551(1) et seq. For a full treatment concerning the confusion arising out of construction of the former law see Editor's Note under sections 1432-1551, Georgia Code of 1926.

Length of Terms.—The county board has power, after having specified the duration of a particular term, to pass a resolution, after expiration of six months of such term, closing the term prior to the time originally provided for expiration of the term. Board v. Thurmond, 162 Ga. 58, 132 S. E. 427.

Same—Effect of Promise to Commissioners.—The board of commissioners of a county has no power to contract with the county board of education as to bind the board of education to operate the schools for any particular time, and the board of education will not be bound by any promise to the board of county commissioners in regard to the length of time it will operate the public schools at any term. Board v. Thurmond, 162 Ga. 58, 132 S. E. 427.

Same—Closing Early to Apply Fund to Prior Indebtedness.—On the facts of this case, the board of education did not abuse its discretion in closing a term earlier than originally planned, and in applying the funds derived from local taxation to payment of the debts accumulated during previous years for money borrowed to pay teachers and operate the schools. Board v. Thurmond, 162 Ga. 58, 132 S. E. 427.

§ 1551 (96). Consolidation.

Name of New District.—Where two or more local school districts are consolidated, it is not necessary that the word "consolidated" appear as a part of the name selected for the consolidated district; and it is proper for a proceeding to validate bonds to be conducted in the name of the district as fixed by the proper school authorities. Hawthorne v. Turkey Creek School Dist., 162 Ga. 462, 134 S. E. 103.

§ 1551 (97). Appropriation for consolidated schools.—Beginning with the year 1927 the State Superintendent of Schools shall set aside $350,000 or so much thereof as may be necessary, and for 1928 and the years to follow the State Superintendent of Schools shall set aside $400,000 or so much thereof as may be necessary, from funds derived from the poll-tax collected and paid into the treasury, to aid in the establishment and maintenance of consolidated school in this State. When the county board of education shall combine smaller schools into a standard or approved consolidated school with at least four teachers, and evidence of this fact is furnished by the County School Superintendent and Board of Education to the State Superintendent of Schools, and when it is made to appear to the State Superintendent of Schools that aid is needed to support such consolidated school, the State Superintendent of Schools shall be authorized to transmit $500.00 annually to the support of such school.

If in addition the local school authorities provide for an approved or standard four-year high school, and evidence of this fact is made to appear to the State Superintendent of Schools, that aid is needed to support said four-year high school, the State Superintendent of Schools shall be authorized to transmit $1,000.00 annually to the support of said school; such funds in both cases shall be used by local authorities in the payment of salaries of principal and teachers.

When two or more schools in any county qualify under this Act, either for the $500.00 aid or for the $1,000.00 aid, the State Superintendent of Schools shall determine to which one of such schools said sums shall be paid; the State Superintendent of Schools shall be governed in his decision by the extent to which the consolidated district has utilized its local ability in building, equipping, and supporting its school, and the number of children to be reached by the consolidation, the number of teachers, the qualifications of the teachers employed, and the character of the work being done by the school. No county now receiving, or that may hereafter receive, aid for both the consolidated ($500.00) and the high-school ($1,000.00) aid shall be eligible to further apply for such aid until every county in the State has had an opportunity to apply. If those counties not receiving both aids fail to qualify, then the State Superintendent of Schools is authorized to extend further aid to those counties receiving either or both aids as provided in this bill, and on same conditions as set forth above. Acts 1925, p. 147; 1927, p. 158.

Editor's Note. — The amendment of 1927 increased the amounts to be set aside by the superintendent of schools. About the middle of the third paragraph, the phrase "the qualification of the teachers employed" was inserted by the same amendment.

§ 1551 (98). Division of school districts.

Effect of Previous Election When District Divided. —

Where the county board of education has duly divided one school district into two school districts, under the provisions of the act, act of 1911, (similar to this section) one of the districts so created may have an election for local school taxation under the statute, although an election for such purpose has been held during the same year and failed to carry in the old district as constituted before the division. Tyson v. Board, 150 Ga. 247, 103 S. E. 158; Dutton v. Rahn, 162 Ga. 189, 190, 132 S. E. 756.

§ 1551 (99). Rearrangement of districts.

Prerequisites to Calling Election.—Walker v. Hall, 161 Ga. 460, 131 S. E. 160, approving and following Shields v. Field, 151 Ga. 465, 107 S. E. 44.

Interference by Equity to Enjoin Proceeding.—A court of equity will not enjoin a consolidation of districts by a county board which has held an election and declared the result to be in favor of the consolidation, because, even if the act can be construed to give the right to contest the election (there being no express provisions to that effect), it must be done before the result is declared. Clark v. Board, 162 Ga. 439, 134 S. E. 74.

§ 1551 (100). Transportation of pupils.—Whenever the county board of education or local district trustees deem it for the best interest of the school, they shall have the right to provide means for the transportation of the pupils and teachers to and from said school. Acts 1919, pp. 288, 327; 1927, p. 174.

Editor's Note.—The local district trustees were brought within the scope of this section by the amendment of 1927.

§ 1551 (104). Term of loan.

Repayment from Local Tax.—A Board of Education having lawfully incurred debts for money loaned to pay teachers and operate the public schools of the county, and such debts having accumulated from year to year, it was in the power of that board to repay such debts from any funds that could lawfully be applied to such purpose, including funds derived from the levy of a local tax in the fall of the school year in which the debts are paid for operating the schools. Board v. Thurmond, 162 Ga. 58, 132 S. E. 427.

ARTICLE 6.

Local Taxation for Schools.

§ 1551 (130). Power to collect taxes.

Restrictions upon Construction. — This statute, dealing with the subject of taxation, is to be interpreted in the light of the fundamental restriction upon taxation imposed by the constitution of this State, and will not be given a construction which violates such constitutional provision. Penick v. Foster, 129 Ga. 217, 58 S. E. 773, 12 L. R. A. (N. S.) 1159, 12 Ann. Cas. 346; Almand v. Board, 161 Ga. 911, 131 S. E. 897.

Levy of Tax upon City.—This statute does not authorize county authorities to levy a tax upon taxable property within an independent school district existing in a city, for the support of the public schools of the county under the control of the county board of education. Almand v. Board, 161 Ga. 911, 131 S. E. 897, overruling Hanks v. D'Arcy, 156 Ga. 55, 118 S. E. 656.

§ 1551 (133). Election for school district.

Validity of Election When District Abolished and Substantially Recreated.—In Dutton v. Rain, 162 Ga. 189, 191, 132 S. E. 756, it was said: "On authority of Stephens v. School District, 154 Ga. 275(6), 277 (114 S. E. 197), we hold that the action of the county board of education in rescinding their former action creating the consolidated school district, and at the same meeting creating substantially the same district, can not be held by this court, as a matter of law, to be a fraud, and that it did not render such election void." The court here has reference to an election for a school district tax, and was considering the following provision taken from § 1535, Civil Code of 1910. "An election for the same purpose shall not be held oftener than every twelve months." It will be noticed that this section contains the same provision. Ed. Note.

Substantial Compliance with Ballot Sufficient.—See § 126 and the note thereto.

§ 1551 (141). Trustees and secretary; powers and duties.

Powers of Trustees—To Borrow Money.—The trustees of a local school district are not empowered or authorized by law to borrow money. Consequently, where such trustees borrowed $2200 from a bank upon the draft of the secretary of said board of trustees upon the tax-collector, which was accepted by the latter, no liability attached to the local school district or to the trustees who succeeded the original borrowers. Powell v. Bainbridge State Bank, 161 Ga. 855, 132 S. E. 60.

ARTICLE 6A.

Payment of Teachers.

§ 1551 (154a). Governor's authority to make debt to pay teachers. — Pursuant to the amendment to Article 7, Section 3, Paragraph 1 of the Constitution of this State, authorizing the contraction by or on behalf of the State of a debt in an amount of $3,500,000.00 for the purpose of paying the public-school teachers of the State, the Governor is hereby authorized and empowered to execute a note or notes for such amount and for such time of payment as the condition of the treasury may demand, at any time in his discretion, for the purpose of paying the public-school teachers of the State. The aggregate of said note or notes shall not at any time exceed the aforesaid constitutional limit, and said note or notes shall not mature later than February of the year succeeding the time of the execution thereof, and the principal amount so borrowed shall be repaid each year out of the common-school appropriation, and the interest thereon shall be paid each year out of the general funds of the State, accrued during the year of issue of said notes. Said notes shall be signed by the Governor and countersigned by the Comptroller-General and Secretary of State. Acts 1927, p. 168.

§ 1551 (154b). Authority to use funds allocated for other purposes.—The Governor is further authorized and empowered, at any time in his discretion, to impress, use, and employ for the payment of public-school teachers of the State, and without payment of interest thereon, any funds in the Treasury which may have been allocated for any special fund or purpose, so as to obviate the necessity of increasing the public debt of the State and the payment of interest. Provided, however, that it shall be the duty of the Governor, when any fund shall be so used to replace said fund or funds by borrowing the same, if necessary, at such time as will not interfere with the expenditure for the purpose appropriated of any special or allocated fund or funds so drawn upon by the Governor by virtue of the authority granted in this Act.

§ 1554c. Limit of authority. — The Governor shall not during any calendar year impress, use, or employ any funds in the Treasury allocated or belonging to any special fund or purpose in excess of the borrowing power of the Governor under this Act.

ARTICLE 7.

Building Houses in Local Tax Districts.

§ 1551 (155). Election for bonds to build and equip school houses.

What Amounts to Selection of Registered Voters.—Where

the tax-collector took the list furnished to him by the trustees, went over it, and struck from it such names as he thought did not belong there, the voters entitled to registration were selected by him, and not by the trustees of the school district, the managers of the election, or the attorney for the trustees who copied the list at the request of the collector. Hawthorne v. Turkey Creek School Dist., 162 Ga. 462, 467, 134 S. E. 103.

When Sections 440 et seq. Followed. — This statute requires that the trustees "shall" follow the law as required of county authorities in section 440 et seq. in the issue of such bonds. Veal v. Deepstep Consolidated School District, 34 Ga. App. 67, 128 S. E. 223.

Notice of Election.—"As a condition precedent to the holding of an election for school bonds a notice of such election must be published for thirty days next preceding the day of the election, in the newspaper in which the sheriff's advertisements for the county are published." Burnam v. Rhine Consolidated School District, 35 Ga. App. 110, 132 S. E. 137, following Scott School Dist. v. Carter, 28 Ga. App. 412, 111 S. E. 216.

TWELFTH TITLE.

Police and Sanitary Regulations

CHAPTER 7.

County Sanitary Regulations, Boards of Health, Sanitary Districts, Cemeteries, Hospitals, etc., Contracts for Sanitation.

§ 1676(14). Cemeteries, hospitals, etc., outside municipalities.

Necessity of Assignment to Users of Permit. — Where a proposed corporation on being organized after the issuance of a permit to a private person, acquired the property named for the purpose, it was not essential to its use and enjoyment of the permission to establish such cemetery that the person by whom such permission was obtained should make an assignment of the same to the corporation. Fairview Cemetery Co. v. Wood, 36 Ga. App. 709, 138 S. E. 88.

Revocation after Expenditures Made.—Where the person to whom the permission was granted or one succeeding thereto had, on the faith thereof, expended large sums of money in the expectation of using and enjoying the permission so granted, a resolution thereafter adopted by the county authorities, for the purpose of rescinding their previous action in making the grant, was void and of no effect, where its adoption was without a hearing and without any sort of notice to the person to be adversely affected, where also there was nothing to show any of the conditions of such permission had been violated. Fairview Cemetery Co. v. Wood, 36 Ga. App. 709, 138 S. E. 88.

CHAPTER 8A.

Registration of Births and Deaths.

§§ 1681(1) to 1681(26). Superseded by the Acts of 1927 p. 353, herein codified as §§ 1681(27) et seq.

§ 1681 (27). Registration of births and deaths. —The State board of health shall have charge of the registration of births and deaths in this State; shall prepare the necessary instructions, forms, and blanks for obtaining and preserving such records, and shall procure the faithful registration of same in each primary registration district as constituted in section 1681(29), and in the central bureau of vital statistics at the Capitol of the State. The said board shall be charged with the uniform and thorough enforcement of this law throughout the State, and shall from time to time recommend any additional legislation that may be necessary for this purpose. Acts 1927, p. 354.

The proper person to issue a burial permit is the registrar of the city or militia district, as the case may be, in which the person died or the body was found. Fairview Cemetery Co. v. Wood, 36 Ga. App. 709, 719, 138 S. E. 88.

§ 1681 (28). Bureau of vital statistics; State registrar; appointment, qualifications.—The secretary of the State Board of Health shall have general supervision over the central bureau of vital statistics, which is hereby authorized to be established by said board, and which shall be under the immediate direction of the State Registrar of Vital Statistics, whom the State Board of Health shall appoint, and who shall be a medical practitioner of not less than five years practice in his profession, and a competent vital statistician. The term of office of the State Registrar of Vital Statistics shall be four years, and he shall continue in office until his successor has qualified. A successor shall be appointed for the ensuing term at least ten days before the expiration of each term. Any vacancy occuring in such office during a term shall be filled by appointment for the unexpired part of the term. The State Board of Health shall provide for such clerical and other assistant as may be necessary for the purposes of this Act, who shall serve during the pleasure of the board. The compensation of the State Registrar of Vital Statistics and the compensation of said assistants shall be paid by the said board out of the funds appropriated by the General Assembly for the maintenance of the State Board of Health. The custodian of the capitol shall provide for the Bureau of Vital Statistics, at the State Capitol, suitable offices, which shall be properly equipped with fireproof vaults and filing cases for the permanent and safe preservation of all official records provided for by this Act.

§ 1681 (29) Districts for registration.—For the purpose of this Act the State shall be divided into registration districts as follows: Each city, each incorporated town, and each militia district or part thereof outside of a city or incorporated town shall constitute a primary registration district. The State Board of Health may combine two or more primary registration districts as one district, or may establish additional districts by dividing a primary registraton district into two or more districts, when necessary to facilitate registration.

§ 1681 (30). Local registrars.—In each city of this State the city clerk, and in each incorporated town the town clerk, and in each militia district or part thereof outside of a city or of an incorporated town the justice of the peace therefor, or, if there be no justice of the peace, the notary public and ex-officio justice of the peace thereof, shall be the local registrar of vital statistics, except where another person has been appointed as such registrar by the State board of Health, the said board being hereby authorized to appoint the local registrars in any and all registration districts, in their discretion. Each local registrar shall appoint a deputy registrar, who shall serve as registrar when the local registrar, is not immediately accessible for the purpose of registration or the issuance of certificates or permits as required by this Act; and should the local registrar and his deputy both be absent from their registration district, the duties of the local registrar of that district may be performed by the local registrar of any adjoining district in the same county; and in such cases the registrar acting in the absence of the local registrar shall note on each certificate issued by him the date of

filing, and shall forward the certificate in ten days, and in all cases before the third day of the following month, to the local registrar in whose place he has acted. Any local registrar or deputy registrar who, in the judgment of the State Board of Health, fails to make a proper and complete return of births and deaths, or to discharge any of his other duties as prescribed by this Act, may be summarily removed by said board, and he shall be subject to such penalties as are provided for such officers under section 503(10) Penal Code.

§ 1681 (31). Burial or removal permit. — The body of any person whose death occurs in this State, or which shall be found dead therein, shall not be interred, deposited in a vault or tomb, cremated, or otherwise disposed of or removed from or into any registration district, or be temporarily held pending further disposition more than seventy-two hours after death, unless a permit for burial, removal, or other disposition thereof shall have been properly issued by the local registrar of the registration district in which the death occurred or the body was found. And no such burial or removal permit shall be issued by the registrar until, where practicable, a complete and satisfactory certificate of death has been filed with him as hereinafter provided; provided, that when a dead body is transported from outside of the state into this State or from one registration district into another registration district within this State, for burial, the transit or removal permit issued in accordance with the law and health regulations of the place where the death occurred shall be accepted by the sexton or person in charge of the cemetery in lieu of a burial permit at the place of burial.

§ 1681 (32). Stillborn child to be registered twice.—A stillborn child shall be registered as a birth and also a death, and separate certificates of both the birth and the death shall be filed with the local registrar, in the usual form and manner, the certificate to contain, in the place of the name of the child, the word "stillbirth," provided that a certificate of birth and a certificate of death shall not be required for a child that has not advanced to the fifth month of uterogestation. The medical certificate of the cause of death shall be signed by the attending physician, if any, and shall state the cause of death as "stillborn," with the cause of stillbirth, if known, whether a premature birth, and if born prematurely, the period of uterogestation, in months, if known; and the burial or removal permit of the prescribed form shall be required. Midwives shall not sign certificates of death for stillborn children; but such cases, and stillbirths occuring without attendance of either physician or mid-wife, shall be treated as deaths without medical attendance, as provided for in section 1681(34).

§ 1681 (33). Death certificate; contents. — The certificate of death shall contain the following items, and such other items as are deemed necessary for legal, social, and sanitary purposes subserved by registration records: (1) Place of death, including State, county, incorporated town, village, or city. If in a city, the ward, street, and house number: if in a hospital or other institution, the name of the same to be given instead of the street and house number. If in an industrial camp, the name of the camp to be given. (2) Full name of decedent. If an unnamed child, the surname preceded by "Unnamed." (3) Sex. (4) Color or race; as white, black, mulatto (or other Negro descent), Indian, Chinese, Japanese, or other. (5) Conjugal relation; as single, married, widowed, or divorced. (6) Date of birth, including year, month, and day. (7) Age, in years, months, and days. If less than one day, the hours or minutes. (8) Occupation. The occupation to be reported of any person male or female, who had any remunerative employment, with the statement of (a) trade, profession, or particular kind of work; (b) general nature of industry, business, or establishment in which employed (or employer). (9) Birthplace, at least State or foreign country, if known. (10) Name of father. (11) Birthplace of father, at least State or foreign country, if known. (12) Maiden name of mother. (13) Birthplace of mother, at least State or foreign country, if known. (14) Signature and address of informant. (15) Official signature of registrar, with the date when the certificate was filed and registered number. (16) Date of death, year, month, and day. (17) Certification as to medical attendance on decedent, fact and time of death, time last seen alive, and cause of death, with contributory (secondary) cause of complication, if any, and duration of each, and whether attributed to dangerous or insanitary conditions or employment; signature and address of physician or official making the medical certificate. (18) Length of residence (for inmates of hospitals or other institutions, transients or recent residents) at place of death and in the State, together with the place where the disease was contracted, if not at place of death, and former or usual residence. (19) Place of burial or removal, date of burial. (20) Signature of undertaker or person acting as such, and post-office address. The personal and statistical particulars (items 1 to 13) shall be authenticated by the signature of the informant, who may be any competent person acquainted with the facts. The statement of facts relating to the disposition of the body shall be signed by the undertaker or the person acting as such. The medical certificate shall be made and signed by the physician, if there was any, last in attendance on the deceased, who shall specify the time in attendance, the time he last saw the deceased alive, and the hour of the day at which the death occurred. And he shall further state the cause of the death, so as to show the course of the disease or sequence of causes resulting in the death, giving first the name of the disease causing death (primary cause) and the contributory (secondary) cause, if any, and the duration of each. Indefinite and unsatisfactory terms, denoting only symptoms of disease or conditions resulting from disease, will not be held sufficient for the issuance of a burial or removal permit, and any certificate containing only such terms, as defined by the State Registrar, shall be returned to the physician or person making the medical certificate, for correction and more definite statement. Causes of deaths which may be the result of either disease or violence shall be carefully defined; and if violence, the means of injury shall be stated, and whether (probably) accidental, suicidal, homi-

cidal. And for the deaths in hospitals or institutions, or of non-residents, the physician shall supply the information required, under this head (item 18), if he is able to do so, and may state where, in his opinion, the disease was contracted.

§ 1681(34). Death without medical attention.—In case of any death occurring without medical attention, it shall be the duty of the undertaker to notify the local registrar of the death, and when so notified the registrar shall, prior to the issuance of the permit, inform the local health officer, if there be such officer in the district where the death occurred, and refer the case to him for immediate investigation and certification; provided, that when the local health officer is not a physician, and in such cases only, the registrar is authorized to make the certificate and return from the statement of relatives or other person having adequate knowledge of the facts; provided, further, that if the registrar has reason to believe that the death may have been due to unlawful act or neglect, he shall then refer the case to the coroner or other proper official for his investigation and certification. And the coroner or other proper official whose duty it is to hold an inquest on the body of any deceased person, and to make the certificate of death required for a burial permit, shall state in his certificate the name of the disease causing the death, or, if from external causes, (1) the means of death, and (2) whether (probably) accidental, suicidal, or homicidal, and shall in any case furnish such information as may be required by the State Registrar in order to classify the death properly.

§ 1681(35). Procedure, in obtaining burial permit.—The undertaker, or the person acting as undertaker, shall file the certificate of death with the local registrar of the district in which the death occurred, and obtain a burial or removal permit prior to any disposition of the body. He shall obtain the required personal and statistical particulars from the person best qualified to supply them, over the signature and address of his informant. He shall then present the certificate to the attending physician, if there was any, or to the health officer, or coroner, as directed by the local registrar, for the medical certificate of the cause of death and other particulars necessary to complete the record as specified in sections 1681-(33), 1681(34) and he shall then state the facts required relative to the date and place of burial or removal, over his signature and with his address, and present the complete certificate to the local registrar in order to obtain a permit for burial, removal, or other disposition of the body. The undertaker shall deliver the burial or removal permit to the person in charge of the place of burial, before interring or otherwise disposing of the body, or shall attach the transit permit to the box containing the corpse when shipped by any transportation company; said permit to accompany the corpse to its destination where, if within the State of Georgia, it shall be delivered to the person in charge of the place of burial. Every person, firm, or corporation selling a coffin or burial casket shall keep a record showing the name of the purchaser, and the purchaser's post-office address, and the name of the deceased, which record shall be open to inspection of the State Registrar at all times. On the first day of each month the person, firm, or corporation selling coffins or burial caskets in this State shall report to the State Registrar each sale for the preceding month, on a blank provided for that purpose; provided, however, that no person, firm, or corporation selling coffins or burial caskets to dealers or undertakers only shall be required to keep such record, nor shall such report be required from the undertakers when they have direct charge of the disposition of the dead body. Every person, firm, or corporation selling coffins or burial caskets at retail, and not having charge of the body, shall inclose within the casket or coffin a notice furnished by the State registrar, calling attention to the requirements of the law, a blank certificate of death, and the rules and regulations of the State Board of Health concerning the burial or other disposition of a dead body.

§ 1631(36). Contents of burial permit.—If the interment or other disposition of the body is to be made within the State, the wording of the burial or removal permit may be limited to a statement by the registrar, and over his signature, that, a satisfactory certificate of death having been filed with him as required by law, permission is granted to inter, remove, or dispose otherwise of the body, stating the name, age, sex, cause of death, and other necessary details upon the form prescribed by the State Registrar.

§ 1681(37). Burial without permit prohibited; indorsement and return of permit.—No person in charge of any premises on which interments are made shall inter or permit the interment or other disposition of any body unless it is accompanied by a burial, removal, or transit permit as herein provided, and every such person shall indorse upon the permit the date of the interment, over his signature, and shall return all permits so indorsed to the local registrar of his district within ten days from the date of interment, or within the time fixed by the local board of health. He shall keep a record of all bodies interred or otherwise disposed of on the premises under his charge, in each case stating the name of each deceased person, place of death, date of burial or disposal, and name and address of the undertaker, which record shall at all times be open to official inspection; provided, that the undertaker or person acting as such, when burying a body in a cemetery or burial ground having no person in charge, shall sign the burial or removal or transit permit giving the date of burial, and shall write across the face of the permit the words "No person in charge," and file the burial or removal or transit permit within ten days with the registrar of the district in which the cemetery is located.

§ 1681(38). Birth registration.—The birth of each and every child born in this State shall be registered as hereinafter provided.

§ 1681(39). Certificate of birth to be filed.—Within ten days after the date of each birth, there shall be filed with the local registrar of the district in which the birth occurred a certificate of such birth, which certificate shall be upon the form adopted by the State Registrar, upon advice and consent of the State Board of Health, with a view of procuring a full and accurate report with respect to each item of information enumerated in section 1681(40). In each case where a phy-

sician, or midwife, or person acting as a midwife was in attendance upon the birth, it shall be the duty of such person to file in accordance herewith the certificate herein contemplated. In each case where there was no physician, or midwife, or person acting as midwife, in attendance upon the birth, it shall be the duty of the father or mother of the child, or the householder or the owner of the premises where the birth occurred, having knowledge of such birth, or the manager or superintendent of the public or private institution where the birth occurred, each in the order named, within ten days after the date of such birth, to report to the local registrar the fact of such birth. In such case, and in case the physician, or midwife, or person acting as midwife, in attendance upon the birth, is unable, by diligent inquiry, to obtain any item or items of information contemplated in section 1681(40), it shall be the duty of the local registrar to secure from the person so reporting, or from any other person having the required knowledge, such information as will enable him to prepare the certificate of birth herein contemplated, and it shall be the duty of the person reporting the birth, or who may be interrogated in relation thereto, to answer correctly and to the best of his knowledge all questions put to him by the local registrar which may be calculated to elicit any information needed to make a complete record of the birth as contemplated by section 1681(40) and it shall be the duty of the informant, in any statement made in accordance herewith, to verify such statement by his signature, when requested so to do by the local registrar.

§ 1681(40). Contents of birth certificate.—The certificate of birth shall contain the following items, and such other items as are deemed necessary for the legal, social, and sanitary purposes subserved by registration records: (1) Place of birth, including State, county, incorporated town, village, or city; if in a city, the ward, street, and house number; if in a hospital or other institution, the name of the same to be given instead of the street and house number. (2) Full name of child. If the child dies without a name, before the certificate is filed, enter the words "died unnamed." If the living child has not yet been named at the date of filing certificate of birth, the space for full name of child is to be left blank, to be filed out subsequently by a supplemental report, as hereinafter provided. (3) Sex of child. (4) Whether a twin, triplet, or other plural birth. A separate certificate shall be required for each child in case of plural births. (5) For plural births, number of each child in order of birth. (6) Whether legitimate or illegitimate. (7) Date of birth, including year, month, and day. (8) Full name of father; provided that if the child is illegitimate, the name of the putative father shall not be entered without his consent, but the other particulars relating to the putative father (items 9 to 13) may be entered if known, otherwise as "unknown." (9) Residence of father. (10) Color or race of father. (11) Age of father at last birthday, in years. (12) Birthplace of father, at least State or foreign country if known. (13) Occupation of father, occupation to be reported if engaged in any remunerative employment, with the statement of (a) trade, profession, or particular kind of work: (b) general nature of industry, business, or establishment in which employed (or employer). (14) Maiden name of mother. (15) Residence of mother. (16) Color or race of mother. (17) Age of mother at last birthday, in years. (18) Birthplace of mother, at least State or foreign country, if known. (19) Occupation of mother. The occupation to be reported if engaged in any remunerative employment, with the statement of (a) trade, profession, or particular kind of work, (b) General nature of industry, business, or establishment in which employed (or employer). (20) Number of children born to this mother, including present birth. (21) Number of children of this mother, living. (22) The certification of the attending physician or midwife as to the attendance at birth, including statement of year, month, day (as given in item 7), and hour of birth, and whether child was born alive or stillborn. This certification shall be signed by the attending physician or midwife, with the date of signature and address; if there is no physician or midwife in attendance, then by the father or mother of the child, householder, owner of the premises, or manager or superintendent of public or private institution where the birth occurred, or other competent person, whose duty it shall be to notify the local registrar of such birth, as required by section 1681(39). (23) Exact date of filing in office of local registrar, attested by his official signature, and registered number of birth, as hereinafter provided.

§ 1681(41). Supplemental report.—When any certificate of birth of a living child is presented without the statement of the given name, then the local registrar shall make out and deliver to the parents of the child a special blank for the supplemental report of the given name of the child, which shall be filled out as directed, and returned to the local registrar as soon as the child shall have been named.

§ 1681(42). Registration of midwives.—Every midwife shall register his or her name, address, and occupation with the local registrar of the district in which he or she resides, or may hereafter establish a residence, such registration to be made on or before the first day of February in each year, or, if such residence is established after that date, then within thirty days after the same is established; and shall thereupon be supplied by the local registrar with a copy of this Act, together with such rules and regulations as may be prepared by the State registrar relative to its enforcement. Within sixty days after the close of each calendar year each local registrar shall make a return to the State Registrar of all midwives who have registered in his district. No fee or other compensation shall be charged by local registrars to midwives for registering their names under this section or making returns thereof to the State Registrar.

§ 1681(43). Blanks supplied by State registrar.—The State Registrar shall prepare, print, and supply all registrars all blanks and forms used in registering, recording, and preserving the returns, or in otherwise carrying out the purposes of this Act, and shall prepare and issue such detailed instructions as may be required to procure the uniform observance of its provisions

and the maintenance of a perfect system of registration; and no other blanks shall be used than those supplied by the State Registrar, except that in the transportation of dead bodies the standard form of permit adopted by the State Board of Embalmers may be used. He shall carefully examine the certificates received monthly from the local registrars; and if any such are incomplete or unsatisfactory, he shall require such further information to be supplied as may be necessary to make the records complete and satisfactory. And all physicians, midwives, informants, or undertakers, and all other persons having knowledge of the facts, are hereby required to supply, upon a form provided by the State Registrar or upon the original certificate, such information as they may possess regarding any birth or death, upon demand of the State registrar, in person, by mail, or through the local registrar. No certificate of birth or death, after its acceptance for registration by the local registrar, and no record made in pursuance of this Act shall be altered or changed in any respect otherwise than by amendments properly dated, signed and witnessed. The State Registrar shall further arrange, bind, and permanently preserve the certificates in a systematic manner, and shall prepare and maintain a comprehensive index of all births and deaths registered, said index to be arranged alphabetically, in case of deaths, by name of decedents, and in case of births, by the names of the fathers, or the mothers in the event the name of the father is not known. He shall inform all registrars what diseases are to be considered infectious, or communicable, and dangerous to the public health, as decided by the State Board of Health, in order that when deaths occur from such diseases proper precautions may be taken to prevent their spread. If any cemetery company or association, any church or historical society or association, or any other company, society, or association, or any individual is in possession of any record of births and deaths which may be of value in establishing the genealogy of any resident of this State, such company, society, association, or individual may file such record, or a duly authenticated transcript thereof, with the State registrar, and it shall be the duty of the State Registrar to preserve such record or transcript, and to make a record and index thereof in such forms as to facilitate the finding of any information contained therein. Such record and index shall be open to inspection by the public, subject to such reasonable conditions as the State Registrar may prescribe. If any person desires a transcript of any record filed in accordance herewith, the State Registrar shall furnish the same upon application, together with a certificate that it is a true copy of such record as filed in his office.

§ 1681(44). Local registrar's duties; unsatisfactory certificate of death.—Each local registrar shall supply blank forms of certificates to such persons as require them. Each local registrar shall carefully examine each certificate of birth or death when presented for record, in order to ascertain whether or not it has been made out in accordance with the provisions of this Act and the instructions of the State Registrar. And if any certificate of death is incomplete or unsatisfactory, it shall be his duty to call attention to the defects in the returns, and to withhold the burial or removal permit until such defects are corrected. All certificates either of birth or death shall be written legibly in durable black ink, and no certificate shall be held to be complete and correct that does not supply all the items of information called for therein, or satisfactorily account for their omission. If the certificate of death is properly executed and complete, he shall then issue a burial or removal or transit permit to the undertaker; provided, that in case the death occurred from some disease which is held by the State Board of Health to be infectious, contagious, or communicable or dangerous to the public health, no permit for the removal or other disposition of the body shall be issued by the registrar, except under such conditions as may be prescribed by the State Board of Health. If a certificate of birth is incomplete, the local registrar shall immediately notify the informant, and require him to supply the missing items of information if they can be obtained. He shall number consecutively the certificates of birth and death, in two separate series, beginning with number one for the first birth, and the first death of each calendar year, and sign his name as registrar in attest of the date of filing in his office. He shall also make a complete and accurate copy of each birth and each death certificate on the form provided by the State registrar for that purpose, and he shall, on or before the tenth day of each month, transmit to the State Registrar all original certificates registered by him for the preceding month, and shall forward to the ordinary of the county in which his district is located his copy of the same, or, if there be a full-time city health officer or a full-time county health officer located in his county, he shall forward his copy to said health officer instead of to the ordinary. And if no birth or no death occurs in any month, he shall on the tenth day of the following month report that fact to the State Registrar on a card provided for that purpose. And all birth and death certificates filed with a local registrar when the birth or death occurred outside his district must be forwarded by him, within ten days, to the local registrar of the district in which the birth or death occurred. The ordinary or health officer, as the case may be, shall file and preserve in his office all copies of certificates received by him.

§ 1681(45). Fees.—Each local registrar shall be paid a fee of fifty cents for each birth certificate and for each death certificate properly made out and registered with him, and correctly recorded and promptly returned by him to the State Registrar as required by this Act. And in case no birth or no death certificate was registered during a month, the local registrar shall be paid a fee of twenty-five cents for each report made by him to that effect, if such report be made promptly as required by this Act. All amounts payable to a local registrar under the provisions of this section shall be paid from county funds by the treasurer of the county in which the registration district is located, and the State Registrar shall annually, or, in the discretion of the State Board of Health, from time to time during the year, certify to the treasurers of the several counties the number of births and deaths properly registered, with the names of the local

registrars and the amounts due each at date of said certificate; provided that before such fees are paid by the county treasurer, the State Registrar's certificate as to the amount due for such fees shall be verified by a certificate of the ordinary of the county, or city or county health officer, as the case may be, to whom copies of the original certificates have been furnished by the local registrar as provided in section 1681(44). The ordinary or the county or city health officer, as the case may be, shall be paid a fee of ten cents for each copy of birth and each copy of death certificate properly filed by him under section 1681(44), said fee to be paid from county funds by the county treasurer.

§ 1681(46). Certified copies.—The State registrar or ordinary or the county or city health officer shall, upon request, supply to any applicant, a certified copy of the record of any birth or death registered under the provisions of this Act, and any such copy of the record of a birth or death, when properly certified by the State registrar or ordinary or city or county health officer, as the case may be, shall be prima facie evidence in all courts and places of the facts therein stated, for which said applicant shall pay a fee of fifty cents. The United States Census Bureau may obtain, without expense to the State, transcripts or certified copies of births and deaths.

CHAPTER 9

Practice of Medicine; How Regulated.

ARTICLE 1

Practitioners

§ 1684. (§ 1479). Practitioners must register.

Section Repealed.—See notes to § 1697(6).

ARTICLE 2

State Board of Medical Examiners

§ 1697(5). License required before practice; how obtained.

Constitutionality.—The right to practice medicine is, like the right to practice any other profession, a valuable right, which is entitled to be protected under the constitution and laws of the State. But the State in the exercise of the inherent police power of the sovereign may place such restrictions on a licensee as may be necessary for the welfare and safety of society. A statute which regulates the right to practice medicine, but leaves the field open to all who possess the prescribed qualifications, does not abridge the privilege or immunities of citizens. Hughes v. State Board, 162 Ga. 246, 134 S. E. 42.

This law is not unjustly discriminatory so as to render it void. Hughes v. State Board, 162 Ga. 246, 134 S. E. 42.

A license to practice medicine is not a contract, and gives the licensee no right to continue in the practice in the future unrestricted, and such license may be revoked for good cause, and such revocation alone is not a taking of property without due process of law. Hughes v. State Board, 162 Ga. 246, 134 S. E. 42.

§ 1697(6). Recording of certificate; fee; report.

Editor's Note.—Section 3 of the act of 1881, embodied in section 1684 of the Code, was repealed by implication by the act of December 12, 1894 (Ga. L. 1894, p. 85). The act of 1894 was in turn repealed, either expressly or by implication, by the act of 1913 (now this section), and after August 18, 1913, a physician licensed under the act of 1894 was not required to register in accordance with the provisions of the act of 1881, and a physician licensed under the act of 1894, who had caused his certificate to be recorded as required by that act, could recover for services rendered after August 18, 1913, although the record of his certificate had been made prior to August 18, 1913. Friedman v. Mizell, 164 Ga. 1, 137 S. E. 400; Friedman v. Mizell, 36 Ga. App. 615, 137 S. E. 864.

§ 1697(13). Refusal and revocation of licenses.

Editor's Note—Constitutionality.—This section is not violative of the constitution, section 6545, which provides that "The right of trial by jury, except where it is otherwise provided in this constitution, shall remain inviolate," etc. Lewis v. State Board, 162 Ga. 263, 133 S. E. 469.

Nor is it violative of the due-process clauses of the State and Federal constitutions. The section provides for notice of the time and place of hearing, for service of the notice, for the production of the defendant's evidence, and for making his defense, and also for an appeal from the State Board of Medical Examiners to a jury in the superior court; and this provides due process of law. Hughes v. State Board, 162 Ga. 246, 134 S. E. 42.

The language of this section which declares that a licentiate's name may be removed from the records in the office of any clerk of court in this State, and his license revoked upon the ground of "conviction of crime involving moral turpitude," is not so vague, uncertain, and indefinite as to render the same void. The words "moral turpitude" are capable of accurate definition. The legislature may enact that one who has been convicted of crime "involving moral turpitude" shall no longer practice medicine. Hughes v. State Board, 162 Ga. 246, 134 S. E. 42.

Nor is the provision that "said appeal to be had as in other cases now provided by law," void for uncertainty. Hughes v. State Board, 162 Ga. 246, 134 S. E. 42.

Retroactive Effect.—This section is not retroactive as applied to the facts of the case at bar. Hughes v. State Board, 162 Ga. 246, 134 S. E. 42.

Prohibiting Advertisements.—Under the police power of the State the legislature may prohibit advertisements by licensed physicians with reference to "any disease of the sexual organs;" and provide for a revocation of the license of such practicing physician upon a majority vote of the State Board of Medical Examiners, for a violation of the above provision of the act. Hughes v. State Board, 162 Ga. 246, 134 S. E. 42.

Notice—Specifying Law Alleged to Be Violated.—In preferring charges against a practicing physician in order to revoke his license under the act of 1913, as amended by the act of 1918, it is not necessary to specify the law under which the charges are preferred. Hughes v. State Board, 162 Ga. 246, 134 S. E. 42.

CHAPTER 10

Professional Nursing

ARTICLE 1

Board of Examiners

§§ 1698 to 1711(1).—Repealed by the Acts of 1927, p. 247, herein codified as §§ 1711(7) et seq.

ARTICLE 3

Profession Regulated

§ 1711(7). Board of Examiners of nurses created; members.—The Board of Examiners of Nurses for Georgia is hereby created. It shall be composed of five persons to be elected and appointed in the following manner: The Georgia State Nurses' Association will, within thirty (30) days after this Act takes effect, nominate to the Governor of this State ten (10) of its members, none of whom is in any way connected with any training-school for nurses. The said nurses must have had at least three (3) years of practice in their profession immediately preceding their appointment. From this number the Governor shall, within thirty (30) days thereafter, appoint

for places on the said board one nurse who shall hold office for one (1) year from date of appointment; and two (2) shall hold office for two (2) years from said date, and two (2) shall hold office for three (3) years from said date. All of the said appointments shall have the same date; provided no two of the nurses so appointed shall have graduated from the same training-school. Upon the expiration of the term of office of any member of said board the Governor of this State shall appoint a successor to fill the said term of office, who shall hold office for three (3) years from the date of the expiration of, the said term of office. The said appointment shall be made from a list of five (5) members of the said association, to be furnished to him by the said association. All vacancies occurring on this board shall be filled by the Governor for the unexpired term from like nominations furnished to him by the said association within thirty (30) days after the vacancy occurs; provided, that if the said association fails to make the nominations herein required within the time here specified, the Governor shall make such appointments by nominating such members of the nursing profession hereto as may seem to him to be proper. Acts 1927, p. 247.

§ 1711(8). Officers. — The members of this State Board of Examiners shall, within thirty (30) days after appointment, organize by the election of one of its members to be the president of the said board, and another to be the secretary and treasurer, who shall hold office for a period of one year and until their respective successors are elected and have qualified; said officers shall be elected by the board annually, and in case of a vacancy in either of said offices the board shall, within forty (40) days after the vacancy occurs, elect one of its number to fill the said office; and in the event there is no such election within the time named, the Governor shall appoint a member of said board to fill the vacancy. The secretary is required to certify to the Governor the names of the officers so elected; and in the case of a vacancy, this shall likewise be certified by the secretary to him; and in the event of a vacancy in the office of the secretary, the president of the board shall certify the same to him, and shall certify the name of the person chosen to fill the vacancy in the event the vacancy is filled by the board.

§ 1711(9). Quorum; records; seal; certificates.—Three (3) members of said Board of Examiners shall constitute a quorum, but no action of said board shall be valid unless authorized by the affirmative vote of three (3) members thereof. The secretary of the board is directed to keep a record of the minutes of the meetings of said board, and a record of the names of all persons applying for registration hereunder, and of the action of the board thereon, and a register of all nurses who have complied with the requirements of this Act, all of which said records shall, at all reasonable times, be open to public inspection. Said board is authorized to have and use an official seal which shall bear the words: "State Board of Examiners of Nurses for Georgia." The certificate of the secretary of said board under the seal thereof as to the action or non-action of the board shall be accepted in evidence in the courts of this State as the best evidence of the minutes of the said board; and likewise the certificate of the secretary under the said seal, as to the registration or non-registration of any person, shall be accepted as the best evidence as to the registration or non-registration of the said person under the requirements of this Act. The secretary shall issue to all nurses admitted to registration hereunder a certificate under the seal of the said board, showing that fact.

§ 1711(10). Examinations; Notice.—It shall be the duty of said board to meet for the purpose of examining applicants for registration, at least once in each year, and oftener should it be deemed necessary by said board. Notice of said meetings shall be given of the time and place of said meetings by written notice posted, postage prepaid, to the last known address of each applicant, at least ten (10) days before the time of said meeting, and by publication in a daily paper of general circulation in Atlanta, and in a nurses' journal, if there be one published in Georgia. The said notice shall be published at the same rates charged for sheriffs' advertisements. Said notice shall be inserted at least once, and the first insertion shall be made at least two weeks prior to said meeting. Provided, the secretary of said board shall issue a temporary permit to each application for registration, which permit will authorize said applicant to do nursing as a registered nurse until the next meeting of the board.

§ 1711(11). Deposit fee by applicant; dental nurses.—All graduate nurses making application for registration as graduate nurses under this Act shall deposit with the Secretary of the said board, at the time of making such application, the sum of ten ($10.00) dollars as an examination or registration fee. Provided, that no person shall engage in practice as a dental hygienist or dental nurse without first obtaining a certificate therefor to be issued by the Board of Dental Examiners of Georgia, which certificate shall be issued by said Board of Dental Examiners upon written examination conducted by and satisfactory to said board, which shall include the subjects of Dental Anatomy, Physiology, Bacteriology, Dental Pathology, Sterilization, Office Routine, and Oral Hygiene and Prophylaxis. Provided further, that applicants for certificates as dental hygienists or dental nurses shall be of good moral character, shall be at least 19 years of age, shall have had such preliminary education and training as may be prescribed by said Board of Dental Examiners, and shall pay to said Board of Dental Examiners a fee of ten dollars for such examination. Provided further, that no person to whom such certificate is issued shall engage in practice as a dental hygienist or dental nurse except under the supervision of a licensed denist, and no such person shall practice dentistry, or do any kind of dental work other than to remove calcareous deposits, secretions, and stains from the normally exposed surfaces of the teeth, and to apply ordinary wash or washes of a soothing character, and to do sterilization and office routine.

§ 1711(12). Qualifications.—Each applicant for registration as a graduate nurse must be at least twenty-one (21) years of age, of good moral character, a graduate of a regular chartered training-school for nurses, connected with a general hospital or sanatorium (in which medical,

surgical, obstetrical, and pediatric cases, and where men, women, and children, are treated) where three (3) years of training with a systematic course of instruction on the above-mentioned classes of cases is given in the hospital or other educational institution, or must have graduated from a training-school connected with a hospital of good standing, supplying a three (3) years' training corresponding to the above standard, which training may be obtained in two or more hospitals. All qualifications of the applicant shall be determined by the State Board of Examiners of Nurses for Georgia, which is empowered to prescribe such examinations for the applicants as will best test their fitness and ability to give efficient care to the sick. All applicants at the same examination shall be subject to the same kind of examination; provided that the said board shall have the power to grant advanced credit, not in any case of excess of twelve (12) months, for didactic and laboratory work done in an accredited college, or for credits either time or scholastic, earned in an institution other than the one from which graduated.

§ 1711(13). Registration without examination.—All nurses graduating on or before June 1, 1909, from such training-schools as are referred to in the preceding sections shall be, by that fact, entitled to registration without examination, upon paying the application fee of ten ($10.00) dollars, as provided in this Act, and submitting sufficient evidence of good moral character. Nurses who shall show to the satisfaction of the said board that they are graduates of training-schools connected with a hospital or sanitorium, giving two years' systematic course of instruction, or if they graduated before or during the year 1897 from such a school giving one year's training, and who are in good moral and professional standing, and are engaged in the practice of the profession of nursing at the passage of this Act, also nurses in training at the time of the passage of this Act and shall graduate hereafter and possess the qualifications herein specified, shall, upon the payment of the application fee, be entitled to registration without examination, provided application is made for registration on or before February 1, 1928. There may be an appeal from the judgment of the said board by the party who is refused a license by the board, or whose license is revoked, as the case may be, if dissatisfied with the judgment, to a jury of the Superior Court of the county of the residence of such dissatisfied party; said appeal to be had as in other cases now provided by law.

§ 1711(14). Nursing without certificate from board; penalty.—After the expiration of six months from the passage of this Act it shall be unlawful for any person or persons to practice professional nursing as a graduate nurse or registered nurse in this State without a certificate from said board; and any person violating any of the provisions of this Act shall be guilty of misdemeanor, and upon conviction thereof shall be punished in accordance with section 1065 of the Penal Code of the State of Georgia. Each graduate nurse who registers in accordance with the provisions hereof shall be styled and known as a registered nurse, and no other nurse shall assume or use such title, or use the abbreviation "R. N.," or any other letters, words, or figures to indicate that he or she is a graduate or registered nurse; and a violation hereof shall be deemed a misdemeanor, and shall upon conviction be punished accordingly. Annually during the months of January or February every registered nurse of Georgia shall be required to have her certificate validated by the issuance of a card attesting to her right to practice as a registered nurse for the current year. This request for validation shall be accompanied by a fee of one ($1.00) dollar, and sent to the secretary of the State Board of Examiners of Nurses for Georgia. On March 1 of each year the roster of nurses who have validated their certificates shall be taken; and the same shall be printed within sixty days thereafter in such form and manner as may be determined by the board. Any certificates not validated may be revoked.

§ 1711(15). Licenses to undergraduate nurses.—The Board of Examiners of Nurses shall issue a license to engage in the care of the sick to undergraduate nurses. Each applicant must be at least nineteen (19) years of age, of good moral character, must present to the Board of Examiners a certificate showing that he or she has had at least twelve (12) months training in a regular chartered training-school for nurses connected with a general hospital or sanitorium, in which medical, surgical, obstetrical, and pediatric cases, and where men, women and children are treated.

§ 1711(16). Fee from undergraduate nurse.—It shall be the duty of said board of Examiners to determine all the qualifications of applicants, and provide for examination for license for undergraduate nurse. Upon filing application for examination and registration as a licensed undergraduate nurse, each applicant shall pay a fee of five ($5.00) dollars, and annually during the months of January or February every licensed undergraduate nurse shall be required to have her certificate validated by the issuance of a card attesting to her right to practice as a licensed undergraduate nurse for the current year. This request for validation shall be accompanied by a fee of fifty (50) cents. Any certificate not validated may be revoked. This shall not apply to attendants or orderlies employed in hospitals. All undergraduate nurses, practicing at the passage of this Act, and possessing the qualifications herein specified, shall, upon the payment of the application fee, be entitled to registration without examination, provided application is made for registration on or before February 1, 1928. After the expiration of six months after the passage of this Act, it shall be unlawful for any person or persons to practice as undergraduate nurse in this State without a certificate from said Board of Examiners, except in hospitals; and any person violating any of the provisions of this Act shall be guilty of misdemeanor, and upon conviction thereof shall be punished in accordance with section 1065 of the Penal Code of the State of Georgia. Each licensed undergraduate who registers in accordance with the provisions hereof shall be styled and known as a licensed undergraduate nurse, and no other persons shall assume or use such title, or use the abbreviation "L. U. N.," or other letters, words, or figures for the purpose of representing that he or she is a licensed undergraduate nurse within the meaning of this Act.

§ 1711(17). Emergency nursing.—This Act shall not be construed to affect or apply to gratuitous nursing of the sick by friends of the family, or as an emergency aid. And this shall not be construed to affect a situation in the event of public emergency pronounced by the State Board of Health to exist in the State at large, or any part thereof, or in the event of an emergency declared by national health authorities, requiring nursing service within or without the State, in which case unlicensed persons may be permitted to nurse or care for the sick for hire during the continuance thereof.

§ 1711(18). Revocation of certificate; notice to holder.—The said board may revoke any certificate issued by it, for sufficient cause to be adjudged by it; but no such certificate shall be revoked without a hearing, notice of the time and place of which shall be given to the holder of the certificate by the secretary at least (30) days before the day set for said hearing, which notice shall plainly set forth the charges against the holder of said certificate, and the trial shall be only upon the grounds specified. Said notice shall be mailed to the said person so accused, at his or her last known address, postage prepaid; or the same shall be delivered personally to the person so accused. The presiding officer of the said board is authorized and empowered to administer oaths to all witnesses giving evidence at such hearing, and no evidence shall be received at such hearing if the same is not under oath.

§ 1711(19). Salary of secretary.—Out of the funds of the said board, accruing from the application fees herein provided, the secretary of said board shall be paid a salary and all necessary expenses, the salary to be determined by the said Board of Examiners. The members of the board shall be entitled out of the funds to receive not less than six ($6.00) dollars per day for each day actually engaged in the service of the board, and all necessary expenses. All payments out of said funds, or any funds of the board, shall first be approved by the presiding officer of said board. Be it further enacted, that one or more persons be employed by the board, to work under the direction of the secretary, and to be paid out of funds accruing from application fees, to assist in carrying out the rules and regulations adopted by the said board, and for giving advice and encouragement to nurse-training schools in preparing applicants for registration. Duties and salaries shall be determined by the board, and shall be paid as other expenses are paid.

§ 1711(20). Certificates of registration without examination.—The Board of Examiners shall have authority to issue certificates of registration without examination to graduate nurses of a State other than Georgia, or of a foreign country, who hold bona fide certificates of registration issued under the laws of such a State or foreign country; provided, the standards of registration are equivalent to those provided in this Act, and the individual qualifications of the nurse meet the requirements of this Act. The registration fee of ten ($10.00) dollars for graduate nurses herein provided shall accompany each application for a certificate. Be it further enacted, that the Board of Examiners shall have authority to issue a certificate of registration or license without examination to undergraduate nurses registered in a State other than Georgia, or of a foreign country, whose qualifications meet the requirements of this Act. The registration fee of five ($5.00) dollars, as herein provided for undergraduate nurses, shall accompany each application for certificate.

§ 1711(21). Continuation of members of existing board; its books, etc., to be property of new board.—The membership of the present Board of Examiners of Nurses for Georgia shall continue for the terms for which each member was chosen or appointed; and that the books, records, files, furniture, and property of the present board shall be the property of the board herein created. The board herein created shall be the successor or continuation of the board now in existence, and the acts of the present board heretofore done shall continue to be in all respects valid and lawful, and all registrations heretofore made or authorized by the said present board shall continue of full force and effect.

§ 1711(22). Nurses not affected by this Act.—The provisions of this Act shall not affect nurses known as practical nurses, not holding themselves out to be either graduate or undergraduate nurses within the meaning of this Act.

CHAPTER 11

State Board of Embalming

§ 1717(4). Disinterred bodies.

As to permit where family consents to disinterment, see note to P. C. 408.

CHAPTER 12

State Board of Pharmacy

§§ 1722 to 1731.—Repealed by the Act of 1927, pp. 291 et seq., herein codified as §§ 1731(1) et seq.

§ 1731(1). Georgia Board of Pharmacy created.—There is hereby created and established a board to be known as the Georgia Board of Pharmacy, with the duties and powers as are hereinafter in this Act provided. Acts 1927, p. 291.

§ 1731(2). Members of existing board to be on new board.—Said board shall consist of five (5) members, and the members of the now existing Georgia State Board of Pharmacy shall continue in office and act as members of the said Georgia Board of Pharmacy hereby created, with all the duties and powers as herein provided, until their respective terms of office expire, the vacancies as they may occur to be filed in keeping with the requirements of this Act.

§ 1731(3). Governor to commission members; term 5 years.—Members of said Georgia Board of Pharmacy shall be commissioned by the Governor, and shall serve for a term of five (5) years, or until their successors are duly appointed and qualified. No person shall be eligible for appointment to membership on said board who is not a licentiate of the Board of Pharmacy of the State of Georgia, and who has not been actually engaged for a period of five (5) years or more in the retail drug business. If any member of said

board after his appointment and qualification shall cease to be actually engaged in the retail drug business, his membership on said board shall at once become vacant; nor shall any person be eligible to appointment on said board who has any official connection with any school or college of pharmacy, and if any member of said board shall, after his appointment and qualification, become connected with any school or college of pharmacy, his membership on said board shall immediately become vacant. No member of the board who has served one full term shall be eligible to reappointment until there has intervened a period of one (1) full term from the date of the expiration of his membership to the date of his reappointment.

§ 1731(4). Annual election of member for next vacancy.—The Georgia Pharmaceutical Association shall from its membership annually elect one member for the next occurring vacancy on said board, who shall meet the qualifications as required by this Act. When regularly submitted to him by the secretary of the said association, the Governor shall make the appointment for the vacancy occurring in said board.

§ 1731(5). Unexpired term.—Vacancies occurring other than by expiration of the term of a member shall be filled for the unexpired term only by the member receiving next highest number of votes at last annual convention of the Georgia Pharmaceutical Association.

§ 1731(6). Oath of appointee.—The appointee to said board shall immediately after his appointment take and subscribe to an oath or affirmation, before a qualified officer, that he will faithfully and impartially perform the duties of the office, which oath shall be filed with the Secretary of State; whereupon the Secretary of State shall issue to said appointee a certificate of appointment.

§ 1731(7). Pay of members.—The members of said board shall receive as their compensation the sum of fifteen dollars ($15.00) per day while in the actual performance of their duties as members of said board, and in addition shall receive their actual traveling expenses while in the performance of their duties on said board, such compensation to be paid out of the funds received by said board under the provisions of this Act.

§ 1731(8). Organization of board.— The said board shall, as soon as practicable after this Act becomes effective, meet and organize and from their members elect a president, a vice-president, and a secretary.

§ 1731(9). Secretary's salary. — The said secretary shall be paid a salary for his services, the amount of the same to be fixed by said board, and paid out of said funds.

§ 1731(10). Examinations by board, time of. —The said board shall meet for examination of applicants for licenses at such place or places, and at such times, as the board may decide. In no case shall the board hold more than three meetings annually.

§ 1731(11). Drugs to be compounded only by or under supervision of registered pharmacist.— It shall be unlawful for any proprietor, owner, or manager of any drug-store or pharmacy to allow any person in his employ except a registered pharmacist to compound or mix any drugs, medicines, or poisons for sale, except an employee under the immediate supervision of a registered pharmacist.

§ 1731(12). Qualifications of Applicants. — Applicants for registered pharmacists must be not less than twenty-one (21) years of age, and shall have at least a high school education with a minimum of sixteen (16) units as are designated by the Association of Accredited Schools, and not less than thirty-six (36) months experience in a drug store or place where poisons are dispensed by a licensed vendor registered under the laws of the State of his abode, or in lieu of the foregoing a graduate of a recognized school of pharmacy; provided, this Act shall not be construed to affect a person who has had three (3) years practical experience under the direct supervision of a registered pharmacist at the time of the passage of this Act.

§ 1731(13). Examination fee.—Applicants for examination as registered pharmacists under this Act shall pay to said board an examination fee of fifteen dollars ($15.00). All fees shall be paid to the secretary of said board at the time of the filing of the application for examination. Any applicant failing to make the required mark is entitled to another examination without any additional charge, provided he takes the second examination within one (1) year from the first.

§ 1731(14). License to one reigstered in another State.—The said board may in its discretion grant licenses as pharmacists to persons who furnish proof that they have been registered as such in some other state, and that they are of good moral character; provided that such other State in its examination requires the same general degree of fitness as is required by the examination in this State.

§ 1731(15). Election of representative to meeting, of association of other States.—The said board, in order to determine and be informed of the status of the boards of other States desiring reciprocal registration, and in order to be advised also regarding the progress of pharmacy throughout the country, may annually elect one of their members to meet with like representatives from other State Boards of Pharmacy, the expenses of such member in attending such meeting to be paid out of the funds received by the said board under the provisions of this Act. The said board through its representatives may, with like representatives from other State Boards of Pharmacy, join in creating and maintaining an Association of members of the several States, to be engaged in the general advancement of pharmacy and the keeping of records of reciprocal registration.

§ 1731(16). Refusal or revocation of license. —Said board may refuse to grant a license to any person found guilty of a felony, or gross immorality, or who is addicted to the use of alcoholic liquors or narcotic drugs to such an extent as to render him or her unfit for the practice of pharmacy, and may after due hearing revoke a license for such cause, or revoke any license which has been procured by fraud.

§ 1731(17). Who may compound or sell drugs, etc.—No person shall engage in the compounding or vending of medicines, drugs, or poisons within the State without full compliance with this Act, except: (1) such druggists as are exempted from the operation of the present law by the statute of the State of Georgia, and such druggists as have heretofore obtained a license and are legally authorized by existing laws to compound and vend drugs, poisons, and chemicals; (2) physicians putting up their own prescriptions and dispensing medicines from their own offices. (3) This item shall be construed in the interest of the public health, and shall not be construed to prohibit the sale by merchants of home remedies, not poisons, or the sale by merchants of preparations commonly known as patent or proprietary preparations when sold only in the original and unbroken packages, Paris green, arsenate of copper, arsenate of lead, or preparations containing any of these articles used for killing Lincoln-bugs, cabbage-worms, caterpillars, all and similar insects, provided the labels, cartons, and packages containing such preparations have the word "Poison" printed across the face, and conform to the United States Pure Food and Drug Act, and general merchants other than druggists shall not be required to register under the provisions of this Act.

§ 1731(18). Duty of board as to examination, license, prosecution.—It shall be the duty of said board to examine all applicants for licenses under the provisions of this Act submitted in proper form, and to grant certificates of licenses to such persons as may be entitled to the same. It shall further be the duty of said board to cause the prosecution of all persons violating the provisions of this Act, and in all such prosecutions the burden shall be upon the defendant to show his authority.

§ 1731(19). Fees to go to fund in State Treasury for pay and expenses of board.—All monies paid to the secretary in fees or from other sources shall be paid by him into the Treasury of the State of Georgia and there held by the State Treasurer for the payment of the compensation and expenses by said board and secretary; the funds arising under the provisions of this Act being hereby especially allocated under the authority of the General Assembly of Georgia for this purpose. After the compensation of said board, the salary of the secretary, and expenses of said board and secretary have been paid, the board shall have the right to establish a reserve or emergency fund not in excess of $1,000.00, and all surplus over and above the above-mentioned expenses and the above-mentioned surplus shall, on the first day of January of each year, revert to the Treasury of Georgia, to be placed in the general fund of the State.

§ 1731(20). Meaning of "drug-store," "pharmacy," "apothecary."—The term "drug-store," "pharmacy," or "apothecary," wherever used in this Act, shall be construed to mean a place where drugs, medicines, or poisons are dispensed, compounded, or sold at retail under the direction and direct supervision of a person who is duly licensed and registered by the Georgia Board of Pharmacy to practice in Georgia.

§ 1731(21). Unlawful use of title "drug-store," etc.—It shall be unlawful for any person in connection with any place of business or in any manner to take, use, or exhibit the title "drug-store," "pharmacy," "apothecary," or any combination of such titles or any title or description of like import or any synonym or other term designated to take the place of such title, unless such place of business is in fact and in truth a drug-store or pharmacy as defined in this Act.

§ 1731 (22). Annual registration.—All persons now lawfully engaged in compounding and vending medicines, drugs, and poisons in this State, shall, on or before the first day of January following the passage of this Act, and every person who shall be hereafter duly licensed under the provisions of this Act shall, before engaging in any business under said license, register in the office of the Secretary of the Georgia Board of Pharmacy annually; said registration shall be entered in a book to be kept for that purpose by said secretary, his name, nationality, and credentials and date thereof under which he is entitled to engaged in such vocation at the time of filing such registration, and a certificate of such registration, stating the terms of the same, shall be given him by said secretary.

§ 1731(23). Power to make rules.—The said Georgia Board of Pharmacy herein provided shall have the power and authority to make rules and regulations governing the action of the board, and to make such other rules and regulations as they deem necessary to carry out the intent and provisions of this Act.

§ 1731(24). Violation a misdemeanor.—Any violation of any provision of this Act shall be a misdemeanor, and the person so offending shall be punished as prescribed in section 1065 of the Penal Code.

CHAPTER 17

Motor Vehicle Laws

ARTICLE 2

Acts 1915, Ex. Sess., and Amendatory Acts

§ 1770(26). Schedule of annual fees for vehicles; registry and license of manufacturers and dealers; number plates; tags for purchasers; penalty.

Constitutionality.—The act is not unconstitutional because it undertakes to tax automobiles, for the construction of public roads, and that there is no authority in the General Assembly of Georgia to tax personal property in order to raise a fund for the construction of public roads, §§ 6358 and 6359, or the fourteenth amendment of the Constitution of the United States. Lee v. State, 163 Ga. 239, 135 S. E. 912.

The act is not unconstitutional upon the ground that it violates the constitution, § 6554, which provides that all taxation shall be uniform upon the same class of subjects and ad valorem on all property taxed. Lee v. State, 163 Ga. 239, 135 S. E. 912.

The tax is not a property tax. Lee v. State, 163 Ga. 239, 135 S. E. 912.

§ 1770(28). Display of number-plate.

Constitutionality.—This section is not open to attack on the ground that it was not one of the subjects included in the Governor's proclamation convening the legislature in extraordinary session. Lee v. State, 163 Ga. 239, 135 S. E. 912.

ARTICLE 3

Acts 1921, pp. 255 et seq.

§ 1770(50). Equipments.

Purpose of Regulation.—The purpose of these several regulations of motor-vehicles is the protection of the lives and limbs of all persons upon or using such streets and highways, not only those who may be met, overtaken, or passed by the driver, but as well for the protection of those who may accompany him. Black v. State, 34 Ga. App. 449, 451, 130 S. E. 591.

Presumption as to Compliance. — With nothing appearing to the contrary, it will be assumed that the automobile was duly equipped with "front lamps" and that they were "throwing strong white lights to a reasonable distance in the direction in which such vehicle is proceeding," in accordance with the requirements of the section. Macon v. Jones, 36 Ga. App. 799, 803, 138 S. E. 283.

Insufficient Brakes as Negligence Per Se.—The operation of a truck along the public streets not equipped with efficient and serviceable brakes, constituted negligence per se. Orange Crush Bottling Co. v. Smith, 35 Ga. App. 92, 132 S. E. 259.

§ 1770(51). Speed limit; intersections, etc.; pedestrians, horses, etc.; passing stationary street cars, etc.

Insufficient Brakes Negligence Per Se.—The trial court did not err in instructing the jury that the law requires motor-vehicles while in use upon the public streets to be equipped with efficient and serviceable brakes, and that the operation of the truck along the public streets not so equipped constituted negligence per se. Orange Crush Bottling Co. v. Smith, 35 Ga. App. 92, 132 S. E. 259.

Section Applied.—A charge to the effect that whenever the operator to any vehicle along a public highway shall meet a vehicle approaching from an opposite direction, the operator of the first vehicle shall turn to the right, was held applicable to the conduct of the plaintiff. Hornbrook v. Reed, 35 Ga. App. 425, 133 S. E. 264.

§ 1770(52). Passing moving vehicles.

Constitutionality.—So much of the section as undertakes to make penal the failure of the operator of a motor-vehicle, when meeting a vehicle approaching in the opposite direction, to "turn his vehicle to the right so as to give one half of the traveled roadway, if practicable, and a fair opportunity to the other to pass by without unnecessary interference" is too uncertain and indefinite in its terms to be capable of enforcement. Heath v. State, 36 Ga. App. 206, 136 S. E. 284. See also Hale v. State, 21 Ga. App. 658, 94 S. E. 823, holding the corresponding section of the Act of 1915 [§ 1770(34)] unconstitutional.

What Constitutes Meeting.—Where a motor-car traveling along a public highway has been brought to a stop in the highway, and another car is approaching it from the front, both cars, notwithstanding one is stationary, are meeting each other in the sense of the section. Roberts v. Phillips, 35 Ga. App. 743, 134 S. E. 837.

Passage on Narrow Bridge. — Charges in an indictment that the defendant failed and refused to give the deceased a fair opportunity to pass by without unnecessary interference is being practical to give one half to the travelled roadway, were not sustained by the proof, where the evidence showed that the cars collided on a temporary bridge which was less than twelve feet wide and too narrow to permit two automobiles to pass each other thereon. Shupe v. State, 36 Ga. App. 286, 287, 136 S. E. 331.

Bridges—Sufficiency of Guard-Rails. — There is no legal duty on a railroad company to construct the guard-rails of a bridge sufficiently strong to withstand the impact of an automobile going at the rate of twenty to twenty-five miles per hour. Corley v. Cobb County, 21 Ga. App. 219, 93 S. E. 1015; Eberhart v. Seaboard Air-Line R. Co., 34 Ga. App. 49, 55, 129 S. E. 2.

§ 1770(53). Warning.

Sounding Horn at Intersections.—There is no statute in this State requiring the operator of a motor-vehicle to sound a horn or give any other warning on approaching the intersection of public streets or highways, unless such intersection is a "dangerous place upon such street or highway." O'Donnelly v. Stapler, 34 Ga. App. 637, 131 S. E. 91.

An allegation that defendant failed to give any warning whatever on approaching an intersection did not amount to a charge of negligent violation of a statute, although it sufficiently specified, in connection with other parts of the petition, that the defendant was negligent in the violation of his duty to exercise ordinary care to avoid injury to the plaintiff's automobile at such intersection. O'Donnelly v. Stapler, 34 Ga. App. 637, 131 S. E. 91.

§ 1770(55). Chauffeur's license.

Roads to Which Applicable.—While it is unlawful for a minor under sixteen years of age to operate a motor vehicle upon the public highways, the rule is not applicable to roads which are not public streets or highways. W. & A. R. R. v. Reed, 35 Ga. App. 538, 544, 134 S. E. 134.

Effect of Presence of Owner—Experience. — It is unlawful for a minor under sixteen years of age to operate a motor-vehicle upon the highways of this State, whether he is accompanied by the owner of the machine or not, and regardless of experience. Western, etc., Railroad v. Reed, 35 Ga. App. 538, 544, 134 S. E. 134.

ARTICLE 3A.

Acts of 1927 pp. 226 et seq.

§ 1770(60a). Secretary of state, ex-officio commissioner of vehicles.—After the passage of this Act the Secretary of State shall be ex-officio Commissioner of vehicles of this State, and shall be charged with the execution of the Act hereafter enacted. Acts 1927 p. 227.

§ 1770 (60b). Definitions.—For the purpose of this Act the following definitions shall apply:

"Vehicle"—Any contrivance used for transportation of persons or property on public highways.

"Motor-vehicle"—Any vehicle, except tractors, propelled by power other than muscular power, not operated exclusively upon tracks.

"Motorcycle" — Any motor-vehicle having but two main wheels in contact with the ground, upon which the operator sits astride. A motorcycle may carry a one wheel attachment generally known as a side-car.

"Tractor" — Any self-propelled vehicle designed for use as a traveling power-plant or for drawing other vehicles, but having no provision for carrying loads independently.

"Trailer"—Any vehicle without motive power, designed for carrying persons or property either partially or wholly on its own structure and for being drawn by a self-propelled vehicle, except those running exclusively on tracks.

"Pneumatic tires"—Tires of rubber and fabric inflated with air.

"Solid tires"—Tires of rubber or similarly elastic material that do not depend on confined air for the support of the load.

"Metallic tires"—Tires of any metal or other hard material.

"Manufacturer," "dealer"—Any person, firm, or corporation engaged in the manufacture, sale, purchase or leasing of motor vehicles or tractors.

"Owner"—Any person, firm, corporation or association holding title to a vehicle or having exclusive right to the use thereof for a period of more than thirty days.

"Operator"—Any person who drives or operates a motor-vehicle or tractor.

"Chauffeur"—An operator for hire.

"Local authorities"—All officers and public officials of the State, municipalities, and counties of the State.

"Trucks".—"A motor-vehicle for the transportation of property or non-passenger carrying motor-vehicles."

For the purpose of this Act—

A vehicle is considered equipped with pneumatic tires when pneumatic tires are used on all wheels.

A vehicle is considered equipped with solid tires when solid tires are used on two or more wheels.

A vehicle is considered equipped with metallic tires when metallic tires are used on two or more wheels.

The National Automobile Chamber of Commerce horse-power rating formula is hereby adopted as the standard for determining the horse-power of passenger-carrying vehicles.

§ 1770(60c). Registration. — That every owner of a motor-vehicle, trailer, tractor (except tractors used only for agricultural purposes) or motorcycle shall, on or before the first day of February in each year, before he shall operate such motor-vehicle, tractor, trailer or motorcycle, register such vehicle in the office of the Commissioner of Vehicles, and obtain a license to operate the same for the ensuing year; and every chauffeur employed to operate motor-vehicles shall likewise register and obtain a license as hereinafter provided.

That application for the registration of a motor-vehicle, trailer, tractor or motorcycle shall be made to the Commissioner of Vehicles, upon blanks prepared by him for such purposes, by the owner. Such application shall contain a statement of the name, place of residence, and address of the applicant, together with a brief description of the vehicle to be registered, its name, model, the name of the manufacturer, its motor number, its shipping weight, carrying capacity, and such other information as the Commissioner of Vehicles may require.

Provided, that nothing in this Act shall be construed as repealing the Act approved August 22, 1925, requiring proof of ownership, certificate of registration and money-order receipt, fifteen-day permit, and penalty for violation of said Act, pages 315 to 317 inclusive of Georgia Laws of 1925.

That application for a chauffeur's license shall be made to the Commissioner of Vehicles upon blanks prepared for such purpose by him, and shall be signed and verified by oath or affirmation. Such application shall be made annually on or before the first day of February, and shall contain a statement of the name and address of the chauffeur, and such other information as the Commissioner of Vehicles may require, and shall be signed and endorsed by at least three responsible owners of motor-vehicles and employers of chauffeurs; provided that no such license shall be issued to any person under sixteen years of age. A fee of $2.00 shall accompany the application. Upon receipt of such application and the payment of the required fee, the Commissioner of Vehicles shall file the application, register the same, assign to the applicant a distinctive number, and make the same a matter of record in his office. He shall likewise furnish such chauffeur a badge, which badge shall be evidence of his right to act as chauffeur until the first day of February of the next year following. Such badge shall be of aluminum or some other suitable metal, oval in form, the greater diameter not to exceed two inches and there shall be stamped thereon the words "Registered Chauffeur No. (Here insert the registration number designated) State of Georgia." The badges shall be of uniform size, numbered consecutively, beginning with the figure 1, and shall be issued in consecutive order and of different design each year. The chauffeur shall at all times, while operating a motor-vehicle upon public streets and highways, wear his badge pinned to his clothing in a conspicuous place. No registered chauffeur shall voluntarily or otherwise permit any other person to wear his badge, nor shall any person wear a chauffeur's badge belonging to any other person, or a fictitious badge, while operating a motor-vehicle upon the public streets and highways.

§ 1770(60d). Registration, licensing, and permit fees.—The annual fees for licensing of the operation of vehicles shall be as follows for each vehicle registered:

A. Motorcycle	$ 5.00
B. Motorcycle side-car	3.00
C. Passenger-carrying motor-vehicles fifty (50) cents per one hundred (100) pounds (or major fraction thereof) gross weight of vehicle; minimum fee.	11.25
For each non-passenger carrying motor-vehicle or truck of one ton capacity or less	15.00
For each non-passenger carrying motor-vehicle or truck of more than one and not exceeding one and one half tons capacity	22.50
For each non-passenger carrying motor-vehicle or truck of one and one half tons and not exceeding two tons capacity	30.00
For each non-passenger carrying motor-vehicle or truck of more than two tons and not exceeding two and one half tons capacity	37.50
For each non-passenger carrying motor-vehicle or truck of more than two and one half tons capacity and not exceeding three tons capacity	45.00
For each non-passenger carrying motor-vehicle or truck of more than three tons capacity and not exceeding three and one half tons capacity	52.50
For each non-passenger carrying motor-vehicle or truck of more than three and one half tons capacity and not exceeding four tons capacity	75.00
For each non-passenger carrying motor-vehicle or truck of more than four tons capacity and not exceeding five tons capacity	150.00
For each non-passenger carrying motor-vehicle or truck of more than five tons capacity and not exceeding six tons capacity	375.00

For each non-passenger carrying motor-vehicle or truck of more than six tons capacity and not exceeding seven tons capacity..... 750.00

For each non-passenger carrying motor-vehicle or truck of more than seven tons capacity..... 1,125.00

H. Trailers (or semi-trailers), when equipped with pneumatic tires, one dollar ($1.00) per one hundred (100) pounds (or major fraction thereof) gross weight of vehicle.

K. Trailers (or semi-trailers), when equipped with solid tires, one dollar and fifty cents ($1.50) per one hundred (100) pounds (or major fraction thereof) gross weight of vehicle.

L. Trailers (or semi-trailers), when equipped with metallic tires, two dollars ($2.00) per one hundred (100) pounds (or major fraction thereof) gross weight of vehicle.

T. Tractors when equipped with pneumatic tires..... 15.00

V. Tractors equipped with solid or metallic tires or treads..... 30.00

Provided, that tractors used exclusively for agricultural purposes shall not be required to register or to pay any fees.

Provided, that hearses and ambulances shall pay the rates prescribed for passenger-carrying motor-vehicles in paragraph C.

§ 1770(60e). Half-Rate fees between Aug. 1 and Jan. 1.—Where application is made for the registration of any vehicle or tractor between the dates of August 1st and January 1st of any year, the fee charged for such registration shall be one half the amount set forth in section 1770 (60d).

§ 1770(60f). Receipt for post-office order as permit.—When application is made for the registration of any vehicle or tractor and a United States post-office money-order is purchased for the correct fee and forwarded with said application, the receipt for said money-order, when dated by the proper authority, shall serve as a fifteen-day permit to operate the vehicle or tractor on the highways of the State.

§ 1770(60g). Registration of makers and dealers.—Manufacturers and dealers engaged in the manufacture, sale, or leasing of motor-vehicles or tractors shall register with the Commissioner of Vehicles, making application for a distinguishing dealer's number, specifying the name and make of motor-vehicle manufactured, sold, or leased by them, upon blanks prepared by the Commissioner of Vehicles for such purposes, and pay therefor a fee of twenty-five ($25.00) dollars, which fee shall accompany such application, and for which said fee the Commissioner of Vehicles shall furnish to said dealers two number-plates to be known as a dealer's number and to be distinguished from the number-plates herein provided for by a different and distinguishing color to be determined by the Commissioner of Vehicles, with the word "Dealer" on same; dealer's number to be for the purpose of demonstrating or transporting dealer's vehicles for sale or lease. No dealer or manufacturer may use or permit to be used a dealer's number for private use or on cars for hire, or other manner not provided for in this section. In case dealers or manufacturers desire more than two tags, they shall so state on the application, and, in addition to the fee of twenty-five (25.00) dollars hereinabove provided, shall pay ten ($10.00) for each and every additional number-plate furnished.

§ 1770(60h). Number-Plates—description, and how attached.—Upon receipt of the application and the payment of the required fee, the Commissioner of Vehicles shall file the application, register the vehicle, assign to it a distinctive serial number, and make the same a matter of record. He shall furnish also without cost two metal number-plates showing thereon the serial number designated to such vehicle. Number-plates shall be of metal at least seven (7) inches wide and not less than sixteen (16) inches in length, and shall show in bold characters the year of registration, serial number, and abbreviation of the name of the State, and such other distinctive markings as in his judgment the Commissioner of Vehicles may deem advisable, so as to indicate the class of weight of the vehicle for which the number-plates were issued. Duplicate number-plates, when one of the originals have been lost, defaced, or destroyed, may be obtained from the Commissioner of Vehicles upon filing affidavit setting forth the facts of such loss or destruction, and the payment of a fee of one dollar. A number, when issued, shall not be transferred from one vehicle to another, and shall not be used by any person or upon any motor-vehicle [other than the motor-vehicle] to which it is assigned, and any use of said number by any person or persons in any manner not provided for in this Act shall be a violation of said Act; provided, however, that where a motor-vehicle has been duly registered in the office of the Commissioner of Vehicles, and the number assigned to said vehicle for the year, the owner of said motor-vehicle to which said number has been assigned may, upon sale or exchange of said motor-vehicle, transfer and assign the number assigned to said motor-vehicle to the purchaser of said machine, by registering such transfer in the office of the Commissioner of Vehicles and the payment of fifty cents, which shall accompany said transfer or registration, and upon said transfer the assignee of said number shall stand in the position of the original personal in whose name such number is recorded.

Every motor-vehicle, tractor, trailer, or motorcycle, which is in use upon the highways of the State, shall at all times display the number-plates assigned to it, and the same shall be fastened to both the front and rear of the machine in a position so as not to swing, and shall be at all times plainly visible. It shall be the duty of the operator of any motor-vehicle to keep both number-plates legible at all times.

§ 1770(60i). Lights and brakes.—Every motor-vehicle, tractor, and motorcycle, while in use or operation upon the streets or highways of this State, shall at all times be provided and equipped with efficient and serviceable brakes and signalling device, consisting of a horn, bell, or other suitable device for producing an abrupt warning signal. Every motor-vehicle using the highways

of this State at night shall be equipped with a lamp or lamps clearly visible for a distance of not less than one hundred feet from front and rear.

"Front Lamp"—Every motor-vehicle and tractor shall be provided with at least two lamps of approximately equal candle-power, mounted on the the right and left sides thereof, and every motorcycle shall have mounted on the front thereof at least one lamp. The front lamps shall throw light to a reasonable distance in the direction in which such vehicle is proceeding. Front lamps shall be provided with a suitable device for dimming or changing focus, so as to prevent dangerously glaring or dazzling rays from the lamps in the eyes of approaching drivers.

"Rear Lamps" — Every motor-vehicle, tractor, and trailer shall have on the rear thereof, and to the left of the axis thereof, one lamp capable of displaying a red light visible for a distance of at least one hundred feet behind such vehicle; provided that when a vehicle is used in conjunction with another vehicle or vehicles, only the last of such vehicles shall be required to carry such lamp. Every motor-vehicle, tractor, trailer, or motorcycle, when on highways of this State at night, shall carry a lamp illuminating with white lights the rear registration plate of such vehicle, so that the characters thereon shall be visible for a distance of at least fifty feet.

Provided, that the provisions of this section as to lights, horns, bells, and or other signalling devices shall not apply to tractors used exclusively for agricultural purposes when and while being operated upon public roads between daylight and dark only; and such lights, horns or other, signalling devices shall not be required for such agricultural tractors not using the public roads.

Provided, that the provisions of this Act requiring front and rear lights on vehicles shall not apply to horse or mule drawn vehicles or other vehicles drawn by muscular power.

§ 1770(60j). Non-Residents License.—Motor vehicles owned by non-residents of the State may be used and operated on the public streets and highways for a period of thirty days without having to register and obtain a license to do so or a chauffeur's license; provided, that the owner or owners thereof shall have fully complied with the laws requiring the registration of motor-vehicles in the State or Territory of their residence, and that the registration number and initial letter of such State or Territory shall be displayed and plainly visible on such vehicle or vehicles. In other respects, however, motor-vehicles owned by non-residents of the State and in use temporarily within the State shall be subject to the provisions of this Act; provided, no resident of this State shall be allowed to operate a motor-vehicle within this State under a license issued by another State.

§ 1770(60k). Restrictions as to speed. — No persons shall operate a motor-vehicle upon any public street or highway at a speed greater than is reasonable and safe, having due regard for the width, grade, character, traffic, and common use of street or highway, or so as to endanger life or limb or property in any respect whatsoever; but said speed shall not exceed those tabulated below:

Total gross combined weight of motor vehicle and load in pounds.	Speed in miles per hour Kind of Tires		
	Metallic	Solid	Pneumatic
Less than 10,000.....	10	25	40
10,000 to 16,000.....	8	20	25
Over 16,000.....	5	18	20

§ 1770(60l). Restrictions as to traffic.—Every person operating a vehicle upon the highways of this State shall observe the following traffic rules and regulations:

a. All vehicles not in motion shall be placed with their right sides as near the right side of the highway as practicable, except on city streets where traffic is obliged to move in one direction only.

b. Slow-moving vehicles shall at all times be operated as close to the right-hand side of the highway as practicable.

c. An operator meeting another vehicle coming from the opposite direction on the same highway shall turn to the right of the center on the highway, so as to pass without interference.

d. An operator of a vehicle overtaking another vehicle going in the same direction, and desiring to pass the same, shall pass to the left of the vehicle overtaken, provided that the way ahead is clear of approaching traffic, but if the way is not clear he shall not pass unless the width of the roadway is sufficient to allow his vehicle to pass to the right of the center thereof in the direction in which his vehicle is moving; provided further, that no operator shall pass a vehicle from the rear at the top of a hill or on a curve where the view ahead is in any way obscured or while the vehicle is crossing an intersecting highway. An operator overtaking and desiring to pass a vehicle shall blow his horn, and the operator of the vehicle so overtaken shall promptly, upon such signal, turn his vehicle as far as reasonably possible to the right in order to allow free passage on the left of his vehicle.

e. An operator in rounding curves shall reduce speed and shall keep his vehicle as far to the right on the highway as reasonably possible.

f. An operator intending to start, to stop, or to turn his vehicle to the left or right shall extend the hand and arm horizontally from and beyond the left side of the vehicle.

g. An operator of a vehicle shall have the right of way over the operator of another vehicle who is approaching from the left in an intersecting highway, but shall give the right of way to an operator of a vehicle approaching from the right on an intersecting highway.

h. An operator of a vehicle shall bring the same to a full stop not less than five feet from the rear of any street-car or passenger-carrying bus headed in the same direction, which has stopped for the purpose of taking on or discharging passengers, and shall remain standing until such car has taken on or discharged said passengers; provided, however, that said operator may pass such street car where a safety zone is established by proper authorities, or where said operator may pass such car at a distance of at least eight feet therefrom,

and provided further that he shall have slowed down and proceeded cautiously.

i. An operator shall reduce speed at crossing or intersection of highways, on bridges, or sharp curves and steep descents, and when passing any animal being led on the highway.

j. An operator shall not use the cut-out of a motor-vehicle while on the highways of this State.

k. An operator of a motor-vehicle or tractor shall sound his horn or other signalling device when approaching points on the highways where the view ahead is not clear or where the view of the side of an intersecting highway is obstructed; provided that in no such case shall such horn or signalling device be used for the purpose of making unnecessary noise.

l. All vehicles carrying poles or other objects which project more than five feet from the rear shall, during the period of from one half hour after sunset to one half hour before sunrise, carry a red light at or near the rear end of the pole or other object so projecting. During the period of from one half hour before sunrise to one half hour after sunset vehicles shall carry a danger-signal at or near the rear end of pole or other object so projecting.

§ 1770(60m). Restriction as to operators. — No person shall operate a motor-vehicle or motorcycle upon any public street or highway, whether as owner or operator of such vehicle, if under sixteen years of age, or while under the influence of intoxicating liquors or drugs; and no person shall take, use, or operate any motor-vehicle or motorcycle upon the public streets and highways without the permission of the owner thereof.

§ 1770 (60n). In case of accident.—In case of accident to any person or damage to any property upon the public street or highway, due to the operation of a motor-vehicle, tractor, or trailer thereon, the operator of such machine shall immediately stop, and, upon request of the person injured or sustaining damage thereby, or of any other person present, give such person his name and address, and if he is not the owner of such vehicle, then in addition the name and address of the owner thereof, and further he shall render such assistance as may be reasonable or necessary.

§ 1770 (60o). Restriction as to size. — No vehicle shall be operated on the highways of this State whose width, including load, is greater than ninety-six (96) inches (except traction engines, whose width shall not exceed one hundred and eight (108) inches, a greater height than twelve (12) feet, six (6) inches, or a greater length than thirty (30) feet; and no combination of vehicles coupled together shall be so operated whose total length, including load, shall be greater than eighty five (85) feet; provided, that in special cases vehicles whose dimensions exceed the foregoing may be operated under permits granted as hereinafter provided.

§ 1770 (60p). Restriction as to weight. — No vehicle of four wheels or less, whose gross weight, including load, is more than 22,000 pounds, no vehicle having a greater weight than 17,600 pounds on one axle, and no vehicle having a load of over eight hundred (800) pounds per inch width of tire upon any wheel concentrated upon the surface of the highways (said width in the case of rubber tires to be measured between the flanges of the rim) shall be operated on the highways of this State; provided, that in special cases vehicles whose weight, including loads, exceed those herein prescribed may be operated under special permits granted as hereinafter provided. Provided further, that the State Highway Commission may designate certain roads or sections of roads on the State-Aid Highway System on which the traffic requirements do not justify heavy type of pavement at the present time, and the said State Highway Commission may prescribe the maximum gross weight of vehicle, including load, which may be operated over the sections thus designated.

§ 1770 (60q). Restriction on wheels.—No load or vehicle any portion of which drags or slides on the surface of the roadways shall be used or transported on the highways of this State; no vehicle shall be used or transported on the highways of this State the wheels of which while being used or transported, either from construction or otherwise, cause pounding on the road surface. No vehicle equipped with solid rubber tires shall be used or transported on the highways of this State, unless every solid rubber tire on such vehicle shall have rubber on its entire traction surface at least one inch thick above the edge of the flange on the entire periphery. No vehicle shall be used or transported on the highways of this State the wheels of which have on the surface any wooden or metal cleets, spikes, corrugations, or other irregularities which tend to damage the surface of the road; provided that this section shall not be taken to prohibit the use of tire chains.

§ 1770 (60r). Permits for extra size or weight. — The special permit required by sections 1770(60p), 1770(60q) and 1770(60r) of this article, for the operation of a vehicle whose size or weight with load exceeds the limits prescribed by this Act, shall be in writing and be issued at the discretion of the State Highway Engineer of this State, or of those officials of the State's political subdivisions who have charge of the highways and bridges over which vehicle is to operate. Such permit may be issued for a single trip or for a definite period not beyond the expiration of the vehicle registration, and may designate the highways and bridges to be used.

§ 1770(60s). Municipal regulations of autos.— That nothing contained in this Act shall be construed as changing or interfering with any regulation or ordinance which has heretofore or may hereafter be adopted by any municipality of this State, regulating the running or operation of motor-vehicles described in this Act; and provided further, that nothing in this Act shall prevent cities and towns from regulating, by reasonable ordinance, the rate of speed except as provided hereinafter, noisy cut-outs, and glaring headlights within said cities and towns; provided, further that nothing herein shall prevent incorporated cities and towns from requiring by ordi-

nance the owners of motor-vehicles residing within the incorporated limits of said cities or towns to register the number of State license with the clerk of council or other officer to be designated by such city or town, together with a brief description of such motor-vehicle, and said incorporated cities or towns shall have the power to provide a penalty for the violation of such ordinance; provided, no additional license fee shall be charged by any municipality.

§ 1770 (60t). Expense of operation.—That the necessary expenses to carry out the provisions of this law shall be defrayed out of the sums collected thereunder, and the amount thereof shall be fixed annually in advance upon an itemized budget-sheet submitted by the Commissioner of Vehicles, thirty days prior to the meeting of the General Assembly, accompanied by an itemized report of the expenditures made for the preceding year, when approved by the Governor of this State. Said expense fund, or so much thereof as shall be needed, shall be drawn upon the warrants of the Governor, supported by bills of particulars and vouchers submitted by the Commissioner of Vehicles; provided said expense fund as shown by said approved budget-sheets shall be set aside out of the first collection made hereunder in any fiscal year, and provided the sums used to defray said expenses shall not exceed 5 per cent. of the total revenue derived under this Act.

§ 1770 (60u). Disbursement of fees.—That the full amount of the fees collected under this Act shall be turned over to the State Treasury by the Commissioner of Vehicles within thirty days after collection, in such manner as the State Treasurer may prescribe, and that it shall be the duty of the State Treasurer to set aside from said fees the sum authorized by the budget-sheet as prescribed under section 21 thereof.

§ 1770(60v). Salary Commissioner of Motor Vehicles. — The Secretary of State is hereby authorized to employ a clerk whose duty it shall be to keep a full record of all motor-vehicle owners in a book to be kept for that purpose. He shall file registration alphabetically by counties, and shall furnish each year to the county commissioner or ordinaries, and also the tax-receivers of the several counties, a list of all owners of motor-vehicles of their respective counties who have registered in this office. He shall perform any and every duty pertinent to his office under the direction of the Secretary of State. The salary of said clerk shall be two hundred dollars per month, payable out of the fees received for the registration of motor-vehicles; and the salary of the Commissioner of Motor Vehicles shall be one hundred and fifty dollars per month, payable out of the fees received for the registration of motor-vehicles.

§ 1770(60w). Throwing things on highways.—That every owner or operator of a machine shall have equal rights upon the highways of this State with all other users of such highways; and no person or persons shall throw glass, nails, tacks, or other obstructions upon the public highways used and traversed by automobiles, or unreasonably obstruct or impede the right of travel of such owner or operator while operating, propelling, or driving such machine; and no person or persons shall give any signal or signs of distress or danger or call for assistance upon a person lawfully operating any such machine on any of the public highways of this State, maliciously and without reasonable cause for so doing.

§ 1770(60x). Sheriff's duties defined—inspector.—That the Commissioner of Vehicles shall at least twice in each year call the attention of the sheriff's constables, and marshals in this State, to the provisions of this Act, and furnish once each quarter to the sheriffs and clerks of the county commissioners of each county, for file in his office, a list of such vehicles as are registered from the county in which said sheriff and clerk hold office; and it shall be the duty of all local authorities in every county to make investigation as to the violation of the provisions of this Act, and said local authorities shall have authority, and it is hereby made their duty, to swear out warrant and prosecute any and all owners of motor vehicles who violate any of the provisions of this Act. The cost of the sheriffs, constables, and marshals shall be paid in the same manner as other criminal costs are paid under the law.

§ 1770(60y). Deputies from highway department, to enforce law.—It shall be the duty of the Commissioner of Vehicles to deputize such employees of the State Highway Department as may be requested by the State Highway Board, for the purpose of enforcing the provisions of this Act. The State Highway Board is hereby authorized to select from its employees men to be deputized by the Commissioner of Vehicles, and such deputies are hereby given the necessary police powers for the purpose of enforcing this Act. There shall be a motor-vehicle license inspector to be appointed by the Secretary of State, who shall have authority to swear out warrants for violations of the motor-vehicle law, and to perform any other duty required by the Secretary of State.

§ 1770(60z). Penalty for violation of this Act.—Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as for a misdemeanor. It is the duty of every arresting officer both county, municipal and State, to enforce the provisions of this Act.

§ 1770(60aa). Civil action not abridged. — Nothing in this Act shall be construed to curtail or abridge the right of any person to prosecute a civil action for damages sustained by reason of injury to a person or property, resulting from the negligent use of the public streets or highways by a motor-vehicle or motorcycle, or by its owner, his employee, or by any other operator thereof.

§ 1770 (60bb). Constitutionality of Act.—That should any of the provisions of this Act be held illegal or unconstitutional, the same shall not vitiate the remaining provisions of said Act, but all such provisions not held illegal or unconstitutional shall remain of full force and effect.

§ 1770(60cc). When effective.—This Act shall not take effect until February 1st, 1928; provided, however, that section 1770(60h) shall take

effect on such date subsequent to February 1st, 1928, as the Commissioner of Vehicles in his direction finds practicable.

ARTICLE 5

Title Registration Act

§ 1770(61). Interest rate.

Persons to Whom Applicable. — Even the criminal procedure provided in this act refers only to those who may obtain license and qualify under the provisions of the act. Bennett v. Bennett, 161 Ga. 936, 949, 132 S. E. 528. From dissenting opinion.

Penalty for Violation of Section.—This act makes no provision for any penalty for a violation of this section. Williams v. Yarbrough, 34 Ga. App. 500, 130 S. E. 361.

Equitable Relief.—There is no provision in this act giving the superintendent of banks the power necessary to the maintenance of a suit seeking relief in equity. The case is controlled by the holding in Bentley v. Board, 162 Ga. 836; Bennett v. Bennett, 161 Ga. 936, 938, 132 S. E. 528.

The borrower could set up in defense of the action of trover by the lender the grounds of equitable relief that in making the loan the lender did not comply with this act, and that the loan contract was void because the lender collected a greater sum as interest than the statute authorized. Calhoun v. Davis, 163 Ga. 760, 137 S. E. 236.

CHAPTER 18

Making Loans

§ 1770(76). Salary assignments.

Transactions to Which Applicable.—This act nullifies and precludes enforcement of certain loans and salary assignments given to secure the same when made in contravention of its provisions as to special licensing by the State bank examiner and as to rates of interest or discount. McLamb v. Phillips, 34 Ga. App. 210, 213, 129 S. E. 570.

Same— Absolute Unconditional Sale of Salary. — This act does not cover a bona fide assignment or sale of wages or salary. McLamb v. Phillips, 34 Ga. App. 210, 213, 129 S. E. 570. Citing Tollison v. George, 153 Ga. 612 (1), 614, 112 S. E. 896; Atlanta Joint Terminals v. Walton Discount Co., 29 Ga. App. 225, 227, 114 S. E. 908.

Same—Effect upon Sections 3446-3465. — Nothing in this act or in other legislation has apparently either expressly or by implication repealed the law of 1904, §§ 3446-3465, so far as it relates to a business of actual and bona fide buying of wages or salaries. That original act, to this extent, therefore, remains in full force. McLamb v. Phillips, 34 Ga. App. 210, 213, 129 S. E. 570.

TITLE THIRTEENTH

Regulations for Particular Branches of Trade

Agriculture

CHAPTER 1

Inspection

ARTICLE 2

Inspection of Oils

§§ 1800 to 1814. Repealed by the Acts of 1927 pp. 279, herein codified as §§ 1814(4) et seq.

§ 1814(4). "Gasoline," "kerosene," defined. — The word "gasoline" used in this Act shall embrace and include gasoline, naptha, benzol, and other products of petroleum under whatever name designated, used for heating or power purposes. The word "kerosene" shall embrace and include kerosene and other products of petroleum under whatever name designated, used for illuminating, heating, or cooking purposes. Acts 1927, p. 279.

§ 1814(5). Inspection of gasoline and kerosene. —For the purpose of the Act all gasoline and kerosene sold, offered or exposed for sale in this State, shall be subject to inspection and analysis as hereinafter provided. All manufacturers, refiners, wholesalers, and jobbers, before selling or offering for sale in this State any gasoline or kerosene, or the like products, under whatever name designated, for power, illuminating, heating, or cooking purposes, shall file with the Comptroller-General a declaration or statement that they desire to sell such products in this State, and shall furnish the name, brand, or trademark of the products which they desire to sell, together with the name and address of the manufacturer thereof, and that all such products are in conformity with the distillation test hereinafter provided.

§ 1814(6). Approval by State Oil Chemist and Comptroller-General. — All materials, fluids, or substances offered or exposed for sale, purporting to be substitutes for, or motor-fuel improvers, or other motor fuels to be used for power, cooking, or heating purposes, shall, before being sold, exposed, or offered for sale in this State, be submitted to the Comptroller-General for examination and inspection, and shall receive the approval of the state Oil Chemist hereinafter provided for, and the Comptroller-General, and then shall be sold or offered for sale only when properly labeled with a label, the form and contents of which has been approved by the State Oil Chemist and Comptroller-General.

§ 1814(7). Illegal sale; confiscation.—The sale or offering for sale of all such gasoline and kerosene as hereinbefore enumerated and designated, used or intended to be used for power, illuminating, cooking, or heating purposes, when sold under whatever name, which shall fall below the standard hereinafter provided, is hereby declared to be illegal, and same shall be subject to confiscation and destruction by order of the Comptroller-General.

§ 1814(8). Containers and labels.—Every person, firm, corporation, or association of persons, delivering at wholesale or retail any gasoline in this State, shall deliver the same to the purchaser only in tanks, barrels, casks, cans, or other containers having the word "gasoline," plainly stenciled or labeled in vermilion red, in English. Such dealers shall not deliver "kerosene oil" in any barrel, cask, can, or other container which has been stenciled or labeled, that has ever contained gasoline, unless such barrel, cask, can, or other container shall have been thoroughly cleaned and all traces of gasoline removed. Every purchaser of gasoline for use or sale shall procure and keep the same only in tanks, barrels, casks, cans, or other containers stenciled or labeled as heretofore provided; every person delivering at wholesale or retail any "kerosene" in this State shall deliver same to the purchaser only in tanks, barrels, casks, cans, or other containers having the word "kerosene" in English, plainly stenciled or labeled in vermilion red, and every person purchasing for use or sale shall procure and keep the same only in tanks, barrels, casks, cans, or other containers stenciled or labeled as heretofore provided. Nothing in this section shall prohibit the delivery of gasoline by hose or pipe from a tank

directly into the tank of any automobile or other motor. In cases where gasoline or kerosene is sold in bottles, cans, or other containers of not more than one gallon, for cleaning and other similar purposes, such bottles, cans, or other containers shall bear label with the words, "unsafe when exposed to heat or fire."

§ 1814 (9). Notice as to shipments; samples.—When gasoline or kerosene is shipped into the State of Georgia in any manner whatever, the manufacturer, refiner, or jobber shall promptly give notice to the Comptroller-General of the date of shipment, and shall furnish a sample of not less than eight ounces of the gasoline or kerosene shipped and labeled, giving the tank-car number, truck number or other container number, with the name and address of the person, company, firm, or corporation and to whom it is sent, and the number of gallons contained in the shipment made. In each instance where gasoline or kerosene is shipped in tank-cars, the record of the tank-car furnished by the railroad companies as to the capacity of each tank-car will be accepted.

§ 1814(10). Test or analysis for buyer.—Any person purchasing any gasoline, illuminating, or heating oils, from any manufacturer, refiner, jobber, or vendor in this State, for his own use, may submit fair samples of said gasoline, illuminating, or heating oils to the Comptroller-General to be tested, or analyzed by the State Oil Chemist. In order to protect the manufacturer or vendor from the submission of spurious samples, the person selecting the same shall do so in the presence of two or more disinterested persons, which samples shall not be less than one pint in quantity, and bottled, corked, and sealed in the presence of said witnesses, and sample shall be placed in the hands of a disinterested person, who shall forward the same at the expense of the purchaser to the Comptroller-General; and upon the receipt by him of any such sample he is hereby required to have the State Oil Chemist to promptly test and analyze the same, and he shall return to such purchaser or purchasers a certificate of analysis, which, when verified by the affidavit of the State Oil Chemist, shall be competent evidence in any court of law or equity in this State.

§ 1814(11). Sale without test; misdemeanor.—It shall be a misdemeanor for any manufacturer, refiner, vendor, jobber, or wholesaler to sell, expose, or offer for sale any gasoline for heating or power purposes in this State, which does not comply with the following distillation test:

1. Corrosion test. A clean copper strip shall not be discolored when submerged in the gasoline for 3 hours at 122° F.

2. Distillation range. When the first drop falls from end of the condenser, the thermometer shall not read more than 55° C. (131° F.)

When 20 per cent. has been recovered in the receiver, the thermometer shall not read more than 105° C. (221° F.)

When 50 per cent. has been recovered in the receiver, the thermometer shall not read more than 140° C. (284° F.)

When 90 per cent. has been recovered in the receiver, the thermometer shall not read more than 200° C. (392° F.)

The end point shall not be higher than 225° C. (437° F.)

At least 95 per cent. shall be recovered as distillate in the receiver from the distillation.

3. Sulphur. Sulphur shall not be over 0.10 per cent.

All the foregoing tests shall be made in accordance with the methods for testing gasoline contained in Technical Paper 323A, United States Government Bureau of Mines, Department of the Interior.

It shall also be a misdemeanor for any manufacturer, jobber, wholesaler, or vendor to sell, offer, or expose for sale any kerosene oil for use or intended to be used for heating, cooking, or power purposes, which does not comply fully with the following distillation test:

1. Color. The color shall not be darker than No. 16 Saybolt.

2. Flash point. The flash point shall not be lower than 100° F.

3. Sulphur. The sulphur shall not be more than 0.125%.

4. Flock. The flock test shall be negative.

5. Distillation. The end point shall not be higher than 625° F.

6. Cloud point. The oil shall not show a cloud at 5° F.

7. Burning test. The oil shall burn freely and steadily for 16 hours, in a lamp fitted with a No. 2 hinge burner.

All of the foregoing tests for kerosene shall be made according to the methods for testing kerosene contained in Technical Paper 323A, United States Government Bureau of Mines, Department of the Interior.

Provided, that the Comptroller-General may from time to time change these specifications to agree with those adopted and promulgated by the United States Government Bureau of Mines; provided further, that sixty days' notice shall be given all manufacturers, refiners, and jobbers doing business in this State, before any such changes shall become effective.

§ 1814(12). State Oil Chemist; appointment, duties, salary.—The Comptroller-General is hereby required to appoint a chemist who shall be an expert oil analyst, and to be designated as the State Oil Chemist, whose duty it shall be to analyze all samples of gasoline and kerosene, and all fluids purporting to be substitutes for, or motor-fuel improvers, or other like products of petroleum, under whatever name is designated, and used for illuminating, heating, cooking, or power purposes, submitted by the Comptroller-General or any duly authorized inspector or inspectors. Said chemist shall hold office for a period of four years, unless sooner removed for cause, as hereinafter provided; and he shall receive a salary of $3,000.00 per annum, payable monthly.

§ 1814(13). Oil inspectors; number, appointment, term, salary, expenses.—The offices of general oil inspectors, State oil inspectors, and of all local oil inspectors are hereby abolished, and it shall be the duty of the Comptroller-General to appoint six oil inspectors, each of whom

shall receive a salary of $2,400.00 per annum, and shall be allowed an expense account not to exceed the sum of $2,400.00 each per annum, payable monthly. The inspectors herein provided for shall hold office for four years, unless sooner removed for cause, as hereinafter provided.

§ 1814(14). Unlawful interest in sale, etc.—Any chemist or inspector who, while in office, shall be interested directly or indirectly in the manufacture or vending of any gasoline shall be guilty of a misdemeanor.

§ 1814(15). Inspectors' automobiles; daily reports.—All inspectors are hereby required to provide themselves, at their own expense, with automobiles equipped with accurate speedometers, and to make daily reports to the Comptroller-General, covering all work performed, and monthly reports shall also be made, showing the following information:

1. Name and number of towns visited.
2. Number of inspections in each town.
3. Number of miles traveled by rail.
4. Number of miles traveled by automobile.
5. Expenses incurred, with vouchers showing the amount spent for hotel bills, gasoline, oil, railroad fares, and incidentals necessary in the performance of their duties.
6. Number of samples drawn, each kind.
7. Number pumps inspected, and the numbers of the pumps.
8. Number pumps condemned.
9. Number of pumps in territory.

§ 1814(16). Duty to collect and test samples.—The Comptroller-General is hereby empowered and it is made his duty to collect, or cause to be collected by his duly authorized inspectors, samples of gasoline, kerosene, or other illuminating cooking, or heating oils sold, offered, or exposed for sale in this State, and to cause samples to be tested or analyzed by the State Oil Chemist hereinbefore provided for, for this purpose. And said State Oil Chemist is hereby required to report his finding to the Comptroller-General, together with a certificate of analysis of such gasoline, kerosene, or other like products of petroleum, under whatever name designated, and used for illuminating, heating, cooking, or power purposes. Such certificate of analysis, when properly verified by an affidavit of said State Oil Chemist, shall be competent evidence in any court of law or equity in this State.

§ 1814(17). Registration of gasoline dealers.—Each and every dealer in gasoline, before selling, exposing, or offering for sale any gasoline in this State, and annually thereafter, shall be required to register and shall make known his desire to sell gasoline to the Comptroller-General, giving the name and manner and kind of pump or pumps he will use, and location of same, and keep said certificate or certificates of registration posted in a prominent and accessible place in his place of business where such gasoline is sold. The form of such certificate shall be designated and issued by the Comptroller-General.

§ 1814(18). Inspector's duty as to pumps.— It shall be the duty of the inspectors herein provided for to familiarize themselves with the accuracy and adjusting devices on the various makes of self-measuring pumps in use in this State; they shall carefully inspect all of such pumps located in the territory assigned to them, at least once every ninety days; all such pumps found to be giving accurate measure with a variation of not exceeding four ounces from the actual measures on a measure of five gallons, he shall place a lead and wire seal, to be provided by the Comptroller-General, on the adjusting device or devices in such way that the adjustment cannot be altered without breaking the seal. Any pump that is found to be giving inaccurate measure in excess of four ounces, the inspector shall then and there notify the operator of the pump, whether owner or lessee, to make the necessary adjustments, the inspector to lend his assistance with the standard measure provided for testing such pumps; after the adjustments have been made, the adjusting devices are to be sealed in the same manner as provided for those pumps found originally accurate. On all pumps that have apparently been altered for the purpose of giving short measure in excess of eight ounces on a measure of five gallons, or that cannot be adjusted within a range of eight ounces, either over or under, on a measure of five gallons, the inspector shall notify the operator of such pump, whether he be owner or lessee, that it must be immediately adjusted, the inspector to lend his assistance with the standard measure for testing such pumps. Should the operator fail or refuse to then and there make such adjustments as are necessary to bring the measure within the allowed variation, the same shall be condemned and dismantled immediately by the inspector examining the same and such pump shall not again be allowed operated in this State without the written consent of the Comptroller-General. Inspectors shall be required to report to the Comptroller-General immediately the name and number of all pumps condemned and dismantled. Any person, company, firm, or corporation who shall reinstall and operate any pump, without the written consent of the Comptroller-General, which has been condemned by a duly authorized inspector herein provided, because of giving short measure in excess of eight ounces to a measurement of five gallons, shall be deemed guilty of a misdemeanor, and upon conviction be punished as prescribed by section 1065 of the Penal Code of Georgia of of 1910. When any pump is condemned under the provisions of this Act by any inspector, it shall be the duty of the inspector to immediately make affidavit, before the ordinary of the county in which the pump is located, that the said pump is being operated by the person who shall be named in the affidavit, contrary to law; and thereupon the ordinary shall issue an order to the person named in the affidavit to show cause before him on the day named in the order not more than ten days nor less than three days from the issuance of the order, why the said pump should not be confiscated and dismantled. On the day named in the order, it shall be the duty of the said ordinary to hear the respective parties and to determine whether or not the pump

has been operated contrary to the provisions of this Act; and if the said ordinary shall find that the said pump has been so operated, then he shall forthwith issue an order adjudging the pump to be forfeited and confiscated to the State of Georgia, and direct the sheriff of the county to dismantle the said pump and take same into his possession, and, after ten days' notice by posting or publication, as the court may direct, to sell the pump to the highest bidder for cash; the proceeds to said sale, or as much therefor as is necessary, shall be used by the sheriff, first, to pay the cost, which shall be the same as in cases of attachment, and thereupon pay over and deliver the residue, if any there be, to the person from whose possession the pump shall have been taken. On and after the passage of this Act, it shall be unlawful for any self-measuring pump, which can be secretly manipulated in such manner as to give short measure, to be installed or operated in this State. Any person, company, firm, or corporation who shall install or operate a self-measuring pump in this State which has a device or other mechanical means used for the purpose of giving short measure, shall, upon conviction thereof, be punished as provided in section 1065 of the Penal Code of Georgia of 1910, and such inaccurate self-measuring pump shall be condemned as heretofore provided in this section, and thereafter it shall be unlawful for any person to sell any kerosene, or gasoline from such pump until such pump shall have been made or altered so as to comply with the provisions of this Act, and shall have been inspected and approved for service by an inspector. After the passage of this Act it shall be unlawful for any one to break a seal applied by an inspector to a pump, without first securing consent of the Comptroller-General, which consent may be given through one of the duly authorized inspectors.

§ 1914(19). Access for inspection.—In the performance of their duties, the Comptroller-General, or any of his duly authorized agents, shall have free access at all reasonable hours to any store, warehouse, factory, storage house, or railway depot, where oils are kept or otherwise stored, for the purpose of examination or inspection and drawing samples. If such access be refused by the owner, agent of such premises or other persons occupying and using the same, the Comptroller-General, or his duly authorized inspectors or agents, may apply for a search warrant, which shall be obtained in the same manner as provided for obtaining search warrants in other cases. Their refusal to admit an inspector to any of the above-mentioned premises during reasonable hours shall be construed as prima facie evidence of a violation of this Act.

§ 1814(20). Violation of Act or of rule; penalty. — Any person, or association of persons, firm, or corporation, who shall violate any of the provisions of this Act, or any rule or regulation promulgated by the Comptroller-General for the enforcement of this Act, shall upon conviction thereof be punished as for a misdemeanor, as prescribed in section 1065, of Penal Code of Georgia of 1910.

§ 1814 (21). Removal of chemist or inspector; charges in writing.—The State Oil Chemist, or oil inspectors provided for herein, may be removed or discharged for misfeasance or malfeasance in office, incompetency, or other good cause, by a majority vote of the Governor of the State the Attorney-General, and Comptroller-General, after the preferment of charges in writing served on any one of said officials not less than ten days prior to the date which may be set by said Comptroller-General, Governor, and Attorney-General, or a majority of them. Charges may be preferred by any one of the three last-named officials, or any citizen of the State, and from the decision of said officials or majority of them, there shall be no appeal.

§ 1814 (22). Expense of equipment, supplies, clerical help, etc., allowance for; limits.—In addition to the salary and expenses of inspectors as provided in section 1814(13) there shall be allowed such further sums for the purchase of equipment, supplies, and clerical help, and to pay any other of the expenses incident to and necessary for the enforcement of this Act, as may hereafter be appropriated; but the total of such expenses shall not exceed the sum of $20,000.00 annually; so that including all salaries as herein provided, and for the enforcement of said Act, the total appropriation shall not exceed the sum of $51,800.00. The Comptroller-General is hereby constituted as chief Oil Inspector of this State, for the purpose of the enforcement of this Act, and his salary therefor is hereby fixed at the sum of twelve hundred dollars ($1,200.00) per annum, to be paid out of the aforesaid total sum of $51,800.00.

§ 1814(23). Salaries and expense accounts; how paid.—The salaries of the State Oil Chemist and of the inspectors and all of the expenses herein provided for shall be paid out of the treasury on warrants signed by the Governor, by requisition of the Comptroller-General, accompanied by itemized statements and vouchers for said salaries and expenses. The expense accounts of said oil inspectors shall be verified under oath and furnished by said Comptroller-General along with the requisitions.

§ 1814 (24). Entire time of chemist and inspectors to be given to duties; bonds.—The State Oil Chemist and the six oil inspectors herein provided for shall devote their entire time to the duties of their respective offices; and each shall give bond, with some good and solvent surety company and in such sum as may be approved by the Comptroller-General, for the faithful discharge of the duties of their respective offices; the premiums on which shall be paid out of the expense fund of $20,000.00 in this Act provided for.

§ 1814 (25). No inspection fees. — No inspection fees of any kind or character shall hereafter be paid for the inspection of gasoline or kerosene.

§ 1814 (26). Vacancies in offices.—The Comptroller-General shall be and is hereby authorized to fill any vacancies which may occur in the offices of State Oil Chemist and Oil Inspector, on account of death, resignation, or other cause.

CHAPTER 3

Regulations, Agriculture, etc.

ARTICLE 1

Cotton, Rice, etc.

§ 1844. (§ 1601). Scalesmen, weighers of cotton, and others to be sworn.

Admissibility of Testimony of Unsworn Scalesman.—The testimony of a scalesman as to the weight of a commodity sold by him is not rendered inadmissible because he has not subscribed to the oath required of him as a scalesman of such a commodity under this section. Buckeye Cotton-Oil Co. v. Murphy & Sons, 34 Ga. App. 363, 129 S. E. 553.

§ 1851. (§ 1608.) Produce not taxable by cities or towns.

Mineral water is not a farm product within the meaning of this section. Pratt v. Macon, 35 Ga. App. 583, 134 S. E. 191.

CHAPTER 5

Peddling

§ 1888. (§ 1642.) Disabled soldiers to peddle without a license.

Exemption Not Based on Certificate.—The right of a disabled or indigent soldier of the late European war to conduct business in a town or city without paying license for the privilege of so doing is based upon the fact that the owner of the business is such soldier, and not on the certificate of the ordinary, which is intended to furnish sufficient proof of said fact, and not as a condition precedent to the exercise of the right. Coxwell v. Goddard, 119 Ga. 369, 46 S. E. 412; Fairburn v. Edmondson, 162 Ga. 386, 134 S. E. 51; Jones v. Macon, 36 Ga. App. 97, 98, 135 S. E. 517.

Indigency of Disability — When Cause of Exemption Ceases.—There is nothing in this section which provides for exemption after the indigency or cause of exemption ceases to exist. The act provides that the said certificate, stating the fact of his being [not having been in the past] such indigent soldier shall constitute sufficient proof. Jones v. Macon, 36 Ga. App. 97, 98, 135 S. E. 517.

Cannot Certify to Permanent Indigency.—While the ordinary might be able to certify to a patent, permanent physical disability, he necessarily could not certify that a person would always be indigent. Jones v. Macon, 36 Ga. App. 97, 98, 135 S. E. 517.

When Tax Is Due Prior to Issuance of Certificate.—The fact that the license tax had become due before the certificate had been issued does not render such soldier liable therefor, if in fact he was a disabled or indigent soldier of said war and a resident of this state at the time the license tax was imposed, especially where he had applied for such certificate before the license tax had become due. Fairburn v. Edmundson, 162 Ga. 386, 134 S. E. 51.

Soldier's License Used to Avoid Tax. — Where it was found that the defendant was running a business himself, deriving the profits from it, and was merely attempting to use a soldier's license, granted to a Confederate soldier, as a shield to protect him from paying a license tax to the City of Atlanta and the State, the action of the judge of the superior court in refusing to sanction a certiorari was sustained. Lacy v. Atlanta, 34 Ga. App. 453, 454, 130 S. E. 74.

CHAPTER 5B

Real Estate Brokers and Salesmen

§ 1896(5). "Real estate broker" and "real estate salesman" defined; provisions, where inapplicable.—Whenever used in this article, "real estate broker" means any person, firm or corporation, who, for another and for a fee, commission or other valuable consideration, sells, exchanges, buys, rents, or offers or attempts to negotiate a sale, exchange, purchase, or rental, of any estate or interest in real estate, or collects, or offers or attempts to collect rent for the use of real estate. The term shall include any person, firm, or corporation advertising through signs, newspapers or otherwise, as conducting a real estate office or real estate business. Provided, however, this provision shall not be construed to include the sale or subdivision into lots by the bona fide fee-simple holder of any tract or parcel of land.

A "real estate salesman" means a person employed by a licensed real estate broker to sell or offer for sale, to buy or offer to buy, to negotiate the purchase, sale or exchange of real estate, or to lease, rent, or offer to lease, rent or place for rent any real estate for or on behalf of such real estate broker. The term shall include any other than bookkeepers and stenographers employed by any real estate broker, as real estate broker is defined in the preceding paragraph of this section.

The provisions of this Act shall not apply to any person, firm or corporation, who, as owner or lessor, shall perform any of the acts aforesaid with reference to property owned by them. Nor shall the provisions of this Act apply to persons, firms, or corporations, not real estate brokers or real estate salesmen, holding a duly executed power of attorney from the owner for the sale, leasing or exchanging of real estate; nor shall said provisions be held to apply to a receiver or trustee in bankruptcy, an administrator, or executor, or trustee, or any person selling real estate under order of court, or pursuant to the terms of a will, mortgage, or deed of trust, or deed to secure a debt. Acts 1925, pp. 325, 326; 1927, p. 307.

Editor's Note.—The last two sentences of the first paragraph and the last sentence of the second paragraph of this section, were added by the amendment of 1927.

The 1927 Act is cumulative to the former law and repeals it only when expressly stated. See § 25 of the Act.

§ 1896(13). Fees for licenses.—The fees for licenses shall be as follows: For a broker's license, the annual fee shall be $25.00. If the licensee be a corporation, the license issued to it shall entitle one official or representative thereof to engage in the business of a real estate broker within the meaning of this act. For all other officers or representatives of a licensed corporation who shall engage in the business of a real estate broker within the meaning of this, the annual fee shall be $10.00. If the licensee be a co-partnership, the license issued to it shall entitle one member of said co-partnership to engage in the business of a real estate broker within the meaning of this Act. For every other member of such co-partnership, the annual fee shall be Ten Dollars.

For a salesman's license, the annual fee shall be Five Dollars. All applications for license shall be accompanied by the license fee as herein provided, and all licenses shall expire upon the 31st day of December of each year. All applications made during the year to expire December 31st of said year. The fees required of brokers and salesmen under this act shall be the full annual fee for all licenses applied for by or before June 30th of any calendar year; and one-half the annual fee for all licenses applied for between July 1st and December 31st of any calendar year. Provided that this section shall not be construed to prevent municipalities from assessing license fees. Acts 1925, pp 325, 332; 1927, p. 308.

Editor's Note.—The annual fee for salesman's license was reduced from ten to five dollars, by the amendment of 1927. The original last sentence which provided that the fee charged shall be prorated on monthly basis, was stricken, and the present last sentence was added, by the same amendment.

CHAPTER 9

State Geologist

§ 1963. (§ 1712.) State geologist.

Cited in annotations to Myers v. U. S., 272 U. S. 52, 1249.

CHAPTER 12

Protection of Trademarks, and Names of Benevolent Organizations

§ 1993. Name and style of benevolent and other associations.

Presumption as to Fraud.—If the association or corporation first appropriating and using the name has a clear right to its use, its subsequent use by another corporation knowing of the right is presumed to be fraudulent. Graves v. District Grand Lodge No. 18, 161 Ga. 110, 129 S. E. 783.

Sufficiency of Proof.—In a case where it is charged that one beneficial incorporated association is using a name which by prior use appertains to another fraternal organization, mere proof by the plaintiff that the defendant was using the name which it had adopted to distinguish it from similar organizations would not entitle the plaintiff to relief. Graves v. District Grand Lodge No. 18, 161 Ga. 110, 129 S. E. 783.

§ 1994. Injunction against infringement.

Enjoined In Toto.—When it is made to appear that the name in question is being used, or indeed if it is shown that it can be used, to mislead the public and induce the belief that the association which is using the name which another is justly entitled to use, the defendant should be enjoined from the use of this name in toto, and not merely partially enjoined. Graves v. District Grand Lodge No. 18, 161 Ga. 110, 129 S. E. 783. The addition of the suffix "incorporated" is not sufficient relief. Id.

Same—Ritual, Passwords, etc. — In Graves v. District Grand Lodge No. 18, 161 Ga. 110, 129 S. E. 783, it was further stated that, "It was further error to omit or refuse to enjoin the use by the defendant of the ritual, passwords, signs, tokens, etc., of the national order."

ARTICLE 3

Gates

§ 2034. (§ 1775.) Impounding animals, how disposed of; and damages, how assessed.

Construed with Section 2082(11)—Quarantining and Dipping.—In Gill v. Cox, 163 Ga. 618, 624, 137 S. E. 40, Mr. Justice Hines speaking for the court, said: "Section [2082-(11)] and [this section] when construed together, furnish the owner of animals impounded under that section an adequate remedy for contesting the amount of expense claimed by the local inspector for quarantining and dipping such animals.

It was the intention of the legislature to make this remedy applicable to an inspector who impounds cattle under section 2082(11). So, if such inspector and the cattle-owner can not agree upon the amount of expense incurred by the inspector in having the animals of the defaulting owner quarantined and dipped, then the inspector must resort to the remedy provided in this section for the recovery of such expense. He can not advertise and sell them without such proceedings. If the cattle-owner wishes to replevy his animals so impounded, and thus lessen the expense of keeping them thereafter impounded, he can give the bond provided for in said section. Gill v. Cox, 163 Ga. 618, 625, 137 S. E. 40.

FOURTEENTH TITLE

Inclosures and Stock

ARTICLE 6

Election for no Fences

§ 2042(2) Exemption of mountain districts from no-fence or stock law; election as to.—In those several counties of the mountain region of Georgia wherein the consent of the State of Georgia has been given to the United States for the acquisition of land for the establishment of National Forest Reserves, where any area composed of three or more militia districts, in which the United States has acquired a majority of the forest lands, which area is isolated from other stock law or no-fence territory by reason of natural barriers such as mountain ranges, or which is adjacent to non-stock law or fence-law territory, and located in counties which heretofore or may hereafter vote in favor of county-wide stock law or no-fence law, may be exempted from the operation of the stock law or no-fence law when a majority of the lawful voters of said area vote in favor of the same. Acts 1927, p. 217.

§ 2042(3) Petition of freeholders.—It shall be the duty of the ordinary of the county wherein such area is located, when a petition is filed with him, signed by ten or more of the freeholders of the several militia districts located in said area, to hear and determine said petition; and if he is satisfied that the area described in said petition is so isolated from other stock-law territory or adjacent to non-stock-law territory, then it shall be his duty to call an election, giving notice of the same for twenty days in each of the districts named in said petition, by posting notices at three or more public places, and submit the question of "Fence" or "No fence" for said area to the qualified voters of the area described in said petition, which election shall be held in each district embraced in the area, under the same rules and regulations governing the holding of elections for members of the General Assembly. If a majority of the votes polled in said area at said election are for "Fence," then the same shall become operative and effective in said area ninety days from the date of said election, and said area shall then be exempt from the operation of county-wide stock law. Acts 1927, p. 218.

ARTICLE 7

Miscellaneous Provisions

§ 2044. Stock-law fences legalized.

Resolution by Commissioner Not Conclusive.—If there has been no honest effort made by the citizens of the district to build good fences and gates on or about the district line, and said fences and gates have not in fact been erected, a resolution of the county commissioners declaring that they have inspected the fences and gates so erected, and recognizing and establishing such fences and gates as the boundary fence between the district and adjoining districts and as a legal fence within the purview of this section, is not conclusive that such fence and gates have been erected; and it would be competent for the plaintiff, in a possessory-warrant proceeding brought to recover some of his hogs which had been impounded by a resident of a district under the claim that the district was a no-fence or stock-law district, to show that no fence and gates had been erected on or about the district line. Parish v. Hendricks, 163 Ga. 385, 136 S. E. 135. Such a resolution is, however, prima facie evidence of the facts contained therein. Id.

§ 2047. (§ 1784.) Gates to be erected.

Proper Gates Are Condition Precedent.—In no event shall the provisions of the stock law go into effect as the results of a militia district election, unless proper gates are so established in public and private roads. Parish v. Hendricks, 163 Ga. 385, 136 S. E. 135. See notes of this case under § 2044.

ARTICLE 10

Tuberculosis in Domestic Animals

§ 2064(1) State Veterinarian's duty as to eradication of tuberculosis in animals.—It shall be the duty of the State Veterinarian to eradicate tuberculosis of domestic animals within the State. To enable the State Veterinarian to eradicate bovine tuberculosis effectively, and to aid him in establishing within the State a modified accredited tuberculosis-free area, in conformity with rules and regulations promulgated by the United States Livestock Sanitary Association and adopted by the Bureau of Animal Industry, United States Department of Agriculture, the county commissioners of any county in which the State and Federal Governments jointly engage in a tuberculosis eradication campaign may appropriate for aiding in said work such sums as the county commissioners or board of roads and revenues may deem adequate and necessary. The State Veterinarian shall have full and complete authority and responsibility in all livestock sanitary control work. The State Veterinarian, or his duly authorized agent, is hereby empowered to enter upon any premises, barn, lot, or any other place where cattle are kept, for the purpose of applying test with tuberculin to ascertain whether or not the animals so tested are affected with tuberculosis. The owners, or keeper of such cattle shall render such reasonable assistance as may be required to enable the State Veterinarian or his agent to apply the test with accuracy and dispatch. Acts 1927, p. 349.

§ 2064(2) Notice to owner of animal.—Should the State Veterinarian receive information or have reason to believe that tuberculosis exists in any animal or herds of animals, he shall promptly notify the owner or owners and shall arrange to have such animal or animals tested by a qualified veterinarian. That all cattle which shall hereafter react to a tuberculin test shall immediately after such reaction be branded on the left jaw with the letter "T," said letter to be not less than two inches in length, and in addition said reactors shall be tagged in the left ear with a special tag to be adopted by the State veterinarian. All cattle so identified shall be slaughtered within a period of fourteen days immediately following such reaction, such slaughter to be under the direction of the State Veterinarian in an abattoir where Federal or competent local meat inspection is maintained. The owners of such reactors to the tuberculin test shall be indemnified for such animals, as hereinafter provided.

§ 2064(3). Notice agreement on value.—Before having such reacting animal or animals slaughtered, it shall be the duty of the State Veterinarian to notify the owner of his findings as to the condition of said animal or animals; and if such animal shall have been purchased by the owner not less than six months prior to the examination by said veterinarian, then the owner and said veterinarian shall, if possible, agree on the value of such animal or animals so condemned. If said State Veterinarian or his agent and the owner of said animal or animals cannot agree as to the value of said animal or animals, then each will select a citizen from the county in which said animal or animals are located, to act in their place. These two arbitrators shall fix the value of such animal or animals, and in the event said two citizens cannot agree, then the United States Veterinary Inspector in charge of co-operative tuberculosis eradication in Georgia shall act as umpire. In no case shall the value fixed by said owner and State Veterinarian, or by the arbitrators, exceed the amount at which said animal or animals were returned by the owner for taxation to State and County authorities, nor shall the value fixed in the case of a pure-bred cow or bull exceed $150.00, nor in case of a grade cow or bull the sum of $90.00. Upon the value being fixed by agreement as hereinbefore provided, said owner shall be paid, within the limitations hereinbefore provided, jointly by the county commissioners out of county appropriations and by the United States Bureau of Animal Industry out of special Federal government tuberculosis eradication funds now available.

§ 2064(4) Restriction of use or sale of tuberculin.—No person, firm, or corporation shall administer veterinary tuberculin, except qualified veterinarians. No person, firm or corporation shall sell, offer for sale or distribution, or keep on hand any veterinary tuberculin, except qualified veterinarians, licensed druggists or others lawfully engaged in the sale of veterinary biological products. "Qualified veterinarians" within the meaning of this Act shall be veterinarians approved by the State Veterinarian and the chief of the United States Bureau of Animal Industry for tuberculin testing cattle intended for interstate shipment.

§ 2064(5) Annual Appropriation. — To enforce the provisions of this Act and to enable the State Veterinarian to eradicate bovine tuberculosis, to establish and maintain a modified accredited tuberculosis-free area, and to develop the livestock industry within the State, the sum of twelve thousand, five hundred ($12,500) dollars annually, or as much thereof as may be necessary, be and the same is hereby appropriated.

§ 2064(6). Penalty.—Any violation of any provisions of this Act is hereby made a misdemeanor, and shall be punishable by a fine of not less than twenty-five ($25.00) dollars for each offense.

FIFTEENTH TITLE.

Department of Agriculture.

CHAPTER 1.

Commissioner of Agriculture.

§ 2066(1) Terms of commissioner.—Beginning January 1, 1929, the term of office of the Commissioner of Agriculture shall be for a period of two years, or until his successor is elected and qualified. Acts 1927, p. 207.

Editor's Note.—The act of 1927 provides that the term of office of the commissioner shall expire December 31, 1928.

§ 2067(1) Bond of Commissioner.—The Commissioner of Agriculture of the State of Georgia is hereby required to give a bond of fifty thousand ($50,000) dollars as a guaranty of the faithful performance of the duties of his office, and for the proper accounting for all monies, fees, etc., received by the office, said bond to be furnished

by a surety company authorized to do business in Georgia by the laws of this State, provided said premium on said bond, shall be paid by the State of Georgia. Acts 1927, p. 206.

§ 2079. Cattle-ticks—suppression of diseases.

Quoted in Gill v. Cox, 163 Ga. 618, 622, 137 S. E. 40.

§ 2081(2). Duties.

Acceptance of Federal Regulation. — The act from which this section was taken and § 2082(11) amounts to an acceptance of the regulations and methods of the Commissioners of Agriculture of United States under Act Cong. May 29, 1884, section 3 (Comp. St. section 8691). Thornton v. United States, 2 Fed. (2d), 561.

Cited in Gill v. Cox, 163 Ga. 618, 622, 137 S. E. 40.

§ 2082(9). Dipping-vats and chemicals; mandamus.

Applied in Colquitt County v. Bahnsen, 162 Ga. 340, 346, 133 S. E. 871.

§ 2082(10). Inspectors.

Constitutionality—Remedy of Inspector for Expenses. — This section when construed in connection with section 2034, furnishes the only remedy by which the local inspector can prosecute his claim for expenses incurred by dipping and caring for such animals, and in defense of such proceeding by the local inspector the owner had an ample remedy for contesting the amount of expense claimed by the local inspector. This being so, this section is not unconstitutional upon the ground that it denies to the owner of animals so impounded due process of law. Gill v. Cox, 163 Ga. 618, 137 S. E. 40.

The enforcement of this section is not unreasonable so as to be unconstitutional upon the ground that it is a deprivation of due process of law. Gill v. Cox, 163 Ga. 618, 137 S. E. 40.

§ 2082(11). Quarantine and dipping; notice; lien for expenses.

As to this section being an acceptance of the Federal regulations, see note to § 2081(2).

Constitutionality.—Gill v. Cox, 163 Ga. 618, 626, 137 S. E. 40, conforms to the holding set out under this catchline in the Georgia Code of 1926.

Failure of Owner to Pay Expenses after Three Days Notice.—That part of the section which provides that "should the owner fail or refuse to pay said expenses after three days notice," does not authorize the inspector to sell the animals after advertising them for three days. The purpose of the notice is to afford the owner an opportunity to pay the expense, and avoid the cost of litigation provided in the above section of the Code. If, after the expiration of such three days notice, the owner does not pay this expense, the inspector must proceed as provided in this section. Gill v. Cox, 163 Ga. 618, 625, 137 S. W. 40. See notes of this case under § 2034.

§ 2082(13). Quarantine along border of Florida and Alabama.

Cited in Gill v. Cox, 163 Ga. 618. 137 S. E. 40.

§ 2082(14). When reinfestation eradicated without expense to county.

Entire Expense upon State.—In Colquitt County v. Bahnsen, 162 Ga. 340, 348, 133 S. E. 871, Mr. Justice Hines speaking for the court said: "We think the true meaning of section 2 of the act of 1924 [this section] is to place upon the State the entire expense of eradicating any subsequent reinfestation of a tick-free county." In support of this holding the court refers to the caption of the Act of 1924, from which this section was taken, and to the fact that an appropriation for the purpose had been made by the Legislature.

Upon a failure of the state veterinarian to perform this duty it will be enforced by mandamus.

The State veterinarian is required to eradicate ticks in reinfested counties without the previous determination of the commissioner of agriculture that such eradication is wise and best. Gill v. Cox, 163 Ga. 618, 137 S. E. 40.

CHAPTER 3.

Adulteration or Misbranding Prohibited

ARTICLE 9.

Sanitation of Food Places.

§ 2119(3). Supervision of state veterinarian over slaughter house, dairies, etc.; report and statistical bulletin.

Slaughter houses are subjects to sanitary regulations. Schoen Bros. v. Pylant, 162 Ga. 565, 571, 134 S. E. 304.

ARTICLE 10.

Apples and Peaches; Grades and Marks.

§ 2119(9). Commissioner of Agriculture to establish grades and marking rules.—The Commissioner of Agriculture is hereby directed to establish and promulgate from time to time official standard grades for all closed packages of peaches and apples, by which the quantity, quality, and size may be determined, and prescribe and promulgate rules and regulations governing the marking which shall be required upon packages of peaches and apples for the purpose of showing the name and address of the producer or packer, the variety, quantity, quality, and size of the product, or any of them; provided that the Commissioner of Agriculture shall establish a grade for immature apples, and an unclassified or similar marking for all peaches and apples not included in the other grades established. Acts 1927, p. 191.

§ 2119(10). Packages to be marked; stamps.—Whenever such standard for the grade or other classifications of peaches or apples under this Act becomes effective, every closed package containing peaches or apples grown and packed for sale or transported for sale by any person, firm, company, or organization, shall bear conspicuously upon the outside thereof, in plain words and figures, such markings as are prescribed by the Commissioner of Agriculture under the provisions of this Act. Every crate or package of peaches or apples shipped from any point within this State shall bear an adhesive stamp showing that they are classified under this Act, which stamp shall be sold by the commissioner of agriculture to applicants therefor for not more than one half (½) of one (1) cent each.

§ 2119(11). Inspection; appointment of inspectors.—The Commissioner of Agriculture of the State of Georgia shall be charged with the enforcement of the provisions of this article, and for that purpose shall have the power: (a) to enter and to inspect personally, or through any authorized agent, every place within the State of Georgia where peaches and apples are produced, packed, or stored for sale, shipped, delivered for shipment, offered for sale, or sold, and to inspect such places and all peaches and apples and containers and equipment found in any such place. (b) to appoint, superintend, control, and discharge such inspectors and subordinate inspectors as in his discretion may be deemed necessary, for the special purpose of enforcing the terms of this Article, to prescribe their duties and fix their compensation. (c) Personally, or through any au-

thorized agent or any such inspector, to forbid the movement of any closed package or packages of peaches or apples found to be in violation of any of the provisions of this Article, which have not been actually accepted by a common carrier for shipment in interstate traffic, and to require the same to be repacked or remarked. A carload of peaches or apples shall not be considered as actually accepted by a common carrier for shipment until the loading is finished, the car sealed, and the bill of lading issued. (d) To cause prosecution to be instituted for violations of this Article.

§ 2119(12). Delivery prima facie evidence of offer to sell.—When peaches or apples in closed packages are delivered to railroad station or a common carrier for shipment, or delivered to a storage house for storage, such delivery shall be prima facie evidence that the peaches or apples are offered or exposed for sale.

§ 2119(13). Penalty.—Any person, firm, company, organization, or corporation, who shall violate any of the provisions of this Article, shall be punishable by a fine of not more than five hundred dollars ($500.00), or imprisonment for a period not to exceed 90 days, either or both, for each offense.

§ 2119(14). Dealers protected by inspection, etc. —No person, firm, or corporation shall be prosecuted under the provisions of this Article, when he or it can be established that the peaches or apples offered for sale have passed inspection by an authorized inspector of the State of Georgia, and bear the official Georgia State inspection stamp, or by an inspector of the United States Department of Agriculture, and found to be packed and marked in accordance with the requirements of the Commissioner of Agriculture of Georgia.

§ 211915). Unfit fruit not to be shipped. — No person in the State of Georgia shall ship any peaches which are immature, or peaches or apples unfit for human consumption; and no apples or peaches shall be offered for sale within the State of Georgia which do not bear on the packages the marks and grades prescribed in section 2119(10).

SIXTEENTH TITLE.

State Board of Game and Fish.

CHAPTER 3.

Oysters and Oyster Beds.

§ 2158(24). Owners of private oyster beds may come under Act.

Cited in Camp v. State, 34 Ga. App. 591, 130 S. E. 606.

THE CIVIL CODE

FIRST TITLE.

Of Persons.

CHAPTER 1.

Different Kinds of Persons, Their Rights and Duties.

ARTICLE 1.

Of Citizens.

§ 2159. (§ 1802.) Natural and artificial persons.

Creation of Corporation Legislative Function.—A corporation can be brought into existence only as the result of express legislation. The conference of power upon persons to organize a corporation is legislative in character, and must be done by direct legislation, or be founded upon legislative or constitutional provisions. Free Gift Society v. Edwards, 163 Ga. 857, 865, 137 S. E. 382.

ARTICLE 3.

Of Persons of Color.

§ 2177. (§ 1820.) Who are persons of Color.—All negroes, mulattoes, mestizos, and their descendants, having any ascertainable trace of either negro or African, West Indian, or Asiatic Indian blood in their veins, and all descendants of any person having either negro or African, West Indian, or Asiatic Indian blood in his or her veins, shall be known in this State as persons of color. Acts 1865-6, p. 239; 1927, p. 272.

Editor's Note.—This section prior to its amendment was much less broad. It merely included negroes, mulatoes, mestizos, and their descendants, having one-eighth negro or African blood in their veins.

§ 2177(1). Registration as to race.—The State Registrar of Vital Statistics, under the supervision of the State Board of Health, shall prepare a form for the registration of individuals, whereon shall be given the racial composition of such individual, as Caucasian, Negro, Mongolian, West Indian, Asiatic Indian, Malay, or any mixture thereof, or any other non-Caucasic strains, and if there be any mixture, then the racial composition of the parents and other ancestors in so far as ascertainable, so as to show in what generation such mixture occurred. Said form shall also give the date and place of birth of the registrant, name, race, and color of the parents of registrant, together with their place of birth if known, name of husband or wife of registrant, with his or her place of birth, names of children of registrant with their ages and place of residence, place of residence of registrant for the five years immediately preceding registration, and such other information as may be prescribed for identification by the State Registrar of Vital Statistics. Acts 1927, p. 272.

§ 2177(2). Supply of forms.—The State Registrar of Vital Statistics shall supply to each local registrar a sufficient number of such forms to carry out the provisions of this Act.

§ 2177(3). Local registrar must cause each person in district to execute form., etc.—Each local registrar shall personally or by deputy, upon receipt of said forms, cause each person in his district or jurisdiction to execute said form in duplicate, furnishing all available information required upon said form, the original of which form shall be forwarded by the local registrar to the State Registrar of Vital Statistics, and a duplicate delivered to the ordinary of the county. Said form shall be signed by the registrant, or, in case of children under fourteen years of age, by a parent, guardian, or other person standing in loco parentis. The execution of such registration certificate shall be certified to by the local registrar.

§ 2177(4). Untrue statement.—If the local registrar have reason to believe that any statement made by any registrant is not true, he shall so write upon such certificate before forwarding the same to the State registrar or ordinary, giving his reason therefor.

§ 2177(5). Penalty for refusal to execute registration certificate, etc. — It shall be unlawful for any person to refuse to execute said registration certificate as provided in this Act, or to refuse to give the information required in the execution of the same; and any person who shall refuse to execute such certificate, or who shall refuse to give the information required in the execution of the same, shall be guilty of a misdemeanor, and shall be punished as prescribed in section 1065 of the Penal Code of Georgia of 1910. Each such refusal shall constitute a separate offense.

§ 2177(6). Fee for registration 30 cents; how divided.—The local registrar shall collect from each registrant a registration fee of thirty cents, fifteen cents of which shall go to the local registrar and fifteen cents of which shall go to the State Board of Health, to be used in defraying expenses of the State Bureau of Vital Statistics. If any registrant shall make affidavit that through poverty he is unable to pay said registration fee of thirty cents, the local registrar shall receive a registration fee of only ten cents for such registration, which sum shall be paid out of the funds of the State Bureau of Vital Statistics, and the State Bureau of Vital Statistics shall receive no fee for such registration. This section shall not apply to the registration of births or deaths, the registration of which is otherwise provided for.

§ 2177(7). False registration, felony; punishment.—It shall be a felony for any person to wilfully or knowingly make or cause to be made a registration certificate false as to color or race, and upon conviction thereof such person shall be punished by imprisonment in the penitentiary for not less than one year and not more than two years. In such case the State registrar is authorized to change the registration certificate so that it will conform to the truth.

§ 2177(8). Form of application for marriage license.—The State Registrar of Vital Statistics

shall prepare a form for application for marriage license, which form shall require the following information to be given over the signature of the prospective bride and groom; name and address; race and color; place of birth; age; name and address of each parent; race and color of each parent; and whether the applicant is registered with the Bureau of Vital Statistics of this or any other State, and, if registered, the county in which such registration was made. The State Registrar of Vital Statistics shall at all times keep the ordinaries of each county in this State supplied with a sufficient number of said form of application for marriage license to care for all applications for marriage license. Each prospective bride and each prospective groom applying for marriage license shall fill out and execute said application in duplicate.

§ 2177(9). Filing application for marriage license.—Upon such applications for marriage license being filed with the ordinary by the prospective bride and prospective groom, the ordinary shall forward the original of such application to the State Registrar of Vital Statistics, and retain the duplicate of such application in his files.

§ 2177(10). Report by State Registrar of Vital Statistics after examination as to registration of applicant.—The ordinary shall withhold the issuing of any marriage license until a report upon such application has been received from the State Registrar of Vital Statistics. Said report from the State Registrar of Vital Statistics shall be forwarded to the ordinary by the next return mail, and shall state whether or not each applicant is registered in the Bureau of Vital Statistics; if registered, the report shall state whether the statements made by each applicant as to race and color are correct according to such registration certificate. If the registration certificate in the office of the Bureau of Vital Statistics show that the statement of either applicant as to race or color are untrue, the report of the State Registrar of Vital Statistics shall so state, and in such case it shall be illegal for the ordinary to issue a marriage license to the applicants, until the truth of such statements of the applicants shall have been determined in a legal proceeding brought against the ordinary to compel the issuing of such license. If the report from the State Registrar of Vital Statistics shows that the applicants are not registered, and if the State Bureau of Vital Statistics has no information as to the race or color of said applicants, then the ordinary shall issue the marriage license if he has no evidence or knowledge that such marriage would be illegal. If one of the applicants is registered with the State Bureau of Vital Statistics and the other applicant is not so registered, if the records of the Bureau of Vital Statistics contain no information to disprove the statements of either applicant as to color or race, then the ordinary shall issue the marriage license, if he has no evidence or knowledge that such marriage would be illegal. Provided, that where each party is registered and such registration certificate is on file in the office of the ordinary of the county where application for marriage license is made, it shall not be necessary for the ordinary to obtain any information from the State Bureau of Vital Statistics; and provided further, that when any person who has previously registered as required herein moves to another county, he may file with the ordinary of the county of his new residence a certified copy of his registration certificate, which shall have the same effect as if such registration had been made originally in said county.

§ 2177(11). Application for marriage license by one not born in this State.—Where any application for marriage license shows that such applicant was not born in this State and is not registered with the Bureau of Vital Statistics of this State, the ordinary shall forward a copy of such application to the State Registrar of Vital Statistics of this State, and shall also forward a copy of the application to the clerk of the superior or circuit court, as the case may be, of the county of the applicant's birth, and another copy to the Bureau of Vital Statistics, at the capitol of the State, of the applicant's birth, with the request that the statements therein contained be verified. If no answer be received from such clerk or Bureau of Vital Statistics within ten days, the ordinary shall issue the license if he have no evidence or knowledge that such marriage would be illegal. If an answer be received within ten days, showing the statement of such applicant to be untrue, the ordinary shall withhold the issuing of the license until the truth of such statements of the applicant shall have been determined in a legal proceeding brought against the ordinary to compel the issuing of such license. In all cases where answers are received from such clerk or Bureau of Vital Statistics, a copy of the answer shall be forwarded to the State Registrar of Vital Statistics of this State.

§ 2177(12). Return of license after marriage.—When a marriage license is issued by the ordinary, it shall be returned to the ordinary by the officer or minister solemnizing the marriage, and forwarded by the ordinary to the State Registrar of Vital Statistics, to be permanently retained by said registrar.

§ 2177(13). "White person" defined.—The term "white person" shall include only persons of the white or Caucasian race, who have no ascertainable trace of either Negro, African, West Indian, Asiatic Indian, Mongolian, Japanese, or Chinese blood in their veins. No person shall be deemed to be a white person any one of whose ancestors has been duly registered with the State Bureau of Vital Statistics as a colored person or person of color.

§ 2177(14). Unlawful for whites to marry other than white; penalty.—It shall be unlawful for a white person to marry any save a white person. Any person, white or otherwise, who shall marry or go through a marriage ceremony in violation of this provision shall be guilty of a felony, and shall be punished by imprisonment in the penitentiary for not less than one nor more than two years, and such marriage shall be utterly void.

§ 2177(15). False statement in application; penalty.—Any person who shall make or cause to be made a false statement as to race or color of himself or parents, in any application for marriage license, shall be guilty of a felony, and shall be punished by imprisonment in the penitentiary for not less than two nor more than five years.

§ 2177(16). Ordinary's noncompliance with law.—

Any ordinary who shall issue a marriage license without complying with each and every provision of this Act shall be guilty of and punished as for a misdemeanor.

§ 2177(17. Performing marriage ceremony in violation of law.—If any civil officer, minister, or official of any church, sect, or religion, authorized to perform a marriage ceremony, shall wilfully or knowingly perform any marriage ceremony in violation of the terms of this Act, he shall be guilty of and punished as for a misdemeanor.

§ 2177(18). Report of violation of law.—If any case of a marriage in violation of the provisions of this Act is reported to the State Registrar of Vital Statistics, he shall investigate such report, and shall turn over to the Attorney-General of the State the information obtained through such investigation.

§ 2177(19). Birth of legitimate child of white parent, and colored parent, report of, and prosecution.—When any birth certificate is forwarded to the Bureau of Vital Statistics, showing the birth of a legitimate child to parents one of whom is white and one of whom is colored, it shall be the duty of the State Registrar of Vital Statistics to report the same to the Attorney-General of the State, with full information concerning the same. Thereupon it shall be the duty of the Attorney-General to institute criminal proceedings against the parents of such child, for any violation of the provisions of this Act which may have been committed.

§ 2177(20). Duty of Attorney-General and solicitor-General as to prosecution.—It shall be the duty of the Attorney-General of the State, as well as the duty of the Solicitor-General of the Superior Court where such violation occurs, to prosecute each violation of any of the provisions of this Act, when the same is reported to him by the State Registrar of Vital Statistics. If the Attorney-General fails or refuses to prosecute any such violation so reported to him by the State Registrar of Vital Statistics, the same shall be grounds for impeachment of the Attorney-General, and it shall be the duty of the State Registrar of Vital Statistics to institute impeachment proceedings against the Attorney-General in such case.

CHAPTER 2

Of Domicile, and Manner of Changing the Same

§ 2181. (§ 1824.) Domicile.

Meaning of "Permanently" as Used in Section.—The word "permanently" is used in this section in contradistinction from the word "temporarily." Alvaton Mercantile Co. v. Caldwell, 34 Ga. App. 151, 128 S. E. 781.

Residence and Domicile Distinguished.—The removal to another county and there renting a house, did not constitute a change of domicile, where the removal was for the purpose of educating children, the former home was maintained, the incidents of citizenship there discharged, and there was at no time an intention to provide a fixed place of abode in the place of removal, or to there establish permanent residence. Alvaton Mercantile Co. v. Caldwell, 34 Ga. App. 151, 128 S. E. 781. See § 2186 and notes thereto.

§ 2186. (§ 1829.) Change of domicile.

Involves Exercise of Volition and Choice.—As to a person sui juris, the matter of making a change in domicile is one involving the exercise of volition and choice. Stanfield v. Hursey, 36 Ga. App. 394, 136 S. E. 826. See notes to § 2181.

§ 2187. (§ 1830.) Of persons not sui juris.

Presumption and Proof of Change. — Where a resident of this state was adjudged insane by the courts of this state in 1910, he was at least prima facie incapable thereafter of making a change of his domicile. Proof that, after such adjudication, he "went over to stay with his people in North Carolina," and was placed in a public institution of that state for insane persons, is insufficient to show that such person ceased to be a resident of the state of Georgia, or that his removal from this state was such as to suspend the operation of the statute of limitations as to a debt against him. Stanfield v. Hursey, 36 Ga. App. 394. Compare Jackson v. Southern Flour, etc., Co., 146 Ga. 453, 91 S. E. 481.

Cannot Change of Own Volition.—A person who has been adjudged insane can not, by his own act or volition, effect a change in his domicile. Stanfield v. Hursey, 36 Ga. App. 394, 395, 136 S. E. 826.

SECOND TITLE

Corporations.

CHAPTER 1

Corporations, Their Creators, Powers, and Liabilities

ARTICLE 4

Corporation Commissioner

§ 2209. Returns of corporations.

Editor's Note.—The section does not in any manner purport by its terms to prohibit a corporation from doing business in this State until it shall have filed the report. Accordingly, a corporation doing business in this State prior to making the report does not thereby violate the terms of the section, the terms of the statute which in such a case it does violate being merely the requirement to file the report, and pay the fee provided for in section 2210, which breach renders the corporation subject, within the discretion of the secretary of state, to the penalty imposed thereby. See Alston v. New York Contract Purchase Corp., 36 Ga App. 777, 138 S. E. 270.

§ 2210. Fees.

See Editor's Note under section 2209.

§ 2211. Penalty for non-compliance.

Effect of Non-Conformance upon Contracts.—The penalty prescribed being all inclusive, and the corporation not being prohibited by such breach of duty from doing business within the State, its contracts are not rendered void by a failure to comply with the requirements mentioned. Alston v. New York Contract Purchase Corp., 36 Ga. App. 777, 138 S. E. 270. See Editor's Note under section 2209.

ARTICLE 5

Powers and Liabilities of Corporations

§ 2226. (§ 1862.) No collateral attack as to corporate existence.

Editor's Note.—This section is merely a codification of the universally accepted doctrine. Since the Dartmouth College Case the principle then announced that a charter to a private corporation constitutes a contract between the State and the incorporators have been controlling, and this alone is sufficient reason why persons not parties to the contract should not be allowed to attack its validity. That right belongs to the State. The State having bestowed life upon the corporation and dictated what it can and can not do, also has the right to waive violations of the contract on the part of the incorporators. However, this doctrine should never be applied in favor of the said incorporators themselves, to the prejudice of a person who has not dealt with them as a corporation. Hence, any person whose property is sought to be taken under the right of eminent domain may challenge the legality of the corporation's charter, such person not having recognized or dealt with the corporation as such. Rogers v. Taccoa Power Co., 161 Ga. 524, 131 S. E. 517. See also Academy of Music v. Flanders Bros., 75 Ga. 14; 20 Harvard Law Review 472.

ARTICLE 9

Corporations, How Served

§ 2258. (§ 1899.) Service of process, how perfected.

II. SERVICE UPON AGENT.

What Constitutes an Agent within Meaning of Section.—Where the person upon whom a rule nisi was served exercised large discretionary and supervisory powers he was held to be an agent of the defendant company, within the meaning of the section. Georgia Creosoting Co. v. Fowler, 35 Ga. App. 372, 133 S. E. 479.

Same—Ticket Agent of Railroad Selling for Pullman Company.—Where the ticket agents of a railroad company sold tickets furnished to them by the Pullman Company and accounted therefor directly to that company from which they received instructions under an agreement without compensation, they were agents of the Pullman Company who represented it in its business and on whom service of process might legally be made in a suit against it, under this section. Huckabee v. Pullman Co., 8 Fed. (2d), 43.

Same—Agents Other Than One Designated for Service.—That a foreign corporation has designated certain persons as its agents for service in the state does not render invalid service of process against it on others, who are in fact its agents for that purpose under the provisions of the state statute. Huckabee v. Pullman Co., 8 Fed. (2d), 43.

III. LEAVING COPY AT PLACE OF BUSINESS.

The essentials for a suit against a foreign corporation are that it shall be engaged in business in the state, and under this section, that service be made upon an agent who represents the corporation in its business or by leaving the process at the place of transacting the usual and ordinary public business of such corporation. Huckabee v. Pullman Co., 8 Fed. (2d), 43.

IV. APPLIED TO FOREIGN CORPORATIONS.

As to who is agent, see II. Service upon Agent; as to place of service, see III. Leaving Copy at Place of Business; as to sufficiency of return, see V. The Return.

V. THE RETURN.

What Return Should Show.—A return of service of process on a foreign corporation, by leaving a copy of the writ "at the office and place of doing business of said corporation," but which failed to state that it was "the place of transacting the usual and ordinary public business of such corporation," is insufficient under this section. Huckabee v. Pullman Co., 8 Fed. (2d), 43.

CHAPTER 2

Private Corporations

ARTICLE 1

Banks

SECTION 1

Preliminary Provisions

§ 2366(1). Bank, definition of.

Constitutionality.—The banking act is not unconstitutional because in conflict with the constitution, section 6437, which provides that "No law or ordinance shall pass which refers to more than one subject-matter." Felton v. Bennett, 163 Ga. 849, 137 S. E. 264.

Nor is the act violative of the foregoing constitutional provisions for the reason that there is contained in the body of the act "matter different from what is expressed in the title thereof." Felton v. Bennett, 163 Ga. 849, 137 S. E. 264.

Nor does it violate the constitution, section 6379. It is within the power of the General Assembly, without violating the constitution to impose upon a designated official the exercise of duties essentially ministerial, though quasi-judicial, by the creation of administrative departments subject to the Governor as the head of the executive department, and thus to create new departments which in no wise affect the distinctness and independence of either the legislative, judicial, or executive departments provided for by the constitution. Felton v. Bennett, 163 Ga. 849, 137 S. E. 264.

§ 2366(3) Branch banks.—Branch banks, already established under the law of this State, shall be operated as branches, and under the name of the parent bank, and under the control and direction of the board of directors and executive officers of said parent bank. The board of directors of the parent bank shall elect a cashier, and such other officers that may be required to properly conduct the business of said branch; and a board of directors, or loan committee, shall be responsible for the conduct and management of said branch, but not of the parent bank or of any other branch save that of which they are officers, directors, or committee. By January tenth of each tax year the board of directors of the parent shall set aside for the exclusive use of said branch such proportion of its entire capital that the total deposits of such branch bank on January first of each tax year bears to the grand total of all the deposits on January first of each tax year in all branches of such bank, or banking association, including the parent bank, in this State. Branch banks shall be taxed on the capital set aside, as herein provided, to their exclusive use in the counties, municipalities, and districts in which they are located, and the parent banks shall be relieved of taxation to the extent of capital so set aside for the exclusive use of such branch; provided, that the real estate owned or held by branch banks shall be taxed in the county, municipality, and district where located, as other real estate situated in such county, municipality, and district, the same to be deducted from either the value of the capital of the parent bank or the respective branch bank. It shall be the duty of the board of directors of the parent bank to furnish a sworn statement to the taxing authorities of the county, municipality, and district in which the branch bank is located, of the total amount of deposits on January first of each tax year in each of the branch banks, including the parent bank, and such sworn statement shall be filed with such taxing authorities not later than March first of each tax year, and shall, at the same time, furnish to such taxing authorities a sworn statement of the proportionate part of the capital of such bank, or banking association, so set aside, as herein provided, for such county municipality, and district for taxing purposes for that year. If the taxing authorities in any county, municipality, and district are not satisfied with the amount of capital set aside for such county, municipality, and district for taxation, such taxing authorities shall have the right to file with the Superintendent of Banks of this State objections to the amount of capital so set aside, and, upon ten days written notice to the directors of the parent bank and to such authorities, such superintendent shall hear evidence, at a time and place to be fixed by him in such notice, and determine, what amount should have been set aside to such branch bank for taxation in the county, municipality, and district in which it is situated, as herein provided, and his decision on the question shall be final, and the amount of capital so set apart by him shall be subject to taxation in such county, municipality, and district in which such branch bank is situated. Capital, as used in this section, shall include surplus and undivided profits, except real estate owned or held by the bank. After this section takes effect, no new or additional branch banks shall be estab-

lished. Acts 1919, pp. 135, 136; 1920, pp. 102, 108; 1927, p. 195.

Editor's Note. — This section was so enlarged by the amendment of 1927 that few of its provisions were found in the original section, while other provisions were left out from its scope. The changes effected are too multifarious for specific description, and may only be determined by close comparison of the old and the new section.

SECTION 7

Taking Possession of Bank by Superintendent

§ 2366(56). Notice of taking possession. — On taking possession of the assets and business of any bank, as in this Act authorized, the Superintendent of Banks shall forthwith give notice of such action to all banks and other persons or corporations holding or in possession of any assets of such bank. No bank or other person or corporation shall have a lien or charge for any payment, advance, or clearance thereafter made, or liability thereafter incurred, against any of the assets of the bank, of whose assets and business the Superintendent shall have taken possession as aforesaid.

The superintendent shall also file and have recorded in the office of the clerk of the Superior court of the county in which the bank is located, and if the bank has a branch or branches in another or other counties, in such county or counties also, a certificate under his hand and the seal of the Department of Banking, wherein he shall set forth that the assets and business of the bank have been taken charge of by him for the purpose of liquidation, giving the date on which he took charge. A certified copy of said certificate shall be admissible in evidence without proof, as a duly recorded deed is admitted. Acts 1919, pp. 135, 155; 1927 pp. 195, 197.

Editor's Note.—The last paragraph of this section was added by the amendment of 1927.

§ 2366(57) Business resumed, how.—After the Superintendent of Banks has so taken possession of any bank, the Superintendent may permit such bank to resume business upon such conditions as may be approved by him. When necessary, in order to make good an impairment of capital, the stockholders, with the approval of the superintendent, may levy a voluntary assessment on the stockholders as provided in section 7 of this article, the amount of the assessments be fixed by the superintendent. Acts 1919, pp. 135, 156; 1927, pp. 195, 198.

Editor's Note.—The last sentence of this section is new with the amendment of 1927.

§ 2366(58). Collections and sales, how made.

Confirmation of Sales.—Whether sales made under an order of the superior court at the instance of the superintendent of banks under this section should be confirmed is a matter within the sound legal discretion of the court. Such sales are never consummated until confirmed. Wingfield v. Bennett, 36 Ga. App. 27, 134 S. E. 840.

§ 2366(66). Superintendent may reject claims or change rank.—If the Superintendent doubts the justice and validity of any claim or deposit or the priority therefor as claimed in the proof filed, he may either reject the same or change the rank or order of paying the same and serve notice of such rejection or change upon the claimant or depositor, either personally or by registered mail, and an affidavit of the service of such notice, which shall be prima facie evidence thereof, shall be filed in the office of the Superintendent. Any action or suit upon such claim so rejected or changed as to rank, whether for the purpose of having said claim allowed or of establishing the rank or order of payment thereof must be brought by the claimant against the bank in the proper court of the county in which the bank is located, within ninety (90) days after such service, or the same shall be barred. Notice of the filing of such suit with a copy of the petition shall be given by the claimant to the Superintendent of Banks by registered mail at least ten days (10) before the suit shall be in order for trial. The Superintendent, if he so desires, may defend the suit in the names of the bank. Suits brought under this section shall be tried at the first term of the court. Acts 1919, pp. 135, 158; 1927, pp. 196, 198.

Editor's Note.—The provision in case the superintendent doubts the priority of the claim is new with 1927 amendment. By the amendment the superintendent may change the rank or order of paying the claim, and the rest of the section is so amended as to conform it to the last referred change. The last three sentences are also new with the amendment.

§ 2366(67) Objections to claims. — Objections to any claim or deposit not rejected or changed as to rank or order of payment by the Superintendent may be made by the party interested, by filing a copy of such objections with the Superintendent; and the Superintendent, after investigation, shall either allow such objections and reject the claims or deposit, or change the rank or order of payment thereof, and present such objections to the Superior Court of the county in which the bank is located, which court shall cause an issue to be made up and tried at the first term thereafter, as to whether or not such claim or deposit should be allowed and as to the proper rank or order of payment thereof. Acts 1919, pp. 135, 159; 1927, pp. 195, 199.

Editor's Note.—The reference to the charge of the rank or order of claims throughout this section is new with the amendment of 1927.

§ 2366(70). Order of paying debts.—After the payment of the expenses of liquidation, including compensation of agents and attorneys, and after the payment of unremitted collections, the order of paying off debts due by insolvent banks shall be as follows:

(1) Debts due depositors.
(2) Debts due for taxes, State and Federal.
(3) Judgments.
(4) Contractual obligations.
(5) Unliquidated claims for damages and the like.

Provided, that nothing herein contained shall affect the validity of any security or lien held by any person or corporation. Acts 1919, pp. 134, 159; 1925, pp. 119, 129; 1927, pp. 195, 199.

Editor's Note.—By the amendment of 1927 the payment of unremitted collections are also made prior to the payment of other classes of claims enumerated. The amendment also changed the order of payment, and the number of the classes of claims enumerated. The proviso is new with the amendment.

Loan to Cashier.—The money loaned to the cashier is not a debt entitled to priority under class 5 [now 1] of this section, as a debt due by the bank as trustee or other fiduciary, or as a claim of like character. Campbell v. Morgan County Bank, 35 Ga. App. 222, 132 S. E. 648.

§ 2366(71) Assessment of stockholders.

Constitutionality.—A consideration and determination of

the question whether the provision of this section is violative of the due-process clause of the fourteenth amendment of the Constitution of the United States being for decision by a full bench of six Justices, who are equally divided in opinion, the judgment of the lower court upon this point is affirmed by operation of law. Felton v. Bennett, 163 Ga. 849, 137 S. E. 264.

Delegation of Authority.—Authority of the superintendent of banks to determine the stockholder's liability to depositors and collection thereof under this section as amended in 1925, cannot be delegated to agent by power of attorney authorized by sections 2366(60), (61), notwithstanding section 2366(74) and section 2366(16). In re Giles, 21 Fed. (2d), 536.

§ 2366(75). Unclaimed deposits and dividends.—Where deposits or other claims against the bank are not filed within twelve months after the expiration of the date fixed by the superintendent for the presentation of claims against the bank, no dividend shall be paid thereon but dividends accruing on said claims shall be distributed as other assets of the bank, and where dividends are not accepted and collected within six months after they are declared, they shall become a part of the general fund of the bank and be distributed as other assets. In case of banks that were closed and being liquidated by the Superintendent before August 25, 1925, claims which were not filed within sixty days from the date of the approval of this act shall be forever barred, and all funds deposited or held to meet such claims, and any dividends which may have been declared but are not collected within such period of sixty days, shall become part of the general funds of the bank, and shall be distributed as other assets. Acts 1925, pp. 119, 132; 1927, 195, 200.

Editor's Note.—The provision as to the bar of claims not presented in time in case of banks closed and in liquidation before August 25, 1925, is new with the amendment of 1927.

SECTION 8

Incorporation of Banks

§ 2366(80). Application for charter.—Any number of persons not less than five (5) may form a corporation for the purpose of carrying on the business of banking, by filing in the office of the Secretary of State an application in writing signed by each of them, in which they shall state.

(3) The amount of its capital stock which shall not be less than twenty-five thousand ($25,000) dollars where located in a town or city whose population does not exceed three thousand according to the last preceding census of the United States, and not less than fifty thousand ($50,000) dollars where located in a city or town whose population exceeds three thousand according to said census. Provided, however, this section shall not apply to banks whose capital stock is now fixed, so they shall not be required to increase the same. Acts 1927, 195, 200.

Editor's Note.—The amendment of 1927 changed the requirement as to the minimum amounts of the capital stock, and the population of places of establishment, which appear in the third clause of this section.

§ 2366(86). Payment of capital.

Prior Law Construed.—In Pearce v. Bennett, 35 Ga. App. 415, 133 S. E. 278, construing Civil Code of 1910, section 2268, which permitted the board of directors to prescribe how any unpaid part of the capital stock should be paid in, it was held that where a subscriber for stock in such a bank had paid his pro rata of the minimum amount required to be paid in before the filing of the application for charter and the subscription contract did not provide otherwise, the remainder of his subscription was not due until the directors called for its payment, and the statute of limitations did not begin to run in his favor as to the unpaid installment until such condition was complied with. It will be noted that section 2268 of the Civil Code of 1910, which Bell, J., referred to in this case was repealed by Acts 1919, p. 135. See Editor's Note under section 2366(1) of the Code of 1926. Of course banks incorporated under the said section are still governed by that law instead of sections 2366(1)-(196) unless the right to change was reserved to the State in the charters of the individual Banks. Dartmouth College case. To ascertain whether such reservation was made in a given case recourse to the charter of the given bank must be had. Ed. Note.

SECTION 18

Liability of Stockholders

§ 2366(140). Exception for trustees and other fiduciaries.

Applicability to Parent of Minor.—One who buys stock in a bank, and has it entered on the books of the bank in his own name as guardian for his minor child, is himself, as between him and the bank, the owner of the stock, and the provisions of this section are not applicable. Where the bank has been taken over by the superintendent of banks under the authority of the banking laws, such person is individually liable for an assessment made against him as stockholder by the superintendent of banks. Rosenberg v Bennett, 35 Ga. App. 86, 132 S. E. 119.

§ 2366(141). Liability of stockholder after transfer of stock.

See note to § 2366(142).

§ 2366(142). Liability when bank fails.

Effect of Liability of Former Stockholder.—The present owner of stock, against whom such an assessment is made, can not defeat liability therefor upon the ground that under the provisions of this and section 2366(141), a former stockholder from whom he purchased the stock within six months prior to the date of the failure of the bank may be liable for an assessment thereon. The right to enforce the assessment against the former stockholder is in the superintendent of banks, and not in the present stockholder. Rosenberg v. Bennett, 35 Ga. App. 86, 132 S. E. 119.

Effect of Defective Title of Former Stockholder.—A present stockholder against whom an assessment has been made under the authority of this law, can not defend against such assessment upon the ground that the former stockholder from whom he purchased the stock had no title. Rosenberg v. Bennett, 35 Ga. App. 86, 132 S. E. 119.

SECTION 19

Regulation of the Business of Banking

§ 2366(148). Qualification of directors.—Every director must, during his whole term of service, be a citizen of his [this] State or reside within 25 miles of the city or town in which the bank is located, and at least three fourths of the directors must be residents of the city or town in which the bank is located or within twenty-five miles thereof, and must continue so to reside during their continuance in office. Every director must own in his own right and unpledged at least ten shares of the capital stock of the bank of which he is a director, upon which all installments which are due shall have been paid in full, unless the capital of the bank shall not exceed twenty-five thousand dollars, in which case he must own at least five shares of such stock. Any director who ceases to be the owner of the number of shares herein required, or who pledges the same, or fails to pay any installment thereon when the same becomes due or who becomes in any other manner dis-

qualified, shall vacate his place as a member of the board. Provided, that this section shall not apply to directors in office at the date this act takes effect, and said directors shall be qualified to succeed themselves as often as they may be re-elected without reference to the provisions of this section. Acts 1919, pp. 135, 197; 1927, pp. 195, 201.

Editor's Note.—Prior to the amendment of 1927 directors of banks with a capital stock of between $15,000 and $50,000 and directors of banks with a capital stock of over $50,000 were required to own two and five shares of the capital stock, respectively. All the other provisions of the section, except the provision as to vacating the office of directors which remains the same, are new with the amendment.

§ 2366(151). Semi-annual examinations by directors.—It shall be the duty of the board of directors of every bank, at least once in each six (6) months, to count the cash and examine fully into the books, papers, and affairs of the bank of which they are directors, and particularly into the loans and discounts thereof, with the special view of ascertaining the value and security thereof, and the collateral security, if any, given in connection therewith, and into such other matters as the Superintendent of Banks may require. Such directors shall conduct such count and examination by a committee of at least three (3) of its members; and shall have the power to employ certified public accountants, or other expert assistance in making such examinations, if they deem the same necessary. Within ten (10) days after the completion of each of such examinations, a report in writing thereof, sworn to by the directors making the same, shall be made to the board of directors, which report shall be spread upon the minutes of said board; and the original thereof shall be placed on file in said bank, and a duplicate thereof filed with the Superintendent of Banks. Provided, however, that in lieu of the semi-annual examination of the directors, such semi-annual examination may be made by accountants, approved by the Superintendent of Banks; and provided, that any bank which fails to transmit to the Superintendent of Banks, within ten (10) days after the completion of the same, a copy of the report made by such board of directors or such accountants shall be subject to the same penalty as is provided by § 2366(44) for failure to make and transmit its report in response to call of the Superintendent of Banks. Acts 1919, pp. 135, 193; 1922, p. 67; 1927, pp. 195, 198.

Editor's Note.—The provision at the beginning of the second sentence as to condicting the counts by a committee, which formerly was merely permissive, was made mandatory by the use of word "shall" in place of "may," by the Act of 1927.

§ 2366(159). Loans by bank, limit of.—No bank shall be allowed to lend to any one person, firm, or corporation more than twenty (20) per cent of its capital, and unimpaired surplus. And no loan shall be made in excess of ten (10) per cent of the capital and surplus, except upon good collateral or other ample security and with the approval of a majority of the directors, or of a committee of the board of directors, authorized to act, which approval shall be evidenced by the written signature of said directors or the members of said committee. In estimating loans to any person, all amounts loaned to firms and partnerships of which he is a member shall be included: Provided, however, that a bank may buy from or discount for any person, firm, or corporation, bills of exchange drawn in good faith against actually existing values, or commercial or business paper actually owned by the person negotiating the same, in addition to loans directly made to the person, firm, or corporation selling the same, such purchase or discount not to exceed (20) per cent of the capital and surplus, to be approved in writing by a majority of the directors, or by a committee of such board authorized to act; and provided, that the limit of loans herein fixed shall not apply to bona fide loans made upon the security of agricultural, manufactured, industrial products or live stock having a market value and for which there is ready sale in the open market, title to which by appropriate transfer shall be taken in the name of the bank, and which shall be secured by insurance against loss by fire, with policies made payable to the bank, where no more than eighty (80) per cent of the market value of such products shall be loaned or advanced thereon. In all such cases a margin of twenty (20) per cent between the amount of the loan and the market value of the products shall at all times be maintained (except where products are intended for immediate shipment); and the bank shall have the right to call for additional collateral when the difference between the market value and the amount loaned shall be less than twenty (20) per cent, and in the event of the failure to comply with such demand, to immediately sell all or any part of such products in the open market and pay the amount of the loan and the expenses of sale, and the balance to the borrower; and provided, that the limit herein fixed shall not apply to loans fully secured by bonds or certificates of indebtedness of the United States or of this State, or of the several counties, districts, or municipalities thereof which have been duly and regularly validated as provided by law. Liabilities arising to the makers and indorsers of checks, drafts, bill of exchange, received by the bank on deposit, cashed, or purchased by it, shall not in any way be considered as borrowed money or loans. It shall be the duty of the Superintendent of Banks to order any loans in excess charged to profit and loss, provided in his opinion such excess is not well secured; and if such reduction shall not be made within thirty (30) days after such notification, to proceed as in other cases provided for violation of the orders of the Superintendent. Acts 1919, pp. 105, 197; 1922, pp. 88, 70; 1927, p. 201.

Editor's Note.—By the amendment of 1927 the phrase "not to exceed twenty (20) per cent of the capital and surplus" with regard to purchases referred to in the first part of the proviso, was substituted for the phrase "if in excess of ten (10) per cent of the capital and surplus."

§ 2366(169). Purchase of stocks and investment securities.—No bank shall subscribe for, purchase, or hold stock in any other bank, except stocks in the Federal Reserve Bank of Atlanta, necessary to qualify for membership therein, nor in any other corporation unless

the same shall have been transferred to it in satisfaction of a debt previously contracted, or shall have been purchased at a sale under a power contained in a note or other instrument by which it was pledged to the bank or under a judgment or degree in its favor, and all such stock shall be disposed of by the bank within six months, unless the Superintendent of Banks shall extend the time for good cause shown. Nor shall a bank purchase or hold any bonds or debentures except such as are classed as investment securities, and the buying and selling of such securities shall be limited to buying and selling without recourse marketable obligations upon which there has never been a default, evidencing indebtedness of any person, copartnership, association, or corporation in the form of bonds, notes and/or debentures, commonly known as investment securities, under such regulations as may be prescribed by the Superintendent of Banks. The total amount of such investment securities shall at no time exceed 25 per cent. of the capital and unimpaired surplus of such bank; but this limitation as to the amount shall not apply to obligations of the United States, of this State, or of the several counties, districts, or municipalities thereof which have been validated as provided by law. Nothing in this section is to be construed as applying to savings banks doing a savings business only. Provided that this section shall not apply to securities actually owned at the date Act of 1919 became effective. Provided, further, that any bank may subscribe for, or purchase, stock in an agricultural credit corporation duly organized under the laws of this State having authority to make loans to the farmers of this State for agricultural purposes and to re-discount the same with the Intermediate Credit Bank of Columbia, but no bank shall subscribe for or purchase stock in more than one such corporation, nor invest therein more than ten per centum of its capital, and no such subscription or purchase shall be made until first approved by the Superintendent of Banks. Acts 1924, p. 76; 1919, pp. 135, 201; 1927, pp. 195, 203.

Editor's Note.—Save the last proviso, all of the provisions of the section were changed by the amendment of 1927. The changes effected are so versatile as to render it impossible to point them out by specific description, and calls for a comparison of the two sections.

§ 2366 (185). Payment of deposit in two names.

Effect upon Title to Deposit.—This section has reference to the liability of the bank as to a joint deposit, making it lawful for the bank to pay either party under such circumstances. It does not affect the right of the property as between the parties; that is, between the depositor and the third person claiming the deposit. It has no applicability to the title to the money as between the depositor and the third party. Clark v. Bridges, 163 Ga. 542, 546, 136 S. E. 444.

§ 2366(190). Forged or raised checks.

Applicability to Signing by Unauthorized Agent.—The expression "forged check," as used in this section applies only to a check created as a result of a criminal act of forgery, and does not apply to a check to which one's name as maker or drawer is signed by another, who purports to act as the agent for the maker or drawer, although no such authority exists. Samples v. Milton County Bank, 34 Ga. App. 248, 129 S. E. 170.

Under the undisputed facts the plaintiff is not, as a matter of law, estopped, irrespective of the provisions of this section, from repudiating the act of the alleged agent in signing the plaintiff's name to the checks without authority. Samples v. Milton County Bank, 34 Ga. App. 248, 129 S. E. 170.

Excuse for Failure to Give Notice.—The effect of the ruling in Citizens, etc., Bank v. Ponsell, 33 Ga. App. 193, 125 S. E. 775, was that the trial court would not have been authorized to hold the reasons assigned by the plaintiff in exculpation of her failure to notify the defendant bank of the forgeries, within 60 days, as required by this section were not inadequate as a matter of law. That ruling did not go to the extent of holding that the circumstances pleaded in extenuation of such failure on the part of the plaintiff were necessarily such as would relieve her from the penalty prescribed. While it is true that the statute charges the depositor with a duty of notifying, it does not undertake to say what facts or circumstances, if any, would be sufficient to obviate the penalty of such dereliction. S. C., 35 Ga. App. 460, 133 S. E. 351.

It is for the jury to say whether the facts pleaded and proved by the plaintiff, in exculpation of her dereliction, were such as would absolve her from the penalty prescribed. Consequently, the overruling of the demurrer to the petition does not mean that the plaintiff is absolutely entitled to recover if she proves her case as laid; for a general demurrer should be overruled in an action based on facts and circumstances justifying the plaintiff's admitted negligence when the jury, from the facts alleged, would be authorized to infer a justification for negligence, though they would not be bound to do so. See McDuffie v. Ocean Steamship Co., 5 Ga. App. 125, 129, 62 S. E. 1008. Ponsell v. Citizens, etc., Bank, 35 Ga. App. 460, 133 S. E. 351.

§ 2366(194). Payment of deposit of deceased depositor.—Upon the death of any person intestate, having a deposit in a bank of not more than three hundred no/100 ($300.00) dollars, such bank shall be authorized to pay over such deposit: (a) to the husband or wife of the depositor; (b) if no husband or wife, to the children; (c) if no children, to the father if living; if not, to the mother of the depositor; (d) if no children or parent, then to the brothers and sisters of the depositor. The receipt of such person or persons shall be a full and final acquittance to the bank and relieve it of all liability to the estate of said deceased depositor or the representative thereof should one be appointed. Such deposit shall be exempt from the process of garnishment. Acts 1919, pp. 135, 210; 1927, pp. 195, 204.

Editor's Note.—Prior to its amendment in 1927, this section applied to deposits not exceeding one hundred dollars. The amendment extended its application to deposits of three hundred dollars and less. The provision as to the exemption of the deposit from process of garnishment is new with the amendment.

§ 2366(195A). Stale checks.—Where a check or other instrument payable on demand at any bank or trust company doing business in this State is not presented for payment within six months from the date thereof, the same shall be regarded as a stale check, and the bank or trust company upon which the same is drawn may refuse payment thereof unless expressly instructed by the drawer or maker to pay the same, and no liability shall be incurred to the drawer or maker for dishonoring the check or other instrument by such non-payment. Acts 1927, pp. 195, 204.

§ 2366(195B). Stop-payment orders to be renewed.—No revocation, countermand, or stop-payment order, relating to the payment of any check or draft against an account of a depositor in any bank or trust company doing business in this State, shall remain in effect for more than ninety (90) days after the service thereof on the bank, unless the same be renewed, which renewals shall be in writing and shall be in effect

for not more than ninety (90) days from the date of the service thereof on the bank or trust company, but such renewals may be themselves renewed from time to time. All notices affecting checks or drafts of any bank or trust company, upon which revocation, countermand, or stop-payment orders have heretofore been made, shall not be deemed to continue in effect for more than ninety (90) days from the date of the approval of this Act, unless renewed in writing, which renewal shall not continue in effect for more than ninety (90) days from the date of the service thereof on the bank or trust company. Acts 1927, pp. 195, 205.

SECTION 20

Operation and Effect of Act

§ 2366(196A). Short title.—The Act approved August 16, 1919, entitled "An Act to regulate banking in the State of Georgia; to create the Department of Banking of the State of Georgia, to provide for the incorporation of banks, and the amendment, renewal, and surrender of charters; to provide penalties for the violation of laws with reference to banking and the banking business; and for other purposes," and the several Acts amendatory thereof, shall be referred to collectively as "The Banking Law." Acts 1927, pp. 195, 205.

§ 2366(196B). Venue of suits; service.—All suits against the Superintendent of Banks, arising out of the liquidation of insolvent banks, shall be brought in the county in which such bank had its principal place of business, and service may be had on the Superintendent by serving such suit and process on the liquidation agent in charge of the affairs of the said bank, or, if there be none, on any former officer of said bank; provided, however, that in all such suits a second original shall be served on the Superintendent of Banks. Acts 1927, pp. 195, 206.

ARTICLE 4

Insurance Companies

SECTION 10

Fire Insurance Contracts

§ 2470. (§ 2089.) Contract of fire-insurance.

Delivery.—The rule of this section is stated in Home Ins. Co. v. Head, 35 Ga. App. 143, 132 S. E. 238.

Where an insurance company has accepted an application for insurance and has issued the policy, actual delivery is not essential to the consummation of a contract of insurance, unless expressly provided for in the application or the policy. See New York Life Ins. Co. v. Babcock, 104 Ga. 67, 30 S. E. 273, 42 L. R. A. 88, 69 Am. St. R. 134. Where both the application and the policy are silent as respects actual delivery of the policy being essential to a consummation of the contract, the contract becomes consummated upon the retention by the company of the notes and the issuance of the policy and mailing it to its local agent for delivery to the applicant. Tarver v. Swann, 36 Ga. App. 461, 137 S. E. 126.

Same—Parol Agreement with Agent.—Where an application for insurance, which, upon the consummation of the contract of insurance, became a part of the contract, provided that the company should "not be bound by any act done or statement made by or to any agent, or other person, which is not contained in this application," an agreement not contained in the application or the policy, made between the applicant and the local agent, when the application and notes were signed, to the effect that the contract of insurance would not be consummated until actual delivery of the policy to the applicant, and that upon failure to make such actual delivery the applicant would not be bound upon the notes, did not become part of the contract. Tarver v. Swann, 36 Ga. App. 461, 137 S. E. 126.

§ 2471. Policies must contain the entire contract.

Necessity of Attaching Copy of Application.—See Couch v. National Life, etc., Ins. Co., 34 Ga. App. 543, 130 S. E. 596; Interstate Life, etc., Co. v. Bess, 35 Ga. App. 723, 134 S. E. 804, citing and following the paragraph set out under this catchline in the Georgia Code of 1926.

§ 2472. (§ 2090.) Interest of assured.

Test of Insurable Interest.—While, under the section, an insurable interest is defined as "some interest in the property or event insured," and a "slight or contingent interest is sufficient, whether legal or equitable" such an insurable interest is not to be taken as synonymous with the sole and unconditional ownership required by the terms of the policy in the instant case. Nor does the rule as to an insurable interest dispense with the contractual requirement as to liens upon the property constituting the subject matter of the risk. Alliance Ins. Co. v. Williamson, 36 Ga. App. 497, 499, 137 S. E. 277.

§ 2475. (§ 2093.) Construction.

Usages and Customs.—See Macon County Ass'n v. Slappey, 35 Ga. App. 737, 741, 134 S. E. 834, following the paragraph under this catchline in the Georgia Code of 1926.

§ 2480. (§ 2098.) Effect of misrepresentation.

Where Capable of Two Constructions.—See Macon County Ass'n v. Slappey, 35 Ga. App. 737, 741, 134 S. E. 834; Johnson v. Mutual Life Ins. Co., 154 Ga. 653, 115 S. E. 14, following paragraph under this catchline in Georgia Code of 1926.

Misrepresentation in Application Not in Writing Attached to Policy.—In Interstate Life, etc., Co. v. Bess, 35 Ga. App. 723, 726, 134 S. E. 804, it was said by Bell, J., "Since the application was not in writing and attached to the policy, the insurer could not defend upon the ground of material misrepresentations not amounting to actual fraud. The failure to make the application a part of the contract differentiates the case from such cases as Supreme Conclave Knights v. Wood, 120 Ga. 328, 47 S. E. 940, where it was held that a material misrepresentation will avoid the policy, whether the statement was made in good faith or wilfully or fraudulently."

Knowledge of Agent as Waiver.—In Interstate Life, etc., Co. v. Bess, 35 Ga. App. 723, 726, 134 S. E. 804, it was said by Bell, J., "In a case like the present, if the agent had actual knowledge of the facts which by a stipulation in the contract would render it void, the insurer could not set up such facts as a defense. But before the knowledge of the agent could work a waiver on the part of his principal, the knowledge must have been actual. Constructive knowledge would not be sufficient for that purpose."

Section Given in Charge.—It would seem that it would not be harmful to the insurer to give in charge a part or all of the above Code section where the sole defense is actual fraud. Interstate Life, etc., Co. v. Bess, 35 Ga. App. 723, 134 S. E. 804.

§ 2482. (§ 2100.) Increasing risk.

Provisions of Section Impliedly Written into Policy. — It would seem that the provisions of this section should be considered as impliedly written into the policy, and that if they are violated the company will not be liable. It therefore becomes necessary to determine from all the surrounding facts and circumstances what character of use is contemplated by a policy. Macon County Ass'n v. Slappey, 35 Ga. App. 737, 741, 134 S. E. 834.

§ 2490 (§ 2108.) Prescribing regulations.

Section cited in Alliance Ins. Co. v. Williamson, 36 Ga. App. 497, 137 S. E. 277.

SECTION 12

Life Insurance

§ 2499. (§ 2117.) Law of fire-insurance applicable.

Section cited in McGlathin v. United States Nat. Life, etc., Co., 36 Ga. App. 325, 136 S. E. 535.

§ 2501(1). Medical examinations.—All persons applying for life-insurance in a life-insurance company writing life insurance in this State shall submit to such reasonable rules and regulations as may be prescribed by such insurance companies; and after a policy is issued on the life of such person, the beneficiary of such policy shall be entitled to collect the amount of such policy under the terms of the contract when it matures, unless the applicant or beneficiary has been guilty of actual fraud or has made material misrepresentations in procuring such policy, which representations change the character and nature of the risk as contemplated in the policy so issued by the company. All statements, covenants, and representations contained in applications for insurance shall never be held or construed to be warranties, but shall be held to be representations only. Acts 1912, pp. 119, 130, 1927, p. 223.

Editor's Note.—Prior to its amendment by Acts 1927, this section at its beginning had contained a provision requiring all insurance companies, with certain exceptions, to make a strict medical examination of persons applying for insurance. The provision and the phrase "for the purpose of making such examinations" which appeared after the phrase "such insurance companies," were stricken by the amendment.

§ 2507. When laws apply.

License Fees of Agents.—Because of this section, section 993(69), relating to taxation of insurance agents, is not applicable to industrial life insurance agents. Hoover v. Pate, 162 Ga. 206, 132 S. E. 763.

SECTION 16A

Mutual Companies Insuring against Loss by Fire, etc.

§ 2549. (§ 2140.) Insurance companies shall pay damages, when.

Demand and Refusal.—See Globe, etc., Ins. Co. v. Jewell-Loudermilk Co., 36 Ga. App. 538, 137 S. E. 286, stating and applying the principle as set out under this catchline in the Georgia Code of 1926.

In a suit upon an insurance policy, where the only allegation as to a demand upon the insurance company for payment of the loss was contained in the allegation as to the filing of the proof of loss, which was filed prior to December 7, 1925, on which date the insurance company acknowledged receipt of proof of loss and denied liability and refused payment of loss, and where the suit was filed on January 12, 1926, the petition did not allege a failure of the insurance company to pay the loss within sixty days after demand. Continental Life Ins. Co. v. Wilson, 36 Ga. App. 540, 137 S. E. 403.

Same—When Insufficient to Support Verdict for Damages.—In the instant case such a demand as required by the section in order for the insured to recover damages in addition to the loss not being shown by the evidence, the verdict for damages given by the section was unauthorized. The judgment overruling the defendant's motion for a new trial was affirmed on condition that such damages be written off. Alliance Ins. Co. v. Williamson, 36 Ga. App. 497, 137 S. E. 277.

Bad Faith.—The "bad faith" referred to in section 299 may be of a different character from that which under certain conditions will authorize a recovery under this section. Copeland v. Dunehoo, 36 Ga. App. 817, 823, 138 S. E. 267.

An Exception to Section 4393.—In Copeland v. Dunehoo, 36 Ga. App. 817, 821, 138 S. E. 267, Bell, J., intimates that this section is an exception to the provision in section 4393, which provides that "exemplary damages can never be allowed in cases arising on contracts."

SECTION 19

Suits against Insurance Companies

§ 2563. (§ 2145.) Suits against insurance companies.

Agents in County When Policy Issued. — A petition against an insurance company, wherein it is alleged that at the time of the issuance of the policy sued on the defendant was represented by named agents in the county in which the suit was filed, alleges jurisdiction in that county, as provided in the section. Process issued thereon is valid. Hagler v. Pacific Fire Ins. Co., 36 Ga. App. 530, 137 S. E. 293.

When Service Made upon Former Agent.—The fact that no legal service could be perfected upon the defendant insurance company in the instant case, because at the time of filing the petition there was no agent of the defendant in the county upon whom service could be legally perfected, does not affect the validity of the process, but affects only the validity of the service perfected by serving the former agent in the county, who, at the time of service, was not an agent of the company and upon whom legal service could not be perfected. The process, therefore, being valid, was subject to amendment. This case is distinguishable from that of Union Marine Fire Ins. Co. v. McDermott, 31 Ga. App. 676, 121 S. E. 849. Hagler v. Pacific Fire Ins. Co., 36 Ga. App. 530, 137 S. E. 293.

§ 2564. (§ 2146.) Service on non-resident, assessment, etc., insurance companies.

Process under Section 2563 Perfected under This Section.—Service upon the defendant company under process issued in accordance with section 2563 can be perfected, under this section by leaving a copy of the petition with the company's agent in the county, if there be one. Hagler v. Pacific Fire Ins. Co., 36 Ga. App. 530, 137 S. E. 293.

ARTICLE 6

Railroads

SECTION 1

Incorporation and Powers

DIVISION 3

Corporate Powers of Railroads

§ 2585. (§ 2167.) Powers of such roads.

Use of Street.—As a general rule, a railroad company must obtain the written consent of the municipal authorities before it can lay a track on any street of a city in this State. Tift v. Atlantic, etc., R. Co., 161 Ga. 432, 443, 131 S. E. 46.

§ 2585(1). Authority to build, relocate, etc.

Approval of Railroad Commission Required.—The right of condemnation given by this and the following section can not be exercised until the railroad commission of this State shall first approve the taking of the property or right of way designated for the public use or uses desired. Tift v. Atlantic, etc., R. Co., 161 Ga. 432, 440, 131 S. E. 46.

SECTION 2

Georgia Public Service Commission

§ 2618. (§ 2185.) Suspension of commissioner from office.

Cited in Myers v. United States, 272 U. S. 52.

§ 2663. Jurisdiction of the commission.

Regulating Baggage.—This section confers the power upon the Public Service Commission to issue an order requiring a terminal company to receive and check to its destination certain properly identified baggage. Atlanta Terminal Co. v. Georgia Pub. Service Comm., 163 Ga. 897, 137 S. E. 556.

§ 2670(1). Name changed to public service commission, authority, rights, etc.

Cited and applied in Atlanta Terminal Co. v. Georgia Pub. Service Comm., 163 Ga. 897, 137 S. E. 556, holding that the commission has power to issue order respecting, receiving and checking baggage.

SECTION 3

Operation of Railroads

§ 2674. (§ 2221.) Extent of such crossings.

Railroad Owes No Duty to Maintain Highway.—A railroad company is under no duty to maintain a public highway, which traverses its right of way, in a condition safe for travel at a point where the highway is not crossed by the company's tracks or at a point not so close to such crossing as to render the repair of the highway at this point "necessary for a traveler to get off, and on the crossing safely and conveniently." Hall v. Georgia Southern, etc., R. Co., 34 Ga. App. 786, 131 S. E. 187.

§ 2677(2). Blow-post; signal of crossing; lookout and exercise of care.

Failure to Comply with Section as Negligence.—If the failure to comply with the section is not the proximate cause of the injury, for example where no post is erected but the engineer nevertheless blew the whistle in accordance with the legal requirements, the presumption of negligence is conclusively rebutted. Stanford v. Southern R. Co., 36 Ga. App. 319, 136 S. E. 804.

§ 2677(16). Elimination of grade crossings.—Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that from and after the passage of this Act, when in the judgment of the State Highway Department of Georgia it is practicable and, in the interest of public safety, reasonably necessary, the State Highway Department may authorize and direct the elimination of grade-crossings on the State road system; and that when in the judgment of the board of commissioners of roads and revenues of any county in the State of Georgia, or of any other authority having jurisdiction over and control of the public roads of that county, it is practicable and, in the interest of public safety, reasonably necessary, such board of commissioners of roads and revenues, or such other authority having jurisdiction over and control of the public roads of the county, may authorize and direct the elimination of grade-crossings on the public roads of said county; provided, that any such elimination of a grade crossing shall be in accordance with the provisions of this Act, and that no elimination of a crossing at grade of a public county road (as distinguished from a road which constitutes a part of the State highway system) shall be eliminated under the provisions of this Act, upon direction or order of any such county authority, until and unless the State Highway Department of Georgia shall approve any such order of any such county authority, and shall concur therein. Acts 1927, p. 299.

§ 2677(17). Same—Definitions.—For the purposes of this Act, the following definitions shall apply:

"Grade crossing." A crossing at grade of a public road intersecting a track or tracks of a railroad or railroads.

"Department." The State Highway Department of Georgia as constituted under the laws of this State.

"Boards." The boards of commissioners of roads and revenues of the several counties of the State, or any other duly constituted authority having jurisdiction over and control of the public roads in the counties, in and for the control of which such board or other authority is constituted under the laws of the State of Georgia.

"Railroads." All steam-railroads and interurban electric or gasoline railways of more than twenty miles in length, which are operated as common carriers, but shall not include street-railways operated in whole or in part within the corporate limits of a city or town, nor logging railroads not operated as common carriers.

"Overpass." A bridge and approaches thereto for carrying highway traffic over a railroad.

"Underpass." A bridge and approaches thereto for carrying a railroad over a highway or other public road which is within the purview of this Act.

This Act may be cited as the "Grade-crossing Elimination Act."

§ 2677(18). Same—Notice to railroad company; adoption of layout.—Whenever the department, with reference to State roads, or a board, with reference to county public roads, shall direct the elimination of any grade-crossing by means of an underpass, overpass, or by relocation, or shall direct the guarding of a grade-crossing by an automatic signaling device, prompt notice of the order in such regard shall be given to the railroad company or companies involved; and within ten (10) days thereafter the representative of the department or board and of the railroad or railroads involved shall meet, and thereafter, within a reasonable time, adopt a layout mutually satisfactory for the construction of a grade separation structure or automatic signalling device. Any such layout so adopted by or through the representatives of a board and of a railroad shall be submitted to the department for its approval, and no work looking to the elimination of the grade-crossing pursuant to the plans so adopted shall be begun until and unless the department concur therein and approve the same, or unless the railroad or railroads involved may agree that its or their portion of the expense involved in the elimination of such grade-crossing shall not be charged against the maximum sum which any one railroad may be required to expend in any one calendar year under any or all of the provisions of this Act, as hereinafter provided. Failing to agree within a reasonable time, then the department or (as the case may be) a board may order the railroad or railroads involved to proceed with the construction of such grade separation structure as it may be required, and as indicated in the plans and specifications accompanying its order; provided, however, that no order of a board entered in such regard shall be binding until and unless the same be concurred in and approved by the department. It shall be the duty of said railroad or railroads to begin work on any such grade separation structure within sixty (60) days after the receipt of a binding order to that effect, and to complete the structure within a reasonable time; provided, however, that in no event shall the railroad or railroads be required, without its consent, to do the actual physical work in providing approaches by fill to an overhead structure or the excavating beneath the supporting structure of an underpass or the approaches thereto, but the cost of such work shall be considered a part of the cost of the grade elimination, whether actually performed by the railroad or the depart-

ment or board, and such cost shall be apportioned as hereinafter provided.

§ 2677(19). Same—Agreement to apportion work.—The department or board may, by agreement with any railroad company, apportion the work to be done in the construction of any grade separation structure, between the railroad company or companies and contractors acting under the control and supervision of the department or of the board; provided, that whenever the department or a board, or any of its or their employees or contra [contractors] acting under the orders of the department or board, or of its or their contractors, shall go upon or be upon the right-of-way of the railroad company, they shall be subject to any reasonable rules and regulations of such railroad made for the protection of its traffic, employees, and passengers.

§ 2677(20). Same—Space for additional track.—When either an overpass or an underpass is constructed under the provisions of this Act, the same shall be so designed and constructed as to be sufficient to accommodate at least one railroad-track in addition to those existing at the time of said construction, unless this requirement is waived by the railroad.

§ 2677(21). Same—Division of cost.—The division of the costs of elimination of grade-crossings by means of grade separation structures shall be as follows:

(a) The total cost of surveys and of the preparation of the plans and specifications, and of the estimates of the cost thereof, shall be paid, one half by the department or county board, and one half by the railroad or railroads involved.

(b) The total cost of a grade-crossing elimination by the use of an overpass or underpass, including the establishment of drainage, shall be paid, one half by the department or (as the case may be) the board, and one half by the railroad or railroads involved; provided, that the construction expense in which the railroad or railroads involved may be required to participate shall be confined to the grade-separation structure and the approaches thereto not exceeding three hundred (300) feet on each side from the center line of the track or tracks as measured along the center of the highways. The approaches shall not be regarded as extending farther than from grade point to grade point, and the railroad shall not be charged with any cost of paving, except on the flooring of an overpass.

(c) In no plan providing either for an overpass or underpass shall the department or board interfere with or change the grade or alignment of the tracks of any railroad, or relocate the line of the railroad, without its consent. Nothing herein, however, shall prevent the department or county board and the railroad or railroads involved from mutually agreeing to the change of the grade or alignment of any track or tracks, or the relocation of the same, and in case of such an agreement the expense of making such change shall be borne equally by the department or board and the railroad or railroads involved; provided, that such change in the railroad-tracks has been made at the written request of the department or county board.

§ 2677(22). Same — Automatic signaling device, required when.—Whenever in the judgment of the department the installation of an automatic signaling device may be reasonably required at a grade-crossing of a State road, and whenever in the judgment of a board the installation of an automatic signaling device may be reasonably required at a grade-crossing of a county road, the department or (as the case may be) a board may require, by written order, the railroad or railroads involved to provide such automatic signaling device as may be appropriate. In any such case the expense of acquiring and installing such device shall be divided equally between the department or county board and the railroad or railroads involved, but the railroad or railroads involved shall at its or their own expense maintain the same.

§ 2677(23). Same—Underpass or overpass unsafe or inadequate; improvement.—Whenever in the judgment of the department exercised in respect of a State road, or in the judgment of a county board exercised in respect of a county public road, an existing underpass or overpass, constructed prior to the approval of this Act, is unsafe or inadequate to serve the traffic for which it was constructed, then the department, when State roads be involved, or the board, when county public roads be involved, may proceed to bring about the improvement or betterment of the existing structure. And in any such event the procedure and division of the cost of construction and the cost of the maintenance of such improvement or betterment, shall be as herein set forth in section 2677(18), (19), (20), (21) and (24) of this Act.

§ 2677(24). Same—Maintenance of overpass, etc.—After the construction of an overpass or underpass, it shall be the duty of the department in the case of State roads, and of the county board in the case of county public roads, to maintain at its or their own expense the drainage, surface, and pavement of the highway and bridge, as well as the approaches and guard-rails, if any; except that when an overpass is constructed with a floor of wood, then the railroad or railroads shall maintain such floor. It shall be the duty of the railroad or railroads to maintain at its expense the foundations, piers, abutments, and superstructures of all underpasses and overpasses located within the limits of its right-of-way.

§ 2677(25) Same—Selection of material.—The railroad company or companies involved shall have the right to select the material to be used in the construction of the grade-separation structure, provided that such material shall not be less durable than creosoted timber of a quality at least equal to that required by the standard specifications of the department for its own bridge work. Neither the department nor any county board shall require any railroad company to construct an underpass of a design, specification, or plan, the strength of which, in the judgment of the railroad company, shall not be sufficient to meet the requirements of its traffic thereover. In no event shall any railroad company be required to participate in the cost of the

construction of any overhead bridge upon a basis or proportion in excess of the cost of a bridge that would be suitable to carry ordinary highway traffic according to the standards of the department, which standards are now for a strength sufficient to support a fifteen-ton roller.

§ 2677(26). Same—Judicial review of order, etc., of department or board.—Any judgment, decision, or order of the department, or of any county board, whether entered upon any question involving the practicability, advisability, or necessity of eliminating any crossing at grade or involving the apportionment of cost of construction, or any other question arising under this Act, shall be subject to judicial review. Pending the final determination of any proceeding at law or in equity so instituted, the department or any county board may, without prejudice to either party, and at its own risk, proceed with the work of eliminating the crossing at grade involved in such litigation, subject to final judgment of the court as to all questions involved in such litigation.

§ 2677(27). Same—Special agreements as to relocation, etc.—Nothing in this Act shall be construed to prevent such department or county board from reaching special agreements with railroad companies providing for grade-crossing elimination by means of relocation of either the railroad or highway involved, or by other means and arranging for joint participation in the cost of such elimination on an agreed basis.

§ 2677(28). Same—Use of right of way.—In all cases where grade-separation structures are built hereunder, the railroad shall permit the use, free of cost, of so much of its right-of-way as may be necessary.

§ 2677(29). Same—Cost where different railroads involved.—Where more than one railroad is involved in the separation of crossings at grade, that portion of the cost of construction and maintenance which this Act provides shall be paid by the railroad or railroads shall be apportioned between such railroads by agreement; and in case they can not agree, the same shall be fixed by the department or (as the case may be) by the county board, after a hearing, subject to a judicial review as provided in section 11, 2677(26) of this Act.

§ 2677(30). Same—Crossings closed; status of crossings in case of relocation.—All existing grade-crossings replaced by grade-separation structures, or avoided by relocation of highways and no longer used by the general public, shall, where possible, be closed, and where continued shall be private crossings and not subject to the provisions of the statutes of Georgia relating to railroad-crossings.

§ 2677(31). Same—Limit of annual expenditure of railroad.—No railroad shall be required to expend in any one calendar year, under any or all of the provisions of this Act, a sum in excess of $40,000.00; provided that no railroad whose gross earnings from both inter and intrastate business in the State of Georgia, as reported to the Public Service Commission of Georgia for the preceding calendar year, did not exceed $2,000,000.00 shall be required without its consent to expend in any one calendar year, under the provisions of this Act, a sum in excess of $3,000.00. In any case where the proportionate part to be paid by a railroad for the elimination of a crossing at grade, when added to amounts theretofore expended and /or for which obligations have been incurred, would exceed the amount which a railroad may be required to expend under the provisions of this section, the department may pay the excess over and above the aggregate of payments legally permissible for requirement of the railroad, and thereafter collect the same with legal interest during succeeding calendar year or years; but nothing herein contained shall be construed as requiring any railroad company to expend in grade-elimination costs and protection in any one calendar year more than the applicable amount as hereinbefore specified.

SECTION 6

Railroads as Common Carriers, and Herein of Other Carriers

§ 2712. (§ 2264.) Common carrier.

III. DEFENSES.

Generally.—See Central, etc., R. Co. v. Council Bros., 36 Ga. App. 573, 137 S. E. 569, stating in part the rule set out under this catchline in the Georgia Code of 1926.

Act of God—Distinguished from Unavoidable Accident.—An act of God means any act produced by physical causes which are inevitable. In other words, unavoidable accidents are the same as the acts of God. Central, etc., R. Co. v. Council Bros., 36 Ga. App. 573, 137 S. E. 569; Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393. These cases seem to conflict with Harmony Grove Tel. Co. v. Potts, 24 Ga. App. 178, 180, 100 S. E. 236, where it was said that a distinction exists between an act of God and an unavoidable accident. It appears though that in the Fish case, and in the Central of Ga. Ry. Co. case, only phenomena were within the contemplation of the courts, while in the Telephone Co. case the court was considering not only natural accidents, which were appropriately classed as acts of God, but also "accidents arising from the negligence or act of man," which are classed as unavoidable accidents. It is submitted that unavoidable accidents is a broad and comprehensive classification, including not only "the negligence or act of man," but also "natural accidents." The so called acts of God are as unavoidable as the acts of man.—Ed. Note.

§ 2713. (§ 2265.) Bailee must show no concurring negligence.

Necessary Proof When Accident Result of Vis Major.—The rule applicable, were it alleged that the damage had been brought about by some vis major, such as an earthquake, lightning, or flood, in which the human element does not and could not enter, would seem to be that where it is alleged that the damage was thus occasioned, it is not necessary for the carrier to show that such an occurrence was in a legal sense an act of God, and its defense would be complete upon proof being made that its own negligence did not contribute to the loss thus caused by an occurrence over which it had no control. Southern R. Co. v. Standard Growers Exch., 34 Ga. App. 534, 130 S. E. 373.

§ 2730. (§ 2279.) Time of responsibility.

Ending of Responsibility as Carrier.—See Central, etc., R. Co. v. Leverette, 34 Ga. App. 304, 129 S. E. 292, following the principle stated in paragraph two under this catchline in the Georgia Code of 1926.

SECTION 8

Injuries by Railroads

§ 2780. (§ 2321.) Damages by running of cars, etc.

I. IN GENERAL.

Presumption of Proximate Cause.—Under the section there

arises, upon proof of injury to a person by a servant of a railroad company, not only a presumption of negligence of the company, but a presumption that the company's negligence was the proximate cause of the injury. Western, etc., Railroad v. Dobbs, 36 Ga. App. 516, 137 S. E. 407. And a charge to the jury which amounts to an instruction to this effect is not error. Id.

Section Modifies General Rule as to Liability of Master.—The general rule that the master is liable for the acts of his servants when done within the scope of their employment, whether the act is wilful or otherwise, is modified as to railway cases, by this section. Furney v. Tower, 36 Ga. App. 698, 137 S. E. 850.

For What Acts Liable.—Before the presumption of negligence against a railway company under this section can arise it must be shown that the act complained of was perpetrated by the servant in the conduct of the business of his employment, as the section should be construed with section 4413. Latimore v. Louisville, etc., R. Co., 34 Ga. App. 263, 129 S. E. 108. But it is immaterial whether the act done was in the scope of the servant's particular employment. Furney v. Tower, 36 Ga. App. 698, 137 S. E. 850.

II. APPLICATION OF RULE.

Injury to Dog.—In Alabama Great Southern R. Co. v. Buchannon, 35 Ga. App. 156, 157, 132 S. E. 253, it was said by Luke, J., who delivered the opinion: "A prima facie case was made for plaintiffs by proof that the dog was killed by the defendant's locomotive, and there should have been a recovery unless the company made it appear that its agents exercised all ordinary and reasonable care and diligence. It was the duty of the company, through its delegated agents and employees, to keep a lookout ahead of the train and to use ordinary and reasonable diligence to discover the dog upon the track and to avoid injuring it."

III. PRACTICE AND PLEADING.

Charge Improperly Construing Section.—Where the trial judge charged the jury as follows: "I charge you that the burden of proof in this case rests upon the plaintiff, that is the burden of proof is upon the plaintiff to satisfy the minds of the jury by the preponderance of the testimony of all the material allegations set out in the original petition in this case and the amendments that have been made and allowed by the court in the trial of this case," it was held that this excerpt deprived the plaintiff of the benefit of the presumption arising in proper cases under the section and was erroneous. Central, etc., R. Co. v. Bridwell, 34 Ga. App. 77, 84, 128 S. E. 238.

§ 2781. (§ 2322.) Consent of negligence.

Comparative Negligence Law.—Where a trial judge charged the jury in substance that where both parties were negligent, but the plaintiff could not have avoided injury by the exercise of ordinary care, and the defendant's was greater than that of the plaintiff, that the rule of comparative negligence and consequent diminution of damages was applicable, it was held upon appeal, that this instruction did not contravene the rule laid down in Americus, etc., R. Co. v Luckie, 87 Ga. 6, 13 S. E. 105, nor did it exclude the defense that the plaintiff's injury was brought about by his own failure to exercise ordinary care. Atlantic Coast Line R. Co. v. Anderson, 35 Ga. App. 292, 133 S. E. 63.

Duty to Charge on Request.—Where the evidence authorized the inference that the plaintiff was negligent, it was error prejudicial to the defendants not to comply with a written request to charge in effect the rule of this section. Southern R. Co. v. Bottoms, 35 Ga. App. 804, 134 S. E. 824.

And a charge that the damage which the plaintiff would be entitled to recover should "be reduced as you may find their negligence to be" is not a full and clear statement of the rule. Southern R. Co. v. Bottoms, 35 Ga. App. 804, 134 S. E. 824.

§ 2782. Injury by coemployee.

Conclusiveness of Presumption.—The presumption of negligence against the employer, arising under this section, from death of a railroad employee, is not conclusive, and, if rebutted by uncontradicted and unimpeached evidence, the court should direct the verdict for the defendant. Walker v. Charleston, etc., R. Co., 8 Fed. (2d), 725.

In an action for death of a railroad employee, supposedly killed when handle of alleged defective jack under freight car flew violently up and struck him under the chin, the presumption of negligence, arising under this section, was conclusively rebutted, and the verdict for the defendant was properly directed. Walker v. Charleston, etc., R. Co., 8 Fed. (2d), 725.

§ 2788. (§ 2324.) Receiver's liability to employees.

Consent of Appointing Court Not Requisite to Suit.—This section and the following section (section 2789) are exceptions to the general rule that before a suit can be maintained against a receiver appointed by the courts of this State it is necessary for the consent of the appointing court to be obtained. Bugg v. Lang, 35 Ga. App. 704, 134 S. E. 623. And no consent is necessary by the express terms of the Judicial Code (U. S. Comp. Stat. 1916, section 1048) when the appointment is by a Federal Court. Id.

Effect upon Federal Receivers.—The authority extended under the Federal statute for suits in the State courts against Federal receivers is paramount, and is in no wise affected by this section. Bugg v. Lang, 35 Ga. App. 704, 134 S. E. 623. See also Eddy v. Lafayette, 49 Fed. 807, 1 C. C. A. 441.

SECTION 11

Suits Against Railroads and Electric Companies.

§ 2798. (§ 2334.) Must be sued where action originates; definition of "electric companies."

Venue of Continuous Tort to Passenger.—This law is applicable in a case where a passenger brings suit in tort against a railroad company for negligence in carrying her beyond her destination in a particular county and through that county into another state, where further damages result from the continued wrong; and where the railroad company has an agent in the county where the tort originated, the venue of a suit for such injury is exclusively in that county. Southern R. Co. v. Clark, 162 Ga. 616, 134 S. E. 605.

ARTICLE 8

Trust Companies

SECTION 5

Act of 1927

§ 2821(15). Definitions. — The term "trust company" shall be construed to mean a corporation having power to execute trusts, and to act in any fiduciary capacity, whether such corporation has been heretofore organized under the previous acts of the General Assembly of this State or as hereafter organized under this act or any amendment thereto. The term "person" as used in this act shall be construed to mean an individual, a partnership, or an incorporated association. The word "superintendent," as used in this Act refers to and shall mean the Superintendent of banks. Acts 1927, p. 344.

§ 2821(16). Unauthorized use of the word trust company.—No corporation or person, except a corporation duly authorized to do a trust business in this State, shall as a designation or name or part of a designation or name, under which business is or may be conducted make use of the word "trust" in any corporate, artificial, or business name or title, or make use of any office sign at the place where such business is transacted having thereon any word or words indicating that such is the place or office of a trust company. And the use or circulation of any letterheads, billheads, blank forms, notes, receipts, certificates, circulars, or any written or printed or partly written and partly printed paper whatever having thereon any word or words indicating that such business is the business of a trust company, is prohibited to any corporation or person except those duly authorized under the laws of this State to do a trust business. Except as

herein otherwise indicated, the provisions of this Act shall apply to all trust companies heretofore incorporated or doing business at the date of the approval of this Act as well as those hereafter incorporated or established. Provided, however, that any corporation regularly chartered and organized and engaged in business on the date of the approval of this Act may continue to use its corporate name, but where the words "trust" or "trust company" are a part of such corporate name, the corporation shall on all signs, advertisements, letterheads, billheads, and other printed forms, use in connection with its corporate name the words, "Not under State Supervision."

§ 2821(17). Duties and powers of the superintendent of banks.—Except as may hereafter be prescribed by law, the Superintendent of Banks, in addition to the duties and powers prescribed in this Act, shall have, possess, and exercise all that jurisdiction, control, supervision, and authority over trust companies organized or doing business under this Act, which he now has or may hereafter be given by the laws of this State over State banks. He shall require reports and make examinations of said trust companies in like manner as is now required of State banks. Trust companies for this examination, supervision, and control shall pay to the Superintendent of Banks the same fees that State banks are now or may hereafter be required to pay. The funds derived from this source shall be used to defray the expenses of the Department of Banking.

§ 2821(18). Guaranty.—That no trust company shall engage in or guarantee the payment of bonds and notes secured by mortgage or deed to real estate within the State of Georgia, or secured by pledge of any choses in action, unless it shall first set apart an amount of its assets, the same to be fixed by the Superintendent of Banks, but in no event to be less than ten thousand ($10,000.00) dollars, as a guaranty fund, which said guaranty fund shall be maintained, unimpaired, or invested in bonds of the United States, or of this State, or of any political subdivision of this State, when and as required to do so by the said superintendent, so long as any guaranty is outstanding. The superintendent shall have the right to designate the place where said guaranty fund shall be deposited. This restriction shall be in addition to the restrictions now imposed by law on trust companies doing business in this State.

§ 2821(19). Trust companies receiving deposits.—That no trust company shall be allowed to receive deposits of any character unless and until its charter shall have been amended so as to confer upon it banking powers and privileges; and when such amendments shall have been obtained and the Superintendent of Banks shall have issued his permit for said company to receive deposits and do business as a bank, it shall be subject to all the provisions of the law relating to banks. Provided, that trust companies heretofore incorporated under the laws of Georgia, with power in their original or amended charters to receive deposits, and that are now conducting their business and reporting to the Superintendent of Banks, shall not be required to further amend their charters in order to continue conducting such business, but they shall be subject to all the provisions of banking laws of this State, subjecting them to the inspection and supervision of the Superintendent of Banks, and their dealing in stocks, bonds, and other securities shall be subject to inspection and approval of the Superintendent of Banks.

§ 2821(20). Dealing in stocks and bonds.—Trust companies operating as investment bankers, and maintaining departments for the purpose [purchase?] and sale of securities, may purchase for resale whole issues or parts of issues of stocks, and debentures of industrial, railroad, and public-service corporations, and other investment securities, and may resell and deal in the same under such regulations as may be prescribed by the Superintendent of Banks.

§ 2821(21). Amendment to charters.—That the method of obtaining an amendment to the charter of trust company, so as to confer upon it banking powers and privileges, and authorize it to receive deposits, shall be the same as that provided for the amendment of the charter of a bank by sections 1 to 7, inclusive, of article 19 of the Banking Act of 1919, except that the amendment must be authorized by the vote of two-thirds of the outstanding capital stock. When the charter shall have been amended, the stockholders shall be liable to depositors to the same extent as are the stockholders of a bank under article 18 of the Banking Act.

§ 2821(22). Surrender of authority to receive deposits, etc.—Any trust company that has heretofore or may hereafter acquire the right to receive deposits, and thereby become subject to the provisions of this Act, shall have the right to surrender to the Secretary of State its authority to receive deposits and to do a banking business, without impairing in any respect its charter rights to conduct a trust company business, and thereupon shall cease to have the right to receive deposits, but may conduct business as a trust company as though it had never had the right to receive deposits or to do a banking business.

§ 2821(23). Time in which amendment obtained.—Trust companies which have not acquired banking powers, but are receiving savings or other deposits, shall be allowed twelve months from the date of the approval of this Act to secure amendments to their respective charters, conferring such powers, or to pay off and settle with their depositors.

§ 2821(24). Penalty.—Any person who as an officer of any corporation or in his individual capacity shall violate the provisions of this Act, or who shall knowingly permit the violation thereof by any corporation with which he is connected, shall be guilty of a misdemeanor.

§ 2821(25). Certain corporations not affected by this Act.—Nothing in this Act shall be construed to affect, embrace, or include, or to bring within the operation of this Act any corporation chartered by the Superior Court, having trust company powers and without banking powers, and which does not receive deposits subject to check, and which invests its funds in loans on real estate.

Approved August 25, 1927.

ARTICLE 9

Corporations Created by Superior Court

SECTION 1

How Incorporated and Dissolved.

§ 2823. (§ 2350.) Superior courts may create what corporations.

Constitutional Provision.—In 1912 the constitution was amended so as to provide that the General Assembly "may confer this authority to grant corporate powers and privileges to private companies to the judges of the superior court in vacation." It will be noted that at present the superior courts receive their power to create corporations by virtue of the constitution. This power, however, "shall be" exercised in the manner which the legislature "shall prescribe by law." Free Gift Society v. Edwards, 163 Ga. 857, 864, 137 S. E. 382.

Courts May Not Delegate Power.—There is no provision of our constitution or statute law authorizing the superior court to commit its delegated powers to a corporation which the court creates by virtue of the power given it by the constitution and law, so as to authorize the corporation thus created to itself charter other corporations without regard to the provisions of our law concerning the acts necessary to be done before the court itself can create such corporations. Free Gift Society v. Edwards, 163 Ga. 857, 864, 137 S. E. 382.

§ 2823(1). Charters granted in vacation.

Amendment after Publication. — The order of incorporation is not void where an amendment of the petition, changing the period of incorporation from thirty to twenty years, is permitted after publication, on the ground that such an order was not based upon an application that had been published as required by law. Rogers v. Toccoa Elect. Power Co., 163 Ga. 919, 137 S. E. 272.

Act Changed Rule.—Prior to the passage and approval of this act the judge of the superior court was without jurisdiction to grant a charter to a private corporation in vacation in a county other than where the application was pending. An order purporting to grant a charter in vacation and in another county is a mere nullity. Rogers v. Toccoa Power Co., 161 Ga. 524, 131 S. E. 517.

SECTION 2

Schools, Churches, Societies, etc.

§ 2830. (§ 2357.) Societies incorporated.

Name, Style and Objects of Association.—Where a plaintiff in its petition designates itself as Tremont Temple Baptist Church, and alleges that it is "a duly organized religious society, and that a certificate of said society has been duly filed and recorded in the office of the clerk of the superior court" of the county in which the church is located, this shows a sufficient compliance with the provisions of the section. Hartsfield v. Tremont Temple Baptist Church, 163 Ga. 557, 136 S. E. 550.

ARTICLE 10

Co-operative Marketing Associations

SECTION 1

Under Acts of 1920

§ 2928(1). Organization; capital stock; application; title; dividends; reserve, profits.

Individual Liability of Members.—Individual liability for debts of a corporation can not be imposed upon all its members by a by-law adopted by vote of a majority of the members where no provision for such liability is made by statute or charter. Corporations without capital stock are within this rule. Mitcham v. Citizens Bank, 34 Ga. App. 707, 131 S. E. 181.

Where an action is against the corporation and all its members, the petition should be dismissed on demurrer on the ground of misjoinder of parties. Mitcham v. Citizens Bank, 34 Ga. App. 707, 131 S. E. 181.

CHAPTER 3

Sale of Stocks, Bonds, etc. "Blue Sky Laws"

§ 2928(47). License necessary.

Persons to Whom Applicable—In Action for Commission.—The defendant, being the issuer, was not required to obtain a permit from the securities commission before putting the stock on the market. Even if the agent or solicitor was required to do this before proceeding to sell the stock, there being nothing to show that when entering into the contract sued on the parties anticipated that the plaintiff would not comply with the law, the defendant can not escape liability for commissions merely because the agent, after the making of the contract, may have violated the criminal law in selling the stock without a license. Floding Inc. v. Gunter, 36 Ga. App. 450, 136 S. E. 798.

§ 2928(50). Class "B" defined; act not applicable.

Sale of Class "A" No Offense.—Taylor v. State, 34 Ga. App. 4, 128 S. E. 228.

THIRD TITLE

Of Domestic Relations

CHAPTER 1

Of Husband and Wife

ARTICLE 1

Of Marriage and Divorce

SECTION 1

Marriage, How and by Whom Contracted

§ 2931 (§ 2412) Who is able to contract.

Previous Marriage.—If a man who had a living wife undivorced entered into a ceremonial marriage with another woman who was not shown to have known of the former marriage, and they cohabited as husband and wife from the time of such marriage and continued to do so after the death of the first wife, they will be considered thereafter as lawfully married. Hamilton v. Bell, 161 Ga. 739, 132 S. E. 83.

§ 2938. Notice of application to be posted; consent of parent or guardian.—Immediately upon receiving application for a license the ordinary or his deputy shall post in the ordinary's office a notice giving the names and residents of the parties applying therefor, and the date of application. No license shall be issued earlier than five days following the date of application for such license, within which period of five days objections to the proposed marriage may be entered; provided the foregoing provisions shall not apply to persons who have arrived at the age of twenty-one years; and upon application for license being made, and the applicant therein claims the party to be twenty-one years of age, or over, it shall be the duty of the ordinary to whom application for license is made to satisfy himself that the applicant's contention as to age is true. If said ordinary does not know of his own knowledge that both parties for whom a marriage license is sought are twenty-one years of age, or over, shall require applicants to furnish birth certificates, or, in lieu thereof, affidavits from at least two persons showing the ages of both parties to be twenty-one years of age, or over; and upon the failure of applicant to convince the ordinary in the foregoing way, shall be required to post notice of said application for the period of five days, as is provided in

Georgia Laws 1924, page 53; provided that in case of emergency or extraordinary circumstance the judge of the court having probate jurisdiction may authorize the license to be issued at any time before the expiration of said five days. It shall be the duty of the ordinary and his deputy to inquire as to ages of all persons for whom marriage license are asked; and if there be any grounds of suspicion that the female is a minor under the age of eighteen years, such ordinary and his deputy shall refuse to grant the license until the written consent of the parents or guardian, if any, controlling such minor, shall be produced and filed in his office; and any ordinary who, himself or deputy, shall fail to post in his office facts pertaining to the application, or who shall issue a license in violation of the time provision, shall knowingly grant such license without such consent, or without proper precaution in inquiring into the fact of minority, or for the marriage of a female to his knowledge domiciled in another county, shall forfeit the sum of $500.00 for every such Act, to be recovered at the suit of the clerk of the Superior Court, and added to the educational fund of the county. The posting of said notice may be dispensed with in the case the parents or guardian of the female appears in person before the ordinary and consents in writing to the issuance of said license. Acts 1924, pp. 53, 54; 1927, p. 224.

Editor's Note.—The first proviso and all that follows it down to the second proviso was inserted by the amendment of 1927. The amendment also effected certain minor changes of phraseology not affecting the substance.

§ 2938(1). Application for license; information as to impediments, etc.—Marriage license shall be issued under the rules prescribed by the preceding section on written application made by the person seeking license therefor, verified by oath of applicant, which application shall state that there is no legal impediment to marriage, and shall give the full name of the proposed husband, with date of birth, present address, and name of father and mother, if known, and if unknown shall so state, with present name of proposed wife with date of her birth and present address, with name of father and mother, if known, and if unknown shall so state, and shall be supported by affidavits of two reputable citizens of the United States of America as to truth of recitals in said application, which application shall be filed in the office of ordinary before marriage license shall be issued upon such application, and such application shall remain in the permanent files in the office of the ordinary, and may be used as evidence in any court of law under the rules of evidence made and provided in similar cases. Acts 1927, p. 226.

SECTION 2

Of Divorces, and How Obtained

§ 2945. (§ 2426.) Grounds for total divorce.

See annotations to section 2951.

§ 2951. (§ 2432.) Proceedings.

Right to Expressly Waive Certain Rights.—None of the provisions of this section or sections 2945, 2952 and 2975 affect the general principle which allows a litigant to expressly waive rights accorded him upon which he may either insist or relinquish at his option. Don v. Don, 162 Ga. 240, 243, 133 S. E. 242.

§ 2954. (§ 2435.) Schedule.

Filing in Case of Separation.—Where the parties have separated it is error to order the schedule to be filed as of the date of filing petition for divorce. Smith v. Smith, 162 Ga. 349, 133 S. E. 842.

Cited in Meadows v. Meadows, 161 Ga. 90, 129 S. E. 659.

§ 2955. (§ 2436.) Transfer pending suit.

Section Not Applicable in Suit for Alimony without Divorce.—In a suit by a wife against her husband for alimony when no suit for divorce is pending, and no schedule of the husband's property is filed, it is not error on the trial, when an ancillary proceeding has been filed subsequently to the filing of the alimony suit, to cancel a deed executed by the husband to his sister, to refuse to give this section in charge. Chandler v. Chandler, 161 Ga. 350, 130 S. E. 685.

Same—Bona Fides a Question for Jury.—In such a suit it was error for the court to charge that a certain deed which purported to convey to a third person, a large portion of the respondent's realty which was alleged in the petition was his property, did not have the effect to pass title to the grantee; it being a question of fact for the jury to decide whether it had been executed bona fide in payment of a pre-existing debt. Mathews v. Mathews, 162 Ga. 233, 133 S. E. 254.

§ 2956. (§ 2437.) Verdict of jury.

When Section Applicable.—This section only refers to cases where a divorce proceeding is pending. Chandler v. Chandler, 161 Ga. 350, 130 S. E. 685.

§ 2971. (§ 2452.) Custody of children.

Award to Maternal Grandparents.—Conflicting evidence as to the fitness of either the father or the mother to have custody of the child, the judge does not abuse his discretion in awarding such custody to the maternal grandparents of the child. Phillips v. Phillips, 161 Ga. 79, 129 S. E. 644.

§ 2972. (§ 2453.) Habeas corpus for wife or child.

Procedure Same as for Habeas Corpus Generally.—No different procedure is provided for obtaining a trial of the writ of habeas corpus under this section of the code from the provisions for the trial of habeas corpus generally, but it is contemplated that the writ shall issue and be tried under this section as provided in the sections relating to habeas corpus generally. Collard v. McCormick, 162 Ga. 116, 120, 132 S. E. 757.

SECTION 3

Of Alimony

§ 2975. (§ 2456.) Permanent and temporary.

When Contention Made That Husband Has no "Estate."—In the instant case the trial judge did not err in awarding temporary alimony and attorney's fees over the contention that the husband had no "estate" out of which the allowance could be made. Lundy v. Lundy, 162 Ga. 42, 132 S. E. 389.

§ 2981. (§ 2462.) Alimony for children on final trial.

Failure to Specify Amount Minor Child Entitled to, etc.—A verdict and decree in a divorce case are not void on the ground that the verdict allowing a stated sum as alimony for the support of the wife and child do not specify what amount the minor child should be entitled to for its support, nor in what manner, how often, nor to whom it should be paid. Cunningham v. Faulkner, 163 Ga. 19, 135 S. E. 403.

When Charge Corrects Previous Error.—When the trial judge, in his charge, instructs the jury to specify "how often, to whom, and until when" the alimony for the child is to be paid, a previous statement that the father is liable for the support of his minor child until it arrives at the age of 21 years, is not thereby rendered harmless. Barlow v. Barlow, 161 Ga. 202, 129 S. E. 860.

§ 2986. (§ 2467.) Proceeding for alimony before the judge.

For Express Use of Minor Child.—Under the circumstances of the instant case the trial judge did not err in entering a judgment awarding attorney's fees and alimony to the wife for the express use of the minor child. Waller v. Waller, 163 Ga. 377, 136 S. E. 149.

ARTICLE 2

Of Rights and Liabilities of Husband and Wife

§ 2996. (§ 2477.) Agency of wife in respect to necessaries.

Presumption of Husband's Duty of Support.—Cohabitation raises a presumption of the wife's authority to purchase necessaries on the credit of her husband; and where the husband seeks to avoid liability on account of purchases so made, he has the burden of "showing that the goods were supplied under such circumstances that he is not bound to pay for them." Shaw v. Allen & Co., 34 Ga. App. 111, 113, 128 S. E. 699. It is submitted that this is not a case of agency proper, but rather has reference to the husband's legal duty to support his wife. So long as he owes her the duty of support he is bound for her necessaries. When this duty ceases to exist, the husband is no longer bound. This is to be distinguished from cases where the husband has held his wife out, by a course of dealing, as his agent. In the instant case the cohabitation merely raises the presumption of the husband's continued duty of support, and placing upon him the duty of showing that the wife has forfeited the right to his support. This is the general rule.—Ed. Note.

Same—Agreement with Wife's Mother.—An agreement between the mother and the husband, for the mother to take the wife to her home and bear the expense of her support and maintenance, was held not to relieve the husband from his obligation to support and maintain his wife. Akin v. Akin, 163 Ga. 18, 135 S. E. 402.

ARTICLE 3

Of Marriage Contracts and Settlements

§ 3007. (§ 2488.) Wife feme sole as to her separate estate.

II. CONTRACTS OF SURETYSHIP.

A. Generally.

Applies to All Contracts—Question of Fraud. — Whether the lender could be defrauded into believing that a married woman could enter into a contract of suretyship, the mere fact that the defendant wife, together with her husband, may have known at the time of the transaction that her promise as a surety was not binding would not operate to change the rule and to render her liable on the contract where otherwise she was not. Rhodes v. Gunn, 34 Ga. App. 115, 128 S. E. 213.

Tests as to What Constitutes Suretyship Contract. — A wife can not bind her separate estate by any contract of suretyship nor by any assumption of the debts of her husband, and "No superficial appearance will be permitted to lead the court away from the true inwardness of the transaction." Rhodes v. Gunn, 34 Ga. App. 115, 128 S. E. 213, citing Gross v. Smith, 31 Ga. App. 95, 119 S. E. 541.

B. Conveyance to Secure Husband's Debt.

In General.—A deed given by a married woman, in pursuance of a scheme by which she pledges her individual property as security for the debt of another, is void in toto. Lee v. Johnston, 162 Ga. 560, 134 S. E. 166.

To Secure Partnership Debt.—A note and deed given by a defendant is not binding upon her as a married woman, where it is given as security for a debt of a partnership of which her husband was a member, and it is immaterial whether the debt is assumed as security or paid as her husband's debt at the insistence of the creditor who knew all the circumstances upon which the payment was being made. Boykin v. Bohler, 163 Ga. 807, 137 S. E. 45.

III. ASSUMPTION OF HUSBAND'S DEBTS.

A. In General.

Validity of Indirect Method of Assuming Husband's Debts.—Where, by a scheme or device to which her husband's creditor is a party, a wife is induced to make a gift to her husband of her separate estate for the purpose of being used by the husband in the payment of his debt to the creditor, and the husband conveys the property to the creditor in extinguishment of the debt, such transaction may, at the instance of the wife, be treated as void and as passing no title from the wife. Calhoun v. Hill, 35 Ga. App. 18, 131 S. E. 918.

C. Loan to Wife to Pay Debts of Husband.

Lender Husband's Creditor.—See Jackson v. Jackson, 161 Ga. 837, 132 S. E. 79, citing and following the paragraph set out under this catchline in the Georgia Code of 1926.

§ 3009. (§ 2490.) Sale to husband or trustees.

Who May Attack.—See McArthur v. Ryles, 162 Ga. 413, 134 S. E. 76, following and applying the paragraph set out under this paragraph in the Georgia Code of 1926.

§ 3011. (§ 2492.) A married woman may contract; presumptions.

Where Husband Wife's Agent.—Where a husband clothed by a written power of attorney, cancelled a certificate of stock standing in the name of his wife, and had a new certificate issued to himself, even though the legal title passed to the husband, the shares were impressed with a trust, and they were in equity still the property of the wife, as were likewise all income or profits arising or derived from said stock. Bacon v. Bacon, 161 Ga. 978, 133 S. E. 512.

Applied in Davis v. Barrett, 163 Ga. 666, 136 S. E. 904.

CHAPTER 2

Of Parent and Child

ARTICLE 1

Legitimate Children

§ 3016. (§ 2497.) Mode of adopting child.—

Any person desirous of adopting a child, so as to render it capable of inheriting his estate, may present a petition to the superior court of the county in which said child may be domiciled, setting forth the name of the father, or, if he be dead or has abandoned his family, the mother, and the consent of such father or mother to the act of adoption; if the child has neither father nor mother, the consent of no person shall be necessary to said adoption. The court, upon being satisfied with the truth of the facts stated in the petition, and of the fact that such father or mother has notice of such application (which notice may be by publication, as required in equity cases for non-resident defendants), or if the father or mother has abandoned the child, and being further satisfied that such adoption would be to the interest of the child, shall declare said child to be the adopted child of such person and capable of inheriting his estate, and also what shall be the name of such child; thenceforward the relation between such person and the adopted child shall be, as to their legal rights and liabilities, the relation of parent and child, except that the adopted father shall never inherit from the child. To all other persons the adopted child shall stand as if no such act of adoption had been taken.

(a) Provided, that no person may adopt a child under this Act unless such person is (1) at least twenty-five years of age, or (2) married and living with husband or wife. The petitioner must be at least ten years older than the child, a resident of this State, and financially able and morally fit to have the care of the child. If the child is 14 years of age or over, his consent shall be necessary to the adoption.

(b) The petition, duly verified in duplicate, shall be filed jointly by husband and wife, unless the person desiring to adopt is unmarried, and shall contain the name and age of the child, the address and age of the petitioner, the name by which the child is to be known, whether the parents are living or not, names and addresses of the living parents or guardians, if known to the

petitioner, and a description of any property belonging to said child.

(c) Upon the filing of the petition the court shall issue summons to the next of kin, parents or guardians, brothers and sisters, if living within the State, and legal notice if a non-resident by service if possible, otherwise by publication once a week for four weeks in the official organ of the county where such proceedings are pending. After the expiration of thirty days from the date of filing of the petition, the case shall be placed upon the regular calendar of the court for a hearing before the judge without a jury, and the court shall hear evidence from witnesses as to the good character, moral fitness, and financial ability of the petitioner to care for the child, as well as all other allegations in the petition. When a child has been awarded by court order, or otherwise legally and permanently surrendered, to the custody of a licensed child-placing agency for permanent placing in a foster home, such agency shall be served with summons in lieu of parents and relatives, and the written consent of such agency shall be filed with the court before adoption can be granted.

(d) Upon the first hearing the court may pass an order only granting temporary custody of the child to the petitioner. Final adoption shall be granted only upon a second hearing after the child shall have been in the custody and care of the petitioner for a period of six months.

(e) A copy of the decree of adoption shall be filed with the State Registrar of Vital Statistics. Acts 1855-6, p. 260; 1859, p. 36; 1882-3, p. 59; 1889, p. 69; 1927, p. 142.

Editor's Note.—The clauses (a), (b), (c), (d), and (e) of this section were added by the amendment of 1927.

Presumption That Proceedings Regular.—Every presumption is to be indulged to sustain a proceeding of adoption by a court of competent jurisdiction. Harper v. Lindsey, 162 Ga. 44, 132 S. E. 639.

Estoppel of Parents.—Where adoptive parents seek and obtain the decree they ask for in a court of their selection, and take the child or children so adopted into the family and treat them as their own, they and their heirs and personal representatives are estopped from asserting that the child is not legally adopted. Harper v. Lindsey, 162 Ga. 44, 132 S. E. 639.

§ 3020. (§ 2501.) Parent's obligation.

No Application to Alimony Proceedings.—This section has no application to proceedings for alimony. Barlow v. Barlow, 161 Ga. 202, 129 S. E. 860.

When Mother Must Support Children.—See note under section 554.

§ 3021. (§ 2502.) Parental power, how lost.

In General.—The right to the services of children and the obligation to maintain them go together. Whatever deprives the parent of the right to the custody and services of the child, without fault on his part, relieves him from the duty to support the child. Thompson v. Georgia Ry. & P. Co., 163 Ga. 598, 603, 136 S. E. 895.

Right to Earnings. — Where a minor child labors and earns money, the presumption is that the proceeds of his labor belongs to his father, if living; and where it is claimed that such in fact belongs to the minor, that presumption must be overcome by proof of the fact that the father has, either expressly or impliedly, manumitted the minor so as to allow the proceeds of the labor to go to the minor. Jones v. McCowen, 34 Ga. App. 801, 131 S. E. 290.

A father may give to a minor child the right to the products of his labor which products cannot be levied on as property of the father. See Ehrlich & Co. v. King, 34 Ga. App. 787, 131 S. E. 524.

Paragraph 5—Effect of Marriage.—The child who marries assumes inconsistent responsibilities which entitle him to the proceeds of his own labor. He becomes the head of a new family, and is no longer a member of the family of his parent. This being so, the parent is under no legal obligation to support him. Thompson v. Georgia Ry. & P. Co., 163 Ga. 598, 604, 136 S. E. 895.

CHAPTER 3

Of Guardian and Ward

ARTICLE 1

Their Appointment, Powers, Duties, Liabilities, Settlements, Resignation, etc.

§ 3047. (§ 2528.) Bond and oath.

As to suit on guardian's bond in ward's name, see note under section 3054.

§ 3054. (§ 2535.) Suit on guardian's bond.

Suit by Ward in Own Name. — Although the statutory bond required of a guardian under section 3047 is payable to the ordinary, suit thereon may be maintained by the ward in his own name after becoming of age, and need not be maintained by the ordinary suing for the use of the ward. Sheppard v. Clark, 35 Ga. App. 503, 134 S. E. 125.

Guardian Need Not Be Joined. — It is not mandatory, under this section, that the guardian be sued in the same action with the surety. It is merely permissible. Sheppard v. Clark, 162 Ga. 143, 132 S. E. 755.

Petition in Action against Guardian and Sureties.—In a suit against the guardian and his surety, it is not necessary to allege that the plaintiff has obtained a judgment against the guardian in his representative capacity, in order to show a cause of action against the surety. American Surety Co. v. Macon Savings Bank, 162 Ga. 143, 132 S. E. 636. In this case the history of this section and section 3974, in regard to suits upon administrator's bonds, is reviewed and the two sections are held to be analogous.—Ed. Note.

Petition in Action against Sureties Alone. — In a suit against the sureties upon a guardian's bond by the ward after becoming of age, where the guardian was not made a party defendant, the petition, which recited that a personal judgment had been obtained against the guardian in a suit by the ward and which recited a return of nulla bona upon an execution issued thereon and that the execution had not been paid, set out a cause of action and was not subject to general demurrer, nor to special demurrer upon the ground of non-joinder of parties. Sheppard v. Clark, 35 Ga. App. 503, 134 S. E. 125.

Same—Amendment. — In a suit upon a guardian's bond against the sureties on it, the guardian not being joined as a party defendant either in his representative capacity or in his individual capacity, the petition is subject to amendment by alleging judgments rendered against the guardian in his representative capacity and in his individual capacity. Sheppard v. Clark, 162 Ga. 143, 132 S. E. 755.

ARTICLE 2

Master's Liability to Servant

§ 3129. (§ 2610.) Injuries to coemployees.

Definition of Fellow Servants. — In determining whether certain servants are fellow servants it is necessary to decide whether the servants, the nature of their duties being considered, were "about the same business," or were "engaged in the common pursuit,"—a phrase which is occasionally found in the decisions, which means the same thing as being "about the same business." Holliday v. Merchants, etc., Transp. Co., 161 Ga. 949, 953, 132 S. E. 210.

Same—Editor's Note. — See in Holliday v. Merchants & Miners Transp. Co., 161 Ga. 949, 132 S. E. 210, following the statement made under this catchline in the Georgia Code of 1926.

§ 3130. (§ 2611.) Duty of master.

IV. DUTY TO PROVIDE SAFE PLACE TO WORK.

A. In General.

Degree of Care.—It is the master's duty to exercise ordinary and reasonable care to furnish the servant with a safe place to work, under this and the following section. Whitehurst v. Standard Oil Co., 8 Fed. (2d), 728.

C. Application of Rule.

1. In General.

Places to Which Rule Relates. — See Flippin v. Central etc., Ry. Co., 35 Ga. App. 243, 132 S. E. 918, affirming the statement made under this catchline in the Georgia Code of 1926.

VI. DUTY IN REGARD TO INSPECTION AND REPAIR

When a Question for Jury.—In servant's action for injuries from ladder's breaking, whether in exercise of reasonable care in making inspection defendant would not have ascertained that rung of ladder was decayed was for the jury, although the ladder had been recently painted, concealing the defect; it not appearing that examination before the ladder was painted would not have disclosed the defect. Whitehurst v. Standard Oil Co., 8 Fed. (2d), 728.

§ 3131. (§ 2612.) Duty of servant.

II. ASSUMPTION OF RISKS BY SERVANTS.

B. Risks Ordinarily Incidental to Service.

1. In General.

Where a servant has equal means with his master of knowing of the defect or danger which brought about his injury, this is an assumed risk. Threlkeld v. Anthony, 36 Ga. App. 227, 136 S. E. 285.

III. ACTIONS FOR INJURIES TO SERVANTS.

A. In General.

Burden of Proof.—The burden is on the plaintiff to show not only negligence on the part of the master, but due care on his own part; and it must appear that the plaintiff did not know, and had not equal means of knowing, all that which is charged as negligence, and that by the exercise of ordinary care he could not have known thereof. Flippin v. Central, etc., Ry. Co., 35 Ga. App. 243, 132 S. E. 918.

ARTICLE 4

Child Labor Regulated

§ 3149(1). Employment of children under 14 in mills, etc., prohibited.

Provision in Insurance Policy. — A provision in an employer's liability policy of insurance to the effect that the policy shall not apply to injuries sustained by any person employed by the insured "in violation of law as to age, or under the age of fourteen years if there is no legal age limit," contemplates a violation of this section. Savannah Kaolin Co. v. Travelers Ins. Co., 35 Ga. App. 24, 131 S. E. 919.

It does not contemplate merely a criminal violation of the act, which occurs only where the employer knowingly employs a person under the prohibited age. Savannah Kaolin Co. v. Travelers Ins. Co., 35 Ga. App. 24, 131 S. E. 919.

ARTICLE 6

Workmen's Compensation Act.

§ 3154(1). Titles.

Purpose of the Act.—In Goelitz v. Industrial Board, 278 Ill. 164, 115 N. E. 855, the Supreme Court of Illinois said: "The fundamental basis of workmen's compensation laws is that there is a large element of public interest in accidents occurring from modern industrial conditions, and that the economic loss caused by such accidents should not necessarily rest upon the public, but that the industry in which an accident occurred shall pay, in the first instance, for the accident." Globe Indemnity Co. v. Lankford, 35 Ga. App. 599, 603, 134 S. E. 357.

§ 3154(2). Definition of terms; compensation on basis of wage.

Policeman of County.—The term "employee," in this section does not apply to a county policeman elected or appointed by the county, since it is not the relation of employer and employee which exists between a county and such a county policeman, but such a county policeman is a public officer. Goss v. Gordon County, 35 Ga. App. 325, 133 S. E. 68. See also section 3154(8) and annotations thereto.

County Treasurer and Clerk of Board of Roads.—Where the treasurer of a certain county became ex-officio clerk of the board of roads and revenues of that county, he was held to be an officer and not an employee within the meaning of this act. U. S. Fidelity Guaranty Co. v. Watts, 35 Ga. App. 447, 133 S. E. 476.

II. ACCIDENT IN EMPLOYMENT.

See annotations to section 3154(14), as to what constitutes injuries arising "out of the employment."

When Injury Arises in Course of Employment.—An injury is received "in the course of" the employment when it comes while the workman is doing the duty which he is employed to perform. It "arises out of" the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of the master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence. Georgia Railway, etc., Co. v. Clore, 34 Ga. App. 409, 410, 129 S. E. 779.

An Accident Arises "Out of" the Employment.—See Maryland Casualty Co. v. Peek, 36 Ga. App. 557, 559, 127 S. E. 121, citing and following the statement under this catchline in the Georgia Code of 1926.

Necessity of Concurrence.—See Refining Co. v. Sheffield, 162 Ga. 656, 134 S. E. 761, citing and following the paragraphs set out under this catchline in the Georgia Code of 1926.

Violation of Rule Not Approved by Commission.—An act done in violation of the rule against the use of the elevator by employees is not necessarily one out of the scope of the employment, to the extent of excluding the master and servant relation; and, where there is nothing to show that the rule had been approved by the industrial commission, its violation would not bar compensation. American, etc., Ins. Co. v. Hardy, 36 Ga. App. 487, 491, 137 S. E. 113.

Temporary Suspension of Employment.—Where a member of a crew on a vessel then lying at the docks, a part of the terminals of the defendant, obtained shore-leave and, after two hours spent ashore returned to the terminals and demanded entrance at a gate, even if the relationship of master and servant existing between the member of the crew and the transportation company had been suspended that relationship came immediately into existence again as soon as the servant returned to the gate and demanded admittance. Holliday v. Merchants, etc., Transp. Co., 161 Ga. 949, 132 S. E. 210.

Replacing Belts at Ginnery.—An injury received in replacing the belts at a ginnery, from which they had been borrowed for use in the sawmill of the lumber company, arose "out of and in the course of" the injured person's employment with that company. Zurich General Accident, etc., Co. v Ellington, 34 Ga. App. 490, 130 S. E. 220.

Evidence.—In Norwick Union Indemnity Co. v. Johnson, 36 Ga. App. 186, 136 S. E. 335, it was held that the evidence did not authorize the finding that injury arose out of and in the cause of employment. Conversely, in Accident Corp. v. Martin, 35 Ga. App. 504, 134 S. E. 174; Guarantee Corp. v. Wallace, 35 Ga. App. 571, 134 S. E. 334, and American, etc., Ins. Co. v. Hardy, 36 Ga. App. 487, 137 S. E. 113. It was held that the evidence authorized the finding that injury did arise out of and in the cause of the employment.

Findings of Fact Conclusive.—It is not enough for the commission to state, merely as a conclusion, in the language of the statute, that the injury is found to have arisen out of and in the course of the employment. This does not mean, however, that it is improper for the commission to give its conclusion in the language of the statute, where the findings of fact as stated are sufficient to justify such conclusion. What the court meant in Southeastern Express Co. v. Edmondson, 30 Ga. App. 697, 119 S. E. 39, was that a mere statement that the commission finds that the injury arose out of and in the course of the employment is not such a finding of fact as would justify an award, when it stands unsupported by any other findings of fact to justify it as a conclusion. American, etc., Ins. Co. v. Hardy, 36 Ga. App. 487, 490, 137 S. E. 113.

III. DISEASE ARISING FROM ACCIDENT.

When Disease Results Naturally and Unavoidably.—See Casualty Co. v. Smith, 34 Ga. App. 363, 374, 129 S. E. 880, quoting and following the paragraph set out under this catchline in the Georgia Code of 1926.

Statements after Occurrence of Injury. — The statements of the employee tending to show that he had suffered an injury and that the injury resulted in hernia, having been made some time after the alleged injury, and being merely narrative and descriptive of something which had fully taken place and become a thing of the past, had no probative value in establishing the fact that he was injured. Bolton v. Columbia Casualty Co., 34 Ga. App. 658, 130 S. E. 535.

IV. WILFUL INJURY BY THIRD PERSON.

Assaults for Reasons Not Personal to Employee.—Where one in the discharge of his duties, is required to travel upon

a train, his exposure to an unprovoked assault by a passenger, who jumps up from his seat and begins shooting at the passengers, is not a risk incident to the employment, and the death of the employee as a result of such an assault is not an injury which arises out of the employment, and therefore is not compensable. Maryland Casualty Co. v. Peek, 36 Ga. App. 557, 137 S. E. 121.

V. COMPENSATION FROM EMPLOYER AND THIRD PERSON—SUBROGATION.

Applied.—For the application of the provision as to subrogation, see Western Atlantic Railroad v. Henderson, 35 Ga. App. 363, 133 S. E. 645.

§ 3154(4). Exemption; notices to reject.

As to presumption where there are less number of employees than ten, see note to section 3154(15).

§ 3154(7). Relief from obligations.

See annotations to section 3154(45).

Employee Not Precluded Notwithstanding Agreement. — An employee can not be deprived of the compensation to which he is entitled thereunder by any agreement between himself and his employer, notwithstanding its approval by the industrial commission. Globe Indemnity Co. v. Lankford, 35 Ga. App. 599, 600, 134 S. E. 357.

§ 3154(8). Provisions not applicable to public employees.

Policeman as Employee—Insurance Expressly Covering Lien. — Although a city policeman may not be an "employee" within the meaning of that term as used in this act, yet where an insurance company insures a city under the workmen's compensation act and the policy expressly covers policemen employed by the city and the salaries of the policemen are taken into consideration in fixing the premium, the policemen, in so far as the insurance company is concerned, are employees of the city and entitled to compensation under the policy. Frankfort General Ins. Co. v. Conduitt, 74 Ind. App. 584 (127 N. E. 212); Kennedy v. Kennedy Mfg. Co., 177 App. Div. 56 (163 N. Y. Supp. 944); Maryland Casualty Co. v. Wells, 35 Ga. App. 759, 134 S. E. 788. See notes to section 3154(2).

§ 3154(15). Common carriers.

Presumption of Operating under This Act. — There is no presumption that an employer and an employee are operating under the provisions of the workmen's compensation act where it does not appear that the employer regularly had in service as many as ten employees in the same business within this State. Bussell v. Dannenberg Co., 34 Ga. App. 792, 132 S. E. 230.

§ 3154(16). Action against exempted employer.

Applied in Fulton Bakery Incorporated v. Williams, 35 Ga. App. 681, 134 S. E. 621.

§ 3154(20). Contractor, when liable; recovery.

Employees of Independent Contractor. — See Zurich General Accident, etc., Ins. Co. v. Lee, 36 Ga. App. 248, 136 S. E. 173, citing and following the paragraph set out under this catchline in the Georgia Code of 1926.

Relation at the Time of Injury Governs.—Whatever may have been the previous relation of the deceased employee to the defendant, where the evidence authorizes the finding that at the time of the accident which resulted in his death he was an employee of the defendant, and not the employee of an independent contractor, the authorized finding of the industrial commission upon this issue can not be disturbed. See, in this connection, Ocean Accident, etc., Corp. v. Council, 35 Ga. App. 632, 134 S. E. 331; Ocean Accident & Guarantee Corp. v. Wilson, 36 Ga. App. 784, 138 S. E. 246.

Institution of Claim against Immediate Employer Prerequisite.—Whatever may be the state of evidence as to the existence of the relation of master and servant between the defendant and the plaintiff, where that part of this section which provides that every claim for compensation under this section shall be in the first instance presented to and instituted against the immediate employer, has not been complied with, no recovery can be had against the principal employer who is not the immediate employer. Zurich General Accident, etc., Ins. Co. v. Lee, 36 Ga. App. 248, 136 S. E. 173.

§ 3154(23). Notice of accident or injury by employee.

Notice to Immediate Superior. — The evidence authorized the inference that the representative of the injured employee immediately gave notice of the injury to the immediate superior of the injured employee, and therefore a written notice to the employer was not necessary. Ocean Accident, etc., Corp. v. Martin, 35 Ga. App. 504, 134 S. E. 174.

§ 3154(27). Liability for medical attention limited.

No Liability over One Hundred Dollars.—Under the provisions of this section the Industrial Commission has no authority to award more than the limit prescribed by this section where the insurance carrier made no agreement that it would be liable for more than the statutory amount. Lumbermen's Mutual Casualty Co. v. Chandler, 162 Ga. 244, 133 S. E. 237; Lumbermen's Mutual Casualty Co. v. Chandler, 35 Ga. App. 464, 134 S. E. 122.

§ 3154(34). Injuries not specified in section 3154(32).

Rate of Compensation for Injury to Already Injured Part. —Where an employee who in childhood had lost a foot and a part of one leg to within three inches of the knee, suffered a compensable injury to the remaining portion of his leg, as a result of which he sustained a 50 per cent. loss of the use of that portion, he was entitled to compensation for such partial loss of use at the rate of 50 per cent. of the amount which he should have received for the loss of a leg or for the loss of use of a leg, irrespective of the previous disability or injury. American Mutual Liability Ins. Co. v. Brock, 35 Ga. App. 772, 135 S. E. 103.

§ 3154(39). List of dependents; termination of dependence.

Conclusive Presumption as to Dependency of Child under 18—Construction of Stepfather Clause.—Under this section a child under eighteen years of age is conclusively presumed to be wholly dependent on the parent, and is therefore entitled to compensation for the homicide of the parent in accordance with the provisions of the statute. The clause of the act providing that the term "child" as thus used shall include "stepchild" and that the term "parent" shall include "step-parents" is to be liberally construed as enlarging the sphere of conclusive dependency in favor of such a child, so as to include a right which would not otherwise conclusively exist. The provision is not to be construed as intended to exclude by unnecessary implication a plainly established claim for the homicide of an actual parent. Travelers Ins. Co. v. Williamson, 35 Ga. App. 214, 132 S. E. 265.

A child under eighteen is conclusively presumed to be dependent upon his father. Hence if his mother is divorced and marries another man who becomes his stepfather, this section establishes a principle of double dependency, and the stepfather clause of the section does not preclude him from recovering for the homicide of his actual father. Travelers Ins. Co. v. Williamson, 35 Ga. App. 214, 220, 132 S. E. 265.

Finding as to Desertion Conclusive When Supported by Any Evidence.—The findings of the industrial commission on questions of fact, which would include any issue upon the question of voluntary desertion by a claimant wife, if supported by any evidence, are conclusive. United States Casualty Co. v. Matthews, 35 Ga. App. 526, 133 S. E. 875; Maryland Casualty Co. v. England, 160 Ga. 810, 812, 129 S. E. 75; Ocean Accident & Guaranty Corp. v. Council, 35 Ga. App. 632, 134 S. E. 331.

Admission of Desertion Amounting to Conclusion of Law. —The finding of the commissioner before whom the case was originally tried, that the claimant was not entitled to compensation on account of her admission "that she had voluntarily left her husband," was a conclusion of law, based upon her own testimony; and hence reversible. Ocean Accident & Guaranty Corp. v. Council, 35 Ga. App. 632, 134 S. E. 331.

§ 3154(45). Review of awards.

See annotations to section 3154(58).

Waiver of Right by Contract.—See Globe Indemnity Company v. Lankford, 35 Ga. App. 599, 134 S. E. 357, citing and following the paragraph set out under this catchline in Georgia Code of 1926. See notes of this case under section 3154(50).

§ 3154(50). Industrial Commission created.

Administrative Body—Jurisdiction.—The Industrial Commission is not a court of general jurisdiction, nor even of limited common law jurisdiction, but it is an industrial commission, made so by express terms of the act of the legislature to administer its provisions as provided therein; as such administrative commission it possesses only such

jurisdiction, powers, and authority as are conferred upon it by the legislature, or such as arise therefrom by necessary implication to carry out the full and complete exercise of the powers granted. Gravitt v. Ga. Casualty Co., 158 Ga. 613, 123 S. E. 897; Globe Indemnity Co. v. Lankford, 35 Ga. App. 599, 601, 134 S. E. 357.

§ 3154(55). Agreements.

Finality of Award upon the Agreement of Parties. — Where the employer and the claimant reach an agreement in regard to compensation, and a memorandum of the agreement is filed with, and approved by, the industrial commission, and thereupon the commission makes an award to the claimant, and notice of the award is given to the interested parties, the award is final and cannot be set aside, diminished, or increased, unless the parties disagree as to the continuance of any weekly payment under the agreement. Lattimore v. Lumbermen's Mutual Casualty Co., 35 Ga. App. 250, 133 S. E. 291.

§ 3154(57). Conduct of hearings.

Award Directed against Both Employer and Insurer. — The award of the industrial commission should be directed against both the employer and the insurance carrier instead of against the insurance carrier only. Hartford Accident, etc., Co. v. Hall, 36 Ga. App. 574, 576, 137 S. E. 415.

§ 3154(58). Review.

Discretion of Commission as to Rule 26.—Rule 26 of the industrial commission, laying down the conditions upon which the full commission will hear evidence on review, is to be enforced or relaxed in the discretion of the commission, without interference by the courts. American, etc., Ins. Co. v. Hardy, 36 Ga. App. 487, 137 S. E. 113.

§ 3154(59). Appeals to Superior Court; writ of error.

Exception Must Point out Error.—An exception on appeal from an award of the industrial committee, on the ground of insufficiency of evidence must point out the particular evidence objected to on the ground of objections. Maryland Casualty Co. v. Wells, 35 Ga. App. 759, 134 S. E. 788.

Raising New Point on Appeal. — See Fidelity Co. v. Christian, 35 Ga. App. 326, 133 S. E. 639, and Ocean Accident, etc., Corp. v. Martin, 35 Ga. App. 504, 134 S. E. 174, citing and following the statement made under this catchline in the Georgia Code of 1926.

Findings of Fact Conclusive.—See Ins. Co. v. Hamilton, 35 Ga. App. 182, 132 S. E. 240. Fidelity Co. v. Christian, 35 Ga. App. 326, 133 S. E. 639; Maryland Casualty Co. v. Miller, 36 Ga. App. 631, 137 S. E. 788, following the statement made under this catchline in the Georgia Code of 1926.

But the judgment of the superior court affirming the award of the industrial commission in a case where the evidence fails to show that the death of the deceased arose out of and in the course of his employment, will be reversed upon appeal to the court of appeals. Georgia Casualty Co. v. Kilburn, 36 Ga. App. 761, 138 S. E. 257.

Sufficiency of Evidence Equivalent to Verdict, etc.—See Fidelity Co. v. Christian, 35 Ga. App. 326, 133 S. E. 639, following the statement made under this catchline in the Georgia Code of 1926.

Correct Order Not Affected by Erroneous Finding as to Notice.—Where the order of the commission denying compensation is not erroneous upon a given ground and was not affected by an erroneous finding as to lack of notice, it will be sustained irrespective of any error affecting a finding that there was a lack of notice. Maryland Casualty Co. v. England, 34 Ga. App. 354, 129 S. E. 446.

Court Authorized to Enter Proper Judgment.—On the appeal of the claimant from an award made on an erroneous basis the superior court is authorized to enter the proper final judgment upon the findings as made. American, etc., Ins. Co. v. Brock, 35 Ga. App. 772, 135 S. E. 103.

FOURTH TITLE
Of Relations Arising from Other Contracts

CHAPTER 1
Of Partnerships

ARTICLE 1
General Principals

§ 3155. (§ 2626.) How Created.

This Section Not Exhaustive. — As between themselves, "the intent of the parties is the true test of a partnership, which may be created by a contract giving rights or imposing liabilities differing from those from which the law ordinarily infers a partnership." Allgood v. Feckoury, 36 Ga. App. 42, 43, 135 S. E. 314, citing Huggins v. Huggins, 117 Ga. 151, 43 S. E. 759.

§ 3158. (§ 2629.) What constitutes a partnership.

In General.—Whenever a joint enterprise, a joint risk, a joint sharing of expenses, and a joint interest in the profits and losses concur, a partnership exists. Smith v. Hancock, 163 Ga. 222, 231, 136 S. E. 52.

Joint and Common Interest Distinguished.—A joint interest in partnership property is another and a very distinct thing from a common interest in the profits alone. The former interest is that of an owner, who has a right to dispose of the profits, and that makes him a partner; but a common interest in the profits confers no title jointly with the other and gives no power to control and dispose of the profits as owner. Smith v. Hancock, 163 Ga. 222, 231, 136 S. E. 52.

No partnership was created by an agreement that the plaintiff should conduct in the defendant's name a store which was to be owned and supplied with goods by the defendant, and should receive an equal share of the net profits. Allgood v. Feckoury, 36 Ga. App. 42, 135 S. E. 314. For a case where the contract between the parties was held to constitute a partnership, see Smith v. Hancock, 163 Ga. 222, 136 S. E. 52. See also Barrow v. Georgia Chemical Works, 34 Ga. App. 31, 128 S. E. 14; Nellis & Co. v. Green, 36 Ga. App. 684, 137 S. E. 843.

§ 3164. (§ 2635.) Effect of dissolution.

Notice to Creditor.—The fact that a creditor may have had no sufficient notice of the dissolution of the partnership does not affect the actual right of one of the erstwhile members to contract on behalf of the partnership. Citizens Nat. Bank v. Jennings, 35 Ga. App. 553, 555, 134 S. E. 114.

§ 3166. (§ 2637.) Denial by defendant.

Sufficiency of Denial.—A plea of no partnership in which it was set up that at the time of the execution of a note there was in fact no such partnership, for the reason that the partnership had a short time before been dissolved, is demurrable where it fails to allege that notice of such dissolution had been given as required by law, or that both the original payee and the present holder of the note, at the time of the accrual of their respective rights in it, had actual knowledge of such dissolution. Cooke v. Faucett, 35 Ga. App. 209, 132 S. E. 268.

ARTICLE 2
Rights and Liabilities of Partners among Themselves

§ 3172. (§ 2643.) Power of each partner.

Negotiable Paper.—One of the defenses which may be maintained against the suit of a bona fide holder upon a negotiable instrument is a plea of non est factum. But "if a partnership, under any circumstances, has the implied right and power to execute notes, one to whom they are offered in the market has a right to presume that they were issued under the circumstances which gave the requisite authority." 8 Corpus Juris, 522. Cooke v. Faucett, 35 Ga. App. 209, 132 S. E. 268.

§ 3176. (§ 2647.) Surviving partner.

Statute of Limitations.—After the dissolution of a partnership by death of one of the partners, the statute of limitations does not commence to run in favor of the surviving partner against the estate of the deceased partner as long as there are debts due by the partnership to be paid, or debts due it to be collected, or until a sufficient time has elapsed since the dissolution of the firm to raise the presumption that all debts due from the partnership have been paid, and that all debts due to it have been collected. Purvis v. Johnson, 163 Ga. 698, 137 S. E. 50.

It will be presumed that, before the expiration of a period of nine years, all debts due by the firm had been paid and those due to the firm had been collected; and tolling from the statute of limitations the five years allowed for the taking out of administration upon the estate of the deceased partner, the suit as to an accounting for the personal assets of the partnership, which was not brought within four years of the expiration of the five-year period, was barred. Purvis v. Johnson, 163 Ga. 698, 137 S. E. 50.

ARTICLE 3

Rights and Liabilities of Partners to Third Persons

§ 3188. (§ 2659.) Power after dissolution.

See under section 3164 note "Notice to Creditor."

CHAPTER 2

Debtor and Creditor

ARTICLE 1

General Principles

SECTION 1

Relation Defined, etc.

§ 3217. (§ 2688.) Equitable assets.

Insurance Policy.—The cash surrender and cash loan value of a policy of life insurance accruing at the end of a specified tontine period is not subject to garnishment by creditors of the insured; nor will such value be made available to the judgment creditor of the insured by a court of equity in proceedings instituted for the purpose of obtaining equitable relief analogous to a process of garnishment at law. Farmers, etc., Bank v. National Life Ins. Co., 161 Ga. 793, 131 S. E. 902.

SECTION 2

Statute of Frauds

§ 3222. (§ 2693.) Obligations which must be in writing.

Statute Makes Contract Unenforceable Merely.—A parol contract unenforceable by reason of the statute of frauds is nevertheless a valid, subsisting contract as between persons other than the contracting parties, for purposes other than a recovery upon it. Waynesboro Planing Mill v. Perkins Mfg. Co., 35 Ga. App. 767, 134 S. E. 831. And therefore the fact that a contract may be required by the statute of frauds to be in writing will not preclude the establishment of its contents by parol, where it has not in fact been reduced to writing. Id.

Presumption That Contract Is Written.—See Beasley v. Howard, 34 Ga. App. 102, 128 S. E. 203, citing Kiser Company v. Padrick, 30 Ga. App. 642, 118 S. E. 791. Bank v. Lovvorn Grocery Co., 34 Ga. App. 772, 131 S. E. 301, citing Ansley v. Hightower, 120 Ga. 719, 48 S. E. 197, following statement made under this catchline in Georgia Code of 1926.

Promise Not within Provision—Promise to Pay Physician.—Where a physician renders professional services to a minor child of a tenant, solely upon the credit of the landlord's promise to pay for such services, the promise is an original and not a collateral undertaking, and is not within the statute of frauds. Pope v. Ellis, 34 Ga. App. 185, 129 S. E. 11.

Same—Agreement to Collect or "Guarantee" Loan.—Neither an agent's promise to collect a loan nor an agreement, as a part of a contract of agency, to "guarantee" it, constitutes a promise to answer for the debt, default, or miscarriage of another, and the statute of frauds is not applicable. Benton v. Roberts, 35 Ga. App. 749, 134 S. E. 846.

Contract Partly in Writing.—A contract for the sale of land, which is partly in writing and partly in parol, is not enforceable, by reason of the statute of frauds. Thompson v. Colonial Trust Co., 35 Ga. App. 12, 131 S. E. 921.

Contract for Resale of Land.—A contract to resell land to the original seller is a contract for the sale of land which comes under the statute of frauds. Amerson v. Cox, 35 Ga. App. 83, 132 S. E. 105.

Optional Contract Included.—An option to purchase rented premises is a contract required by the statute of frauds to be in writing by this section. Robinson v. Odom, 35 Ga. App. 262, 133 S. E. 53. See also Kennington v. Small, 36 Ga. App. 176, 136 S. E. 326.

Joint Adventure in Lands Not within Section.—An agreement to enter a joint adventure for the purpose of dealing in lands into which one is to put property and another his service, and which does not contemplate a transfer of title is not within the statute, notwithstanding it may be intended that as an incident of the enterprise one of the parties may take title to lands for the benefit of both. Manget v. Carlton, 34 Ga. App. 556, 130 S. E. 604.

Contract of Resale.—See Singer Company v. Gray & Son, 34 Ga. App. 345, 129 S. E. 555, following the principle stated under this catchline in the Georgia Code of 1926.

Sufficiency of Writing Letters Acknowledging Terms.—See Edison v. Plant Bros. & Co., 35 Ga. App. 683, 134 S. E. 627, following the principle stated under this catchline in the Georgia Code of 1926.

Correspondence between opposing counsel was properly admitted as tending to prove the existence of the contract sued on and that such contracts were consequently not within the statute. Garrard v. Oil Co., 35 Ga. App. 137, 132 S. E. 234.

Stated in Beasely v. Howard, 34 Ga. App. 102, 128 S. E. 203.

§ 3223. (§ 2694.) Exceptions.

Agreement Not to Levy on Crop.—An oral agreement, based on a consideration, not to levy on a crop is enforceable where there has been performance and acceptance. Armstrong v. Reynolds, 36 Ga. App. 594, 137 S. E. 637.

When Whole Performance Necessary to Prevent Fraud.—See Bank v. Winter Inc., 161 Ga. 898, 905, 132 S. E. 422, following the principle stated under this catchline in the Georgia Code of 1926.

Contracts for the Sale of Goods, etc.—Performance by a creditor making delivery, and acceptance by the debtor of such delivery, of goods in accordance with the terms of an oral contract will take the same without the statute. Pafford v. Hinson & Co., 34 Ga. App. 73, 128 S. E. 207.

Fruit Packed and Shipped.—See Nellis & Co. v. Houser, 35 Ga. App. 33, 132 S. E. 142, following the principle stated under this catchline in the Georgia Code of 1926.

Goods Specially Made. — The special manufacturing of goods done in compliance with the intent and purpose of the order, and within the time specified, amounts to such part performance of the contract on the part of the vendor as would render it a fraud on the part of the vendee to refuse acceptance. Edison v. Plant Bros. & Co., 35 Ga. App. 683, 134 S. E. 627.

Applied in Kennington v. Small, 36 Ga. App. 176, 136 S. E. 326.

§ 3224. (§ 2695.) Void acts.

III. CHARACTER OF TRANSACTION AND BADGES OF FRAUD.

Conveyance to Oneself as Trustee.—The making of a deed by a person as an individual to himself in his representative capacity, the deed being for land in which he has a contingent remainder, is, on insolvency, sufficient evidence on which to base a verdict that the deed was executed with the intent to hinder and delay collection of the grantor's other debts. Eberhardt v. Bennett, 163 Ga. 796, 806, 137 S. E. 64.

Evidences of Fraud.—"Failure to produce testimony is a badge of fraud, where the bona fides of the transaction is in issue, and witnesses who ought to be able to explain it are in reach." Eberhardt v. Bennett, 163 Ga. 796, 806, 137 S. E. 64.

Same—Disposing of Entire Property.—See Eberhardt v. Bennett, 163 Ga. 796, 806, 137 S. E. 64, citing and following the statement in the first paragraph under this catchline in the Georgia Code of 1926.

ARTICLE 2

Acts Void as against Creditors

§ 3226. Merchandise, how sold in bulk.

I. GENERAL CONSIDERATION.

Purpose of Sections.—This section is for protection of then existing creditors, who are to be notified, and in absence of fraud such sale cannot be attacked by subsequent creditors for noncompliance with this act. Dodd v. Raines, 1 Fed. (2d), 658.

Sufficiency of Presumption of Fraud to Avoid Transfer in Bankruptcy.—To entitle a trustee to recover property as transferred by bankrupt within four months with intent to defraud creditors, under Bankruptcy Act, section 67e (Comp. St. section 9651), there must be proof of actual intent to defraud, and a presumption of fraud raised by this statute is not sufficient. Dodd v. Raines, 1 Fed. (2d). 658.

II. APPLICATION OF SECTION.

No Distinction between Creditor.—This section draws no distinction between those creditors whose debts may have arisen from sales of merchandise and such creditors as

sustain that relation by reason of indebtedness created by the debtor for other independent and disassociated reasons. It applies as well to a sale of a stock of goods in bulk by a debtor to a creditor in extinguishment of his debt as to a sale for cash or on credit. Anderson v. Merchants, etc., Bank, 161 Ga. 12, 129 S. E. 650.

CHAPTER 3

Preferences and Assignments for Benefit of Creditors

§ 3230. (§ 2697.) Legal preference.

Methods of Preferring Creditors—Good Faith.—See Bank v. Ellison, 162 Ga. 657, 134 S. E. 751, citing and following the statement in the second paragraph under this catchline in the Georgia Code of 1926.

Bankrupt Debtor.—A voluntary bankrupt having an assignable interest in the property claimed by him in his petition as exempt under the constitution and homestead laws of this state can transfer this interest in good faith to his creditor either in extinguishment of, or to secure, a pre-existing debt, before the property is set aside by the trustee in bankruptcy, and before the same is confirmed by the bankrupt court. Silver v. Chapman, 163 Ga. 604, 136 S. E. 914.

When Right to Prefer Extinguished. — The right of the debtor to prefer one creditor to another in a bona fide transaction continues up to the date when a judgment or lien is obtained against him. The mere pendency of a suit does not extinguish that right to prefer. Bank v. Ellison, 162 Ga. 657, 134 S. E. 751.

CHAPTER 5

Mortgages

ARTICLE 1

General Principles

§ 3256. (§ 2723.) What is a mortgage, and what it may embrace.

I. GENERAL CONSIDERATIONS.

Distinguished from Security Deed.—A statutory mortgage in this State does not convey title, but only creates a lien on property. A statutory security deed conveys title to property as security, and is expressly declared to be "not a mortgage." The latter has been declared to be in effect an equitable mortgage, but vastly different rights arise from the effect of the two classes of security. Carmichael v. Citizens, etc., Bank, 162 Ga. 735, 134 S. E. 771; Bank v. Beard, 162 Ga. 446, 449, 134 S. E. 107.

The objects of a mortgage and security deed and a bill of sale to personalty under the provisions of the Code are identical—security for debt. While recognizing the technical difference between a mortgage and security deed and as hereinbefore pointed out, the court has treated deeds to secure debts and bills of sale to secure debts as equitable mortgages. Bank v. Beard, 162 Ga. 446, 449, 134 S. E. 107. See also Hill v. Smith, 163 Ga. 71, 135 S. E. 423.

III. AFTER ACQUIRED INTEREST AND INCREASE.

General Rule.—See Dunson Co. v. Cotton Mills, 34 Ga. App. 768, 131 S. E. 186, citing and following the statement in the last paragraph under this catchline in the Georgia Code of 1926.

Same—Bill of Sale to Secure Debt.—The object of the statute was to devise a practical means to enable owners of such class of property to use it as a security. The statute should be construed in this light; and when so construed, giving due effect to substance as compared to form, the provision as to after acquired property is sufficient to include bills of sale to secure debt, though not expressly named therein. Bank v. Beard, 162 Ga. 446, 449, 134 S. E. 107. See note of this Case under § 3306.

§ 3258. (§ 2725.) Reducing deed to mortgage.

Possession—Effect of Possession in Vendor.—See Sims v. Sims, 162 Ga. 523, 527, 134 S. E. 308, citing and following the law as stated under this catchline in the Georgia Code of 1926.

§ 3262. (§ 2729.) Defective record.

See notes to § 3307.

§ 3270. (§ 2737.) Cancellation of mortgage.

Stated in Ellis v. Ellis, 161 Ga. 360, 362, 130 S. E. 681.

ARTICLE 2

Mortgages on Real Estate, How Enforced

SECTION 1

Application to Foreclose; When, Where, and How Made, and Proceedings Thereon

§ 3278. (§ 2745.) Transferee may foreclose, how.

Evidence Justifying Recovery.—In a suit upon a mortgage note, instituted by the payee for the use of an assignee, where it appears that the assignee is the holder of the legal title, the assignee is the real party at interest. Although the petition may not be amended by striking the name of the nominal party plaintiff and substituting therefor the name of the assignee as plaintiff, there may nevertheless be a recovery for the plaintiff upon evidence which sustains only the right of the assignee to recover, where such evidence has been admitted without objection. Carden v. Hall, 34 Ga. App. 806, 131 S. E. 296.

ARTICLE 3

Of Mortgages on Personal Property, and Bills of Sale to Secure Debts, How Foreclosed

SECTION 1

Application to Foreclose, by Whom and How Made

§ 3292. (§ 2759.) Mortgaged property, when sold without foreclosure.

Estoppel to Deny Consent.—Where the holder of the subsequent mortgage failed to question the legal right of the other holder to intervene in a proceeding for distribution of process from a foreclosure without foreclosing her mortgage, and where the jury found against the holder of the subsequent mortgage, and judgment was entered in favor of the other holder, the holder of the subsequent mortgage will not be heard to insist for the first time that it is illegal because the earlier mortgage had not been foreclosed and no equitable reason for claiming the fund derived from a sale under the subsequent mortgage was set out in the intervention. Bank v. Goolsby, 34 Ga. App. 217, 129 S. E. 8.

SECTION 2

Of Defenses, When and How Made

§ 3301. (§ 2766.) Replevy bond.

Failure to Give Proper Bond or Affidavit.—See Bridges v. Melton, 34 Ga. App. 480, 129 S. E. 913, citing and following the statements made under this catchline in the Georgia Code of 1926.

CHAPTER 6

Sales to Secure Debts

§ 3306. (§ 2771.) Absolute deeds and not mortgages.

I. GENERAL CONSIDERATIONS.

Distinguished from Mortgage.—See notes to § 3256.

Applies to Both Realty and Personalty.—A bill of sale of personalty to secure a debt stands on the same footing as a deed to realty to secure a debt. The status of each is provided for in this section. Bank v. Beard, 162 Ga. 446, 448, 134 S. E. 107.

Attaches to After-Acquired Property.—Where a bill of sale on an ordinary stock of merchandise changing in specifics is executed merely to secure a debt, the bill of sale will attach to after-acquired portions of the stock as in case of mort-

gages, whether or not the bill of sale makes express reference to such after-acquired property. Bank v. Beard, 162 Ga. 446, 134 S. E. 107. See note of this case under § 3256.

II. DETERMINING WHETHER INSTRUMENT IS MORTGAGE OR DEED TO SECURE DEBT.

Distinctions.—See notes to § 3256.

IV. LIEN OF SECURITY DEED, FI. FA. AND PRIORITIES.

Priorities.—See Bank v. Ins. Co., 163 Ga. 718, 721, 137 S. E. 53, following the statement made under this catchline in the Georgia Code of 1926.

VI. TRANSFER OR ASSIGNMENTS.

Rights of Transferee.—A transferee of the grantee named in the security deed occupies the position of such grantee as against the grantor and those claiming under him. Gilliard v. Johnston, 161 Ga. 17, 129 S. E. 434.

§ 3307. (§ 2772.) Record of such deeds.

Necessity for Record.—A "bill of sale" as contemplated by this section is a "deed" to personalty, and is included in the meaning of the word "deeds" as employed in section 3320; and consequently under that law bills of sale to secure debt are required to be recorded. Bank v. Beard, 162 Ga. 446, 451, 134 S. E. 107.

Defective Record.—Construing section 3262 with the section a defective record of security deed will be equivalent to no record, and, in the language of this section, it will "remain valid against the persons executing" it, but will be "postponed to all liens created or obtained, or purchases made, prior to" a legal record of the security deed. Bank v. Ins. Co., 163 Ga. 718, 722, 137 S. E. 53.

The words "liens created or obtained," as employed in the section, have been held to refer to liens arising by contract, and not by operation of law. Donovan v. Simmons, 96 Ga. 340, 22 S. E. 966; Griffeth v. Posey, 98 Ga. 475, 25 S. E. 515; Bank v. Beard, 162 Ga. 446, 450, 134 S. E. 107.

Where Recorded.—A retention-of-title contract attested by a person described as a commercial notary public of L. county, although the caption of the instrument indicates that it was executed in a town in W. county is presumably officially executed in L. county. It nevertheless is legally executed to record in W. county, the residence of the maker. Smith v. Simmons, 35 Ga. App. 427, 133 S. E. 312.

No Prior Lien for Money Judgment unless Execution Entered. — Applying this section, as modified by sections 3320 and 3321, a money judgment against the grantor or maker of a bill of sale to secure a debt would not have a lien as against third parties or those claiming under the bill of sale, unless an execution issuing on the judgment should be entered on the execution docket. Consequently a junior money judgment upon which no execution was issued and placed on the execution docket would not create a lien within the meaning of this section, to which the bill of sale therein referred to could be postponed. Bank v. Beard, 162 Ga. 446, 452, 134 S. E. 107.

Priority between Bill of Sale and General Execution.—Where a bill of sale to secure a debt as provided in this section, is executed and subsequently recorded, whether or not such recording should occur within thirty days after the date of the execution of the paper, such bill of sale is superior in dignity to a subsequently obtained unrecorded general execution. Bank v. Beard, 162 Ga. 446 453, 134 S. E. 107.

The status of a recorded bill of sale to secure a debt, which was not recorded until after the time provided by law, is inferior in dignity to a subsequently obtained execution which was recorded prior to the record of the bill of sale. Bank v. Beard, 162 Ga. 446, 454, 134 S. E. 107.

Same—Record from Time of Filing.—In a contest between a bill of sale to secure a debt and a lien of a subsequently recorded general execution, the record of the bill of sale dates back from the time of its filing for record in the office of the clerk of the superior court. Bank v. Beard, 162 Ga. 446, 455, 134 S. E. 107.

Same—Same—Fractions of a Day.—Where a priority as between a bill of sale to secure a debt and the lien of a subsequently recorded general execution depends upon whether the bill of sale was recorded first or the general execution was entered upon the execution docket first, such recording and such entry upon the execution docket having occurred on the same day, in determining such priority fractions of a day are to be considered. Bank v. Beard, 162 Ga. 446, 134 S. E. 107.

§ 3309. (§ 2774.) To reconvey title of property conveyed to secure debts.

As to the distinction between a security deed and a mortgage, see note under section 3256.

Effect of Failure to Record Cancellation.—If record of cancellation is not effected according to this section, the security deed appearing of record to be valid, a purchaser without notice acquires title. Ellis v. Ellis, 161 Ga. 360, 362, 130 S. E. 681.

§ 3310. (§ 2775.) Liens against vendee do not attach to the property.

In General.—The right of the mortgagee under this section, will be defeated by the payment of the secured debt, either by the vendor or his assignee. Gilliard v. Johnston & Miller, 161 Ga. 17, 129 S. E. 434.

CHAPTER 8

Conditional Sales

§ 3318. (§ 2776.) Conditional sales, how executed.

I. IN GENERAL.

Object of Section.—This section is in the nature of a statute of frauds and outlaws all reservations of title as against third persons where the contract is not written. The words "third parties" include creditors, but are not restricted to them, and are to be construed literally. Flemming v. Drake, 163 Ga. 872, 137 S. E. 268.

II. FORM AND REQUISITES.

A. Writing, Execution, etc.

Description of Property.—The rights of a third party, acquiring title in good faith from the vendee, are protected, where the record of the alleged conditional sale shows on its face that not only was no particular property described, but that at the time the instrument was signed no particular property was in the minds of the parties, and that consequently no attempt was or could have been made by the instrument to specify or even refer to any particular property. Stevens Hdw. Co. v. Bank, 34 Ga. App. 268, 129 S. E. 172.

Must Be in Writing.—Under this and the following section whenever personal property is sold and delivered with a condition that title shall remain in the vendor until the purchase price is paid, to be valid as against third parties, the contract must be in writing and recorded within thirty days after delivery of the property sold, which is the time when the sale becomes effective under the terms of the statute. Anglo-American Mill Co. v. Dingler, 8 Fed. (2d), 493.

B. PARTICULAR INSTRUMENTS.

Stipulations for Paying Rent or Hire.—Where a written contract provides that the bailee may at any time before the expiration of the period of rental become the purchaser of the property upon the payment of the aggregate rental value, upon which payment he shall receive credit for the payments previously made as rental, the contract constitutes a conditional sale. Singer Sewing Machine Co. v. Tidwell & Co., 36 Ga. App. 525, 137 S. E. 128.

§ 3319. (§ 2777.) How recorded.

I. GENERAL CONSIDERATION.

Necessity of Recordation—Record Necessary Only as against Third Parties.—See II, A, Writing Execution, etc., under the preceding section.

III. PRIORITIES.

A. In General.

Necessity for Recordation.—See Sewing Machine Co. v. Tidwell & Co., 36 Ga. App. 525, confirming the matter set out under this catchline in the Georgia Code of 1926.

CHAPTER 10

Liens Other than Mortgages

ARTICLE 1

To Whom Granted, Rank and Priority

§ 3333. (§ 2791.) Rank of liens for taxes.

In General.—Taxes due the State are not only against the owner but against the property also, regardless of judgments, mortgages, sales, transfers, or incumbrances of any kind. Bibb Nat'l Bank v. Colson, 162 Ga. 471, 134 S. E. 85.

Lien for Paving Streets.—A lien against property owners

for the proportionate costs of paving streets has the rank of a tax lien and its dignity takes rank under this section, and consequently takes priority over a prior mortgage. Brunswick v. Gordon Realty Co., 163 Ga. 636, 642, 136 S. E. 898.

§ 3335. (§ 2793.) Special lien of laborers.

To What Property Applicable.—The special lien given by this section to laborers, on the product of their labor, attaches to the property of their employers only. Jones v. Central Georgia Lumber Co., 35 Ga. App. 172, 132 S. E. 236.

§ 3348. (§ 2800). Liens for supplies, etc., furnished.

As to penalty for giving false information regarding liens under this section see section 713 of the Penal Code.

I. BY AND TO WHOM SUPPLIES FURNISHED.

Landlord As Surety.—See O'Quinn v. Carter, 34 Ga. App. 310, 129 S. E. 296, citing and following the statement made under this catchline in the Georgia Code of 1926.

III. CHARACTERISTICS OF LIEN.

Not Affected by Bankruptcy.—See Sitton v. Turner, 34 Ga. App. 12, 128 S. E. 77, citing and following the statements under this catchline in the Georgia Code of 1926.

Similar to Claim for Purchase Money.—Under this section, landlords furnishing supplies to their tenants for the purpose of making crops on the rented premises have a lien, by operation of law, on the crops there made in the year for which the supplies were furnished and such a lien is in the nature of a claim for purchase-money. Mutual Fertilizer Co. v. Moultrie Bkg Co., 36 Ga. App. 322, 136 S. E. 803.

Execution Against Supplies.—Quaere: After supplies have been furnished but before they are utilized by the tenant for the purpose intended, are they subject to levy and sale under executions against the tenant held by third persons? Mutual Fertilizer Co. v. Moultrie Bkg. Co., 36 Ga. App. 322, 136 S. E. 803.

§ 3353. (§ 2804.) Mechanics' liens, how declared and created.

Waiver of Right to Object to Lien.—An owner who resists foreclosure upon the ground that the material was not such as provided for by the contract may waive the right to assert this defense, and thereby be estopped to dispute evidence on the part of the materialman to the contrary. Acceptance and use of such material without objection or complaint, and payment therefor to another instead of to the materialman, will authorize the conclusion that the owner waived his right and estopped himself. Rylander v. Koppe, 162 Ga. 300, 301, 133 S. E. 236.

§ 3354. (§ 2805.) Mechanic's lien on personalty.

Enforcement.—See Young v. Alford, 36 Ga. App. 708, 137 S. E. 914, citing and following the statement made under this catchline in the Georgia Code of 1926.

§ 3356. (§ 2807.) Liens in favor of planing-mills, etc.

Applied in Young v. Alford, 36 Ga. App. 708, 137 S. E. 914.

§ 3364(1). Jeweler's liens for repair.—It shall be lawful for any jeweler, or other person, firm, or corporation engaged in the business of repairing watches, clocks, jewelry and other articles of similar character, to sell such articles upon which charges for repairs, including work done and materials furnished, have not been paid, which have remained in the possession of such jeweler, person, firm, or corporation, for a period of one year after the completion of said repairs, for the purpose of enforcing the lien of such jeweler, person, firm, or corporation for materials furnished and work done in repairing such article or articles. Acts 1927, p. 218.

§ 3364(2). Notice before sale.—Before any sale shall be made as provided in section 3364(1), the person, firm, or corporation making such sale shall give thirty days' notice thereof by posting a notice of such sale before the court-house door of the county in which such repairs were made, giving the name of the owner of the article or articles so repaired, if known, and if not known, the name of the person from whom such article or articles were received, a description of the article or articles to be sold, and the name of the person, firm, or corporation making such repairs and proposing to make such sale; and shall also give written notice thereof by sending a registered letter to the last known address of the owner of such article or articles, or the person who left such article or articles for repairs, advising such persons of the time and place of sale, the description of the article or articles to be sold, and the amount claimed by said person, firm, or corporation for such repairs, including work done and materials furnished, and the said amount so claimed for such repairs shall also be stated in the notice posted before the court-house door as hereinbefore stated.

§ 3364(3). Sale at public outcry before court-house.—All sales made under the provisions of this Act shall be made at public outcry, before the court-house door of the county where the person, firm, or corporation making such sale had his place of business at the time of receiving the article or articles to be sold, and during the hours provided by law for holding sheriff's sales.

§ 3364(4). Application of proceeds.—The proceeds of any sale made under the provisions of this Act shall be applied first to the payment of the lien for services rendered by the person, firm, or corporation making such sale, for work done and materials furnished in repairing such article or articles sold, including the cost of the registered notice hereinbefore provided for, and the residue, if any, shall be paid to the ordinary of the county wherein such sale shall have taken place, who shall hold said sum for a period of one year, during which time the owner or owners of the article or articles so sold may claim said residue; but at the end of said period of one year, if said residue shall not have been claimed by the owner or owners of the article or articles, so sold, then and in that event said residue shall by the said ordinary be placed in the common-school fund of the county wherein said sale was made.

§ 3364(5). Display of sign as to intention to sell.—Any jeweler, person, firm, or corporation desiring to avail himself of the provisions of this Act shall display a sign in his place of business notifying the public that all articles left for repairs will be sold for charges at the expiration of one year from completion of such repairs.

ARTICLE 3

Foreclosure of Liens on Personal Property.

§ 3366. (§ 2816.) Enforcement of liens on personalty.

What Counter-Affidavit Must Contain.—Only defensive matter to a foreclosure of a lien on personalty being required in a counter-affidavit filed by the defendant under this section such an affidavit, when made by the defendant's agent, as provided in section 3607, need not contain a sworn averment that the affiant is agent for the defendant. It is sufficient if such affidavit is in fact made by the defendant's duly authorized agent, and where the affidavit purports on its face to be executed by such agent, the agency is presumed and the affidavit is prima facie valid. Georgia Lumber Co. v. Thompson, 34 Ga. App. 281, 129 S. E. 303.

ARTICLE 4

Miscellaneous Provisions

§ 3374. (§ 2824.) Attorney's rights in claim cases.

Cited in Porter v. Stewart, 163 Ga. 655, 660, 137 S. E. 28.

CHAPTER 11

Homestead

ARTICLE 1

Exemptions

SECTION 4

Surveyors Return; Approval of Plat and Application

§ 3386. (§ 2836.) Objections, how and when made.

Effect in Bankruptcy of Failure to Set Aside Exemption.—The fact that the bankrupts, as residents of Georgia, did not set apart exemptions in the manner provided by either Const. Ga. art. 9, sec. 1, or sections 3416, 3378, et seq., did not preclude the allowance of exemptions under such law in bankruptcy proceedings. Clark v. Nirenbaum, 8 Fed. (2d). 451.

The purpose of an objection to the schedule for want of sufficiency and fullness is to prevent the allowance of the homestead (section 3378 paragraph 3), and it does not fail as an objection under this section merely because it may be described as an "objection to the homestead." Alday v. Spooner, 35 Ga. App. 614, 617, 134 S. E. 343.

When Appeal Lies.—Where a creditor filed objections, one of which was to the schedule for want of sufficiency and fullness in that the applicant had omitted certain personalty, appeal to the superior court lies from an adverse judgment of the ordinary. Alday v. Spooner, 35 Ga. App. 614, 134 S. E. 343. See note of this case under § 3388.

§ 3388. (§ 2838.) Appraisers and appeals.

Objections Not Limited to Schedule.—This section does not provide exclusively for objections to the schedule. The creditor is not required to object to the schedule, if he desires to dispute "the propriety of the survey, or the value of the premises so platted as the homestead." Alday v. Spooner, 35 Ga. App. 614, 616, 134 S. E. 343.

ARTICLE 2

Statutory or Short Homestead

SECTION 1

Property Exempt from Sale

§ 3416. (§ 2866.) Property exempt from sale.

As to effect in bankruptcy of failure to set aside homestead exemption, see note to § 3378. See annotations under § 6582.

I. GENERAL NOTE.

Exemption as Homestead—Waiver after Setting Apart.—There is no true homestead in Georgia, but under this section there is a direct exemption of property without regard to residence or home, realty or personalty, and though such exemption may be waived before setting apart (Const. Ga. art. 9, sections 3, 5), after setting apart of exempt property it cannot be aliened or incumbered by debtor. In re Trammell, 5 Fed. (2d), 326.

Increase of Exemption.—Debtor's right of exemption under Const. Ga. art. 9, section 1, and this section, affects debtor's whole property as an inchoate incumbrance created by law, and cannot be increased as to debts in existence without violating contract clause of Federal Constitution. In re Trammell, 5 Fed. (2d), 326.

Setting Aside in Bankruptcy Court.—"Setting apart" of debtor's exempt property is a mere identification of the property to which the exemption is applied, the burden of securing which is put on debtor and is a proper function of bankruptcy court, whose action is equivalent to action by the state court in effectuating exemption. In re Trammell, 5 Fed. (2d), 326.

Alienage as Affecting Right. — Alienage of resident of state is no bar to claim of exemption provided by this section. In re Trammell, 5 Fed. (2d), 326.

Same—Where Family Resident Out of State.—Alien resident of Georgia having no family within State, but having mother in Poland and sister in other state to whom he regularly sends money, is not the head of a family entitled to exemption provided by this section. In re Trammell, 5 Fed. (2d), 326.

When Property Set Aside to Defeat Sale.—Setting apart of property exempt under this section, though necessary to defeat sale, is timely, when not had before levy, if made before sale. In re Trammell, 5 Fed. (2d), 326.

After Acquired Property.—Property not owned by a debtor, when filing his schedule of property exempted under this section but which is afterwards acquired by him, is not subject to exemption under the schedule, although described therein. Smith v. Eckles, 65 Ga. 326; Fuller v. Doyal, 34 Ga. App. 245, 129 S. E. 117.

SECTION 2

How Set Apart

§ 3421. (§ 2871.) Sale subject to incumbrance.

Pending Application.—See Rogers v. Kimsey, 163 Ga. 146, 135 S. E. 497, citing and following the statement under this catchline in the Georgia Code of 1926.

CHAPTER 12

Interest and Usury

ARTICLE 1

General Principles

§ 3431. (§ 2881.) Interest only from demand, when.

Provision That Obligation Bear No Interest.—A stipulation in a contract for the sale of goods, to be delivered within a reasonable time in the future and to be paid for on delivery, to the effect that the obligation of the purchaser was to bear no interest, did not mean that the purchaser would not be required to pay interest in case of and after his default, but was merely a provision against the payment of interest prior to the maturity of the purchase-money. Morgan v. Colt Co., 34 Ga. App. 630, 130 S. E. 600.

§ 3434. (§ 2884.) Interest on liquidated demands.

I. WHEN INTEREST ALLOWED.

When Recovery Exceeds Amount Stated in Bond. — The defendant may be liable, though the aggregate amount of the plaintiff's recovery, both for principal and interest, will exceed the maximum amount of the defendant's liability as stated in a bond. United States Fidelity, etc., Co. v. Koehler, 36 Ga. App. 396, 137 S. E. 85.

On Damages Recovered for Breach of Sale Contract.—Under this section interest is recoverable on damages recovered for breach of a contract of sale by the buyer from the time the amount of damages became fixed by a resale. Bell v. Lamborn, 2 Fed. (2d), 205.

II. LIQUIDATED DEMANDS.

A. Particular Instances of Liquidated Demands.

Breach of a Contract of Sale.—Where a purchaser breached a contract by a failure to pay the purchase-money on the delivery of the goods, the seller was entitled to recover the agreed purchase-price as liquidated damages, with interest thereon from the time the purchaser was liable and bound to pay. Morgan v. Colt Co., 34 Ga. App. 630, 130 S. E. 600.

§ 3436. (§ 2886.) Beyond eight per cent. interest forbidden.

What Constitutes Usury. — There are four requisites of every usurious transaction: (1) A loan or forbearance of money, either express or implied. (2) Upon an understanding that the principal shall or may be returned. (3)

And that for such loan or forbearance a greater profit than is authorized by law shall be paid or is agreed to be paid. (4) That the contract was made with an intent to violate the law. The fourth element may be implied if all the others are expressed upon the face of the contract. Bank v. Farmers State Bank, 161 Ga. 801, 810, 132 S. E. 221.

Court Will Look at Substance of Transaction.—The ingenuity of man has not devised a contrivance by which usury can be legalized, if it appears that the purpose of the scheme was to exact a larger profit for the use of the money actually advanced than eight per cent. per annum. In determining whether the contract is usurious the substance of the transaction will be critically inspected and analyzed; for the name by which the transaction is denominated is altogether immaterial if it appears that a loan of money was the foundation and basis of agreement which is under consideration. Bank v. Farmers State Bank, 161 Ga. 801, 132 S. E. 221.

If an agreement is a mere device or subterfuge by which one party was permitted to charge a higher than the lawful rate of interest allowed in this State for a loan of money, the agreement would be usurious, and the company could collect no interest at all. Stewart v. Miller & Company, 161 Ga. 919, 925, 132 S. E. 535.

"Underwriting" Not within Section.—An "underwriting," is not an agreement to loan money and under the circumstances of the case this section does not apply. Stewart v. Miller & Co., 161 Ga. 919, 132 S. E. 535.

Transaction with underwriter of bond issue, who received discount of 15 per cent from face value of bonds and other specific allowances, is not usurious, under this section, in view of necessity for resale of bonds. G. L. Miller & Co. v. Claridge Manor Co., 14 Fed. (2d), 859.

Allowance of Expenses—Burden of Proof.—The party alleging that a transaction with an underwriter of a bond issue was usurious by reason of an allowance for expenses has the burden of proving that the amount was so extravagant as to show bad faith. G. L. Miller & Co. v. Claridge Manor Co., 14 Fed. (2d), 859.

Charging Interest on Interest Due.—A contract to pay eight per cent. per annum semi-annually, with interest on the semi-annual payments of interest after due, does not constitute usury under this section. Pendergrass v. New York Life Ins. Co., 163 Ga. 671, 137 S. E. 36.

Question for Jury.—The question as to whether one intends to exact usury by a contrivance or device or whether the alleged charge is bona fide for actual services is for the determination of the jury. Bank v. Farmers State Bank, 161 Ga. 801, 132 S. E. 221.

§ 3438 (1). All interest forfeited for usury.

Constitutionality.—See Mitchell v. Loan & Investment Co., 161 Ga. 215, 130 S. E. 565, approving the statement under this catchline in the Georgia Code of 1926.

Forfeiture of Interest Is Sole Forfeit.—Under the laws of Georgia the exaction of a higher rate of interest for the use of money than eight per centum per annum is unlawful, and prevents the collection of any interest whatever. Bank v. Farmers State Bank, 161 Ga. 801, 132 S. E. 221; but no other forfeit shall be occasioned. Stewart v. Miller & Co., 161 Ga. 919, 132 S. E. 535; Padgett v. Jones, 34 Ga. App. 244, 129 S. E. 109.

Thus an assignment of salary to secure a usurious debt would be valid as to the principal. Flood v. Empire Investment Co., 35 Ga. App. 266, 271, 133 S. E. 50.

ARTICLE 2

Business of Loans on Personal Property

§ 3446. License required.

See note to § 1770(61).

Purpose of Article.—As the only provision in this article for raising revenue is that contained in § 3447 it is manifest that its purpose is not the raising of revenue, but is the protection of those who are compelled to borrow from improper lenders who have failed to comply with the statutes for such protection. McLamb v. Phillips, 34 Ga. App. 210, 129 S. E. 570.

Effect of Noncompliance on Contract.—Therefore a contract made without a compliance with and in violation of the statute is void and unenforceable. McLamb v. Phillips, 34 Ga. App. 210, 129 S. E. 570.

CHAPTER 13

Of Bailments

ARTICLE 1

General Principles

§ 3472. (§ 2899.) Extraordinary.

Scope of Section.—See Peavy v. Peavy, 36 Ga. App. 202, 204, 136 S. E. 96, citing and following the statement under this catchline in the Georgia Code of 1926.

§ 3473. (§ 2900.) Gross neglect.

When Violation of Speed Law Not Gross Negligence.—Conceding, but not deciding, that the State law, prohibiting the driving of automobiles at a greater rate of speed than ten miles an hour while approaching and traversing intersections of public highways, applies to intersections of streets in a city, the violation of this law would not constitute gross negligence. Southern Ry. Co. v. Davis, 132 Ga. 812, 817, 65 S. E. 131; Peavy v. Peavy, 36 Ga. App. 202, 204, 136 S. E. 96.

§ 3474. (§ 2901.) Due care in child.

No Invariable Rule.—The care and diligence required of an infant of tender years is not fixed by any invariable rule with reference to the age of the infant or otherwise. It depends upon the capacity of the particular infant, taking into consideration his age as well as other matters. McLarty v. Southern Ry. Co. 127 Ga. 161, 56 S. E. 297; MacDougald Construction Co. v. Mewborn, 34 Ga. App. 333, 337, 129 S. E. 917.

Infants under Fourteen.—Infants under fourteen years of age are chargeable with contributory negligence resulting from a want of such care as their mental and physical capacity fits them for exercising, and assume the risk of those patent, obvious and known dangers which they are able to appreciate and avoid. Evans v. Josephine Mills, 119 Ga. 448. 46 S. E. 674; MacDougald Construction Co. v. Mewborn, 34 Ga. App. 333, 337, 129 S. E. 917.

Question of Capacity for Jury.—See Western & Atlantic R. R. v. Reed, 35 Ga. App. 538, 134 S. E. 134.

§ 3475. (§ 2902.) Imputable negligence.

Negligence of Husband Not Imputed to Wife.—Where a husband, not acting as agent of his wife, operates an automobile not belonging to the wife, but under her command, his negligence is not imputable to the wife. Holloway v. Mayor, 35 Ga. App. 87, 132 S. E. 106.

Instructions to Jury.—For a case where it was not error to instruct the jury, as a matter of law, that the negligence of the driver of the vehicle was not imputable to the person for whose homicide the action was brought. See Western & Atlantic Railroad v. Reed, 35 Ga. App. 538, 134 S. E. 134.

ARTICLE 5

Pledges and Pawns

§ 3533. (§ 2961.) Transfer.

Transferee Stands in Transferor's Shoes.—The transferee of a pledge is a purchaser of the thing pledged. Continental Trust Co. v. Bank, 162 Ga. 758, 761, 134 S. E. 775.

CHAPTER 14

Of Principal and Surety

ARTICLE 1

The Contract

§ 3540. (§ 2968.) Stricti juris.

Section cited in Southern Surety Co. v. Williams, 36 Ga. App. 692, 137 S. E. 861.

§ 3541. (§ 2969.) Form immaterial.

Cited in Mulling v. Bank, 35 Ga. App. 55, 135 S. E. 222; Federal Reserve Bank v. Lane, 35 Ga. App. 177, 132 S. E. 247.

ARTICLE 2
Relative Rights of Creditor and Surety.

§ 3544. (§ 2972.) Of risk.

See notes to § 4294(120).

ARTICLE 3
Rights of Surety against Principal

§ 3556. (§ 2984.) Proof of suretyship.

Apparent Joint Principals.—See Nunnally v. Colt Co., 34 Ga. App. 247, 129 S. E. 119, following the principle stated in the first paragraph under this catchline in the Georgia Code of 1926.

Same—Married Women.—Where a married woman signs a note ostensibly as a maker jointly with her husband, when in fact she is a surety only, before she can establish the fact of her suretyship as against the payee of the note it must be made to appear, despite her apparent relationship as principal, that the payee, with knowledge of the facts which would constitute her a surety, contracted with her as a surety. Bennett v. Danforth, 36 Ga. App. 466, 137 S. E. 285.

ARTICLE 5
Rights of Sureties as to Third Persons

§ 3567. (§ 2995.) Subrogation.

Applied in McWhorter v. Bank, 162 Ga. 627, 134 S. E. 606.

Section Cited in Reid v. Whisenant, 161 Ga. 503, 131 S. E. 904.

CHAPTER 15
Of Principal and Agent

ARTICLE 1
Relations of Principal and Agents Among Themselves

§ 3571. (§ 2999.) What may be done by agent.

Delegation of Power by Agent in General.—For a case holding substantially with the doctrine laid down in the case in paragraph three under this catchline in the Georgia Code of 1926, see Mathis v. Western, etc., Railroad, 35 Ga. App. 672, 680, 134 S. E. 793.

§ 3575. (§ 3003.) Revocation.

Unreasonable Instructions—Bona Fide Disregard.—Where an agency is coupled with an interest, and the principal gives to the agent unreasonable instructions detrimental to the agent's interest, the agent may disregard the instructions and act for himself, provided he acts in good faith; and the principal would be bound thereby. Southern Trading Corp. v. Benchley Bros., 34 Ga. App. 625, 130 S. E. 691.

§ 3576. (§ 3004.) Agent limited by his authority.

Section Applied in Benton v. Roberts, 35 Ga. App. 749, 134 S. E. 846.

§ 3577. (§ 3005.) Money deposited by agent.

Section Quoted in Oslin v. State, 161 Ga. 967, 132 S. E. 542.

§ 3578. (§ 3006.) Payment to agent failing to produce obligation.

Section Quoted in Oslin v. State, 161 Ga. 967, 132 S. E. 542.

§ 3579. (§ 3007.) Agents and fiduciaries to keep accounts.

Section Quoted in Oslin v. State, 161 Ga. 967, 132 S. E. 542.

§ 3581. (§ 3009.) Diligence of an agent.

Section Cited in Benton v. Roberts, 35 Ga. App. 749, 134 S. E. 846.

§ 3584. (§ 3012.) Estoppel.

Sub-Agent May Deny Title in Employing Agent and in Corporation.—In Paschal v. Godley, 34 Ga. App. 321, 322, 129 S. E. 565, it was said: "While an agent can not dispute his principal's title except in certain instances not present in this case, yet if * * * in possession of the cattle merely by virtue of an employment by * * * an officer of the corporation, * * * he would not because of these facts be estopped from defending upon the ground that the title was * * * in the company."

§ 3587. (§ 3015.) Brokers right to commission.

II. COMPENSATION.

B. Sale by Principal.

Before Broker Procures Purchasers—Exclusive Authority and Exclusive Right.—A distinction has been raised between an exclusive agency to sell and an exclusive right to sell. Several cases in which there was merely an exclusive agency have called attention to the fact that an exclusive right was not conferred, without stating what the effect of conferring such right would be, and when that question has come squarely before the courts they have held that conferring the exclusive right to sell excluded sales by the owners themselves. 10 A. L. R. 818. See dissenting opinion of Luke, J., in Barrington v. Dunwody, 35 Ga. App. 517, 520, 134 S. E. 130.

Same—Same—Result as to Owners Right to Sell.—"Obviously if the broker is given an exclusive right to sell, it precludes his employer from selling in any manner other than through that particular broker's agency. The grant of merely an exclusive agency, however, does not have the effect of preventing the owner from selling independently through his own personal efforts, as it simply secures to the broker an exclusive 'agency,' that is, the employer can not sell through the medium of another broker without violating the terms of his agreement and rendering himself liable therefor." 4 R. C. L. 260, section 12. Quoted in the dissenting opinion of Luke, J., in Barrington v. Dunwody, 35 Ga. App. 517, 520, 134 S. E. 130.

D. Modification of Effects of Section by Contract—Sales Agents—Necessity for Consummation of Sale.

Modification by Agreement.—An owner may stipulate in the contract of listment that he is not to be subject to the payment of brokerage commissioners until the actual acceptance of title by the officer. Kiser Real Estate Co. v. Shippen Hardwood Lumber Co., 34 Ga. App. 308, 129 S. E. 294.

ARTICLE 2
Rights and Liabilities of Principal as to Third Persons

§ 3595. (§ 3023.) Extent of authority.

III. SPECIAL AGENTS.

Duty to Investigate Authority.—For a case which adheres to the rule laid down in the first paragraph under this catchline in Georgia Code of 1926, see Quillion & Bros. v. Wales Adding Machine Co., 34 Ga. App. 135, 136, 128 S. E. 698.

How Far Principal Bound.—One who deals with a special agent, knowing at the time the limits within which the agent, under the terms of his appointment, has authority to bind his principal, is bound to act with reference to this knowledge, and can not hold the principal liable for loss occasioned by acts of the agent in excess of, or contrary to, the latter's authority in the premises. See Littleton v. Loan etc., Asso., 97 Ga. 172, 25 S. E. 826; Quillian & Bros. v. Wales Adding Machine Co., 34 Ga. App. 135, 136, 128 S. E. 698.

Authority to Collect.—In Quillan & Bros. v. Wales Adding Machine Co., 34 Ga. App. 135, 137, 128 S. E. 698, is quoted the following statement taken from an opinion delivered by Mr. Justice Lewis, in Walton Guano Co. v. McCall, 111 Ga. 114, 116, 36 S. E. 469: "As a general rule a special agent or attorney to collect a debt is not authorized to receive anything as a payment thereon except actual cash." In the same case it was added that an agency does not necessarily include an agency to collect.

§ 3606. (§ 3034.) Agent is a competent witness.

I. IN GENERAL.

Cited in George v. Rathstein, 35 Ga. App. 126, 132 S. E. 414.

ARTICLE 3
Rights and Liabilities of Agent as to Third Persons

§ 3607. (§ 3035.) Agent may act under this Code, for principal.

See notes to § 3366 par. 6.

FIFTH TITLE

Of Property and the Tenure by Which it is Held

CHAPTER 1

Of Realty

§ 3621. (§ 3049). Fixtures.

Particular Fixtures Considered and Principles Illustrated—Machinery.—Boilers, smokestacks, etc., installed in creamery plant, removal of which would incapacitate plant, is, under this section, fixtures included within a prior mortgage of after-acquired property, which became superior to vendor's reservation of title. In re Moultrie Creamery & Produce Co., 2 Fed. (2d), 129.

However heavy mill machinery not attached to the building, but held in place by its own weight, does not pass under a mortgage of the realty and appurtenances, which did not mention the machinery. Anglo-American Mill Co. v. Dingler, 8 Fed. (2d), 493.

§ 3630. (§ 3058.) Streams boundary lines.

Constitutionality. — The provisions in this section as to change of currents and gradual accretions are not unconstitutional as a violation of the due-process clause of the State and Federal Constitutions. Johnson v. Hume, 163 Ga. 867, 137 S. E. 56.

CHAPTER 2

Of Personalty

§ 3651(1). Crops; liens, how attested and recorded; levies on unmatured crops.

Effect of Sale of Land with Growing Crops.—Since the passage of this section the purchaser of lands upon which crops are growing, at a sale by the trustee in bankruptcy of the owner of the land, does not acquire any interest in or title to such crops. Such purchaser under such sale only acquires title to the land so purchased, and the right to the rents, issues, and profits thereof after the date of his purchase. Chatham Chemical Co. v. Vidalia Chemical Co., 163 Ga. 276, 136 S. E. 62.

Effect of Land Mortgage upon Crop Mortgage.—Want of valid title in the mortgagor to the premises on which mortgaged crops are grown, and outstanding title in a third person who is no party to the suit, does not bar an action brought by the mortgagee to foreclose and enforce his mortgage on such crops. Chatham Chemical Co. v. Vidalia Chemical Co., 163 Ga. 276, 136 S. E. 62.

Title to Crops on Land Encumbered before but Sold after Section.—Notwithstanding this section, the purchaser of lands under a power of sale in a security deed of older date than the section acquired title to crops grown after the passage of this section at the time of the sale if they were grown and owned by the grantor in such deed; but if the grantor had in fact, prior to such sale, rented in good faith these lands to others, who raised such crops, such purchaser did not acquire title to them, but only the interest of the grantor in such deed in these crops. Chason v. O'Neal, 158 Ga. 725, 124 S. E. 519; Brooks v. Causey, 36 Ga. App. 233, 136 S. E. 282.

§ 3652. (§ 3076.) Rights and remedies.

There Can Be No Right of Action until There Has Been a Wrong.—See Strachan Shipping Co. v. Hazlip-Hood Co., 161 Ga. 480, 131 S. E. 283, which quotes with approval the doctrine of the cases under this catchline in Georgia Code of 1924.

§ 3653 (§ 3077.) Assignment of choses in action.

III. WHAT IS ASSIGNABLE.

B. Under This Section.

2. Particular Choses Considered.

Funds in Potential Existence.—It is not necessary that the fund attempted to be assigned shall be in actual existence at the time, for it is well settled that it is sufficient if it "exists potentially." Brown Guano Co. v. Bridges, 34 Ga. App. 652, 656, 130 S. E. 695.

VI. EQUITABLE ASSIGNMENT.

Immediate Change of Ownership.—In order to infer an equitable assignment, such facts and circumstances must appear, as would not only raise an equity between the assignor and the assignee, but show that the parties contemplated an immediate change of ownership with respect to the particular fund in question, not a change of ownership when the fund should be collected or realized, but at the time of the transaction relied upon to constitute the assignment. Brown Guano Co. v. Bridges, 34 Ga. App. 652, 656, 130 S. E. 695.

SIXTH TITLE

Estates and Rights Attached Thereto

CHAPTER 1

Of Absolute Estates or in Fee Simple

§ 3659. (§ 3083.) What words create.

Intention of Maker Cardinal Rule of Construction.—For cases holding substantially with cases cited under this catchline in the Georgia Code of 1926, see Banks v. Morgan, 163 Ga. 468, 470, 136 S. E. 434, and cases there cited.

CHAPTER 3

Of Estates in Remainder and Reversion

§ 3676. (§ 3100.) Vested or contingent.

What Uncertainties Make Contingency.—There is a distinction between the uncertainty which makes a remainder contingent and the uncertainty of the estate ever taking effect in possession, which is incidental to even a vested remainder. In a vested remainder the time of possession and the enjoyment being deferred, there is always an uncertainty as to whether the estate will ever be enjoyed in possession. Walters v. Walters, 163 Ga. 884, 890, 137 S. E. 386. See also, 23 R. C. L. 500, sec. 33.

Same—Vested Subject to Be Divested.—Where remainders are subject to be divested, in whole or in part, by the disposition of the whole or some part of the property left by the testator, this contingency does not deprive the remainder of its character as vested. Walters v. Walters, 163 Ga. 884, 890, 137 S. E. 386. See also Melton v. Camp, 121 Ga. 693, 49 S. E. 690.

Illustrations of Vested Remainders.—For a case holding substantially with McDonald v. Taylor, 107 Ga. 43, 32 S. E. 879, cited under this catchline in Georgia Code of 1926, see Walters v. Walters, 163 Ga. 884, 890, 137 S. E. 386.

§ 3678. (§ 3102.) Perpetuities.

Cases Not within Rule.—Clearly the limitation of an estate to plaintiff for life, and at her death to her children born and to be born, does not create a perpetuity. Palmer v. Neely, 162 Ga. 767, 135 S. E. 90.

§ 3681. (§ 3105.) Assent of the executor.

General Rule.—The first sentence of this section merely states the general rule. David v. David, 162 Ga. 528, 134 S. E. 301.

CHAPTER 4

Of Estates for Years

§ 3685. (§ 3109.) Definition.

Leasehold as Realty.—The plaintiff had a written lease from the owner of the premises in question, for a term of five years. This created an estate in realty in the lessee as an estate for years, if it be in lands, passes as realty in this State. Anderson v. Kokomo Rubber Co., 161 Ga. 842, 846, 132 S. E. 76.

CHAPTER 5

Of Landlord and Tenant

§ 3692. (§ 3116.) Implied contract to pay rent.

Security Deed Given but Possession Retained.—One who makes to a creditor for the purpose of securing a debt, a deed to land, but retains possession of the land, does not thereby become the "tenant" either of such creditor or of his vendee. Finn v. Reese, 36 Ga. App. 591, 592, 137 S. E. 574. See also, Ray v. Boyd, 96 Ga. 808, 22 S. E. 916.

§ 3694 (§ 3118.) Landlord not liable for negligence of tenant.

Duty and Liability of Landlord for Repairs.—It would seem that the degree of diligence required under the section in keeping the premises safe does not consist in either slight diligence or of extraordinary diligence, but rather consists of ordinary care, such as a prudent householder might reasonably be expected to exercise. See Cuthbert v. Schofield, 35 Ga. App. 443, 133 S. E. 303.

§ 3698. (§ 3122.) Estoppel.

Section cited in Hardeman v. Ellis, 162 Ga. 664, 135 S. E. 195.

§ 3699. (§ 3123.) Repairs and improvements.

II. DUTY AND LIABILITY OF LANDLORD.

Extent of Landlord's Duty to Repair—Premises Suited for Purpose.—Except as provided by this section there is in this State, as at common law, no implied covenant that the premises are suitable for the purpose for which they are leased, or for the particular use for which they are intended by the tenant. Cox v. Lowney Co., 35 Ga. App. 51, 132 S. E. 257. And an instruction that it is the duty of the landlord to make the premises suitable for the purpose intended is erroneous. Id.

In this case the court cites the decisions appearing under this catchline in the Georgia Code of 1926 and admits that they would seem to support a holding to the contrary. A nice distinction, however, is drawn between the duty to keep in repair and the duty to make repairs, and, on reason and principle, it appears that such a distinction is justifiable because if the property leased is inherently unfitted for purposes intended, irrespective of repairs, (in the principle case a basement as a candy storeroom) the tenant should be charged with notice of the inadequacies. The situation is analogous to that which exists when premises are leased which contain patent defects under which circumstances the landlord is not held accountable for repairs.—Ed. Note.

§ 3705. (§ 3129.) Title to cropper's crop in landlord.

Title to Crop—When Goes to Cropper.—For a case holding substantially with cases cited under this catchline in the Georgia Code of 1926, see Folds v. Harris, 34 Ga. App. 445, 446, 129 S. E. 664.

Same—After Settlement and before Division.—Where there has been no division of the crop between the landlord and the cropper and where the cropper's portion of the crop has not been set aside, and thus the cropper has not received his part of the crop, no title to the crop passes into him, although he may have settled with the landlord for all advances made. Atlanta Trust Co. v. Oliver-McDonald Company, 36 Ga. App. 360, 136 S. E. 824.

Same—Interest of Landlord.—A landlord's interest in the title to crops grown by his cropper is only to the extent of the value of the landlord's portion of the crops, as well as of any indebtedness for advances made to the cropper. Franklin v. Tanner, 34 Ga. App. 254, 129 S. E. 114.

Trover against Third Person.—A landlord, who has not settled with his cropper but has received only a part of the crops to which he is entitled and whose interest in the remaining crops is in an amount less than their value, can, in a trover suit for their conversion against a third person, who has acquired them by purchase from the cropper, recover only to the extent of the amount of his claim against the cropper. Franklin v. Tanner, 34 Ga. App. 254, 129 S. E. 114.

§ 3711. (§ 3135.) Casualties no abatement of rent.

What Amounts to Eviction.—Where a landlord enters upon the rented premises for the ostensible purpose of making repairs, irrespective of whether it is in conformity with a legal obligation due to his tenant, or whether it is for the purpose of protecting his own property, if his conduct consists of negligent acts of such grave and permanent character as would render the premises unfit for tenancy, and is such as would legally import the intent to deprive the tenant of their enjoyment, it amounts in law to an eviction of the tenant, and the landlord can not thereafter recover subsequently accruing rent. Feinberg v. Sutker, 35 Ga. App. 505, 134 S. E. 173.

§ 3712. Interfering with certain relations.

Section Compared with Section 125 of Penal Code.—This section and the following section (section 3713) make it unlawful to do the things therein specified, even though there would be no conflict with the employee's duty under his contract of employment, which is something quite different from enticing, persuading, or decoying the servant to desert his employer during his term of service, as prohibited by section 125 of the Penal Code. Therefore, the ruling as to the Constitutional invalidity of this section and the following section is not to be applied to that section of the Penal Code. Rhoden v. State, 161 Ga. 73, 78, 129 S. E. 640.

CHAPTER 6

Of Estates on Condition

§ 3717. (§ 3137.) Precedent and subsequent.

Section cited in Grantham v. Royal Insurance Co., 34 Ga. App. 415, 130 S. E. 589.

§ 3721. (3141.) Effect of breach of condition.

Necessity of Entry to Revest Estate.—The grantor in a deed containing a condition subsequent, upon a breach thereof, is not revested with the title until there has been an entry. Barnesville v. Stafford, 161 Ga. 588, 592, 131 S. E. 487.

CHAPTER 7

Of Tenancy in Common

§ 3723. (§ 3143). Definition of tenancy in common.

Rule Stated—Trustee and Cestui Que Trust.—If a trustee acquires title to specific realty for his individual use and also for the use of his cestui que trust, the entire estate will be an estate in common, and the trustee and the cestui que trust will be tenants in common. Carmichael v. Citizens & Southern Bank, 162 Ga. 735, 134 S. E. 771.

§ 3724. (§ 3144). Rights and liabilities of cotenants.

Action by Adverse Claimant against Cotenant.—Proof of title of tenants in common to land from which timber has been cut and removed by one of them, superior to the title of an adverse claimant, will entitle the tenant so cutting and removing the timber to its proceeds, as against such adverse claimant, notwithstanding the fact that the tenant cutting and removing the timber in such proceeding alleges ownership of the land and timber in severalty. Horn v. Towson, 163 Ga. 37, 135 S. E. 487.

§ 3727. (§ 3147). Accounting between cotenants.

Encumbrance of Estate—Cotenant's Superior Lien.—This section does not make the claim for indebtedness superior to a security deed made by the tenant in common individually, purporting to convey his undivided interest in the realty to a third person as security for his personal obligation. Carmichael v. Citizens & Southern Bank, 162 Ga. 735, 134 S. E. 771.

CHAPTER 8

Of Trust Estates, Trusts and Trustees, and Deeds to Interests in Property for its Improvement

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ARTICLE 1

Of Their Creation and Nature

§ 3728. (§ 3148). Definition.

Stated in Macy v. Hays, 163 Ga. 478, 485, 136 S. E. 517.

§ 3733. (§ 3153). Express, etc.

There can be no expressed trust unless it is created in writing. Macy v. Hays, 163 Ga. 478, 485, 136 S. E. 517.

Examples of application will be found in Macy v. Hays, 163 Ga. 478, 136 S. E. 517.

§ 3736. (§ 3156). Execution of trusts.

Illustration of Executory Trusts.—The following case is an example of an executory trust. Burton v. Patton, 162 Ga. 610, 134 S. E. 603.

§ 3739. (§ 3159). Implied trusts.

Money Must Be Paid at or before Purchase.—For a case reiterating the principle declared in the cases under this catchline in the Georgia Code of 1926, see McDonald v. Dabney, 161 Ga. 711, 132 S. E. 547.

When Member of Firm Holds Land for Other Members.—Where land is bought in whole or in part with money contributed by one of the members of a firm, and the legal title is taken in the name of the other members, under an agreement that the latter is to hold the land for the use of the firm, an implied trust arises in favor of the partnership, and the members become equitable owners and equitable tenants in common of the land. McDonald v. Dabney, 161 Ga. 711, 132 S. E. 547.

Pleading—Sufficiency of Allegation.—For case wherein the allegations of the petition as amended, construed most strongly against the pleader, were held not to raise an implied trust upon the principles of this section, see Drake v. Drake, 161 Ga. 87, 129 S. E. 635.

Evidence.—To engraft an implied trust upon an absolute deed by parol evidence, such evidence ought to be clear and satisfactory. McDonald v. Dabney, 161 Ga. 711, 132 S. E. 547.

Proof.—Ordinarily, where one person seeks to enforce an implied trust in land because it was paid for in part by his money and title thereto was taken in the name of another, he must prove the amount of his money so used; but where real estate is purchased with funds of a partnership, contributed by both members, and title is taken in the name of one of the members under an agreement that he is to hold the same for the use of the firm, this rule does not apply. The partner seeking to enforce the implied trust arising under these circumstances will not be required to show the specific amount of the funds contributed by him to the partnership capital which went into the purchase thereof. McDonald v. Dabney, 161 Ga. 711, 732, 132 S. E. 547.

Paragraph Applied in Stonecypher v. Coleman, 161 Ga. 403, 410, 131 S. E. 75; Manget v. Carlton, 34 Ga. App. 556, 559, 130 S. E. 604; Carmichael v. Citizens, etc., Bank, 162 Ga. 735, 134 S. E. 771.

§ 3762. (§ 3179). Purchaser with notice.

Notice of Trust Relationship—What Instrument Notice of.—A purchaser of land is charged with notice of recitals in the deed to his vendor, to the effect that the land was purchased with proceeds of the sale of trust funds. Carmichael v. Citizens, etc., Bank, 162 Ga. 736, 134 S. E. 771. Citing Cheney v. Rodgers, 54 Ga. 168; Hancock v. Gumm, 151 Ga. 667, 107 S. E. 872, 16 A. L. R. 1003; Rosen v. Wolff, 152 Ga. 578, 585, 110 S. E. 877. But he is not charged with notice of such recitals when contained in a deed by the vendor to another person, even though the deed purports to convey a part of the same general tract. The recital, in order to charge notice to the purchaser, must be in an instrument constituting a link in his chain of title. Carmichael v. Citizens, etc., Bank, supra, citing, Hancock v. Gumm, supra.

Innocent Purchaser from Purchaser with Notice. — If a grantee in the security deed, with notice of the equity of the claimants in the hands therein conveyed, transferred for value a note thereby secured to another without notice of such equity and who took the same in good faith, the latter acquired at least an equitable interest in such land as a purchaser, and holds such interest free from the secret equity of the claimants and the implied trust set up. First Nat. Bank v. Pounds, 163 Ga. 551, 136 S. E. 528.

§ 3773. (§ 3189). Lien on estates for trust funds.

When Funds of Estate Loaned.—When an administrator deposits with, or lends to, a firm of which he is a partner the funds of the estate which he represents, and the same are mingled with the funds of the firm and used in its business, upon the dissolution of the firm by the death of such partner (the administrator) the beneficiary of the trust fund thus misapplied has a lien upon the assets of the firm in the hands of the surviving partner, superior to those of the firm's unsecured creditors. Miller & Co. v. Gibbs, 161 Ga. 698, 132 S. E. 626.

ARTICLE 2

Of Trusts and Trustees

§ 3780. (§ 3196). When court will declare one a trustee.

Section Quoted in McDonald v. Dabney, 161 Ga. 711, 731, 132 S. E. 547.

§ 3781. (§ 3197). Want of trustee.

Appointment by Court for Educational and Religious Trusts.—For a case following, in a material manner, the principle enunciated in the first paragraph under this catchline in the Georgia Code of 1926, see Dominy v. Stanley, 162 Ga. 211, 133 S. E. 245.

§ 3785. (§ 3201). Tracing assets.

When Traceable May Always Follow.—The beneficiary of a trust may always follow the trust funds wherever they can be traced. Miller & Co. v. Gibbs, 161 Ga. 698, 707, 132 S. E. 626.

Need Not Show Investment in Specific Property.—It is not indispensably necessary for the beneficiary, in order to trace trust funds, to show that they have been invested in specific property by the trustee or the person aiding the trustee in the misapplication of the funds. Miller & Co. v. Gibbs, 161 Ga. 698, 708, 132 S. E. 626. But it is necessary that they should be clearly traced and identified either in original or substitute form. Id.

Same—Ober v. Cochran Reconciled.—In Ober & Sons Co. v. Cochran, 118 Ga. 396, 45 S. E. 382, 98 Am. St. Rep. 118, Mr. Presiding Justice Fish used some language which at first blush might seem to conflict with the rule as announced by the Georgia Courts. That language is: "In order to recover a trust fund which has been misapplied by the trustee or person holding it in a fiduciary character, it must be clearly identified or distinctly traced into the property, fund, or chose in action which is to be made subject to replace it." This does not mean that the trust fund can not be traced into the general property or funds of such trustee or person holding it in a fiduciary capacity. If the funds can be traced into the general property or funds of such trustee or person, the trust will be enforced. Miller & Co. v. Gibbs, 161 Ga. 698, 709, 132 S. E. 626.

SEVENTH TITLE

Of Title and Mode of Conveyance

CHAPTER 1

Of Title by Grant

ARTICLE 3

Processioning

§ 3820. (§ 3246). Rules in disputed lines.

When Construction Most Favorable to Grantee Prevails.—Where all other means of ascertaining the true construction of a deed fails, and a doubt still remains, that construction is rather to be preferred which is most favorable to the grantee. Holder v. Jordan Realty Co., 163 Ga. 645, 650, 136 S. E. 907, citing Tyler on Boundaries, 119, 120; Harris v. Hull, 70 Ga. 831.

Section Given in Charge.—As to a case sustaining a trial judge's charge to the jury involving a substantial portion of the section, see Cherokee Ochre Co. v. Georgia Ochre Co., 162 Ga. 620, 134 S. E. 616.

§ 3821. (§ 3247). General reputation, when evidence.

Binding on Grantees.—See Booker v. Booker, 36 Ga. App. 738, 138 S. E. 251, for a case following the cases cited under this catchline in the Georgia Code of 1926.

§ 3823. (§ 3249). Protest and appeal to superior court.

Discrepancies in Dower Plat and Processioners.—Where it appeared conclusively that the surveyor for the processioners followed the line between the lands of the litigants as shown by the dower plat, any errors made upon the lines between other landowners, or any discrepancies in the dower plat and the plat made by the processioners, were immaterial and harmless. Groover v. Durrence, 36 Ga. App. 543, 137 S. E. 299.

Survey of Other Boundaries.—Where the only dispute is over the dividing line between two tracts of land, a survey of other boundaries is unnecessary. Groover v. Durrence, 36 Ga. App. 543, 137 S. E. 299.

CHAPTER 2
Of Title by Will

ARTICLE 1
Of the Nature of Wills, by Whom and How Executed

§ 3832. (§ 3258). Power of testators.

Providing for Creation of Corporation.—A testator under the laws of this State can provide by his will for the creation by his executors of a corporation to which the executors shall convey the residue of his estate for the purpose of carrying on his general business. Palmer v. Neely, 162 Ga. 767, 135 S. E. 90.

§ 3840. (§ 3266). Insane persons.

Monomania under This Section—Particular Type of Mania.—Mania is a form of insanity accompanied by more or less excitement, which sometimes amounts to fury. The person so affected is subject to hallucinations and delusions, and is impressed with the reality of events which have never occurred and things which do not exist, and his actions are more or less in conformity with his belief in these particulars. Hall v. Unger, 11 Fed. Cas. 261, 263 (No. 5949). This mania may extend to all objects; or it may be confined to one or a few objects, in which latter case it is called monomania. Dyar v. Dyar, 161 Ga. 615, 628, 131 S. E. 535.

§ 3841. (§ 3267). Eccentricity, imbecility, etc.

Rule of Evidence.—The section is a rule of evidence, and may be given in charge on an issue of devisavit vel non, without specially pleading such rule, where there is evidence to authorize such charge. Dyar v. Dyar, 161 Ga. 615, 623, 131 S. E. 535.

§ 3842. (§ 3268). Amount of capacity necessary.

Standard of Mental Capacity—Charges.—In his charge to the jury the judge gave certain instructions which would probably lead the jury to conclude that the capacity to contract was identical with the capacity to make a valid will; and this identity does not exist. Such instructions were erroneous. Tarlton v. Richardson, 163 Ga. 553, 136 S. E. 526.

§ 3846. (§ 3272). Formalities of execution.

II. SIGNATURE OF TESTATOR.

Testator's Name Signed by Another.—Where a person's name is signed for him, at his direction and in his presence, by another, the signature becomes his own. The relationship of principal and agent is not thereby created, nor does the doctrine of such a relationship become involved. Neal v. Harber, 35 Ga. App. 628, 134 S. E. 347.

Acknowledgment of Signature.—It is absolutely necessary that the attesting witnesses either actually see the testator sign the instrument, or that the testator acknowledge his signature thereto either expressly or impliedly. Wood v. Davis, 161 Ga. 690, 693, 131 S. E. 885.

§ 3851. (§ 3277.) Charitable devises.

Execution within Ninety Days of Death.—Under this section a bequest to an educational institution by will which was executed less than 90 days before death is void. Southern Industrial Inst. v. Marsh, 15 Fed. (2d), 347.

ARTICLE 2
Of Probate and Its Effect

§ 3864. (§ 3290.) Original will to remain in office.

Section Cited in Young v. Certainteed Products Corp., 35 Ga. App. 419, 133 S. E. 279.

§ 3870. (§ 3296.) Admission of executor, etc.

Origin.—This section had its origin in codification, and not in statute. Brown v. Kendrick, 163 Ga. 149, 154, 135 S. E. 721.

General Rule Stated.—It has been held that declarations made before its execution, by parties who afterwards become legatees under the will, are not admissible against the validity of the will. Brown v. Kendrick, 163 Ga. 149, 154, 135 S. E. 721, citing 2 Schouler on Wills (6th ed), section 809; In re Ames, 51 Iowa, 596 (2 N. W. 408); Burton v. Scott, 3 Rand. 399, 407; Thompson v. Thompson, 13 Ohio St. 356, 363.

Executor Who Is Propounder and Legatee.—See Brown v. Kendrick, 163 Ga. 149, 154, 135 S. E. 721, which upholds the doctrine of the case under this catchline in the Georgia Code of 1926.

ARTICLE 3
Probate of Foreign Wills

§ 3873. (§ 3299.) What requisite if land devised.

Sections 3873-3880 Explained.—Under sections 3873-3880 a foreign will can be probated, and Georgia property willed thereunder can be administered, only by such resident executor as may be named therein, or, if none, by a resident administrator with the will annexed, appointed at the instance of any heir, legatee, distributee, devisee, or creditor of the testator. The purpose and effect of the act of 1894, now incorporated in these sections, is not only to require the domestic probate of foreign wills before Georgia property can be administered thereunder, but also to prohibit such probate and the administration of Georgia property willed thereunder by any person other than a resident executor or a resident administrator with the will annexed, selected and appointed as therein provided, to the exclusion of the executor therein named or any administrator with the will annexed appointed elsewhere. League v. Churchill, 36 Ga. App. 681, 137 S. E. 800.

ARTICLE 5
Of Devises and Legacies

§ 3896. (§ 3320.) Effect of assent.

Effect of Assent Where Debts Made Permanent to Will.—Where executors, directed to carry out business ventures of testator, incurred debts pursuant to will, they could not thereafter interfere with rights of creditors by assenting to devises or legacies. Holt v. Daniel Sons & Palmer Co., 8 Fed. (2d), 700.

§ 3900. (§ 3324.) Intention of testator.

I. IN GENERAL.

When May Have Effect as It Stands.—In the instant case the trial judge did not err in rejecting parol evidence tending to show that the testator instructed the scrivener to so draw the will as to give to his brother and sister an estate in remainder in the property real and personal given his wife for life or widowhood under his will, when the will, as it stands, may have effect. Hill v. Hill, 161 Ga. 356, 359, 130 S. E. 575.

§ 3906. (§ 3330.) Lapsed legacies.

"Execute" Synonymous with "Made."—The word "executed" in the phrase "when the will is executed," as used in the section is synonymous with the word "made." MacIntyre v. McLean, 162 Ga. 280, 133 S. E. 471.

§ 3910. (§ 3334.) Election.

Renouncing Inconsistent Rights.—For a case following the doctrine embodied in the note under this catchline in the Georgia Code of 1926, see Robinson v. Ramsey, 161 Ga. 1, 10, 129 S. E. 837.

§ 3913. (§ 3337.) Devise changed from real to personal property, and vice versa.

Proceeds of Realty Treated as Personalty.—On the theory of equitable conversion, the proceeds of real estate sold under a power of sale conferred by the will of a decedent are usually regarded as personal assets of the estate. Brown Guano Co. v. Bridges, 34 Ga. App. 652, 655, 130 S. E. 695, citing 11 R. C. L. 120.

ARTICLE 7
Of Nuncupative Wills

§ 3925. (§ 3349.) Nuncupative wills, when good.

Cited and partially stated in Felker v. Taylor, 162 Ga. 433, 134 S. E. 52.

§ 3926. (§ 3350.) When proved.

Partially Stated in Felker v. Taylor, 162 Ga. 433, 134 S. E. 52.

CHAPTER 3
Of Title by Descent and Administration

ARTICLE 1
Of Inheritable Property and the Relative Rights of the Heirs and Administrator

§ 3929. (§ 3353.) Descent to heirs.

Realty—Equitable Estate Therein.—When the father of the plaintiffs died intestate, holding possession of lands under bonds for title with a part of the purchase-money paid, he had a beneficial interest or equitable estate therein. Upon his death this interest or estate descended to his heirs at law. Stonecypher v. Coleman, 161 Ga. 403, 409, 131 S. E. 75.

§ 3931. (§ 3355.) Rules of inheritance.

Wife "Heir" of Husband.—The widow of a deceased person is not, strictly speaking, an heir at law of her husband. Haddock v. Callahan Grocery Co., 163 Ga. 204, 135 S. E. 747.

ARTICLE 2
Of Administration

SECTION 1
Different Kinds of Administrators and Rules for Granting Letters

§ 3943. (§ 3367.) Rules for granting letters.

Sister's Rights Prior to Nieces and Nephews.—Where a man died intestate leaving no wife nor any relatives except one sister and the children and grandchildren of four deceased sisters and one deceased brother, all said relatives being sui juris and qualified to administer on the estate, the person selected in writing by the sister of the intestate was entitled to letters of administration in preference to the person selected in writing by a majority of the children of the intestate's deceased sisters and brother, although these constituted a majority both numerically and in point of interest. Dawson v. Shave, 162 Ga. 126, 132 S. E. 912.

SECTION 3
The Appointment of Administrators, Their Bond and Removal

§ 3972. (§ 3396.) Bond of administrator.

Liability of Administrator and Sureties.—The condition requires the administrator to account for all the money and property belonging to the estate he administers and coming into his hands as such administrators, and to distribute such money and the proceeds of such property in accordance with law. The sureties on the bond of such an administrator are liable for any breach of the condition of the bond, including any failure of the administrator to discharge faithfully his duty in collecting and preserving and distributing the assets of the estate. Ellis v. Geer, 36 Ga. App. 519, 137 S. E. 290.

§ 3974. (§ 3398.) Suit on bonds.

Liability Joint and Several.—The obligation of an administrator and the sureties on his bond is joint and several. Ellis v. Geer, 36 Ga. App. 519, 137 S. E. 290.

Suits against Sureties Alone.—For a case following cases under this catchline in the Georgia Code of 1926, see American Surety Co. v. Macon Savings Bank, 162 Ga. 143, 147, 132 S. E. 636.

Compared with Section 3054.—In American Surety Co. v. Macon Savings Bank, 162 Ga. 143, 147, 132 S. E. 636, it was said to be manifest, by a comparison of the two sections [this section and section 3054] that while the language used in each is somewhat different, the purpose of the codifiers was the same.

SECTION 5
Of Managing the Estate and Paying the Debts

§ 4004. (§ 3428.) Compromises by administrator.

Provisions Must Be Followed.—An agreement by a guardian to compromise an indebtedness due to the ward is invalid in the absence of a compliance by the guardian with any of the provisions of this and the two following sections. Nix v. Monroe, 36 Ga. App. 356, 136 S. E. 806.

§ 4005. (§ 3429.) May make compromise.

Provisions Must Be Followed.—See same catchline under section 4004.

§ 4006. (§ 3430.) Trustee may compromise claims.

Requirements of Section Requisite to Compromise.—See note "Provisions Must Be Followed" under section 4004.

SECTION 7
Of Administrator's Sale

§ 4033. (§ 3457.) Property held adversely.

Exception to General Rule.—Where an administratrix and her attorney knew that certain land was being held adversely to the estate and that the heir in possession had actually filed his claim thereto on the very day of the sale and just before the sale, and they concealed this fact, then such possession held adversely to the estate by a third person and his filing of a claim would constitute such fraud as would be relievable in equity, and would prevent the application of the doctrine of caveat emptor. Dukes v. Bashlor, 162 Ga. 403, 407, 134 S. E. 98.

SECTION 8
Of Distribution, Advancements, and Year's Support

§ 4041. (§ 3465.) Year's support of family.

I. EDITOR'S NOTE AND GENERAL CONSIDERATIONS.

Effect of Prior Deed to Defraud Creditors.—A deed made to defraud creditors, though void as to them, is good between the grantor and the grantee, and the former after executing such deed has no title to the property thereby conveyed; and thereafter the same can not be set apart as a year's support for his widow. McDowell v. McMurria, 107 Ga. 812, 33 S. E. 709; Bank v. Powell, 163 Ga. 291, 135 S. E. 922.

VI. NATURE AND AMOUNT OF PROPERTY.

Kind of Property Assignable.—The year's support provided for under this section must be set apart "from the estate" of the deceased husband or father. Summerford v. Gilbert, 37 Ga. 59; Bank v. Powell, 163 Ga. 291, 135 S. E. 922.

§ 4042. (§ 3466.) Support continued, when.

Where Executor Has Made Advances.—Where a widow consumed property of the estate of her deceased husband as a support and accepted advances from the executor for that purpose, and where these transactions occurred prior to the grant of a first year's support and might have been pleaded in defense thereto, they can not be shown in defense to an application by her for a second year's support. Hill v. Hill, 36 Ga. App. 327, 136 S. E. 480, citing Fulghum v. Fulghum, 111 Ga. 635, 36 S. E. 602, 37 S. E. 774; Wood v. Brown, 121 Ga. 471, 49 S. E. 295.

Pending Litigation.—Where an estate being administered under a will is kept together for a longer period than twelve months by a suit of the executor for the construction of the will (Hill v. Hill, 161 Ga. 356, 130 S. E. 575), and not by any fault of the testator's widow, the widow, if there are no debts, will ordinarily be entitled to support from the estate for each year that it is thus kept together. Hill v. Hill, 36 Ga. App. 327, 136 S. E. 480.

§ 4052. (§ 3474.) Advancements.

Advancements Claimed Only in Cases of Intestacy.—In this State it is only in cases of intestacy that parties can claim advancements or be compelled to account for them. Robinson v. Ramsey, 161 Ga. 1, 4, 129 S. E. 837, citing Huggins v. Huggins, 71 Ga. 66.

Advancements Distinguished from Debts.—An advancement differs from a debt in that there is no enforceable liability on the part of the child to repay during the lifetime of the donor or after his death, except in the way of suffering a deduction in his portion of the estate. Robinson v. Ramsey, 161 Ga. 1, 6, 129 S. E. 837.

Same—Example.—In a will the term used by the testator,

that each of certain children "owes the estate" a named sum of money, without any direction that this debt shall be treated as an advancement, fixes the status of the transaction as one of debts, and "debt" is not synonymous with "advancement." Robinson v. Ramsey, 161 Ga. 1, 129 S. E. 837.

SECTION 9

Of Commissions and Extra Compensation, and Expense of Giving Bond

§ 4067. (§ 3489.) Extra compensation.

Executor Must Show Nature of Services.—Where an executor claims compensation for extra services, the nature, character, extent, and value of such services must be satisfactorily proved by him; and in the absence of such showing, the refusal of the lower court to approve an exception to the auditor's finding of fact that the executor rendered no extra services will not be reversed where it appears that another finding of the auditor allows the executor compensation for all extra services so proved by the evidence. Clements v. Fletcher, 161 Ga. 21, 129 S. E. 846.

Order Presumably Valid.—The order of the ordinary, although not conclusive on the parties in interest, furnishes at least prima facie evidence that the executor was entitled to the amount. Clements v. Fletcher, 161 Ga. 21, 47, 129 S. E. 846.

§ 4069. (§ 3491.) Forfeiture of commissions.

In General.—It can not be said as a matter of law that an executor forfeits all compensation by reason of his neglect or misconduct in the administration of an estate. Under the evidence and facts of the case, it was a question of fact to be determined in the first instance by the auditor, and in the second instance upon exception to such finding by the judge. Clements v. Fletcher, 161 Ga. 21, 51, 129 S. E. 846, citing Adair v. St. Amand, 136 Ga. 1, 70 S. E. 578.

Relief from Forfeit—When Will Provides Compensation.—Where the will provided for reasonable compensation to the executor instead of commissions, the order of the ordinary would relieve the executor from forfeiture of such compensation by reason of such failure to make returns. Clements v. Fletcher, 161 Ga. 21, 129 S. E. 846.

CHAPTER 4

Of Title by Contract

ARTICLE 1

Of Private Sales

§ 4106. (§ 3526.) Essentials of a sale.

Consent of Parties—Double Agency.—In a suit in trover, it indisputably appearing that when the property sued for was turned over by the agent of the plaintiff to himself as the agent of the defendant it was without the knowledge or consent of either principal, and with no further purpose or intent than that the principals might thereafter agree upon a sale and the terms of a sale as between themselves, the transaction did not meet the requirements of a sale. Willingham Stone Co. v. Whitestone Marble Co., 36 Ga. App. 230, 136 S. E. 180.

Completed Sale.—See Hatchett v. State, 34 Ga. App. 134, 128 S. E. 687, affirming the second paragraph under this catchline in the Georgia Code of 1926.

§ 4113. (§ 3533.) What is fraud.

Misrepresentation.—In the forum of conscience a misrepresentation of the first kind mentioned in this section is of deeper dye than one of the latter kind; but in the forum of law both constitute fraud, the former positive fraud, and the latter legal fraud. Gibson v. Alford, 161 Ga. 672, 683, 132 S. E. 442.

§ 4117. (§ 3537.) Possibility can not be sold.

Futures.—See catchline "Cotton Futures" under section 4256.

§ 4119. (§ 3539.) Agent in possession and with apparent right to sell.

Illustrations.—See Pilcher v. Enterprise Mfg. Co., 36 Ga. App. 760, 138 S. E. 272, holding substantially the same as the second paragraph under this catchline in the Georgia Code of 1926.

§ 4120. (§ 3540.) Purchaser without notice, protected.

Purchaser from Fraudulent Grantee.—Where property was conveyed to defraud creditors and the grantee sold to a bona fide purchaser, the latter is protected under this section and section 4535 although the grantee is not a "vendee" as the word is used in this section. Bank v. Wheeler, 162 Ga. 635, 134 S. E. 753.

Quoted in Pilcher v. Enterprise Mfg. Co., 36 Ga. App. 760, 138 S. E. 272.

§ 4122. (§ 3542.) Deficiency in sale of lands.

III. SALE BY TRACT OR ENTIRE BODY.

Number of Acres Descriptive Merely.—See Holliday v. Ashford, 163 Ga. 505, 136 S. E. 524, holding substantially the same as the paragraph under this catchline in the Georgia Code of 1926.

§ 4124. (§ 3544.) Purchaser losing land, rights of.

Quoted in Holliday v. Ashford, 163 Ga. 505, 136 S. E. 524.

§ 4125. (§ 3545.) Delivery of goods essential.

III. CONSTRUCTIVE DELIVERY.

B. Delivery of Bill of Lading and Warehouse Receipts.

Warehouse Receipts.—See Continental Trust Co. v. Bank, 162 Ga. 758, 134 S. E. 775, quoting the second paragraph under this catchline in the Georgia Code of 1926.

§ 4130. (§ 3550.) Purchase-price, when due.

Cash Sale Presumed.—See Freeman v. Stedham, 34 Ga. App. 143, 128 S. E. 702, affirming the first sentence in this paragraph under the same catchline in the Georgia Code of 1926.

§ 4131. (§ 3551.) Remedy of seller on default of buyer.

I. GENERAL CONSIDERATION.

Action on Open Account.—A suit "on open account" can not by amendment be changed into a suit under this section. Butler v. Crown Cork, etc., Co., 34 Ga. App. 28, 128 S. E. 15.

Objection as to Time of Shipment.—In a suit brought by the seller after he has sold the goods for the buyer under this section the buyer will not be heard then to raise for the first time the issue that the shipment was not made in strict compliance with the contract as to time. Cobb Lumber Co. v. Sunny South Grain Co., 36 Ga. App. 140, 135 S. E. 759.

IV. STORING GOODS FOR VENDEE.

Waiver.—Where a purchaser notifies the seller to cancel the order, but the seller, refusing to accept such tender of breach, thereafter delivers the goods to a carrier, and the purchaser, after their arrival, refuses acceptance, and the seller proceeds to store them for the purchaser and brings suit on the contract for the purchase price, such a mere ineffective tender of delivery on the part of the seller would not amount to a waiver on his part of his right to such a procedure under this section, but he is still entitled to sue not on open account for goods sold and delivered, but upon the contract for the purchase price of the goods thus retained by the purchaser. Edison v. Plant Bros. & Co., 35 Ga. App. 683, 134 S. E. 627.

§ 4135. (§ 3555.) Implied warranty.

I. GENERAL CONSIDERATION AND WARRANTY OF TITLE.

Stipulation against Parol Alteration.—Because a written contract of sale stipulates that it covers all the agreements between the purchaser and seller, and that it can not be altered or modified in any manner except by agreement in writing of its officers, such stipulation does not prevent the purchaser from setting up the implied warranty of the law. Colt Co. v. Bridges, 162 Ga. 154, 132 S. E. 889.

III. EXPRESS WARRANTY AS EFFECTING IMPLIED WARRANTY.

Express Warranty Excludes Implied One—Scope of Express Warranty Important.—An express warranty may or may not exclude the implied warranty which the law attaches to all contracts of sale, the exclusion of this implied warranty being dependent upon the scope and terms of the express warranty. Colt Co. v. Bridges, 162 Ga. 154, 132 S. E. 889.

Exclusion Not in Every Feature of Contract.—See Colt

Co. v. Bridges, 162 Ga. 154, 132 S. E. 889, affirming the holding of the first paragraph of this section in the Georgia Code of 1926.

§ 4136. (§ 3556.) Effect of breach.

I. GENERAL CONSIDERATIONS.

Partial Failure of Consideration.—An action for damages for a breach of the implied warranty under subsection 2, section 4135 lies where there is a partial failure of consideration. Boone v. Lewis, 35 Ga. App. 478, 133 S. E. 653.

III. DAMAGES.

Measure of Damages.—The measure of damages is the difference between the price paid for the goods and their actual value as reduced by their defective condition. Boone v. Lewis, 35 Ga. App. 478, 133 S. E. 653.

See Colt Co. v. Mallory, 35 Ga. App. 289, 133 S. E. 55, affirming the holding of the first sentence in paragraph 4 under this catchline in the Georgia Code of 1926.

Same—Travelling Expenses.—Expense properly and reasonably incurred by the plaintiff in travelling in order to lessen the loss was a proper item of damages. Boone v. Lewis, 35 Ga. App. 478, 133 S. E. 653.

Same—Testimony of Vendee as to Value of Goods.—Where a defendant testified that goods were of no value to him in the condition they were in, this did not show that they were not of some value. Colt Co. v. Mallory, 35 Ga. App. 289, 291, 133 S. E. 55.

§ 4144. (§ 3564.) Essentials of gift.

Present Intention.—See Clark v. Bridges, 163 Ga. 542, 136 S. E. 444, quoting the sentence in the paragraph under the same catchline in the Georgia Code of 1926.

Transfer of Stock.—Under sections 4144-4147, transfer of stock to educational institution, without delivery of certificates, did not constitute a gift; transfer being only prima facie evidence of delivery. Southern Industrial Inst. v. Marsh, 15 Fed. (2d), 347.

§ 4147. (§ 3567.) Delivery.

Delivery between Members of Same Family.—The rule as to delivery is not so strictly applied to transactions between members of a family living in the same house, the law in such cases accepting as delivery acts which would not be so regarded if the transaction were between strangers living in different places. Harrell v. Nicholson, 119 Ga. 458, 460, 46 S. E. 623; Williams v. McElroy, 35 Ga. App. 420, 133 S. E. 297.

Deposit Subject to Checking Account.—A deposit made in a bank by a parent for the benefit of a child but subject to be drawn out at any time by either is not a gift under this and the other sections of this chapter. Clark v. Bridges, 163 Ga. 542, 136 S. E. 444.

Renunciation of Dominion—Question for Jury.—Where a husband as donor had parted absolutely with his title in favor of his wife, and the subject-matter of the gift (certain promissory notes) remained in a box to which the wife carried the key, but which contained articles belonging to each, and to which each continued to have the right of access, it became a question of fact for the jury to determine whether, under the circumstances, the donor had in fact relinquished control by the gift. Williams v. McElroy, 35 Ga. App. 420, 133 S. E. 297.

§ 4150. (§ 3570.) Presumption of gifts [of personal property].

Question for Jury.—Gross v. Higginbotham, 34 Ga. App. 549, 130 S. E. 371, affirms the holding under this catchline in the Georgia Code of 1926.

§ 4154. (§ 3574.) Donatio causa mortis.

Essentials.—Under this section, a gift causa mortis must be intended to be absolute only in the event of death. Southern Industrial Inst. v. Marsh, 15 Fed. (2d), 347.

CHAPTER 5

Of Title by Escheat and Forfeiture

§ 4155. (§ 3575.) Escheat.

Interest of State.—Where it is alleged that a deceased left no heirs and that the will made by him was false and fraudulent it was held that the State had sufficient interest in the property to file a petition demanding probate of the will and to caveat the probate since otherwise the State would have no way of declaring the property escheated. Oslin v. State, 161 Ga. 967, 132 S. E. 542. The dissenting opinion to this case by Russell, C. J., contains a discussion of the history of escheats.—Ed. Note.

CHAPTER 6

Of Title by Prescription

§ 4164. (§ 3584.) Adverse possession.

When Possession Adverse.—Where a vendor sold property to his wife and continued in possession without making her a deed thereto as he promised, he does not hold adversely to her. McArthur v. Ryals, 162 Ga. 413, 134 S. E. 76.

§ 4167. (§ 3587.) Possession extends to what bounds.

Meaning of "Contiguous."—The word "contiguous," as used in this section means to touch. Standard Dictionary; Webster's New International Dictionary. Accordingly, tracts of land which corner with one another are contiguous. Morris v. Gibson, 35 Ga. App. 689, 134 S. E. 796.

When One Deed Conveys Several Tracts.—The same deed may make independent conveyances of two or more separate and non-contiguous tracts of land. In such a case actual possession of one or more of such distinct entities as thus conveyed will not be extended by construction to include them all. But where the several tracts designated as being included by the terms of the conveyance actually adjoin or corner, so as to in fact constitute a single parcel, actual possession of a portion of the premises thus conveyed will be extended by construction to include the entire premises. Morris v. Gibson, 35 Ga. App. 689, 134 S. E. 796.

§ 4168. (§ 3588.) Possession for twenty years gives title.

Other Titles Extinguished.—"When an adverse possessor has held for the requisite period and his prescriptive title ripens, it extinguishes all other inconsistent titles and itself becomes the true title." Powell on Actions for Land, 459, sec. 349. Danielly v. Lowe, 161 Ga. 279, 130 S. E. 687.

§ 4175. (§ 3595.) Other exceptions.

Period of Non-Representation—No Deduction after Five Years.—"If the estate remains unrepresented for more than five years, no deduction at all from the adverse possessor's term will be allowed in favor of the personal representative." Powell's Actions for Land, 448. Danielly v. Lowe, 161 Ga. 279, 130 S. E. 687.

CHAPTER 7

Of Conveyances of Titles

ARTICLE 1

Generally

§ 4179. (§ 3599.) Requisites of a deed.

Consideration—Inquiry into—When Permissible.—See Sikes v. Sikes, 162 Ga. 302, 133 S. E. 239, affirming the holding in the first paragraph under this catchline in the Georgia Code of 1926.

§ 4182. (§ 3602.) Form of deed.

From sufficient in Crider v. Woodward, 162 Ga. 743, 135 S. E. 95.

§ 4187. (§ 3607.) Inconsistent clauses in deed.

In General.—The holding of Thompson v. Hill, 137 Ga. 308, 73 S. E. 640, as set out under this catchline in the Georgia Code of 1926, is affirmed in Clark v. Robinson, 162 Ga. 395, 134 S. E. 72, and Holder v. Jordan Realty Co., 163 Ga. 645, 136 S. E. 907.

§ 4190. (§ 3610.) Ancient deed.

Jury to Pass on Genuineness.—Where such a deed as described in this section is apparently genuine, has come from the proper custody, and is shown not to be inconsistent with possession, or if other corroboration appears, it should be admitted in evidence as prima facie established. But the jury has the right to finally pass on its genuineness, after hearing all the testimony pro and con. Gaskins v. Guthrie, 162 Ga. 103, 132 S. E. 764.

ARTICLE 3

Of Registration

§ 4198. (§ 3618.) Deeds, when and where recorded.

Applied in Dorsey v. Clower, 162 Ga. 299, 133 S. E. 249.

§ 4212. (§ 3630.) Copy when evidence.

Proof of Inquiry as to Loss of Original Deed Requisite.—In order to admit in evidence a certified copy of a registered deed, it must be shown that the original has been destroyed, or that it was lost or inaccessible, or that due diligence has been exercised in endeavoring by proper search and inquiry to ascertain in whose custody it is. Beall v. Francis, 163 Ga. 894, 896, 137 S. E. 251.

EIGHTH TITLE

Of Contracts

CHAPTER 1

General Principles

§ 4219. (§ 3634.) Specialty.

An insurance policy under seal constituted a "specialty," under sections 4219, 4359, such that there could be no recovery of money paid under it, on ground of false representations, as long as it remained uncanceled, and suit to cancel and to recover such payment was not barred on ground that complainant had adequate and complete remedy at law. Massachusetts Protective Ass'n v. Kittles, 2 Fed. (2d), 211.

§ 4222. (§ 3637.) Essentials of a contract.

Subject Matter Not in Existence.—If a contract amounts to an executory agreement for a bona fide sale of property of a character such as under the circumstances and under the law can be legally made the subject matter of a sale, and is not merely speculative in character, the parties may be bound, although the subject matter of the sale has no existence at the time the agreement is entered upon, and the seller expects to comply with his contract by subsequently acquiring the property thus agreed to be conveyed. Parks v. Washington, etc., R. Co., 35 Ga. App. 635, 133 S. E. 634. Citing Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 201, 37 S. E. 485, 81 Am. St. R. 28; Jones v. Fuller, 27 Ga. App. 84, 107 S. E. 544; Gilbert v. Copeland, 22 Ga. App. 753, 97 S. E. 251.

§ 4224. (§ 3639.) Conditions precedent and subsequent.

Example of Condition Subsequent.—Where the commissioners of a drainage district, enter into a collateral agreement with a contractor by the terms of which such commissioners agree "to be personally responsible for the money of the district until money can be secured by the issuing and sale of bonds of said district or until the district secures money from other sources," such collateral agreement is based upon a condition subsequent; and upon the fulfilment of the condition subsequent all liability under such agreement, ipso facto, ceases. Board v. Williams, 34 Ga. App. 731, 753, 131 S. E. 911.

§ 4230. (§ 3645.) Assent is essential to contract.

Mutual Assent—Bank and Depositor.—Where a bank delivered to a depositor, money, neither he nor the bank intending that it should be accepted by him in payment of the amount due to him, but with the expectation on the part of the bank that he should deliver the money to a third party, the depositor was not paid and the bank continued to be his debtor. Davis v. Farmers, etc., Bank, 36 Ga. App. 415, 419, 136 S. E. 816.

Unilateral Contracts.—An agreement by one of the parties to a controversy to accept a certain sum of money in settlement, without any promise by the other to pay it, does not render the latter liable therefor, although the agreement is in writing and signed by both of the parties. Manget v. Carlton, 34 Ga. App. 556, 130 S. E. 604.

Illustrations—Note Accompanying Application for Insurance Policy.—An application for a policy of insurance must be accepted within a reasonable time, or else it may be treated by the applicant as having been rejected. Home Ins. Co. v. Swann, 34 Ga. App. 19, 128 S. E. 70.

Same— Same—Reasonable Time.—While the period constituting such a reasonable time may, as a general rule, be a matter for determination by the jury under all the evidence, yet where the insurance company appears to have remained silent for approximately six months after receipt of the application, the presumption that it was rejected becomes conclusive. Home Ins. Co. v. Swan, 34 Ga. App. 19, 128 S. E. 70.

CHAPTER 3

Of the Consideration

§ 4241. (§ 3656.) Nudum pactum.

Time for Acceptance—Insurance Policy.—Where a person applies for a policy of insurance, accompany his application with a note to cover the premium, yet no policy of insurance was ever delivered or tendered to him by or for the company and was a nudum pactum, the note was without any consideration to support it. Home Ins. Co. v. Swann, 34 Ga. App. 19, 128 S. E. 70.

§ 4242. (§ 3657.) Valid consideration.

Concurrence of Benefit and Injury.—A consideration need not be a benefit accruing to the promisor. Porter Fertilizer Co. v. Brewer, 36 Ga. App. 329, 136 S. E. 477.

Past and Future Support.—A deed in consideration of one dollar actually paid, and of past support of the grantors by the grantees, and an agreement on the part of the grantees for the future support of the grantors, is not a voluntary conveyance, but one based upon a valuable consideration. Dorsey v. Clower, 162 Ga. 299, 131 S. E. 249.

§ 4243. (§ 3658.) Good and valuable considerations.

Caring for Parents.—See note Past and Future Support under section 4242.

§ 4250. (§ 3665.) Failure of consideration.

Notes—When Receipt of Consideration Acknowledged. — Where a promissory note has been made, acknowledging receipt of the consideration the receipt of part of consideration cannot be denied unless the admission and promise resulted from the mutual mistake of the parties or unless brought about by the mistake of one party knowingly taken advantage of by the other. Spells v. Swift & Co., 34 Ga. App. 620, 130 S. E. 593, citing Bonds v. Bonds, 102 Ga. 163, 29 S. E. 218 and Shelton & Co. v. Ellis, 70 Ga. 297, 301.

CHAPTER 4

Of Illegal and Void Contracts

§ 4251. (§ 3666). Void contracts.

Negotiable Instruments Given for Illegal Purpose. — See Editor's Note under section 4294(57).

§ 4252. (§ 3667.) Attorney's fees in notes.

II. GENERAL CONSIDERATIONS.

Need Not Be in Writing.—There is no law requiring that a promise to pay attorney's fees shall be in writing in order to be enforceable under this section. Forsyth Mercantile Co. v. Williams, 36 Ga. App. 130, 135 S. E. 755.

Waiver of Right.—See Bank v. Farmers State Bank, 35 Ga. App. 340, 133 S. E. 307, quoting the holding under this catchline in the Georgia Code of 1926.

Amount of Fees Collectible.—Where a note provided for 10 per cent attorney's fees the defendant can not lessen his liability by setting up the fact that plaintiff actually contracted with his attorney for a less sum. Bank v. Farmers State Bank, 35 Ga. App. 340, 133 S. E. 307.

III. NOTICE.

B. Sufficiency of Notice.

Notice naming a term preceding the term to which the suit is finally made returnable will not suffice. Russell v. Life Ins. Co., 134 Ga. App. 640, 130 S. E. 689.

IV. THE RETURN DAY, PAYMENT AND FILING OF SUIT.

Under the Federal equity rule 12, which requires the clerk of a federal court on the filing of a bill to issue subpoena, returnable 20 days from the issuing thereof, such day is "return day" of such bill, within the meaning of this section. Perry v. Hancock Mut. Life Ins. Co., 2 Fed. (2d), 250.

V. TRIAL.

B. Evidence.

Necessity of Proof—Implied Where Case in Default.—See State Mut. Life Ins. Co. v. Jacobs, 36 Ga. App. 731, 137 S. E. 905; affirming the holding given under this catchline in the Georgia Code of 1926.

§ 4256. (§ 3671.) Gaming contracts.

Cotton Futures.—A cotton futures contract, though it is condemned by section 4258, as unlawful, is not a gaming contract in the sense and meaning of this section, and the money paid upon such consideration may not be recovered back. Lasseter v. O'Neill, 162 Ga. 826, 135 S. E. 78. The history of these sections is thoroughly discussed in the opinion to this case. It should be noted that this decision practically overrules the cases cited under this catchline in the Georgia Code of 1926. The dissenting opinion of Hines, J., is based upon this and other considerations. Ed. Note.

§ 4257. Dealing in futures prohibited.

See note "Cotton Futures" under preceding section.

In General.—In general a state Legislature may prescribe rules of evidence and may create presumptions of the existence of a fact or fault from given facts, if there is really some connection between them in reason or experience, provided there is a fair opportunity for rebuttal allowed; but it may not enact that facts which it could not declare to be a crime, shall be sufficient, though only prima facie, evidence of one. This statute belongs to the former class, but even if such provisions are invalid they do not invalidate the body of the act. Fenner v. Boykin, 3 Fed. (2d), 674, affirmed in 271 U. S. 240, 46 S. Ct. 492.

Within Police Power of State.—A state statute prohibiting contracts for future delivery in all cases where margins are deposited is not unconstitutional as a deprivation of liberty or property without due process of law, but is within the police power of the state. Fenner v. Boykin, 3 Fed. (2d), 674, affirmed in 271 U. S. 240, 46 S. Ct. 492.

Intent to Gamble Required.—This and the following sections do not apply to contracts for future delivery, where there is an intent that the commodity bought shall actually be delivered, but only to transactions where it is the intent to gamble on the fluctuation of the market. Fenner v. Boykin, 3 Fed. (2d), 674, affirmed in 271 U. S. 240, 46 S. Ct. 492.

§ 4258. Contracts that are illegal.

As to cotton futures contracts, see note under section 4256.

In General.—This section does not apply to gaming as referred to in section 4256, and as defined in Dyer v. Benson, 69 Ga. 609. Nor does it authorize suits to recover money or property after it has been paid over in transactions such as are described in the act. Lasseter v. O'Neill, 162 Ga. 826, 833, 135 S. E. 78. Same case 36 Ga. App. 55, 135 S. E. 224.

In accordance with the general rule where persons are in pari delicto in the violation of a positive law, this section contemplates leaving the parties where it found them. Lasseter v. O'Neill, 162 Ga. 826, 833, 135 S. E. 78.

CHAPTER 5

Of Construction of Contracts

§ 4266. (§ 3673.) Intention of parties must be sought.

Deeds.—See Hill v. Smith, 163 Ga. 71, 135 S. E. 423, holding substantially the same as the cases in the first paragraph under this catchline in the Georgia Code of 1926.

Section applied in Lanier v. Register, 163 Ga. 236, 135 S. E. 719; Miller v. First Nat. Bank, 35 Ga. App. 334, 132 S. E. 783.

§ 4267. (§ 3674.) Intention of one party known to the other.

Section Applied in Slade v. Raines, 161 Ga. 859, 132 S. E. 58.

§ 4268. (§ 3675.) Rules of interpretation.

Where Contract Ambiguous. — Where the description of land applies equally to several tracts, a latent ambiguity results, which may be explained by showing which one of the several tracts was claimed by the grantor. 2 Delvin on Real Estate (3d ed.), 2026, section 1043. Petretes v. Atlanta Loan, etc., Co., 161 Ga. 468, 473, 131 S. E. 510.

Section Applied.—Rogers-Morgan Co. v. Webb, 34 Ga. App. 424, 130 S. E. 78.

Section Applied in Miller v. First Nat. Bank, 35 Ga. App. 334, 335, 132 S. E. 783.

Insurance Policy.—In accordance with this section, where an insurance policy required an inventory to be taken it was held that a list showing the cost price of the articles was sufficient and that the actual value was not required. Goldman v. Aetna Ins. Co., 162 Ga. 313, 133 S. E. 741.

Determined by Intention—Example.—In a contract where the date named was not fixed as a final and definite date for delivery, but the time of shipment could be accelerated or deferred at the will of the vendee, it could not reasonably be said that shipment on the particular date mentioned in the agreement was intended by the parties to be of the very essence of the contract. Cobb Lumber Co. v. Sunny South Grain Co., 36 Ga. App. 140, 135 S. E. 759.

Contract of Employment.—Where an agency was established in order that the agent or servant might take a car to a certain place for the purpose of sale, provided that if he failed to sell it, he would have it back that night before the employer's garage was closed, time was of the very essence of the conditional employment; and the servant's authority and the master's liability were limited accordingly. Palmer v. Heinzerling, 34 Ga. App. 544, 130 S. E. 537.

CHAPTER 6

Negotiable Instruments

ARTICLE 1

Of Negotiable Papers and How Transferred

§ 4276. (§ 3684.) Transfer of secured note carries security.

Applicability to Security Deed.—See First Nat. Bank v. Pounds, 163 Ga. 551, 136 S. E. 528, quoting the second paragraph under this catchline in the Georgia Code of 1926.

ARTICLE 3

Of the Rights of Holders

§ 4294(30). What constitutes negotiation.

Effect of Transfer for Affection upon Necessity for Indorsement.—See Moore v. Moore, 35 Ga. App. 39, 131 S. E. 922, quoting the holding under this catchline in the Georgia Code of 1926.

ARTICLE 4

Negotiable Instrument in General

SECTION 3

Negotiation

§ 4294(49). Transfer without indorsement; effect of.

Transfer for Love and Affection.—Neither under the N. I. L. nor under the law as it previously existed, does the legal title to a negotiable promissory note, payable to order, pass to a transferee for a consideration of love and affection only and not for value, except by indorsement upon the instrument itself or upon a paper attached to it. Such a transferee, therefore, acquires no legal title to the note by a separate transfer to him in writing executed by the payee but unattached to the note. Moore v. Moore, 35 Ga. App. 39, 131 S. E. 922.

§ 4294(57). Rights of holder in due course.

Editor's Note.—In Commercial Bank v. Cohen, 34 Ga. App. 756, 131 S. E. 117, the court held that "a check given for whisky, being for an illegal consideration is void and therefore not enforceable even by an innocent purchaser of the check." This decision was based upon section 4286, which has now been superseded by the provisions of the N. I. L. It seems probable that the cause of action in the case referred to arose prior to the adoption of the N. I. L. since by that law illegal consideration is not a valid defense against a holder in due course.

And also in Howard v. Caldwell, 35 Ga. App. 366, 133 S. E. 284, it is stated that under section 4286 the only de-

fenses permissible against a bona fide holder of a promissory note are non est factum, gambling or immoral or illegal consideration and fraud in the procurement. The court does not mention this section under which all but the first of these are no longer defenses against a holder in due course.

Defense of Non Est Factum by Partner.—As against a bona fide holder the defense of non est factum set up by a member of a partnership in a suit upon a note signed by the firm amounts only to a denial of the factum of the partnership's execution of the note and cannot concern itself with restrictions upon the authority of the other partner. See Cooke v. Faucett, 35 Ga. App. 209, 132 S. E. 268. This case was decided under section 4286 but it seems to apply equally to this section as the defense of non est factum is still available as against a holder in due course.

The holder of an instrument as collateral is a holder in due course only to the extent of the debt secured. Wyche v. Bank, 161 Ga. 329, 130 S. E. 566.

SECTION 5

Liabilities of Parties

§ 4294(65). Warranty where negotiation by delivery, etc.

Warehouse Receipt.—In the recent case of Continental Trust Co. v. Bank, 162 Ga. 758, 764, 134 S. E. 775, construing section 4277, it was held that the transferor of a cotton warehouse receipt impliedly warrants that the cotton represented by such receipt is in existence at the time the receipt is transferred.

SECTION 8

Discharge of Negotiable Instruments

§ 4294(120). When persons secondarily liable on; discharged.

Necessity for Consideration to Discharge. — See Gay v. Carpenter, 35 Ga. App. 768, 134 S. E. 803, affirming the holding stated under this catchline in the Georgia Code of 1926.

Retaking of Property by Seller.—A retaking of property by the seller, for the purpose of holding it until the purchaser, who is the maker of a note for it, has paid part of the purchase money, and a release of the property then to the purchaser, when such retaking in no wise increases the surety's risk, does not release the surety. Gay v. Carpenter, 35 Ga. App. 768, 134 S. E. 803.

ARTICLE 6

Promissory Notes and Checks

§ 4294(184). Promissory note defined.

Agreement to Pay in Specifics.—All agreements to pay in specifics are presumed to be made in favor of the debtor, and he has the option of paying the debt either in specifics or in money amounting to the value of the specifics. Mobley v. Tufts, 36 Ga. App. 764, 765, 138 S. E. 272.

CHAPTER 7

Of Defenses to Contracts

ARTICLE 1

Denial of the Contract

§ 4296. (§ 3702.) Effect of alteration.

Applied in Blaylock v. Walker County Bank, 36 Ga. App. 377, 136 S. E. 924.

§ 4299. (§ 3705.) Indorsement, etc., not to be proved.

Stated in Pope v. Woolford Realty Co., 35 Ga. App. 284, 134 S. E. 174.

ARTICLE 2

Denial of the Obligation of a Contract, Either Originally or by a Subsequent Act of the Opposite Party

§ 4301. (§ 3707.) Conditions.

Applied in Rogers v. Southern Fertilizer, etc., Co., 36 Ga. App. 229, 136 S. E. 106.

§ 4304. (§ 3710.) Rescission.

When Rescission Complete.—If, while an option to purchase rented premises was in force, it was, by mutual agreement between the parties, surrendered to the maker in full satisfaction and discharge of the several rent notes due him, the rent contract was effectually rescinded. Robinson v. Odom, 35 Ga. App. 262, 133 S. E. 53.

§ 4305. (§ 3711.) Rescission for fraud.

Opportunity of Party to Redress Wrong.—See Henderson v. Lott, 163 Ga. 326, 335, 136 S. E. 403, quoting the holding under this catchline in the Georgia Code of 1926.

Contract Not Void.—See Henderson v. Lott, 163 Ga. 326, 335, 136 S. E. 403, quoting the holding under this catchline in the Georgia Code of 1926.

Time of Restoration.—See Henderson v. Lott, 163 Ga. 326, 335, 136 S. E. 403; Gibson v. Alford, 161 Ga. 672, 132 S. E. 442, stating substantially the holding under this catchline in the Georgia Code of 1926.

Restitution—When Unnecessary.—Where an ex-husband fraudulently induced his ex-wife to accept a much less amount of alimony than she was entitled to under her judgments, it was not necessary to restore or offer to restore the amount of alimony which she received under the contract. Ellis v. Ellis, 161 Ga. 360, 365, 130 S. E. 681, citing Farnell v. Brady, 159 Ga. 209, 125 S. E. 57.

Effect of Recognition after Knowledge.—Where one is entitled to rescind a contract on ground of fraud or false representations, and who has full knowledge of the material circumstances of the case, freely and advisedly does anything which amounts to a recognition of the transaction, or acts in a manner inconsistent with a repudiation of the contract, such conduct amounts to acquiescence, and, though originally impeachable, the contract becomes unimpeachable in equity. Gibson v. Alford, 161 Ga. 672, 132 S. E. 142. See also Home Ins. Co. v. Swann, 34 Ga. App. 19, 26, 128 S. E. 70.

§ 4306. (§ 3712.) Without consent.

Effect of Recognition after Knowledge.—See same catchline under section 4305.

Stated in Home Ins. Co. v. Swann, 34 Ga. App. 19, 26, 128 S. E. 70.

ARTICLE 3

Of Payment, and Herein of Appropiration of Payments

§ 4314. (§ 3720.) Bank-bills, checks, and notes, payment in.

General Effect of Giving Check or Note—Acceptance of Offer.—The mailing of a check to the plaintiff on March 27, including rent through March 31, in compliance with the express offer contained in the bill for rent presented by the plaintiff on March 27, would not of itself amount to an acceptance of the offer by noon of March 30, as required by the terms of the offer. Williams-Thompson Co. v. Louisville, etc., R. Co., 35 Ga. App. 556, 558, 133 S. E. 633.

§ 4316. (§ 3722.) Appropriation of payments.

Direction by Wife of Debtor.—Directions as to the application of payments by the wife of the debtor, she not being the agent of the debtor, do not bind the creditor. Neal v. Harber, 35 Ga. App. 628, 134 S. E. 347.

§ 4317. (§ 3723). Voluntary payments.

Taxes—Recovery.—Where a corporation pays an alleged illegal occupation tax and it does not appear from the petition that there was a provision for any penalty by arrest, fine, or imprisonment, or by seizure of property, or by molestation of business, for failure to pay the license tax assessed the payment cannot be said to come under the exceptions in this section. Savannah v. Southern Stevedoring Co., 36 Ga. App. 526, 137 S. E. 123.

ARTICLE 4

Of Performance, and Herein of Tender

§ 4318. (§ 3724.) Performance of contracts.

Substantial Compliance.—Where an entire lighting plant, with the exception of a certain valve designated as "one iron, free gratis," was delivered within the time allowed under the contract and the seller notified the purchaser that such valve was not then in stock but would be subsequently forwarded, and "it was shipped later by express," the jury were authorized to find that the seller had substantially complied with his obligation to deliver the entire plant within a reasonable time. Morgan v. Colt Co., 34 Ga. App. 630, 130 S. E. 600.

§ 4322. (§ 3728.) Tender.

Incomplete Tender Not within Section.—See Jeanes v. Atlanta, etc., Nat. Bank, 34 Ga. App. 568, 570, 130 S. E. 353, holding the same as the second paragraph under this catchline in the Georgia Code of 1926.

ARTICLE 5

Accord and Satisfaction

§ 4326. (§ 3732.) What is accord and satisfaction.

Promise in Executory Agreement.—See Messenger Pub. Co. v. Overstreet, 36 Ga. App. 458, 137 S. E. 125, holding substantially the same as the first sentence under this catchline in the Georgia Code of 1926.

ARTICLE 6

Of Pendency of Another Action, and Former Recovery

§ 4335. (§ 3741.) Former judgment.

I. IN GENERAL.

Applied in Chastain v. Chastain, 163 Ga. 69, 135 S. E. 439.

II. PARTIES.

Third Parties Not Barred by Findings.—Since "in cases of attachment the claim may be interposed either before or after judgment" (§ 5120), where a claimant, in response to a levy of the execution in attachment, files his claim to property in the hands of a garnishee, he is not estopped by the previous judgment in favor of the plaintiff in attachment against the garnishee on the issue tried, on a traverse of his answer, to which such claimant was not a party nor is he bound merely by reason of the fact that during the trial of the traverse to the garnishee's answer, he was physically present at the trial, but took no part therein. Tarver v. Jones, 34 Ga. App. 716, 131 S. E. 102.

IV. JUDGMENT AS ESTOPPEL.

Estoppel Generally.—The doctrine of estoppel by judgment has reference to previous litigation between the same parties based upon a different cause of action, and there is such an estoppel only as to such matters as were necessarily or actually adjudicated in the former litigation. Farmer v. Baird, 35 Ga. App. 208, 132 S. E. 260.

Where Motion to Set Aside Overruled.—The previous judgment of the trial court overruling a motion to set aside amounts to an adjudication that the original judgment could not be set aside for any reason that was or which might have been assigned, and that judgment renders a subsequent motion in arrest subject to the application of the doctrine of res judicata. Farmer v. Baird, 35 Ga. App. 208, 209, 132 S. E. 260.

§ 4338. (§ 3744.) Effect of sustaining demurrer.

Applied in Cox v. Cox, 163 Ga. 93, 135 S. E. 504.

ARTICLE 7

Of Set-Off and Recoupment

§ 4339. (§ 3745.) Set-off.

See catchline "Plea of Usury" under section 4348.

Agreements in More Than One Contract.—Where a plaintiff agreed to sell and also to install a lighting plant, set-off for improper installation will be allowed whether the contract to install was part of the contract of sale or was a separate contract. Colt Co. v. Hiland, 35 Ga. App. 550, 134 S. E. 142.

§ 4344. (§ 3750.) Set-off against negotiable note.

Editor's Note.—In Fulton Nat. Bank v. Redmond, 161 Ga. 204, 130 S. E. 568, the holdings of Tinsley v. Beall, 2 Ga. 134 and Polk v. Stewart, 144 Ga. 335, 336, 87 S. E. 21, as set out under this catchline in the Georgia Code of 1926, are quoted and approved.

Essential Elements of Plea.—See Fulton Nat. Bank v. Redmond, 161 Ga. 204, 130 S. E. 568, quoting the paragraph under this catchline in the Georgia Code of 1926.

Applied in Pullen v. Powell, 35 Ga. App. 333, 132 S. E. 922.

§ 4348. (§ 3754.) Effect of dismissal after set-off filed.

Plea of Usury.—Where in an action on a note the defendant pleaded that because of usury the plaintiff was entitled to recover only the sum which the defendant had obtained, the plea went merely to the justice in part of the plaintiff's demand, and was not a plea of set-off, within the meaning of this section. Pape v. Woolford Realty Co., 35 Ga. App. 284, 134 S. E. 174.

§ 4350. (§ 3756.) Recoupment.

Editor's Note—When Recoupment Allowed.—It is the recognized rule that, under a contractual relationship, the injured party may, where the rules of pleading permit, waive his rights under the contract, and recoup in tort, except where the breach complained of is simply the neglect of a duty expressly provided for by the contract itself. Porter v. Davey Tree-Expert Co., 34 Ga. App. 355, 359, 129 S. E. 557.

But a cross-action based on a tort can not be so amended as to base it on a contract. Tench v. Downey Hospital, 36 Ga. App. 20, 135 S. E. 106.

For recoupment to lie, the plaintiff should be liable to the defendant under the contract sued upon. Tench v. Downey Hospital, 36 Ga. App. 20, 135 S. E. 106.

Persons Who May Recoup Damages.—See Tennessee Chemical Co. v. George, 161 Ga. 563, 131 S. E. 493, holding substantially the same as the first two sentences under this catchline in the Georgia Code of 1926.

Burden of Proof.—See Porter v. Davey Tree-Expert Co., 34 Ga. App. 355, 356, 129 S. E. 557 holding the same as the paragraph under this catchline in the Georgia Code of 1926 and citing additional cases.

§ 4352. (§ 3758.) For what it lies.

Necessary Allegations.—A plea in the nature of a recoupment for alleged overpayments which nowhere alleges upon what terms or conditions, if any, the alleged overpayments were made, fails to set out any right in the defendant to recover against the plaintiff. Risener v. Kidd, 35 Ga. App. 38, 132 S. E. 112.

ARTICLE 8

Of Limitation of Actions on Contracts

SECTION 1

Periods of Limitations

§ 4362. (§ 3768.) Open accounts.

Instances Where Section Not Applied.—This section does not apply to the right of a road commissioner to collect salary that is due him. Sammons v. Glascock County, 161 Ga. 893, 131 S. E. 881.

Applied in Stanfield v. Hursey, 36 Ga. App. 394, 136 S. E. 826.

§ 4369. (§ 3775.) Limitations in equity.

Injunction against Paving Ordinance.—Where the owner of property stood by and allowed street improvements to be carried to completion, and received the benefits of the work and enjoyed them for several years, without taking any legal proceedings to prevent the expenditure of the money when the work was being carried on; he is estopped from enjoining a sale of his property to pay assessments. Raines v. Clay, 161 Ga. 574, 578, 131 S. E. 499.

SECTION 2
Exceptions and Disabilities

§ 4374. (§ 3779.) Persons excepted.

Applied in Stonecypher v. Coleman, 161 Ga. 403, 131 S. E. 75.

§ 4378. (§ 3783.) Absence from state of defendant.

The Removal of a Debtor.—In order for the removal of a debtor from this State to suspend the operation of the statute of limitations, it must be accompanied by an intention to change his legal residence or domicile. Stanfield v. Hursey, 36 Ga. App. 394, 136 S. E. 826.

Ownership of Property within State.—The fact that the defendant might have owned property within the State during the period of his nonresidence does not operate to prevent the tolling of the statute. Kimball v. Kimball, 35 Ga. App. 462, 133 S. E. 295.

CHAPTER 8
Of Breach and Damage

§ 4390. (§ 3794.) Liquidated damages.

In Absence of Agreement Fixing Damages.—Where no agreement fixing the amount of damages in case of the breach of a contract is embraced in the contract itself, the damages accruing to either party by reason of a breach are such as will compensate him for the injury sustained. Spalding Constr. Co. v. Simon, 36 Ga. App. 723, 725, 137 S. E. 901.

Applied in Colt Co. v. Hiland, 35 Ga. App. 550, 134 S. E. 142; Standard Motors Finance Co. v. O'Neal, 35 Ga. App. 727, 134 S. E. 843.

§ 4391. (§ 3795.) Penalties.

Cited in Standard Motors Finance Co. v. O'Neal, 35 Ga. App. 727, 134 S. E. 843.

§ 4393. (§ 3797.) Exemplary damages.

Strict Construction.—In Copeland v. Dunehoo, 36 Ga. App. 817, 821, 138 S. E. 267, it was said: "A strong word is 'never', yet we must construe this section in the light of all others relating to the same subject, and, on so construing it, we think that while the rule stated therein is a very strict and well-nigh universal one, it is still not a rule without any exception whatever. It seems that at least one exception is found in the provision for smart-money as contained in section 299."

§ 4394. (§ 3798.) Remote damages.

Applied in Bank v. Riehle, 36 Ga. App. 470, 137 S. E. 642; Courier-Herald Pub. Co. v. American Type Founders Co., 34 Ga. App. 473, 130 S. E. 80.

§ 4395. (§ 3799.) Damages contemplated by parties.

Applied in Colt Co. v. Hiland, 35 Ga. App. 550, 134 S. E. 142.

Stated in Neal v. Medlin, 36 Ga. App. 796, 797, 138 S. E. 254.

§ 4396. (§ 3800.) Interest.

Question of Interest within Discretion of Jury.—Whether interest from the time of the breach shall be added to the damages is within the discretion of the jury. Black v. Automatic Sprinkler Co., 35 Ga. App. 8, 131 S. E. 543.

§ 4398. (§ 3802.) Plaintiff bound to lessen damage.

This section is applicable only where the damages can be lessened by reasonable efforts and expense. Reid v. Whisenant, 161 Ga. 503, 510, 131 S. E. 904.

Applied in Pullman Co. v. Strang, 35 Ga. App. 59, 80, 132 S. E. 399.

Quoted in part in Western, etc., Railroad v. Townsend, 35 Ga. App. 70, 135 S. E. 439.

§ 4400. (§ 3804.) On covenants of warranty to land.

Stated in Neal v. Medlin, 36 Ga. App. 796, 138 S. E. 254.

NINTH TITLE
Of Torts, or Injuries to Persons or Property

CHAPTER 1
General Principles, and Herein of Fraud and Deceit

§ 4403. (§ 3807.) What are torts.

Section Quoted and applied in Strachan Shipping Co. v. Hazlip-Hood Cotton Co., 35 Ga. App. 94, 132 S. E. 454.

§ 4407. (§ 3811.) Cases of election.

Stated in Tennessee Chemical Co. v. George, 161 Ga. 563, 564, 131 S. E. 493.

§ 4408. (§ 3812.) Privity.

Applied in Strachan Shipping Co. v. Hazlip-Hood Cotton Co., 35 Ga. App. 94, 98, 132 S. E. 454.

§ 4410. (§ 3814.) Deceit.

Actionable Misrepresentation—When Vendee Need Only Believe.—Where the basis upon which the contract was entered upon lies in the existence or nonexistence of certain material facts, the verity of which needs must be ascertained from the statement of one acquainted with such facts, each of the contracting parties has a right to rely upon the truth of the other's statements with reference thereto, when such statements relate to matters apparently within the knowledge of the party asserting them; and to do this without checking up the statements with the declarations of other and different persons, in order, by such an investigation, to test their probable truth. Deibert v. McWhorter, 34 Ga. App. 803, 804, 132 S. E. 110.

Mere Concealment Provision Charged.—Where the plaintiff is proceeding ex delicto for deceit, it is not cause for a new trial to the defendant that the judge in his charge to the jury, which included this section, gave that part of the section dealing with "mere concealment." Deibert v. McWhorter, 34 Ga. App. 803, 132 S. E. 110.

§ 4413. (§ 3817.) By wife, servant, etc.

Purely Personal Quarrels.—Where it appeared that the real purpose of the person assaulted in approaching the agent of a railroad company at his place of business was solely to renew a mere personal quarrel between the plaintiff and the agent, the plaintiff bring under notice that the agent was acting according to his instructions, the railroad company had no concern in what passed between them, and the trial judge did not err in granting a nonsuit. Dugger v. Central, etc., R. Co., 36 Ga. App. 782, 783, 138 S. E. 266. But see the dissenting opinion of Mr. Justice Hines in Holliday v. Merchants, etc., Transp. Co., 161 Ga. 949, 964, 132 S. E. 210.

Application of Section to Railway Cases.—While this code section has been applied in numerous railway cases, it appears that the rule of liability on the part of railway companies is not wholly fixed and determined by the provision of law quoted, but is enlarged or modified by the provisions of section 2780. Moore v. DeKalb Supply Co., 34 Ga. App. 375, 377, 129 S. E. 899.

Cited in Fisher v. Georgia Northern R. Co., 35 Ga. App. 733, 134 S. E. 827.

§ 4414. (§ 3818.) By employee.

In General.—Where one "contracts with an individual exercising an independent employment, for him to do a work not in itself unlawful or attended with danger to others, such work to be done according to the contractor's own methods and not subject to the employer's control or orders except as to results to be obtained, the employer is not liable for the wrongful or negligent acts of such independent contractor or his servants." Zurich General Acci., etc., Ins. Co. v. Lee, 36 Ga. App. 248, 136 S. E. 173, quoting from Quinan v. Standard Fuel Supply Co., 25 Ga. App. 47, 102 S. E. 543.

Same—Test for Determining Relationship.—Under the section and the decisions relating thereto, the test to be applied, in determining the relationship of the parties under a contract, lies in whether it gives, or the employer assumes, the right to control the time and manner of executing the work, as distinguished from the right merely to require results in conformity to the contract. Zurich General Acci., etc., Ins. Co. v. Lee, 36 Ga. App. 248, 136 S. E. 173, citing 39 C. J. p. 1322, section 1525; 42 A. L. R. 616, III a.

§ 4419. (§ 3823.) Frauds by acts or silence.

Applied in May v. Yearty, 34 Ga. App. 29, 128 S. E. 67.

§ 4420. (§ 3824.) Owner bound to keep premises safe, when.

Editor's Note.—It would seem that the degree of diligence required, under the section, in keeping the premises safe, does not consist in either slight diligence or of extraordinary diligence, but rather consists of ordinary care, such as a prudent householder might reasonably be expected to exercise. See Cuthbert v. Schofield, 35 Ga. App. 443, 133 S. E. 303. This rule is not in conflict with those cases, of which the case of Fulton Ice, etc., Co. v. Pece, 29 Ga. App. 507, 116 S. E. 57, is typical, in which the owner or occupier of land is required, under this section, to exercise extraordinary diligence towards an invitee, in discovering and repairing defects in the premises entered upon. In the Pece case, supra, the object causing the injury was not alleged to have been "apparently sound and in safe condition," but was shown to be old and worn. In the Cultbert case the owner was without actual knowledge of the defect, and there was nothing to indicate the propriety or necessity of making an inspection. Ordinary diligence would certainly not require an inspection where there is no reason to think an inspection necessary. See 29 Corpus Juris 427(2). Besides the rule of inspection might be applied with a much greater degree of rigidity in cases like the Pece case, supra, relating to dangerous instrumentalities.

Erroneous Charge as to Duty to Invitee.—A charge to the jury to the effect that such a landowner is under the duty to see that the premises are "in such condition that the person invited may approach and remain thereon in safety," was error, in that the court, instead of charging, according to the true rule, that the duty of the landowner is to keep his premises safe, placed upon the landowner the heavier burden of seeing that the person on the premises remained there in safety. Southern R. Co. v. Bottoms, 35 Ga. App. 804, 134 S. E. 824.

Applied in Bussell v. Dannenberg Co., 34 Ga. App. 792, 132 S. E. 230; Hickman v. Toole, 35 Ga. App. 697, 134 S. E. 635.

CHAPTER 2

Of Injuries to the Person

ARTICLE 1

Physical Injuries

§ 4422. (§ 3826.) Physical injuries.

Charge When Suit Based upon Negligence Alone.—In a suit for personal injuries based upon negligence alone, it is inapt to give in charge this section. Georgia R. etc., Co. v. Bryans, 35 Ga. App. 713, 134 S. E. 787; Hirsch v. Plowden, 35 Ga. App. 763, 134 S. E. 833.

§ 4424. (§ 3828.) Recovery for homicide, when.

Recovery for Death of Child—Dependency of Mother. — In order for a mother to recover under the provisions of this section for the homicide of her child, it must appear not only that the child contributed substantially or materially to her support, but also that she was dependent upon it to an appreciable or material degree therefor. Owens v. Anchor Duck Mills, 34 Ga. App. 315, 129 S. E. 301. When mother was inmate of Georgia State Sanitarium, as an insane person long prior to, and at the time of homicide, she was not dependent upon the said child. Id.

Same—Measure of Damages.—Where the defendant is liable and there is no reason to reduce the damages, the plaintiff is entitled to recover the value of the decedent's life. Western, etc., Railroad v. Reed, 35 Ga. App. 538, 546, 134 S. E. 134.

1924 Amendment—Constitutionality. — The amendment of 1924 adding the words "minor or sui juris" after the words "child or children" is constitutional. Peeler v. Central, etc., R. Co., 163 Ga. 784, 137 S. E. 24.

Same—Purpose.—It was the purpose of the General Assembly in the passage of this act to exclude dependency as a prerequisite essential to a child's right to recover for the homicide of a parent; and the provision of the act entitling a child, whether minor or sui juris, to recover damages for the homicide of its parent, properly construed, makes the question whether the child is dependent upon such parent in any respect wholly immaterial. Peeler v. Central, etc., R. Co., 163 Ga. 784, 137 S. E. 24.

Same—Action by Adult Child under Section Prior to Amendment.—An adult child cannot recover for the homicide of his widowed mother, where such homicide occurred prior to the amendment of August 18, 1924. Thompson v. Georgia R., etc Co., 163 Ga. 598, 136 S. E. 895. See also Peeler v. Central, etc., R. Co., 163 Ga. 784, 137 S. E. 24.

§ 4425. (§ 3829.) Definition of terms in preceding section.

Section controlling principle in Leslie v. Macon, 35 Ga. App. 484, 133 S. E. 638. See also fairly complete list of cases there cited as applying the section.

§ 4426. (§ 3830.) Diligence of plaintiff.

Charge of Section.—A charge embodying, substantially, the language of the section, was not erroneous as impressing the jury that the plaintiff was under a duty to avoid the consequences of the defendant's negligence, though such negligence was not known or apparent to her, or was reasonably to be apprehended by her, and that if she didn't avoid it she could not recover. Howard v. Georgia, Ry., etc., Co., 35 Ga. App. 273, 133 S. E. 57. In this connection, see also, Central, etc., Ry. Co. v. Barnett, 35 Ga. App. 528, 134 S. E. 126.

Same—When Judge Must Give.—Where the pleadings and the evidence make an issue as to the plaintiff's diligence and the defendant's negligence, it is error for the court to omit an instruction to the jury embodying the principle expressed in the code section, even in the absence of any request to do so. Georgia R., etc., Co. v. McElroy, 36 Ga. App. 143, 144, 136 S. E. 85.

Contributory Negligence.—Where by the exercise of ordinary care the deceased could have avoided the consequence to himself caused by the defendant's negligence, a nonsuit was properly ordered. Little v. Rome R., etc., Co., 35 Ga. App. 482, 483, 133 S. E. 643; as to the plaintiff's duty generally in this connection, see Atlantic Coast Line R. Co. v. Anderson, 35 Ga. App. 292, 133 S. E. 63.

Same — Instruction to Jury. — It is improper to instruct the jury that the plaintiff must have been free from negligence before it can recover. Lime-Cola Bottling Co. v. Atlanta, etc., R. Co., 34 Ga. App. 103, 128 S. E. 226.

Same—Same—Rule as to Contributory Negligence and Diminution of Damages Confused. — An instruction to the jury, in which the rule expressed in the section which precludes a recovery where the plaintiff has failed to exercise ordinary care, is confused with the rule as to comparative negligence and diminution or apportionment of damages, is erroneous. Brown v. Meikleham, 34 Ga. App. 207, 128 S. E. 918.

ARTICLE 2

Injuries to Reputation

§ 4429. (§ 3833.) Malice.

In General.—It is slanderous per se to falsely utter and publish a statement, with reference to a married woman, to the effect that she is the common wife of her husband and another man. Malice and damage will be inferred. Barker v. Green, 34 Ga. App. 574, 130 S. E. 599.

Words Spoken in Jest and Retraction as Defense.—Malice is an "aggravating circumstance." The existence of malice would not be conclusively rebutted by proof of a retraxit, accompanied by an explanation that the words were spoken merely in jest, and only for the purpose of "teasing" the person to whom they were addressed. Barker v. Green, 34 Ga. App. 574, 130 S. E. 599.

Erroneously Charged—Corrected in Time.—It was not cause for a new trial to the losing party that the presiding judge gave in charge to the jury all of the section, when immediately thereafter he expressly informed them that a part of the section was not applicable, and correctly instructed them as to which part was applicable. Barker v. Green, 34 Ga. App. 574, 130 S. E. 599.

§ 4433. (§ 3837.) Slander.

In General—Prima Facie Case.—Where the statements tended to show affliction with a contagious disease, and calculated to injure the plaintiff in her profession, and the evidence did not affirmatively show that the alleged slanderous statements were privileged; a prima facie case for the plaintiff was made out, and the court erred in granting a nonsuit. Brown v. McCann, 36 Ga. App. 812, 138 S. E. 247.

SECTION 2

Malicious Prosecution

§ 4440. (§ 3844.) Probable cause.

Cited in Norman v. Young, 35 Ga. App. 221, 132 S. E. 414.

§ 4446. (§ 3850.) When the right accrues.

Abandonment of Prosecution.—While the procuring from the committing court of an order discharging the defendant in a warrant amounts to a termination of the prosecution when no further action is taken, the mere allegation of such discharge, without at least showing in general terms that the prosecution has been terminated, does not meet the requirements of this section. Rogers Co. v. Murray, 35 Ga. App. 49, 50, 132 S. E. 139.

ARTICLE 3

Other Torts to the Person

SECTION 3

Nuisances and Other Injuries to Health

§ 4460. (§ 3864.) Sale of unwholesome provisions.

Pleadings.—For a case substantially following the case cited under this catchline in the Georgia Code of 1926, see Copeland v. Curtis, 36 Ga. App. 255, 136 S. E. 324.

Liability of Original Vendor.—The general rule is that where personal property sold by A to B is resold by B to C. there is no implied warranty. Young v. Certainteed Products Corp., 35 Ga. App. 419, 133 S. E. 279. Whether the rule is applicable under this section—Quaere.

CHAPTER 3

Of Injuries to Property

ARTICLE 1

To Real Estate

§ 4471. (§ 3875.) Right or possession.

Liability of Lessee to Subsequent Lessee.—Where the owner of certain realty leased the same to a tenant, and before the expiration of the term of the tenancy executed a lease of the same premises to a second lessee, the latter, upon the expiration of the time of the former tenancy, was vested with the right of possession of the property; and where the former tenant refused to surrender possession, the second tenant could maintain an action for damages against the former tenant for withholding the right of possession. Anderson v. Kokomo Rubber Co., 161 Ga. 842, 132 S. E. 76. The Supreme Court, in this case, reversed the Court of Appeals holding in the same case, Kokomo Rubber Co. v. Anderson, 33 Ga. App. 241, 125 S. E. 783. See under catchline "Lessee Not Liable to Subsequent Lessee," Georgia Code of 1926.

§ 4479. (§ 3883.) Slander of title.

When Right of Action Accrues.—In an action for false, slanderous, and malicious words impugning the title to the plaintiff's lands, the right of action accrues to the plaintiff upon the doing of the act complained of, just as in injuries to personal reputation. King v. Miller, 35 Ga. App. 427, 133 S. E. 302.

ARTICLE 3

Injuries to Personalty Generally

§ 4485. (§ 3888.) Trespass.

Trespass by Domestic Animals. — If domestic animals, such as oxen and horses, injure any one in person or property when they are rightfully in the place where they do the mischief, the owner of such animals is not liable for such injury unless he knows they are accustomed to do mischief; and such knowledge must be alleged and proved. But if they are wrongfully in the place where they do the mischief, the owner is liable, though he had no notice that they were accustomed to do so before. Wright v. Turner, 35 Ga. App. 241, 132 S. E. 650, citing Clark v. State, 35 Ga. App. 241, 132 S. E. 650; Cooley on Torts, 341, 342 (2d ed. 402); Reed v. Southern Exp. Co., 95 Ga. 108, 22 S. E. 133.

CHAPTER 4

Of Defenses

ARTICLE 1

Of Justification

§ 4489. (§ 3892.) Extenuation.

Jury to Consider Testimony.—When the defendant has introduced testimony tending to sustain a plea of justification, though it fails to make it out, the jury may take such testimony into consideration in mitigation of damages. Hutcheson v. Browning, 34 Ga. App. 276, 129 S. E. 125, citing Henderson v. Fox, 80 Ga. 479, 6 S. E. 164; Ransone v. Christian, 49 Ga. 491; Ivester v. Coe, 33 Ga. App. 620, 127 S. E. 790, 792; 5 Corpus Juris, 674 (section 112).

ARTICLE 2

Of Satisfaction, and Herein of Tender

§ 4493. (§ 3896.) Tender of damages.

Refers to Plea of Tender.—The right and privilege given to the defendant by the provisions of the section contemplates and has reference to a plea of tender filed in response to the plaintiff's suit, and not to a mere oral offer or proposal to settle the suit by a future delivery of the property involved. Downs Motor Co. v. Colbert, 34 Ga. App. 542, 130 S. E. 592.

§ 4494. (§ 3897.) Tender in trover.

Applied in Downs Motor Co. v. Colbert, 34 Ga. App. 542, 130 S. E. 592.

ARTICLE 3

Limitation of Actions

§ 4495. (§ 3898.) For damages to realty.

Quoted in King v. Miller, 35 Ga. App. 427, 133 S. E. 302.

§ 4497. (§ 3900.) To the person.

Applied in Mansor v. Wilcox, 35 Ga. App. 213, 132 S. E. 251.

CHAPTER 5

Of Damages

§ 4503. (§ 3906.) Aggravation.

Charge of Section in Slander Case.—In a case of slander where the words were spoken merely in jest, and only for the purpose of "teasing" the person to whom they were addressed,—where the evidence showed that the utterance was made and published as alleged, a charge to the jury in the language of this section was not error on the ground that there was no evidence of "aggravating circumstances." Barker v. Green, 34 Ga. App. 574, 130 S. E. 599.

Whether this section cannot be applicable at all in a slander case is not presented in and is not passed by Barker v. Green, 34 Ga. App. 574, 130 N. C. 599.

§ 4504. (§ 3907.) Vindictive damages.

See annotations to the preceding section.

Instruction as to Present Worth of Pain.—A jury in a personal injury suit, where damages for future pain and suffering are sued for, should not be instructed that the amount representing the monetary compensation for future pain and suffering should be reduced to its present worth. Louisville, etc., R. Co. v. Maffett, 36 Ga. App. 513, 137 S. E. 404.

It would be proper, however, in such a case to instruct the jury that in awarding damages for future pain and suffering they should give consideration to the fact that the plaintiff is receiving a present cash consideration for damage not yet sustained. Southern R. Co. v. Bottoms, 35 Ga. App. 804, 134 S. E. 824.

§ 4505. (§ 3908.) Necessary expenses.

Instruction as to Reasonable Expenses for Medical Attention.—An instruction to the jury that the plaintiff would be entitled to recover the reasonable expenses that were incurred for medical attention "on account of injuries" was

equivalent to an instruction that the plaintiff could recover the "necessary expenses consequent upon the injury," as provided in this section. Orange Crush Bottling Co. v. Smith, 35 Ga. App. 92, 132 S. E. 259.

§ 4509. (§ 3912.) Damages too remote, when.

Presence of Other Hypotheses as to Cause of Injury.—Where there were several reasonable hypotheses as to the cause of the injury with which the evidence was not less consistent than which the conclusion sought to be established, the evidence was insufficient to authorize a finding that the injury was the proximate result of the defendant's negligence. Pullman Co. v. Strang, 35 Ga. App. 59, 80, 132 S. E. 399.

§ 4510. (§ 3913.) Rule to ascertain.

A result intended by a wrongdoer cannot, under this and the following section, be too remote for recovery of damages. Richards v. International Agricultural Corp., 10 Fed. (2d), 218.

TENTH TITLE

Of Equity

CHAPTER 1

General Principles

§ 4518. (§ 3921.) Equity jurisdiction.

The Municipal Court of the City of Atlanta Has No Equity Jurisdiction.—See Ahlgren v. Walton, 34 Ga. App. 42, 128 S. E. 585.

§ 4521. (§ 3924.) Complaint must do equity.

Applicable Where Both Legal and Equitable Relief Sought.—The principle established by this section is as well applicable where one in an equity suit seeks both legal and equitable relief, as where he seeks a purely equitable right. Montgomery v. Atlanta, 162 Ga. 534, 550, 134 S. E. 152.

Favorite Maxim.—The equitable maxim which is embodied in this section is a favorite maxim in equity. Duke v. Ayers, 163 Ga. 444, 454, 136 S. E. 410.

§ 4522. (§ 3925.) Complete justice.

Effect of Dismissal of Petition upon Cross Bill.—The dismissal of the plaintiff's petition will not have the effect of dismissing a cross-bill of the defendant, although the relief prayed is not equitable in character and is cognizable in a court of law, in view of the uniform procedure act. Jackson v. Mathis, 35 Ga. App. 178, 132 S. E. 410.

Favorite Maxim.—The maxim embodied in this section is a favorite maxim of equity. Henderson v. Lott, 163 Ga. 326, 331, 136 S. E. 403.

§ 4528. (§ 3931.) Possession notice of title.

Reference for Review of Cases.—For an exhaustive review of cases decided upon the principle inculcated by this section, see McDonald v. Dabney, 161 Ga. 711, 132 S. E. 547.

Notice of Whose Rights.—Possession is not only notice of the rights of the possessor, but of those under whom he claims. Walker v. Neil, 117 Ga. 733, 745, 45 S. E. 387; Austin v. Southern Home Bldg., etc., Assn., 122 Ga. 439, 50 S. E. 382; McDonald v. Dabney, 161 Ga. 711, 724, 132 S. E. 547.

Exclusiveness of Occupancy.—The possession of land which will be notice of the occupant's title must have some element in it indicative that the occupancy is exclusive in its nature. McDonald v. Dabney, 161 Ga. 711, 132 S. E. 547.

Possession Open, Visible, etc.—In order for the possession to have the effect of notice it must be actual, open, visible, exclusive and unambiguous. McDonald v. Dabney, 161 Ga. 711, 132 S. E. 547.

§ 4529. (§ 3832.) Notice.

Applied in Waynesboro Planing Mill v. Augusta Veneer Co., 35 Ga. App. 686, 134 S. E. 790.

Notice Received in Representative Capacity.—Notice received in representative capacity affects act transacted in personal capacity. Puckett v. Jones, 36 Ga. App. 253, 136 S. E. 462.

§ 4530. (§ 3933.) Notice extends to facts discovered.

Description of Stock of Goods.—Under this section description of property in a chattel mortgage as "our stock of merchandise consisting of dry goods, shoes, clothing, groceries, and hardware," is sufficient where it is shown that the mortgagor was a well-known firm and had only one stock of goods, which was located in the town where the mortgage was executed. In re Coleman, 2 Fed. (2d), 254.

Applied in Waynesboro Planing Mill v. Augusta Veneer Co., 35 Ga. App. 686, 134 S. E. 790.

Charge of Section Upheld.—The charge of the court in substance as this section was upheld under the evidence and circumstances of the case. Darden v. Washington, 35 Ga. App. 777, 134 S. E. 813.

Cited in North Georgia Trust, etc., Co. v. Hulme, 35 Ga. App. 627, 134 S. E. 200.

§ 4531. (§ 3934.) Bona fide purchaser.

See annotations to § 3762.

Evidence as to Bona Fides Conflicting—Injunction Denied.—Injunction against exercising power of sale will be denied where there is conflict of evidence that the creditor had knowledge that the land was paid for by the debtor with trust fund. Johnson v. Southern States Phosphate, etc., Co., 163 Ga. 98, 135 S. E. 435.

Right of Bona Fide Purchaser Unqualified.—The purchaser is entitled to his bargain, if made in good faith, and can not be disturbed in his possession, no matter what equitable arrangement the holder of the secret equity proposes as affording protection to all the parties concerned, and a court of equity has no jurisdiction to interfere with such vested legal right and title. Johnson v. Southern States Phosphate, etc., Co., 163 Ga. 98, 105, 135 S. E. 435.

A bona fide mortgagee stands precisely in the attitude of a bona fide purchaser, and is entitled to the same protection. Johnson v. Southern States Phosphate, etc., Co., 163 Ga. 98, 105, 135 S. E. 435.

§ 4533. (§ 3936.) Lis pendens, notice by.

Bankruptcy against H., Notice to W's Mortgagee.—The pendency of bankruptcy proceedings against the husband is general notice to the mortgagee of the wife who claims title under the husband. Chatham Chemical Co. v. Vidalia Chemical Co., 163 Ga. 276, 278, 136 S. E. 62.

§ 4335. (§ 3938.) Purchaser without notice from one with notice, and vice versa.

Principle Applied.—See Bank v. Wheeler, 162 Ga. 635, 134 S. E. 753.

Applied to bona fide holder of note from a mala-fide grantee in a security deed. First Nat. Bank v. Pounds, 163 Ga. 551, 136 S. E. 528.

The reason is that otherwise a bona fide purchaser might be deprived of selling his property for full value. North Georgia Trust, etc., Co. v. Hulme, 35 Ga. App. 627, 134 S. E. 200.

§ 4537. (§ 3940.) Which of two innocent persons to bear loss.

Instance of Application.—Undisclosed principal subject to same defenses as are available against the agent. Truluck v. Carolina Portland Cement Co., 34 Ga. App. 501, 130 S. E. 356.

§ 4538. (§ 3941.) Common-law remedy.

Prayer for Discovery, etc., Immaterial—When.—Notwithstanding the prayer for "discovery," "accounting," and relief in equity, where the petition alleges no cause showing inadequacy at law, equity has no jurisdiction. Decatur County v. Praytor, etc., Co., 36 Ga. App. 611, 137 S. E. 918.

Partition Proceedings.—In proceedings for partition where no peculiar circumstances are shown for equitable jurisdiction, equity will not interfere; the remedy prescribed at law in § 5355 being sufficient for partition purposes. Saffold v. Anderson, 162 Ga. 408, 410, 134 S. E. 81.

Cancelling Policy after Loss on Ground of Fraud.—The question whether equity will cancel a policy and enjoin proceedings at law thereon, on the ground of fraud, that defense being available at law, was raised but not decided in Davis v. Metropolitan Life Ins. Co., 161 Ga. 568, 573, 131 S. E. 490.

§ 4560. (§ 3963.) Application and order.

Effect of Failure to Bring Suit against All Parties Named.—Where an application is made naming several parties as possible defendants, it is not necessary that a suit be instituted against all persons named in order to use the testimony against one of them. Hardeman v. Ellis, 162 Ga. 664, 135 S. E. 195.

CHAPTER 3

Of Perpetuation of Testimony

ARTICLE 4

Of Accident and Mistake

§ 4567. (§ 3907.) Error in form.

Relief Notwithstanding Set off at Law.—The equitable relief prescribed by this section will be given notwithstanding the existence of a defense by way of set off in favor of the defendant which he might be availed of at law. Gibson v. Alford, 161 Ga. 672, 682, 132 S. E. 442.

Mistake on One Side, Fraud on the Other.—In addition to reforming a contract when, from mutual mistake or mistake common to both parties, an instrument does not express the true agreement of the parties, a court of equity will also reform an instrument where there is ignorance or mistake on one side, and fraud or inequitable conduct on the other. Gibson v. Alford, 161 Ga. 672, 682, 132 S. E. 442.

Correcting Misdescription to Conform to Agreement.—Where it is made to appear that an agreement was made with reference to a certain designated piece of land, reformation of the contract made to evidence the agreement will be decreed if the misdescription in the contract or deed includes more land than ought to be included, or contains less than the parties agreed upon. Gibson v. Alford, 161 Ga. 672, 682, 132 S. E. 442.

§ 4568. (§ 3071). Rule of construction as to conditions.

Cited in Grantham v. Royal Ins. Co., 34 Ga. App. 415, 130 S. E. 589.

§ 4580. (§ 3983.) Mistake of fact.

Laches Repelled by Other Circumstances.—While the suit was brought many years after the making of the deed, the original purchaser, and the other two parties plaintiff had been in continual possession of the land, and the plaintiffs were not aware of the mistake in the deed until a short time before the suit was brought. This fact, and where there had been no assertion of a claim adverse to the rights of the plaintiffs, as set up in the petition, and no fact or circumstance to put plaintiffs on notice of such claim, and the further fact that no rights of third parties had intervened, warrants the finding that the plaintiffs were not barred by laches. Sweetman v. Dailey, 162 Ga. 295, 133 S. E. 257.

CHAPTER 5

Of Account and Set-Off

§ 4586. (§ 3989.) Account.

Accountng between Parties.—A court of equity has jurisdiction in all cases of an accounting and settlement between partners. Smith v. Hancock, 163 Ga. 222, 229, 136 S. E. 52.

§ 4587. (§ 3990.) Mingling of goods.

Applied against a sheriff as to fund procured from execution sale. Finance Co. v. Lowry, 36 Ga. App. 337, 136 S. E. 475.

CHAPTER 6

Of Administration of Assets

§ 4596. (§ 3999.) Interfering with administration.

Cited in Nash v. Cowart, 162 Ga. 236, 133 S. E. 263.

§ 4597. (§ 4000.) Petitions for direction.

Only Representative Can Ask Relief.—Under this section only the representative of the estate may ask for the direction of a court. Palmer v. Neely, 162 Ga. 767, 135 S. E. 90.

Cash Surrender Value of Policy.—The cash surrender and cash loan value of a policy of life insurance accruing at the end of a specified tontine period is not subject to garnishment by creditors of the insured; nor will such value be made available to the judgment creditor of the insured by a court of equity in proceedings instituted for the purpose of obtaining equitable relief analogous to a process of garnishment at law. Farmers, etc., Bank v. National Life Ins. Co., 161 Ga. 793, 131 S. E. 902.

Cited in Cooper v. Reeves, 161 Ga. 232, 131 S. E. 63.

CHAPTER 8

Of Election

§ 4609. (§ 4012.) Election.

Cited in Hardeman v. Ellis, 162 Ga. 664, 135 S. E. 195, which case was distinguished from Lamar v. McLaren, 107 Ga. 591, 34 S. E. 116 decided under this section.

§ 4610. (§ 4013.) By a legatee.

Cited in Robinson v. Ramsey, 161 Ga. 1, 10, 129 S. E. 837.

CHAPTER 9

Of Execution of Powers

§ 4620. (§ 4023.) Power of sale in deeds of trust, etc.

Sale of Part of Land Not Authorized.—The holder of a security deed, which conveys a single tract of land, can not under a power of sale contained in said deed which authorizes such holder to sell the same upon default of the grantor in paying the debt secured thereby, sell a part of said tract, but must sell the whole. Doyle v. Moultrie Bkg. Co., 163 Ga. 140, 142, 135 S. E. 501.

CHAPTER 10

Of Fraud

§ 4623. (§ 4026.) Misrepresentation.

Applied in Nix v. Citizens Bank, 35 Ga. App. 546, 130 S. E. 597.

§ 4626. (§ 4029). Slight evidence sometimes sufficient.

Cited in Eberhardt v. Bennett, 163 Ga. 796, 803, 137 S. E. 64.

CHAPTER 11

Of Specific Performance

§ 4634. (§ 4037.) Parol contract for land.

Parol Evidence Is Admissible.—In an action for specific performance of a contract, not in writing, for the exchange of lands, parol evidence is necessarily admissible for the purpose of proving such contract. Hattaway v. Dickens, 163 Ga. 755, 137 S. E. 57.

Payment of Full Purchase Price—Erroneous Instruction.—In a dispute between two claimants as to the ownership of land, where it appeared that one of them bought the land under a parol contract and paid the full purchase price without receiving a deed, an instruction to the jury that "the only question to be considered by them is who has the superior title, the legal written title, to the land in question," is erroneous as excluding from the jury the right of the claimant under this section. Franklin v. Womack, 162 Ga. 715, 134 S. E. 758.

§ 4637. (§ 4040.) Inadequacy of price.

Applied in Chan v. Judge, 36 Ga. App. 13, 134 S. E. 925.

THE CODE OF PRACTICE

FIRST TITLE

Courts of Original Jurisdiction, Their Officers, Organizations, and Practice

CHAPTER 1

General Provisions

§ 4642. (§ 4045.) When judicial officer is disqualified.

Grounds Enumerated Exhaustive. — The statutory grounds of the disqualification of a judge are set forth in this section, and are exhaustive of the subject. It follows that basis or prejudice on the part of a judge is no ground for his disqualification. Hendricks v. State, 34 Ga. App. 508, 130 S. E. 539.

Former Counsel.—The rule as to disqualification when the judge has served as counsel in the case, applied in Faulkner v. Walker, 36 Ga. App. 636, 137 S. E. 909.

Disqualification to Forfeit Bond.—A presiding judge who is disqualified to try a criminal case is also disqualified to forfeit a bond in such case, or to grant a rule nisi on the forfeiture. Faulkner v. Walker, 36 Ga. App. 636, 137 S. E. 909.

§ 4643. (§ 4046.) Powers of courts to punish for contempt.

Trial by Jury—Violation of Mandamus.—Every court has power to compel obedience to its judgments, orders, and processes; and in a proceeding for contempt growing out of the alleged violation by the defendant therein of a mandamus absolute, the judge can determine all questions of fact without the intervention of a jury, except in the cases provided for in this section. Gaston v. Shunk Plow Co., 161 Ga. 287, 130 S. E. 580.

Cited in Smith v. State, 36 Ga. App. 37, 39, 135 S. E. 102.

§ 4644. (§ 4047.) Powers of courts enumerated.

General Consideration—Interference with Receivers Possession.—One who dispossesses the receiver of property consigned to him by the court dispossesses the court, and of course becomes in contempt of court; and he may be punished for contempt, and the property may be restored. A contempt of court being complete by dispossessing the receiver, the fact that no injunctive order has been passed does not affect the case. Coker v. Norman, 162 Ga. 351, 133 S. E. 740.

Paragraph 4—Power to Secure Attendance of Witness.—Where it is necessary in order to secure the attendance of a witness at court to make him testify, the court has ample authority to secure his attendance by requiring him to give bail, or, in default thereof, to go to jail. Pullen v. Cleckler, 162 Ga. 111, 114, 132 S. E. 761.

Cited in Smith v. State, 36 Ga. App. 37, 39, 135 S. E. 102.

CHAPTER 2

Justices' Courts, Their Officers, and Practice

ARTICLE 5

Commencement of Suits, Services, etc.

§ 4715. (§ 4116.) Suits, how commenced.

Liberal Construction.—Niceties in pleading are not required in a justice's court. Accordingly, a liberal construction has been given to this section. If the defendant is informed of the nature of the plaintiff's demand against him, the requirement of this section is met. Ladd Lime, etc., Co. v. Case, 34 Ga. App. 190, 129 S. E. 6.

§ 4717. (§ 4118.) Summons, how served.

The statutory method of service is exclusive, and such a defendant can not be served by leaving a copy "at his office" unless his office is also his most notorious place of abode, or residence. Bennett v. Taylor, 36 Ga. App. 752, 754, 138 S. E. 273.

§ 4726. (§ 4127.) Defendant may plead as in superior court.

Cited in Owen v. Moseley, 161 Ga. 62, 71, 129 S. E. 787.

ARTICLE 9

Appeals and Juries

§ 4742. (§ 4142.) Appeals to the superior court.

Jurisdictional Amount as Affected by Counterclaim.—Although the plaintiff's claim be less than $50, where a counter-claim is filed for more than $50 but not exceeding the maximum jurisdictional amount of $100, the defendant may appeal to the superior court. Owens v. College Park Supply Co., 35 Ga. App. 618, 134 S. E. 179.

CHAPTER 3

Ordinaries

ARTICLE 1

Ordinaries and Their Courts

§ 4786. (§ 4228.) Eligibility and disability of ordinary.

Extent of Prohibition upon Acting as Guardian.—The code provisions which prohibit an ordinary from acting as guardian of a minor do not prevent an ordinary from recovering in behalf of a minor money derived from benefit insurance where the act of 1918 authorizes an ordinary to receive and collect such money. Foster v. Wood, 36 Ga. App. 734, 137 S. E. 847.

ARTICLE 4

Other Authority of Ordinary

§ 4804(1). Custody and distribution when no legal guardian.—The ordinaries of the several counties of this State be and they are hereby made and constituted the legal custodians and distributors of all moneys due and owing to any minor child or children, idiots, lunatics, insane persons, and persons non compos mentis, who have no legal and qualified guardian, to receive and collect all such moneys due or owing to such minor or minors, idiots, lunatics, insane persons, and persons non compos mentis, arising from such insurance policies, benefit societies, legacies, inheritances, or from any other source; provided, that the amount due such minor or minors, idiots, lunatics, insane persons, and persons non compos mentis from all sources does not exceed the amount of five hundred dollars, without any appointment or qualifying order, he is authorized to take charge of such money or funds for such minor or minors, idiots, lunatics, and insane persons and persons non compos mentis, by virtue of his office as ordinary in the county of the residence of such minor or minors, idiots, lunatics, insane persons, and persons non compos mentis, and the certificate of such ordinary, that no legally qualified guardian has been so appointed and that the estate of such minor or minors, idiots, lunatics, insane persons, and persons non compos mentis, from all sources, does not exceed the amount of five hundred dollars ($500.00), shall be conclusive, and shall be sufficient authority to justify any debtor or debtors in making payment of monies due as aforesaid, claims therefor having been made by such ordinary. Acts 1918, pp. 198, 199; 1927, p. 257.

Editor's Note.—The amendment of 1927 constituted the ordinaries custodian and distributor of moneys due and owing

to idiots, lunatics, insane persons and persons non compos mentis.

Collection of Benefit Insurance.—The code provisions which prohibit an ordinary from acting as guardian of a minor do not prevent an ordinary from recovering in behalf of a minor money derived from benefit insurance where this act authorizes an ordinary to receive and collect such money. Foster v. Wood, 36 Ga. App. 734, 137 S. E. 847.

§ 4804(2). Employment of counsel.—The ordinary of the county of the residence of such (minor or minors), idiots, lunatics, insane persons, and persons non compos mentis is hereby authorized and permitted, in his discretion, to employ counsel to bring suit to recover any amount due such minor or minors, idiots, lunatics, insane persons, and persons non compos mentis, in the name of such ordinary as guardian for such minor or minors, idiots, lunatics, insane persons and persons non compos mentis, in any court having jurisdiction thereof, and such ordinary shall have authority to pay such counsel so employed a reasonable fee for his services in such matters, which is necessary to enforce the right of such minor or minors, idiots, lunatics, insane persons, and persons non compos mentis, out of the funds so collected. Acts 1918, pp. 198, 199; 1927, p. 258.

Editor's Note.—The ordinary of the county of residence of "idiots, lunatics, insane persons and persons non-compos mentis" was brought within the operation of this section by the amendment of 1927. In amending the section the words "minor and minors," which appeared immediately before the above referred insertion, were inadvertantly, it is believed, left out. The preliminary statement of the amendatory act directs no such omission, and from a reading of the section as a whole it becomes evident that it was not the intention of the legislature to leave out those words. Hence they are inserted parenthetically at the place where they originally appeared.

§ 4804(4). Record open to inspection.—It shall be the duty of such ordinaries to keep a well-bound book properly indexed, in which a complete record shall be kept of all money received by him for such minor or minors, idiot, lunatic, insane persons, and persons non compos mentis; said record shall show from what source said funds were derived, and to show to whom and for what such money was paid, which book shall be open for inspection of the public at all times, as other records in his office. Acts 1918, pp. 198, 199; 1927, p. 257.

Editor's Note.—By the amendment of 1927, the ordinary is required to keep record of moneys received for idiots, lunatics, insane persons and persons non compos mentis.

§ 4804(6). Payment authorized.—The ordinary receiving such funds is hereby authorized and directed to pay out said funds so received by him, or whatever amount he may think necessary, for the support, education, and maintenance of such minor or minors, idiots, lunatics, and insane persons and persons non compos mentis, as he may think in his judgment proper and right, and when so expended shall be final, and no liability shall attach to such ordinary or his bondsmen by reason of such expenditures when properly done. Acts 1918, pp. 198, 199; 1927, p. 257.

Editor's Note.—The provision as to the payment for the support, education, etc., of idiots, lunatics, insane persons and persons non compos mentis, was introduced by the amendment of 1927.

§ 4804(7). Deposit of funds.—When any such funds shall come into the hands of the ordinary of any county, belonging to such minor or minors, idiots, lunatics, insane persons, and persons non compos mentis, and there shall be no cause or necessity arising for the payment out of said funds for support, education, and maintenance of such minor or minors, idiots, lunatics, insane persons, and persons non compos mentis, then in that event it shall be the duty of such ordinary to place said funds in some good and solvent bank, in the savings department of such bank at the then current rate of interest allowed on saving deposits, and when so deposited there shall be no further liability against such ordinary or his bondsmen when such deposit is made in good faith. Acts 1918, pp. 198, 199; 1927, p. 257.

Editor's Note.—The amendment of 1927 extended the operation of this section to funds of idiots, lunatics, insane persons and persons non compos mentis.

CHAPTER 6

The Superior Courts and Their Officers

ARTICLE 1

The Superior Court and Its Judges

§ 4839. (§ 4315.) Must hold courts as prescribed by law.

Reference. — As to terms in McDuffie, Bryan, Bacon, Dougherty, Echols, Forsyth, Jeff Davis, Jenkins, Lamar Building, Pulaski, Robin, Tift, Turner, see acts of 1927 pp. 175, et seq.

Effect of Sitting in Wrong County.—A charter, granted by a court sitting in a county other than the one prescribed by law, is void. Rogers v. Toccoa Power Co., 161 Ga. 524, 131 S. E. 517.

§ 4849. (§ 4320.) Jurisdiction of superior courts.

To Compel Attendance of Witness. — This section is not applicable to a situation where a witness having been subpoenaed to attend the superior court, fails to do so, and the court proceeds by attachment to compel his attendance and punish him by a fine not exceeding three hundred dollars; this being governed by section 5852. Pullen v. Cleckler, 162 Ga. 111, 132 S. E. 761.

§ 4850. (§ 4321.) Judges may grant writs of certiorari, etc.

Cross Reference.—As to the enforcement by the judge of delivery of property to receiver, see annotations to section 5475.

§ 4863. (§ 4334.) Judge expressing opinion on facts, error.

II. WHAT CONSTITUTES.

Contentions of the Parties.—Instructing the jury as to what the court understood to be the contentions of the parties, is not an expression of opinion. McArthur v. Ryals, 162 Ga. 413, 418, 134 S. E. 76.

Instruction as to Circumstantial Evidence, Held as Error as Expression of Opinion.—Cook v. State, 36 Ga. App. 582, 137 S. E. 640.

Assumption of Commission of Crime.—There being nothing in the evidence or in the defendant's statement to dispute the facts that the alleged crime was committed, and his defense resting solely upon the contention that he did not participate in the offense, the court, in charging the jury, did not violate the provisions of this section in assuming that a crime had been committed. Pruitt v. State, 36 Ga. App 736, 138 S. E. 251.

IV. ILLUSTRATIVE CASES.

"You Seem to Be Fishing Anyhow" Not Expressive of Opinion.—The use of the sentence by the court "well go ahead and use him (the witness); you seem to be fishing anyhow," was, under the circumstances of the case, held not to be an intimation of opinion by the judge. Richardson v. State, 161 Ga. 640, 131 S. E. 682.

§ 4864. Within what time judges shall decide motions.

Provision Directory.—The provision as to the duty of the judge to notify counsel of the overruling of a motion for a new trial, is directory only, and will not suffice, when considered in connection with section 6152, to extend the time prescribed therein for presenting bills of exception for approval. Burnett v. McDaniel & Co., 35 Ga. App. 367, 133 S. E. 268.

ARTICLE 2

Judicial Districts and Circuits

§ 4870. (§ 4339.) Thirty-three judicial circuits.—The entire state is divided into thirty-three judicial circuits, in reference to the jurisdiction and sessions of the superior court, as follows, to wit:

Augusta Circuit, composed of the counties of Burke, Columbia, and Richmond. Acts 1807, p. 38; 1927, p. 175.

Toombs Circuit, composed of the counties of Glascock, Lincoln, McDuffie, Taliaferro, Warren, and Wilkes. Acts 1910, p. 63; 1927, p. 175.

Editor's Note.—The county of McDuffie was added to Toombs Circuit by the amendment of 1927. The paragraphs here set out were the only ones affected. This act makes provisions so as not to affect the rights of solicitor general during the present time.

ARTICLE 3

Sessions and Adjournments of Superior Courts

§ 4877. (§ 4346.) Terms adjourned five days before next term.

Motion for New Trial Goes to Next Term.—The preceding term of the court stands adjourned by operation of law five days prior to the commencement of the succeeding term; and a motion for new trial made in one term automatically goes over to the next regular term, and the judge is without jurisdiction to dismiss it in vacation. Marshall v. State, 34 Ga. App. 434, 129 S. E. 665.

ARTICLE 4

Clerks of Superior Courts

§ 4897. (§ 4366.) May be removed.

Pleading—Particularity of Charges.—Where the petition alleges that the acts of misconduct which are grounds for removal are illustrated in detail by a certain auditor's report on file in the office of the clerk of the superior court (who is the defendant), and which is referred to in the petition as an exhibit, the charges are alleged with a degree of particularity sufficient to put the defendant on notice. Wallace v. State, 34 Ga. App. 281, 129 S. E. 299.

Part of Default in Other Capacity than Clerk of Superior Court.—Although it may appear from the petition and exhibits that a certain part of the money collected was collected by the clerk in his capacity of clerk of the city court, and that certain of the records alleged to have been improperly kept were improperly kept by him as clerk of the city court, the petition sets out sufficient grounds for his removal as clerk of the superior court. Wallace v. State, 34 Ga. App. 281, 129 S. E. 299.

But he can not, by reason of any misconduct on his part in the discharge of the duties devolving on him as ex-officio clerk of a city court, be removed from office by the judge of the superior court, as is provided in this section. Wallace v. State, 34 Ga. App. 281, 129 S. E. 299.

§ 4901(6). Endorsement of plat for laying out street or highway; report of city planning commission.—In any county having a population of 60,000 or more inhabitants by the last United States Census, it shall be unlawful to record or receive for record in the office of the clerk of the superior court any map or plat for the laying out of any street or highway unless it bears the endorsement thereon of the commissioners of roads and revenues, provided that if the land to be platted is located within a city having a city planning commission established by charter, or outside of such city within six (6) miles of the limits thereof, such endorsement shall be by the mayor and general council of such city. Before approving a plan or plat of such subdivision of land, the commissioners of roads and revenues or the mayor and general council, shall consider the location, widths and grades of the proposed streets or highways within or adjacent to such subdivision. Each such subdivision of land shall have adequate means of access to the lots therein from the public streets or highways and shall be so laid out as to provide for the continuation of existing streets and highways and for the proposed highway widenings deemed necessary in the public interest by such commissioners of roads and revenues or such mayor and general council and shall be so laid out as to permit of an appropriate subdivision of adjoining properties; provided that such commissioners or such mayor and general council may waive or modify any of the above conditions or requirements wherever owing to the peculiar shape or location of the land such condition or requirement cannot in the judgment of such commissioners or of such mayor and general council reasonably be demanded with due regard to the appropriate development of the land to be subdivided. Any such map must first be submitted to the city planning commission for consideration and report to the mayor and general council provided the property thus platted is located within such city or within six miles of the limits thereof. The foregoing provisions shall likewise apply when any person in said territory desires to construct sewers or disposal plants or similar construction for the disposal of sewerage. In such event the provisions of this section apply, so that the plans for the construction of said sewerage and disposal plants must be approved in the same manner as is provided for the approval of plats and the penalty provided in section 4901(7) shall apply to all improvements and any subdivisions wherein sewers or disposal plants as herein provided are constructed; the same penalty concerning same shall apply for failure to have the plans for the same approved before being installed as applies to selling land as herein provided with reference to recording plats. Acts 1921, pp. 216, 219; 1923, p. 111; 1927, p. 318.

Editor's Note.—The last two sentences of this section are new with the amendment of 1927.

The Act of 1927 makes no reference to the Act of 1923 which reduced the required population from 200,000 to 60,000 but amends the original act, enacted in 1921. Although the Act of 1927 fixes the required population at 200,000 or more in view of the Act of 1923 it would seem that 60,000 is the intended minimum.

CHAPTER 7

Attorneys at Law

ARTICLE 10

General Principles

§ 4954. (§ 4416). Liability of attorneys to be ruled.

Relationship Necessary.—Certain facts held not to constitute the relation of attorney and client, and application of section denied. Smith v. International Lawyers, 35 Ga. App. 158, 132 S. E. 245.

§ 4956. (§ 4418.) Limitation on authority.

Applied in Rawls v. Heath, 36 Ga. App. 372, 376, 136 S. E. 822.

Burden of Proof.—Where the defendant to a suit contends that he settled the claim by paying the plaintiff's attorney less than the full amount thereof, the burden is upon the defendant to show affirmatively that the plaintiff's attorney had special authority from his client to make the settlement. High v. Hollis, 35 Ga. App. 195, 132 S. E. 260.

§ 4957. (§ 4419.) Improper conduct by counsel.

IV. MISTRIAL.

B. Instructions Remedying Improper Remarks.

See Furney v. Tower, 36 Ga. App. 698, applying the principle stated under this analysis line in the Code.

CHAPTER 8

Stenographers

§ 4985. (§ 4447). Compensation in civil cases

Assessment of Costs against Public Treasury.—The court cannot assess the cost of stenographic reports against the public treasury in a civil case between private parties. Macris v. Tsipourses, 35 Ga. App. 671, 134 S. E. 621.

SECOND TITLE

Special Rights, Remedies, and Proceedings

CHAPTER 1

Appeals

ARTICLE 1

In What Cases Allowed

§ 4998. (§ 4453). Appeals lie in what cases.

Cross Reference.—See annotations to § 4742.

§ 5000. (§ 4455). Appeal when to be entered.

When Section Applicable.—Unless there are provisions made where a greater or less time is fixed for entering appeals in particular cases, the general provision of this section will control. Hughes v. State Board, 162 Ga. 246, 253, 134 S. E. 42.

ARTICLE 3

Effect of Appeals

§ 5015. (§ 4470.) Effects of appeal.

Applied to Judgment of Justice's Court.—Upon appeal the judgment of justice's court remains operative with all of its incidents, save in so far as it is incapable of enforcement pending the appeal. Haygood v. King, 161 Ga. 732, 132 S. E. 62.

§ 5022. (§ 4477.) Arbitrators limited by submission.

Cited in United States Fidelity, etc., Co. v. Corbett, 35 Ga. App. 606, 612, 134 S. E. 336.

CHAPTER 3

Of Attachments

ARTICLE 1

Of Issuing Attachments

§ 5056. (§ 4511.) By whom affidavit may be made.

Cross Reference.—For affidavit as to garnishment, see § 5269.

§ 5094. (§ 4549). Garnishment, how obtained.

Cited in Owen v. Moseley, 161 Ga. 62, 64, 129 S. E. 787.

ARTICLE 5

Of Pleading and Defenses in Attachment

§ 5107. (§ 4561.) No traverse shall delay plaintiff.

Disposal of Traverse.—Notwithstanding this section, a traverse to the grounds of attachment should be first disposed of, unless it be continued for cause. This provision of the Code simply means that nothing that works a continuance of the traverse only shall postpone the main case. Alvaton Mercantile Co. v. Caldwell, 34 Ga. App. 151, 128 S. E. 781.

Effect of Finding Issue in Defendant's Favor.—When an issue on a traverse is found in favor of the defendant, all he gains is that the levy falls, and if a judgment is obtained on the merits it does not date from the time of the levy as provided by § 5124, but it would take lien on the property attached as well as on other property, from the date of the judgment only. Blakely Milling, etc., Co. v. Thompson, 34 Ga. App. 129, 128 S. E. 688.

ARTICLE 7

Replevy and Disposition of Property Attached

§ 5113. (§ 4567.) Defendant may replevy property, officer's duty.

Cited in Blakely Milling, etc., Co. v. Thompson, 34 Ga. App. 129, 128 S. E. 688.

ARTICLE 9

Of Lien of Attachments, Judgment and Execution

§ 5124. (§ 4578.) Lien of attachments.

Cross Reference.—See annotations to § 5107.

CHAPTER 4

Auditors

ARTICLE 1

Appointment and Powers

§ 5127. (§ 4581.) Auditor instead of master.

Applied as to reference to auditor by the judge of his own motion. Darien Bank v. Clifton, 162 Ga. 625, 134 S. E. 619.

§ 5128. (§ 4582.) Auditor at law.

Cited in Holston Box, etc., Co. v. Vonberg, 34 Ga. App. 298, 129 S. E. 562.

§ 5129. (§ 4583.) Powers of auditor.

Cited in Ellis v. Geer, 36 Ga. App. 519, 520, 137 S. E. 290.

§ 5139. (§ 4593.) Report may be recommitted.

Cited in Holston Box, etc., Co. v. Vonberg, 34 Ga. App. 298, 300, 129 S. E. 562.

ARTICLE 4

Hearing of Exceptions and Final Disposition of Case

§ 5141. (§ 4595.) Jury trial, when.

Right to Jury Trial without Demand in City Court.—This section is a general law, but must be construed with reference to the local statute creating the city court of Lexington, provided how a jury trial in causes pending therein may be dispensed with. It seems that the local statute would apply to trials of exceptions of fact to an auditor's report; that is, there must be a demand for jury trial. Shehane v. Wimbish, 34 Ga. App. 608, 612, 131 S. E. 104.

§ 5146. (§ 4600.) What evidence to be read to jury, and of verdict.

Presumption and Burden of Proof.—Auditor's findings are prima facie true, and the burden of overcoming them is on the exceptor. McDonald v. Dabney, 161 Ga. 711, 712, 132 S. E. 547.

CHAPTER 5

Bail in Actions for Personalty

§ 5153. (§ 4607.) Perishable property, how sold.

Applied as to amount of recovery in action of trover. Standard Motors Finance Co. v. O'Neal, 35 Ga. App. 727, 134 S. E. 843.

§ 5154. (§ 4608). Release of defendant without security, when.

Time of Giving Notice.—The giving of "five days notice of the time and place of hearing," required by this section is not complied with by serving the plaintiff, on the first day of May, with notice of hearing on the fifth day of May following. From the first day of May to the fifth day of May is only four days. Hardin v. Mutual Clothing Co., 34 Ga App. 466, 129 S. E. 907.

Failure to Answer No Waiver.—Where a defendant petitions the court for a discharge, and the respondent fails to file a written answer to the petition, the respondent is not to be considered as in default, but may appear and introduce evidence in rebuttal of that offered by the petitioner. Harris v. Hines, 35 Ga. App. 414, 133 S. E. 294.

CHAPTER 6

Of Claims to Property in Execution

ARTICLE 2

When, Where, and How Tried

§ 5170. (§ 4624.) Burden of proof on plaintiff.

Applied in Peterson v. Wilbanks, 163 Ga. 742, 753, 137 S. E. 69; Blount v. Dunlap, 34 Ga. App. 666, 130 S. E. 693.

Burden is on claimant, when defendant in fi. fa. is in possession to show his title to the property in defendant's possession. Jones Motor Co. v. Finch Motor Co., 34 Ga. App. 399, 129 S. E. 915.

Burden on Plaintiff in Fi. Fa. When Possession Unknown.—Where it does not appear in whose possession the property was found, the burden of proof is upon the plaintiff in fi. fa. Singer Sewing Mach. Co. v. Crawford, 34 Ga. App. 719, 131 S. E. 103.

CHAPTER 8

Of the Writ of Certiorari

ARTICLE 2

How Obtained, and Proceedings Thereon

§ 5181. (§ 4635.) From the court of ordinary.

Noncompliance Ground of Dismissal.—Noncompliance with the requirements of setting forth "plainly and distinctly the error complained of," and failure to set forth the grounds of the motion for a new trial or attach them to the petition as an exhibit, is a ground for dismissal. East River Nat. Bank v. Ellman, 36 Ga. App. 263, 136 S. E. 799.

§ 5185. (§ 4639.) Bond and security to be given.

IV. PAYMENT OF COSTS.

Certificate—Sufficiency of.—A certificate made by the judge whose judgment is the subject matter of complaint, that "the petitioner has paid all accrued costs to this date in the sum of $9.25" is sufficient as a compliance with this section. Whitley v. Jackson, 34 Ga. App. 286, 129 S. E. 662.

§ 5187. (§ 4641.) Affidavit in lieu of bond.

What Must Affidavit State.—The affidavit should allege that owing to his poverty the affiant is unable to give the required security; merely stating that the affiant "is unable to give the security, as required by law," is not sufficient, and the affidavit not being amendable, the certiorari is void. Roberts v. Selman, 34 Ga. App. 171, 128 S. E. 694.

§ 5188. (§ 4642.) Must be applied for in thirty days.

Judgment Sustaining Demurrer Not Final Determination.—A judgment sustaining a demurrer to a petition, which grants leave to the plaintiff to amend on pain of dismissing the suit, is not a final judgment, and certiorari does not lie thereto. Messengale v. Colonial Hill Co., 34 Ga. App. 807, 131 S. E. 299.

§ 5190. (§ 4644.) Ten days notice to the adverse party.

Immaterial Variance between Process and Record.—A defendant in certiorari being entitled only to written notice of the sanction of the writ of certiorari and the time and place of hearing, and not to service of a copy of any of the proceedings, it is immaterial that a copy of the proceedings served, showed as surety upon the certiorari bond a name different from that appearing as surety upon such bond as it appeared of record. Whitley v. Jackson, 34 Ga. App. 286, 129 S. E. 662.

§ 5191. (§ 4645). Shall operate as a supersedeas.

Cited in Hargett v. Columbus, 36 Ga. App. 628, 629, 137 S. E. 911.

§ 5195. (§ 4646.) Answer filed five days before the first day of term.

Applied in Heinz v. Backus, 34 Ga. App. 203, 205, 128 S. E. 915.

ARTICLE 3

Of the Answer, Hearing, Judgment and Costs

§ 5196. (§ 4647.) Exceptions to answer.

Certainty and Definiteness of Exceptions.—Exceptions must specify the defects. They must be so definite, apt, and certain that the magistrate may be able to understand the exact nature of the deficiency. Macris v. Tsipourses, 35 Ga. App. 671, 134 S. E. 621.

Method Prescribed by Section Exclusive.—An incomplete answer to a writ of certiorari can be perfected only by exceptions taken thereto in the manner prescribed by this section. Macris v. Tsipourses, 35 Ga. App. 671, 134 S. E. 621.

SECTION 3

Of the Judgment and Costs

§ 5201. (§ 4652). Certiorari may be dismissed or returned.

Returning Case—Verdict Contrary to Evidence.—In a case when the only error alleged is that the verdict is contrary to the law and the evidence, it is erroneous to render a final judgment in petitioner's favor; for the reason that in such a case the error complained of is not "an error in law which must finally govern the case." Tuten v. Towles, 36 Ga. App. 328, 136 S. E. 537.

Applied as to entering final decision where there is question of fact to be decided in the lower court. Strickland v. American Nat. Bank, 34 Ga. App. 549, 130 S. E. 598.

Cited in Shehane v. Wimbish, 34 Ga. App. 608, 613, 131 S. E. 104; Flood v. Empire Inv. Co., 35 Ga. App. 266, 270, 133 S. E. 60.

§ 5203. (§ 4654.) Damage may be awarded.

Cited in Flood v. Empire Inv. Co., 35 Ga. App. 266, 270, 133 S. E. 60.

§ 5209. (§ 4660.) Notice to owner.

Time for Appointment of Assessor.—Construing together this section and sections 5218, 5216, and 5219, the landowner has until the day fixed for the hearing in the notice in which to appoint his assessors, which hearing shall not be less than fifteen days from the time of serving the notice. A different ruling is not required by the decision in City of Elberton v. Adams, 130 Ga. 501, 61 S. E. 18, decided by five Justices. Sheppard v. Edison, 161 Ga. 907, 132 S. E. 218.

§ 5216. (§ 4667.) How service effected.

See note to § 5209.

§ 5218. (§ 4669.) Direction and contents of notice.

See note to § 5209.

§ 5219. (§ 4670.) When assessor to be appointed by ordinary.

See note to § 5209.

§ 5229. (§ 4679). Appeal not to delay, when.

Cited in Gaston Shunk Plow Co., 161 Ga. 287, 304, 130 S. E. 580.

CHAPTER 9
Condemnation of Private Property

ARTICLE 4
To What Condemnations Applicable, Appeal, Final Judgment, etc.

§ 5240. Water-power owners may condemn.

Editor's Note and General Consideration.—The question of the constitutionality of this section was suggested by counsel but not raised in Rogers v. Toccoa Elect. Power Co., 163 Ga. 919, 137 S. E. 272.

Effect of Furnishing Power in Another State.—A corporation having the power of eminent domain under this section would not lose such power because it also furnished electric power in Tennessee. Rogers v. Toccoa Elect. Power Co., 163 Ga. 919, 137 S. E. 272.

Injunction—Proper Remedy to Determine Power of Eminent Domain.—In a proceeding under this section the sole question to be passed upon by the assessors is the amount of compensation to be paid. In such proceedings the assessors can not pass upon the legal power of the company to institute such proceedings. The remedy of the landowner is to apply to a court of equity to enjoin the condemnation proceedings if they are unauthorized. Rogers v. Toccoa Power Co., 161 Ga. 524, 526, 131 S. E. 517.

What Determines "Public Use."—Whether a purpose is a public or private purpose within the meaning of the law relating to eminent domain does not depend on use or the amount of use by the public, but upon the right of the public to such use. Rogers v. Toccoa Elect. Power Co., 163 Ga. 919, 137 S. E. 272.

Applied in the case of electric power company. Rogers Toccoa Elect. Power Co., 163 Ga. 919, 137 S. E. 272.

§ 5240(1). Condemnation of road or highway for power plant generating electricity.—Where any proceeding to condemn a public road or highway is instituted, if the same is a part of the State highway system, or jurisdiction or control thereof has been taken over or assumed by the State Highway Board or other State authority, the notice of intention to condemn shall be addressed to and served upon the chairman of the State Highway Board or such other officer as may hereafter be vested with the supervision and control of said State highway system; and if said road or highway is under the supervision or control of county authorities, the notice of intention to condemn shall be addressed to and served upon the ordinary, chairman of the board of commissioners of roads and revenues, commissioner of roads and revenues, or such other officer as is by law vested with jurisdiction over and control of the public roads of the county in which said road to be condemned is located. The procedure in such condemnation of public roads and highways shall be the same as provided by the general laws of the State, as now embodied in section 5206 et seq. of the Code of Georgia and as the same may hereafter be amended, in so far as the same is not in conflict with the provisions of this section; and the public officer or officers to be notified and served as aforesaid shall act for and in behalf of the State or county, as the case may be, in the appointment of an assessor and in all other respects as provided in said general law of the State with respect to the owner or owners of property sought to be condemned. Provided, however, before any public road condemned under the provisions of this section can be used by the condemnor, the new road, including any and all bridges and culverts that may be necessary as a part thereof, shall be laid out and constructed by the condemnor and by the condemnor made ready for use by the public, all of which new construction shall be approved by the authorities having control of the road condemned; and provided further that the terms "public road" or "public highway," whenever used in this section or section 5240 shall include not only highways and roads proper, but bridges, culverts, and appurtenances as well. Acts 1927, p. 373.

§ 5243. Condemnation for public roads.

Additional Land for Road.—Whenever a public road is already established, and it becomes necessary to condemn land for the purpose of grading, improving, turnpiking, paving, widening, or macadamizing the same, for the use and convenience of the public, the county authorities must pursue the method laid down in this section. But when the State highway department wishes to condemn land for rights of way for State-aid roads, it is not required to, and can not, pursue this method. Cook v. State Highway Board, 162 Ga. 84, 98, 132 S. E. 902.

ARTICLE 5
Condemnation on Petition of State or Federal Government

§ 5246(1). When petition authorized; procedure in case of doubt as to title.

Proceeding in Rem—Parties.—Under this section the State Highway Board can, in one proceeding, condemn a right of way over two tracts of land, one owned by one of the plaintiffs and the other owned by both plaintiffs, such proceeding being one in rem and not against individuals. In such a proceeding all persons interested will be allotted the damages to which they are respectively entitled. Cook v. State Highway Board, 162 Ga. 84, 132 S. E. 902.

The venue is in the county in which the land lies; but if the tract of land lies in two conties, such proceeding can be brought in the superior court of either county. Cook v. State Highway Board, 162 Ga. 84, 132 S. E. 902.

Necessity of Condemning All of Defendant's Land in One Proceeding.—In a proceeding to condemn a right of way and approaches to a public bridge on one side of the river, it is not a good objection to said proceeding that the plaintiffs would be entitled to recover damages for their lands lying on the opposite bank of said stream, the proceeding not being instituted to condemn a right of way over said lands. Cook v. State Highway Board, 162 Ga. 84, 132 S. E. 902.

Recovery for Injury to Ferry Right.—If this proceeding damages the plaintiffs by destroying any rights of ferry which they might have over said river, such damages can be assessed in the present proceeding. Cook v. State Highway Board, 162 Ga. 84, 132 S. E. 902.

CHAPTER 11
Garnishments

ARTICLE 1
How Issued and Served; Answer; and What Is Subject to

§ 5265. (§ 4705). Garnishment.

Suit Pending—When.—A suit is pending, within the meaning of this section, although a judgment may in fact have been rendered in the suit, when there still remains a legal

possibility that the judgment may be reversed, as when a bill of exceptions to the judgment has been tendered and certified by the trial judge and has been filed with the clerk of the Court of Appeals. Carrollton Bank v. Glass, 35 Ga. App. 89, 132 S. E. 238.

§ 5268. (§ 4708). Garnishment, how obtained.

Cross References.—See annotations to succeeding section, and annotations under section 4392.

§ 5269. (§ 4709). How and by whom issued, etc.

Time of Filing Answer.—Where the garnishee fails to answer at the first and the second terms of court, but files an answer on the first day of the third term before the garnishment case has been called on the docket and before a motion has been made by the plaintiff to enter a judgment obtained during the second term, such answer is not too late. Owen v. Moseley, 161 Ga. 62, 129 S. E. 787.

§ 5272. (§ 4712). What is subject to garnishment.

Proceeds of Realty Sold by Execution.—If executors, empowered by will to sell lands of the decedent, sell them for the purpose of division, the proceeds are personalty, uninpressed with the character of real estate, and therefore are subject to garnishment. Brown Guano Co. v. Bridges, 34 Ga. App. 652, 130 S. E. 695.

ARTICLE 4

Answer, Traverse, Claim, and Judgment

§ 5281. (§ 4719.) Answer or garnishee and judgment.

When Judgment May Be Entered on Dissolution Bond.—Where a garnishment is sued out pendente lite by the plaintiff and dissolved by the defendant, there can be no judgment rendered on the bond given to dissolve the garnishment until after judgment is rendered in the main action in favor of the plaintiff against the defendant therein. Cone v. Glidden Stores Co., 36 Ga. App. 246, 136 S. E. 170.

Default Judgment against Garnishee.—Where a garnishment has been dissolved by the defendant in the main case, if the garnishee fails or refuses to answer, judgment by default may be rendered against him for such amount as may have been obtained by judgment against the defendant; and upon such judgment against the garnishee being entered, judgment may be had for the amount thereof against the defendant and the sureties on the bond to dissolve the garnishment. Carpenter v. Bryson, 35 Ga. App. 622, 134 S. E. 180.

§ 5282. (§ 4720). Claimants may dissolve garnishment.

Cited in Tarver v. Jones, 34 Ga. App. 716, 131 S. E. 102; Johnson v. Planters Bank, 34 Ga. App. 241, 129 S. E. 125.

CHAPTER 12

Of the Illegality of Executions

§ 5306. (§ 4737). No illegality until after levy.

Applied in Carter v. Alma State Bank, 34 Ga. App. 766, 131 S. E. 184.

§ 5308. (§ 4739). Damages for delay only.

Damages Assessed When Portion of Affidavit Dismissed.—Where a portion of an affidavit of illegality has been dismissed on demurrer for insufficiency, and the remainder is admitted to be incorrect, the jury may be authorized to infer from this that it was filed for delay only, and a verdict assessing damages in favor of the plaintiff in execution, at less than 25% of the principal debt, will not be disturbed, where there is any evidence to support it, unless for some material error of law. Felker v. Still, 35 Ga. App. 236, 133 S. E. 519.

CHAPTER 14

Nuisances and Their Abatement

§ 5329. (§ 4760) May be removed, and how.

Necessity of Actual Existence of Nuisance.—This and the following sections were not intended to afford a remedy against that which is not an actually existing nuisance, as distinguished from that which may or probably will become such. The language of this section seems to admit of no other construction. Fairview Cemetery Co. v. Wood, 36 Ga. App. 709, 719, 138 S. E. 88.

§ 5337(2). House of prostitution; house and contents a nuisance.

Amendment Showing Abatement Pending Suit.—It was error to refuse to allow a verified amendment to the defendant's answer to a petition to enjoin him from conducting a nuisance in violation of this statute; the allegations of the amendment showing that the nuisance had been absolutely discontinued a few days after the beginning of the proceeding for injunction, and several weeks before the trial, and that all issues in the proceeding had become moot. (Two JJ. dissent.) Yancey v. State, 161 Ga. 138, 129 S. E. 642.

CHAPTER 15

Officers of Court, Rules Against

§ 5346. (§ 4774). Rules nisi against officers.

Cited in Gaston v. Shunk Plow Co., 161 Ga. 287, 297, 130 S. E. 580.

§ 5347. (§ 4775). Answer to rule nisi, and subsequent proceedings.

Traverse of Answer.—Traverse of answer to remedial proceeding for contempt is not necessary, and the court can hear, without such traverse, the evidence to determine whether the defendant has or has not violated the order of the court. Gaston v. Shunk Plow Co., 161 Ga. 287, 297, 130 S. E. 580.

CHAPTER 16

Of Partition

ARTICLE 1

General Principles

§ 5355. (§ 4783). Partition.

Necessity of Peculiar Circumstances.—Where no peculiar circumstances are shown, equity will not take cognizance of a partition suit. Safford v. Anderson, 162 Ga. 408, 134 S. E. 81.

CHAPTER 18

Tresspassers on Land and Tenants Holding Over

ARTICLE 1

Proceedings Against Intruders on Land and Tenants Holding Over

SECTION 1

Proceedings Against Intruders

§ 5380. (§ 4808). Intruders, how ejected.

Bona Fide Claim to Possession Good Defense.—That the alleged intruder claims the legal right to possession of the land in good faith is a legal defense against eviction under such process. Hill v. Security Loan, etc., Co., 35 Ga. App. 93, 132 S. E. 107.

Necessity of Process and Return.—Under this section, no process or return of service is required. Hill v. Security Loan, etc., Co., 35 Ga. App. 93, 132 S. E. 107.

§ 5382. (§ 4810). Return of affidavit and trial.

Trial at What Term.—The proceeding under section 5380 being strictly summary and there being no provision as to when an issue formed upon a counter-affidavit to such a proceeding under this section may be tried, the trial of such an issue may be held at the term of court during which the counter-affidavit is filed. Hill v. Security Loan, etc., Co., 35 Ga. App. 93, 132 S. E. 107.

SECTION 2

Proceedings Against Tenants Holding Over

§ 5389. (§ 4817). Double rent and writ of possession, when.

Demand for Rent.—It is not essential that the plaintiff should prove a demand for payment of the rent prior to the institution of the proceeding. Moore v. Collins, 36 Ga. App. 701, 138 S. E. 81, and cases cited.

Time from Which Rent Runs.—Where the tenant files a counter-affidavit and bond, he may be charged with double rent, or double the rental value of the property, as the case may be (see Stanley v. Stembridge, 140 Ga. 750, 79 S. E. 842), from the date of the demand for the premises, or, if such date is not shown, from the date of the issuance of the dispossessory warrant, provided the plaintiff is entitled to prevail in such case. Moore v. Collins, 36 Ga. App. 701, 138 S. E. 81, and cases cited.

Effect of Receivership of the Property upon Payment of Double Rent.—Whether or not double rent is uncollectible for a period during which the rented premises are in possession of a receiver, the pendency of the receivership will prevent the collection of double rent only when the control and possession of the property by the receiver prevented the tenant from moving out and surrendering the rented premises to the landlord. Graf v. Shiver, 36 Ga. App. 532, 137 S. E. 283.

THIRD TITLE

Extraordinary and Equitable Remedies and Pleadings

CHAPTER 1

Joinder of Legal and Equitable Causes

§ 5406. (§ 4833). Equitable or legal rights, remedies applied.

III. OPERATION UPON SUBJECT MATTER.

Petition Not Demurrable on Certain Grounds.—Since the passage of this section a petition which sets forth a legal cause of action, though using terms appropriate to an equitable proceeding, is not demurrable on the grounds (a) that it sets forth no cause of action (b) that there is no equity in the petition, and (c) that the plaintiff has an adequate remedy at law. Smith v. Hancock, 165 Ga. 222, 136 S. E. 52.

§ 5407. (§ 4834). Equitable relief from the court.

Amendment seeking equitable relief in common law suit allowed. Moon v. First Nat. Bank, 163 Ga. 489, 136 S. E. 433.

§ 5411. (§ 4838). New parties and extraordinary remedies for defendant.

Amendment of Bill of Exceptions Filed by New Party, Allowed.—McMillian v. Spencer, 162 Ga. 659, 134 S. E. 921.

Maker's Rights in Action upon the Note by Transferee.—In an action upon a note by the transferee thereof against the maker, the latter can set up his defenses against the payee, and also can make the payee a party to the suit. McMillan v. Spencer, 162 Ga. 659, 134 S. E. 921.

CHAPTER 2

Parties in Equitable Proceedings

§ 5417. (§ 4844). Parties.

Judgment Creditor as Party Defendant.—In Swift & Co. v. First Nat. Bank, 161 Ga. 543, 549, 132 S. E. 99, it was held that the judgment creditor was properly joined as defendant, in a suit for injunction by mortgagee to prevent the sale of the property under levy.

CHAPTER 3

Trial and Its Incidents

§ 5423. (§ 4850). Special verdicts and costs.

Costs in chancery do not always follow the event of the suit, but are awarded according to the justice of the cause. They rest in the sound discretion of the court, to be exercised upon full view of the merits and circumstances of the case. Peninsular Naval Stores Co. v. Culbreth, 162 Ga. 474, 134 S. E. 608.

(a) In an equity case it is the province of the judge to determine upon whom the costs shall fall. (b) Auditor's fees may, in the discretion of the court, be apportioned between the parties. (c) The stenographer's fee for reporting the evidence in a case shall be paid upon such terms as the parties may agree upon; and if no agreement is entered into as to the payment thereof, then in such manner as may be prescribed by the presiding judge. McDonald v. Dabney, 161 Ga. 711, 132 S. E. 547.

CHAPTER 4

Decrees

§ 5426. (§ 4853). Decrees and remedies.

Cited in Swift & Co. v. First Nat. Bank, 161 Ga. 543, 550, 132 S. E. 99; Gore v. Humphries, 163 Ga. 106, 114, 135 S. E. 481.

§ 5429. (§ 4856). Confirmation of sale under decree.

Applied.—Wingfield v. Bennett, 36 Ga. App. 27, 134 S. E. 840.

CHAPTER 6

Of Extraordinary Remedies

ARTICLE 1

Mandamus, Quo Warranto, and Prohibition

§ 5443. (§ 4870). When not granted.

Proper Remedy Should Be Resorted to in Lieu of Mandamus.—Where it appears that the applicant had a remedy for any error of the ordinary, he can not neglect the remedy and afterwards resort to mandamus proceedings. Sharp v. McAlpin, 162 Ga. 159, 161, 132 S. E. 891.

§ 5445. (§ 4872). Facts in issue, how and when tried.

Applied.—Browne v. Benson, 163 Ga. 707, 137 S. E. 626.

ARTICLE 4

Receivers

§ 5475. (§ 4900). Receiver, when an officer of the court.

Enforcement of Delivery of Property to Receiver.—A judge may, in vacation, enforce the delivery of fund or property to the receiver, by attaching and imprisoning any party refusing obedience to his order. Coker v. Norman, 162 Ga. 351, 133 S. E. 740.

§ 5477. (§ 4902). Power of appointment to be cautiously exercised.

Receiver in Divorce and Alimony Case.—In a suit for divorce and alimony, under the circumstances of the case, the prayer for appointment of receiver of the husband's property was denied in view of this section. Reeve v. Reeve, 163 Ga. 95, 135 S. E. 434.

General Creditor May Not Enjoin Debtor.—In view of this section and section 5495 creditors without lien cannot, as a general rule, enjoin their debtors from disposing of property, or obtain injunction or other extraordinary relief in equity. Dixie Metal Products Co. v. Jones, 163 Ga. 70, 135 S. E. 406.

§ 5479. (§ 4904). Receivers, when appointed.

Appointment without Hearing.—The grant of a temporary injunction and the appointment of a receiver, without a hearing and without sufficient grounds is erroneous. Board v. Municipal Securities Corp., 161 Ga. 634, 131 S. E. 495.

CHAPTER 7

Injunctions

ARTICLE 1

When Granted

§ 5491. (§ 4914). Administration of criminal laws, no interference by equity.

Proceedings under Ordinances.—Notwithstanding this section where an ordinance illegal and unreasonable in itself is being enforced by prosecution which would deprive a man of his property, or destroy the carrying on of his lawful business, a court of equity will interfere, specially where the authorities are giving to it an interpretation not authorized by its language. Lilburn v. Alford Bros., 163 Ga. 282, 284, 136 S. E. 65.

§ 5495. (§ 4918). Creditors without liens.

Cross Reference.—See annotations to § 5477.

A creditor having a justice's court judgment from which an appeal has been taken, and who is otherwise entitled to injunctive relief, does not come within the provisions of this section. Haygood v. King, 161 Ga. 732, 132 S. E. 62.

§ 5499. (§ 4922). Injunction can not compel.

Mandatory Injunction. — An injunction dispossessing one party and admitting another to possession is equivalent to a mandatory injunction, which is not within the proper scope of injunction. Injunction is not available for the purpose of accomplishing an eviction, or to prevent interference with realty by one already in possession. Beck v. Kah, 163 Ga. 365, 136 S. E. 160; Burns v. Hale, 162 Ga. 336, 133 S. E. 857.

ARTICLE 2

Procedure in Injunction Cases

§ 5501. (§ 4924). Injunctions, in what manner granted.

As to temporary injunction without hearing, see annotations to sec. 5479.

§ 5502. (§ 4925). The hearing, writ of error, judge's order.

Application to Interlocutory Injunction.—A bill of exceptions will lie to the grant of an interlocutory injunction under this section, and there is no merit in the motion to dismiss the bill of exceptions on the ground that it "does not except to any judgment or ruling upon any issue that is final in the case." Brindle v. Goswick, 162 Ga. 432, 134 S. E. 83.

Extent to Which Supersedeas Operates.—One method of obtaining a supersedeas is that provided in this section. This method is applicable in cases in which injunctions are granted or dissolved. In such a case either party may sue out a writ of error to the Supreme Court from a decision against him, upon complying with the law applicable to the same; but no such writ of error shall have the effect to establish or deny any injunction independently of the order of the judge. Tift v. Atlantic Coast Line R. Co., 161 Ga. 432, 447, 131 S. E. 46.

§ 5504. (§ 4927). In application to enjoin cutting timber.

Cited in Chapple v. Hight, 161 Ga. 629, 632, 131 S. E. 505.

FOURTH TITLE

Of Actions

CHAPTER 1

General Principles

§ 5513. (§ 4936). Implied obligations to pay.

Advancement or Loan.—Where the person making an advancement to a husband is a brother of the dead wife, the advancement, if made voluntarily by him and without a request from the husband, is inferably a gift, and there does not arise as a matter of law any implied promise on the part of the husband to repay the money thus advanced. But where the advancement is made at the request of the husband, either express or implied, although there is no express promise to repay, an implied promise by the husband to repay is inferable. Lovett v. Allen, 34 Ga. App. 385, 129 S. E. 897.

§ 5514 (§ 4937). Joinder of legal and equitable actions.

Editor's Note and General Consideration. — Jackson v. Mathis, 35 Ga. App. 178, 132 S. E. 410, following the statement in the Code of 1926 taken from Lacher v. Manley, 139 Ga. 80, 78 S. E. 188.

§ 5516. (§ 4939). Parties to actions on contracts.

See annotation to secs. 4460 and 5689.

Exceptions to Section.—To this general rule there are exceptions. Where the purchaser of the assets of a firm agree to pay their debts, a creditor of the firm can by bill, to which the partners and purchasers are parties, enforce this agreement for his benefit. Bell v. McGrady, 32 Ga. 257. So where a married woman, having separate property, and being indebted to another by note, conveyed her separate estate absolutely to others in consideration of their agreement to pay her an annuity for life and all debts against her separate property, the agreement may in equity be enforced by her creditors. Reid v. Whienant, 161 Ga. 503, 507, 131 S. E. 904.

Ownership.—The assignee of a mortgage may enforce it against the purchaser of the property who assumes payment. Reid v. Whisenant, 161 Ga. 503, 507, 131 S. E. 904.

Cited in Young v. Certainteed Prod. Corp., 35 Ga. App. 419, 133 S. E. 279.

§ 5520. (§ 4943). Consolidation of cases.

Creditor Suits against Administratrix.—Where after several suits are separately filed by judgment creditors of the estate of a decedent against the administratrix and the sureties on her bond, a receiver is appointed, under another proceeding, to take charge of the estate, and where, after his appointment the court, by consent of parties, passes an order consolidating all the cases pending against the administratrix and the sureties on her bond, directing that they shall all proceed in the name of the receiver as plaintiff, there is but one case for trial. Ellis v. Geer, 36 Ga. App. 519, 137 S. E. 290.

Cited in Don v. Don, 162 Ga. 240, 243, 133 S. E. 242.

§ 5521. (§ 4944). Different claims may be joined.

Actions Which May Be Joined.—A count against a former employer refusing to return an account book to the plaintiff, is one in tort, and hence properly joined with a count for conversion of the book, under this section. Richards v. International Agri. Corp., 10 Fed. (2d), 218.

Exception to Section.—The exception to this rule is where equitable principles are involved, such as insolvency or nonresidence of the plaintiff. In such cases, where the court has equitable jurisdiction, the general rule does not obtain, and it is permissible to set up a defense founded either in tort or on contract in response to a suit of either nature. But where the court has not equitable jurisdiction, and the suit is filed, for example, in a city court, such a court has jurisdiction of such a dissimilar and equitable plea only when it is purely defensive in its nature, and, if sustained, would result in a verdict finding generally in favor of the defendant. Porter v. Davey Tree-Expert Co., 34 Ga. App. 355, 357, 129 S. E. 557.

§ 5522. (§ 4945). Concurrent suits.

Cited and applied in Nix v. Citizens Bank, 35 Ga. App. 55, 56, 132 S. E. 249; Chapple v. Hight, 161 Ga. 629, 630, 31 S. E. 505.

CHAPTER 2.

Actions, Where and How Brought.

ARTICLE 1

Of the Venue

§ 5527. (§ 4950.) Equitable proceedings, venue.

Instances Where General Rule of Section Applied.—Suit to recover possession of land and damages for cutting timber, and for equitable relief relating to land and timber. Brindle v. Goswick, 162 Ga. 432, 134 S. E. 83.

But an equitable action jointly against the vendee, in an invalid reservation contract, and his transferee, brought in the county of the transferee's residence, to recover as in trover the article sold, and to reform the contract so as to make it include a description of that article, did not lie for lack of jurisdiction. Flemming v. Drake, 163 Ga. 872, 137 S. E. 268.

ARTICLE 3

Suits, How Commenced

SECTION 1

The Petition

§ 5539. (§ 4961). Petition to be pragraphed.

Cited in Pape v. Woolford Realty Co., 35 Ga. App. 284, 134 S. E. 174, and Cochran v. Carter, 35 Ga. App. 286, 132 S. E. 921.

SECTION 2

Exhibits

§ 5541. (§ 4963). Copies, exhibits, etc.

Editor's Note and General Consideration.—A contract referred to in note need not be set out where the note and not the contract constitutes the cause of action. Reed v. Colonial Hill Co., 34 Ga. App. 48, 128 S. E. 201.

There is full compliance with this section where the petition sets forth, as to each of the notes sued on, the date, amount, maturity, rate of interest, and date from which it runs, and attaches a specimen copy, with the further statement that each of the notes sued on is otherwise identical in form. Reed v. Colonial Hill Co., 34 Ga. App. 48, 49, 128 S. E. 201.

In Heyward v. Ramsey, 35 Ga. App. 472, 473, 134 S. E. 119, the court said: "Though the petition alleges that the amount due the plaintiff was for services rendered 'as per contract,' it was not necessary to attach a copy of the contract."

SECTION 5

Dismissal of Petitions

§ 5548. (§ 4970). Dismissal of petition.

Exception to Section.—A petition for habeas corpus is an exception to the operation of this section. Hence, a petitioner in a habeas corpus proceeding has no right to deprive the court of jurisdiction, after jurisdiction has once attached, by a voluntary dismissal. Collard v. McCormick, 162 Ga. 116, 124, 132 S. E. 757.

ARTICLE 4

Filing, Process, and Service.

§ 5557. (§ 4979). Copy of publication to be filed.

Generally.—See Faughnan v. Bashlor, 163 Ga. 525, 136 S. E. 545, following the note in the Georgia Code of 1926.

§ 5563. (§ 4985). Service of process, how made.

See annotations to section 4717.

§ 5566. (§ 4988). Entry of sheriff may be traversed.

Pleading—Affidavit of Illegality.—Where an affidavit of illegality is based upon the ground that the affiant was not served in the suit, and where the affidavit sets forth a return of service by the sheriff and a traverse of such return by the affiant, and it is not alleged in the traverse that the traverse was made at the next term of the court after the affiant had notice of the sheriff's return, the affidavit of illegality is subject to dismissal on demurrer. Knight v. Jones, 63 Ga. 481; Clements v. Haskins, 35 Ga. App. 484, 134 S. E. 125.

§ 5573. (§ 4995). Special pleading not admitted.

Effect of Section upon Pleading Estoppel.—Under this section it is not necessary for the plaintiff to plead estoppel. Every fact pleaded in an answer as true is treated as denied by the plaintiff, and evidence may be introduced in behalf of the plaintiff to rebut, controvert, or otherwise show that for any reason the defense pleaded is not good against the plaintiff's claim. But in a case where the defendant relies upon estoppel as a defense, it must be pleaded because other sections of this act require that the defense be plainly and clearly presented. Brown v. Globe, etc., Fire Ins. Co., 161 Ga. 849, 854, 133 S. E. 260.

ARTICLE 5

In Ejectment

§ 5576. (§ 4998). Mesne profits, no separate suit for.

Cited in Treadway v. Harris, 34 Ga. App. 583, 585, 130 S. E. 827.

§ 5579. (§ 5001.) True claimant made defendant.

Defendant Not Bound by Judgment When Not Made a Party.—A judgment in a former suit for land in which the defendant was not a party and was not notified or made a party under this section, is not admissible in evidence against the defendant in a later suit for the land. Harrison v. Hester, 163 Ga. 250, 251, 135 S. E. 845.

§ 5585. (§ 5007.) The consent rule.

Actions to Which Limited.—The consent rule set out in this section is applicable only to actions of ejectment brought in the fictitious form. Horn v. Towson, 163 Ga. 37, 135 S. E. 487.

ARTICLE 6

Against Joint, and Joint and Several Contractors

CHAPTER 3

Making Parties Pending Action

§ 5601. (§ 5019.) Parties made in term or vacation.

Time at Which Rule Returnable.—No time is prescribed at which the rule shall be returnable. That time is left to the discretion of the court. Upon return of the rule the judge can do no more than allow or refuse to allow the respondent to be made a party. McMillan v. Spencer, 162 Ga. 659, 663, 134 S. E. 921.

§ 5602. (§ 5020.) Time of trial where parties made.

Applied in McMillan v. Spencer, 162 Ga. 659, 663, 134 S. E. 921.

CHAPTER 4

Abatement, Retraxit, Dismissal, and Removal of Actions

§ 5623. (§ 5041). Death of one of several defendants.

Death after Reference to Auditor.—Under this section the death of one of the defendant sureties after the filing of a suit against principal and sureties on an administrator's bond, and after a reference of the case to an auditor, but before the hearing by the auditor, does not abate the suit or deprive the auditor of jurisdiction. Ellis v. Geer, 36 Ga. App. 519, 137 S. E. 290.

§ 5627. (§ 5044.) Actions may be dismissed at any time.

See annotations to section 5548.

FIFTH TITLE

Of Defenses and Proceedings Pending Action

CHAPTER 1

Defenses, Pleas, Etc.

ARTICLE 1

General Provisions

§ 5628. (§ 5045.) Sufficiency of petitions and pleas determined at first term.

Effect of Order Allowing Time for Amendment.—An order declaring that the petition would be dismissed unless amended within a given time could not operate as a final judgment of dismissal, and upon the amendment of the petition the merits of the case could be determined. Smith v. Bugg, 35 Ga. App. 317, 133 S. E. 49.

§ 5631. (§ 5048.) Demurrer, grounds of.

When Proper—Grounds for Special Demurrer.—While multifariousness is a ground of demurrer under this section it is not favored by the courts. Smith v. Hancock, 163 Ga. 222, 233, 136 S. E. 52.

§ 5633. (§ 5050.) Demurrer to pleas.

See annotations to sec. 5573.

§ 5638. (§ 5055.) Verified petition requires verified plea.

Authority of Corporate Officer.—Sworn averments as to agency or authority of corporate officer, to make the affidavit, is not required. Georgia Lumber Co. v. Thompson, 34 Ga. App. 281, 129 S. E. 303.

§ 5647. (§ 5063.) Replication and order for trial.

See annotations to section 5573.

§ 5649. (§ 5065.) No part to be stricken out.

Applied in Home Ins. Co. v. Swann, 34 Ga. App. 19, 26, 128 S. E. 70.

§ 5650. (§ 5066.) Pleas of non est factum must be sworn to.

Applied in Wier v. Armour Fertilizer Works, 34 Ga. App. 461, 129 S. E. 915.

§ 5651. (§ 5067.) Petition and answer make issue.

See annotations to § 5573.

§ 5652. (§ 5068.) Effect of amendment.

Immaterial Amendment.—While the filing of a material amendment to the petition after the case has been entered "in default" will open the default so as to give the defendant full right to plead, the filing of an immaterial amendment, whether before or after the entry of default, will not affect the validity of the judgment rendered, since the judgment cures any defective statement of the original cause of action. Henderson v. Ellarbee, 35 Ga. App. 5, 131 S. E. 524.

Applied in Land v. Pike's Peak Lumber Co., 35 Ga. App. 159, 132 S. E. 644; Taylor v. Keown, 36 Ga. App. 631, 634, 137 S. E. 907.

ARTICLE 2

Judgment by Default

§ 5653. (§ 5069.) Call of appearance-docket.

When Section Applies.—If on the call of the appearance docket at the appearance term a case is called in which the defendant has filed no demurrer, plea, or answer, and the judge marks the case on the docket "in default," such entry by the judge on the docket is a judgment that the case is in default. But such an entry is not a "judgment by default." At most it can only be a judgment that the case is "in default" and in no sense is a rendition of a final judgment against the defendant in response to the prayers of the petition. Love v. National Liberty Ins. Co., 157 Ga. 259, 262, 121 S. E. 648; Fraser v. Neese, 163 Ga. 843, 137 S. E. 550.

Effect of Agreement Extending Time.—The private stipulation between the parties is not binding on the court, or operative as extending the time provided by statute for filing a defense. Fraser v. Neese, 163 Ga. 843, 137 S. E. 550.

Same—Manner of Taking Advantage of Agreement.—Notwithstanding an agreement between the parties for a continuance, the defendant must appear before the court and ask for a continuance as provided by law, or after being marked "in default" must proceed as prescribed to open the default. If he fails to follow such procedure the court is without power to open it at a following term. Fraser v. Neese, 163 Ga. 843, 137 S. E. 550.

Power of Clerk to Alter Entry.—If after an entry by the judge at the appearance term the clerk of the court during the same term, without direction or authority from the judge, erases the entry "in default" of the docket by drawing a line through it, such action upon the part of the clerk should be treated as a mere clerical act insufficient in law to modify or alter the default judgment entered by the judge. Fraser v. Neese, 163 Ga. 843, 137 S. E. 550.

Irregularity of Second Entry as Affecting First.—The original entry of default made by the judge at the first term is not affected by the fact that an entry is made at a subsequent term by virtue of an ex parte order of the judge even though the second entry might be irregular because the defendant was not given a hearing. Fraser v. Neese, 163 Ga. 843, 137 S. E. 550.

§ 5654. (§ 5070.) Opening default.

Effect of Failure to Make Proper Showings.—The movants having failed to comply with the provisions of this and the following section by not making the proper showing, it can not be held that the court erred in denying the application, especially as it does not appear that there was an abuse of the discretion which the trial judge exercises over the whole matter. Henderson v. Ellarbee, 35 Ga. App. 5, 131 S. E. 524.

§ 5656. (§ 5072.) Opening default at trial term.

Discretion of Court.—See Strother v. Harper, 36 Ga. App. 445, 446, 136 S. E. 828, following statement under this catchline in Ga. Code of 1926.

§ 5662. (§ 5078.) Verdict in suits in default.

Direction of Verdict.—While the judge may ordinarily have no authority to render judgment without the verdict of a jury, except in cases referred to in this section, and section 6516, this does not mean that, even in those cases where the verdict of a jury is necessary, the court may not direct it where it is demanded by the law and the facts. Pape v. Woolford Realty Co., 35 Ga. App. 284, 134 S. E. 174. This principle was applied with reference to a promissory note and collection of attorney fees in State Mut. Life Ins. Co. v. Jacobs, 36 Ga. App. 731, 137 S. E. 905.

Cited in Cochran v. Carter, 35 Ga. App. 286, 132 S. E. 921.

ARTICLE 3

Particular Pleas

SECTION 1

To the Jurisdiction

§ 5664. (§ 5080.) Jurisdiction, when admitted.

Motion to Vacate after Verdict Not Waiver of Jurisdiction.—Where a nonresident learning that verdict and judgment had gone against him, first moved to vacate the verdict and judgment, the appearance by such motion after the rendition of the verdict and judgment is not such an appearance as to amount to a waiver of jurisdiction. Christian v. Terry, 36 Ga. App. 815, 816, 134 S. E. 244.

§ 5666. (§ 5082.) Contents of the plea.

Allegation as to Lack of Jurisdiction Must Be Substantiated by Facts.—The caveat merely contains the statement that the court which passed the order adopting the children was without jurisdiction over them. The rules of good pleading require the allegation of facts to support this conclusion. The allegation is that they were adopted by a court having no jurisdiction; and if the caveator desired to collaterally attack the adoption for want of jurisdiction in the court which did pass the order, the burden was upon him to allege in a proper plea such facts upon which he relied to deprive the court of jurisdiction. Harper v. Lindsey, 162 Ga. 44, 47, 132 S. E. 639.

SECTION 4

Non Est Factum, etc.

§ 5678. (§ 5094.) Pleas of former recovery and pendency of former suit.

Cause Not Identical.—The pendency of an action for dam-

ages brought by the plaintiffs against the counties of Telfair and Jeff Davis, for the wrongful taking and appropriation of a right of way over their lands for a public road and for a free public bridge, does not prevent the subsequent proceeding brought by the state highway to condemn their land for the same purposes. Cook v. State Highway Board, 162 Ga. 84, 96, 132 S. E. 902.

Applied in Holston Box, etc., Co. v. Vonberg, 34 Ga. App. 298, 129 S. E. 562.

CHAPTER 2

Of Amendments

ARTICLE 1

General Principles

§ 5681. (§ 5097.) Amendments of pleadings, when allowed.

II. GENERAL CONSIDERATION.

Setting Out Cause of Action.—This section, properly construed, means, that in order to admit of an amendment, a valid cause of action must be set forth in the original declaration. Macon v. Newberry, 35 Ga. App. 252 132 S. E. 917.

IV. WHAT PLEADINGS AMENDABLE.

Material Evidence Omitted from Exceptions. — Where within the time required by law a party files exceptions to the auditor's report, but neglects to set forth in connection with such exception the evidence necessary to be considered in passing thereon, or to point out the same by proper reference, or to attach it as exhibits to his exceptions, such exceptions can be thereafter amended so as to cure these defects. Clements v. Fletcher, 161 Ga. 21, 129 S. E. 846.

§ 5682. (§ 5098.) Enough to amend by.

Amendment Showing Insurable Interest.—A petition in a suit on a fire insurance policy may be amended to show the insurable interest of the plaintiff. Georgia Farmers Fire Ins. Co. v. Tanner, 34 Ga. App. 809, 131 S. E. 191.

§ 5683. (§ 5099.) New cause of action and parties not allowable.

Editor's Note.—See Strachan Shipping Co. v. Hazlip-Hood Cotton Co., 161 Ga. 480, 483, 131 S. E. 283, quoting from the case referred to under this catchline in the Georgia Code of 1926.

Instances of Amendments Allowable within Rule.—A new cause is not added where the consignor of goods in an action in tort for damages struck an allegation that the goods were lost and substituted an allegation that they were carried to a place other than the destination, sold and the proceeds paid to another. Strachan Shipping Co. v. Hazlip-Hood Cotton Co., 161 Ga. 480, 131 S. E. 283.

Adding New Parties.—New and distinct parties can not properly be added by amendment in a proceeding to remove obstructions from a private way. Troup v. Tomberlin, 34 Ga. App. 623, 130 S. E. 541.

§ 5689. (§ 5105.) Usee's name added and one or more plaintiffs may be stricken.

Initial Right to Bring Action as Prerequisite.—A plaintiff without the legal or equitable right to maintain a suit cannot amend so as to sue for the use of another. Ludlam Constr. Co. v. Cummings, 34 Ga. App. 786, 131 S. E. 191.

This principle was applied in a suit by a materialman who attempted to substitute the obligee for his use where he improperly brought suit in his own name against a compensated bonding company as surety, no indemnity being provided for the materialman in the bond. American Surety Co. v. Bibb, 162 Ga. 388, 134 S. E. 100.

ARTICLE 2

Particular Cases

SECTION 1

Of Amending Verdicts, Judgments, and Executions

§ 5694. (§ 5110.) Amendment of verdict.

Applied as to separating the amount of the principal and interest in a lump sum verdict. Morgan v. Colt Co., 34 Ga. App. 630, 130 S. E. 600.

§ 5695. (§ 5111.) After dispersion of jury.

See annotation to § 5694.

SECTION 2

Amending Official Returns

§ 5701. (§ 5117.) May be made nunc pro tunc.

Applied in Freeman v. Stedham, 34 Ga. App. 143, 128 S. E. 702.

SECTION 4

Of Other Amendments

§ 5706. (§ 5122.) Amendment of affidavits to foreclose, etc.

The affidavit for garnishment is amendable by striking therefrom the words "for which judgment has been obtained," and inserting in lieu thereof the words "for which is now pending." Carrolton Bank v. Glass, 35 Ga. App. 89, 132 S. E. 238.

Applied to amendment of distress warrant which failed to allege that the tenant "is removing" or "seeking to remove" his crops from the rented premises. Johnson v. Lock, 36 Ga. App. 620, 137 S. E. 911.

§ 5707. (§ 5123.) Amendment of appeal and other bonds.

The bond executed by an applicant for garnishment, is amendable under this section. Where neither the obligations of the sureties are altered nor the rights of the opposite party prejudiced, such bond may be amended in any manner to conform to the requirements of the statute, without the consent of the sureties. Carrollton Bank v. Glass, 35 Ga. App. 89, 132 S. E. 238.

Instances of Amendments to Appeal Bonds.—The execution of a bond by the attorney in the attorney's own name for the plaintiff by name, instead of in the name of the plaintiff by the attorney, is amendable. Whitley v. Jackson, 34 Ga. App. 286, 129 S. E. 662.

§ 5709. (§ 5125.) Clerical mistakes may be amended.

A clerical veriance in the name of the defendant as it appears in the petition and the process is curable by amendment under this section. Grand Lodge Knights of Pythias v. Massey, 35 Ga. App. 140, 132 S. E. 270.

CHAPTER 3

Of Continuances

§ 5710. (§ 5126.) But one continuance at common law.

Editor's Note and General Consideration.—The discretion in refusing a continuance was held not to be abused where a continuance had been granted at two previous terms and for one day at the third term. Camp v. Lanier, 36 Ga. App. 54, 135 S. E. 224. See Yeates v. Yeates, 162 Ga. 153, 132 S. E. 768, where a third continuance was refused.

SIXTH TITLE

Of Evidence

CHAPTER 1

General Principles

§ 5732. (§ 5146.) How determined.

Number of Witnesses.—The ruling that it might amount to reversible error, in charging the provisions of this section, to fail to include in the charge the provision that "the jury may also consider the number of witnesses, though the preponderance is not necessary with the greater number,' does not apply to a case where the number of witnesses on

both sides are the same. Atlanta Gas-Light Co. v. Cook, 35 Ga. App. 622, 134 S. E. 198.

§ 5736. (§ 5150.) Estoppels.

II. ESTOPPEL BY RECORD.

Admission in Pleadings.—In Duke v. Ayers, 163 Ga. 444, 453, 136 S. E. 410, the court said: "His answer was filed and became a part of the record in the cause in which the judgment issued. His admission of the non-payment of this judgment was a solemn admission in judicio that the judgment had not been paid. The court acted upon it and amended the judgment as prayed. By such admission, made in judicio, the plaintiff is estopped from asserting that he had paid off this judgment at a date prior to the making of such admission."

III. ESTOPPED BY DEED.

Conclusiveness of Recital as to Consideration.—Ordinarily, where the statement in a deed as to its consideration is merely by way of recital, the actual consideration of the deed is subject to explanation; but if the consideration is referred to in the deed in such a way as to make it one of the terms or conditions of the contract, it can not be varied by parol. Sikes v. Sikes, 162 Ga. 302, 304, 133 S. E. 239.

§ 5737. (§ 5151.) Estoppel as to title to real estate.

If estoppel by acts or false declarations can in any case be the basis upon which to predicate the recovery of land, it falls clearly within the provisions of this section. Groover v. Simmons, 163 Ga. 778, 780, 137 S. E. 237.

§ 5739. (§ 5153.) Trustees estopped to claim title adverse to estate.

Executors.—Where the plaintiff maintained a suit for specific performance of the contract alleged, in which he sought to have decreed in himself title to the entire property owned by his testatrix at the time of her death, and devised by her and given to the executor (plaintiff) and other beneficiaries, it was held that he was estopped on the ground that he had had the will probated and qualified as executor, and continued in the office of executor for two years, during which time he had discharged the duties of his office and had paid out large sums of money; this conduct being inconsistent with his claim of title to the entire estate of his testatrix. Hardeman v. Ellis, 162 Ga. 664, 135 S. E. 195.

Trustee of Corporations.—The principles of this section apply to a trustee holding choses in action for a corporation. Caswell v. Vanderbilt, 35 Ga. App. 34, 132 S. E. 123.

§ 5740. (§ 5154.) Prima facie presumptions.

Insanity shown once to have existed is, in the absence of proof to the contrary, presumed to continue. Stanfield v. Hursey, 36 Ga. App. 394, 136 S. E. 826.

§ 5743. (§ 5157.) Jury right to infer, what.

Cited in Yellow Cab Co. v. Nelson, 35 Ga. App. 694, 696, 134 S. E. 822.

CHAPTER 2

Of Rules Governing the Admission of Testimony

ARTICLE 1

General Rules

§ 5744. (§ 5158.) Must be relevant.

Editor's Note.—If the evidence offered by a party is of doubtful relevancy, it should nevertheless be admitted and its weight left to the jury. Even where irrelevant evidence is admitted over timely objection, it affords no cause for a new trial, unless the nature of the evidence is such as reasonably to prejudice the rights of the objecting party. Continental Trust Co. v. Bank, 36 Ga. App. 149, 136 S. E. 319.

§ 5745. (§ 5159.) Character and conduct of parties.

Applied in Swinney v. Wright, 35 Ga. App. 45, 48, 132 S. E. 228.

§ 5746. (§ 5160.) Burden of proof.

The burden of proof of the lack of consideration to a contract falls upon the party asserting the defense. Bankers Trust v. Hanover Nat. Bank, 35 Ga. App. 619, 134 S. E. 195.

§ 5751. (§ 5165.) Positive and negative testimony.

Credibility of Witnesses.—Carter v. State, 34 Ga. App. 230, 129 S. E. 10, following Ga. Code 1926.

Cited in Yeates v. Yeates, 162 Ga. 153, 132 S. E. 768.

§ 5754. (§ 5168.) Officer de facto.

Applied in Howell v. State, 162 Ga. 14, 134 S. E. 59 to establish that deceased was a deputy sheriff.

§ 5759. (§ 5172.) Secondary evidence, when admitted.

Accessibility or Diligence.—Beall v. Francis, 163 Ga. 894, 137 S. E. 251, applying principle announced in Ga. Code 1926.

Certified Copy of Marriage Contract.—It appearing from the record that both parties to an alleged marriage contract were dead, and that it could not be found among their papers the court did not err in admitting, as secondary evidence of the contents of such paper, certified copy of a record in the office of the clerk of the superior court of the county in which the maker of the instrument died. Beall v. Francis, 163 Ga. 894, 137 S. E. 251.

ARTICLE 2

Of Hearsay

§ 5763. (§ 5176.) Sometimes original evidence.

A memorandum found on the person of deceased was held admissible on trial for murder, as original evidence under this section. Etheridge v. State, 163 Ga. 186, 199, 136 S. E. 72.

Applied in Davis v. Farmer's Bank, 36 Ga. App. 415, 422, 136 S. E. 816; Alvation Mercantile Co. v. Caldwell, 34 Ga. App. 151, 128 S. E. 781.

§ 5767. (§ 5180.) Declarations of persons in possession.

Applied in Crider v. Woodward, 162 Ga. 743, 755, 135 S. E. 95.

§ 5769. (§ 5182.) Books of account.

Order of Proof.—No foundation for their admission having been laid as required by this section the court did not err in refusing to admit in evidence certain pages from the defendants' ledger. Kennedy v. Phillips, 34 Ga. App. 166, 128 S. E. 779.

§ 5773. (§ 5186.) Testimony of witness on former trial.

Inaccessibility. — Allen v. Davis, 34 Ga. App. 5, 128 S. E. 74, applying principle stated in Ga. Code, 1926.

ARTICLE 3

Of Admissions and Confessions

§ 5775. (§ 5188.) Admissions in pleadings, how far evidence.

Pleadings Stricken or Withdrawn.—Where a part of a petition or of a plea is stricken by amendment, the stricken part may, if pertinent to any issue remaining in the case, be offered in evidence; but, unless so offered and admitted in evidence, it is not evidence for the consideration of the jury or proper matter for argument of counsel, save only where the amendment is made after the evidence is closed. Lydia Pinkham Medicine Co. v. Gibbs, 108 Ga. 138, 33 S. E. 945; Alabama Mid. R. Co. v. Guilford, 114 Ga. 627, 40 S. E. 794. A different rule is applicable to parts of pleadings that are not stricken. Continental Trust Co. v. Bank, 36 Ga. App. 149, 136 S. E. 319.

§ 5776. (§ 5189.) Parties to record.

Admissions of Executors, etc.—On the investigation of an issue of devisavit vel non, the admission of an executor before qualification, or of a legatee, unless the sole legatee, shall not be admissible in evidence to impeach the will. To this general rule there is an exception: If the admission be in reference to the conduct or the acts of the executor or legatee himself as to some matter relevant to the issue on trial, the same will be admitted to impeach the will, although made by the executor before qualification, or by a legatee who is not the sole legatee. Brown v. Kendrick, 163 Ga. 149, 135 S. E. 721.

Same—Before Execution of Will.—Declarations made by

a person before the execution of a will, but who is afterwards named therein as executor and a legatee, are inadmissible to impeach the will as those of an executor and legatee. Brown v. Kendrick, 163 Ga. 149, 135 S. E. 721.

Declarations or admissions of the propounder of a will, made before the execution of the instrument and before he became clothed with the trust, are inadmissible to impeach the will when offered by caveators as the declarations or admissions of a party to the record. Brown v. Kendrick, 163 Ga. 149, 135 S. E. 721.

Declarations as to Title.—In the trial of a claim case declarations of a defendant in execution, made after the pendency of litigation and prior to the time of levy, but at a time when she was not in possession of the property levied on, that she owned such property, are not admissible as evidence and of no probative value even if admitted without objection. Nelson v. Brannon, 32 Ga. App. 455, 123 S. E. 735 and citations. McSwain v. Estroff, 34 Ga. App. 185, 129 S. E. 16.

§ 5781. (§ 5194.) Admissions improperly obtained.

Applied in Duncan v. Bailey, 162 Ga. 457, 134 S. E. 87, to reject admission made with view of compromise.

§ 5785. (§ 5189.) Confidential communications, etc.

Communications Overheard Admissible. — Confidential communications between the husband and wife overheard by a third person are not excluded under this clause of this section. Sims v. State, 36 Ga. App. 266, 136 S. E. 460.

Terms of Attorney's Contract.—The terms of an attorney's contract do not come within the privilege provided by this section. Bank v. Farmers State Bank, 161 Ga. 801, 816, 132 S. E. 221.

ARTICLE 4

Of Parol Evidence to Affect Written.

§ 5788. (§ 5201.) General rule.

Subsequent Agreement.—The rule of this section is not violated by proof of a new and distinct subsequent agreement in the nature of a novation. Wimberly v. Tanner, 34 Ga. App. 313, 129 S. E. 306.

§ 5790. (§ 5203.) Void instruments.

Contract to Evade Usury, Penalty or Forfeiture.—It is always permissible to show by parol evidence that a paper is but a cover for usury, penalty, forfeiture, or other illegal advantage to one of the parties. For if the law did not sedulously disregard form and seek for substance, nothing would be easier than its evasion by giving innocent names to prohibited acts. Flood v. Empire Invest. Co., 35 Ga. App. 266, 270, 133 S. E. 60.

§ 5794. (§ 5207.) Other cases.

Subsequent Agreement.—See note to sec. 5788. The new agreement contemplated by this section must be based upon a valuable consideration and embody the essentials of a new contract. Guthrie v. Rowan, 34 Ga. App. 671, 131 S. E. 93.

CHAPTER 3

Of Records and Other Written Evidence

ARTICLE 1

Of Records and Public Documents

§ 5821. (§ 5234.) Effect of judgment on party vouched into court.

Use of Former Judgment Where Party Was Vouched.—There is no error in introducing a judgment against a vendee of a stolen car, taking the car away from the vendee, in an action by the vendee against the vendor for the purchase money, where the vendee gave the vendor notice of the former suit and the vendor failed to defend. Barrett v. Miller, 36 Ga. App. 48, 135 S. E. 111.

ARTICLE 2

Of Private Writings

§ 5833. (§ 5244.) Subscribing witness, exceptions.

Bond for Title.—Where a bond for title admitted over objection is only collaterally material, it falls within this exception. Chance v. Chance, 163 Ga. 267, 135 S. E. 923.

§ 5834. (§ 5245.) Other proof.

Circumstantial Evidence.—The existence and genuineness of a deed may be proved by circumstantial evidence. Campbell v. Sims, 161 Ga. 517, 131 S. E. 483.

§ 5836. (§ 5247.) Comparison of hands.

Signatures.—The jury may render a verdict establishing the genuineness of an instrument from a comparison between the disputed signature and other signatures of the defendant which are admittedly genuine, and from evidence that the disputed signature "favors," "looks very much like," "bears a great resemblance to," and "is the same kind of handwriting" as the admittedly genuine signatures. Collins v. Glisson, 35 Ga. App. 111, 132 S. E. 114.

CHAPTER 5

Of Oral Testimony

ARTICLE 1

Of Witnesses, Their Attendance and Fees

§ 5849. (§ 5260.) Subpoena.

Appeal or New Trial—Letter as Notice.—Before the presumption of the receipt of a letter by the addressee arises, so as to constitute a sufficient notice under this section the evidence must affirmatively show that the letter was written, properly addressed and stamped, and mailed. Rowland v. State, 34 Ga. App. 689, 690, 131 S. E. 96.

§ 5852. (§ 5263.) Failure to attend.

Forcing Attendance and Punishment of Witnesses. — Where a witness has been subpoenaed to attend the superior court and fails to obey the precept, the court may, under this section, proceed by attachment to compel the attendance of such witness, and also to punish him by a fine not exceeding three hundred dollars. But in such a case section 4849, par. 5 does not apply. Pullen v. Cleckler, 162 Ga. 111, 132 S. E. 761. See annotations to section 4849, par. 5.

ARTICLE 2

Of the Competency of Witnesses

§ 5856. (§ 5267.) Court decides competency.

Child of Tender Years.—Where, under the proof a child of five years was not shown to possess sufficient intelligence to understand the nature of an oath, or the penalty for its violation, it was held that the court erred in permitting the witness to testify. Edwards v. State, 162 Ga. 204, 132 S. E. 893.

Applied in Goodson v. State, 162 Ga. 178, 132 S. E. 899.

§ 5858. (§ 5269.) Who are competent to testify.

Witness Present in Transaction.—The fact that evidence by a disinterested witness may have been adduced for the plaintiff, a personal representative, in support of a transaction between the deceased and defendant would not operate to alter the general rule. Shippey v. Carpenter, 36 Ga. App. 61, 135 S. E. 220.

But the defendant may impeach the testimony of the plaintiff's witness by denying that such witness was present when the agreement between the decedent and himself was made. Shippey v. Carpenter, 36 Ga. App. 61, 135 S. E. 220.

Grantor as Witness.—In an action of ejectment, the opposite party to the deceased grantee of a deed is incompetent under this section to testify in her own behalf to conversations and transactions with such deceased person affecting adversely the title conveyed by the deed. Sikes v. Sikes, 162 Ga. 302, 303, 133 S. E. 239.

Party to Testamentary Contract. — Where a nephew and uncle contracted such that the property passing to the uncle's wife should become the nephew's upon her death, the nephew is not a competent witness as to the contract in an action of specific performance by the nephew against the wife to enforce the contract. Hardeman v. Ellis, 162 Ga. 664, 667, 135 S. E. 195.

Actions to Recover Purchase Price of Partnership. — On the trial of an action to recover from a partnership a sum

paid by the plaintiff on the purchase-price of the partnership business, the death of a member of the firm did not render inadmissible as evidence for the plaintiff a letter addressed to the firm by the plaintiff, in the lifetime of that member, stating that the latter told him that the firm would return the money. Saunders v. Hudson, 34 Ga. App. 752, 131 S. E. 115.

Testimony of Interpleader Competent When Representative Does Not Object.—On the trial of an action instituted by an administrator praying for direction by the court in the distribution of the estate of his decedent, testimony by one of the interpleading claimants, tending to show an executed contract in parol under which she was entitled to the estate, was not subject to exclusion on the objection of the other interpleaders (the administrator not objecting) upon the ground that the witness was incompetent to give such testimony, because it was as to transactions or communications with the decedent whose administrator was a party. The administrator was not seeking a recovery, and was not interested in the result save as a stakeholder or a third party entitled to maintain a petition for interpleader. Cooper v. Reeves, 161 Ga. 232, 131 S. E. 63.

Witness Testifying against Interests.—Where the witness is not a party to the suit, and is not testifying in his own interest, but is testifying against his interest, he does not fall within the inhibition of this paragraph of this section. Chance v. Chance, 163 Ga. 267, 135 S. E. 923.

Alleged Agent of Defendant, Witness against Administrator.—That a husband was present and looking after the transaction when his wife executed a deed of conveyance did not raise the implication, as matter of law, that he was her agent, and did not disqualify him as a witness on the trial of a suit defended by her, in which the administrators of the deceased grantee in the deed were plaintiffs; it not otherwise appearing that he was her agent, or that he looked after the transaction on her behalf, or that he had a legal or pecuniary interest in the result of the suit. Sikes v. Sikes, 162 Ga. 302, 133 S. E. 239.

Applied as to transactions, in Campbell v. Sims, 161 Ga. 517, 520, 131 S. E. 483; as to transferee, in Campbell v. Sims, 161 Ga. 517, 520, 131 S. E. 483.

§ 5862. (§ 5273.) Idiots, etc.

Evidence Admitted Erroneously.—When an examination by the court shows that the child has no such knowledge it is error to permit the child to testify over proper objection. Horton v. State, 35 Ga. App. 493, 133 S. E. 647.

ARTICLE 3

Of the Examination of Witnesses

§ 5869. (§ 5280.) Separate examination.

Liberal Construction.—In administering the rule of this section, the judge is invested with a broad discretion which is to be liberally construed, and the exercise of this discretion will not be controlled or overruled except in case of an abuse of discretion. Under the circumstances disclosed by the record in this case we can not hold that the trial judge abused his discretion, and that the exclusion of the witness in the circumstances stated would require the grant of a new trial. Groover v. Simmons, 161 Ga. 93, 129 S. E. 778.

§ 5874. (§ 5285.) Opinions of witness.

Opinion—Facts upon Which Conclusion Based. — On the trial of an issue as to general mental incapacity to make a will, a subscribing witness to the paper propounded as a will may give in evidence his opinion as to whether the testator at the time of executing the paper appeared "to have sense enough to know who his children were," with or without stating any other facts on which his opinion was based. Dyar v. Dyar, 161 Ga. 615, 131 S. E. 535.

The opinion of a witness may be given in evidence as to the insolvency of a party, provided it is accompanied by the facts upon which the opinion is founded. Bennett v. American Bank, etc., Co., 162 Ga. 718, 729, 134 S. E. 781.

The court properly rejected the testimony of an affiant, that as the result of years of study, observation, and experience, he was firmly convinced that the Masonic Order in America is purely an altruistic, charitable institution, and that the practice of charity is the real excuse for its existence. The question was not one of opinion; and if it had been, such testimony was a mere opinion and conclusions of the witness, who was not shown to be an expert, without the facts upon which such opinion and conclusion was based. Atlanta Masonic Temple Co. v. Atlanta, 162 Ga. 244, 133 S. E. 864.

Same—Specific Instances of Question of Opinion. — The question as to whether the car furnished could and did afford proper refrigeration between the points of shipment, when re-iced at regularly established icing stations, was held one of opinion. Central, etc., R. Co. v. Evans, 35 Ga. App. 438, 143 S. E. 122.

Cited in Humphreys v. State, 35 Ga. App. 386, 133 S. E. 518.

§ 5875. (§ 5286.) Market value, how proved.

The jury are not bound by the opinion of experts as to value. Black v. Automatic Sprinkler Co., 35 Ga. App. 8, 131 S. E. 543.

Specific Applications.—Testimony as to the value of services rendered is in the nature of opinion evidence. Western, etc., Railroad v. Townsend, 36 Ga. App. 70, 72, 135 S. E. 439.

Applied in Blaylock v. Walker County Bank, 36 Ga. App. 377, 136 S. E. 924.

ARTICLE 4

Impeachment of Witnesses

§ 5879. (§ 5290.) Impeaching own witness.

Examination of Opposite Party.—An opposite party may be cross-examined without entitling counsel for any opposite party or parties, as a matter of absolute right, to cross-examine the witness. Scarborough v. Walton, 36 Ga. App. 428, 136 S. E. 830.

§ 5881. (§ 5292.) By contradictory statements.

Sufficiency of Previous Statement.—A previous statement made by a witness, to be impeaching, must refer to matters relevant to his testimony and to the case, and must contradict some matter testified to by him. Otherwise, the attempt to impeach will be unsuccessful. Tanner v. State, 163 Ga. 121, 129, 135 S. E. 917.

§ 5883. (§ 5294.) Credibility of witnesses.

Applied in United States Fidelity Co. v. Hall, 34 Ga. App. 307, 129 S. E. 305.

§ 5884. (§ 5295.) What credit to impeached witness.

Section Analyzed with Respect to Contradictions. — The phrase "successfully contradicted" applies where a witness has not been really impeached, but only where there has been an effort to impeach. In the next sentence of the section there is a provision applicable to a witness who has been really impeached, or "successfully" impeached. It will be observed that the language employed in this last referred sentence fits exactly the definition of perjury. The conclusion, therefore, is that when one has been guilty of perjury, he should not be believed, unless corroborated. The last sentence applies where the circumstances do not prove the witness guilty of perjury. Reed v. State, 163 Ga. 206, 218, 135 S. E. 748.

Same—Use of "Successfully Impeached."—The expression "successfully impeached" is inappropriate because it is confusing to use it in place of the words "successfully contradicted," as used in this section. Reed v. State, 163 Ga. 206, 218, 135 S. E. 748.

CHAPTER 6

Of Interrogatories and Depositions

ARTICLE 1

Commissions, How Issued and Returned

§ 5886. (§ 5297.) Who may be examined on interrogatories.

See annotations to § 5910.

ARTICLE 5

Evidence before Court Commissioner

§ 5910. (§ 5315.) Depositions taken without order or commission.

Effect of Refusal to Testify.—A party to a pending action who is a competent and compellable witness served with proper notice for the taking of his depositions, but refuses to answer proper questions upon the sole ground that he does not come within any of the classes specified in section

5886, is guilty of contempt. Stephens v. Liquid Carbonic Co., 36 Ga. App. 363, 136 S. E. 808.

SEVENTH TITLE
The Verdict and Judgment

CHAPTER 1
Verdict and Judgment

ARTICLE 1
Of the Verdict and Its Reception

§ 5926. (§ 5331.) Direct verdict, when.

Testing Propriety of Directing Verdict.—Where, under all the circumstances, only one conclusion is reasonably possible, the question ceases to be issuable as one of fact and becomes a question of law. Southern Pacific Co. v. DiCristina, 36 Ga. App. 433, 439, 137 S. E. 79.

Converse of Section.—Where there is conflicting evidence as to material issues, it is error for the court to direct a verdict. Bailey v. First Nat. Bank, 34 Ga. App. 454, 129 S. E. 920.

Refusal to Direct Always Proper. — Roberts v. Groover, 161 Ga. 414, 131 S. E. 158.

In proceedings to probate a will, upon a caveat for mental incapacity, where the evidence did not support such incapacity, directing verdict for the propounder was held not erroneous. Mason v. Taylor, 162 Ga. 149, 152, 132 S. E. 893.

Applied in Taylor v. Mentone Hotel & Co., 163 Ga. 357, 361, 136 S. E. 137.

§ 5927. (§ 5332.) Construction of verdicts.

Amount Where Verdict for Defendant.—A verdict in a trover suit, which reads, "We, the jury, find the property in dispute in favor of the defendant," will, at the instance of the defendant, be construed as a verdict finding for the defendant for the value of the property in the amount established by the plaintiff's affidavit for bail, which is corroborated by the plaintiff's own personal testimony upon the trial. This is true although the defendant may not, prior to the rendition of the verdict, have elected to take a verdict for the value of the property. Pound v. Baldwin, 34 Ga. App. 810, 131 S. E. 291.

A verdict is certain which can be made certain by what itself contains or by the record. Smith v. Cooper, 161 Ga. 594, 595, 131 S. E. 478.

Verdict are to be construed in the light of the pleadings and the evidence, and all that is essential to a valid verdict is substantial certainty to a common and reasonable intent. It appearing from the pleadings and evidence in the record in this case that the validity of two deeds was involved, both relating to a single transaction, the court did not err in construing the finding of the jury finding "the deed" invalid as a reference to both deeds involved in the common issue. Short v. Cofer, 161 Ga. 587, 131 S. E. 362.

§ 5930. (§ 5335.) Plaintiff may choose verdict.

Section Construed with Section 4494. — The plaintiff does not have the option given to him under this section, "if the defendant at the first term will tender the property to the plaintiff, together with reasonable hire for the same since the conversion, disclaiming all claim of title." In such a case the plaintiff is limited to a recovery of the property under the tender; and is chargeable with the cost, unless it be shown that a previous demand for the property had been made and refused. Downs Motor Co. v. Colbert, 34 Ga. App. 542, 130 S. E. 592.

Effect of Election upon Issue.—The sole issue in the trial of an action of trover is that of title to the property in dispute; and the fact that the plaintiff may elect to take a money verdict under this section in lieu of the specific personalty claimed can in no event alter that issue. Citizens Bank v. Mullis, 161 Ga. 371, 131 S. E. 44.

§ 5933. (§ 5338.) Juries may sustain verdict.

Applied in Anderson v. Howard, 34 Ga. App. 292, 297, 129 S. E. 567.

ARTICLE 5
How Attacked, and Herein of Motion in Arrest of Judgment

§ 5960. (§ 5365.) Amendable defects, no ground to arrest.

Applied to a distress warrant containing amendable defects. Johnson v. Lock, 36 Ga. App. 620, 621, 137 S. E. 911.

Cited or applied in Hudson v. Cohen, 34 Ga. App. 119, 126 S. E. 205.

Applied in Henderson v. Ellarbee, 35 Ga. App. 5, 6, 131 S. E. 524.

§ 5961. (§ 5366.) Judgments obtained by perjury will be set aside.

Subsequent Statement of Witness as to Falsity of Evidence.—The fact that a witness for the state in a criminal case, though he be the only witness for the prosecution, has made declarations, since the trial, that this testimony given upon the trial was false, is not cause for a new trial. Morrow v. State, 36 Ga. App. 217, 136 S. E. 92.

§ 5964. (§ 5369.) Judgments, when void.

Setting Aside by Justice.—A justice of the peace has no authority to set aside a judgment rendered by him; the subsequent entering of a second judgment purporting to set aside the first mentioned judgment, was itself void and should be treated as a nullity under this section. Edwards v. Edwards, 163 Ga. 825, 137 S. E. 244.

Orders.—Where the judge's order shows on its face a total lack of jurisdiction, the judgment is wholly void, and may, under this section, be attacked collaterally. Rogers v. Toccoa Power Co., 161 Ga. 524, 528, 131 S. E. 517.

§ 5965. (§ 5370.) Equity may set aside judgment.

Applied in Ehrlich v. Bell, 163 Ga. 547, 136 S. E. 423.

§ 5968(1). Jurisdiction to set aside judgment on secured debt.—When a judgment shall be rendered upon any obligation secured by a deed to secure debt, a bond for title to realty, or a bill of sale to personality, given under section 3306 of the Civil Code, the court which rendered such judgment, or the judge thereof in vacation, shall have jurisdiction, power, and authority to vacate and set aside said judgment at any time before the sale of the property described in the deed, bond for title, or bill of sale is made, upon motion of the attorney of the plaintiff and defendant in fi. fa., and the payment of the costs. Acts 1927, p. 221.

§ 5968(2). Cancellation of fi. fa.—Whenever a judgment shall be so vacated and set aside, the clerk of the court in which it was rendered shall mark the fi. fa. issued thereon cancelled and the clerk of the Superior Court shall enter the same upon the general execution docket, and make thereon an appropriate reference to the order vacating the judgment. Whenever a judgment shall as herein provided be vacated and set aside, any deed reconveying the property to the defendant in fi. fa. for the purpose of levy and sale shall be, by virtue of the provisions hereof, automatically cancelled and rendered null and void, and the clerk of the Superior Court shall enter on the record of such deed or reconveyance, when recorded, the word "cancelled," and make appropriate reference to the order vacating the judgment.

§ 5968(3). Original status restored.—When a judgment shall be vacated and set aside as herein provided, the obligation upon which the same was rendered, as well as the deed, bond for title, or bill of sale securing the same, shall be fully restored in all respects to the original status of the same which existed prior to the commencement of the suit in which such judgment was rendered, and thereafter the same shall be for all purposes whatsoever legally of force and effect as if suit had not been instituted and judgment obtained on the said obligation.

§ 5968(4). Applicable to mortgage foreclosure.

—The jurisdiction, power, and authority to vacate and set aside a judgment, as hereinbefore provided, shall extend to a judgment on purchase-money note, conditional sale contract where title is reserved as security, or bond for title is given, and all other cases where it is necessary under section 6037 of the Civil Code to reconvey property to the defendant in fi. fa. for the purpose of levy and sale. The provisions of this Act shall also extend and be applicable in all respects to a judgment and decree foreclosing a mortgage.

EIGHTH TITLE

Costs in Civil Cases

CHAPTER 1

Of Costs in Civil Cases

§ 5989(3). In counties containing cities of more than 175,000 population.—One official court reporter for each of the several divisions of the superior and city courts in counties of this State containing a city of more than 175,000 population, according to the Federal census of 1920, shall be paid out of the treasury of such county a salary to be fixed by the commissioners of roads and revenues of such county, not to exceed forty-two hundred dollars per annum, payable monthly, which salary shall be compensation in full for attendance upon, and taking stenographic notes in, any court or division thereof covered by this Act. Acts 1923, p. 104; 1925, p. 164; 1927, p. 216.

Editor's Note.—The maximum salary to be paid to a court reporter under this section was raised from three thousand dollars to forty-two hundred dollars, by the amendment of 1927.

CHAPTER 3

Abolition of Fee System in Certain Counties

ARTICLE 1

Counties of 200,000 or More Population

§ 6017(1). County officers to receive salaries instead of fees.

Cited in Georgia-Carolina Lumber Co. v. Wright, 161 Ga. 281, 285, 131 S. E. 173.

§ 6017(6). Commissions for collection of corporation, occupation and other special taxes returnable to state. — Provided however, commissions now or hereafter allowed by law for the collection of corporation, occupation and other special taxes shall be collected by the officers aforesaid for the use of the State and held as public moneys belonging to the state and shall be remitted by the officer collecting the same to the State in the same manner and at the same time the taxes are remitted, and none of said commissions shall be turned into the county treasury. The provisions of this section shall not apply to counties having a population of not less than ninety thousand (90,000) nor more than one hundred and fifty thousand (150,000) inhabitants. Acts 1925, pp. 159, 160; 1927, p. 208.

Editor's Note.—The last sentence of the section was added by the amendment of 1927.

§ 6017(7). County officers to receive salaries instead of fees; exception.—This Act shall apply to all counties in the State of Georgia having by the United States census of 1920 a population of forty-four thousand to sixty thousand inhabitants and to all counties in the State of Georgia having by the United States census of 1920 a population of seventy thousand to one hundred and fifty thousand inhabitants and to all counties in the State which may by any future census of the United States have a population of seventy thousand to one hundred and fifty thousand inhabitants except as hereinafter provided. In all such counties the fee system for compensating the officers herein named shall be abolished except those fees that are paid by the State to the Tax Collector and Tax Receiver and the officers herein named shall thereafter be paid salaries as herein provided instead of fees as under the present system except for the fees to be paid by the State as will be hereinafter provided. Acts 1924, p. 90; 1925, p. 161; 1927, p. 207.

Editor's Note.—The phrase "except as hereinafter provided" at the end of the first sentence, was inserted by the amendment of 1927.

§ 6017(8). Salaries to be fixed annually 90 days before January 1.—The salaries, in all such counties as are described in Section 6017(7), of the Clerk of the Superior Court, (whether he be ex officio clerk of other courts or not) the Sheriff, the Ordinary, the Tax Collector, and the Tax Receiver, shall be fixed for the terms of such officers, at least ninety days before the first of January, (beginning with January, 1926), by the Commissioners of Roads and Revenues, if there be such, (whether the body shall consist of one or several commissioners) or, in event that there are no such Commissioners, the Ordinary or other County authorities having charge of the Roads and Revenues of such counties and such salaries shall be fixed for each term, at the time aforesaid, and shall not be changed during said terms. Provided that in counties having a population of not less than ninety thousand (90,000) nor more than one hundred and fifty thousand (150,000) by the census of the United States, the clerk of the Superior Court shall be paid a salary of nine thousand ($9,000.00) dollars per annum; the sheriff a salary of seven thousand ($7,000.00) dollars per annum; the ordinary a salary of six thousand, five hundred ($6,500.00) dollars per annum; the tax-collector a salary of one thousand ($1,000.00) dollars per annum for services collecting the county taxes; the tax-receiver a salary of three thousand, five hundred ($3,500.00.) dollars per annum for receiving the returns for county taxes; each of said salaries to be paid in equal monthly installments. Provided that nothing herein shall affect any fees or compensation that are now allowed by law to the said tax-collector by the State of Georgia or that may be fixed or allowed hereafter by law, it being the intent of this proviso that the fees and compensation which said tax-collector receives from the State shall not be abrogated and shall not be considered as any part of the salary he receives from the County of Chatham. Acts 1924, p. 90; 1927, p. 208.

Editor's Note.—Both of the provisos to this section were added by the amendment of 1927.

§ 6017(11). Payment of salaries, how made. —After said salaries and expenses are so fixed

and determined, as provided in §§ 6017(8), 6017(9) and 6017(10), it shall be proper and lawful for the treasurer of the county, or other custodian or depository of county funds, out of the county funds which may be paid into the county treasury of such county and derived under the provisions of § 6017(13) on or before the fifteenth day of each month, to pay out the monthly portion of such salaries and expenses to each officer herein named, who shall retain his own salary, and disburse the salaries of assistants and deputies and expenses of the office. Provided, however, that it may be lawful for the Treasurer of the County, or other custodian or depository of County funds, to anticipate the payment into the County Treasury of funds derived under the provisions of § 6017(13) and to pay out of County funds the monthly portion of such salaries and expenses to each officer herein named, as herein above provided. Such disbursement shall be made in accordance with the provisions of any local or special Act of any county affected by the provision of this Act, regulating the methods of disbursements of other county funds. Provided, that as relates to counties having a population of not less than ninety thousand (90,000) nor more than one hundred and fifty thousand (150,000) inhabitants, the words and figures, "as provided in §§ 6017(8), 6017(9) and 6017(10)" as used in this section shall not apply. Acts 1924, pp. 90, 92; 1925, p. 162; 1927, p. 209.

Editor's Note.—The last proviso was added by the amendment of 1927.

ARTICLE 2

Of Fi. Fas., How Levied, and Proceedings Thereon

§ 6026. (§ 5421.) Form of levy.

Cited in Wiley v. Martin, 163 Ga. 381, 136 S. E. 151.

§ 6028. (§ 5423.) On what property first levied, right of.

Section Not Applicable to Tax Execution.—This section does not apply to tax sales. McDaniel v. Thomas, 162 Ga. 592, 133 S. E. 624.

Effect Where Defendant Not Allowed to Point out Property—Notice to Surety.—It is not a ground of illegality that the defendant surety was not notified of the impending levy and was given no opportunity to point out property either in his possession or in the possession of one of the principals in the judgment. Mulling v. Bank, 36 Ga. App. 55, 135 S. E. 222.

§ 6029. (§ 5424.) Sale of separate parcels subject to lien.

To What Liens Applicable.—Applied to the enforcement of a tax lien. Columbia Trust, etc., Co. v. Alston, 163 Ga. 83, 135 S. E. 431.

§ 6030. (§ 5425.) Growing crop to be sold, how.

Stage of Maturity When Subject to Levy.—As to crops, such as cotton, which do not mature on the stalk at one time, but whose maturity is extended throughout the latter portion of the growing season, the rational construction of this section would be, that the crop is subject to levy, whenever it has reached that stage of maturity when it is ready for harvesting to commence. Barnesville Bank v. Ingram, 34 Ga. App. 369, 129 S. E. 112.

§ 6031. (§ 5426.) Notice of levy on land.

Cited in Wiley v. Martin, 163 Ga. 381, 384, 136 S. E. 151.

§ 6032. (§ 5427.) Setting aside execution sale.

Applied in Davis v. Elliott, 163 Ga. 169, 175, 135 S. E. 731.
Cited in Wiley v. Martin, 163 Ga. 381, 136 S. E. 151.

ARTICLE 3

Levy and Sale Where Defendant Has not Legal Title

§ 6037. (§ 5432.) Levy, when contract of purchase or bond for title made.

I. EDITOR'S NOTE AND GENERAL CONSIDERATIONS.

Applied in Corley v. Jarrell, 36 Ga. App. 225, 136 S. E. 177.

VI. FILING AND RECORDING.

Necessity for Filing and Recording Deed—Proper Person to Execute Deed.—Under this section, the "holder of the legal title," and not the original vendor, is the proper person to execute the quitclaim deed under the fi. fa. If a note only is transferred and no deed is made conveying the legal title to the land as security, then it is necessary, after the transferee has obtained judgment, that the vendor execute a quitclaim deed to the purchaser before the fi. fa. could have been levied, because in that event the vendor would have continued to be the holder of the legal title. Swinson v. Shurling, 162 Ga. 604, 134 S. E. 613.

VII. LEVY AND SALE.

General Considerations.—Under this section, the holder of a debt and of the legal title of land conveyed to him as security by the debtor, may, upon default in payment, reduce the debt to judgment, place of record a quitclaim reinvesting the debtor with the legal title to the land, and thereupon have the land levied on and sold in satisfaction of the judgment, free from the claims of persons who purchased the land from the debtor subject to the security deed. Scott v. Paisley, 271 U. S. 632, 46 S. Ct. 591 affirming S. C. 158 Ga. 876, 124 S. E. 726.

Notice.—There is no principle entitling such purchasers to notice of the exercise of this statutory power by the creditor, and that in failing to provide such notice the statute does not deprive them of property without due process of law or deny them the equal protection of the laws. Scott v. Paisley, supra.

§ 6038. (§ 5433.) Where another than vendor, etc., has judgment.

In General—Scope—Applies to Stranger to Security Deed.—Where it appears that a conveyance of title to the property levied on, made by the defendant in execution to a stranger prior to the levy, would, if valid, operate, under the section to deprive the defendant in execution of any leviable interest in the property, the plaintiff in execution may, in the same action, for the purpose of subjecting the property to the execution, attack the conveyance upon the ground of fraud. This case is distinguishable from Sloan v. Loftis, 157 Ga. 93, 120 S. E. 781, in which it appears conclusively, as a matter of law, that the legal title was in the claimant, and that the only interest the defendant in execution had ever had in the property levied upon was as a purchaser holding under a bond for title. Remington v. Garrett, 34 Ga. App. 715, 130 S. E. 831.

No Levy Until Note Paid.—See Miller v. First Nat. Bank, 35 Ga. App. 334, 132 S. E. 783, holding the same as the paragraph under this catchline in the Georgia Code of 1926.

Cited in Duke v. Ayers, 163 Ga. 444, 454, 136 S. E. 410.

CHAPTER 2

Of Forthcoming Bonds

§ 6042. (§ 5437.) Rights of plaintiffs not affected.

Section quoted in Garmany v. Loach, 34 Ga. App. 722, 131 S. E. 108.

CHAPTER 6

Of Sales under Execution

ARTICLE 1

When and Where Made

§ 6060. (§ 5455.) Place, time, and manner of sales.

Not Applicable to Parties under Contract to Deliver.—

The provisions of the section, relieving levying officers in certain instances from removing heavy property to the court-house door, were made for the benefit of the officers and the parties to processes levied by them, and not for the benefit of other persons who may voluntarily contract in writing by a statutory bond to deliver such property at the court-house door. See Scruggs v. Bennett, 34 Ga. App. 131, 132, 128 S. E. 703, and cases there cited.

ARTICLE 3

Sale of Perishable Property

§ 6068. (§ 5463.) Sale of perishable property.

As to amount of recovery, see note under section 5153.

Liens.—For a case holding substantially with the case under this catchline in the Georgia Code of 1926, see Chambers v. Planters Bank, 161 Ga. 535, 131 S. E. 280.

One Filing Intervention Charged with Notice of Application for Short-Order Sale.—One who files an intervention claiming title to a vehicle against which condemnation proceedings have been instituted for transporting prohibited liquors along the public highways is chargeable with notice of an application, already of file in the same court, for a "short-order" sale of the property under the section. Parker v. State, 36 Ga. App. 370, 136 S. E. 800.

§ 6069. (§ 5464.) How sold.

See note to preceding section under catchline "Liens." Ed. Note.

TENTH TITLE

New Trials

CHAPTER 1

By Whom and for What Causes Allowed

§ 6084. (§ 5479.) For erroneous charge to jury, etc.

Section cited in May v. Yearty, 34 Ga. App. 29, 128 S. E. 67; Carr v. Hendrix, 34 Ga. App. 446, 129 S. E. 876.

§ 6085. (§ 5480.) On account of new evidence.

Facts Known by Summoned Witnesses Who Did Not Testify.—Where witnesses summoned by the defendant are present at the trial but are not examined, a new trial will not be granted on the ground that since the verdict the defendant has for the first time learned that they could have testified to facts material to his defense. Rounsaville v. State, 163 Ga. 391, 397, 136 S. E. 276; Hall v. State, 117 Ga. 263, 43 S. E. 718.

§ 6086. (§ 5481.) Rule in such cases.

Discretion of Trial Judge.—That it is no abuse of discretion to refuse a new trial when the proper affidavits supporting witnesses are absent is reaffirmed in Carpenter v. State, 35 Ga. App. 349, 133 S. E. 350, and in Nelson v. State, 35 Ga. App. 364, 133 S. E. 351.

Affidavits—In Support of Witnesses.—An affidavit in support of the witness upon whose newly discovered evidence a new trial is sought must give the names of his associates, a statement that he keeps good company not being sufficient to meet this requirement, which is necessary to enable the prosecution to make a counter-showing; and where such affidavit does not comply with this requirement, the trial judge does not abuse his discretion by refusing to grant a new trial on this ground. Brice v. State, 34 Ga. App. 240, 129 S. E. 665, citing Ivey v. State, 154 Ga. 63, 113 S. E. 175. See also, Carpenter v. State, 35 Ga. App. 349, 133 S. E. 350; Wright v. State, 34 Ga. App. 505, 130 S. E. 216.

Rule of Industrial Commission.—Rule 26 of the industrial commission follows this section, relating to newly discovered evidence as a ground for a new trial. American Mutual Liability Ins. Co. v. Hardy, 36 Ga. App. 487, 491, 137 S. E. 113.

Quoted in part in Hewett v. State, 36 Ga. App. 664, 137 S. E. 853.

Applied in Shahan v. State, 36 Ga. App. 315, 136 S. E. 798.

§ 6092(1). Effect of failure to raise objections before trial judge.

Applied in City Nat. Bank v. Bridges, 34 Ga. App. 178, 128 S. E. 694.

§ 6093. (§ 5488.) Brief of evidence.

General Considerations.—The brief of evidence required is a condensed and succinct brief of material portions of oral testimony; the briefer the brief the better, provided it includes the substance of all the material portions of the evidence, oral and documentary. It is not dependent exclusively upon the stenographic report. The use of the question and answer form in the brief, except in unusual instances, is not permissible. Brown v. State, 163 Ga. 681, 137 S. E. 31.

What Constitutes Non-Compliance.—Where the document purporting to be a brief of the evidence is made up of portions of the pleadings together with the captions of the same and other documentary evidence copied without briefing, and where many pages of the oral evidence are not briefed but are set out as questions and answers, such a paper will be held to constitute no compliance with the law. Davis v Gray, 163 Ga. 271, 136 S. E. 81.

Same—Absence of Bona Fide Effort to County. — Where there had been no bona fide effort to comply with the requirement of this section, the court will not undertake to determine any question the decision of which is dependent upon a consideration of the so-called brief of evidence annexed to the bill of exceptions. Clay v. Austell School Dist., 36 Ga. App. 354, 136 S. E. 540.

ELEVENTH TITLE

Supreme Court

CHAPTER 1

The Supreme Court and Its Powers

§ 6103. (§ 5498.) Powers enumerated.

Cited in Gore v. Humphries, 163 Ga. 106, 115, 135 S. E. 481.

CHAPTER 2

Its Judges

§ 6116. Reversal and affirmance; number of judges.

Applied as to affirmance by operation of law when the justices are equally divided. Irby v. Allen & Co., 161 Ga. 858, 131 S. E. 910.

CHAPTER 4

What Causes May Be Taken to the Supreme Court

§ 6138. (§ 5526.) Writ of error.

I. EDITOR'S NOTE.

For cases holding substantially with the rule of the first paragraph under this analysis line in the Georgia Code of 1926, see American Agri. Chemical Co. v. Bank, 34 Ga. App. 62, 128 S. E. 208; Brown v. Marbut-Williams Lumber Co., 34 Ga. App. 348, 129 S. E. 575.

II. WHEN WRIT OF ERROR OR BILL OF EXCEPTIONS LIE.

A. Premature Jurisdiction Generally.

When Premature. — The direction of a verdict finding against a plea of res adjudicata is not such a final judgment as is subject to review by direct bill of exceptions. The ruling may be excepted to by exceptions pendente lite, upon which error may be assigned in a bill of exceptions containing an exception to a final judgment; but the error alleged to have been committed can not be reviewed in the Supreme Court until there has been a final judgment in the lower court. Douglas v. Hardin, 163 Ga. 643, 136 S. E. 793.

C. Other Instances of Final Disposition.

Judgment on General Demurrer.—A judgment overruling the general demurrer to a petition, is a final determination of the case and would authorize the defendant to assign error thereon in a direct bill of exceptions. Newton v. Roberts, 163 Ga. 135, 135 S. E. 505.

Order for Making New Party.—An order for making a new party is a final disposition of the cause as to such new party if the trial court refuses to make him a party, and consequently a writ of error sued out by him cannot be

said to have been prematurely obtained. McMillan v. Spencer, 162 Ga. 659, 134 S. E. 921.

Applied in Seaboard Air Line R. Co. v. Sarman, 36 Ga. App. 448, 136 S. E. 920; Cooper v. Whitehead, 163 Ga. 662, 136 S. E. 911.

§ 6139. (§ 5527.) Bills of exceptions; cross-bills.

See annotation to section 6224.

III. CROSS-BILLS.

General Considerations.—Calhoun Oil, etc., Co. v. Western, etc., Railroad, 35 Ga. App. 436, 133 S. E. 348, affirms the holding of the second sentence under this catchline in the Georgia Code of 1926.

CHAPTER 5

Of Taking Cases to Supreme Court

ARTICLE 1

Mode of Procedure

§ 6144. When motion for new trial, etc., not necessary.

Cited in Home Ins. Co. v. Swann, 34 Ga. App. 19, 128 S. E. 70.

§ 6147. (§ 5534.) Judge to examine certificate.

Section Will Not Prevent Dismissal of Improperly Certified Certificate.—The judge's certificate to the bill of exceptions must state that it is true; and for lack of such certification the bill of exceptions will be dismissed. This is not a mere "want of technical conformity to the statutes or rules regulating the practice in carrying cases to" the Supreme Court; and this section will not prevent the dismissal of the bill of exceptions for the lack of such certification. Cady v. Cady, 161 Ga. 556, 131 S. E. 282.

ARTICLE 2

Diminution of Record

§ 6149. (§ 5536.) Additional record, how procured.

What May Be Brought up.—For a case holding with the principle set out under this catchline in the Georgia Code of 1926, see Free Gift Lodge v. Edwards, 161 Ga. 832, 132 S. E. 206.

Applied in Lewis v. Moultrie Banking Co., 36 Ga. App. 347, 351, 136 S. E. 554.

ARTICLE 3

Bills of Exceptions, When to Be Signed

§ 6152. (§ 5539.) Bill of exceptions, when to be tendered.

General Considerations—Failure to Certify for More than Thirty Days.—This section does not in any case authorize delay in tendering a bill of exceptions for more than thirty days after the final adjournment of the court for that term. Birmingham Finance Co. v. Chisholm, 162 Ga. 501, 134 S. E. 301.

Delay or Extension of Time. — Cohen v. Brown, 35 Ga. App. 508, 134 S. E. 119, affirms the holding given in the first paragraph under this catchline in the Georgia Code of 1926. Burnett v. McDaniel & Co., 35 Ga. App. 367, 133 S. E. 268, holds substantially the same as the second paragraph under this catchline in the Georgia Code of 1926.

Same—Supersedeas Does Not Extend.—The fact that the order of the superior court to which exception is taken provides that it shall operate as a supersedeas for twenty days relates merely to the enforcement of the judgment pending a valid writ of error, and did not have the effect of changing the date of the order excepted to, or of extending the time prescribed by law within which an appeal could e taken. Cohen v. Brown, 35 Ga. App. 508, 134 S. E. 119.

Applied in Parrish v. Central, etc., R. Co., 36 Ga. App. 133, 135 S. E. 762; Forrester v. Frizzell, 35 Ga. App. 562, 134 S. E. 182; Hamilton v. Kinnebrew, 161 Ga. 495, 131 S. E. 470; McDonald v. Dabney, 161 Ga. 711, 132 S. E. 547.

Cited in Miller & Co. v. Gibbs, 161 Ga. 698, 699, 132 S. E. 626.

§ 6153. (§ 5540.) Fast bills of exception.

Cited in Miller & Co. v. Gibbs, 161 Ga. 698, 132 S. E. 626.

§ 6154. (§ 5541.) Exceptions pendente lite.

Applied to cross bill of exceptions to review interlocutory hearings to which no exception was filed within time prescribed. Miller & Co. v. Gibbs, 161 Ga. 698, 132 S. E. 626.

ARTICLE 4

Proceedings in Case of Death or Refusal to Sign

§ 6155. (§ 5542.) When the judge is dead or absent.

Failure to Tender to Judge.—The provisions of the section are not applicable where a so-called bill of exceptions was not certified by the judge of the trial court, but was verified by the oath of the attorney for the plaintiff in error, and where it appears that the bill of exceptions was never tendered to the presiding judge for certification although the judge lived for more than ninety days after the adjournment of the term of the court during which the judgment complained of was rendered, and was capable of acting and could have certified the bill had it been presented to him in time. Linthicum v. Trust Co., 36 Ga. App. 423, 136 S. E. 813.

§ 6158. (§ 5545.) Judge refusing to certify.

Applied in Nash v. Sheppard, 161 Ga. 192, 129 S. E. 639.

ARTICLE 5

Service of Bills of Exceptions

§ 6160(1). Parties bound by service on counsel; waiver of defects.

General Considerations—Absence of Service or Acknowledgment.—Where there is no service and no acknowledgment of service or waiver thereof, the bill of exceptions will be dismissed. Izlar v. Central, etc., R. Co., 162 Ga. 558, 134 S. E. 315.

Parties Bound by Service upon Counsel—Non-residents of County.—Where it is attempted to serve a bill of exceptions by leaving a copy thereof at the residence of the attorney of the defendant in error, it must affirmatively appear that the defendant in error is a non-resident of the county. Saunders v. Saunders, 163 Ga. 770, 137 S. E. 15.

Sufficiency of Acknowledgment to Bind in Dual Capacity. —Where an acknowledgment of service by "Atty. for X" has been procured, X is bound both personally and in his representative capacity, and the bill of exceptions can be amended in the Supreme Court by making any person a party defendant in error to the case who is bound by such service, although such person may not have been named in the bill of exceptions. Henderson v. Lott, 163 Ga. 326, 328, 136 S. E. 403.

Acknowledgment as Waiver—Service on Sunday. — The Court of Appeals will not dismiss the bill of exceptions merely because the service thereof appears to have been acknowledged on a date which the court judicially knows was Sunday, when counsel did not state in the entry of acknowledgment that it was not to be construed as a waiver of the defect. Bartow v. Smith, 35 Ga. App. 57, 132 S. E. 103.

Applied in Sanders v. Sanders, 163 Ga. 770, 137 S. E. 15.

§ 6160(2). Bill of exceptions amended to make person a party defendant.

Applied in Sanders v. Sanders, 163 Ga. 770, 137 S. E. 15; Henderson v. Lott, 163 Ga. 326, 328, 136 S. E. 403. See note under preceding section.

ARTICLE 6

Supersedeas

§ 6165. (§ 5552.) Supersedeas, how obtained.

Applied in Tift v. Atlantic Coast Line R. Co., 161 Ga. 432, 447, 131 S. E. 46.

ARTICLE 7

Duty of Clerks of Superior and City Courts

§ 6167. (§ 5554.) Filing in clerk's office.

Sufficient Filing.—For cases sustaining the principle stated

in the second sentence under this catchline in the Georgia Code of 1926, see Gibbs v. Hancock Mut. Life Ins. Co., 35 Ga. App. 505, 133 S. E. 749; Norris v. Baker County, 135 Ga. 229, 69 S. E. 106; Goodin v. Mills, 137 Ga. 282, 73 S. E. 399; Tatum v. Trappnell, 30 Ga. App. 104, 117 S. E. 251.

Effect of Non-Compliance. — Where it appears from the certificate of the clerk of the trial court that the section was not complied with, and that counsel for plaintiff in error was the cause of such failure, the writ of error must be dismissed. Atlanta, etc., Nat. Bank v. Goodwin, 34 Ga. App. 169, 128 S. E. 691.

Cited in Alford v. Gibson, 161 Ga. 567, 131 S. E. 529.

ARTICLE 3

Making Parties, etc.

§ 6176. (§ 5562.) Essential parties.

Instances of Essential Parties—Use May Be Essential Party.—There may be cases in which the nominal plaintiff is so wholly without interest in the suit, or the results thereof, as to make the usee the proper person upon whom to perfect any service required to be made in behalf of the defendant. Sligh v. Smith, 36 Ga. App. 237, 239, 136 S. E. 175.

Applied in Whitehurst v. Holly, 162 Ga. 323, 133 S. E. 861.

ARTICLE 4

No Dismissals in Supreme Court, When

§ 6183. (§ 5569.) Unlawful to dismiss for technical defect.

Applied in Colquitt County v. Bahnsen, 162 Ga. 340, 341, 345, 133 S. E. 871; Stephens v. Liquid Carbonic Co., 36 Ga. App. 363, 367, 136 S. E. 808.

Cited in Flood v. Empire Invest. Co., 35 Ga. App. 266, 133 S. E. 60.

§ 6184. (§ 5570.) Dismissal avoided by amendment.

Amending to Conform to Judgment.—The plaintiff in error should be allowed to amend the bill of exceptions so as to make it conform with technical accuracy to the judgment. Flood v. Empire Invest. Co., 35 Ga. App. 266, 268, 133 S. E. 60.

§ 6186. (§ 5572.) Benefits lost by negligence.

Applied in Barrett v. Union Banking Co., 163 Ga. 893, 137 S. E. 14.

§ 6187. No dismissal because not certified in time.

Applied in Parrish v. Central, etc., R. Co., 36 Ga. App. 133, 135 S. E. 762.

ARTICLE 5

Amendments

§ 6190. (§ 5575.) Incomplete record, how corrected.

Where a demurrer is not sent up as a part of record, the Supreme Court is empowered under this section to require it sent up. Bennett v. Benton, 162 Ga. 139, 140, 133 S. E. 855.

ARTICLE 7

Decisions

§ 6204. (§ 5585.) First grant of a new trial.

Where First New Trial Error.—It is error even to grant a first new trial where the law and the evidence demands the verdict as rendered, whether it was directed by the court or returned at the volition of a jury. Jones Motor Co. v. Finch Motor Co., 34 Ga. App. 399, 401, 129 S. E. 915.

Applied in Riggins v. Scott, 35 Ga. App. 465, 133 S. E. 647; Louisville & N. R. Co. v. Barksdale, 34 Ga. App. 812, 131 S. E. 298; Nabros v. Nabros, 161 Ga. 382, 131 S. E. 45. See Douglas v. Hardin, 161 Ga. 838, 131 S. E. 896.

§ 6207. (§ 5588.) Decision of, how reversed.

Applied in Hallman v. Atlanta Child's Home, 161 Ga. 247, 254, 130 S. E. 814.

ARTICLE 8

Record and Costs

§ 6210. (§ 5591.) Attorney liable for costs.

Advance of Costs by Attorney Does Not Defeat Levy.—A levy under an execution for costs, issued in the name of the plaintiff for the use of officers of court, is not subject to be arrested by affidavit of illegality on account of the fact that the attorney for the plaintiff had advanced the costs incurred in the appellate court. Harvey v. Long Cigar, etc., Co., 36 Ga. App. 45, 135 S. E. 222.

ARTICLE 9

Judgment and Remittitur

§ 6213. (§ 5594.) Damages in cases of affirmance.

Court Not Convicted That Case for Delay.—See Guthrie v. Rowan, 34 Ga. App. 671, 131 S. E. 93, holding the same as the paragraph under this catchline in the Georgia Code of 1926.

Must Be Judgment for Sum Certain.—See Clark v. Union School District, 36 Ga. App. 80, 135 S. E. 318, holding substantially the same as the first sentence under this catchline in the Georgia Code of 1926.

When Is Case Brought Up for Delay—Objection That Verdict Contrary to Law and Evidence. — Where the only ground of exception presented was that the verdict is contrary to law and without evidence to support it, and where it appears that under a proper application of the law the evidence supports the verdict this section will be applied. Yeomans v. Beasley, 36 Ga. App. 467, 137 S. E. 131.

Applied in Felker v. Still, 35 Ga. App. 236, 133 S. E. 519.

RULES OF THE SUPREME COURT OF THE STATE OF GEORGIA

II. Bills of Exceptions and Records

§ 6224. (§ 5605.) Rule 6. Bills of exceptions.

Bill Held Sufficient.—See Colquitt County v. Bahnsen, 162 Ga. 340, 345, 133 S. E. 871, where the bill of exceptions was held to specify plainly the decision of the court denying the plaintiff a mandamus absolute.

IV. Costs

§ 6232. (§ 5613.) Rule 14. Attorneys, etc., bound.

Appointed Counsel Not Relieved of Payment.—Under this rule of court the counsel can not be relieved from the payment of costs on the ground that he was appointed in the court below to represent the defendant, the latter being unable to employ counsel, and being financially unable to respond to him for the costs incurred. James v. State, 162 Ga. 42, 132 S. E. 417.

RULES OF THE SUPERIOR COURTS

Established by the Judges in Convention, at Atlanta, July 5, 1907

COMMON-LAW RULES

XII. Illegality

§ 6288. (§ 5662.) Rule 29. No second affidavit.

General Considerations — When First Affidavit Void. — This section has no application where the first affidavit of illegality was void. Bridges v. Melton, 34 Ga. App. 480, 129 S. E. 913.

CONSTITUTION OF THE STATE OF GEORGIA

ARTICLE 1

Bills of Rights

SECTION 1

Rights of the Citizen

§ 6359. (§ 5700.) Par. 3. Life, liberty, and property.

See annotations to §§ 5206, 6700.

Right to Hearing—Condemnation Law.—The provisions of the act of the General Assembly to amend the charter of Edison, approved August 4, 1923, relating to the condemnation of land for school purposes, the proceedings for condemnation, and the notice to be given to the owners of property sought to be condemned, are not in violation of this section inasmuch as the act provides for a hearing before assessors duly appointed after notice, in the same manner and under the same regulations as are contained in the general law for condemnation of private property. Sheppard v. Edison, 161 Ga. 907, 132 S. E. 218.

Same—Tax Law. — If the act of the General Assembly furnishes the taxpayers notice and hearing before the act becomes operative, there is no lack of due process. The taxpayers are presumed to qualify, to inform themselves as to the merits of the proposed issues, and to exercise their rights as voters in all elections submitted to them. Where they have this opportunity, there is no lack of "due process of law" which would nullify proposed legislation. Green v. Atlanta, 162 Ga. 641, 648, 135 S. E. 84.

Zoning Ordinance which deprives a person of the lawful use of his property held unconstitutional, under this section. Morrow v. Atlanta, 162 Ga. 228, 133 S. E. 345.

Instances Where Section Not Violated.—The automobile law of 1915 is not invalid under this section. Lee v. State, 163 Ga. 239, 135 S. E. 912.

Expenditure of municipal funds for special services rendered in tax valuation, does not deprive citizens of property without due process of law. Tietjen v. Savannah, 161 Ga. 125, 126, 129 S. E. 653.

Section 125 of the Penal Code is not unconstitutional as violative of this section. Rhoden v. State, 161 Ga. 73, 129 S. E. 640.

Same—Ordinances.—Ordinances making a tax assessment for street improvement, a lien upon the property, is not violative of this section. Baugh v. LaGrange, 161 Ga. 80, 130 S. E. 69.

§ 6362. (§ 5703.) Par. 6. Crimination of self not compelled.

Evidence Obtained from Receiver of Accused.—The introduction of documentary evidence obtained from a receiver of the property and assets of one accused of crime, by the process of subpoena duces tecum, although such evidence may be incriminatory in its nature and tend to convict the accused of crime, is not violative of this section. Rawlings v. State, 163 Ga. 406, 136 S. E. 448.

§ 6364. (§ 5705.) Par. 8. Jeopardy of life, etc., more than once, forbidden.

Cited in Reed v. State, 163 Ga. 206, 212, 135 S. E. 748.

§ 6370. (§ 5711.) Par. 14. Appropriations to sects forbidden.

See annotations to § 6454.

§ 6376. (§ 5717.) Par. 20. Contempts.

Cited in Pullen v. Cleckler, 162 Ga. 111, 114, 132 S. E. 761.

§ 6379. (§ 5720.) Par. 23. Legislative, judicial, and executive, separate.

Editor's Note and General Considerations.—The judicial department of the government can not interfere with any provision made by the legislative branch of the government which the General Assembly may deem to be necessary as expenses in discharging its duties of legislation. Speer v. Martin, 163 Ga. 535, 537, 136 S. E. 425.

Instances Where Section Not Violated.—The banking law of 1919 is not repugnant with this section.

SECTION 3

Protection to Person and Property

§ 6388. (§ 5729.) Paragraph 1. Private ways; just compensation.

Editor's Note and General Considerations—Effect of Enhancement of Value upon Amount of Damages.—In the application of this provision of the fundamental law the courts have uniformly recognized the rule that where none of the property, or only a part of it, is actually taken for public use, any enhancement of the market value which arises directly from such public improvement and which accrues directly to the particular property remaining may be set off against the gross damage which may be thus occasioned. Muecke v. Macon, 34 Ga. App. 744, 131 S. E. 124.

Cited in Smith v. Floyd County, 36 Ga. App. 554, 137 S. E. 646; Rogers v. Toccoa Power Co., 161 Ga. 524, 528, 131 S. E. 517.

§ 6389. (§ 5730.) Par. 2. Attainder; ex post facto and retroactive laws, etc.

Instances of Valid Acts.—Municipal ordinance requiring deposits by consumers of light and water, though having meters, not invalid under this section as impairing the obligation of contract. Young v. Moultrie, 163 Ga. 829, 831, 137 S. E. 257.

SECTION 4

Special Legislation Forbidden

§ 6391. (§ 5732.) Paragraph 1. General laws, and how varied.

Instances of Special Laws.—The act of 1924 (Ga. Laws 1924, p. 275) authorizing counties to change road in a town, is a special law and unconstitutional under this section. Shore v. Banks County, 162 Ga. 185, 186, 132 S. E. 753.

Section not applied to special law creating a city charter. Baugh v. LaGrange, 161 Ga. 80, 82, 130 S. E. 69.

§ 6392. (§ 5733). Par. 2. What acts void.

Cited in Speer v. Martin, 163 Ga. 535, 539, 136 S. E. 425.

SECTION 5

Governmental Rights of the People

§ 6393. (§ 5734.) Paragraph 1. State rights.

Cited in Green v. Atlanta, 162 Ga. 641, 648, 135 S. E. 84.

§ 6394. (§ 5735.) Par. 2. Enumeration of rights not deny others.

Cited in Green v. Atlanta, 162 Ga. 641, 648, 135 S. E. 84.

ARTICLE 2

Elective Franchise

SECTION 1

Qualification of Voters

§ 6397. Par. 3. Who entitled to register and vote.

See note under section 34 paragraph 3.

ARTICLE 3

Legislative Department

SECTION 7

Enactment of Laws

§ 6437. (§ 5771.) Par. 8. One subject-matter expressed.

See application as to section 3438, P. C. §§ 461(12), 419(1).

Instances Where Section Not Violated.—The banking law

of 1919 is not repugnant with this section. Felton v. Bennett, 163 Ga. 849, 137 S. E. 264.

The act of 1901 to create a new charter for the city of LaGrange held not violative of this section. Baugh v. LaGrange, 161 Ga. 80, 130 S. E. 69.

Acts of 1925 (Laws 1925, p. 896) amending incorporation law of certain school was held not unconstitutional under this section. English v. Smith, 162 Ga. 195, 133 S. E. 847.

Municipal ordinance relating to salaries of firemen was held not unconstitutional under this section. Green v. Atlanta, 162 Ga. 641, 135 S. E. 84.

§ 6445. (§ 5779.) Par. 17. Statutes and sections of Code, how amended.

Acts Not Violative.—The acts of 1924 as to recovery for homicide of parent (Ga. L. 1924, p. 60) is not unconstitutional as being in violation of this section. Peeler v. Central, etc., R. Co., 163 Ga. 784, 137 S. E. 24.

This section was not violated by the act of 1925 amending the law under which Barnesville School is incorporated. English v. Smith, 162 Ga. 195, 199, 133 S. E. 847.

§ 6446. (§ 5780.) Par. 18. Corporate powers, how granted.

Cited in Free Gift Society v. Edwards, 163 Ga. 857, 864, 137 S. E. 382.

SECTION 9

Pay of Members

§ 6454. (§ 5788.) Paragraph 1. Compensation.

No Injunction Can Be Granted.—Where the question is not raised that the mileage is in an amount in excess of that allowed by this section, but this proceeding merely seeks to determine under what circumstances such mileage may be allowed by the proper committees and presiding officers of the General Assembly, the courts can grant no injunction to enjoin the Treasurer of the State from paying mileage. Speer v. Martin, 163 Ga. 535, 537, 136 S. E. 425.

ARTICLE 4

Power of the General Assembly over Taxation, etc.

SECTION 2

Regulation of Corporations

§ 6463. (§ 5797.) Paragraph 1. Railroad tariffs.

Section Not Intended to Limit Powers.—Independently of this provision, the General Assembly possesses the inherent power to regulate public utilities. The conference upon the General Assembly of the powers stated in this section was not intended to limit its powers to those expressed in that provision. Atlanta Terminal Co. v. Georgia Public Service Commission, 163 Ga. 897, 137 S. E. 556.

§ 6464. (§ 5798.) Par. 2. Right of eminent domain; police power.

Police Power—Regulation of Busses Valid.—Ordinance regulating busses for transportation of passengers in streets, held not violative of this section. Schlesinger v. Atlanta, 161 Ga. 148, 129 S. E. 861.

ARTICLE 5

Executive Department

SECTION 1

Governor

§ 6481. (§ 5815.) Par. 12. Reprieves and pardons.

Reprieve.—The constitution does not undertake to define what is meant by a reprieve; properly construed, a reprieve by the executive is nothing but a temporary suspension for the period named in the respite of the execution of the sentence imposed by the court. Gore v. Humphries, 163 Ga. 106, 114, 135 S. E. 481.

Stay of Execution.—The contention that only the Governor can stay the execution of a sentence in a case where such sentence has been suspended by the Governor in the exercise of his right to suspend the sentence by reprieve is untenable under P. C. sec. 1069(7). Gore v. Humphries, 163 Ga. 106, 114, 135 S. E. 481.

ARTICLE 6

Judiciary

SECTION 2

Supreme Court, and Court of Appeals

§ 6502. (§ 5836.) Par. 5. Jurisdiction.

Editor's Note.—In regard to the holding set out in the third paragraph under this catchline in the Georgia Code of 1926, it is said that the decision in the Yesbik case has since been considered the chart and guide for the Supreme Court in all subsequent cases where the rules there announced were applicable. See King v. State, 155 Ga. 707, 712, 118 S. E. 368. Louisville, etc., R. Co. v. Tomlin, 161 Ga. 749, 759, 132 S. E. 90.

Constitutional Questions.—In Griggs v. State, 130 Ga. 16, 60 S. E. 103, the Supreme Court said: "This court will not pass upon the constitutionality of a statute unless it appears that the question was made in the court below and passed upon by the trial judge, and further that the particular provision of the constitution alleged to have been offended by the statute was clearly designated." United States Fidelity, etc., Co. v. Watts, 35 Ga. App. 447, 451, 133 S. E. 476.

§ 6506. Par. 9. Court of Appeals.

Nature of Question Certified—Constitutional Question.—See Daniel v. Claxton, 35 Ga. App. 107, 132 S. E. 411, holding the same as the second sentence under this catchline in the Georgia Code of 1926, citing Gulf Paving Co. v. Atlanta, 149 Ga. 114, 99 S. E. 374.

Dismissal Case Reinstated.—Since the court has never formulated the rules contemplated by the amendment of 1916 and at present no statute or rule provides for the giving of notice to counsel of the hearing of cases in this court, where counsel did not receive the notice which was mailed to him and hence failed to prosecute and the case was dismissed the court will reinstate the case in its discretion. Winder v. Winder Nat. Bank, 161 Ga. 882, 884, 132 S. E. 217.

Cited in Winder v. Winder Nat. Bank, 161 Ga. 882, 132 S. E. 217.

SECTION 4

Jurisdiction of Superior Courts

§ 6516. (§ 5848.) Par. 7. Judgment by the court.

See note under section 5662.

Cited in Pierce v. Jones, 36 Ga. App. 561, 137 S. E. 296.

SECTION 16

Venue

§ 6540. (§ 5871.) Par. 3. Equity cases.

See annotation to § 5527.

SECTION 18

Jury Trials

§ 6545. (§ 5876.) Paragraph 1. Trial by jury.

Contempt Proceeding.—In a proceeding for contempt against the defendant, growing out of his alleged violation of a mandamus absolute, he is not entitled to a trial by a jury when an issue of fact is raised. Gaston v. Shunk Plow Co., 161 Ga. 287, 298, 130 S. E. 580.

Instances Where Section Not Violated.—Section 1697(13) is not unconstitutional as violative of this section. Lewis v. State Board, 162 Ga. 263, 133 S. E. 469.

ARTICLE 7

Finance, Taxation, and Public Debt.

SECTION 1
Power of Taxation

§ 6551. (§ 5882.) Paragraph 1. Taxation, how and for what purposes exercised.

Power of Taxation Limited.—The General Assembly has only those powers of taxation over the State which it is permitted to exercise under the grant of power contained in the constitution. Brown v. Martin, 162 Ga. 172, 174, 132 S. E. 896.

SECTION 2
Taxation and Exemptions

§ 6553. (§ 5883.) Paragraph 1. Must be uniform, etc.; domestic animals.

II. TAXES IMPOSED BY MUNICIPALITIES.

Instances of Municipal Taxes.—Under the general language of this section, a leasehold estate in state owned property (governor's mansion) is taxable by a municipality. Henry Grady Hotel Co. v. Atlanta, 162 Ga. 818, 135 S. E. 68.

SECTION 6
Purposes of Taxation by Counties and Cities

§ 6562. (§ 5892.) Par. 2. Taxing power of counties limited.

The word "roads" does not include "streets" of municipalities in the county. Mitchell County v. Cochran, 162 Ga. 810, 815, 134 S. E. 768.

Applied in Commissioners v. Martin, 161 Ga. 220, 130 S. E. 569.

Cited in Bank v. Hagedorn Constr. Co., 162 Ga. 488, 499, 134 S. E. 310.

SECTION 7
Limitation on Municipal Debts

§ 6563. (§ 5893.) Paragraph 1. Debt of counties and cities not to exceed seven per cent.

Definitions.—A registered voter under this section is one who had been lawfully registered and who has the present right to vote. Persons merely entitled to be registered or those lawfully registered who have been disqualified to vote are not included. Daniel v. Claxton, 35 Ga. App. 107, 132 S. E. 411.

Issuance of Notes in Excess of Limit.—An issue of notes in excess of the limit allowed by this section is void since the tax digest of the county will show the assessed valuation. And the county cannot make recitals which will estop it from denying that the loan is in excess of the limit. Baker v. Rockdale County, 161 Ga. 245, 130 S. E. 684.

Municipal Contract for Property Valuation.—Section is not violated by municipal contract for special services in valuing property for taxation. Tietjen v. Savannah, 161 Ga. 125, 134, 129 S. E. 653. Such contract was held not to constitute a debt within the meaning of the section. Id.

§ 6564. (§ 5894.) Par. 2. County and city bonds, how paid.

Installment Bonds.—Nothing in this section is inconsistent with the authorization of an issue of bonds in installments and the levy of the tax for the payment of each installment in the year of its issue. Brady v. Atlanta, 17 Fed. (2d), 764.

Cited in Bank v. Hagedorn, etc., Constr. Co., 162 Ga. 488, 498, 134 S. E. 310.

ARTICLE 8
Education

SECTION 4
Educational Tax

§ 6579. (§ 5909.) Paragraph 1. Local taxation for public schools.

Property Subject to Tax Levy.—The taxes provided for by this section can only be levied upon "all taxable property of the county outside of independent local systems" for the support of county schools under the control of county boards of education. Almand v. Board, 161 Ga. 911, 131 S. E. 897.

When Limit Is Reached.—Where the limit of five mills has been reached by a local tax for the support of public schools, the county authorities can not be compelled, on the recommendation of the board of education, to levy an additional tax for educational purposes. Such additional tax is not permissible under the law, outside of the independent local systems. Brown v. Martin, 162 Ga. 172, 132 S. E. 896.

ARTICLE 9
Homestead and Exemptions

SECTION 1
Homestead

§ 6582. (§ 5912.) Paragraph 1. Homestead and exemption.

Constitutionality—Increase of Exemption.—A debtor's right of exemption under this section cannot be increased as to debts in existence without violating contract clause of Federal Constitution. In re Trammell, 5 Fed. (2d), 326.

"Setting Apart" of debtor's exempt property is a mere identification of property to which exemption shall be applied, the burden of securing which is put on the debtor. In re Trammell, 5 Fed. (2d), 326. And is timely if made before sale, though after levy. Id.

Same—Bankruptcy Proceedings.—Property exempt under this section and section 3416, but not set apart prior to petition in bankruptcy, may be set apart in the bankruptcy proceeding. In re Trammell, 5 Fed. (2d), 326. And the action of the bankruptcy court is equivalent to action by State Court in effectuating exemption. Id.

What Constitutes Head of a Family.—A resident of Georgia having no family within State, but having mother in Poland and sister in another state to whom he regularly sends money, is not the head of a family within the meaning of this section, and section 3416. In re Trammell, 5 Fed. (2d), 326.

Alienage of resident of state is no bar to claim of exemption provided by Const. Ga. Art. 9, section 1, and section 3416. In re Trammell, 5 Fed. (2d), 326.

ARTICLE 11
Counties and County Officers

SECTION 1
Counties

§ 6594. (§ 5924.) Paragraph 1. Counties are corporate bodies.

Liability of County to Suit Generally.—This section subjects the counties of this State to suit, but not to suits upon all causes of action. It does not make them generally liable to suits, like individuals or as municipal corporations. Being political subdivisions of the State, they can not be sued unless made subject to suit expressly or by necessary implication. Decatur County v. Praytor, etc., Contracting Co., 163 Ga. 929, 931, 137 S. E. 247.

SECTION 3
Uniformity in County Offices

§ 6600. (§ 5930.) Paragraph 1. County offices to be uniform.

Cited in McDaniel v. Thomas, 162 Ga. 592, 593, 133 S. E. 624.

CONSTITUTION OF THE UNITED STATES

ARTICLE 8
Amendments.

§ 6700. (§ 6030.) Art. 14. [1.] Citizenship.

Tax Lien upon Property before Improvement.—An act making a tax lien upon property before any paving or improvement is begun on the street for which the tax is levied is not unconstitutional as violative of the due process clause of this section. Baugh v. LaGrange, 161 Ga. 80, 130 S. E. 69.

THE PENAL CODE

Crimes and Their Punishment

PRELIMINARY PROVISIONS

§ 19. (§ 19). No conviction for an assault or attempt when the crime is actually perpetrated.

Evidence held not authorizing conviction for attempt to commit the crime of attempting the making of liquor. Raines v. State, 34 Ga. App. 175, 176, 132 S. E. 243.

§ 30. (§ 30.) Limitations of prosecutions.

Exception as to Running of Limitation—Allegation and Proof.—In a criminal case, where an exception is relied upon to prevent the bar of the statute of limitations, it must be alleged and proved. Bazemore v. State, 34 Ga. App. 773, 131 S. E. 177.

FIRST DIVISION

Definition of a Crime. Persons Capable of Committing. Persons Punishable

ARTICLE 2

Infants, Lunatics, Idiots, and Persons Counseling Them

§ 34. (§ 34.) Infant under the age of ten years.

Applied in McRae v. State, 163 Ga. 336, 342, 136 S. E. 268.

SECOND DIVISION

Principals and Accessories in Crime

ARTICLE 1

Principals in First and Second Degree

§ 42. (§ 42.) Principals in first and second degree.

Charge of section upheld. Coggeshall v. State, 161 Ga. 259, 131 S. E. 57.

Quoted in Bullard v. State, 34 Ga. App. 198, 200, 128 S. E. 920.

FOURTH DIVISION

Crimes Against the Person

ARTICLE 1

Homicide

§ 61. (§ 61.) Express malice.

Circumstances Tending to Show Malice.—On the trial of a man for the homicide of his sister-in-law, growing out of a difficulty in which her husband also was killed by the accused, evidence tending to show a previous difficulty between the accused and the husband (although such difficulty occurred several months prior to the homicide), and the existence of bad blood between them, was admissible as tending to show malice, intent, or motive in killing the deceased. Jeffords v. State, 162 Ga. 573, 134 S. E. 169.

§ 67. (§ 67.) Involuntary manslaughter.

Death Caused by Speeding Involuntary Manslaughter.—Where one operates an automobile upon a public street or highway of this State at a rate of speed penalized by statute, or while he is under the influence of intoxicating liquors, and, in consequence thereof, he kills a human being without any intention to do so, he is, under that view of the case most favorable to him, guilty of involuntary manslaughter. Black v. State, 34 Ga. App. 449, 130 S. E. 591.

§ 68. (§ 68.) Punishment.

Refusal to Charge to Consider Words or Threats not Error.—It is not erroneous for the court, in instructing the jury on the law of voluntary manslaughter, as contained in this section, to fail or refuse to charge in immediate connection therewith the right of the jury to consider words, threats, or menaces in determining whether the circumstances attending the homicide were such as to justify the fears of a reasonable man that his life was in imminent danger or that a felony was about to be committed upon his person. Brown v. State, 36 Ga. App. 83, 135 S. E. 513.

§ 70. (§ 70.) Justifiable homicide.

Where this Section Governs Case, § 73 Excluded.—Where the law of justifiable homicide to prevent the commission of a felony upon the person of the slayer, as embraced in this section and section 71, is involved, it is error to limit the defense to justifiable homicide in a case of mutual combat as embraced in section 73. Boatwright v. State, 162 Ga. 378, 134 S. E. 91.

§ 71. (§ 71.) Fear must be reasonable.

Danger Apprehended Must Be Urgent and Pressing.—The doctrine of reasonable fear does not apply to any case of homicide where the danger apprehended is not urgent and pressing, or apparently so, at the time of the killing. Martin v. State, 36 Ga. App. 288, 291, 136 S. E. 324.

Request for Instruction as to Reasonable Fears.—Where this section had been given in charge, if further instructions were desired, relating to the doctrine of reasonable fears as applicable to the case, there should have been appropriate written requests. Paramore v. State, 161 Ga. 166, 129 S. E. 772.

§ 72. (§ 72.) Killing in defense.

Application to Homicide of Officer.—The provisions of this section are not applicable to killing of an arresting officer who shot at a fleeing automobile. Howell v. State, 162 Ga. 14, 30, 134 S. E. 59.

§ 73. (§ 73.) The danger must be urgent.

Section Applicable for Cases of Mutual Combat.—Where the law of justifiable homicide in cases of mutual combat is involved, the court should instruct the jury that the provisions of this section are applicable only in the event the jury find that the accused and the deceased were engaged in mutual combat. Boatwright v. State, 162 Ga. 378, 134 S. E. 91. See § 70.

§ 74. (§ 74.) Mutual protection.

Applied in Chisholm v. State, 162 Ga. 13, 132 S. E. 388.

§ 94(1). Sexual intercourse with female under fourteen.

Burden of Proving Capacity to Consent.—A female over fourteen years of age is presumed to possess sufficient mental capacity to intelligently assent to or dissent from acts of sexual intercourse; and where in a rape case the contention of the State is that a woman above that age did not possess such intelligence, the burden rests upon the State to establish this fact. Smith v. State, 161 Ga. 421, 131 S. E. 163.

Intercourse with an Imbecile Constitutes Rape Regardless of Consent.—A man who has sexual intercourse with an imbecile female, who is mentally incapable of expressing any intelligent assent or dissent, or of exercising any judgment in the matter, is guilty of rape, though no more force is used than is necessary to accomplish the carnal act, and though the woman offer no resistance. Smith v. State, 161 Ga. 421, 131 S. E. 163.

Indictment for Rape—Verdict for Fornication Void.—Where one is tried on an indictment charging rape and drawn under this section, a verdict finding the accused guilty of fornication is null and void, and the judgment based thereon should be arrested on motion of the defendant. Holland v. State (this case), 161 Ga. 492, 131 S. E. 503. Holland v. State, 34 Ga. App. 824, 131 S E. 923.

ARTICLE 4

Rape

ARTICLE 5

Assault, and Assault and Battery

§ 97. (§ 97.) Assault with intent to murder.

Effect of Section 115(1).—Section 115(1) of the Penal Code does not in any sense modify or repeal this section. Gazaway v. State, 34 Ga. App. 442, 444, 129 S. E. 888.

Intent Question for Jury. — The intent with which a shot is fired is a question for the jury. Gazaway v. State, 34 Ga. App. 442, 444, 129 S. E. 888.

§ 103. (§ 103.) Opprobrious words may be proved in defense.

Jury May Consider Conduct of Person Assaulted and Degree of Force Justified.—The jury may consider the actions and conduct of the person assaulted at the time of the assault, with other facts, in determining if force, and what degree of force, on the part of the defendant was justified, and if not justified, what, if any, effect should be given to such facts as in mitigation. Hutchison v. Browning, 34 Ga. App. 276, 129 S. E. 125.

ARTICLE 7

Kidnapping, and Industrial Home Children

§ 110. (§ 110.) Inveigling children.

Misapprehension as to the Age Is No Excuse. — The fact that the accused was ignorant of the girl's age, and that he believed, in good faith, and had good grounds to believe, that she was more than eighteen years of age, is no defense to an indictment under this section. Smiley v. State, 34 Ga. App. 513, 130 S. E. 359.

ARTICLE 9

Shooting at Another

§ 115. (§ 113.) Shooting at another.

Applied to officer shooting at an automobile in which the plaintiff was riding. Copeland v. Dunehoo, 36 Ga. App. 817, 822, 138 S. E. 267.

Effect of Section 115(1).—Section 115(1) of the Penal Code does not in any way modify or repeal this section. Gazaway v. State, 34 Ga. App. 442, 444, 129 S. E. 888. See annotation to § 115(1).

ARTICLE 9A

Shooting at Dwelling House

§ 115(1). Shooting at occupied dwelling prohibited; penalty.

Intent under this Section and Section 115.—The misdemeanor of unlawfully shooting into an occupied dwelling house under this section may be committed without an intention to maim or wound any person therein; but the intent to wound under section 115 is an essential element of the felony of unlawfully shooting at another. Gazaway v. v. State, 34 Ga. 442, 444, 129 S. E. 888.

Shooting at a Dwelling with Intent to Shoot at Another.—While it is a misdemeanor for any person to shoot at any occupied dwelling house, yet if, in addition to the essentials of that offense, the elements of unlawfully shooting at another or of assault with intent to murder are made to appear, the offender may be punished for the felony so shown. Gazaway v. State, 34 Ga. App. 442, 129 S. E. 888.

Effect of Section upon §§ 97, 115.—This section does not in any sense modify or repeal section 115, defining the offense of unlawfully shooting at another, or section 97, which defines the offense of assault with intent to murder. Gazaway v. State, 34 Ga. App. 442, 444, 129 S. E. 888.

ARTICLE 9B

Eavesdropper or "Peeping Tom"

§ 115(2). Unlawful to be eavesdropper or "Peeping Tom."

Applied in Cobb v. Bailey, 35 Ga. App. 302, 304, 133 S. E. 42.

ARTICLE 12

Blackmail and Threatening Letters

§ 118. (§ 116.) Blackmail defined.

Charge in the Language of Section.—An indictment which charges the offense of blackmailing substantially in the language of this section is not demurrable. Beard v. State, 36 Ga. App. 266, 136 S. E. 333.

ARTICLE 14

Interfering with Apprentices, Servants, Croppers, Farm Laborers, and Employees

§ 125. (§ 122.) Enticing, and attempting to entice away, a servant, cropper, or farm laborer.

Constitutionality.—This section is not violative of the constitution, § 6359. Rhoden v. State, 161 Ga. 73, 129 S. E. 640.

FIFTH DIVISION

Crimes Against the Habitations or Persons

ARTICLE 2

Burglary

§ 146. (§ 149.) Burglary defined.

Allegation as to Place of Business.—Where the house entered was not a "dwelling, mansion, or storehouse," it must be alleged in the indictment that the house was a place of business where valuable goods were contained or stored. Moody v. State, 36 Ga. App. 284, 136 S. E. 464.

It is not essential that the house should be expressly denominated in the indictment as a "place of business," if descriptive words are used sufficient to show that the house was used as a place of business of another. Moody v. State, 36 Ga. App. 284, 136 S. E. 464.

Same—Mere Existence of Valuable Goods Not Sufficient.—The mere fact that valuable goods were contained or stored therein is not alone sufficient to make the house a place of business, within the meaning of section. Moody v. State, 36 Ga. App. 284, 136 S. E. 464.

Church Building.—Whether an ordinary church building or edifice, appropriated to public worship, is subject to be burglarized, is not decided. Moody v. State, 36 Ga. App. 284, 136 S. E. 464.

A smokehouse within 65 feet of the owner's dwelling house and used by him as an outhouse and place for storing meat is among the buildings referred to in this section regardless of whether the smokehouse is within the same inclosure as the dwelling. Moore v. State, 34 Ga. App. 182, 129 S. E. 6.

SIXTH DIVISION

Crimes Relative to Property

ARTICLE 1

Robbery

§ 148. (§ 151.) Definition.

Request to Charge Definition of Robbery.—The omission to give in charge the definition of robbery as in this section is not error in the absence of request so to do. Gore v. State, 162 Ga. 267, 134 S. E. 36.

§ 149. (§ 152.) By open force, punishment.

Charge of robbery upheld under the evidence in the case. Watkins v. State, 36 Ga. App. 297, 136 S. E. 815.

ARTICLE 2

Larceny

§ 168. (§ 171.) Receiving stolen goods.

Conviction of Principal Thief.—An indictment under this section must allege that the principal thief has been indicted and convicted. Ford v. State, 35 Ga. App. 655, 134 S. E. 357

The conviction of the principal is not an element in the crime defined in this section, but is a regulation which affects the time when or the manner in which a person indicted under said section can be tried. The gist of the offense created by this section is buying or receiving goods

with the felonious knowledge that they were stolen. Ford v. State, 35 Ga. App. 655, 134 S. E. 353; 162 Ga. 422, 134 S. E. 95.

The record of the conviction of the principal thief is conclusive evidence of his conviction, but is merely prima facie evidence of his guilt; but the introduction of such record in evidence by the State places the onus upon the accessory of disapproving the guilt of the principal. Ford v. State, 35 Ga. App. 655, 134 S. E. 353.

The accessory could waive the conviction of the principal and go to trial on the charge preferred against him. Ford v. State, 35 Ga. App. 655, 134 S. E. 353.

ARTICLE 3

Embezzlement and Fraudulent Conversions

§ 186. (§ 188.) Embezzlement by the bank or other corporate officers, servants, or stockholders.

Substitution of Stock of Less Value for Stock of More Value. — Where the corporate officer substituted certain stock of less value for other stock of more value, deposited as collateral security, with the intent to defraud, he was held guilty of embezzlement under this section. Wilkins v. State, 36 Ga. App. 743, 138 S. E. 253.

ARTICLE 5

Banking

§ 211(15). Falsely advertising that deposits are insured.—Any officer, director, agent, or employee of any bank, who shall advertise by any office sign or upon any letterhead, billhead, blank note, receipt, certificate, circular, or on any written or printed paper that the deposits in said bank are insured or are guaranteed, unless such deposits are in fact insured or guaranteed in a manner satisfactory to the Superintendent of Banks and by his express permission, shall be guilty of a misdemeanor. Acts 1919, pp. 212, 214; 1927, pp. 195, 205.

Editor's Note.—This section prior to its amendment made the act of advertisement an offense in the event the deposits were not in fact insured or guaranteed. The phrase "in a manner satisfactory to the superintendent of Banks and by his express permission" did not then exist.

ARTICLE 11

Firing the Woods

§ 227. (§ 229.) Who may.—No person but a resident of the county where the firing is done, owning lands therein, or domiciled thereon, outside of any town incorporation, shall set on fire any woods, lands, or marshes, nor shall such persons, except between the first of January and the first of March annually. Cobb, 824; 1927, p. 144.

Editor's Note.—By the amendment of 1927, the date contained in the excepting clause was changed from February 20, April 1, to January 1, March 1.

SEVENTH DIVISION

Forgery, Counterfeiting, and Unlawful Currency

ARTICLE 1

Forgery, Counterfeiting, and Unlawful Currency

§ 231. (§ 233). Forging official certificates, etc.

Where Forged Instrument Composed of Two Parts. — Clause 7 applied in Johnson v. State, 36 Ga. App. 310, 136 S. E. 329, notwithstanding that the forged instrument was composed of two parts, the other part being treated as surplusage.

EIGHTH DIVISION

Crimes against the Public Justice and Official Duty

ARTICLE 5.

Obstructing Legal Process, and Sentence or Order of Court

§ 311. (§ 306). Obstructing legal process.

Allegation as to Serving of Lawful Process.—An indictment or accusation based upon this section, which does not allege that the officer was attempting to serve or execute a lawful process or order, is fatally defective. Prichard v. State, 34 Ga. App. 181, 129 S. E. 12.

ARTICLE 8

Receiving, Harboring, or Concealing Guilty Persons, and Compounding Crimes and Penalties

§ 326. (§ 321). Receiving, harboring, guilty person.

Concealing Body of Murdered Person.—Where A, knowing that B is guilty of murder, assists B in concealing the crime and the body of the murdered person, A is not thereby guilty of "receiving, harboring, or concealing" the murderer, within the meaning of this section. Heath v. State, 34 Ga. App. 218, 128 S. E. 914.

ARTICLE 11

Appointment of Peace-Officers and Detectives

§ 366. (§ 375.) Other offenses against public justice.

Section Adopts Offenses Punishable at Common Law. — This section and section 366 only adopts and make crimes in this state offenses against public justice or against the public peace which were punishable as such at common law. Prichard v. State, 34 Ga. App. 181, 129 S. E. 12.

ARTICLE 12

Interfering with Board of Public Welfare

§ 339(1). Interference with inspection; refusing access to records.

Obstructing Officer Arresting without Warrant. — Under this section and section 366, a third person can not be punished for resisting or obstructing an officer in this state who is attempting, without a warrant, to arrest another for a violation of the prohibition law of this state. Prichard v State, 34 Ga. App. 181, 129 S. E. 12.

NINTH DIVISION

Crimes against the Public Peace and Tranquility

ARTICLE 8

Other Offenses against Public Peace

§ 366. (§ 375). Other offences against public peace.

See annotation to section 339.

TENTH DIVISION

Offenses against Public Morality and Decency, Public Health, Public Safety and Convenience, Public Trade, Public Policy, Suffrage, Public Police

ARTICLE 8

Gaming-Houses, Gaming-Tables, and Gambling.

§ 389 (§ 398). Gaming-houses.

Cited in Fenner v. Boykin, 3 Fed (2d), 674, 678.

ARTICLE 9

Lotteries, Gift Enterprises, Dealing in Futures, and Trading-stamps

§ 397. (§ 406). Lottery tickets.

Punchboard constituting gambling device under this section. See Hobbs v. K. & S. Sales Co., 35 Ga. App. 226, 230, 132 S. E. 775.

§ 398. (§ 407). Carrying on a lottery.

See annotation to preceding section.

ARTICLE 12

Human Bodies, Embalming Illegally, Arbitrary Burial Regulations, and Cemeteries

§ 408. (§ 415). Illegal removal from grave.

Disinterment with Consent of the Relatives.—This section does not apply in cases in which the disinterment is done by and with the consent of relatives entitled to control the burial and disposition of the bodies. Fairview Cemetery Co. v. Wood, 36 Ga. App. 709, 720, 138 S. E. 88.

ARTICLE 13

Disturbing Divine Service, or Societies, Violating the Sabbath, Intruding on Camp-grounds, Disturbing Schools, Dance-Halls

§ 419(1). Dancing in public places on Sunday.

Constitutionally.—The act which enacted this and the following section is not unconstitutional as violative of § 6437. Durden v. State, 161 Ga. 537, 131 S. E. 496.

ARTICLE 14

Manufacture and Sale of Intoxicants, and Regulations as to Liquors, and Substitutes for Intoxicants

§ 442. Drunkenness in public places.

Acquittal as Bar.—Acquittal under this section was no bar to a conviction on an indictment under section 528(21). Smith v. State, 34 Ga. App. 601, 130 S. E. 219.

Evidence held not authorizing conviction under this section. Chandler v. State, 36 Ga. App. 121, 135 S. E. 494.

ARTICLE 14A

Manufacturing, Selling, Keeping, etc., of Prohibited Liquors and Beverages

§ 448(3). Prohibited acts specified.

General Verdict Supported Only by One Court out of Two.—It is error to refuse a new trial where an accusation contained two counts, the first charging a sale of whisky, and the second charging possession of whisky, both charges growing out of the same transaction, where upon the trial the evidence authorizes a conviction upon the second count only and the verdict is a general verdict of guilty. Simmons v. State, 162 Ga. 316, 134 S. E. 54.

ARTICLE 14D

Subsequent Prohibitions and Regulations of Intoxicating Liquors

§ 448 (36). Unlawful to carry, receive, or possess specified liquors.

Evidence Not Warranting Allegation.—Where a proceeding is instituted under this act, to condemn an automobile alleged to have been used in conveying intoxicating liquors over a designated public road, and the evidence does not demand a finding that the vehicle was used in conveying liquors "on the public roads named in the petition," the direction of a verdict "for confiscation is reversible error." Wells v. State, 33 Ga. App. 426, 126 S. E. 856. Citizens Auto Co. v. State, 35 Ga. App. 166, 132 S. E. 258.

§ 448 (54). Contraband articles; destruction, sale and proceeds.

Verdict Directed Not Warranted by Evidence Reversible.—Where a proceeding is instituted under this section, to condemn an automobile alleged to have been used in conveying intoxicating liquors over a designated public road, and the evidence does not demand a finding that the vehicle was used in conveying liquors "on the public roads named in the petition," the direction of a verdict "for confiscation" is reversible error. Citizens Auto Co. v. State, 35 Ga. App. 166, 132 S. E. 258.

Burden of Proof upon the State.—In a proceeding under this section, to condemn a vehicle or conveyance used in transporting liquor, the sale or possession of which is prohibited by law, the burden is upon the State, the condemner, to show that the vehicle or conveyance was used in conveying the prohibited liquors or beverages with the knowledge of the owner or lessee. Seminole Securities Co. v. State, 35 Ga. App. 723, 134 S. E. 625.

ARTICLE 15

Vagrants

§ 449. Vagrancy defined.

Proof That Accused Was Able to Work.—A conviction of vagrancy under this section is unauthorized where there is no proof that the accused was able to work. Bryant v. State, 34 Ga. App. 523, 130 S. E. 352.

Charge as to Age.—Failure to charge the jury that to convict the defendants the evidence should show that they were more than sixteen years of age, is not error, it not appearing from the motion for a new trial, or from the evidence, that either of the defendants was not of that age. Shank v. State, 36 Ga. App. 301, 136 S. E. 332.

ARTICLE 17B

Sales of Securities

§ 461 (8). Unlawful sale, etc., of certain securities.

The sale of bonds payable in one year from the date of their issue is no offense, under the Georgia securities law. Taylor v. State, 34 Ga. App. 4, 128 S. E. 228.

§ 461 (11). Selling Class "D" securities without license; advertisements of illegal sales.

Constitutionality.—So much of this section as makes it a felony for an issuer of securities falling within class D to sell or offer to sell, etc., is unconstitutional as violative of section 6437. Smiths v. State, 161 Ga. 103, 129 S. E. 766.

ARTICLE 18

Illegal Practice of Professions, Carrying on Business, and Medical College Diplomas

§ 476 (13). Motor fuel distributors; penalty.—

Any distributor who shall fail to register, or make monthly returns, or give bond, or pay the tax, as herein provided, or who shall fail to do any other act in sections 993(293) to 993(300) of the civil code required, shall be guilty of a mis-

demeanor and shall be punished as provided in section 1065 of the Penal Code of Georgia. Acts 1927, p. 108.

Editor's Note.—Section 476(12) of the code upon the same subject, simply provides a punishment for violation of §§ 993(164)-993(168) relative to occupation tax levied on motor-fuel distributors.

ARTICLE 23A

Vital Statistics

§§ 503(8) and 503(9). Superseded by the Acts of 1927 pp. 353 et seq., herein codified as § 503 (10).

§ 503 (10). Violation of vital statistic law by any person.—Any person who, for himself or for an officer, agent, or employee of any other person or of any corporation or partnership, (a) shall inter, cremate, or otherwise finally dispose of a dead body of a human being, or permit the same to be done, or shall remove such body from the primary registration district in which the death occurred or the body was found, without the authority of a burial or removal permit issued by the local registrar of the district in which the death occurred or in which the body was found, or (b) shall refuse or fail to furnish correctly any information in his possession, or shall furnish false information affecting any certificate of record, required by this Act, or (c) shall wilfully alter otherwise than is provided by section 1681(43) or shall falsify any certificate of birth or death, or any record established by §§ 1681(27) to 1681(46) or, (d) being required by §§ 1681(27) to 1681(46) to fill out a certificate of birth or death and file the same with the local registrar, or deliver it upon request, to any person charged with the duty of filing the same, shall fail, neglect or refuse to perform such duty in the manner required by §§ 1681(27) to 1681(46) or, (e) being a local registrar or deputy registrar, shall fail, neglect, or refuse to perform his duty as required by §§ 1681(27) to 1681(46) shall be deemed guilty of a misdemeanor, and upon conviction thereof shall for the first offense be fined not less than five dollars nor more than fifty dollars, and for each subsequent offense not less than ten nor more than one hundred dollars, or be imprisoned in the county jail not more than sixty days, or be both fined and imprisoned in the discretion of the court. Acts 1927, p. 353.

§ 503(11) Enforcement of vital statistic law.—Each local registrar is hereby charged with strict and thorough enforcement of the provisions §§ 1681(27) to 1681(46) in his registration district, under the supervision and direction of the State Registrar, and he shall make an immediate report to the State Registrar of any violation of this law coming to his knowledge, by observation or upon complaint of any person, or otherwise. The State Registrar is hereby charged with the thorough and efficient execution of the provisions of said sections in every part of the State, and is hereby granted supervisory power over local registrars and deputy local registrars, to the end that all its requirements shall be uniformly complied with. The State Registrar, either personally or by an accredited representative, shall have authority to investigate cases of irregularity or violation of law, and all registrars shall aid him upon request in such investigations. When he shall deem it necessary, he shall report such cases of violations of any of the provisions of sections above referred to, to the prosecuting attorney of the county, with the statement of the facts and circumstances; and when any such case is reported to him by the State registrar, the prosecuting attorney shall forthwith initiate and promptly follow up the necessary court proceedings against the person or corporation responsible for the alleged violation of law. And upon request of the State Registrar, the Attorney-general shall assist in the enforcement of the provisions of said sections.

ARTICLE 24

The Public Safety

§ 517. (§ 515.) Trains must stop within fifty feet of each railroad crossing.

Violation as Negligence at Highway Crossing.—The purpose of this section is to prevent collisions of trains and cannot be invoked by a private individual in a suit for injuries sustained at a railway and highway crossing for the purpose of showing negligence because the engine failed to stop before crossing the track of a nearby intersecting railroad. Central, etc., R. Co. v. Griffin, 35 Ga. App. 161, 132 S. E. 255.

§ 518(1). Penalty for not erecting blow-posts.

See notes under sections 2677(1) et seq., citing Lime-Cola Bottling Co. v. Atlanta, etc., R. Co., 34 Ga. App. 103, 128 S. E. 226.

§ 519(1). Penalty for breach of duty by engineer.

See notes under sections 2677(1) et seq., citing Lima-Cola Bottling Co. v. Atlanta, etc., R. Co., 34 Ga. App. 103, 128 S. E. 226.

§ 526(1). Automatic fire-box door required.

Validity.—The case of Napier v. Atlantic Coast Line R. Co., 272 U. S. 605, affirmed 2 Fed. (2d) 891, as annotated under this catchline in Ga. Code of 1926.

§ 528(2). Violating Civil Code §§ 1770(1)-1770(20) regulating motor vehicles.

Effect of Acquittal for Drunkardness upon Prosecution.—Acquittal on an indictment under P. C. section 442 charging the defendant with having appeared in an intoxicated condition on a public highway, which intoxication was made manifest by boisterousness and indecent condition and acting, and by vulgar, profane, and unbecoming language, was no bar to a conviction on an indictment under this act, charging the defendant with having operated an automobile on the public highway while in an intoxicated condition. Smith v. State, 34 Ga. App. 601, 130 S. E. 219.

§ 528(3). Violating Civil Code §§ 1770(2)-1770(48) regulating motor vehicles.

Constitutionality.—The title of the act is broad enough to authorize the provision making penal the use of a number-plate not furnished by the Secretary of State. This provision was germane to the object of the act, directly tending to make the provisions of the act effective. Lee v. State, 163 Ga. 239, 135 S. E. 912.

§ 528(4). Violating Civil Code §§ 1770(50)-1770(60) regulating motor vehicles.

Constitutionality.—So much of the motor-vehicle act of 1921 as undertakes to make penal the failure of the operator of a motor-vehicle, when meeting a vehicle approaching in the opposite direction, to "turn his vehicle to the right so as to give one half of the traveled roadway, if practicable, and a fair opportunity to the other to pass by without unnecessary interference," is too uncertain and indefinite in its terms to be capable of enforcement. Heath v. State, 36 Ga. App. 206, 136 S. E. 284.

A defendant could not lawfully be convicted upon such charges. Hale v. State, 21 Ga. App. 658, 94 S. E. 823; Heath v. State, 36 Ga. App. 206, 136 S. E. 384; Shupe v. State, 36 Ga. App. 286, 287, 136 S. E. 331.

ARTICLE 35

Terrapins, Turtles, Fishing, and Oysters

§ 612. Closed period; seines, nets, gigs, spears.

Applied in Camp v. State, 34 Ga. App. 591, 130 S. E. 606.

ARTICLE 39

Emigrant Agents

§ 632. (§ 601.) Acting as emigrant agent without a license.

The word "emigrants," does not apply to persons who have no intention of abandoning their residence in this State or of acquiring a domicile outside the State, but who leave the State merely for the purpose of temporarily engaging in work in another State. Benson v. State, 36 Ga. App. 87, 135 S. E. 514.

ARTICLE 43

Suffrage, Campaign Expenses, Campaign Funds, and Political Mass Meetings

§ 658. (§ 623.) Superintendent to deliver list to clerk, etc.

False Misstatement of Votes.—If the number of votes is knowingly and falsely misstated by a superintendent of an election, he has failed to discharge a duty imposed upon him by law, and he is liable to be prosecuted, under this section. Black v. State, 36 Ga. App. 286, 136 S. E. 334.

ELEVENTH DIVISION

Offenses Committed by Cheats and Swindlers

ARTICLE 1

Deceitful Means or Artful Practices

§ 703(1). Defrauding hotels and boarding houses punishable.

Necessary for Fraudulent Intent. — The evidence in this case did not authorize the jury to find that the defendant, with intent to defraud, obtained food and lodging from the boarding-house named in the accusation. Cowin v. State, 35 Ga. App. 499, 133 S. E. 880.

713. (§ 668). False information as to liens.

Substitution for Section 719.—Where the judge based his instructions to the jury on this section, which was inapplicable to the case on trial, and made no reference to sec. 719, which was applicable, this was error, as the crime defined by the last-named section contains elements which it is necessary to allege and prove, different and distinct from those necessary to be alleged and proved under this section. Sims v. State, 34 Ga. App. 683, 685, 131 S. E. 101.

§ 716. Proof of intent to defraud.

Fraudulent Intent — Presumptive Evidence — Burden of Proof.—The burden of proving that one accused of a violation of this section did not have good cause for quitting the hirer rests upon the prosecution (Thorn v. State, 13 Ga. App. 10, 78 S. E. 853); and this essential proof is not furnished by the hirer's testimony that the accused "did not have any reason for not returning the money or picking the cotton." Miller v. State, 34 Ga. App. 140, 128 S. E. 588. See also Cofer v. State, 34 Ga. App. 220, 129 S. E. 110.

A conviction is unauthorized where the evidence fails to show that the laborer did not have a good and sufficient cause for his failure to perform the contract. Such essentials are not supplied by statements of the hirer that he knew of no good reasons why the laborer did not work for him. King v. State, 36 Ga. App. 272, 136 S. E. 466; Cofer v. State, 34 Ga. App. 220, 129 S. E. 110.

THE SUPERIOR COURT—ITS OFFICERS AND JURIES

ARTICLE 1

Jurisdiction of the Court, and Authority of the Judges

§ 792(1). Certiorari on ground that venue or time not proved.

Cited in George v. Rothstein, 35 Ga. App. 126, 132 S. E. 414.

ARTICLE 2

Sessions and Adjournments

§ 796. (§ 796.) Special terms for either civil or criminal business.

Applied in Rawlings v. State, 163 Ga. 406, 136 S. E. 448.

ARTICLE 6

Stenographic Reporter

§ 810. (§ 810.) Reporters.

When Paid Out of Public Treasury.—The court could not assess as costs against the public treasury in a civil case between private parties the expense of requiring the notes of the official stenographer to be written out for the benefit of the judge. The case of Bugg v. State, 13 Ga. App. 672, 79 S. E. 748, is distinguished upon the ground that it was a criminal proceeding. Macris v. Tsipourses, 35 Ga. App. 672, 134 S. E. 621.

ARTICLE 7

The Grand Jury

§ 824. Ineligible at next succeeding term.

Section Modified by Acts of 1921.—The act of 1921 (p. 135), being a general law providing that the grand jurors of one term might be compelled to serve the following term, modified, so far as jurors serving in Walton superior court were concerned, the provisions of this section. Long v. State, 34 Ga. App. 125, 128 S. E. 784.

§ 827. (§ 824.) How summoned.

Section Directory.—The provision of this statute with respect to the praecept is directory merely, and not mandatory, and a failure of the clerk of the superior court to carry out such provision affords no ground for a challenge to the array of the jurors put upon a defendant in a criminal case. Newham v. State, 35 Ga. App. 391, 133 S. E. 650, and cases cited.

§ 833. (§ 829.) Duty of grand jurors.

Cited in Gibson v. State, 162 Ga. 504, 134 S. E. 326.

§ 851(1). Transfer of investigation to grand jury of another county.

Necessity of Indictment Showing Change.—An indictment was not void for the reason that the jurisdiction of the grand jury of a county to which the investigation was transferred under this section to return the indictment did not appear from the indictment, it not being stated therein that the investigation of the crime had been transferred from Long County to Tattnall County. Sallette v. State, 162 Ga. 442, 134 S. E. 68. Sallette v. State, 35 Ga. App. 658, 134 S. E. 203.

While it might be better for the indictment to show that the trial judge had ordered the transfer, yet the omission of such facts from the indictment would not render the indictment void. See Howell v. State, 162 Ga. 14, 134 S. E. 59. Sallette v. State, 162 Ga. 442, 134 S. E. 68.

ARTICLE 9

The Petit Jury

§ 854. (§ 850.) Trial by jury.

Cited in Paramore v. State, 161 Ga. 166, 174, 129 S. E. 772.

§ 857. (§ 853). Panels, how made.

Number of Strikes in Consolidated Case.—Where several cases pending against an estate are consolidated in one proceeding against a receiver therefor, the parties so joined have a right to only six strikes in selecting a jury. Ellis v. Geer, 36 Ga. App. 519, 520, 137 S. E. 290.

ARTICLE 10

Special Provisions as to Juries

§ 875. (§ 871.) Juries in special emergencies.

Applied in Rawlings v. State, 163 Ga. 406, 136 S. E. 448.

§ 876. (§ 872.) Compensation of jurors, and court-bailiffs; subpoena clerks.—The first grand jury impanelled at the fall term of the superior courts of the several counties shall fix the compensation of jurors and court bailiffs in the superior courts of such counties for the next succeeding year, such compensation not to exceed $3.00 per diem; except in counties having a population of 200,000 or more, according to the last United States census, the compensation of court bailiffs as fixed by the grand jury shall be $200.00 per month, provided the Commissioners of Roads and Revenues, or other authority having control of county finances of such counties shall first approve the payment of such salaries and the number of deputies to be employed in each court; and the same compensation shall be allowed to bailiffs and jurors of the several city courts and special courts in this State, as is allowed bailiffs and jurors in the superior courts in which such city or special court may be located. The pay of tales jurors shall be the same as the regular drawn traverse jurors, and there shall be no distinction in the pay of tales and regular drawn jurors.

The commissioners of roads and revenues or other authority having control of county finances of such counties may designate one of said bailiffs as a subpœna clerk in the Superior Court, may define his duty and fix his compensation at not exceeding two hundred dollars per month, to be paid monthly out of the county treasury. Acts 1890-1, p. 80; 1895, p. 74; 1919, p. 104; 1922, p. 50; 1925, p. 100; 1927, pp. 135, 193.

Editor's Note.—The compensation of court bailiffs in counties of 200,000 population or more was raised from $150 to $200; and the last sentence was added, by the amendment of 1927.

§ 876(1). Compensation in counties of 200,000 or more.—In all counties having by the United States census of 1920, or any future census, a population of 200,000 inhabitants or more, the salaries of court bailiffs appointed by the judges of the Superior courts and by the judges of the city courts shall be two hundred dollars per month for each bailiff, to be paid monthly out of the county treasury; provided, however, the commissioners of roads and revenues, or other county authority having charge of the fiscal affairs of said county, may, in their discretion, reduce said salaries to any sum not less than one hundred and fifty dollars per month for each bailiff. Acts 1927, p. 194.

PROCEEDINGS TO COMMITMENTS, INCLUSIVE

ARTICLE 2

Arrest

§ 917. (§ 896.) Arrest without warrant.

Charging Exact Language.—A charge in entire harmony but not in exact language of this section and section 921 is neither a misstatement of law nor misleading. Cobb v. Bailey, 35 Ga. App. 302, 133 S. E. 42.

§ 918. (§ 897.) Selection of judge to try the case.

Cited in Fox v. State, 34 Ga. App. 74, 75, 128 S. E. 222.

§ 922. (§ 901.) Duty of person arresting.

Cited in Fox v. State, 34 Ga. App. 74, 75, 128 S. E. 222.

§ 923. Arresting officer not to advise dismissal of warrent.

Cited in Fox v. State, 34 Ga. App. 74, 75, 128 S. E. 222.

ARTICLE 3

Courts of Inquiry, and the Proceedings Therein

§ 947. (§ 922.) Bail.

Cited in Fox v. State, 34 Ga. App. 74, 75, 128 S. E. 222.

§ 948. (§ 923.) Waiving trial.

Cited in Fox v. State, 34 Ga. App. 74, 75, 128 S. E. 222.

§ 949. (§ 924.) Disposition of papers.

Cited in Fox v. State, 34 Ga. App. 74, 75, 128 S. E. 222.

INDICTMENT AND PRESENTMENT

ARTICLE 1

Form of Indictment

§ 954. (§ 929.) Form of indictment.

Sufficiency of Indictment for Car Breaking.—See Whitener v. State, 34 Ga. App. 697, 131 S. E. 301, and note to P. C. section 181.

ARTICLE 2

When Two Returns of "No Bill" Are a Bar

§ 955. (§ 930.) Two returns of "no bill" are a bar.

Change of Return after Entry on Minutes.—After a grand jury has returned into court a true bill of indictment, and the same has been entered on the minutes of the superior court by its clerk, the court obtains jurisdiction of the case, and the grand jury is without authority, at the same term of the court, to recall the true bill, erase the entry of "true bill," and make an entry of "no bill" on the indictment. Gibson v. State, 162 Ga. 504, 134 S. E. 326.

CHANGE OF VENUE

ARTICLE 1

When and How Venue May Be Changed

§ 964. (§ 939.) Venue, when and how changed.

Venue changed under section in Howell v. State, 162 Ga. 14, 134 S. E. 59.

Cited in Sallette v. State, 162 Ga. 442, 134 S. E. 68.

§ 965. (§ 940.) Clerk to transmit papers, etc.; subpoenas for witnesses.

Cited in Howell v. State, 162 Ga. 14, 134 S. E. 59.

FROM THE CALL OF THE DOCKET TO SENTENCE

ARTICLE 4

Pleas of Insanity, and Misnomer

§ 979. (§ 954). Misnomer, plea of.

Applied in Rountree v. State, 34 Ga. App. 668, 670, 130 S. E. 919.

ARTICLE 10

Continuances

§ 987. (§ 962). Continuance for absence of witnesses.

Applied in Teems v. State, 34 Ga. App. 594, 130 S. E. 216.

§ 992. (§ 966). Discretion of the court.

Cross-Examination of Defendant on Motion.—It is not a reversible error to permit the defendant to be cross-examined on his motion for a continuance. Bell v. State, 36 Ga. App. 111, 112, 135 S. E. 521.

ARTICLE 11

Trial of Joint Offenders

§ 995. (§ 969). Trial of joint offenders.

Number of Arguments. — Where two are tried together without objection they have a right to only one argument. Bloodworth v. State, 161 Ga. 332, 346, 131 S. E. 80.

ARTICLE 12

Impaneling the Jury

§ 997. (§ 971). Putting panel on prisoner.

Cited in Rawlings v. State, 163 Ga. 406, 136 S. E. 448.

§ 998. (§ 972). Challenge to the array.

Grounds for.—If there is objection to individual members of the panel of jurors, the challenge should be to the poll, and not to the array. Thompson v. Buice, 162 Ga. 556, 134 S. E. 303.

Form.—A challenge to the array, for any cause going to show that it was not fairly or improperly empaneled, must be in writing. Thompson v. Buice, 162 Ga. 556, 134 S. E. 303.

§ 999. (§ 973). Challenges for cause.

Relation in Ninth Degree Illustrated.—A juror who is related to the deceased in that his great great grandmother was a sister to the deceased's grandfather is sufficient to disqualify him. Ethridge v. State, 163 Ga. 186, 136 S. E. 72.

§ 1001. (§ 975). Questions on voir dire.

Paragraph One—When Hearing on Oath Disqualifies. — Even though a juror had heard the evidence on a previous trial of the same case, this would not disqualify him unless he had formed and expressed an opinion from having heard the testimony delivered under oath. Ford v. State, 35 Ga. App. 655, 657, 134 S. E. 353, and citations.

ARTICLE 15

Evidence

§ 1008. (§ 982). Object of evidence.

Quoted in Groves v. State, 162 Ga. 161, 162, 132 S. E. 769.

§ 1010. (§ 984). Circumstantial evidence, when sufficient.

Necessity of Charging Language of Section.—The failure of the court to charge the law of circumstantial evidence in the exact language of this section is not error. Sellers v. State, 36 Ga. App. 653, 137 S. E. 912.

A charge of court using "should" instead of "must", in quoting this section, does not require a new trial. Adams v. State, 34 Ga. App. 144, 128 S. E. 924.

Cited in Hall v. State, 36 Ga. App. 670, 137 S. E. 915.

§ 1013. (§ 987). When testimony warrants a conviction.

Charge of Court.—A charge substantially in the language of this section is not erroneous in that the court failed to charge the jury that the testimony should be sufficient to satisfy the minds and conscience of a fair and impartial jury, etc. Smith v. State, 34 Ga. App. 779, 131 S. E. 923.

Erroneous Charge under This Section.—The following charge under this section was held inaccurate: "Whether dependent upon positive or circumstantial evidence, the true question in all criminal cases is not that the conclusion to which the evidence points may be false, but whether or not the state has satisfied the minds and consciences of the jury beyond a reasonable doubt of the guilt of the accused." King v. State, 163 Ga. 313, 136 S. E. 154.

§ 1017. (§ 991). Number of witnesses necessary.

Charging Part of Section When Inapplicable.—The court did not err in giving in charge this section as to the number of witnesses necessary to convict of perjury and certain other offenses, although a part of the section was not applicable to the case where the inapplicable part was explained. Pence v. State, 36 Ga. App. 270, 136 S. E. 820.

§ 1018. (§ 992). Alibi, as a defense.

Section given in charge. Coggeshall v. State, 161 Ga. 259, 266, 131 S. E. 57.

ARTICLE 17

Of Hearsay

§ 1023. (§ 997). Sometimes original evidence.

Cited in Sloan v. State, 35 Ga. App. 347, 133 S. E. 269.

§ 1025 (§ 999.) Declarations of conspirators.

Applied in Ethridge v. State, 163 Ga. 186, 191, 136 S. E. 72.

§ 1027. (§ 1001). Testimony of witness on former trial.

Production of Articles Present at Former Trial.—Where the testimony, of a deceased witness who had testified at the former trial, contained references to certain physical objects, which at the former trial were in court, this fact did not stop the operation of this section on the ground that such articles were not produced in court at the trial now under review nor offered in evidence, even though the state did not account for their absence. Bloodworth v. State, 161 Ga. 332, 334, 131 S. E. 80.

ARTICLE 18

Of Admissions and Confessions

§ 1029. (§ 1003). Acquiescence or silence as admission.

Admissibility of Statements Made by Wife.—A former statement made in front of her husband and a third person may not be proved by the third person unless the statement when made required an answer or denial. Bowen v. State, 36 Ga. App. 666, 137 S. E. 793.

§ 1031. (§ 1005). Weight of such evidence.

Omission to Charge as to Confessions.—In absence of a timely request, the court did not err in omitting to charge this section. Even where under the special facts of the case, it is the duty of the court without a request to charge upon the law of confessions, the omission to do so is not cause for a new trial, it appearing that without such confession there was sufficient evidence to warrant the conviction. Gore v. State, 162 Ga. 267, 134 S. E. 36.

§ 1032. (§ 1006). Confession must be voluntary.

See annotation to preceding section.

§ 1035. (§ 1009). Confession of conspirators.

Application of Phrase "After the Enterprise Is Ended."—The phrase "after the enterprise is ended," necessarily makes admissible any statements made by any of the conspirators until the ultimate purpose of the conspiracy has been accomplished. Hence where a killing is only an incident in carrying out a purpose to accomplish some further object, it would seem to follow from the very wording of the section that where the enterprise had not ended, because the real purpose of the conspiracy has not been achieved prior to the completion of the enterprise, statements made even after such a killing and until the purposes of the conspiracy has been fully accomplished would be admissible on the trial of any of those engaged in the conspiracy. Rawlings v. State, 163 Ga. 406, 421, 136 S. E. 448.

ARTICLE 19

Prisoner's Statement

§ 1036. (§ 1010). Prisoner's statement.

Charge substantially in the language of the section upheld. Coggeshall v. State, 161 Ga. 259, 265, 131 S. E. 57.

ARTICLE 20

Competency of Witnesses

§ 1037. (§ 1011). Persons not competent or compellable.

4. Husband and wife shall not be competent or compellable to give evidence in any criminal proceeding for or against each other, except that either shall be competent, but not compellable,

to testify against the other upon the trial for any criminal offense committed, or attempted to have been committed, upon the person of either by the other. The wife is also competent witness to testify for or against her husband in case of abandonment of his child, as provided for in section 116 of this Code. Acts 1866, pp. 138, 139; 1880-1, p. 121; 1887, p. 30; 1927, p. 145.

Editor's Note.—Prior to the amendment of 1927 the exception contained in the fourth subdivision of this section concerned only the wife. Now both the husband and wife are competent for the purpose specified in the exception. Only that subdivision was affected by the amendment.

Proof of Statements Made by Wife. — Notwithstanding the statutory inhibition against the giving of testimony by a wife against her husband in a criminal case, yet where a wife makes statements in the presence of her husband and a third person which would implicate her husband in the violation of a criminal statute, and the husband makes no denial thereof, the third person may testify as to these statements. Bowen v. State, 36 Ga. App. 666, 137 S. E. 793.

§ 1038. (§ 1012). Persons who are incompetent witnesses.

Children.—The test as to the competency of a child of tender years to be a witness is knowledge by the child of the nature of an oath, and when an examination by the court shows that the child has no such knowledge it is error to permit the child to testify over proper objection. Horton v. State, 35 Ga. App. 493, 133 S. E. 647.

ARTICLE 21

Examination of Witnesses

§ 1045. (§ 1019). Leading questions.

When Discretion Not Abused.—The discretion of the trial judge was not abused, under the facts of the case in allowing the solicitor-general to ask certain leading questions of certain reluctant witnesses for the state. Ethridge v. State, 163 Ga. 186, 195, 136 S. E. 72.

§ 1046. (§ 1020). Memorandum in aid of witness's memory.

Cited in Adams v. State, 34 Ga. App. 144, 128 S. E. 924.

§ 1047. (§ 1021). Opinions of witness.

Applied in Tanner v. State, 163 Ga. 121, 122, 127, 135 S. E. 917.

ARTICLE 22

Impeachment of Witnesses

§ 1052. (§ 1026). By contradictory statements.

Determination of Credibility within Province of the Jury.—This rule provides for impeachment of a witness and for sustaining him when his credibility has been attacked in the manner designated, but leaves it to the jury to determine whether the witness has testified truthfully. If the witness has been sustained by proof of general good character, that would go to his credit, but in the absence of such proof the truthfulness of his testimony would still be for determination by the jury. The mere fact that the witness had made statements out of court, contradictory to his testimony at the trial, would not as matter of law necessarily deprive his testimony of all probative value. King v. State, 163 Ga. 313, 322, 136 S. E. 154.

ARTICLE 23

Argument of Counsel

§ 1055 (4). Extension of time.

Necessary Showing.—It is necessary that counsel make a showing in the manner prescribed, as to the necessity of an extension of time, in order to do justice to the case of their client. Where the showing required by the statute is not made it will not be held that there was any abuse of discretion on the part of the trial judge in refusing to extend the time for argument as requested. Bloodworth v. State, 161 Ga. 332, 346, 131 S. E. 80.

ARTICLE 24

Charge of the Court

§ 1058. (§ 1032.) Judge not to express opinion on the facts.

Statement as to Irrelevant Letter.—Statement that a letter offered, which was entirely irrelevant, had no probative value, was held not to be a violation of this section. Tanner v. State, 163 Ga. 121, 122, 129, 135 S. E. 917.

Reason for Ruling on Objection to Evidence No Expression of Opinion.—When an objection is made to evidence offered, the judge has a right, if he deems proper, to give the reasons for his decision on the objections; and such reasons so given if pertinent to the objections made, do not constitute an expression of opinion. Reed v. State, 163 Ga. 206, 213, 135 S. E. 748.

Stating an admitted fact does not constitute an expression or intimation of opinion. Swain v. State, 162 Ga. 777, 789, 135 S. E. 187.

Same—Assumption That Crime Committed.—There being nothing in the evidence or in the defendant's statement to dispute the fact that the alleged crime was committed, and his defense resting solely upon the contention that he did not participate in the offense, the court did not violate this section in assuming that a crime had been committed. Pruitt v. State, 36 Ga. App. 736, 138 S. E. 251.

ARTICLE 25

The Verdict

§ 1059. (§ 1033). Jury judges of law and facts; form and construction of verdicts.

Interchanging "Maximum" and "Minimum."—It is reasonable to construe a verdict finding the accused guilty of making intoxicating liquor and fixing a "maximum" penalty of one year, and a "minimum" penalty of one and a half years as meaning a minimum of one year and a maximum of one and one-half years so as to uphold the validity of it under this section. Jordan v. State, 36 Ga. App. 648, 137 S. E. 798.

§ 1060 (1). Jury to prescribe minimum and maximum term of punishment, when; rules of Prison Commission.

Emphasis of Power to Fix Minimum and Maximum Sentence. — The power given to the jury to prescribe a minimum and maximum term is emphasized by the further provision that "in cases of pleas of guilty, then the judge shall have the right to prescribe such minimum and maximum term as he may see fit." Mitchell v. State, 34 Ga. App. 505, 506, 130 S. E. 355.

Effect of Jury Failing to Fix Maximum and Minimum.—Where the jury failed to prescribe the maximum and minimum in a burglary case but merely recommended him to the mercy of the court, the verdict was not in proper form, and it was error for the judge to receive it and fix the minimum and maximum term of punishment. He should have sent the jury back to their room with the instruction that they fix the minimum and the maximum penalty. Mitchell v. State, 34 Ga. App. 505, 130 S. E. 355.

Right to Poll Jury.—Where the jury returned a maximum-minimum sentence and the judge immediately turned to the accused and stated that that would be his sentence, the accused was not deprived of his right to poll the jury. He had this privilege while the verdict was being reduced to writing and retired as a judgment. Taylor v. State, 36 Ga. App. 639, 642, 138 S. E. 83. Case distinguished from McCullough v. State, 10 Ga. App. 403, 73 S. E. 546.

§ 1060(2). Punishment to be fixed by city-court jury in county of 60,000 to 70,000 population.

—Juries in their verdicts upon the trial of all cases upon the criminal side of the court, involving misdemeanors, in constitutional city courts having jurisdiction over counties whose population under the 1920 census of the United States was not less than sixty thousand inhabitants and not more than seventy thousand inhabitants, and over counties whose population under any future census of the United States shall be not less than sixty thousand inhabitants and not in excess of

seventy thousand inhabitants, shall in their verdicts prescribe the sentence or punishment to be inflicted upon the defendant, in which verdict may be imposed an alternative sentence or a sentence imposing a fine, a term in jail, and a term upon the chain-gang, all within the limits prescribed by law for misdemeanors, either, any, or all of said punishments; and the judge in imposing the sentence upon the defendant shall follow that fixed by the jury in its verdicts.

In all such courts in cases wherein pleas of guilty shall be entered, then the judge shall have the right to prescribe the punishment within the limits fixed by law for misdemeanors. Acts 1927, p. 317.

§ 1061. (§ 1035.) Jury may find the attempt.

Attempting to Manufacture Liquor.—The evidence was held not sufficient to support a verdict of attempting to manufacture liquor. Hartline v. State, 34 Ga. App. 224, 129 S. E. 123.

ARTICLE 26

The Sentence

§ 1062. (§ 1036.) Punishment; recommendation of the jury.

Recommendation of Misdemeanor Punishment for Mayhem.—The failure of the court to instruct the jury that in case they should convict the defendant of mayhem, they would have the right to recommend that he be punished as for a misdemeanor was not error. Cowart v. State, 34 Ga. App. 517, 130 S. E. 358.

§ 1065. (§ 1039.) Misdemeanors, how punished.

Judge's Discretion in Sentencing.—Where a female, under indictment for a misdemeanor, pleads guilty, the judge may in his discretion sentence her to labor and confinement in the woman's prison on the state farm. Conley v. Pope, 161 Ga. 462, 131 S. E. 168.

Dividing Sentence into Two Periods.—The fact that the judge divided the sentence into two periods of six months each, did not make the total sentence to the chain-gang exceed the period fixed by the statute. Scott v. McClelland, 162 Ga. 443, 445, 133 S. E. 923.

Sentence to Hard Labor.—A sentence in a misdemeanor case which provides that the person convicted shall be confined at hard labor for the space of one year at the state farm is not in conformity with this section as that section provides that the convict shall "work" or "labor," and this does not necessarily mean "hard labor." Screen v. State, 107 Ga. 715, 33 S. E. 393; Potter v. State, 35 Ga. App. 248, 132 S. E. 783.

Power to Give Less than Maximum.—The court, having the power to both pass upon the defendant a sentence of twelve months and to impose a fine of not exceeding $1,000, could do less than both, and could do so without giving the defendant any election as to paying or refusing to pay the fine. Dickson v. Officers of Court, 36 Ga. App. 341, 343, 136 S. E. 537.

§ 1066. (§ 1040.) Attempts, how punished.

Cited in Hartline v. State, 34 Ga. App. 224, 129 S. E. 123.

§ 1609(1). Electrocution substituted for hanging.

Applied in Gore v. Humphries, 163 Ga. 106, 135 S. E. 481.

§ 1070. (§ 1044). Sentence shall specify time and place.

Fixing New Date for Unexecuted Sentence.—When the day fixed by the trial court for the execution of a capital sentence has passed, and the sentence for any reason whatever has not been executed, it is the duty of the judge of the superior court in which the sentence of death was imposed, either in term or in vacation by an order as prescribed by law to name and fix a new date for the execution of said capital sentence, which shall be not less than ten days nor more than twenty days from the date of said order. Gore v. Humphries, 163 Ga. 106, 135 S. E. 481.

§ 1081(1). Probation of offenders.

Constitutionality.—This act is not unconstitutional. Williams v. State, 162 Ga. 327, 133 S. E. 843; Rhodes v. State, 162 Ga. 627, 134 S. E. 448.

Oral Remarks to Sheriff as Constituting Probation.—The oral remarks of the judge to the sheriff, in passing sentence on the defendant, to watch after her, and if he had further trouble with her to take her to the chain-gang, can not be construed as placing the defendant upon probation, under this act as such oral declarations of the judge constitute no part of the sentence. Conley v. Pope, 161 Ga. 462, 131 S. E. 168.

Power to Suspend Sentence.—Under this section the judge has no power to pass a sentence and then suspend it, and where he has attempted to do so this section has no application. Kemp v. Meads, 162 Ga. 55, 132 S. E. 533.

The general rule is that a judge of the superior court of this State has no authority to suspend execution of a sentence imposed by him in a criminal case. Where he does suspend such sentence, so much of the sentence as orders a suspension may afterwards be revoked and the prisoner be required to serve the sentence. Scott v. McClelland, 162 Ga. 443, 133 S. E. 923.

§ 1081(4). Delinquent probationers.

Limitation upon Power to Withdraw Parol.—A parole can not lawfully be revoked as a mere matter of caprice. In such hearing the judge is the sole judge of the credibility of the witnesses, but he is not permitted to withdraw a parole unless there be sufficient evidence to authorize a finding that one or more of the conditions upon which the parole was granted has been violated. Williams v. State, 162 Ga. 327, 133 S. E. 843.

Where it can not be determined whether the criminal act charged against the probationer as in violation of his parole was committed prior to the imposition of the sentence or subsequent thereto, a finding revoking the parole would be contrary to law and would not be authorized. Williams v. State, 162 Ga. 327, 133 S. E. 843.

Review on Bill of Exceptions.—Watts v. State, 36 Ga. App. 215, 136 S. E. 323, followed the cases cited under this catchline in Ga. Code 1926. See also Kennedy v. State, 36 Ga. App. 602; 137 S. E. 573; Anderson v. State, 36 Ga. App. 602, 137 S. E. 572.

Cited in Taylor v. State, 36 Ga. App. 639, 642, 138 S. E. 83.

NEW TRIALS, AND THE SUPREME COURT

ARTICLE 1

When New Trial Will, and Will Not Be Granted

§ 1088. (§ 1061.) On account of new evidence.

See annotation under section 5480 of the Civil Code.

ARTICLE 2

The Motion and Proceedings Thereon

§ 1090(1). Objections before trial judge.

Cited in George v. Rothstein, 35 Ga. App. 126, 132 S. E. 414.

§ 1091. (§ 1064.) Motion made after adjournment of court.

Notice Relates to the Time for Absolute Rule.—The notice required by this section "relates to the time when the party (having at term regularly moved his rule nisi) shall apply for his rule absolute," and is complied with when the opposite party is served with the copy of the motion for new trial and the rule nisi issuing thereon twenty days before the time at which the hearing is to be had under the rule nisi. Coggeshall v. Park, 162 Ga. 78, 80, 132 S. E. 632.

ARTICLE 3

The Supreme Court

§ 1101(1). Proof of venue or time of commission of offense.

Cited in George v. Rothstein, 35 Ga. App. 126, 132 S. E. 414.

SALARIES AND FEES

ARTICLE 8

Jury Commissioners and Clerks

§ 1138(3). Jury Commissioners in Counties of two hundred thousand or more.—Jury commissioners and their clerks in all counties in the State having a population, according to the United States Census of 1920 or any future census, of two hundred thousand or more shall be paid ten dollars ($10.00) each for every day's service in revising the jury list, said compensation to be paid from the county treasurer; provided, however, that any commissioner or clerk who is already on the county payroll shall receive no additional compensation for services under this Act. Acts 1927, p. 222.

§ 1138(41). Jury Commissioners and clerks in counties with population between 33,000 and 33,050.—Jury commissioners and their clerks in all counties of this State having a population, according to the United States census of 1920, of not less than 33,000 and not more than 33,050, shall be paid five ($5.00) dollars each for every day's service in revising the jury-list. Said compensation to be paid from the county treasury. Acts 1927, p. 147.

ARTICLE 13

Witnesses from Other Counties, and When Venue Is Changed

§ 1143. (§ 1114.) Subpoena for non-resident State's witness.

Void if Not Signed by Clerk and Solicitor General.—Unless at the time a subpoena for a non-resident witness for the state in a criminal case is issued it is signed both by the clerk of the superior court and the solicitor-general of the circuit, it is void. Cody v. Boykin, 163 Ga. 1, 135 S. E. 75.

THE PENITENTIARY

ARTICLE 3

Miscellaneous Provisions

§ 1230. (§ 1174.) Expenses of trials for escapes.

Fund Out of Which to Be Paid.—No reference is made here or elsewhere in the code as to the fund from which the expense is to be paid, and it seems that the provision in the act of 1823, that it shall be paid out of the penitentiary fund, remains unrepealed. Campbell v. Davison, 162 Ga. 221, 133 S. E. 468.

TAX TO SUPPORT PRISIONERS IN CERTAIN COUNTIES

§ 1236(1). County tax to support prisoners. — In those counties in the State of Georgia having a population, according to the United States census of 1920, or any future census, of not less than 44,195 nor more than 63,690 the commissioners of roads and revenues are hereby authorized, in their discretion, to levy a tax annually upon the taxable property in said counties, the proceeds of which are to be used by said commissioners for the maintenance and support of prisoners, including the chain-gang operated by said counties. Acts 1927, p. 339.

§ 1236(2). Use of chain-gang on municipal streets.—Said commissioners may in their discretion, for the purpose of keeping said chain-gang regularly engaged, employ said chain-gang upon the streets or public works of municipalities located in said counties, as well as upon the rural roads and public works of said counties, so long as the expense of maintaining and supporting said chain-gang does not exceed the amount raised by said tax levy.

§ 1236(3). Separation of tax fund.—In those counties coming within the terms of this Act, in which the provisions of the alternative road law, contained in the Code of Georgia of 1910, sections 694 to 704, inclusive, are in effect, the funds derived from tax levies made for the maintenance and support of prisoners and the funds derived under the provisions of the alternative road law shall be kept separate and apart, in order that no portion of the tax funds derived under the alternative road law shall be applied to the expense of maintaining and supporting the chain-gang while engaged in work other than upon the rural roads.

GEORGIA TRAINING SCHOOL FOR GIRLS

ARTICLE 1

Establishment and Management

§ 1259(5). No compensation; Oath and bond; expenses.—Said Board of Managers shall receive no compensation for their services, and they shall qualify on said board, taking and subscribing to an oath faithfully and impartially to discharge their duties, and entering into bond in such sums and in such securities as shall be prescribed by the Governor, conditioned on the faithful performance of all duties required of them in this Act. The actual and necessary expenses of this Board of Managers incurred in the discharge of their official duties, together with the expense of making said bonds herein provided, shall be paid out of the general appropriation for said institution. Said Board of Managers shall organize by electing one of their members as chairman and another as secretary of said board; and when it may be deemed advisable, said board shall appoint a competent woman as superintendent of said institution, at a salary to be fixed by said Board of Managers, and shall appoint such other employees as may be necessary to carry on the work of said institution, prescribing the duties of both the superintendent and all other employees; provided, the salary of said superintendent and said employees as well as the expenses of the Board of Managers shall be paid out of the maintenance fund, appropriated by § 1259(3). The superintendent and all other employees shall be subject to removal from office at any time by said board. It shall be the duty of said Board of Managers to meet once every three months, for the purpose of attending to such matters as may come before them in the management of said institution. Special meetings may be called by the chairman. Absence from any three meetings, unless excused by the majority of the members present, shall be treated by the Governor as a resignation from

office. Acts 1913, pp. 87, 89; 1919, p. 285; 1927, p. 341.

Editor's Note.—The amendment of 1927 combined this section with § 1259(6), and, in addition to other immaterial omissions, omitted the word "other" preceding the word "members" in the last sentence of the combined section.

§ 1259(6). Included in the amendment to § 1259(5) by the Acts of 1927.

§ 1259(9). Who may be committed and how; fees for carrying persons to school.—The Judges of the City and Superior Courts may in their discretion commit to the Georgia Training School for Girls any girl under eighteen years of age who has committed any offense against the laws of this State, not punishable by death or life imprisonment, or who habitually associates with vicious or immoral people, or who is incorrigible to such an extent that she cannot be controlled by parent or guardian, there to be held until such girl reaches the age of twenty-one, unless sooner discharged, bound out, or paroled under the rules and regulations of said Board of Managers; provided, however, that no girl who is insane or an idiot or who comes under the classification of mental defectives as defined in section 3 of Act approved August 19, 1919, establishing the Georgia Training School for Mental Defectives, or who is afflicted with an incurable disease, shall be sentenced or committed to said institution. The Judges of the City and Superior Courts may hear and determine such cases, presiding in a court or in chambers; provided, that any girl brought before a court shall have a right to demand trial by jury, and may appeal from the judgment of said court as provided by law. The fees that are now allowed by law for carrying persons to the penitentiary shall be allowed to the sheriffs of the various counties of the State, for services in taking such girls as may be committed by the several courts to the Georgia Training School for Girls. Acts 1913, pp. 87, 90; 1927, p. 343.

Editor's Note.—The exception, in the proviso, as to girls who came under the classification of mental defective as defined by the Act of 1919, is new with the amendment of 1927.

§ 1259(10). Improper subjects retained; how dealt with; parole. — The superintendent in charge of such institution be and, with consent of the chairman of Board of Managers, shall be authorized and empowered to return whence she came any girl who shall be found an improper subject for admission, and who shall thereupon be dealt with by the court or judge committing her as would have been legal in the first instance had not said girl been committed to the said Georgia Training School for Girls; and provided, that said Board of Managers shall be authorized to discharge or release any inmate from said institution, or to liberate conditionally on parole any inmate of said institution, under such rules and regulations and upon such terms as said Board of Managers may deem in the best interests of the inmate. Acts 1913, pp. 87, 90; 1927, p. 349.

Editor's Note.—By the amendment of 1927 the Board of Managers are authorized to discharge or release any inmate. The amendment omitted a provision which authorized the Board of Managers to bind out to some suitable person any inmate, or return her to her parents or guardian.

SPECIAL QUASI CRIMINAL PROCEEDINGS

Habeas Corpus

ARTICLE 1

Proceedings in Applications for Habeas Corpus

§ 1307. (§ 1226.) How wife or child may be disposed of.

See annotation to § 2972 of the Civil Code.

§ 1313. (§ 1232.) Proceedings must be recorded.

Filing Papers after Hearing by the Judge.—Manifestly this section contemplates filing the papers in the proceedings with the clerk of the superior court after the hearing by the Judge. Collard v. McCormick, 162 Ga. 116, 119, 132 S. E. 757.

PENSIONS FOR COUNTY EMPLOYEES

§ 1519(44). County employees in counties of more than 200,000 people.—There may be raised and established funds for the aid, relief, and pensions of the employees of the county and their dependents, in all counties having a population of more than two hundred thousand by the United States census of 1920, or any subsequent census of the United States. Acts 1927, p. 262.

§ 1519(45). Right to retire after 25 years service.—Every employee and future employees who may participate in the pension fund may as a matter of right retire from active service, provided he shall have been an employee of the county for twenty-five years at the time of his retirement.

§ 1519(46). Voluntary retirement of disabled employees.—Any employee who is eligible to participate and future employees who are eligible to participate, who shall be injured or whose health shall become permanently impaired to render them totally disabled, shall upon application be retired. Should the board of trustees refuse to grant an order of retirement, the applicant shall select a physician, the board shall select a physician, and the two physicians so selected shall select a third, and their decision shall decide the question.

§ 1519(47). Half-pay after retirement; pension for widow, etc.—When such employee shall retire as a matter of right he shall be paid one-half of his salary he was receiving at the time of his retirement, for the rest of his life, to be paid monthly. In case of death of a pensioner, his widow and children or dependents shall draw his pension as herein provided.

§ 1519(48). Half-pay for total disability.—When such employees shall be retired for total disability, he shall be paid one-half of the salary he was receiving at the time of his retirement, for the rest of his life, to be paid monthly; but this Act shall not affect any aid or relief or pension received at the time of the passage of this Act.

§ 1519(49). Board of trustees for fund; members.—There is hereby established a board of trustees whose duties it shall be to manage said fund. The board of trustees shall consist of the chairman of the commissioners of roads and revenues, the chief of the county police department, and the superintendent of public works of the

county; and if there be no chairman of the commissioners of roads and revenues, and if there be no chief of county police, and if there be no superintendent of public works, the county authorities having charge of the affairs of the county shall manage said pension funds. The trustees shall formulate rules for taking care of employees, and prescribe regulations and conditions under which said aid, relief, and pensions shall be paid. The board shall keep a strict account of disbursements and receipts of all funds, which shall be open at all times to public inspection. The board of trustees shall have its first meeting on Friday following the first Monday in October after the passage of this Act, and organize by electing a chairman, a vice-chairman, and a secretary. The chairman shall sign all vouchers.

§ 1519(50). Deduction from salaries.—All county employees who desire to participate in the pension fund shall have two (2) per cent. of their salaries deducted monthly.

§ 1519(51). Return of amount deducted from salary.—In case an employee who has not served twenty-five years and whose employment has been severed by the county, he shall receive the amount deducted from his salary for the pension fund.

§ 1519(52). Involuntary retirement.—In case an employee has served twenty-five years does not desire to retire, the board of trustees may in their discretion retire him, after first obtaining the consent of the county commissioners.

§ 1519(53). Former pensions not affected.—This Act shall not repeal nor in any wise affect any pensions or benefits or aids now being paid to those who were receiving the same and who shall receive the same after the passage of this Act.

§ 1519(54). Widow and children, pension of, stops when.—When any employee has served twenty-five years, and who has not taken a pension, dies, his widow and minor children shall receive his pension until such widow shall remarry, or until such minor children or dependents shall have reached the age of sixteen years.

§ 1519(55). Workmen's compensation law not affected.—This Act shall not affect or be affected by any workmens' compensation law or other similar laws.

PENSIONS FOR MUNICIPAL EMPLOYEES

§ 1519(56). City employees in cities of above 150,000 people.—There shall be raised and established funds for the pension of all officers and employees now in active service and on the pay-rolls, and future officers and employees in all cities in Georgia having a population of more than one hundred and fifty thousand (150,000) by the United States census of 1920, or any subsequent census of the United States. Acts 1927, p. 265.

§ 1519(57). Right to retire after 25 years service.—Every regular officer and employee of such city, in active service at the time of the passage of this Act, now on the pay-roll, and future officers and employees, may as a matter of right retire from active service, provided he shall have served twenty-five (25) years in active service of such city at the time of his retirement.

§ 1519(58). Half-pay.—When such officer or employee shall retire as a matter of right, he shall be paid one-half of the salary he was receiving at the time of his retirement, for the rest of his life, to be paid monthly.

§ 1519(59). Board of trustees for fund; members.—There is hereby established a board of trustees, to serve without pay, whose duty it shall be to see that the provisions of this Act are carried out by such cities; that the funds are kept separate; each of such cities shall have a board of trustees composed of the mayor, city comptroller, and city treasurer, or such officials who discharge duties usually assigned said officers. This board shall make rules describing forms for applicants for said pensions, and all other matters connected with their duties under this Act. When a pension is awarded by said board, the award shall be transmitted to the governing authorities of said city, who shall provide some manner for verifying the facts of the petition, or other legal requirements; when so verified, a check shall be drawn on the fund provided for the payment of the pension each month during the life of the pension, signed by the mayor and paid by the treasurer with the notation on each check that the pension has been approved by the governing authority of such city. Said board shall designate times and place of meeting, method of hearing and decisions, etc.

§ 1519(60). Deduction of 2 per cent. from salaries.—The sum of two per centum shall be deducted from the salaries or wages of all officers and employees of such cities as and when paid. This sum shall be retained by the city treasurer, and is hereby set apart as a pension fund free from the control of such cities for any other purpose of expenditure.

§ 1519(61). Appropriation to meet deficiency in fund.—When pensions are properly allowed and become a charge on such cities, and the fund derived from the deductions from the salaries and wages is not sufficient to meet such pensions, the governing authorities of such cities shall provide, by appropriation from the current funds thereof, a sufficient sum to meet said pensions as they fall due.

§ 1519(62). Objectors to deduction excluded.—In case any employee or officers objects to the deduction of said salary or wages of said two per cent, or otherwise objects to the payment of said two per centum, such officer or employee shall not be entitled to the pension provided by this Act.

§ 1519(63). Supplementary ordinances.—The governing authorities of such cities shall be authorized to pass ordinances supplementing the provisions of this Act where its terms are found not to be full enough to provide for the collection and payment of such payment.

§ 1519(64). Funds not assignable or subject to garnishment etc.—None of the funds herein provided for shall be subject to attachment, garnishment, or judgment, nor shall they be assigned, but shall be paid to the pensioner only or on his order.

§ 1519(65). Effect as to pensioner under previous law.—This Act does not repeal nor in anywise affect any benefit or pension now being paid under some previous ordinance or Act, but no pensioner shall receive two pensions. Those already receiving pensions are not eligible to pensions under this Act.

§ 1519(66). Workmen's compensation law not affected.—This Act shall not affect nor be affected by any workmen's compensation law or similar laws.

PENSIONS FOR MUNICIPAL OFFICERS

§ 1519(67). City officers in cities of above 150,000 people.—All cities in Georgia having a population of more than 150,000 inhabitants by the United States census of 1920, or any subsequent census of the United States, shall provide pensions for the following heads of departments of their assistants or subordinates, to wit: city clerk and chief deputy; city attorney and assistant and investigator; comptroller, assistant and auditor; purchasing agent; treasurer and tax-collector; tax-assessors, their tax investigator and their chief clerk; marshal; building inspector; recorders; health officer; superintendent of Grady and Battle Hill sanatoriums; chief of construction, assistants in charge of sewers, streets, sidewalks, repairs, plumbing, and bridges; chief sanitary inspector and assistant; street-improvement collector; superintendent of electrical affairs; warden; superintendent of public schools; librarian; general manager of parks and cemeteries; general manager of waterworks, together with superintendent of construction and two chief engineers in the waterworks department. If said cities have no officials or employees having these particular titles then the officials or employees discharging the duties nearest to those indicated shall receive the pension herein provided. Provided, the officers named are in active service in their several offices and positions at the time of the passage of this Act, and their names are on the pay-roll, and likewise for their successors in office or in said positions, provided they have served twenty-five (25) years in the active service of said city at the time of their retirement. In counting this period of service, any official who was serving in a municipality annexed to said city, shall have conputed the time of service rendered in the annexed municipality in making up said twenty-five (25) years. Acts 1927, p. 269.

§ 1519(68). Right to retire on half-pay.—Said officers and employees shall be and they are hereby authorized to retire as a matter of right, when they shall have passed or attained the required years of service, and in such event they shall be paid one half of the salary they are receiving at the time of such retirement, for the rest of their lives, to be paid monthly.

§ 1519(69). Committee in charge of pensions.—It shall be the duty of the governing authorities of said cities to provide that some standing committee shall have charge of these pensions. Said committee shall formulate the rules under which applications therefor shall be made, and provide for the method by which said pensions may be set up, ordered and established. When so ordered and established, they shall report to the governing authorities and to the comptroller, and same shall thereafter become a fixed and binding obligation on the part of the city. When so found and reported, the city, through its governing authorities shall provide for the payment thereof from fund herein provided and its current funds, and these payments shall be kept up during the lives of said pensioners and funds shall be annually provided sufficient to cover the payment of said pensions, and same shall be promptly paid to said pensioners monthly, and shall be one half of the sum received at the time of their retirement.

§ 1519(70). Supplementary ordinances.—Such cities shall by their governing bodies be authorized to pass ordinances carrying into effect the purposes of this Act, but not in violation of the terms thereof. This is done in order to provide for rules and regulations, so that the provisions of this Act may be carried out and become effective, although its terms may not be sufficiently specific to secure the results desired.

§ 1519(71). Pensions only for those paying 2 per cent. of salary to fund.—The fund with which to pay the pensions herein provided for shall be set up as follows: Each of said officials may pay into a fund established and set apart by ordinance the sum of (2) two per cent. of their salaries monthly. Should said fund, at any time, be insufficient to meet and pay said pensions, such cities shall supplement, by appropriation from current funds, sufficient amounts to make up the difference. In case any of said officials fail to pay said per centum, they shall thereupon become ineligible to receive pensions. These matters shall be regulated by ordinance.

§ 1519(72). Not affected by workmen's compensation law.—This Act shall not affect nor be affected by any workmen's compensation laws; nor any similar laws; nor shall any pensioner be paid more than one pension, if there are other regulations by general law or charter amendment under which the pensioner may be paid another and different pension.

§ 1519(73). Meaning of "governing authorities."—The words "governing authorities," herein used, mean either general council or council or commission or other officials in charge of the affairs of said city.

APPENDIX I

Amendments to Special Acts of 1926

§ 4(c). Merger; tax rate; counties excluded.—Where any local or independent system is repealed by and in the manner provided in this act, the territory formerly included in such independent system shall become and constitute a school district of the county in which it is located, and shall enjoy the same privileges and shall be governed by the same laws as other school districts in said county, including the authority to levy local taxes for school purposes; provided that the rate for such taxation shall not exceed the rate allowed by law to other similar school districts. Provided, that nothing herein contained shall ap-

ply to a municipal or independent local school system of a municipality having a population of 200,000 or more, according to the last or any other United States Census. Acts 1926, pp. 40, 41; 1927, p. 160.

Editor's Note. — The last proviso was substituted for a previous proviso which had excepted from the operation of the section, counties having a population of 200,000 or more.

APPENDIX II

Proposed Amendments to the Constitution

§ 6452(1). Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, that Article 3, Section 7, of the Constitution of Georgia may be amended by adding thereto the following paragraph, to wit:

Paragraph 25. The General Assembly of the State shall have authority to grant to the governing authorities of the cities of Atlanta, Savannah, Macon, Augusta, Columbus, LaGrange, Brunswick, Waycross, Albany, Athens, Rome, Darien, Dublin, Decatur, Valdosta, Newnan, Thomaston and East Thomaston, and cities having a population of 25,000 or more inhabitants according to the United States Census of 1920 or any future census, authority to pass zoning and planning laws whereby such cities may be zoned or districted for various uses and other or different uses prohibited therein, and regulating the use for which said zones or districts may be set apart, and regulating the plans for development and improvement of real estate therein. The General Assembly is given general authority to authorize the cities of Atlanta, Savannah, Macon, Augusta, Columbus, LaGrange, Brunswick, Waycross, Albany, Athens, Rome, Darien, Dublin, Decatur, Valdosta, Newnan, Thomaston and East Thomaston, and cities having a population of 25,000 or more inhabitants according to the United States census of 1920 or any future census, to pass zoning and planning laws.

§§ 6490 to 6492. Be it enacted by the General Assembly of the State of Georgia and it is hereby enacted by authority of the same, that Article 5 Section 2, of the Constitution of the State of Georgia be and the same is hereby amended by striking from Article 5, Section 2, paragraph two, three, and four in their entirety, and inserting in lieu of said paragraphs two, three and four a paragraph to be known as paragraph two and to read as follows, to wit: "The General Assembly shall have power to prescribe the duties, authority, and salaries of the Secretary of State, Comptroller-General, and Treasurer, and to provide help and expenses necessary for the operation of the department of each."

§ 6523. An amendment is proposed to Article 6, Section 7, of the Constitution of this State, § 6523, by adding to paragraph one of said section the following words, to wit: "And provided, however, that the General Assembly may, in its discretion, abolish justice courts and the office of justice of the peace and notary public ex-officio justice of the peace in any county in this State having within its borders a city having a population of over twenty thousand, and establish in lieu thereof such court or courts or system of courts as the General Assembly may in its discretion deem necessary; or conferring upon existing courts, by extension of their jurisdiction, the jurisdiction as to subject-matter now exercised by justice courts and by justices of the peace and notaries public ex-officio justices of the peace; together with such additional jurisdiction, either as to amount or to subject-matter, as may be provided by law, whereof some other court has not exclusive jurisdiction under this Constitution; together also with such provisions as to rules and procedure in such courts and as to new trials and the correction of errors in and by said courts; and with such further provision for the correction of errors by the Superior Court or the Court of Appeals or the Supreme Court, as the General Assembly may, from time to time, in its discretion, provide or authorize. The Municipal Court of Atlanta shall have jurisdiction in Fulton County and outside the city limits of Atlanta, either concurrently with, or supplemental to, or in lieu of justice courts, as may be now or hereafter provided by law. Any court so established shall not be subject to the rules of uniformity laid down in Paragraph 1 of Section 9 of Article 6 of the Constitution of Georgia. Provided that nothing herein contained shall apply to Richmond County."

§ 6533. An amendment is proposed to Paragraph 1 of Section 13 of Article 6 of the Constitution § 6533, as follows: By striking after the words "Provided, that the County of Chatham shall, from its treasury, pay to Judge of the Superior Courts of the Eastern Circuit" the words and figures "$3,000.00 per annum," and substitute in lieu thereof the words and figures "$5,000.00 per annum," so that said proviso when amended shall read: "Provided, that the County of Chatham shall, from its treasury, pay to the judge of the Superior Court of the Eastern Circuit $5,000.00 per annum; said payments are hereby declared to be a part of the court expenses of said county, and shall be made to the judge now in office, as well as his successors."

§ 6563. An amendment is proposed to Article 7, section 7, Paragraph 1, of the Constitution of Georgia, § 6563, as heretofore amended, shall be further amended by adding at the end thereof a new subparagraph in the following words, to wit: "Provided that the City of Columbus may issue and sell 'street-improvement bonds' without the said assent of two thirds of the qualified voters at an election called thereon, but upon a majority vote of the members of its governing body, with these limitations: First, the terms of such bonds shall in no case exceed ten years. Second, the amount of each issue shall be limited to the amount assessed by such municipality upon each improvement. Third, these bonds shall be issued only for the grading, including curbs and gutters, or paving or repaving of streets or portions of streets or sidewalks. Fourth, the interest thereon shall not exceed six per centum per annum. Fifth, these bonds may be issued without regard to the amount of other outstanding debts or bonds or such municipality. Sixth, these bonds not to be issued except in case such grading, including curbs and gutters, pavement, or repavement has

been petitioned for in writing by the owners of more than fifty per cent. of the property abutting on the street or portion of street paved or repaved."

Another amendment to the same section is proposed as follows: by adding at the end of said paragraph the following: Except that the City of LaGrange, from time to time as necessary for the purpose of repairing, purchasing, or constructing a waterworks system, including all necessary pipe-line, pumping-stations, reservoirs, or anything else that may be necessary for the building, constructing, or operating a waterworks system for the City of LaGrange, may incur a bonded indebtedness in addition to and separate from the amount of debts hereinbefore in this paragraph allowed to be incurred, to an amount in the aggregate not exceeding the sum of five hundred thousand ($500,000.00) dollars, and such indebtedness not to be incurred except with the assent of two-thirds of the qualified voters of said city at an election or elections to be held as may now or may hereafter be prescribed by law for the incurring of new debts by said City of LaGrange.

By a later act it is proposed that the section shall be further amended by adding at the end thereof a new subparagraph in the following words, to wit: "And except that Fulton County and/or Chatham County, and/or Richmond County may, in addition to the debts hereinbefore allowed, make temporary loans between March 1st and December 1st in each year, to be paid out of the taxes received by the county in that year, said loans to be evidenced by promissory notes signed by the chairman and clerk of the board having charge of the levying of taxes in said county and previously authorized by resolution by a majority vote at a regular monthly meeting of such board entered on the minutes. The aggregate amount of said loans outstanding at any one time shall not exceed fifty per cent. of the total gross income of the county from taxes and other sources in the preceding year, and no new loans shall be made in one year until all loans made in the previous year have been paid in full."

And finally that the section as heretofore amended, shall be further amended by adding at the end thereof a new subparagraph in the following words, to wit: "And except that the County of Ware may be authorized to increase its bonded indebtedness in the sum of two hundred and fifty thousand dollars in addition to the debts hereinbefore in this paragraph allowed to be incurred, and at a rate of interest not to exceed five per centum per annum; which said bonds shall run for a period or periods of time not to exceed thirty years, and may be issued from time to time, and in such denominations as may be determined by the county authorities of said county, to be signed by the commissioner of roads and revenues of said county, and the clerk of said commissioner, and shall be known and designated as Hospital Construction and Equipment bonds, and which said bonds shall be sold, and the proceeds thereof used and handled by the commissioner aforesaid, acting with the clerk and ordinary, or by a committee or commission selected, appointed, and qualified in such way or method as such county authority may designate. The proceeds of all bonds issued and sold under this authority shall be used for the purpose of acquiring a hospital-site in the City of Waycross, or outside of Waycross, in Ware County, and building, constructing, and equipping thereon a hospital where medical and surgical treatment and care may be provided those in need of such. The power conferred by this amendment shall be exercised under such rules and regulations respecting the acquiring of a site, the building and equipping of said hospital, as well as the operation of the same, providing for payment for such medical and surgical treatment and care in such hospital, excepting only charity cases as the county authorities acting alone or in conjunction with the Waycross medical society may deem meet and proper.

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