

SUPPLEMENT

TO

The Code of Iowa

CONTAINING

ALL THE LAWS OF A GENERAL AND
PERMANENT NATURE

ENACTED BY

The Twenty-Seventh, Twenty-Eighth, Twenty-Ninth, Thirtieth,
Thirty-First and Thirty-Second General Assemblies, with
Complete Annotations to the Code and Supplement,
Down to and Including Decisions Rendered
at the May Term, 1907, of the Supreme
Court, together with the

RULES OF THE SUPREME COURT

EDITED BY C. N. JEPSON
OF THE SIOUX CITY BAR

PUBLISHED BY AUTHORITY OF THE STATE

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PREFACE

The committee to supervise the publication of the "Code Supplement 1907" has endeavored to make the edition of the supplement such that it would be a credit to the state, and of great value to those who use it.

It has been the aim of the committee to follow closely the general style and system of the code and first supplement, believing that much innovation in a work of this kind would be improper and probably confusing. If the result of its efforts shall be as acceptable as that of the committees which have preceded it, the committee will be content.

Mr. C. N. Jepson, as code editor, and his assistants, have done their work faithfully and well, with a spirit of enthusiasm and a desire to have the volume as nearly perfect as they could make it, and the same spirit seems to have actuated all who have had any part in its construction. Their earnestness and efforts deserve commendation.

The committee has had the benefit of the counsel and kindly advice of Hon. J. H. Trewin, chairman of the previous Code and Code Supplement Supervising Committees, and also the advice and services of Mr. J. R. Carter, former editor. The committee was fortunate in procuring the annotations from Judge Emlin McClain, whose work in this line has heretofore been so acceptable to the state.

The volume covers the work of six general assemblies and contains the annotations of the 103rd to the 133rd Iowa reports, inclusive, and subsequent cases in the Northwestern Reporter, down to the beginning of the September term, 1907, of the supreme court. Also the cases in the federal courts, during the same period, in which the constitution or statutes of the state have been construed or applied. The labor of publishing this supplement was far greater than the legislature anticipated when it passed the law directing its publication.

The committee regrets that it was not possible to properly complete the volume within the time prescribed, but hopes that the quality of the work will fully excuse the delay, and trusts the same will meet with approval.

GEO. W. DUNHAM,
J. L. WARREN,
SHERMAN W. DEWOLF,
E. W. WEEKS,
C. W. HACKLER,
C. G. SPARKS,
Committee.

PREFACE TO SUPPLEMENT OF 1902

When it was proposed at the extra session of the twenty-sixth general assembly that the state should publish an annotated code, objection was made that it would become obsolete in a few years and that the people would be obliged to rely upon private enterprise for the publication of the laws. The answer was section twenty-four of the act under which the code was published and which read as follows: "The twenty-ninth general assembly and each third general assembly thereafter shall select, in a manner as provided in section two hereof for the selection of editor, some competent and suitable person to compile, annotate and superintend the publication of the statutes of a general or permanent nature enacted after the adoption of the code."

In pursuance of this provision the twenty-ninth general assembly elected John R. Carter, Esq., editor of the code supplement, and enacted the statute for its annotation and publication which is found on the first and second pages of this volume. Under its provisions the committee has had general supervision of the work; and Mr. Carter has made the copy, compared it with the enrolled bills, prepared the tables, revised, enlarged and materially improved the index, annotated the negotiable instruments law, read the proof and in short performed all his duties in a most satisfactory manner.

The annotations were purchased from the Hon. Emlin McClain which is a sufficient guaranty of their excellence.

The committee is under obligation to the Hon. John J. Crawford of the New York bar, author of "Crawford's Annotated Negotiable Instruments Law," for the use of the annotations to his work.

Every effort has been made by all concerned to produce a creditable work, and the universal favor with which the code was received leads the committee to hope that this supplement will meet with like approval.

JAMES H. TREWIN,
W. P. WHIPPLE,
CLAUDE R. PORTER,
FRANK S. PAYNE,
W. K. BARKER,
ALBERT W. HAMANN,
Committee.

EDITORIAL NOTE

In the present code supplement the general form and arrangement of the code supplement of 1902 has been retained as nearly as possible. The arrangement in that supplement seemed to meet with general approval, and the profession and users of it have become accustomed to it; then, too, the last three sessions of the legislature, in many instances, have amended or added to matter in the code supplement by reference thereto. It has been difficult to at all times follow this plan satisfactorily, and at the same time obtain a symmetrical work.

The present volume includes all laws of a public nature passed by the twenty-seventh to the thirty-second general assemblies, inclusive. The annotations appearing in the code supplement of 1902 giving reference to the Northwestern Reporter have in all instances been changed to the volume and page of the Iowa Reports, except in those cases not officially reported, the citations to the Northwestern Reporter in such instances having been retained. The citations to what is known as the "Negotiable Instruments Law" appearing in the last supplement have been retained, and other Iowa annotations added. The new annotations were procured by the Code Supplement Supervising Committee from Justice Emlin McClain of the supreme court.

The index to the present code supplement covers both this work and the code of 1897. In some instances it has been enlarged. The letter S, preceding sections in the index, indicates that the same will be found in the code supplement. All other reference is to the code.

The statutes and rules of the supreme court have been added, and indexed separately, and a table given, showing where all general legalizing acts, relating to conveyances may be found, the time of taking effect, and the general assembly that enacted the same.

The table of the acts of the twenty-seventh to the thirty-second general assemblies, inclusive, is consecutively numbered and shows where, in this supplement, the matter is placed. This table also shows where, in the supplement of 1902, all public laws passed by the twenty-seventh, twenty-eighth and twenty-ninth general assemblies are found.

A table is given showing sections of the code and code supplement of 1902 that have been amended or repealed and substitute enactments passed by the twenty-seventh to the thirty-second general assemblies, inclusive.

With the assistance of Mr. Carter, the editor of the supplement of 1902, a table has been made and placed herein, showing all of the present sections of the code and code supplement, and the corresponding sections of McClain's code of 1888, the code of 1873, the revision of 1860, the code of 1851, and the territorial code of 1843 as near as that was possible, and giving the chapter and section of the general assembly where the matter originated, or has been amended. A note at the head of this table explains it more in detail.

I have endeavored to make the present code supplement perfect. That it is perfect or without mistakes, I appreciate would be too much to claim. It is the result of my best effort.

The members of the Supervising Committee have invariably been kind to me and have helped in every way possible within their power to make this work satisfactory to the profession and public generally; and to Mr. Carter, editor of the last code supplement, I am indebted for much valuable counsel and assistance.

C. N. JEPSON.

Sioux City, Iowa, October, 1907.

EDITORIAL NOTE TO CODE SUPPLEMENT OF 1902

That I should say something concerning the volume, which is here produced, will not only be expected but, certainly, considered fitting and proper. In the discharge of my duties, as editor of the code supplement, I have spared myself neither time nor labor to make the work perfect in every respect. How well I have succeeded in accomplishing this, or what measure of success has attended my efforts, I leave for those who may have occasion to consult the work to determine. That it will be found without error is probably too much to expect, notwithstanding the care with which every page has been watched.

The annotations found herein, with the exception of those found under the negotiable instruments law, have been furnished by Judge Emlin McClain of our supreme court. The Iowa annotations to the negotiable instruments law were prepared by myself, while those of other states were taken substantially from "Crawford's Annotated Negotiable Instruments Law" (second edition), the author having very kindly consented to the use of the same. It was not the purpose to exhaustively annotate this law, but only to give a sufficient citation of authorities, and those most accessible to the bar, to assist in a proper construction of the law. These annotations differ from those furnished by Judge McClain, both as to form and arrangement, following, as they do, the style used by the author in his work on the same subject.

The index will be found to be a complete index to both the code and supplement, referring the user to the one or the other where the matter will be found. The sections that will be found in the supplement, referred to in the index, are preceded by the black letter **S**. All sections following said letter will be understood to be in the supplement, while those not preceded by said letter will be understood to be in the code. For the reason that so many had become more or less familiar with the old index it was thought best to use the same as the basis for the new, correcting, enlarging and adding to as might be found necessary, which has been done.

The table of acts of the twenty-seventh, twenty-eighth and twenty-ninth general assemblies, numerically arranged, shows where, in this work, the corresponding matter will be found. The table of amended sections, while prepared more particularly for the new edition of the code, has been inserted herein, and will be found useful to those who have not the amended sections noted in their code. At the request of the Code Supplement Supervising Committee, I have prepared other tables, which will be found in the new edition of the code. One, a table of cases cited in the code to the Northwestern Reporter, and which table shows the official Iowa report and page, where those cases may be found; also a table of session laws.

I desire to acknowledge the very kind and courteous treatment I have received from the Code Supplement Supervising Committee, and each and every member thereof.

JOHN R. CARTER.

Sioux City, Iowa, September, 1902.

A TABLE

Showing number of chapters consecutively, title of acts, time of taking effect, and section or sections of the supplement to the code where same are found, of all public laws enacted by the twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first and thirty-second general assemblies, respectively. Also showing the sections of the supplement of 1902 where the acts of the twenty-seventh, twenty-eighth, and twenty-ninth assemblies are found.

THE TWENTY-SEVENTH GENERAL ASSEMBLY.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
1	An act to amend chapter 20 of laws of the extra session of the twenty-sixth general assembly..... Took effect July 4, 1898.		p. 3	p. 5
2	An act to repeal section 41 of the code, and enact a substitute therefor, relating to the amendment and repeal of acts of the general assembly..... Took effect by publication, April 8, 1898.		41-a	Repealed
3	An act to amend section 104 of the code, relating to interest on state warrants..... Took effect by publication, April 8, 1898.		104	104
4	An act to amend section 126 (chapter 5, title II) of the code, relating to public printing and binding and distribution of documents..... Took effect by publication, April 5, 1898.		126	Repealed
5	An act to repeal section 144 of the code, relating to public printing and binding..... Took effect by publication, February 17, 1898.		144-a	144-a
6	An act to amend chapter 6, title II, of the code..... Took effect July 4, 1898.		152-a	152-a
7	An act to amend section 152 of the code, authorizing the executive council to use committee rooms for office purposes..... Took effect by publication, April 6, 1898.		152	152
8	An act to amend chapter 7, title II, of the code, relating to the executive council..... Took effect by publication, April 5, 1898.		170-a	170-a
9	An act amending title III of the code, relating to courts of record, and the use of shorthand notes as evidence.. Took effect by publication, March 10, 1898.		245-a	245-a
10	An act to amend section 227 of the code and provide an additional judge for the twelfth judicial district..... Took effect by publication, April 6, 1898.	1 2 3	227 227-a 227-b	227 227-a 227-b
11	An act to amend section 227 of the code and increase the number of district judges in the eighteenth judicial district..... Took effect July 4, 1898.	1 2	227 227-c	227 227-c

TWENTY-SEVENTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
12	An act to amend section 298 (chapter 8, title III) of the code, relating to compensation of clerks..... Took effect by publication, February 10, 1898.		298	298
13	An act prohibiting members of boards of supervisors and township trustees from making contracts with their respective townships or counties..... Took effect July 4, 1898.		468-a	468-a
14	An act to define the jurisdiction of courts in counties bordering on the Missouri river..... Took effect by publication, April 13, 1898.		395-a	395-a
15	An act to amend section 407 of the code, relating to the redemption of county bonds..... Took effect by publication, April 7, 1898.		407	407
16	An act to amend section 490 (chapter 4, subdivision 5, title IV) of the code, relating to the compensation of county treasurers		490	490
17	An act to amend section 511 of the code, relating to fees and compensation of sheriffs..... Took effect by publication, January 29, 1898.		511	511
18	An act to amend section 654 (chapter 2, title V) of the code, relating to appointment of police matrons..... Took effect by publication, March 10, 1898.		654	654
19	An act to amend section 683 of the code, relating to the appropriation of money in towns..... Took effect July 4, 1898.		683	683
20	An act amendatory to chapter 4, title V, of the code, relating to general powers of cities and towns..... Took effect July 4, 1898.		716-a	716-a
21	An act to amend section 700 of the code, relating to the power of cities to regulate, license and tax certain kinds of business		700	700
22	An act to amend sections 696, 700, and 737 (chapter 4, title V) of the code, relating to the general powers of cities and towns..... Took effect July 4, 1898.	1 2 3	696 700 737	696 700 737
23	An act to amend sections 742, 744, 745 and 747 (chapter 5, title V) of the code, relating to the purchase and construction of waterworks..... Took effect by publication, March 26, 1898.	1 2 3 4	742 744 745 747-a	742 744 745 747-
24	An act to amend section 814 of the code, relating to street improvements		814	814
25	An act to amend sections 850 and 859 of the code, relating to election of park commissioners..... Took effect by publication, February 10, 1898.	1 2	850 859	Repealed Repealed
26	An act to amend section 859 (chapter 9, title V) of the code, relating to park commissioners and board of public works		859	Repealed
	Took effect by publication, March 1, 1898.			

TWENTY-SEVENTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
27	An act to amend sections 891 and 892 (chapter 11, title V) of the code..... Took effect July 4, 1898.	1	891	891
		2	892	892
28	An act to amend sections 952, 953, 958, 971, 979 and 1020 of the code, relating to cities under special charters..... Took effect July 4, 1898.	1	952	952
		3	971	971
		4	958	958
		5	979	979
		6	1020	1020
29	An act to amend subdivision 12, of section 1005, of the code, relating to cities under special charters levying a special bridge tax..... Took effect July 4, 1898.		1005	1005
30	An act to amend sections 1305, 1321, 1360, 1361 and 1372 of the code, relating to assessment rolls..... Took effect July 4, 1898.	1	1305	1305
		2	1321	1321
		3	1360	1360
		4	1361	1361
		5	1372	1372
31	An act to amend section 1346 of the code, relating to taxation of express companies..... Took effect July 4, 1898.		Repealed	
32	An act to repeal section 1347 of the code, relating to taxing of peddlers, and enact a substitute therefor..... Took effect by publication, April 9, 1898.		1347-a	Repealed
33	An act to amend section 1371 of the code, relating to duties of township, city and town assessors..... Took effect by publication, February 23, 1898.		1371	1371
34	An act to provide for the general levy for state purposes, and to repeal section 1380 of the code..... Took effect July 4, 1898.	1-3	1380-b -1380-d	1380-b -1380-d
		4	1380-a	1380-a
35	An act to amend section 1436 of the code, relating to redemption of land from tax sale..... Took effect July 4, 1898.		1436	1436
36	An act to amend section 1457 of the code, relating to the security of the revenue, and to permit counties to receive interest on moneys deposited in banks..... Took effect July 4, 1898.		1457	1457
37	An act to amend chapter 4, title VII of the code, relative to the assessment and collection of the collateral inheritance tax..... Took effect by publication, April 8, 1898.	1	1476	1476
		2-4	1477-a -1477-c	1477-a -1477-c
		5	1479-a	1479-a
		6	1476-b	1476-b
		7	1477-d	1477-d
38	An act amendatory to chapter 2, title VIII, of the code, relating to working roads..... Took effect July 4, 1898.		Repealed	
39	An act to amend section 1562 of the code, relating to the destruction of thistles..... Took effect July 4, 1898.		1562	1562
40	An act to amend section 1610 (chapter 1, title IX) of the code, relating to corporations for pecuniary profit..... Took effect by publication, April 8, 1898.		1610	1610
41	An act to amend section 1610 of the code and to encourage the production of sugar from beets grown in the state... Took effect July 4, 1898.		1610	1610

TWENTY-SEVENTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
42	An act to repeal section 1654 of the code and enact a substitute therefor Took effect July 4, 1898.		Repealed	
43	An act to repeal section 1661 (chapter 3, title IX) of the code, relating to agricultural societies, etc., and enact a substitute therefor Took effect July 4, 1898.		1661-a	1661-a
44	An act to amend section 1744 of the code, relating to proofs of loss under contracts of insurance. Took effect by publication, April 8, 1898.		1744	1744
45	An act to amend section 1752 (chapter 4, title IX) of the code, relating to insurance other than life. Took effect by publication, April 8, 1898.		1752	1752
46	An act to amend section 1782 of the code, relating to life insurance companies and associations. Took effect July 4, 1898.		1782	1782
47	An act to amend section 1832 of the code, relating to the issuing of state auditor's certificates to fraternal beneficiary societies, orders, etc. Took effect by publication, April 13, 1898.		1832	Repealed
48	An act to amend section 1898 of the code, relating to building and loan associations. Took effect by publication, March 9, 1898.		1898	1898
49	An act to amend section 2071 (chapter 5, title X) of the code, relating to liability for injuries to employes. Took effect July 4, 1898.		2071	2071
50	An act to amend chapter 5, title X, of the code, relating to the regulation of automatic couplers. Took effect by publication, January 29, 1898.		2080	2080
51	An act relating to certain fines and penalties provided for by section 2083 of the code, pertaining to automatic couplers Took effect by publication, March 1, 1898.	1 2	2083-a 2083-b	2083-a 2083-b
52	An act amendatory to title XII of the code, relating to the police of the state. Took effect July 4, 1898.	1-5	2510-a -2510-e	Repealed
53	An act to prohibit the bringing into the state of any nursery stock infested with the San Jose scale; to provide punishment therefor, and prevent its spread within the state Took effect July 4, 1898.	1-6	2575-c -2575-h	2575-a47 -2575-a52
54	An act repealing section 2291 of the code, relating to compensation for keeping patients in insane hospitals, and to enact a substitute therefor. Took effect July 4, 1898.		2291-a	2291-a
55	An act to amend section 2308 (chapter 2, title XII) of the code, relating to tax levy for county insane fund. Took effect July 4, 1898.		2308	2308
56	An act to amend section 2386 of the code, relating to registered pharmacists Took effect by publication, April 13, 1898.		2386	3286

TWENTY-SEVENTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
57	An act to amend section 2392 of the code, relating to the change of place of conducting pharmacy..... Took effect by publication, March 1, 1898.		2392	2392
58	An act to amend section 2400 of the code, relating to revocation of pharmacists' permit..... Took effect by publication, April 8, 1898.		2400	2400
59	An act to amend section 2488 of the code, relating to the ventilation of mines..... Took effect July 4, 1898.		2488	2488
60	An act to amend chapter 9, title XII, of the code, relating to the use of oil in coal mines..... Took effect by publication, April 7, 1898.	1 2	2494 2495-a	2494 2495-a
61	An act to amend section 2503 of the code, relating to the inspection of petroleum products..... Took effect by publication, April 5, 1898.		2503	Repealed
62	An act to amend section 2508 of the code, relating to the specific gravity and inspection of petroleum products.. Took effect by publication, April 13, 1898.		2508	Repealed
63	An act to amend section 2536 (chapter 14, title XII) of the code, in relation to the state veterinary surgeon..... Took effect July 4, 1898.		2536	2536
64	An act amending sections 2539, 2540 and 2559 of the code, relating to the care and propagation of fish and the protection of birds and game..... Took effect by publication, April 8, 1898.	1 2 3 4	2539 2540 2559 2540	2539 2540 2559 2540
65	An act for the protection of deer, elk and goats, and to provide punishment for the violation thereof..... Took effect July 4, 1898.	1 2	2551-a 2551-b	2551-a 2551-b
66	An act to amend section 2551 of the code, relating to the protection of game..... Took effect July 4, 1898.		2551	2551
67	An act to amend section 2564 (chapter 16, title XII) of the code, relating to the state board of health..... Took effect by publication, April 5, 1898.		2564	2564
68	An act to amend section 2583 (chapter 17, title XII) of the code, relating to the practice of medicine..... Took effect by publication, March 24, 1898.		2583	2583
69	An act to regulate the practice of osteopathy in the state of Iowa..... Took effect July 4, 1898.			Repealed
70	An act to amend section 2589 of the code, relating to examinations for registration as pharmacists..... Took effect by publication, April 13, 1898.		2589	Repealed
71	An act to amend section 2597 of the code, relating to the practice of dentistry..... Took effect July 4, 1898.			Repealed
72	An act to amend section 2608 of the code, relating to the support of the soldiers' home..... Took effect July 4, 1898.		2608	2608

TWENTY-SEVENTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
73	An act to repeal section 2634 of the code, relating to the state board of educational examiners, and to enact a substitute therefor Took effect July 4, 1898.		2634-a	Repealed
74	An act fixing the salary of the chief executive officers of certain state institutions, and defining the qualifications of the superintendent of the school for the deaf..... Took effect July 4, 1898.		2727-c	2727-c
75	An act to amend section 2644 (chapter 3, title XIII) of the code, relating to state university..... Took effect July 4, 1898.		2644	2644
76	An act to amend sections 2646 and 2650 (chapter 4, title XIII) of the code, relating to the state college of agriculture and mechanic arts..... Took effect by publication, April 6, 1898.	1 2	2646 2650	2646 2650
77	An act to amend section 2682 of the code, relating to the normal school at Cedar Falls, Iowa..... Took effect July 4, 1898.		2682	2682
78	An act to amend the title of chapter 6, title XIII, and to amend sections 2683, 2685, 2688, and 2692 of said chapter, relating to the orphans' home and home for destitute children, at Davenport, Iowa..... Took effect by publication, April 8, 1898.	1 2 3 4 5	Title 2683 2685 2688 2692	2683 2685 2688 Repealed
79	An act to amend section 2700 of the code, relating to the institution for feeble-minded children..... Took effect by publication, April 13, 1898.	1 2	2700 2700-a	2700 2700-a
80	An act to amend sections 2708, 2709 and 2711 (chapter 8, title XIII) of the code, relating to the discharge of boys and girls from industrial schools..... Took effect by publication, April 8, 1898.		Repealed	
81	An act amending section 2713 of the code, relating to the support of the industrial school..... Took effect July 4, 1898.		2713	Repealed
82	An act to amend section 2718 of the code, relating to the support of the college for the blind..... Took effect July 4, 1898.		Repealed	
83	An act amending section 2727 of the code, relating to the support of the school for the deaf..... Took effect July 4, 1898.		Repealed	
84	An act to amend sections 2728, 2730, 2731 and 2732 and repeal section 2733 of the code, relating to county high schools, and to enact a substitute therefor..... Took effect July 4, 1898.	1 2 3 4 5	2728 2730 2731 2732 2733-a	2728 2730 2731 2732 2733-a
85	An act to amend section 2734 of the code, relating to the qualifications of county superintendents..... Took effect July 4, 1898.		2734	Repealed
86	An act to amend sections 2736 and 2737 (chapter 13, title XIII) of the code, relating to county superintendents... Took effect July 4, 1898.	1 2	2736 2737	Repealed Repealed
87	An act to amend section 2738 of the code, relating to the disbursement of the institute fund..... Took effect July 4, 1898.		2738	2738

TWENTY-SEVENTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
88	An act to require boards of school directors to fence school-house sites Took effect July 4, 1898.	1 2	2745-a 2745-b	2745-a 2745-b.
89	An act to empower boards of directors of school corporations to change boundary lines between such corporations in certain cases Took effect July 4, 1898.		2793-a	Repealed
90	An act to provide for the sale and distribution of the school laws of Iowa..... Took effect July 4, 1898.	1-4	2823-j -2823-m	2823-j -2823-m
91	An act to amend sections 2744 and 2754 of the code, relating to the names of school corporations and the election of directors therein..... Took effect by publication, February 19, 1898.	1 2	2744 2754	2744 2754
92	An act to amend section 2752 of the code, relating to boards of directors of school townships..... Took effect July 4, 1898.		2752	2752
93	An act to amend section 2754 of the code of Iowa, relating to term of office of school treasurers..... Took effect by publication, February 18, 1898.		2754	2754
94	An act to amend section 2808 of the code, providing for the distribution of common funds in the hands of the county treasurer Took effect July 4, 1898.		2808	2808
95	An act to amend sections 2812 and 2813 of the code, relating to the issuing of bonds by school corporations, and levying of taxes for the payment thereof..... Took effect July 4, 1898.	1 2	Repealed 2813	2813
96	An act to amend section 2942 (chapter 6, title XIV) of the code, relating to conveyance of real estate..... Took effect by publication, March 1, 1898.		2942	2942
97	An act to amend section 2943 of the code, relating to taking and certifying of acknowledgments..... Took effect by publication, April 8, 1898.		2943	2943
98	An act to amend section 2979 (chapter 8, title XIV) of the code, relating to homesteads..... Took effect by publication, March 22, 1898.		2979	2979
99	An act to amend section 3494 (chapter 4, title XVIII) of the code, relating to place of bringing action..... Took effect July 4, 1898.		3494	3494
100	An act to amend sections 3847 and 3849 (chapter 15, title XVIII) of the code, relating to security for costs..... Took effect July 4, 1898.	1 2	3847 3849	3847 3840
101	An act to repeal section 3912 of the code, relating to perishable property, and enact a substitute therefor..... Took effect by publication, March 10, 1898.		1312-a	1312-a
102	An act to amend section 3947 of the code, relating to notice to defendant in case of garnishment..... Took effect July 4, 1898.		3947	3947
103	An act to amend section 3948 of the code, relating to garnishment Took effect by publication, January 29, 1898.		3948	3948

TWENTY-SEVENTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
104	An act to amend section 3988 of the code, relating to levy of attachment on mortgaged personal property..... Took effect July 4, 1898.		3988	3988
105	An act to amend section 4142 of the code, relating to shorthand notes Took effect July 4, 1898.		4142	4142
106	An act to amend sections 4259 and 2930 of the code, relating to partition of real estate..... Took effect July 4, 1898.	1 2	4259 2930	4259 2930
107	An act to amend section 4538 (chapter 1, title XXII) of the code, relating to the filing of transcripts..... Took effect July 4, 1898.		4538	4538
108	An act to amend section 4606 (chapter 1, title XXIII) of the code, relating to husband and wife as witnesses..... Took effect July 4, 1898.		4606	4606
109	An act relating to the indictment and punishment of persons who have been convicted three or more times, and making certain evidence competent proof upon the trial thereof Took effect July 4, 1898.	1-4	4871-a -4871-d	4871-a -4871-d
110	An act to amend section 4850 (chapter 5, title XXIV) of the code, relating to taking goods from the charge or custody of an officer..... Took effect July 4, 1898.		4850	4850
111	An act to prohibit illegal voting at primary elections and providing penalties therefor..... Took effect by publication, April 9, 1898.	1-4	4919-a -4919-d	4919-a -4919-d
112	An act prohibiting the adulteration of candy and prescribing penalties therefor..... Took effect July 4, 1898.	1 2	4984-a 4984-b	Repealed Repealed
113	An act to repeal section 5016 of the code, relating to dead swine, and enact a substitute therefor..... Took effect July 4, 1898.		5016-a	5016-a
114	An act to amend sections 5240 and 5246 of the code, relating to the grand jury, and to repeal section 340 of the code Took effect by publication, April 13, 1898.	1 2 3	5240 5246 340-a	5240 5246 340-a
115	An act to repeal section 5274 of the code, relating to indictments, and enact a substitute therefor..... Took effect July 4, 1898.		5274-a	5274-a
116	An act to provide for the use of the deputy warden a house, heat and light..... Took effect by publication, April 13, 1898.		5669-a	5669-a
117	An act to amend section 5663 of the code, relating to duties of guards at the penitentiary..... Took effect by publication, April 13, 1898.		5663	5663

TWENTY-SEVENTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
118	An act to create a state board of control..... Took effect by publication, March 29, 1898.	1-35	{ 2727 -a1 -2727 -a35	{ 2727 -a1 -2727 -a35
		36-45	{ 2727 -a37 -2727 -a46	{ 2727 -a37 -2727 -a46
		46-55	{ 2727 -a48 -2727 -a57	{ 2727 -a48 -2727 -a57
165	An act to legalize acknowledgments taken under code of '73 Took effect by publication, April 13, 1898.		2942-c	2942-c
166	An act to legalize acknowledgments of deeds and conveyances of land..... Took effect July 4, 1898.		2942-d	2942-d
182	An act to legalize conveyances of real property by executors or trustees under foreign wills..... Took effect July 4, 1898.		3295-a	3295-a

THE TWENTY-EIGHTH GENERAL ASSEMBLY.

Chap.	TITLE--TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
1	An act to amend chapter 1 of the acts of the twenty-seventh general assembly, relating to the publication of the laws of the state..... Took effect by publication, February 13, 1900.		p. 3	p. 5
2	An act to amend paragraph 8 of section 89 of the code, relating to the drawing of warrants by the auditor of state..... Took effect by publication, April 14, 1900.		89	89
3	An act to amend section 123 of the code, and prohibit the charging off of balances of unexpended appropriations... Took effect by publication, April 14, 1900.	1 2	123 123-a	123 123-a
4	An act to amend section 125 of the code, relating to the printing and binding of reports of state officers..... Took effect by publication, April 13, 1900.		125	Repealed
5	An act to amend section 136 of the code, relating to printing reports of the academy of science..... Took effect by publication, April 6, 1900.		136	136
6	An act to provide for the making of biennial reports by state officers, commissions, and boards; for the publication thereof by the executive council, and for the repeal of section 163 of the code..... Took effect July 4, 1900.	1-3	163-a -163-c	163-a -163-c
7	An act to amend section 166 of the code, relating to advertising for sealed proposals..... Took effect by publication, April 7, 1900.		166	166
8	An act to amend section 227 of the code, relating to Harrison county..... Took effect July 4, 1900.		227	227
9	An act to repeal sections 256 and 258 of the code, relating to superior courts, and to enact substitutes therefor, and to amend section 276 of the code..... Took effect July 4, 1900.	1 2 3	256-a 258-a 276	Repealed 258-a 276
10	An act to amend section 261 of the code, relating to superior courts and changes of venue therein..... Took effect by publication, April 7, 1900.		261	261
11	An act to amend chapter 10 of title III of the code, relating to admission to the bar..... Took effect July 4, 1900.	1 2 3 4 5 6 7 8	310 311 312 315 311-a 311-b 311-c	310 311 312 315 311-a 311-b 311-c
12	An act to amend section 316 of the code, relating to non-resident attorneys..... Took effect July 4, 1900.		316	316
13	An act to amend section 370 of the code, relating to administrators, etc., depositing funds with the clerk of the district court..... Took effect July 4, 1900.		370	370

TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
14	An act to amend section 371 of the code, relating to the duties of the clerk of the district court..... Took effect by publication, February 27, 1900.		371	371
15	An act to amend section 576 of the code, relative to the duties of township clerk..... Took effect by publication, March 30, 1900.		576	576
16	An act to amend section 602 of the code, relating to the election of officers in newly incorporated towns; also election of assessor therein..... Took effect July 4, 1900.		602	602
17	An act to amend section 669 of the code, relating to compensation of councilmen..... Took effect by publication, April 7, 1900.		669	669
18	An act to amend section 704 of the code, relating to general powers of cities and towns..... Took effect by publication, March 16, 1900.		704	704
19	An act to amend sections 720, 724 and 725 of the code, relating to powers of cities and towns..... Took effect by publication, February 22, 1900.		{ 720 724 725	{ 720 724 725
20	An act to amend section 729 of the code, relating to the powers of library trustees..... Took effect July 4, 1900.		729	729
21	An act to amend section 732 of the code, relating to the levying of taxes for library purposes..... Took effect by publication, March 6, 1900.		732	Repealed
22	An act to amend section 732 of the code as amended, relative to taxes for library purposes..... Took effect by publication, April 12, 1900.	1 2	732 732-a	Repealed 732-a
23	An act to amend section 740 of the code, enabling school corporations to accept gifts and bequests..... Took effect by publication, March 1, 1900.		740	740
24	An act to amend section 742 of the code, relating to the purchase and construction of waterworks..... Took effect July 4, 1900.	1 2	742 742-a	742 742-a
25	An act to amend sections 747 and 748 of the code, as amended by chapter 23 of the acts of the twenty-seventh general assembly, relating to waterworks..... Took effect by publication, March 6, 1900.	1 2	747-a 748	747-a 748
26	An act to amend section 777 of the code, relating to temporary sidewalks..... Took effect by publication, April 7, 1900.	1 2	777 777-a	777 777-a
27	An act to amend section 779 of the code, relating to the collection of taxes..... Took effect July 4, 1900.		779	779
28	An act to amend section 799 of the code, relating to street improvements and special assessments..... Took effect July 4, 1900.		799	799
29	An act to regulate the levy and collection of special assessments in cities and towns, and cities acting under special charter..... Took effect by publication, April 14, 1900.	1-5	792-a -792-e	792-a -792-e

TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
30	An act to amend sections 851 and 852 of the code; also sections 850 and 859 of the code, as amended by chapter 25 of the acts of the twenty-seventh general assembly, relating to park commissioners..... Took effect by publication, February 15, 1900.	1	850	Repealed
		2	851	Repealed
		3	852	Repealed
		4	859	Repealed
31	An act to amend section 852 of the code and authorizing an increase of the tax levy for park purposes..... Took effect July 4, 1900.		852	Repealed
32	An act to amend section 894 of the code, relating to taxation in cities and towns..... Took effect by publication, April 4, 1900.		894	894
33	An act to amend section 1077 of the code, relative to registration of voters..... Took effect by publication, April 12, 1900.		1077	1077
34	An act to amend section 1096 of the code, relating to time of closing polls at election..... Took effect by publication, March 15, 1900.		1096	1096
35	An act amending section 1106 of the code, relating to ballots..... Took effect July 4, 1900.		1106	1106
36	An act to amend section 1119 of the code, relating to the marking and validity of ballots..... Took effect July 4, 1900.		1119	1119
37	An act to provide for greater purity in elections by the use of voting machines; also creating a board of voting machine commissioners and defining their duties, and repealing all laws in conflict with this act..... Took effect July 4, 1900.	1-21	1137-a -1137-u	1137-a7 -1137-a27
38	An act to amend section 1173 of the code, relating to election of presidential electors..... Took effect July 4, 1900.		1173	1173
39	An act to amend section 1222 of the code, relating to appeals in certain cases..... Took effect by publication, February 27, 1900.		1222	1222
40	An act to encourage the manufacture of sugar in the state of Iowa, by making certain exemptions in taxes..... Took effect by publication, April 11, 1900.		1304-a	1304-a
41	An act to repeal section 1306 of the code, relating to assessment of taxes, and indebtedness of counties and other political and municipal corporations..... Took effect by publication, April 7, 1900.	1	1606-a	1606-a
		2	1606-b	Repealed
42	An act to provide for the taxation of the property of telegraph and telephone companies, and to amend section 1330 of the code, and to repeal section 1331 of the code. Took effect by publication, April 13, 1900.	1	1330	1330
		2-8	1330-a -1330-g	1330-a -1330-g
		9	1331-a	1331-a
43	An act to amend section 1333 of the code, and enacting certain provisions relative to taxing insurance corporations. Took effect by publication, March 31, 1900.	1-6	1333 -1333-e	1333 -1333-e
44	An act to amend section 1340 of the code, relating to assessment of taxes..... Took effect July 4, 1900.		1340	1340

TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
45	An act providing for the taxation of the property of express companies, and repealing sections 1345 and 1346 of the code, and chapter 31 of the acts of the twenty-seventh general assembly..... Took effect by publication, April 14, 1900.	1 4 5 8-10	1346-a 1346-d 1346-e 1346-h -1346-j	Repealed 1346-e 1346-h -1346-j
46	An act to amend section 1348 of the code, relating to licensing peddlers..... Took effect July 4, 1900.		1348	1348
47	An act to repeal section 1385 of the code, relating to correction of assessment and tax lists, and enact a substitute therefor..... Took effect July 4, 1900.	1-3	1385-a -1385-c	1385-a -1385-c
48	An act to repeal section 1389 of the code, relating to record of delinquent taxes, and to enact a substitute therefor..... Took effect July 4, 1900.	1-4	1389-a -1389-d	1389-a -1389-d
49	An act to authorize the executive council to reassess and relevy taxes heretofore or hereafter held to be invalid, to certify the same to the proper county officers, and to authorize such officers to levy such taxes..... Took effect by publication, April 7, 1900.	1 2	1330-h 1330-i	1330-h 1330-i
50	An act providing for the discovery of property withheld from taxation, and listing the same..... Took effect by publication, April 12, 1900.	1-5	1407-a -1407-e	1407-a -1407-e
51	An act to amend chapter 4 of title VII of the code, and chapter 37 of the acts of the twenty-seventh general assembly, relating to assessment and collection of collateral inheritance tax..... Took effect by publication, April 10, 1900.	1 2 3 4 5 6 7 8 9 10 11 12	1467-a 1467-b 1467-d 1467-e 1476-a 1479-b 1471-a 1478-b 1478-a 1478-c 1477-e 1467-c	1467-a 1467-b 1467-d 1467-e 1476-a 1479-b 1471-a 1478-b 1478-a 1478-c 1477-e 1467-c
52	An act to amend section 1560 of the code, relating to notice to remove obstruction from highways..... Took effect July 4, 1900.		1560	1560
53	An act to amend section 1563 of the code, relating to the Russian thistle..... Took effect July 4, 1900.		1563	1563
54	An act to amend section 1570 of the code, relating to trimming of hedges..... Took effect July 4, 1900.		1570	1570
55	An act to amend section 1571 of the code, relating to operation of steam threshing engines on public highways.. Took effect July 4, 1900.		1571	1571
56	An act to amend section 1618 of the code, relating to renewal of corporations, and fee to be paid..... Took effect by publication, March 16, 1900.	1 2	1618 1618-a	1618 1618-b
57	An act to amend section 1627 of the code, relating to shares of capital stock of corporations..... Took effect July 4, 1900.		1627	1627

TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
58	An act to create a department of agriculture, and to repeal sections 1653, 1654, 1655, 1656, 1657, 1674, 1682, and 1683 of the code, and chapter 42 of the acts of the twenty-seventh general assembly and amending sections 1679 and 1681 of the code..... Took effect July 4, 1900.	1-17 18 19 20 21	1657-b -1657-r 1657-a 1679 -1681 1657-s 1657-t	1657-b -1657-r 1657-a 1679 -1681 1657-s 1657-t
59	An act to amend chapter 43 of the acts of the twenty seventh general assembly, relating to agricultural societies, and to amend sections 1658 and 1659 of the code.. Took effect July 4, 1900.	1 2	1661-a 1658 -1659	1661-a 1658 -1659
60	An act to amend section 1709 of the code, relating to insurance Took effect by publication, April 3, 1900.		1709	1709
61	An act to amend section 1710 of the code, relating to limitation of insurance risks..... Took effect July 4, 1900.		1710	Repealed
62	An act to repeal section 1720 of the code, relating to auditor's insurance report, and to enact a substitute therefor Took effect by publication, March 15, 1900.		1720-a	1720-a
63	An act to amend section 1743 of the code, relating to stipulations of arbitration in policies..... Took effect July 4, 1900.		1743	1743
64	An act to amend section 1743 (chapter 4, title IX) of the code, relating to insurance other than life..... Took effect July 4, 1900.		1743	1743
65	An act relating to insurance companies on the stipulated premium plan, and to amend chapter 7, title IX of the code, and provide penalty for violations..... Took effect by publication, April 12, 1900.	1-16	1784 -1784-o	Repealed
66	An act to amend section 1806 of the code, relating to loans on life insurance policies..... Took effect July 4, 1900.		1806	Repealed
67	An act to add to chapter 10 of title IX and to amend sections 1848 and 1852 of the code, relating to savings banks Took effect by publication, April 5, 1900.	1 2,4 3	1850-a 1848 1852	1850-a 1848 1852
68	An act to amend section 1889 of the code, relating to receiving of time deposits by loan and trust companies... Took effect July 4, 1900.		1889	1889
69	An act to amend chapter 13, title IX of the code, and to repeal chapter 48 of the acts of the twenty-seventh general assembly, relating to building and loan associations Took effect by publication, May 3, 1900.	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16	1898-c 1902-a 1903-a 1899-a 1903-b 1898-d 1907-a 1907-b 1907-c 1893-a 1894-a 1898-a 1906-a 1908-a 1915-a 1898-b	1898-c 1902-a 1903-a 1899-a 1903-b 1898-d 1907-a 1907-b 1907-c 1893-a 1894-a 1898-a 1906-a 1908-a 1915-a 1898-b

TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
70	An act to amend section 1998 of the code, relating to condemnation of additional ground for railroad purposes.. Took effect by publication, April 5, 1900.		1998	1998
71	An act to regulate the sale, and require the redemption, of passenger tickets by common carriers..... Took effect July 4, 1900.	1-4	2128-a -2128-d	2128-a -2128-d
72	An act to amend the military code of Iowa. Sections 2173, 2178, 2180, 2203, 2212, amended; and sections 2176, 2179, 2181 and 2211, repealed and substitutes enacted therefor..... Took effect July 4, 1900.	1 2 3 4 5 6 7 8 9	Repealed 2176-a Repealed 2180 2181-a 2203 2211-a 2212 2178	Repealed 2180 Repealed Repealed Repealed Repealed Repealed
73	An act to amend section 2213 of the code, relating to compensation of officers and soldiers of the Iowa national guard Took effect by publication, April 6, 1900.	1 2	2213 2213-a	Repealed 2213-a
74	An act to amend section 2382 of the code, relating to the sale of intoxicating liquor..... Took effect July 4, 1900.	1, 2	2382	2382
75	An act to amend sections 2390 and 2393 of the code, relating to bonds of pharmacists..... Took effect July 4, 1900.	1 2	2390 2393	2390 2393
76	An act to amend section 2401 of the code, relating to businesses conducted under permits..... Took effect July 4, 1900.		2401	2401
77	An act to amend section 2403 of the code, relating to sale of intoxicating liquors..... Took effect by publication, April 12, 1900.		2403	Repealed
78	An act to amend section 2451 of the code, relating to revocation of a bar to proceedings against persons selling intoxicating liquors..... Took effect July 4, 1900.		2451	2451
79	An act to amend section 2483 of the code, relating to compensation of mine inspectors..... Took effect July 4, 1900.		2483	2483
80	An act to amend section 2490 of the code, relating to mines and mining Took effect July 4, 1900.		2490	2490
81	An act to amend section 2490 of the code, relating to payment of coal miners..... Took effect July 4, 1900.		2490	2490
82	An act requiring mine foremen, etc., to submit to examination, and hold certificates of competency, and providing penalties for violations of this act..... Took effect July 4, 1900.	1-6	2489-a -2489-f	2489-a -2489-f
83	An act to amend section 2508 of the code, relating to inspection and use of petroleum products..... Took effect by publication, April 13, 1900.	1 2	2508 2508-a	Repealed Repealed

TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
84	An act to amend sections 2512, 2513 and 2514 of the code, relating to inspection of passenger boats..... Took effect by publication, March 30, 1900.	1 2 3	2512 2513 2514	2512 2513 2514
85	An act to amend section 2515 of the code, relating to assistant dairy commissioner..... Took effect July 4, 1900.		2515	2515
86	An act to protect game and provide a fund to pay expenses of prosecution under this act..... Took effect by publication, March 23, 1900.	1-5 7 8	2563-a -2563-e 2563-g 2563-h	2563-a -2563-e 2563-g 2563-h
87	An act to repeal section 6 of chapter 86 of the acts of the twenty-eighth general assembly, and to enact a substitute therefor..... Took effect by publication, April 12, 1900.		2563-f	2563-f
88	An act to amend section 2564 of the code, relating to public health districts..... Took effect July 4, 1900.		2564	2564
89	An act to amend sections 2576 and 2582 of the code, relating to examination of persons entering the practice of medicine..... Took effect by publication, February 27, 1900.	1 2	2576 2582	2576 2582
90	An act to amend section 2583 (chapter 17, title XII) of the code, relating to compensation of secretary of state board of medical examiners..... Took effect July 4, 1900.		2583	2583
91	An act to repeal chapter 19 of title XII of the code, and enact a substitute therefor, relating to dentistry..... Took effect July 4, 1900.	1-12	2600-a -2600-l	2600-a -2600-l
92	An act to define powers of the board of control in relation to the pension money of members of the Iowa Soldiers' Home..... Took effect by publication, March 31, 1900.	1 2 4	2606-a 2606-b 2606-d	2606-a 2606-b 2606-d
93	An act to regulate the practice of veterinary medicine, etc., in the state of Iowa, and provide penalties..... Took effect July 4, 1900.	1 3-16	2538-a 2538-c -2538-p	2538-a 2538-c -2538-p
94	An act to amend sections 2622 and 2627 of the code, relating to duties of the superintendent of public instruction..... Took effect July 4, 1900.	1 2	2622 2627	2622 2627
95	An act to amend section 2629 of the code, relating to examination of teachers for state certificates..... Took effect July 4, 1900.		2629	2629
96	An act to repeal section 2630 of the code, relating to teachers' certificates, and to enact a substitute therefor. Took effect July 4, 1900.	1 2	2630-a 2630-b	2630-a 2630-b
97	An act providing for the levy of a special tax for the state university..... Took effect July 4, 1900.		Repealed	
98	An act to amend section 2667 of the code, relating to interest on loans from funds of the state college of agriculture and the mechanic arts..... Took effect by publication, January 25, 1900.		2667	2667

TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
99	An act to levy a tax to provide for equipment for necessary buildings for the Iowa state college of agriculture and mechanic arts..... Took effect July 4, 1900.		Repealed	
100	An act repealing sections 2702, 2703 and 2705 of the code, and chapter 80 of the twenty-seventh general assembly, and amending chapter 8 of title XIII of the code, relating to industrial schools..... Took effect July 4, 1900.	1 2 3 4 5 6 7 8 9 10 11 12 13 14	2703-a 2704 2705-a 2705-b 2707 2708 2709 2710 2711 2713 2709 2711 2711-a 2711	2703-a Repealed 2705-a 2705-b 2707 2708 2709 2710 2711 2713 2709 2711 2711-a 2711
101	An act making provision for the support of the industrial school for girls, at Mitchellville, Iowa..... Took effect by publication, April 6, 1900.		2713	2713
102	An act relating to the industrial school for girls and to establish a reformatory for females at Anamosa..... Took effect by publication, April 11, 1900.	1-14	2713-a -2713-n	2713-a -2713-n
103	An act providing for closing the industrial home for the blind..... Took effect by publication, April 7, 1900.	1-8	2722-a -2722-h	2722-a -2722-h
104	An act to amend section 2750 of the code, relating to special meetings of voters of school corporations..... Took effect by publication, April 5, 1900.		2750	2750
105	An act to amend section 2755 of the code, relating to election precincts of school districts..... Took effect by publication, February 10, 1900.		2755	2755
106	An act to amend section 2771 of the code, relating to filling vacancies on boards of school directors..... Took effect July 4, 1900.		2771	2771
107	An act to amend section 2778 of the code, relating to employment of teachers..... Took effect July 4, 1900.		2778	2778
108	An act to amend section 2806 of the code, relating to the contingent fund..... Took effect July 4, 1900.		2806	2806
109	An act to provide for the teaching of the elements of vocal music in all the public schools of Iowa..... Took effect July 4, 1900.	1 2	2823-g 2823-t	2823-s 2823-t
110	An act to establish libraries in all school districts..... Took effect July 4, 1900.	1-5	2823-n -2823-r	2823-n -2823-r
111	An act to amend section 2831 of the code, relating to county uniformity of school books..... Took effect July 4, 1900.		2831	2831
112	An act to amend section 2832 of the code, relative to distribution of uniform text-books..... Took effect July 4, 1900.		2832	2832

TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
113	An act to amend sections 2849 and 2855 of the code, relating to the school fund, loans and interest..... Took effect by publication, March 6, 1900.	1 2	2849 2855	2849 Repealed
114	An act consolidating a portion of the state library with the historical department..... Took effect by publication, March 13, 1900.	6 1-6	2881-a -2881-f	Repealed 2881-a -2881-g
115	An act to amend section 2881 of the code, relating to the compensation of state librarian and assistants..... Took effect by publication, April 7, 1900.		2881	Repealed
116	An act to create a library commission and promote free public libraries in the state of Iowa..... Took effect July 4, 1900.	1	2888-a	2888-a
117	An act relating to the rights of alien corporations..... Took effect by publication, March 16, 1900.	1-3	2889-a -2889-c	2889-a -2889-c
118	An act relating to notarial seals of non-resident notaries. Took effect July 4, 1900.		2943-a	2943-a
119	An act to amend section 2978 of the code, relating to extent of a homestead, within city or town..... Took effect July 4, 1900.		2978	2978
120	An act to amend section 3138 of the code, relating to hotel and innkeepers' liabilities..... Took effect by publication, April 6, 1900.		3138	3138
121	An act defining the place of bringing action against corporations engaged in coal mining..... Took effect July 4, 1900.		3499-a	3499-a
122	An act to amend section 3958 of the code, relating to return of executions..... Took effect July 4, 1900.		3958	3958
123	An act to amend section 4027 of the code, relating to notice of execution sales..... Took effect July 4, 1900.		4027	4027
124	An act to amend section 4051 of the code, relating to redemption of real estate sold upon execution..... Took effect July 4, 1900.		4051	4051
125	An act to amend section 4608 of the code, relating to communications in professional confidence..... Took effect by publication, February 10, 1900.		4608	4608
126	An act to amend section 4807 of the code, relating to malicious mischief and trespass..... Took effect July 4, 1900.		4807	Repealed
127	An act to punish railway train robbers..... Took effect by publication, March 30, 1900.		4810-a	4810-a
128	An act providing for the payment by the state of costs and fees incurred in prosecutions for escaping from the penitentiary..... Took effect July 4, 1900.	1-3	4897-b -4897-d	4897-b -4897-d
129	An act to repeal section 4946 of the code, relating to bodies for medical purposes, and to enact a substitute therefor. Took effect July 4, 1900.	1-5	4946-a -4946-e	4946-a -4946-e

TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
130	An act prohibiting the use of gasoline, benzine, naphtha, and other explosives in tenements..... Took effect by publication, April 5, 1900.	1 2	4999-k 4999-l	4999-a13 4999-a14
131	An act to prevent and punish the desecration of the flag of the United States..... Took effect July 4, 1900.		5028-a	5028-a
132	An act to amend section 5034 of the code, relating to using blasphemous or obscene language..... Took effect July 4, 1900.		5034	5034
133	An act to punish persons engaged in boxing contests where admission is charged, and accessories..... Took effect July 4, 1900.		5038-a	5038-a
134	An act to amend section 5258 of the code, relating to minutes kept by grand jury..... Took effect by publication, April 3, 1900.		5258	5258
135	An act to amend section 5373 of the code, relating to evidence on part of state in criminal causes..... Took effect July 4, 1900.		5373	5373
136	An act to amend sections 5662 and 5667 of the code, relating to bonds of wardens and clerks of penitentiaries.... Took effect by publication, April 5, 1902.	1 2	5662 5667	5662 5667
137	An act to amend section 5685 of the code, relating to gate receipts at penitentiaries..... Took effect by publication, April 13, 1900.	1 2	5685 5685-a	Repealed Repealed
138	An act to prohibit the manufacture of pearl buttons and butter tubs in the state penitentiary..... Took effect by publication, April 13, 1900.	1 2	5702-a 5702-b	5702-a 5702-b
139	An act to repeal chapter 38 of the acts of the twenty-seventh general assembly, relating to cutting of weeds on public roads, and enact a substitute therefor..... Took effect July 4, 1900.		1562-a	1562-a
140	An act authorizing the board of control to use unexpended balance of appropriation made in chapter 140 of the acts of the twenty-sixth general assembly, and to amend chapter 54 of the acts of the twenty-seventh general assembly, relating to patients in insane hospitals..... Took effect July 4, 1900.		2291-a	2291-a
141	An act to amend section 1 of chapter 74 of the acts of the twenty-seventh general assembly, relating to the salary of the chief executive officer of the Iowa soldiers' orphans' home at Davenport..... Took effect by publication, April 5, 1900.		2727-c	2727-c
142	An act to amend section 1 of chapter 95 of the acts of the twenty-seventh general assembly in relation to bonds of school corporations..... Took effect by publication, April 10, 1900.		Repealed	
143	An act to amend chapter 118 of the acts of the twenty-seventh general assembly, relating to certain state institutions..... Took effect by publication, April 13, 1900.	1 2 3 4 5	2727-a47 2727-a35 2727-a36 2727-a3 2727-a43	2727-a47 2727-a35 2727-a36 2727-a3 2727-a43

TWENTY-EIGHTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
144	An act placing private and county institutions for care of the insane under the board of control..... Took effect by publication, April 13, 1900.	1-11	{ 2727 -a58 -2727 -a68	{ 2727 -a58 -2727 -a68
145	An act to amend chapter 148 of the acts of the twenty-seventh general assembly, relating to traveling libraries Took effect July 4, 1900.		Omitted	
146	An act repealing section 9 of chapter 160 of the acts of the ninth general assembly, and providing for the payment, by the treasurer of state, of swamp land indemnity to county authorities..... Took effect by publication, April 12, 1900.	1-3	116-d -116-f	116-d -116-f
147	An act to amend chapter 61 of the private, local, and temporary acts of the fifteenth general assembly, confirming in the state university of Iowa, the title to certain town lots and streets..... Took effect July 4, 1900.		Omitted	
182	An act to surrender jurisdiction to the United States over certain real property..... Took effect July 4, 1900.		4-a	4-a

TWENTY-NINTH GENERAL ASSEMBLY.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
1	An act to amend section 65 of the code, relating to the salary of the governor..... Operative January, 1904.		65	65
2	An act to amend section 106 of the code, relating to time of settlement of auditor of state with treasurer of state.. Took effect July 4, 1902.		106	106
3	An act relating to the defense of the treasurer of state in certain cases, and providing for payment and satisfaction of judgments rendered against him in such cases	1-5	116-g -116-k	116-g -116-k
	Took effect by publication, April 3, 1902.			
4	An act to amend sections 118 and 119 of the code, defining the duties of the state printer and state binder..... Took effect July 4, 1902.	1 2	118 119	118 119
5	An act to amend section 120 of the code, relating to printing and binding..... Took effect July 4, 1902.		120	120
6	An act to amend sections 125 and 126 of the code, relating to printing, etc., of public documents..... Took effect July 4, 1902.	1 2	125 126	Repealed Repealed
7	An act to amend section 136 of the code, relating to publication of reports of Iowa academy of sciences..... Took effect by publication, March 27, 1902.		136	136
8	An act providing for the purchase of engravings, plates, or cuts for state publications, and fixing the manner of paying the cost of same..... Took effect July 4, 1902.		137-a	137-a
9	An act repealing section 161 of the code, relating to annual settlements with state departments, and enacting a substitute therefor..... Took effect by publication, April 9, 1902.		161-a	161-a
10	An act to amend sections 164 and 165 of the code, relating to powers and duties of the executive council..... Took effect July 4, 1902.	1 2	164 165	164 165
11	An act to amend section 165 of the code, relating to sale of state furniture and stores..... Took effect July 4, 1902.		165	165
12	An act to amend chapter 1, title III of the code, relating to the organization of the supreme court..... Took effect July 4, 1902.	1 2 3 4 5-8	192-a 192-b 193-a 193-b 203-a -203-d	192-a 192-b 193-a 193-b 203-a -203-d
13	An act to amend section 253 of the code, relating to the salaries of district judges..... Took effect July 4, 1902.		253	253

TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLE- MENT, 1902	SECS. OF THIS WORK
14	An act to repeal section 254 of the code, relating to compensation of shorthand reporters, and to enact a substitute therefor..... Took effect July 4, 1902.	1-3	254-a -254-c	254-a1 -254-a3
15	An act authorizing the district court to appoint trustees to manage, control and invest funds donated for and on account of cemetery purposes..... Took effect July 4, 1902.	1-8	254-d -254-k	254-a4 -254-a11
16	An act to amend section 255 of the code, relating to superior courts..... Took effect July 4, 1902.		255	255
17	An act to amend section 296 of the code, relating to fees in probate matters..... Took effect July 4, 1902.		296	296
18	An act to amend section 308 and to repeal section 303 of the code, relating to compensation of county attorneys, and to enact a substitute therefor..... Took effect July 4, 1902.	1 2	303-a 308	303-a 308
19	An act to amend section 325 of the code, relating to removal of attorneys, and payment of costs therefor..... Took effect by publication, April 11, 1902.		325	325
20	An act to amend section 337 of the code, relating to grand and petit jury lists..... Took effect July 4, 1902.		337	337
21	An act to amend section 423 of the code, relating to the powers of boards of supervisors..... Took effect by publication, March 27, 1902.		423	423
22	An act to amend section 441 of the code, relating to compensation of official papers..... Took effect July 4, 1902.		441	441
23	An act requiring the county auditor to compile and prepare a financial report and providing for the printing and distribution thereof..... Took effect July 4, 1902.	1 2	480-a 480-b	480-a 480-b
24	An act to amend section 483 of the code, relating to payment of interest on county warrants..... Took effect July 4, 1902.		483	483
25	An act to amend section 496 of the code, relating to employment of additional help by county recorders..... Took effect July 4, 1902.		496	496
26	An act to amend section 508 of the code, relating to sheriffs' fees..... Took effect July 4, 1902.		508	508
27	An act to repeal sections 509 and 510 of the code, relating to compensation of sheriffs and deputy sheriffs and to fix the salaries of such officers..... Took effect July 4, 1902.	1 2	510-a 510-b	510-a 510-b
28	An act to amend section 586 of the code, relating to care and maintenance of cemeteries..... Took effect July 4, 1902.		586	586

TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
29	An act to amend sections 645 and 658 of the code, relating to powers and duties of mayors of cities..... Took effect by publication, April 3, 1902.	1 2	658 645	658 Repealed
30	An act to amend sections 661 and 674 of the code, relating to assessors in cities and towns..... Took effect July 4, 1902.	1 2	661 674	661 674
31	An act creating a board of police and fire commissioners in cities of the first class having more than sixty thousand inhabitants, and defining powers and duties of such. Took effect July 4, 1902.	1-8 9-10	679-a -679-h 679-j -679-k	679-a -679-h 679-j -679-k
32	An act amending section 721 of the code, relating to questions submitted to popular vote in cities and towns. Took effect July 4, 1902.		721	721
33	An act to amend section 724 of the code, as amended by chapter 19 of the acts of the twenty-eighth general assembly, relating to powers of cities and towns..... Took effect by publication, April 5, 1902.		724	724
34	An act to amend section 727 of the code, relating to gifts and bequests for public library purposes..... Took effect by publication, April 8, 1902.	1 2	727 727-a	727 727-a
35	An act to authorize library boards to condemn grounds for location of libraries and for additional library grounds..... Took effect July 4, 1902.	1-3	729-a -729-c	729-b -729-d
36	An act to amend section 732 of the code, as amended by chapters 21 and 22 of the acts of the twenty-eighth general assembly, relating to levying of taxes for library purposes..... Took effect July 4, 1902.		732	Repealed
37	An act requiring the keeping of accounts in cities and towns and requiring that publicity be given thereto.... Took effect July 4, 1902.	1-3	741-a -741-c	741-a -741-c
38	An act authorizing the loaning of funds accumulated under chapter 1 of the acts of the twenty-sixth general assembly, or under section 742 of the code, and to legalize a contract between the city of Des Moines and the Des Moines Water Works company for a loan of such funds..... Took effect by publication, February 18, 1902.	1 3	742-b 742-c	742-b 742-c
39	An act to amend chapter 5, sections 745, 746, 747 and 748 of the code, relating to purchase or erection of water works in cities of the first class..... Took effect July 4, 1902.	1	{ 745 746 747-a 748	{ 745 746 747-a 748
40	An act to amend section 745 of the code, as amended by chapter 23 of the acts of the twenty-seventh general assembly, relating to purchase and construction of water works..... Took effect by publication, March 28, 1902.	1 2	745 745-a	745 745-b
41	An act to repeal section 747 of the code as amended relating to appointment of waterworks trustees in cities of the first class, and to enact a substitute therefor..... Took effect by publication, March 15, 1902.	1 2	747-a 747-b	747-a 747-b

TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
42	An act authorizing cities having voted taxes aiding corporations in constructing bridges across a navigable boundary river, to vote additional taxes for the purchase of such bridge..... Took effect July 4, 1902.	1-4	766-a -766-d	766-a -766-d
43	An act to amend sections 771, 773 and 774 of the code, relating to viaducts..... Took effect July 4, 1902.	1 2 3	771 773 774	Repealed 773 774
44	An act to amend section 823 of the code, relating to notice of the levy of special assessments..... Took effect by publication, April 4, 1902.		823	823
45	An act to amend sections 850 and 859 of the code, as amended by chapter 25 of the acts of the twenty-seventh general assembly, and as amended by chapter 30 of the acts of the twenty-eighth general assembly, relating to park commissioners in cities..... Took effect July 4, 1902.	1, 2 3	850 859	Repealed Repealed
46	An act to amend sections 860, 861 and 862 of the code, relating to powers of certain cities to vote taxes for parks and dams, and jurisdiction of same over parks without their corporate limits..... Took effect by publication, April 5, 1902.	1 2 3	860 861 862	Repealed Repealed Repealed
47	An act relating to the power of certain cities and towns to appropriate money for park purposes..... Took effect July 4, 1902.	1 2	862-a 862-b	862-a 862-b
48	An act to amend section 894 of the code, as amended by chapter 32 of the acts of the twenty-eighth general assembly, relating to levy of special taxes by cities..... Took effect by publication, April 3, 1902.		894	894
49	An act to amend section 915 of the code, relating to recording and certification of plats..... Took effect July 4, 1902.		915	915
50	An act repealing section 953 of the code, and section 2 of chapter 28 of the acts of the twenty-seventh general assembly, and amending subdivision 6 of section 1005 of the code, relating to assessment of taxes for library purposes in cities acting under special charters..... Took effect July 4, 1902.	1 2	953-a 1005	953-a 1005
51	An act to fix the compensation of waterworks trustees in special charter cities..... Took effect by publication, April 16, 1902.		955-a	Repealed
52	An act to amend section 1004 of the code, relating to levying taxes in special charter cities..... Took effect by publication, April 8, 1902.		1004	1004

TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
53	An act to amend sections 1075, 1130, 1528, 1533, 1542, 1545, 1551 and 1554, and 4808 of the code, and to repeal sections 1532, 1540 and 1550 of the code, and to enact substitutes therefor, and to repeal sections 1541, 1546, 1553 and 1567 of the code, relating to duties of township trustees, clerks, etc..... Took effect July 4, 1902.	1	1075	1075
		2	1130	1130
		3	1528	1528
		4	1532-a	1532-a
		5	1533	1533
		6	1540-a	1540-a
		7	1541-a	1541-a
		8	Repealed	
		9	1545	1545
		10	1546-a	1546-a
		11	1551	1551
		12	1553-a	1553-a
		13	1554	1554
		14	1567-a	1567-a
		15	1566-a	1566-a
		16	4808	4808
		17	1566-b	1566-b
		18	1567-b	1567-b
54	An act providing for condition of bond to be given by public officers and others..... Took effect by publication, April 11, 1902.	1-4	1177-a	1177-a
			-1177-d	-1177-d
55	An act to fix the compensation of appraisers of property.. Took effect by publication April 5, 1902.		1290-a	1290-a
56	An act to amend section 1304 of the code, relating to exemption of property from taxation..... Took effect July 4, 1902.		1304	1304
57	An act to amend section 1333 of the code, relating to taxes on foreign insurance companies..... Took effect July 4, 1902.		1333	1333
58	An act to amend sections 1334 and 1337 of the code, relating to assessment of railway property for taxation	1 2	1334	1334
			1337	1337
Took effect by publication, March 1, 1902.				
59	An act to amend section 1400 of the code, relating to taxes levied on buildings..... Took effect July 4, 1902.		1400	1400
60	An act requiring railroad companies to file plats of all lines of railroad owned or operated in the several counties of the state with county auditors..... Took effect July 4, 1902.	1 2	1337-a	1337-a
			1337-b	1337-b
61	An act relating to reports to be made by railroads to the executive council..... Took effect by publication, April 15, 1902.	1-6	1340-a	1340-a
			-1340-f	-1340-f
62	An act defining and providing for the taxation of freight line and equipment companies..... Took effect July 4, 1902.	1-8	1342-a	1342-a
			-1342-g	-1342-g
63	An act to refund to administrators any surplus they have paid to the treasurer of state as collateral inheritance tax in excess of that legally due..... Took effect July 4, 1902.	1 2	1475-a	1475-a
			1475-b	1475-b
64	An act to amend sections 1528, 1533, and 1554 of the code and to repeal section 1542 and to enact a substitute therefor, relating to the levying, certifying and collection of road tax..... Took effect by publication, March 27, 1902.	1 2 3 4	1528	1528
			1533	1533
			1542-a	1542-a
			1554	1554

TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLE- MENT, 1902	SECS. OF THIS WORK
65	An act to amend section 1530 of the code, relating to the working of highways..... Took effect July 4, 1902.		1530	1530
66	An act to amend sections 1610 and 1618 of the code, as amended by chapter 40 of the acts of the twenty-seventh general assembly, and chapter 56 of the acts of the twenty-eighth general assembly, relating to incorporations for pecuniary profit..... Took effect by publication, March 5, 1902.	1 2	1610 1618	1610 1618
67	An act to amend section 1613 of the code, relating to publication of notice of incorporation..... Took effect by publication, March 18, 1902.		1613	1613
68	An act to amend sections 1672 and 1673 of the code, relating to the horticultural society..... Took effect July 4, 1902.	1 2	1672 1673	1672 1673
69	An act to amend section 1675 of the code, relating to farmers' county institutes..... Took effect July 4, 1902.		1675	1675
70	An act amending paragraph 5 of section 1709 of the code, relating to insurance..... Took effect July 4, 1902.		1709	1709
71	An act to amend section 1709 of the code, relating to insurance..... Took effect July 4, 1902.		1709	1709
72	An act to amend section 1710 of the code, relating to limitation of insurance risks..... Took effect July 4, 1902.		1710	Repealed
73	An act relating to notice and proof of loss, of personal property insured..... Took effect by publication, April 12, 1902.		1742-a	1742-a
74	An act to amend section 1759 of the code, and to provide for the insurance of plate glass..... Took effect July 4, 1902.		1759	Repealed
75	An act to amend section 1771 of the code, relating to stock or premium notes..... Took effect July 4, 1902.		1771	1771
76	An act to amend section 1870 of the code, relating to limit of liabilities of banks..... Took effect by publication, April 11, 1902.		1870	1870
77	An act amending chapter 13 of the code, and chapter 69 of the acts of the twenty-eighth general assembly, relating to building and loan associations..... Took effect July 4, 1902.	1-10	1920-a -1920-j	1920-a -1920-j
78	An act to amend sections 1946, 1948 and 1951 of the code, relating to levees, drains and water courses..... Took effect July 4, 1902.	1 2 3	1946 1948 1951	1946 1948 1951
79	An act to amend section 1998 of the code, relating to depot grounds of railway corporations..... Took effect by publication, April 11, 1902.		1998	1998

TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
80	An act amendatory of chapter 4, title X of the code, enabling the United States to take private property for public improvements Took effect by publication, April 4, 1902.		2024-c	2024-c
81	An act amending section 2026 of the code, relating to interurban street railways Took effect July 4, 1902.	1-4 5 6	2033-a -2033-d 2066 2033-e	2033-a -2033-d Repealed 2033-e
82	An act to amend section 2028 of the code, relating to taking of private property for works of internal improvement Took effect by publication, April 2, 1902.		2028	2028
83	An act providing for the condemnation of real estate by the state, for the use and benefit of institutions of the United States, and the payment of damages thereof Took effect by publication, April 5, 1902.	1 2	2024-a 2024-b	2024-a 2024-b
84	An act to authorize and empower railroad corporations of this state to transact business, lease or purchase railroads, or to purchase the stock, bonds or securities of railroads in other states Took effect by publication, April 18, 1902.	1 2	2038-a 2038-b	2038-a 2038-b
85	An act to amend sections 2084, 2085, 2086, 2087, 2088, 2089, 2090 and 2091 of the code, relating to taxes in aid of railroads, and extending the provisions thereof to trolley and electric railways Took effect by publication, March 12, 1902.	1 2	2084 2091-a	2084 2091-a
86	An act to amend section 2086 of the code, relating to the voting of taxes in aid of railways Took effect by publication, April 9, 1902.		2086	2086
87	An act requiring railway companies to post in passenger stations bulletins giving the time of arrival and departure of trains Took effect July 4, 1902.		2077-a	2077-a
88	An act to repeal sections 2168, 2169, 2173, of the code and 2179 of the code as amended by chapter 72 of the acts of the twenty-eighth general assembly, and to enact substitutes therefor, and to amend sections 2174, 2175 and 2181 of the code, as amended by chapter 72 of the acts of the twenty-eighth general assembly, and 2199 of the code, relating to the militia Took effect by publication, April 16, 1902.	1 2 3 4 5 6 7 8	2168-a 2169-a 2173-a 2174 2175 2179-a 2181-a 2199	2168-a Repealed Repealed Repealed Repealed Repealed Repealed 2199
89	An act to amend sections 2204 and 2214 of the code, relating to the militia Took effect by publication, April 12, 1902.	1 2	2204 2214	Repealed Repealed
90	An act authorizing the commander-in-chief to organize naval militia in Iowa, and prescribing regulations Took effect July 4, 1902.	1-5	2215-a -2215-e	2215-a -2215-e
91	An act to repeal section 2253 of the code, relating to hospitals for the insane, and to enact a substitute therefor . . Took effect July 4, 1902.		2253-a	2253-a
92	An act to amend section 2267 of the code, relating to appeals from findings of commissioners of insanity Took effect July 4, 1902.		2267	2267

TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLE- MENT, 1902	SECS. OF THIS WORK
93	An act to provide a department in one of the hospitals for the insane for the treatment of dipsomaniacs, inebriates and those addicted to the excessive use of narcotics.... Took effect July 4, 1902.	1-5	2310-a -2310-e	2310-a1 -2310-a5
94	An act to amend section 2410 of the code, relating to sale of intoxicating liquors and abatement of nuisance..... Took effect July 4, 1902.		2410	2410
95	An act to amend sections 2433 and 2435 of the code, relating to sale of intoxicating liquors, and assessment of mulct tax Took effect by publication, April 8, 1902.	1 2	2433 2435	2433 2435
96	An act to amend subdivision 3 of section 2448 of the code, relating to surety on bonds..... Took effect July 4, 1902.		2448	2448
97	An act amending sections 2470, 2471 and 2472 of the code, relating to commissioner of labor statistics..... Took effect July 4, 1902.	1 2 3	2470 2471 2472	2470 2471 2472
98	An act to amend chapter 9, title XII of the code, relating to mines and mining..... Took effect July 4, 1902.		2479-a	2479-a
99	An act to amend section 2482 of the code, relating to mines and mining Took effect July 4, 1902.		2482	2482
100	An act relating to the examination of shot examiners in coal mines and defining their duties..... Took effect by publication, April 16, 1902.		2495-b	2495-b
101	An act to amend section 2508 of the code, relating to the inspection and use of petroleum products..... Took effect July 4, 1902.		2508	Repealed
102	An act amending section 2522 of the code, relating to reports to dairy commissioner..... Took effect July 4, 1902.		2522	2522
103	An act to amend sections 2540, 2551, 2556 and 5561 of the code, and section 2539 of the code as amended by chapter 64 of the acts of the twenty-seventh general assembly; and to repeal section 5 of chapter 64 of the acts of the twenty-seventh general assembly, and making further provisions, relating to care of fish and protection of birds and game..... Took effect July 4, 1902.	1 2 3 4 5 6 7 8 9	2539 2540 2539-a 2540 2540-a 2546 2551 2556 2561	2539 2540 2539-a 2540 2540-a 2546 2551 2556 2561
104	An act to amend section 2547 of the code, and prohibit the taking of fish from certain waters, except with hook and line Took effect by publication, March 26, 1902.		2547	2547
105	An act to repeal section 2570 of the code, relating to quarantine and the expenses thereof, and to enact a substitute therefor Took effect by publication, April 16, 1902.	1 2	2570-a 2570-b	Repealed Repealed
106	An act to amend section 2571 of the code, relating to time of meetings for local board of health..... Took effect July 4, 1902.		2571	2571

TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
107	An act to amend section 2572 of the code, relating to enforcement of rules of state board of health..... Took effect by publication, March 18, 1902.		2572	2572
108	An act relating to powers of boards of health and the erection and maintenance of pest-houses and hospitals in certain cases Took effect July 4, 1902.	1 2	2575-a 2575-b	2575-a1 2575-a2
109	An act to amend section 2581 of the code, relating to itinerant physicians Took effect July 4, 1902.		2581	2581
110	An act relating to the sale of cocaine and providing punishment for the illegal sale thereof..... Took effect by publication, March 25, 1902.	1-3	2596-a -2596-c	2596-a -2596-c
111	An act to amend section 2604 of the code, relating to appointment of officers for the soldiers' home..... Took effect July 4, 1902.		2604	2604
112	An act to amend section 2604 of the code, relating to compensation of adjutant, quartermaster and surgeon of the Iowa soldiers' home..... Took effect July 4, 1902.		2604	2604
113	An act to amend section 2608 of the code, as amended by chapter 72 of the acts of the twenty-seventh general assembly, and to provide additional support for the soldiers' home at Marshalltown..... Took effect by publication, April 17, 1902.		2608	2608
114	An act to amend section 2629 of the code, relating to examination of applicants for state certificates..... Took effect by publication, April 10, 1902.		2629	2629
115	An act providing for the inspection, recognition and supervision of schools for the instruction and training of teachers for the common schools, and for the licensing of graduates of the same..... Took effect July 4, 1902.	1-4	2634-b -2634-e	2634-b -2634-e
116	An act establishing the rank of commandant and instructor in military science and tactics in state educational institutions Took effect by publication, March 25, 1902.		2644-c	2644-c
117	An act providing for a special tax for the state normal school at Cedar Falls, Iowa..... Took effect by publication, April 10, 1902.		2682-a	2682-a
118	An act providing for the admission of feeble-minded women to the institution at Glenwood, and for the maintenance thereof Took effect July 4, 1902.	1 2	2695-a 2695-b	2695-a 2695-b
119	An act to amend sections 2708, 2709, 2711 (chapter 8, title XIII) of the code, and to repeal sections 12, 13 and 14 of chapter 100 of the acts of the twenty-eighth general assembly, relating to the discharge of boys and girls from industrial schools Took effect by publication, March 25, 1902.	1 2 3 4	2708 2708-a 2709 2711 2708 2709 2711	2708 2708-a 2709 2711 2708 2709 2711
120	An act to amend 2711 of the code, relating to discharge or parole of inmates of industrial schools..... Took effect July 4, 1902.		2711	2711

TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLE- MENT, 1902	SECS. OF THIS WORK
121	An act to repeal section 2718 of the code, as amended by chapter 82 of the acts of the twenty-seventh general assembly, relating to support of the college for the blind, and to enact a substitute therefor..... Took effect by publication, March 19, 1902.	1 2	2718-a 2718-b	2718-a 2718-b
122	An act to repeal section 2727 of the code, as amended by chapter 83 of the acts of the twenty-seventh general assembly, relating to support of the school for the deaf, and to enact a substitute therefor..... Took effect by publication, March 20, 1902.	1 2	2727-a 2727-b	2727-a 2727-b
123	An act to amend section 2738 of the code, relating to duties of county superintendents..... Took effect July 4, 1902.		2738	2738
124	An act to amend section 2742 of the code, relating to county superintendents..... Took effect July 4, 1902.		2742	2742
125	An act to amend section 2755 of the code, relating to registration of voters for school elections..... Took effect July 4, 1902.		2755	2755
126	An act to amend section 2794 of the code, relating to the organization of independent districts..... Took effect by publication, April 8, 1902.		2794	2794
127	An act to repeal section 2812 of the code, section 1 of chapter 95 of the acts of the twenty-seventh general assembly, and chapter 142 of the acts of the twenty-eighth general assembly, relating to the issuance of school bonds, and to enact a substitute therefor..... Took effect July 4, 1902.	1 2	2812-a 2812-b	2812-a Repealed
128	An act for compulsory education..... Took effect July 4, 1902.	1-9	2823-a -2823-i	2823-a -2823-i
129	An act to amend section 3016 of the code, relating to bushel weight..... Took effect July 4, 1902.		3016	Repealed
130	An act relating to negotiable instruments, repealing sections 3043, 3045, 3049, 3050, 3051, 3052, 3054 and 3055 (chapter 3, title XV) of the code..... Took effect July 4, 1902.	1-196 197 198	3060 -a1 -3060 -a196 3060-a 3060 -a198	3060 -a1 -3060 -a196 3060-a 3060 -a198
131	An act to amend section 3225 of the code, relating to support of families of insane persons..... Took effect July 4, 1902.		3225	3225
132	An act relating to the rights, duties and relations between parent and child by adoption..... Took effect July 4, 1902.		3253	3253
133	An act to repeal chapter 8 of title XVI of the code, relating to care of friendless children, and to enact a substitute therefor..... Took effect July 4, 1902.	1-13	3260-a -3260-m	3260-a -3260-m
134	An act to amend section 3287 of the code, relating to the recording of wills..... Took effect July 4, 1902.		3287	3287

TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
135	An act to amend section 3386 of the code, relating to property rights of one who feloniously takes the life of another Took effect July 4, 1902.		3386	3386
136	An act relating to the rules of descent of estates of children by adoption..... Took effect July 4, 1902.	1-3	3381-a -3381-c	3381-a -3381-c
137	An act to amend section 3439 of the code, relating to limitation of action on judgments..... Took effect July 4, 1902.	1 2	3439 3439-a	3439 3439-a
138	An act to amend section 3497 of the code, relating to the place of bringing action..... Took effect by publication, March 6, 1902.		3497	3497
139	An act to amend section 3529 of the code, relating to manner of commencing actions..... Took effect by publication, March 6, 1902.		3529	3529
140	An act to amend section 3325 of the code, making taxes on property in the hands of receivers a preferred claim... Took effect July 4, 1902.		3825	3825
141	An act to amend section 4544 of the code, relating to garnishment proceedings Took effect July 4, 1902.		4544	4544
142	An act relating to kidnaping for the purpose of ransom and prescribing penalty therefor..... Took effect July 4, 1902.	1 2	4750-b 4750-c	4750-b 4750-c
143	An act making it a crime to advise or incite the unlawful killing of a human being and fixing the punishment therefor Took effect July 4, 1902.		4750-a	4750-a
144	An act to amend section 4790 of the code, relating to the possession of burglars' tools..... Took effect July 4, 1902.		4790	4790
145	An act to amend section 4807 of the code, relating to malicious mischief and trespass..... Took effect July 4, 1902.		4807	Repealed
146	An act making it a crime to sell property upon which there is a lien for rent, without consent of the landlord, and fixing penalty therefor..... Took effect July 4, 1902.	1 2	4852-a 4852-b	4852-a 4852-b
147	An act to repeal section 4897 of the code, relating to escape from prison, and to enact a substitute therefor..... Took effect July 4, 1902.		4897-a	4897-a
148	An act defining the crime of sodomy..... Took effect July 4, 1902.		4937-a	4937-a
149	An act providing for the safety and comfort of laborers in factories or buildings Took effect July 4, 1902.	1-4	4999-a -4999-d	4999-a1 -4999-a2 4999-a4 4999-a5
150	An act for the preservation of life by the erection of fire escapes Took effect July 4, 1902.	1-6	4999-e -4999-j	Repealed

TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
151	An act amending section 5052 of the code, relating to use or sale of bottles, boxes, etc., of another..... Took effect by publication, February 22, 1902.		5052	5052
152	An act relating to the indictment and punishment of persons who have been convicted of felony two or more times in this state, or in this and other states, and making certain evidence competent proof thereof..... Took effect July 4, 1902.	1 2	5091-a 5091-b	5091-a 5091-b
153	An act to amend section 5096 of the code, relating to bail after conviction of certain crimes..... Took effect July 4, 1902.		5096	5096
154	An act to protect sheriffs in procuring evidence for the identification of criminals, or persons accused of crime. Took effect July 4, 1902.		5499-a	5499-a
155	An act to amend section 5707 of the code, relating to employment of persons imprisoned in penitentiary..... Took effect July 4, 1902.		5707	5707
156	An act to amend section 5716 of the code, relating to compensation of officers and employes of the state penitentiaries..... Took effect by publication, March 11, 1902.		5716	5716
157	An act providing for the support of hospitals for the insane, and for the transfer of patients on account of the opening of the hospital at Cherokee..... Took effect by publication, April 11, 1902.	1-3	2291-a -2291-d	2291-a -2291-d
158	An act to repeal chapter 69 of the acts of the twenty-seventh general assembly, relating to the practice of osteopathy, and to enact a substitute therefor..... Took effect July 4, 1902.	1-6	2583-a -2583-f	2583-a -2583-f
159	An act making provision for the support of the department of the industrial school for boys at Eldora..... Took effect by publication, April 12, 1902.		2713	2713
160	An act to amend section 23 of chapter 118 of the acts of the twenty-seventh general assembly, providing for payment of expenses of state architect..... Took effect by publication, April 18, 1902.		2727-a23	2727-a23
161	An act to amend section 2 of chapter 25 of the acts of the twenty-eighth general assembly, relating to disbursement of tax money levied and collected for and on account of waterworks..... Took effect July 4, 1902.	1 2	748 748-a	748 748-a
162	An act providing that chapter 25 of the acts of the twenty-eighth general assembly, relating to waterworks, be made applicable to cities under special charters..... Took effect by publication, March 21, 1902.	1	748-b	748-b
163	An act to amend section 3 of chapter 30 of the acts of the twenty-eighth general assembly, relating to levy of taxes for park purposes in certain cities..... Took effect July 4, 1902.		852	Repealed

TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
164	An act to repeal sections 2, 3, 6 and 7 of chapter 45 of the acts of the twenty-eighth general assembly, and to enact a substitute therefor; and to amend section 1 of chapter 45 of the acts of the twenty-eighth general assembly, relating to taxation of express companies..... Took effect by publication, March 1, 1902.	1-3 4 5	1346-a -1346-c 1346-f 1346-g	1346-a -1346-c 1346-f 1346-g
165	An act to amend section 3 of chapter 58 of the acts of the twenty-eighth general assembly, relating to membership in annual convention of department of agriculture..... Took effect July 4, 1902.		1657-d	1657-d
166	An act to amend section 8 of chapter 58 of the acts of the twenty-eighth general assembly, relating to the construction of street railways upon the state fair grounds..... Took effect by publication, April 4, 1902.		1657-i	1657-i
167	An act to amend section 2 of chapter 67 of the acts of the twenty-eighth general assembly, relating to savings banks..... Took effect by publication, March 15, 1902.		1848	1848
168	An act to amend chapter 83 of the acts of the twenty-eighth general assembly, relating to the inspection and use of petroleum products..... Took effect July 4, 1902.	1	2508 -2508-a	Repealed
169	An act to amend chapter 92 of the acts of the twenty-eighth general assembly, relating to pension money of members of Iowa soldiers' home..... Took effect July 4, 1902.		2606-c	2606-c
170	An act to amend section 93 of the acts of the twenty-eighth general assembly, relating to the practice of veterinary medicine, surgery and dentistry..... Took effect by publication, April 5, 1902.	1 2 3 4	2538-b 2538-c 2538-e 2538-i	2538-b 2538-c 2538-e 2538-i
171	An act to repeal chapter 97 of the acts of the twenty-eighth general assembly, and to enact a substitute therefor, levying a tax for state university..... Took effect by publication, April 8, 1902.	1 2	2644-a 2644-b	2644-a 2644-b
172	An act to repeal chapter 99 of the acts of the twenty-eighth general assembly, and enact a substitute therefor, levying a tax for the Iowa state college of agriculture and mechanic arts..... Took effect by publication, April 8, 1902.	1-3	2674-a -2674-c	2674-a -2674-c
173	An act to repeal sections 2, 3, 4 and 5 of chapter 116 of the acts of the twenty-eighth general assembly; also amending section 168 of the code, and repealing sections 2868, 2869, 2871, 2872, 2873 and 2874 of the code; also repealing chapter 148 of the acts of the twenty-seventh general assembly..... Took effect by publication, April 15, 1902.	1-7 8	2888-b -2888-h 168 2869-a	2888-b -2888-h 168 2869-a
174	An act to amend chapter 167 of the acts of the twenty-eighth general assembly, relating to monuments for battle field of Shiloh..... Took effect by publication, April 2, 1902.		Omitted	
176	An act to provide for the general levy for state purposes for 1902 and subsequent years..... Took effect by publication, April 18, 1902.	1 2	170-b 170-c	170-b 170-c

TWENTY-NINTH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF SUPPLEMENT, 1902	SECS. OF THIS WORK
177	An act fixing a uniform time at which all annual appropriations shall begin Took effect by publication, April 18, 1902.	1-3	116-a -116-c	116-a -116-c
207	An act to provide a water supply for military reservations of the United States in this state..... Took effect by publication, February 18, 1902.	1 2	742-d 742-e	742-d 742-e
210	An act to authorize the improvement of the channels of meandered streams within corporate limits of certain cities Took effect by publication, March 15, 1902.	1-15	879-a -879-o	879-a -879-o
213	An act ceding to the United States jurisdiction over certain lands Took effect March 28, 1902.	1-3	4-c-4-e	4-c-4-e
224	An act to legalize certain proceedings of city and town councils Took effect by publication, February 28, 1902.		658-a	658-a
226	An act to legalize the incorporation of certain corporations Took effect by publication, March 11, 1902.		1613-a	1613-a
237	An act to legalize certain conveyances under power of attorney from husband or wife..... Took effect by publication, April 2, 1902.		2942-b	2942-b
249	An act to legalize certain instruments in writing which were defectively acknowledged..... Took effect July 4, 1902.		2942-e	2942-e

THIRTIETH GENERAL ASSEMBLY.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
1	An act repealing chapter 2 of the acts of the twenty-seventh general assembly, and section 41-a of the supplement to the code, relating to the repeal and amendment of statutes, and enacting a substitute therefor.....	1	41-a
		2	41-b
	Took effect by publication, March 8, 1904.		
2	An act to amend sections 55, 1419, 1441, 1495, 1842, 1843, 2388, 3074, 3109, 3131 and 4474 of the code, and section 1618 of the supplement to the code, relating to publication of legal notices.....	1	55
		2	1419
		3	1441
		4	1495
		5	1842
		6	1843
		7	2388
		8	3074
		9	3109
		10	3131
		11	3284
		12	4474
		13	1618
		14	1293-a
	Took effect July 4, 1904.		
3	An act to amend section 113 of the code, relating to interest on state funds.....		113
	Took effect by publication, April 2, 1904.		
4	An act providing for the payment of the bonds of the state treasurer and deputy state treasurer.....		115-a
	Took effect by publication, April 13, 1904.		
5	An act amending section 126 of the code by repealing sub-sections 5 and 6 of section 1 thereof, relating to state documents and publications.....	1-4	126-a -126-d
	Took effect by publication, March 14, 1904.		
6	An act relating to the disposition of public documents not required for state use.....	1-3	144-b -144-d
	Took effect July 4, 1904.		
7	An act requiring an accounting of fees and expenses of state officers, boards and commissioners.....	1-4	170-d -170-g
	Took effect July 4, 1904.		
8	An act to repeal chapter 8 of title II of the code, relating to the census, and enacting a substitute therefor.....	1-10	171 -177-b
	Took effect July 4, 1904.		
9	An act relating to appointments in public departments of the state, counties, cities and towns of United States soldiers, sailors and marines.....	1-2	1056-a15 1056-a16
	Took effect by publication, March 23, 1904.		
10	An act to amend section 212 of the code, relating to the salary of the assistant attorney general.....		212
	Took effect July 4, 1904.		
11	An act enlarging the powers of the district courts, and to regulate the treatment and control of dependent, neglected and delinquent children.....	1-16	254-a13 254-a28
	Took effect July 4, 1904.		

THIRTIETH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
12	An act to amend chapter 5-a of title III of the supplement to the code, relating to appointment of trustees to manage and invest cemetery funds..... Took effect July 4, 1904.		254-a12
13	An act defining the duties of clerks of the district courts in cases of suspension or revocation of license of an attorney at law to practice		329-a
14	An act to amend sub-division 1 of section 354 of the code, relating to compensation of jurors..... Took effect July 4, 1904.		354
15	An act to amend section 403 of the code, relating to county bonds.. Took effect by publication, April 13, 1904.		403
16	An act to amend section 403 of the code, relating to funding and refunding outstanding county indebtedness..... Took effect by publication, April 9, 1904.		403
17	An act to amend sections 430 and 433 of the code, relating to the power and duty of boards of supervisors, relative to indigent soldiers, sailors and marines..... Took effect July 4, 1904.	1 2	430 438
18	An act to amend section 441 of the supplement to the code, relating to official publications in newspapers..... Took effect July 4, 1904.		441
19	An act repealing section 479 of the code, relating to compensation of county auditors, and enacting a substitute therefor..... Took effect July 4, 1904.		479
20	An act to amend section 494 of the code, relating to the duties of county recorders..... Took effect July 4, 1904.		494
21	An act to amend sections 495 of the code and 496 of the supplement to the code, relating to compensation of county recorders	1 2	495 496
22	An act to amend section 560 of the code, relating to township clerk and trustees..... Took effect July 4, 1904.		560
23	An act to amend section 586 of the supplement to the code, relating to township trustees..... Took effect July 4, 1904.		586
24	An act to amend sections 728 and 730 of the code, relating to library officers, and to legalize control under joint ownership of cities, towns and institutions of learning over public libraries.. Took effect July 4, 1904.	1 2 3	728 730 730-a
25	An act to amend section 732 of the supplement to the code, relating to the support and maintenance of free public libraries.. Took effect July 4, 1904.		732
26	An act to repeal sections 738 and 739 of the code, relating to sewers in towns and smaller cities..... Took effect by publication, April 2, 1904.		738-9

THIRTIETH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
27	An act authorizing certain cities to levy a tax for the erection of public buildings..... Took effect July 4, 1904.		Repealed
28	An act authorizing cities of the second class and towns to levy a tax for the erection of public buildings..... Took effect July 4, 1904.	1-4	741-j -741-m
29	An act to amend section 771 of the supplement to the code relating to the construction of viaducts in certain cities..... Took effect July 4, 1904.		Repealed
30	An act relating to the construction of permanent sidewalks, and providing for the assessment and collection of the costs thereof. Took effect by publication, March 19, 1904.	1-8	791-a -791-h
31	An act relating to the construction of sewers by incorporated towns Took effect by publication, April 2, 1904.		Repealed
32	An act to amend section 835 of the code, relating to refunding the cost of pavement removed by street railways..... Took effect July 4, 1904.		835
33	An act authorizing cities to protect property from floods, and providing the manner and payment of costs thereof..... Took effect by publication, April 2, 1904.	1-9	849-a -849-i
34	An act to amend sections 852 and 853 of the supplement to the code, relating to powers and duties of park commissioners..... Took effect July 4, 1904.	1 2	852 853
35	An act to amend section 860 of the supplement to the code, relating to the issuance of bonds by cities and towns for park purposes.. Took effect July 4, 1904.		Repealed
36	An act to amend section 861 of the supplement to the code, relating to the salary of park commissioners..... Took effect by publication, April 9, 1904.		Repealed
37	An act to amend section 881 of the code, relating to sewer outlets and sewer and garbage disposal plants, by repealing the same, and to enact a substitute therefor..... Took effect by publication, April 13, 1904.		881
38	An act repealing sub-division 4 of section 894 of the supplement to the code, relating to a levy of taxes for library purposes, and to enact a substitute therefor..... Took effect July 4, 1904.		Repealed
39	An act to amend section 1129 of the code, relating to elections, and the payment of expenses thereof..... Took effect by publication, April 2, 1904.		1129
40	An act to provide for the election of delegates of political parties by primary election, and for the nomination of officers by a delegate convention system..... Took effect by publication, April 13, 1904.		Repealed
41	An act to amend section 1272 of the code, relating to the filling of vacancies in office..... Took effect by publication, February 29, 1904.		1272

THIRTIETH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
42	An act to amend section 1303 of the code, relating to county levy for bridge purposes..... Took effect July 4, 1904.		1303
43	An act to amend section 1306-b of the supplement to the code, relating to the erection or purchase of waterworks and sewers in incorporated towns and cities of the second class..... Took effect by publication, April 9, 1904.		Repealed
44	An act to amend sections 1328 and 1329 of the code, relating to reports of telegraph and telephone companies for assessment purposes..... Took effect by publication, March 26, 1904.	1 2	1328 1329
45	An act to amend section 1330-b of the supplement to the code, relating to assessment of telegraph and telephone companies... Took effect July 4, 1904.		1330-b
46	An act to amend section 1334 of the supplement to the code, by repealing sub-section 3 thereof, and requiring railways and other corporations to report real estate owned by them to the executive council for assessment..... Took effect July 4, 1907.	1 2 3	1334-a 1334-b 1334 -1334-c
47	An act to amend sections 1342-b and 1342-d of the supplement to the code, relating to the taxation of freight lines and equipment companies..... Took effect by publication, April 16, 1904.	1-2 3	1342-b 1342-d
48	An act repealing section 1347-a of the supplement to the code, relating to peddlers, and enacting a substitute therefor..... Took effect by publication, April 13, 1904.		Repealed
49	An act to provide for the filing with county auditors of maps of telegraph and telephone lines..... Took effect by publication, April 9, 1904.	1 2	1400-a 1400-b
50	An act to amend sections 1383 and 1533 of the code, relating to road tax..... Took effect by publication, April 16, 1904.	1 2	1383 1533
51	An act to amend section 1467 of the code, relating to the collection of a tax on collateral inheritances..... Took effect by publication, April 8, 1904.		1467
52	An act to amend section 1571 of the supplement to the code, relating to steam engines on public roads..... Took effect by publication, April 8, 1904.		1571
53	An act providing for the regulation of motor vehicles upon highways and streets..... Took effect July 4, 1904.	1-12	1571-a -1571-l
54	An act to amend section 1641 of the code, relating to ownership of real property by corporations..... Took effect July 4, 1904.		1641
55	An act relating to the right of one holding stock in a fiduciary capacity to vote the same..... Took effect July 4, 1904.		1641-a
56	An act to provide for the examination of insurance companies... Took effect by publication, March 19, 1904.	1-10	1821-a -1821-j

THIRTIETH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
57	An act to provide for the licensing of agents of insurance companies and associations..... Took effect by publication, April 13, 1904.	1 2	1821-k 1821-l
58	An act to provide for the consolidation or re-insurance of the risks of insurance companies and associations..... Took effect by publication, April 1, 1904.	1-9	1821-m -1821-w
59	An act to provide for the approval of policies or contracts of life insurance companies..... Took effect July 4, 1904.	1-3	1873-a 1783-c
60	An act to amend section 1788 of the code, relating to stipulated premium and assessment life insurance associations..... Took effect July 4, 1904.		1788
61	An act to provide for the examination of fraternal beneficiary associations Took effect by publication, March 19, 1904.	1-6	1839-a -1839-f
62	An act to repeal section 1832 of the supplement to the code, relating to fraternal beneficiary associations, and to enact a substitute therefor..... Took effect by publication, April 1, 1904.		1832
63	An act to provide for consolidation or re-insurance of risks of fraternal beneficiary societies..... Took effect by publication, April 1, 1904.	1-3	1839-g -1839-i
64	An act to repeal sections 1875 and 1876 of the code, relating to the appointment and compensation of bank examiners, and to enact a substitute therefor..... Took effect by publication, April 24, 1904.		1875, 1876
65	An act to amend section 1889 of the code, relating to savings and state banks, and loan and trust companies..... Took effect July 4, 1904.		1889
66	An act to provide for the regulation of certain persons, firms, partnerships, associations and corporations engaged in handling certain shares, contracts, etc., on the partial payment or installment plan..... Took effect by publication, May 4, 1904.	1-9	1920-k -1920-s
67	An act to amend section 1946 of the code, relating to levees, drains, ditches and watercourses..... Took effect by publication, May 4, 1904.	1 2-6	1946 1946-a -1946-e
68	An act relating to the establishment of levees, drains, ditches and watercourses, drainage districts, and the method of constructing and the manner of paying for the same..... Took effect by publication, May 3, 1904.	1-48	1989-a1 -1989-a47
69	An act providing for the establishment and maintenance of pumping stations in levee districts of the state..... Took effect by publication, April 16, 1904.		1989-b
70	An act relating to the drainage of surface waters..... Took effect July 4, 1904.		1989-c
71	An act to provide for the condemnation of real property for the use of the state..... Took effect by publication, April 15, 1904.	1 2	2024-d 2024-e

THIRTIETH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
72	An act to provide for the condemnation of real property for court houses and jails..... Took effect by publication, April 16, 1904.	1-3	2024-f -2024-h
73	An act to provide for the purchase or condemnation of gravel lands for road purposes..... Took effect by publication, April 8, 1904.	1-4	2024-i -2024-l
74	An act relating to the liability of common carriers..... Took effect July 4, 1904.		Repealed
75	An act to repeal section 2078 of the code, relating to the classification of railways, and to enact a substitute therefor..... Took effect July 4, 1904.		2078
76	An act to require common carriers to issue transportation to shippers of live stock..... Took effect by publication, April 13, 1904.	1-5	2157-a 2157-e
77	An act to amend chapter 1, title XI, of the code and the supplement to the code, and repealing sections 2169-a, 2173-a, 2175, 2176-a, 2178, 2179-a, 2181-a, 2212, 2213 and 2214 of the supplement to the code, and sections 2183, 2184 and 2188 of the code, relating to the state militia and Iowa National guard, and enacting substitutes therefor..... Took effect by publication, April 15, 1904.	1 2 3 4 5 6 7 8 9 10 11 12 13	2169-a 2173-a 2175 Repealed Repealed 2179-a Repealed 2183 2184 2188 2212 Repealed 2214
78	An act providing for the payment of costs and expenses accruing from the care and investigation of insane persons in counties in which they have no legal settlement..... Took effect by publication, April 1, 1904.		2308-a
79	An act to amend section 2287 of the code, relating to the return of patients escaped from hospitals for the insane..... Took effect July 4, 1904.		Repealed
80	An act to repeal section 3221 of the code, relating to guardianship of insane persons, and to provide for the establishment of a state hospital for inebriates..... Took effect by publication, April 9, 1904.	1-26 22	2310-a6 -2310-a32 3221
81	An act to amend section 2340 of the code, relating to damage done by dogs..... Took effect by publication, April 16, 1904.		2340
82	An act to amend section 2406 of the code, relating to actions for the suppression of illegal sales of intoxicating liquors..... Took effect July 4, 1904.		2406
83	An act to amend sections 2437 and 2438 of the code, relating to the mulct tax..... Took effect July 4, 1904.	1 2	2437 2438
84	An act relating to the sale of intoxicating liquors and defining bootlegger..... Took effect July 4, 1904.	1 2	2461-a 2461-b

THIRTIETH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
85	An act to repeal section 2477 of the code, relating to the expenses of the bureau of labor statistics, and to enact a substitute therefor Took effect by publication, April 16, 1904.		2477
86	An act to amend section 2479-a of the supplement to the code, relating to the board of examiners of mine inspectors..... Took effect by publication, March 14, 1904.		2479-a
87	An act to repeal chapter 11, title XII, of the code, and sections 2503, 2508 and 2508-a of the supplement to the code, relating to the inspection of petroleum products, and to enact a substitute therefor..... Took effect July 4, 1904.	1 2 3 4 5 6 7 8 9 10	2503 2504 2505 2506 2507 2508 2508-a 2509 2509-a 2510
88	An act to amend section 2515 of the supplement to the code, relating to the compensation of the deputy and assistant dairy commissioners Took effect July 4, 1904.	1	2515
89	An act to amend section 2536 of the supplement to the code, relating to the annual appropriation for carrying on the work of the veterinary surgeon..... Took effect by publication, April 13, 1904.		2536
90	An act to amend section 2538-i of the supplement to the code, relating to the registration of veterinarians registered in other states or in foreign countries..... Took effect by publication, April 13, 1904.	1 2	2538-i 2538-il
91	An act to amend section 2538-j and 2538-p of the supplement to the code, relating to the department of veterinary surgery and medicine Took effect by publication, April 6, 1904.	1 2	2538-j 2538-p
92	An act to amend sections 2540 and 2551 of the supplement to the code, relating to protection of fish and game..... Took effect July 4, 1904.	1-2 3	2540 2551
93	An act to amend section 2540 of the code, relating to protection of fish and game..... Took effect July 4, 1904.		2540
94	An act to amend section 2546 of the supplement to the code, relating to taking fish from the waters of the state..... Took effect by publication, March 24, 1904.		2546
95	An act to amend section 2552 of the code, relating to the protection of fish and game..... Took effect by publication, March 17, 1904.	1-2	2552
96	An act to provide for the protection of live birds..... Took effect July 4, 1904.		2563-i
97	An act to amend section 2564 of the code, relating to the meetings of the state board of health..... Took effect by publication, March 26, 1904.		2564

THIRTIETH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK.
98	An act to amend section 2570-a of the supplement to the code, relating to expenses of local boards of health in restricting spread of infectious diseases, and to repeal section 2570-b of the supplement to the code..... Took effect July 4, 1904.		Repealed
99	An act to provide for the regulation of the removal of persons with infectious diseases..... Took effect July 4, 1904.	1-4	2575-a3 -2575-a6
100	An act to require the registration of births and deaths..... Took effect July 4, 1904.		Repealed
101	An act to provide for the establishment and maintenance of a bacteriological laboratory at Iowa City..... Took effect by publication, April 13, 1904.	1 2 3	2575-a7 2575-a8 Repealed
102	An act to amend section 2582 of the supplement to the code, relating to registration, without examination, of physicians registered in other states..... Took effect by publication, March 17, 1904.	1 2	2582 2582-a
103	An act to amend section 2606-b of the supplement to the code, relating to pension money of members of the Iowa soldiers' home..... Took effect July 4, 1904.		2606-b
104	An act requiring reports from state educational institutions..... Took effect July 4, 1904.		2682-b
105	An act to create a highway commission, and defining the duties of same..... Took effect by publication, April 16, 1904.		2674-f
106	An act to amend section 2691 of the code, and to repeal section 2692 of the supplement to the code, relating to the support of the Iowa soldiers' orphans' home, and to enact a substitute therefor..... Took effect July 4, 1904.	1 2	2691 2692
107	An act to amend section 2715 of the code, relating to compensation for non-resident pupils in the college for the blind..... Took effect July 4, 1904.		2715
108	An act to amend section 2724 of the code, relating to compensation for non-resident pupils in the school for the deaf..... Took effect July 4, 1904.		2724
109	An act to amend section 2727-a-23 of the supplement to the code, relating to the employment of architects by the board of control. Took effect by publication, April 8, 1904.		2727-a23
110	An act appropriating money in aid of the quarterly conferences of chief executive officers of state institutions..... Took effect July 4, 1904.	1 2	2727-a69 2727-a70
111	An act authorizing the appointment of police officers at certain state institutions..... Took effect July 4, 1904.		2729-a71

THIRTIETH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
112	An act to provide for the disposition of unclaimed money left by deceased inmates of state institutions..... Took effect by publication, April 15, 1904.	1-3	2727-a72 -2727-a74
113	An act to amend section 2738 of the supplement to the code, relating to the publication of reports by county superintendents of schools Took effect July 4, 1904.		2738
114	An act to amend chapter 14, title XIII, of the code, relating to indebtedness for schoolhouse purposes..... Took effect by publication, April 1, 1904.	1-4	2820-a -2820-b
115	An act to amend section 2783 of the code, relating to text-books in public schools..... Took effect July 4, 1904.		2783
116	An act to amend section 2823-a and 2823-e of the supplement to the code, relating to compulsory education..... Took effect July 4, 1904.	1 2	2823-a 2823-e
117	An act relating to the state historical society..... Took effect by publication, April 13, 1904.	1 2	2882-a 2882-b
118	An act to amend section 2942-f of the supplement to the code, relating to conveyances of real estate..... Took effect July 4, 1904.		2942-f
119	An act to repeal sections 3167 and 3169 of the code, relating to the conveyance of real property by one spouse when the other is insane, and to enact substitutes therefor..... Took effect by publication, April 9, 1904.	1 2	3167 3169
120	An act to repeal section 3279 of the code, and amending section 3276 of the code, relating to the inheritance of a child born after the making of a will..... Took effect by publication, April 9, 1904.	1 2 3	3279 3279-a 3276, -3279-b
121	An act to amend section 3376 of the code, relating to the distributive share of surviving spouse as affected by will..... Took effect July 4, 1904.		3376
122	An act to amend section 3656 of the code, relating to the time of trying appeal cases in contested elections..... Took effect July 4, 1904.		3656
123	An act relating to the release of liens on attached property..... Took effect July 4, 1904.	1 2	3934-a 3934-b
124	An act to protect employes in garnishment cases..... Took effect July 4, 1904.		4071-a
125	An act to amend section 4134 of the code, relating to procedure in the supreme court..... Took effect by publication, March 24, 1904.		4134
126	An act to repeal sections 4136 and 4137 of the code, relating to assignments of error in appeals to the supreme court, and to enact a substitute therefor..... Took effect by publication, February 20, 1904.		4136

THIRTIETH GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
127	An act to repeal chapter 18, title XXI, of the code, relating to changing of names, and to enact a substitute therefor..... Took effect July 4, 1904.	1-10	4471-a -4471-j
128	An act to amend section 4481 of the code, relating to the place of bringing actions, and the taxation of costs therein..... Took effect July 4, 1904.		4481
129	An act to amend section 4768 of the code, relating to assault with intent to commit murder..... Took effect July 4, 1904.		4768
130	An act to repeal section 4807 of the supplement to the code, relating to malicious mischief and trespass, and to enact a substitute therefor..... Took effect July 4, 1904.		4807
131	An act relating to the protection of property of public libraries and reading rooms..... Took effect July 4, 1904.		4830-a
132	An act to prohibit the willful taking of any electrical current, gas or water from wires, meters or pipes, with intent to defraud... Took effect July 4, 1904.		4852-c
133	An act relating to larceny of domestic fowls or poultry in the night time..... Took effect July 4, 1904.		4852-d
134	An act relating to the bringing into any penitentiary, reformatory or industrial school of the state of certain drugs, liquors, weapons or articles designed to aid escapes..... Took effect by publication, March 10, 1904.		4913-a
135	An act to prohibit docking horses..... Took effect July 4, 1904.	1 2	4975-a 4975-b
136	An act to repeal sections 4999-e, 4999-f, 4999-g, 4999-h, 4999-i and 4999-j of the supplement to the code, relating to the construction of fire escapes, and to enact substitutes therefor..... Took effect by publication, April 8, 1904.	1-7	4999-a6 -4999-a12
137	An act relating to objectionable advertisements in the vicinity of public school buildings..... Took effect by publication, July 4, 1904.	1 2	5028-s 5028-t
138	An act to amend section 5256 of the code, relating to clerks of grand juries..... Took effect July 4, 1904.		5256
139	An act to amend sections 5663 and 5716 of the code, as amended, and to repeal section 5711 of the code, relating to assistant deputy wardens for the penitentiaries..... Took effect by publication, April 15, 1904.	1 2 3 4	2663 5669 5716 5711
140	An act to repeal sections 5685 and 5685-a of the supplement to the code, relating to disposition of gate receipts of state penitentiaries, and to enact a substitute therefor..... Took effect by publication, April 9, 1904.		5685
141	An act to amend section 5716 of the code, relating to the classification and payment of turnkeys and guards of the penitentiaries.. Took effect July 4, 1904.	1	5716

THIRTIETH GENERAL ASSEMBLY—CONTINUED.

Chap	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
142	An act relating to the distribution of the code, supplement to the code, and other state documents..... Took effect July 4, 1904.	1 2 3	29-a 29-b 29-c
143	An act to amend section 1, of chapter 101, of the acts of the twenty-eighth general assembly (section 2713 of the supplement to the code), relating to the support of the industrial school for girls.. Took effect by publication, April 13, 1904.		Repealed
157	An act to provide for the appointment of a state agent, defining his duties, and making an appropriation therefor.....		Repealed
185	An act to enable the state of Iowa to sell abandoned river channels, sandbars or islands in the navigable waters of the state, and authorizing the appointment of a commission to ascertain and establish the boundary lines between the state of Iowa and adjoining states..... Took effect by publication, April 13, 1904.		Repealed
186	An act relating to meandered lake beds in the state, and authorizing the sale of the same..... Took effect by publication, May 4, 1904.	1-9	2900-a19 -2900-a27
187	An act relating to the sale of islands in the waters of the state.. Took effect July 4, 1904.	1-5	2900-a28 -2900-a32

THIRTY-FIRST GENERAL ASSEMBLY.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
1	An act to amend sections 18 and 19 of the provisions relating to the code and subsequent statutes, relating to the report of sales of codes and session laws..... Took effect July 4, 1906.		p. 5
2	An act to amend chapter 1 of the acts of the twenty-seventh general assembly, relating to the publication of laws..... Took effect by publication, April 11, 1906.		p. 5
3	An act to amend sections 70, 71 and 141 of the code, and section 2622 of the supplement to the code, and to repeal section 125 of the supplement to the code, and section 126 of the supplement to the code as amended by chapter 5 of the acts of the thirtieth general assembly, relating to printing, binding and distribution of state reports and documents, and to enact a substitute therefor	1 2 3 4 5 6	70 71 125 126 141 2622
	Took effect July 4, 1906.		
4	An act to amend section 88 of the code, relating to the compensation of the clerk of the state land office..... Took effect by publication, March 17, 1906.		88
5	An act to amend section 122 of the code, relating to biennial reports of state officers..... Took effect July 4, 1906.		122
6	An act to repeal section 137 of the code, relating to the publication and distribution of the proceedings of the Iowa state teachers' association, and to enact a substitute therefor..... Took effect by publication, April 2, 1906.		137
7	An act to amend section 138 of the code, relating to the printing of the docket for the supreme court..... Took effect by publication, April 2, 1906.		138
8	An act to amend section 146 of the code, relating to the term of office of the custodian of public buildings. Took effect July 4, 1906.		146

THIRTY-FIRST GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
9	An act to amend sections 2359, 555, 2755, 2828, 2841, 1864, 2093, 232, 3307, 3403, 4024, 399, 400, 446, 1940, 1944, 1981, 2372, 2374, 600, 608, 611, 615, 633, 926, 2003, 5626 of the code, and 602 of the supplement to the code, and section 3 of chapter 114, section 8 of chapter 68 and section 3 of chapter 43 of the acts of the thirtieth general assembly, relating to legal publications.. Took effect July 4, 1906.	1	2359
		2	555
		3	2755
		4	2822
		5	2841
		6	1864
		7	2093
		8	232
		9	3307
		10	3405
		11	4024
		12	399
		13	400
		14	446
		15	1940
		16	1944
		17	1981
		18	2372
		19	2374
		20	600
		21	608
		22	611
		23	615
		24	633
		25	926
		26	2003
		27	5026
		28	602
		29	2820
		30	1939-a8
		31	1306-d
		32	1293-a
10	An act to repeal section 256-a of the supplement to the code, relating to election and term of office of judges of the superior courts, and to enact a substitute therefor..... Took effect July 4, 1906.		256-a
11	An act to amend section 308 of the supplement to the code, relating to the compensation of county attorneys..... Took effect by publication, April 23, 1906.		308
12	An act to amend section 410 of the code, and to repeal section 411 of the code, relating to the election and term of office of the members of the board of supervisors, and to enact a substitute therefor Took effect July 4, 1906.	1	410
		2	411
13	An act to amend division 20 of section 422 of the code, relating to the powers of boards of supervisors..... Took effect July 4, 1906.		400 422
14	An act to amend sections 729 of the supplement to the code, and 422 of the code, relating to the powers of trustees of public libraries, and to provide for use of same by residents outside of districts..... Took effect by publication, April 11, 1906.	1	729-729-a
		2	422
		3	592-a
		4	741-n
15	An act to amend section 441 of the supplement to the code, relating to official newspapers..... Took effect July 4, 1906.		441
16	An act to amend section 498 of the code, relating to the keeping of a fee book by county recorders..... Took effect July 4, 1906.		498

THIRTY-FIRST GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
17	An act to amend section 585 of the code, relating to townships and township officers..... Took effect July 4, 1906.		585
18	An act relating to the transfer of funds raised by townships for the purpose of building a public hall..... Took effect July 4, 1906.		592-b
19	An act to amend section 622 of the code, relating to the severance of territory from cities and towns..... Took effect by publication, February 20, 1906.		622
20	An act to amend section 722 of the code, relating to condemnation of property by cities and towns for the purpose of constructing dams and reservoirs..... Took effect by publication, April 2, 1906.		722
21	An act to repeal section 732 of the supplement to the code, and chapter 36 of the acts of the thirtieth general assembly, relating to the levy of taxes for library purposes, and to enact substitutes therefor..... Took effect July 4, 1906.	1 2	732 894
22	An act providing for the construction and maintenance of hospitals in certain cities, and authorizing the creation of indebtedness therefor..... Took effect by publication, April 16, 1906.	1-8	741-o -741-v
23	An act to amend section 745 of the supplement to the code, relating to the purchase and construction of waterworks..... Took effect by publication, April 11, 1906.	1 2	745 745-a
24	An act to repeal chapter 31 of the acts of the thirtieth general assembly, relating to sewers in cities and towns, and to enact a substitute therefor..... Took effect by publication, April 14, 1906.		840-a
25	An act to amend section 801 of the code, relating to street improvements, sewers and preliminary notices of sewer improvements.. Took effect by publication, April 19, 1906.		801
26	An act granting additional powers to cities of the first class in the construction or repair of mains and sewers, and making certain parts of the code applicable thereto..... Took effect by publication, April 24, 1906.	1-5	840-b -840-f
27	An act to amend section 855 of the code, relating to park commissioners and their powers..... Took effect by publication, April 11, 1906.		Repealed
28	An act to amend chapter 36 of the acts of the thirtieth general assembly, relating to park commissioners..... Took effect by publication, April 11, 1906.		Repealed
29	An act to amend section 902 of the code, relating to the collection and payment of taxes in cities and towns..... Took effect July 4, 1906.		902
30	An act to amend sections 922 and 923 and to repeal section 934 of the code, relating to the platting of lands by the county auditor, and to enact a substitute therefor..... Took effect July 4, 1906.	1 2 3	922 923 924

THIRTY-FIRST GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
31	An act to amend section 975 of the code, relating to delinquent taxes in cities under special charter..... Took effect by publication, March 17, 1906.		975
32	An act relating to penalty on unpaid taxes in cities acting under special charter..... Took effect by publication, April 11, 1906.		1056-a4
33	An act relating to the assessment and taxation of property in special charter cities..... Took effect by publication, March 26, 1906.	1-2	1056-a5 -1056-a6
34	An act to provide for the publication of municipal accounts, and to establish a uniform system of accounts, reports and audit in cities and towns..... Took effect July 4, 1906.	1-8	1056-a7 -1056-a14
35	An act relating to religious worship of inmates of state, county and city institutions..... Took effect July 4, 1906.	1-3	5718-a1 -5718-a3
36	An act to repeal sections 1057, 1064, 1065, 1066, 1070 and 1071 of the code, relating to the election of officers and term of office, and to enact substitutes therefor..... Took effect July 4, 1906.	1 2 3 4 5 6	1057,1064 1057-a 1065 1066 1070 1071
37	An act to amend section 1060 and to repeal section 1074 of the code, relating to the election and term of office of township trustees, and to enact a substitute therefor..... Took effect July 4, 1906.	1 2	1060 1074
38	An act to repeal section 1068 of the code, relating to railroad commissioners, and to enact a substitute therefor..... Took effect July 4, 1906.		1068
39	An act to repeal section 1072 of the code, relating to the term of office of county officers, and to enact a substitute therefor..... Took effect July 4, 1906.		1072
40	An act to amend section 1076 of the code, relating to the registration of voters..... Took effect by publication, February 4, 1906.	1 2	1076 1076-a
41	An act to amend section 1076 of the code, relating to registration of voters..... Took effect July 4, 1906.		1076
42	An act to amend section 1093 of the code, relating to election boards..... Took effect July 4, 1906.		1093
43	An act to amend section 1106 of the supplement to the code, relating to the form of ballots to be used at elections..... Took effect July 4, 1906.		1106
44	An act to amend sections 1109, 1120, 1121 of the code, and sections 1106 and 1119 of the supplement to the code, relating to elections, form of, and manner of marking ballots..... Took effect July 4, 1906.	1 2 3 4 5	1106 1109 1119 1120 1121

THIRTY-FIRST GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
45	An act to amend sections 2 and 5 of chapter 40 of the acts of the thirtieth general assembly, relating to primary elections..... Took effect by publication, April 12, 1906.		Repealed
46	An act to amend section 7 of chapter 40 of the acts of the thirtieth general assembly, relating to primary elections..... Took effect by publication, March 13, 1906.		Repealed
47	An act to amend section 1293 of the code, relating to the publication of official ballot..... Took effect July 4, 1906.		1293
48	An act to amend section 1304 of the code, so as to exempt from taxation the accumulations and funds of fraternal beneficiary associations Took effect July 4, 1906.		1304
49	An act to repeal section 1306-b of the supplement to the code, and chapter 43 of the acts of the thirtieth general assembly, relating to the limit of indebtedness of municipal corporations, and to enact a substitute therefor..... Took effect by publication, April 9, 1906.	1-5	1306-b -1306-f
50	An act to amend section 1322 of the code, relating to the taxation of national, state and savings banks, and shares of stock therein Took effect July 4, 1906.	1 2	1322 1322-a
51	An act to repeal section 1391 of the code, relating to delinquent taxes, and to enact a substitute therefor..... Took effect July 4, 1906.		1391
52	An act to encourage the planting of forest and fruit trees..... Took effect July 4, 1906.	1-14	1400-c -1400-p
53	An act to amend section 1407 of the code, relating to the collection of delinquent taxes.....		1407
54	An act to amend section 1467 of the code, relating to assessment and collection of collateral inheritance tax..... Took effect July 4, 1906.		1467
55	An act to amend section 1467 of the code, relating to the assessment and collection of collateral inheritance tax..... Took effect July 4, 1906.		1467
56	An act to amend section 1530 of the supplement to the code, giving boards of supervisors power to levy additional county road funds Took effect July 4, 1906.		1530
57	An act to amend section 1533 of the code, relating to superintendents of roads..... Took effect by publication, March 13, 1906.		1533
58	An act to amend section 1533 of the code, and section 1540-a of the supplement to the code, relating to the collection of road taxes Took effect by publication, April 21, 1906.	1 2	1533 1540-a
59	An act to amend section 1538 of the code, relating to the compensation of trustees and township clerk..... Took effect July 4, 1906.		1538

THIRTY-FIRST GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
60	An act to amend section 1550 of the code, relating to the collection of poll tax..... Took effect July 4, 1906.		1550
61	An act to amend section 1566-a of the supplement to the code, relating to the publication of itemized accounts of township officers Took effect July 4, 1906.		1566-a
62	An act to provide for the improvement of public highways by the use of the road drag..... Took effect by publication, February 16, 1906.	1 2	1570-b 1570-c
63	An act to encourage the use of wagons with wide tires on public highways Took effect July 4, 1906.	1 2	1570-d 1570-e
64	An act to amend section 1612 of the code, relating to the service of notice or process upon certain corporations..... Took effect July 4, 1906.		1612
65	An act to provide for the renewal or extension of the corporate period of state and savings banks..... Took effect July 4, 1906.		1618-a
66	An act to amend section 1657-d of the supplement to the code, relating to the agricultural convention..... Took effect July 4, 1906.		1657-d
67	An act to amend section 1657-n of the supplement to the code, relating to the salary of the secretary of state agricultural department Took effect July 4, 1906.		1657-n
68	An act to amend section 1689 of the code, relating to mutual insurance companies Took effect July 4, 1906.		1689
69	An act to amend section 1709 of the supplement to the code, relating to the insurance of live stock..... Took effect by publication, March 1, 1906.		1709
70	An act to amend sections 1709 and 1710 of the supplement to the code, as amended by section 2 of chapter 71 of the acts of the thirty-first general assembly, relating to insurance other than life Took effect by publication, April 11, 1906.	1 2	1709 1710
71	An act to amend section 1709, and to repeal section 1710, of the supplement to the code, relating to insurance other than life, and to enact a substitute therefor..... Took effect by publication, April 2, 1906.	1 2	1709 1710
72	An act to amend section 1709 of the supplement to the code, relating to insurance other than life..... Took effect by publication, March 31, 1906.	1	1709
73	An act to repeal section 1737 of the code, relating to publication of certificates of compliance of companies transacting the business of insurance other than life, and to enact a substitute therefor Took effect July 4, 1906.		1737

THIRTY-FIRST GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
74	An act to provide that life insurance companies may transact health, accident and employers' liability insurance..... Took effect July 4, 1906.		1783-d
75	An act to repeal section 1784 of the supplement to the code, relating to the assessment of life insurance associations, and to enact a substitute therefor..... Took effect July 4, 1906.		1784
76	An act to repeal sections 1784-a, 1784-b, 1784-c, 1784-d, 1784-e, 1784-f, 1784-g, 1784-h, 1784-i, 1784-j, 1784-k, 1784-l, 1784-m, 1784-n and 1784-o of the supplement to the code, relating to stipulated premium and assessment life insurance associations.. Took effect July 4, 1906.		1784-a
77	An act to amend section 1806 of the supplement to the code, relating to the investment of funds of insurance companies and associations .. Took effect July 4, 1906.		1806
78	An act to amend section 1850 of the code, relating to investment of funds of savings banks..... Took effect by publication, March 17, 1906.		1850
79	An act to amend section 1869 of the code, relating to embezzlement by officers or employes of state and savings banks..... Took effect by publication, February 23, 1906.		Repealed
80	An act to amend section 1871 of the code, relating to examination of state and savings banks..... Took effect July 4, 1906.		1871
81	An act to amend sections 1875 and 1876 of the code, as repealed and re-enacted by chapter 64 of the acts of the thirtieth general assembly, relating to bank examiners..... Took effect July 4, 1906.		1875
82	An act to amend sections 1968, 1969, 1971 and 1972 of the code, relating to the drainage of lead and zinc mines..... Took effect July 4, 1906.	1 2 3 4	1968 1969 1971 1972
83	An act to amend sections 1977, 1986 and to repeal sections 1976, 1979, 1982 and 1984 of the code, relating to levees built by the United States, and to enact substitutes therefor..... Took effect by publication, February 23, 1906.	1 2 3 4 5 6	1976 1977 1979 1982 1984 1986
84	An act to amend sections 2, 5, 28, 42, 44 and 48, chapter 68, of the acts of the thirtieth general assembly, relating to levees, drains, ditches and water-courses..... Took effect by publication, April 21, 1906.	1 2 3 4 5 6	1989-a2 1989-a5 1989-a27 1989-a41 1989-a43 1989-a47
85	An act to amend sections 2, 3, 5, 8 and 26, of chapter 68, of the acts of the thirtieth general assembly, relating to the establishment of levees, drains, ditches and water-courses..... Took effect by publication, April 13, 1906.	1 2 3 4 5 6	1989-a2 1989-a3 1989-a5 1989-a6 1989-a8 1989-a25

THIRTY-FIRST GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
86	An act to provide for the payment of preliminary expenses in connection with drainage districts and making provision for the same Took effect by publication, February 26, 1906.		1989-a48
87	An act to amend section 2026 of the supplement to the code, relating to street railways over highways..... Took effect by publication, April 19, 1906.		Repealed
88	An act to amend section 2052 of the code, relating to the collection of fees in the office of secretary of state..... Took effect by publication, April 2, 1906.		2052
89	An act to repeal chapter 74 of the acts of the thirtieth general assembly, relating to common carriers, and to enact a substitute therefor Took effect July 4, 1906.	1 2	2074-a 2074-b
90	An act relating to the issuance and acceptance of free passes over steam or interurban railways..... Took effect July 4, 1906.		Repealed
91	An act to amend sections 2192 and 2201 of the code, 2211 of the supplement to the code, and sections 1, 2, 3, 9, 11 and 13 of chapter 77 of the acts of the thirtieth general assembly, and to repeal sections 2190 and 2191 of the code, and sections 2174, 2203 and 2204 of the supplement to the code, and sections 4 and 5 of chapter 77 of the acts of the thirtieth general assembly, and to enact substitutes therefor; and to repeal section 2189 and section 7 of chapter 77 of the thirtieth general assembly, relating to the state militia..... Took effect by publication, April 12, 1906.	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18	2169-a 2173-a 2174 2175 2176-a 2178 2184 2181-a -2189 2190 2191 2192 2201 2204-a Repealed 2204 2211 2212 2214
92	An act to amend section 2283 of the code, and to repeal section 2727-a28 of the supplement to the code, and acts in conflict therewith, relating to the care and removal of non-resident insane to their place of legal settlement..... Took effect by publication, April 18, 1906.	1 2 3	2727-a28a 2727-a28b 2727-a28, 2283
93	An act to repeal section 2287 of the code, as amended by chapter 79 of the acts of the thirtieth general assembly, relating to the capture and return of patients escaped from hospitals for the insane; to provide for payment of the expenses thereof, and to enact a substitute therefor..... Took effect by publication, April 23, 1906.		2287
94	An act to repeal section 2292 of the code, relating to the expenses of the insane and inebriates, and to enact a substitute therefor.. Took effect July 4, 1906.		2292
95	An act to amend chapter 80 of the acts of the thirtieth general assembly, relating to admission of patients to hospitals for inebriates Took effect by publication, April 14, 1906.		2310-a10

THIRTY-FIRST GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
96	An act to amend section 15 of chapter 80 of the acts of the thirtieth general assembly, relating to the state hospital for inebriates Took effect by publication, March 17, 1906.		2310-a20
97	An act to provide for the payment of certain expenses of indigent patients paroled or discharged from the state hospital for inebriates and the hospital for female inebriates..... Took effect by publication, April 19, 1906.		2310-a32
98	An act to repeal sections 2341 and 2342 of the code, relating to the registration and publication of pedigrees, and to enact a substitute therefor Took effect July 4, 1906.		Repealed
99	An act to amend section 2439 of the code, relating to the collection of the mulct tax..... Took effect July 4, 1906.		2439
100	An act to amend section 2448 of the code, relating to the establishment of saloons near cemeteries..... Took effect by publication, April 6, 1906.		2448
101	An act to amend section 2450 of the code, relating to the sale of intoxicating liquors under the mulct law..... Took effect July 4, 1906.		2450
102	An act to amend section 2469 of the code, and section 2470 of the supplement to the code, relating to the bureau of labor statistics Took effect July 4, 1906.	1 2	2469 2770
103	An act to regulate the employment of child labor, and to provide for the enforcement thereof..... Took effect July 4, 1906.	1-7	2477-a -2477-g
104	An act to repeal sections 2500, 2501 and 2502 of the code, relating to the geological survey, and to enact a substitute therefor..... Took effect July 4, 1906.	1-2 3 4	2500 2501 2502
105	An act to amend sections 1 and 9 of chapter 87 of the acts of the thirtieth general assembly, relating to the inspectors of petroleum products Took effect July 4, 1907.	1 2	2503 2509-a
106	An act to regulate the sale of gasoline..... Took effect January 1, 1907.	1-3	2510-j -2510-l
107	An act defining the powers of state food and dairy commissioner, his deputy and assistants..... Took effect July 4, 1906.	1-3	2528-a -2528-c
108	An act for the protection of birds, their nests and eggs..... Took effect July 4, 1906.	1-11	2563-j -2563-t
109	An act to repeal sections 2566 and 2567 of the code, and chapter 100 of the acts of the thirtieth general assembly, and to require the registration of births and deaths..... Took effect July 4, 1906.	1-9	2575-a11 -2575-a19
110	An act to amend section 2567 of the code, relating to the reporting of marriages and divorces..... Took effect July 4, 1906.	1-2	2567

THIRTY-FIRST GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
111	An act to repeal section 2570-a of the supplement to the code, and chapter 98 of the acts of the thirtieth general assembly, relating to quarantine, care of infected persons and payment of expenses incurred thereby, and to enact a substitute therefor..... Took effect July 4, 1906.	1 2	2570-a -2570-b 2570-a1
112	An act to amend sections 2575-c, 2575-d, 2575-e and 2575-f of the supplement to the code, relating to the bringing into the state infested nursery stock..... Took effect July 4, 1906.	1-2 1 3	2575-a47 2575-a48 -2575-a49 2575-a50
113	An act to amend section 3 of chapter 101 of the acts of the thirtieth general assembly, relating to the state board of health laboratory at Iowa City..... Took effect by publication, April 16, 1906.	-	Repealed
114	An act to amend section 2576 of the supplement to the code, relating to the dates of meetings of the state board of medical examiners..... Took effect July 4, 1906.		2576
115	An act to repeal section 2589 of the supplement to the code, and section 2590 of the code, relating to the examination of pharmacists and their assistants, and to enact a substitute therefor.. Took effect July 4, 1906.	1 2-5	2589 2589-a -2589-d
116	An act amendatory to, and additional to chapter 19-a of title XII of the code, and enacting a substitute therefor..... Took effect July 4, 1906.	1 2 3 4	2600-m 2600-n 2600-i 2600-h
117	An act to amend section 2604 of the supplement to the code, relating to the salary of the commandant of Iowa soldiers' home..... Took effect July 4, 1906.		2604
118	An act to amend section 2604 of the supplement to the code, relating to the salary of commandant of the Iowa soldiers' home..... Took effect July 4, 1906.		2604
119	An act to amend section 2606 of the code, relating to the rules for admission to the Iowa soldiers' home..... Took effect by publication, April 6, 1906.		2606
120	An act to provide for the prevention of tuberculosis, and for the establishment and maintenance of a state sanatorium for the treatment of tuberculosis..... Took effect by publication, April 23, 1906.	1-14	2627-a75 -2727-a88
121	An act to amend section 2625 of the code, relating to the superintendent of public instruction and his reports..... Took effect July 4, 1906.		2625
122	An act to repeal sections 2632, 2734, 2735 and 2736 of the code and sections 2734, 2736 and 2737 of the supplement to the code, and to define the qualifications of county superintendents; and to provide for the examination and certification of teachers for the public schools; the classification of teachers' certificates and the registration of the same..... Took effect October 1, 1906.	1 1-22	2632 2734-a -2734-v
123	An act to amend section 2641 of the code, relating to the reports of the state university..... Took effect July 4, 1906.		2641

THIRTY-FIRST GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
124	An act to provide for the establishment of a course of practical and scientific instruction in the art of clay working and ceramics, the use of cements and allied industries in the state college of mechanic arts (additional to chapter 4 of title XIII of the code). Took effect July 4, 1906.	1 2	2674-d 2674-e
125	An act to amend section 2680 of the code, relating to the biennial report of the state normal school..... Took effect July 4, 1906.		2680
126	An act to amend section 2685 of the supplement to the code, relating to admission to the Iowa soldiers' orphans' home..... Took effect by publication, February 23, 1906.		2685
127	An act to repeal section 2690 of the code, and to provide for the placing, by adoption and contract, of children of the Iowa soldiers' orphans' home Took effect July 4, 1906.	1-4 5	2690-a -2690-d 2690
128	An act to repeal section 2704 of the supplement to the code, relating to placing, under contract, of boys and girls committed to the industrial school, and to enact a substitute therefor..... Took effect July 4, 1906.		2704
129	An act to amend section 2708 of the supplement to the code, relating to the age of commitment of females to the industrial school.... Took effect July 4, 1906.		2708
130	An act to repeal section 2713 of the supplement to the code, as amended by chapter 143 of the acts of the thirtieth general assembly, relating to the support fund of the industrial school, and to enact a substitute therefor..... Took effect by publication, April 11, 1906.	1 2	2713 2713-a1
131	An act to amend section 2717 of the code, relating to the biennial report of the college for the blind..... Took effect July 4, 1906.		2717
132	An act to repeal section 2726 of the code, relating to the expense of inmates of the school for the deaf; and the time and manner for certifying the same, and to enact a substitute therefor..... Took effect July 4, 1907.		2726
133	An act to amend section 2727-c of the supplement to the code, relating to the salary of the chief executive officer of the industrial school for girls..... Took effect by publication, April 2, 1906.		2727-c
134	An act relating to the inspection of county and private institutions in which insane persons are kept, and societies and homes receiving friendless children..... Took effect July 4, 1906.		3260-n
135	An act to amend section 2729 of the code, relating to the term of office of trustees of county high schools..... Took effect July 4, 1906.		2729

THIRTY-FIRST GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
136	An act to amend sections 2739, 2762, 2764, 2765, 2769, 2773, 2785, 2800, 2801, 2802 of the code, and sections 2754 and 2806 of the supplement to the code; and to repeal sections 2757 and 2793 of the code, relating to the school year, organization and meetings of school boards, reports of school officers and the changing of boundaries of school corporations, and to enact substitutes therefor	1 2 3 4 5 6 7 8 9 10 11 12 13 14	2739 2754 2757 2762 2764 2765 2769 2773 2785 2793 2800 2801 2802 2806
	Took effect by publication, March 13, 1906.		
137	An act to amend section 2758 of the code, relating to the qualification of school directors.....		2758
	Took effect by publication, March 20, 1906.		
138	An act to repeal section 2763 of the code, relating to notice of special meetings of voters in school districts, and to enact a substitute therefor	1 2-4 5 6	2763 2763-a -2763-c 2764 2765
	Took effect by publication, April 18, 1906.		
139	An act to amend section 2768 of the code, relating to school building bond funds.....		2768
	Took effect July 4, 1906.		
140	An act to repeal section 2812-b of the supplement to the code, relating to school district bonds, and to enact a substitute therefor..	1	2812-b
	Took effect by publication, April 21, 1906.		
141	An act to provide for the organization of consolidated independent school districts		2794-a
	Took effect by publication, April 11, 1906.		
142	An act to provide for the care and preservation of public archives.	1 2 3 4 5	2881-j Repealed Repealed 2881-m Repealed
	Took effect July 4, 1906.		
143	An act to amend section 2881-e of the supplement to the code, relating to state law library.....		2881-e
	Took effect July 4, 1906.		
144	An act relating to gifts, devises or bequests to state institutions..		2904-a
	Took effect by publication, February 28, 1906.		
145	An act to amend section 2941 of the code, relating to recording instruments in cities and towns or villages in separate books.....		2941
	Took effect July 4, 1906.		
146	An act to legalize acknowledgments of instruments in writing heretofore taken by notaries public.....	1-3	2942-g -2942-i
	Took effect by publication, March 23, 1906.		
147	An act to repeal section 3016 of the supplement to the code, relating to bushel weight, and to enact a substitute therefor.....	2	3016
	Took effect July 4, 1906.		

THIRTY-FIRST GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
148	An act to amend section 3047 of the code, relating to the assignment of wages..... Took effect July 4, 1906.		3047
149	An act to amend section 3060-a132 of the supplement to the code, relating to negotiable instruments..... Took effect July 4, 1906.		3060-a132
150	An act relating to lost, stolen or destroyed notes, bonds, bills of exchange, drafts, certificates of deposit or other evidence of indebtedness..... Took effect July 4, 1906.	1 2	3060-a199 3060-a200
151	An act relating to the time of bringing actions against estates of decedents..... Took effect July 4, 1906.		3447-a
152	An act relating to the limitation for the commencement of actions relative to real property..... Took effect July 4, 1906.	1 2	3447-b 3447-c
153	An act to amend section 3494 of the supplement to the code, relating to the place of bringing actions..... Took effect July 4, 1906.		3494
154	An act to amend section 3540 of the code, relating to the publication of original notices in commencement of actions against unknown defendants..... Took effect by publication, February 28, 1906.		3540
155	An act to amend section 3652 of the code, relating to trial and judgment..... Took effect by publication, February 16, 1906.		3652
156	An act to amend chapter 12 of title XVIII of the code, relating to the priority of claims in the distribution of property in hands of receivers..... Took effect July 4, 1906.		3825-a
157	An act to amend section 4025 of the code, relating to notice to defendant in sales under execution..... Took effect by publication, March 17, 1906.		4025
158	An act to amend section 4114 of the code, relating to notice of appeal..... Took effect July 4, 1906.		4114
159	An act to repeal section 4633 of the code, relating to the provision for the recording of United States and state patents, and certified copies thereof, and to enact a substitute therefor..... Took effect July 4, 1906.		4633
160	An act to amend section 4821 of the code, relating to hunting on enclosed lands..... Took effect by publication, February 28, 1906.		4821
161	An act to amend section 4822 of the code, relating to malicious injury to buildings and fixtures..... Took effect by publication, April 18, 1906.		4822
162	An act relating to injury or destruction of sidewalks..... Took effect July 4, 1906.		4030-b

THIRTY-FIRST GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
163	An act to amend chapter 5 of title XXIV of the code, relating to larceny Took effect July 4, 1906.		4852-e
164	An act to amend section 4936 of the code, relating to incest..... Took effect July 4, 1906.		4936
165	An act to provide for the punishment of persons who ask, request or solicit another to have carnal knowledge with any female..... Took effect July 4, 1906.		4975-c
166	An act to prevent adulteration, misbranding and imitation of foods; to change the name of office of state dairy commissioner, and to define his duties; and to repeal sections 4982, 4984, 4987, 4993, 4994, 4995, 4996, 4997 and 4998 of the code, and 4984-a and 4984-b of the supplement to the code, and to amend section 4986 of the code, relating to offenses against public health..... Took effect July 4, 1906.	1-8 9 10-15 16 17	4999-a15 -4999-a22 Repealed 4999-a24 -4999-a29 Repealed 4999-a30
167	An act to amend sections 4989 and 4990 of the code, relating to the sale of adulterated milk and cream..... Took effect July 4, 1906.	1 2	4989 4990
168	An act relating to the pasteurizing of milk by creameries..... Took effect July 4, 1906.	1 2	4989-a 4989-b.
169	An act to prohibit unfair commercial discrimination between different sections, or unfair competition..... Took effect by publication, May 5, 1906.	1-8	5028-b -5028-i
170	An act relating to the inspection of registered cattle brought into the state for breeding or dairy purposes..... Took effect by publication, April 14, 1906.	1-4	5028-j -5028-m.
171	An act to prohibit the manipulation of the Babcock test, or any other contrivance for determining the quality of milk or cream.. Took effect July 4, 1906.	1 2	5077-a1 5077-a2
172	An act to amend section 5716 of the code, relating to the compensation of chaplains of the penitentiaries..... Took effect July 4, 1906.		5716
181	An act providing for the appointment of state agents for the industrial school and the soldiers' orphans' home, defining their duties and making an appropriation for their salaries and to repeal chapter 157 of the acts of the thirtieth general assembly..... Took effect July 4, 1906.	1-4	2692-a -2692-d
212	An act to repeal chapter 185 of the acts of the thirtieth general assembly, relating to sale of abandoned river channels, sandbars or islands, and to enact a substitute therefor..... Took effect by publication, April 9, 1906.	1-17	2900-a1 -2900-a18

THIRTY-SECOND GENERAL ASSEMBLY.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
1	An act to amend section 36 of the code, relating to the publication of the acts of the thirty-second general assembly..... Took effect by publication, March 16, 1907.		36
2	An act to amend sections 65 and 2627 of the supplement to the code, and sections 87, 99, 116, 205, 2121 and 2585 of the code, relating to the compensation of the secretary of the governor and deputy state officers..... Took effect by publication, April 9, 1907.	1 2 4 5 6 7 8	65 87 116 2627 205 2121 2585
3	An act to amend sections 3 and 4 of chapter 3 of the acts of the thirty-first general assembly, relating to printing, binding and distribution of state reports and documents..... Took effect by publication, April 15, 1907.	1 2-3	125 126
4	An act to amend section 136 of the supplement to the code, relating to the distribution of the reports of the academy of science..... Took effect by publication, April 4, 1907.		136
5	An act to amend sections 156, 157, 1378 and 1382 of the code, relating to the duties of the secretary of the executive council.... Took effect July 4, 1907.	1 2 3	156 157 1378, 1382, 1382-a
6	An act to amend sections 168, 2629, 2634-a of the supplement to the code, section 2631 of the code (chapter 2, title XIII), and chapter 122 of the acts of the thirty-first general assembly, relating to the board of educational examiners..... Took effect by publication, April 6, 1907.	1 2 3 4 5	168 2629 2631 2634-a 2634-a1
7	An act to amend chapter 11 of the acts of the thirtieth general assembly, relating to the settlement and control of dependent, neglected and delinquent children..... Took effect by publication, March 28, 1907.	1 2 3	254-a29 254-a18 254-a30
8	An act to amend section 255 of the supplement to the code, and chapter 10 of the acts of the thirtieth general assembly, relating to superior courts..... Took effect by publication, March 15, 1907.	1 2	255 256-a
9	An act to amend section 281 of the code, relating to the practice of law by judges of courts of record..... Took effect July 4, 1907.		281
10	An act to amend section 308 of the supplement to the code, as amended by chapter 11 of the acts of the thirty-first general assembly, relating to the compensation of county attorneys..... Took effect July 4, 1907.	1 2	308 308-a
11	An act to amend section 310 of the supplement to the code, relating to the qualifications for admission to the bar..... Took effect July 4, 1907.	1 2	310 310-a
12	An act to provide for new jury lists where for any cause a lawfully constituted grand jury or petit jury cannot be obtained, or lawfully qualified talesmen cannot be selected, under the law from those persons who are returned by the election officers to serve as jurors..... Took effect by publication, March 22, 1907.	1-4	337-a -337-d

THIRTY-SECOND GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
13	An act to amend section 68 of the code, relating to the registration of commissions, and to repeal sections 373, 374, 375 and 376 of the code, relating to notaries public, and to enact substitutes therefor Took effect July 4, 1907.	1 2 3 4 5	373 374 375 376 68
14	An act to repeal section 412 of the code, relating to the time of holding meetings of the board of supervisors, and to enact a substitute therefor Took effect July 4, 1907.		412
15	An act to amend section 422 of the code, relating to the powers of board of supervisors..... Took effect July 4, 1907.		422
16	An act to amend sections 2 and 3 of the acts of the thirty-first general assembly, relating to powers of township trustees..... Took effect by publication, March 30, 1907.		592-a
17	An act to amend sections 422 and 1660 of the code, relating to the purchase of land for county fair societies..... Took effect by publication, March 29, 1907.	1 2	422 1660
18	An act to amend section 432 of the code, relating to the meetings of the soldiers' relief commission..... Took effect July 4, 1907.		432
19	An act to amend section 448 of the code, relating to borrowing money for erection of public buildings in certain counties..... Took effect by publication, March 22, 1907.		448
20	An act to repeal sections 458 and 459 of the code, relating to taxation of dogs, and injuries to domestic animals, and to enact a substitute therefor Took effect by publication, April 3, 1907.	1 2-5	458-459 458-a -458-d
21	An act to repeal section 469 of the code, relating to the compensation of county supervisors, and to enact a substitute therefor.... Took effect by publication, March 16, 1907.		469
22	An act to amend section 1 of chapter 21 of the acts of the thirtieth general assembly, relating to the compensation of county recorders Took effect by publication, April 11, 1907.		495
23	An act to amend section 520 of the code, relating to the appointment of shorthand reporters by coroners, and making provision for the payment thereof..... Took effect July 4, 1907.		520
24	An act to provide for a uniform system of books, blanks, records, vouchers, receipts, etc., for certain county officers..... Took effect July 4, 1907.	1 2	550-a 550-b
25	An act to amend section 591 of the code, relating to compensation of county clerks..... Took effect July 4, 1907.		591

THIRTY-SECOND GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
26	An act to amend sections 641, 655, 867, 871 and 873 of the code, 661 of the supplement to the code, and chapters 2 and 9, title V of the code and the supplement to the code, relating to the organization and officers of towns and cities, and to provide for the appointment of a board of public works, and providing a penalty for the violation thereof; and to repeal sections 646, 647, 648, 649, 651, 652, 657 and 865 of the code, and section 645 and paragraph 5 of section 658 of the supplement to the code, and to enact substitutes therefor..... Took effect by publication, March 30, 1907.	1	641
		2	645
		3	646
		4	647
		5	648
		6	649
		7	651
		8	652
		9	655
		10	657
		11	658
		12	661
		13	679-f
		14	865
		15	867
		16	871
		17	873
		18	879-p
		19	879-q
27	An act to provide that section 654 of the supplement to the code, and section 672 of the code, relating to police matrons, shall apply to special charter cities..... Took effect by publication, March 28, 1907.		654-a
28	An act to amend subdivision 16 of section 668 of the code, relating to the duties of the city council, and to make same apply to cities of the second class..... Took effect by publication, March 27, 1907.		668
29	An act to amend sections 679-a, 679-f, 679-g and 679-h of the supplement to the code, relating to the board of police and fire commissioners in certain cities..... Took effect by publication, April 4, 1907.	1	679-a
		2	679-f
		3	679-g
		4	679-h
		5	679-j
30	An act to authorize towns and cities, and cities under special charter to make appropriation for dues in league of Iowa municipalities Took effect by publication, April 3, 1907.		694-a
31	An act to amend section 700 of the supplement to the code, relating to intelligence or employment offices..... Took effect July 4, 1907.		700
32	An act to give cities and towns power to regulate public dance halls, skating rinks, fortune tellers, clairvoyants and bill boards Took effect July 4, 1907.	1-2	700-a -700-b
33	An act to authorize the board of trustees of free public libraries to unite with any local historical associations for the preservation and purchase of articles of historical and educational nature Took effect July 4, 1907.		729-e
34	An act to authorize the construction of city halls in certain cities, and to repeal chapter 27 of the acts of the thirtieth general assembly Took effect by publication, April 13, 1907.	1-6	741-d -741-i
35	An act to amend chapter 23 of the acts of the thirty-first general assembly, relating to the construction and maintenance of hospitals Took effect July 4, 1907.	1	741-o -741-q

THIRTY-SECOND GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
36	An act relating to the levy of a bridge tax in cities of the first class Took effect July 4, 1907.	1-3	758-a -758-c
37	An act to amend section 768 of the code, relating to vestibules of street cars Took effect July 4, 1907.		768
38	An act to amend (repeal) section 771 of the code, and section 1 of chapter 2 of the acts of the thirtieth general assembly, relating to the construction of viaducts, and to enact substitutes therefor... Took effect July 4, 1907.	1 2	771 771-a
39	An act to amend section 776 of the code, relating to the publication of notices of questions submitted to the voters of cities and towns Took effect by publication, March 16, 1907.		776
40	An act to provide for special assessments for sidewalk and street improvements in cities and towns..... Took effect July 4, 1907.	1	791-i
41	An act to provide for sewer outlets and purifying plants and the levy of a tax therefor, in cities of the second class and towns... Took effect July 4, 1907.		849-j
42	An act to amend chapter 9, title V, of the code, and amendments thereto, relating to park commissioners, and to repeal sections 850, 851 and 852 of the code, and supplement to the code, and amendments thereto, and to enact substitutes therefor..... Took effect July 4, 1907.	1 2-15	850 850-a -850-n
43	An act to amend section 852 of the supplement to the code, as amended by chapter 34 of the acts of the thirtieth general assembly, relating to the levy of additional tax for park purposes. Took effect July 4, 1907.		852
44	An act to amend section 912 of the code, relating to the issuance of certificates or bonds in anticipation of special taxes by towns.... Took effect by publication, March 14, 1907.		912-a
45	An act to amend section 955 of the code, relating to the establishment and operation of heating plants in special charter cities.. Took effect by publication, March 28, 1907.		955
46	An act to repeal section 955-a of the supplement to the code, relating to compensation of waterworks trustees in special charter cities Took effect by publication, February 27, 1907.		955-a
47	An act to amend chapter 14, title V, of the code, relating to the management of waterworks in certain special charter cities..... Took effect by publication, March 2, 1907.	1-3	1056-a1 -1056-a3
48	An act to provide for the government of certain cities, and the adoption thereof by special election..... Took effect by publication, April 1, 1907.	1-22	1056-a17 -1056-a40
49	An act to amend chapter 37 of the acts of the thirty-first general assembly, relating to special election of township officers in newly created townships Took effect by publication, March 27, 1907.		1074-a

THIRTY-SECOND GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
50	An act to amend chapter 3, title VI, of the code, relating to elections Took effect July 4, 1907.	2-7	1137-a1 -1137-a6
51	An act to provide for the nomination by political parties of candidates for various offices; and the election of delegates to conventions of political parties by primary election system; and to repeal chapter 40 of the acts of the thirtieth general assembly, relating to primary elections. Took effect July 4, 1907.	1	1087-a1 -1087-a35
52	An act to repeal section 1164 of the code, relating to recording abstracts of votes in the office of the secretary of state, and to enact a substitute therefor. Took effect July 4, 1907.		1164
53	An act to provide that chapter 8, title VI, of the code, relating to removal of municipal officers, shall be applicable to special charter cities Took effect by publication, February 26, 1907.		1256-a
54	An act to amend section 1304 of the code, relating to exemption from taxation Took effect July 4, 1907.		1304
55	An act to amend section 1304-a of the supplement to the code, relating to exemption of property from taxation. Took effect July 4, 1907.		1304-a
56	An act to amend section 1333 of the supplement to the code, relating to taxes paid by foreign fire insurance companies. Took effect July 4, 1907.		1333
57	An act to amend section 1333-d of the supplement to the code, relating to domestic fire corporations and associations. Took effect July 4, 1907.		1333-d
58	An act to repeal section 1346-d of the supplement to the code, relating to assessment of express companies for taxation, and to enact a substitute therefor. Took effect July 4, 1907.		1346-d
59	An act to repeal chapter 48 of the acts of the thirtieth general assembly, relating to the licensing of peddlers, and to enact a substitute therefor Took effect by publication, April 6, 1907.		1347-a
60	An act to amend section 1373 of the code, relating to the correction of erroneous assessments Took effect by publication, April 10, 1907.	1 2	1373 1373-a
61	An act to amend section 1432 of the code, relating to the assignment of certificates of purchase at tax sales, and to provide for the issuance of duplicate certificate of purchase in case of loss or destruction of original; and to repeal section 1433 of the code, and to enact a substitute therefor. Took effect by publication, March 22, 1907.	1 2	1432 1433
62	An act to authorize county treasurers to commence and prosecute ordinary actions at law for the enforcement of tax liens; and for the issuance of a writ of attachment in certain cases without bond for the purpose of enforcing the payment of taxes whether due or not due, additional to chapter 2, title VII, of the code. . . . Took effect by publication, April 13, 1907.	1 2	1452-a 1452-b

THIRTY-SECOND GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
63	An act to repeal section 1460 of the code, relating to the statement of county treasurer's account with the treasurer of state.. Took effect July 4, 1907.		1460
64	An act to repeal section 1483 of the code, relating to the establishment of roads and highways, and to enact a substitute therefor.. Took effect July 4, 1907.		1483
65	An act to give power to board of supervisors in relation to the alteration and straightening of highways, and to prevent the encroachment of streams thereon..... Took effect July 4, 1907.		1527-a
66	An act authorizing the board of supervisors to grant to municipalities the use of public highways for the laying of water mains and pipes Took effect July 4, 1907.		1527-b
67	An act to amend section 1530 of the supplement to the code, relating to county road fund, and the manner of its distribution.... Took effect July 4, 1907.		1530
68	An act to amend sections 2, 4 and 5 of chapter 53 of the acts of the thirtieth general assembly, relating to motor vehicles..... Took effect July 4, 1907.	1 2 3	1571-b 1571-d 1571-e
69	An act to authorize and direct boards of supervisors in counties adjoining and bordering upon the state line to meet the authorities in control and charge of public highways in adjoining counties of other states, and to agree upon the portion of each public highway, upon the state line, to be kept in repair by the state of Iowa and such other states..... Took effect July 4, 1907.		1570-a
70	An act to amend section 1610 of the supplement to the code, relating to approval of articles of incorporation of corporations for pecuniary profit Took effect by publication, April 10, 1907.		1610
71	An act to amend chapter 1, title IX, of the code, relating to corporations for pecuniary profit..... Took effect July 4, 1907.	1-5	1641-b -1641-f
72	An act to prohibit the making of false statements concerning the pecuniary condition of corporations, the shares, bonds or property thereof Took effect July 4, 1907.		1641-g
73	An act to prohibit any corporation doing business within the state, or any of its officers, from making any contribution to political parties or for political purposes..... Took effect July 4, 1907.	1-4	1641-h -1641-k
74	An act to provide for proportionate representation to minority stockholders of insurance companies, additional to chapters 1, 4, 6, 7 and 8 of title IX of the code..... Took effect by publication, March 28, 1907.	1 2	1821-v 1821-w
75	An act to amend section 1743 of the supplement to the code, relating to the removal of goods and merchandise covered by insurance Took effect July 4, 1907.		1743

THIRTY-SECOND GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
76	An act to provide for a uniform policy to be used by all fire insurance companies doing business in the state of Iowa..... Took effect July 4, 1907.	1-4	1758-a -1758-d
77	An act to provide for the regulation of solicitation and use of proxies by insurance companies..... Took effect July 4, 1907.	1-3	1821-x -1821-z
78	An act to amend chapter 56 of the acts of the thirtieth general assembly, relating to examination of insurance companies..... Took effect by publication, February 12, 1907.		1821-c
79	An act relating to the capital stock of insurance companies organized upon the stock plan, and to provide the conditions under which such companies shall operate..... Took effect July 4, 1907.	1-4	1783-e -1783-h
80	An act to repeal chapter 5 of title IX of the code, relating to mutual assessment associations, and to enact a substitute therefor; and to repeal section 1759 of the code as amended, and sections 1760, 1761, 1762, 1763, 1764, 1765, 1766 and 1767 of the code, relating to mutual assessment associations..... Took effect July 4, 1907.	1-16	1759-a -1759-p
81	An act to amend section 1768 of the code, relating to approval of articles of incorporation of life insurance companies..... Took effect by publication, March 29, 1907.		1768
82	An act to amend section 1794 of the code, relating to foreign fraternal accident insurance associations..... Took effect by publication, February 12, 1907.		1794
83	An act to provide a method whereby assessment life associations may be re-incorporated as regular reserve life insurance companies Took effect by publication, March 23, 1907.	1 2	1798-a 1798-b
84	An act to regulate the disbursement of domestic life insurance companies Took effect July 4, 1907.		1820-a
85	An act to prohibit misrepresentations by life insurance companies Took effect July 4, 1907.	1 2	1820-b 1820-c
86	An act relating to the rates of fraternal beneficiary societies..... Took effect July 4, 1907.		1839-j
87	An act to permit fraternal beneficiary societies or associations to purchase and own real estate, and to erect a building thereon and to occupy and rent the same..... Took effect July 4, 1907.		1839-k
88	An act to provide for the investment of the funds of fraternal beneficiary associations... Took effect July 4, 1907.		1839-l
89	An act to amend senate file number 22 (being chapter 88 of the acts of the thirty-second general assembly), providing for the investment of funds of fraternal beneficiary associations..... Took effect July 4, 1907.		1839-1

THIRTY-SECOND GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
90	An act to regulate the indebtedness of state and savings banks, and to repeal section 1855 of the code..... Took effect by publication, April 4, 1907.	1 2 3	1855 1855-a 1855-b
91	An act to repeal section 1869 of the code, relating to pay of, and loans to officers of state and savings banks, and to enact a substitute therefor..... Took effect July 4, 1907.		1869
92	An act to amend section 1873 of the code, relating to the publication of reports of state and savings banks..... Took effect July 4, 1907.		1873
93	An act to amend section 5 of chapter 83 of the acts of the thirty-first general assembly, section 1986 of the code as amended by section 6 of chapter 83 of the acts of the thirty-first general assembly, section 1985 of the code and chapter 2 of title X of the code as amended by chapter 83 of the acts of the thirty-first general assembly, relating to United States levees..... Took effect by publication, March 22, 1907.	1 2 3 4	1984 1986 1985 1985-a
94	An act to amend chapter 68 of the acts of the thirtieth general assembly, and chapter 85 of the acts of the thirty-first general assembly, relating to levees, ditches, drains and water-courses.. Took effect by publication, March 22, 1907.	1 2 3 4 5 6	1989-a2 1989-a3 1989-a6 1989-a11 1989-a49 1989-a50
95	An act to amend section 2, as amended by chapters 84 and 85 of the acts of the thirty-first general assembly, and sections 14, 18 and 19 of chapter 68 of the acts of the thirtieth general assembly, relating to levees, drains, ditches and water-courses, and making the provisions thereof applicable to chapter 2, title X, of the code..... Took effect by publication, April 2, 1907.	1 2 3 4	1989-a2 1989-a14 1989-a18 1989-a51
96	An act to amend section 2022 of the code, relating to cattle guards at private crossings of railways..... Took effect July 4, 1907.		2022
97	An act to repeal section 2026 of the supplement to the code, and chapter 87 of the acts of the thirty-first general assembly, relating to street railways over highways, and to enact substitutes therefor..... Took effect by publication, April 16, 1907.		2026
98	An act to define, regulate and confer rights and powers upon automobile railways, additional to chapter 4, title X, of the code. Took effect by publication, April 6, 1907.		2033-f
99	An act to amend section 2051 of the code, relating to the conditional sale or lease of power house and electrical equipment.... Took effect July 4, 1907.		2051
100	An act to repeal section 2057 of the code, relating to fences constructed by railroad companies, and to enact a substitute therefor Took effect July 4, 1907.		2057
101	An act to amend section 1, of chapter 89, of the acts of the thirty-first general assembly, relating to actions against common carriers..... Took effect July 4, 1907.		2074-a

THIRTY-SECOND GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
102	An act to repeal sections 2076 and 2077 of the code, relating to classification of railroads and passenger rates, and to enact substitutes therefor..... Took effect July 4, 1907.	1 2	2076 2077
103	An act relating to the hours of service of railroad employes..... Took effect July 4, 1907.	1 2	2110-a 2110-b
104	An act relating to terminal facilities of interurban railroads..... Took effect by publication, April 6, 1907.	1-6	2110-c -2110-h
105	An act to provide for the destruction of noxious weeds growing on railroad right of ways..... Took effect July 4, 1907.	1-3	2110-i -2110-k
106	An act to repeal section 2113 of the code, relating to the powers and duties of board of railroad commissioners, and to enact a substitute therefor..... Took effect July 4, 1907.		2113
107	An act to amend section 2116 of the code, relating to the duty of railroads to transport freight..... Took effect by publication, April 5, 1907.		2116
108	An act to enlarge the powers and duties of the board of railroad commissioners Took effect by publication, April 17, 1907.	1-3	2120-a -2120-c
109	An act to regulate the stringing of wires over railroad tracks... Took effect July 4, 1907.	1-7	2120-d -2120-j
110	An act providing for reports and investigations of accidents on railroads Took effect by publication, March 29, 1907.		2120-k
111	An act to repeal sections 2153 and 2155 of the code, relating to joint freight rates, and the power and duties of the board of railroad commissioners, and to enact substitutes therefor..... Took effect by publication, April 2, 1907.	1 2	2153 2155
112	An act to prohibit common carriers of passengers from issuing free tickets, passes and transportation, and discriminating reduced rates Took effect July 4, 1907.	1-6	2157-f -2157-k
113	An act providing for scales and the weighing of coal transported in carload lots by common carriers..... Took effect July 4, 1907.	2-7	2157-l -2157-q
114	An act relating to the reconsignment to a new destination of property forwarded by common carriers..... Took effect July 4, 1907.		2157-r
115	An act to define the duty of common carriers of freight respecting the speed of cars of live stock..... Took effect by publication, April 13, 1907.	1-3	2157-s -2157-u
116	An act to repeal sections 2165 and 2166 of the code, relating to express companies, and to enact substitutes therefor..... Took effect July 4, 1907.	1 2 3-7	2165 2165-a 2165-b -2165-f

THIRTY-SECOND GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
117	An act to amend section 18 of chapter 91 of the acts of thirty-first general assembly, and to repeal section 12 of chapter 77 of the acts of the thirtieth general assembly, and section 14 of chapter 91 of the acts of the thirty-first general assembly, relating to state militia, and to enact substitutes therefor..... Took effect July 4, 1907.	1 2 3 4	2203 2213 2214 2214-a
118	An act to amend section 2270 of the code, relating to legal settlement of insane patients..... Took effect July 4, 1907.		2270
119	An act to amend section 7 of chapter 80 of the acts of the thirtieth general assembly, relating to the commitment and release from hospitals for inebriates..... Took effect by publication, May 9, 1907.		2310-a12
120	An act to repeal chapter 98 of the acts of the thirty-first general assembly, relating to the registration of pedigrees, and to enact a substitute therefor..... Took effect by publication, April 2, 1907.	1 2-6	2341 2341-a -2341-e
121	An act to provide for the payment of a bounty for the destruction of pocket gophers..... Took effect July 4, 1907.	1-3	2348-a -2348-c
122	An act to repeal section 2403 of the code, and 2403 of the supplement to the code, relating to the sale or gift of intoxicating liquors to minors, intoxicated persons, or to persons in the habit of becoming intoxicated, and to enact substitutes therefor..... Took effect by publication, April 13, 1907.	1 2	2403 2403-a
123	An act to regulate the taxation of persons maintaining offices or places of business where intoxicating liquors are held in store, and purchase price collected for the owner thereof..... Took effect July 4, 1907.	1 2	2461-c 2461-d
124	An act relating to the sale of intoxicating liquors near military reservations..... Took effect by publication, April 15, 1907.		2461-e
125	An act to amend sections 2467 and 2468 of the code, relating to fire companies..... Took effect July 4, 1907.	1 2	2467 2468
126	An act to amend section 1 of chapter 85 of the acts of the thirtieth general assembly, relating to salary of commissioner of bureau of labor statistics and his deputy..... Took effect by publication, April 11, 1907.		2477
127	An act to amend section 1 of chapter 85 of the acts of the thirtieth general assembly, relating to the expenses of bureau of labor statistics..... Took effect July 4, 1907.		2477
128	An act to provide for the regulation of employment offices or bureaus, and to provide for the examination of the same..... Took effect July 4, 1907.	1-5	2477-h -2477-l
129	An act to amend section 2483 of the supplement to the code, relating to salaries of mine inspectors..... Took effect July 4, 1907.		2483

THIRTY-SECOND GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
130	An act prohibiting the storage or transportation of powder into coal mines while miners or other employes are working therein. Took effect July 4, 1907.	1-5	2496-a -2496-e
131	An act to require manufacturers and dealers to label white lead, paints, mixed paints and linseed oil, and to repeal sections 2510-a, 2510-b, 2510-c, 2510-d and 2510-e of the supplement to the code.. Effective January 1, 1908.	8 1-9	2510-a 2510-b -2510-i
132	An act to amend chapter 88 of the acts of the thirtieth general assembly, relating to compensation of deputy and assistant dairy commissioners..... Took effect by publication, April 11, 1907.		2515
133	An act to amend sections 2529, 2530 and 2934 of the code, and to repeal sections 2533 and 2538 of the code, relating to the state veterinary surgeon, and to enact substitutes therefor..... Took effect by publication, April 5, 1907.	1 2 3 4 5	2529 2530 2533 2534 2538
134	An act for the protection of mongolian, ring-neck, English and Chinese pheasants..... Took effect July 4, 1907.	1. 2	2563-u 2563-v
135	An act to amend section 5 of chapter 109 of the acts of the thirty-first general assembly, relating to the reporting of deaths by assessors Took effect July 4, 1907.		2575-a15
136	An act to amend section 7 of chapter 109 of the acts of the thirty-first general assembly, relating to the registration of births and deaths Took effect July 4, 1907.		2575-a17
137	An act to repeal section 3 of chapter 101 of the acts of the thirtieth general assembly, and chapter 113 of the acts of the thirty-first general assembly, relating to the state board of health laboratory at Iowa City, and to enact substitutes therefor..... Took effect July 4, 1907.	1 2	2575-a9 2575-a10
138	An act to prohibit and regulate hospitals, institutions and places created for or maintained and used as lying-in or maternity hospitals, or hospitals or places for the reception, care and treatment of women in labor..... Took effect July 4, 1907.	1-8	2575-a20 -2575-a27
139	An act to provide for the examination and regulation of graduate nurses, and to regulate the practice of nursing by graduate nurses Took effect July 4, 1907.	1-8	2575-a28 -2575-a35
140	An act to regulate the transportation of dead bodies, and the practice of embalming, and to provide for the examination and licensing of embalmers..... Took effect July 4, 1907.	1-11	2575-a36 -2575-a46
141	An act to repeal section 2578 of the code, relating to the revocation of physicians' certificates, and to enact a substitute therefor... Took effect July 4, 1907.	1 2 3	2578 2578-a 2578-b
142	An act to repeal section 2593 of the code, relating to the practice of pharmacy, and to enact a substitute therefor..... Took effect July 4 1907.		2593

THIRTY-SECOND GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
143	An act to amend section 2596-a of the supplement to the code, relating to the sale of cocaine, and restricting the sale of certain other drugs..... Took effect July 4, 1907.		2596-a
144	An act to amend section 3 of chapter 116 of the acts of the thirty-first general assembly, relating to the practice of dentistry... Took effect by publication, April 19, 1907.		2600-i
145	An act to amend section 2602 of the code, relating to admission of persons to the soldiers' home..... Took effect July 4, 1907.		2602
146	An act to amend section 2608 of the supplement to the code, relating to soldiers' home at Marshalltown..... Took effect July 4, 1907.		2608
147	An act to amend chapter 120 of the acts of the thirty-first general assembly, relating to the state sanatorium for treatment of tuberculosis Took effect by publication, April 16, 1907.	1-14 2 3 4 5	2727-a75 -2727-a88 2727-a85 2727-a87 2727-a89 2727-a90
148	An act to authorize the state educational board of examiners to issue state certificates to graduates of higher institutions of learning Took effect July 4, 1907.	1-3	2634-f -2634-h
149	An act to authorize the state educational board of examiners to validate teachers' certificates issued in other states..... Took effect July 4, 1907.		2630-c
150	An act to amend section 2771 of the supplement to the code, relating to filling vacancies of school boards..... Took effect by publication, April 5, 1907.		2771
151	An act to amend section 2808 of the supplement to the code, and section 2850 of the code, relating to the permanent school fund, and to repeal sections 2855 of the supplement to the code, and 2809 of the code, and to enact substitutes therefor..... Took effect by publication, April 16, 1907.	1 2 3 4	2855 2809 2808 2850
152	An act to repeal chapter 140 of the acts of the thirty-first general assembly, relating to bonds of school corporations, and to enact a substitute therefor..... Took effect July 4, 1907.	1-5	2812-b -2812-f
153	An act to repeal section 2814 of the code, relating to the acquisition of schoolhouse sites, and to enact a substitute therefor..... Took effect July 4, 1907.		2814
154	An act to amend section 2823-f of the supplement to the code, relating to the enforcement of compulsory education..... Took effect July 4, 1907.		2823-f
155	An act to provide for the consolidation and charge of boundaries of school districts in certain cities of the first class..... Took effect by publication, March 15, 1907.	1-4	2820-e -2820-h
156	An act to repeal sections 2881 of the code, and 2881-f of the supplement to the code, relating to compensation and bond of state librarian and assistants..... Took effect by publication, April 15, 1907.	1 2 3-5	2881 2881-f 2881-g -2881-i

THIRTY-SECOND GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
157	An act to amend chapter 142 of the acts of the thirty-first general assembly, by repealing sections 2 and 5 thereof, relating to preservation of public archives, and to enact substitutes therefor Took effect July 4, 1907.	1 2 3	2881-k 2881-l 2881-n
158	An act to repeal section 2935 of the code, relating to indexes to be kept by county recorders, and to enact a substitute therefor... Took effect July 4, 1907.		2935
159	An act amending title XIV of the code, relating to rights of property, and the conveyance thereof..... Took effect July 4, 1907.	1 2	2924-a 2924-b
160	An act to authorize persons, firms and corporations engaged in the business of storing goods for profit to issue warehouse receipts of the goods so stored; and to regulate the issuance, negotiation and transfer of such receipts, and to repeal section 3129 of the code..... Took effect July 4, 1907.	1-59	3129 3138-a1 -3138-a59
161	An act to amend section 3181 of the code, relating to divorces and marriage of divorced persons..... Took effect July 4, 1907.		3181
162	An act to determine the place of bringing actions against municipal corporations in the state in all counties where terms of the district court are held in more than one place..... Took effect by publication, March 16, 1907.		3504-a
163	An act to amend section 3529 of the supplement to the code, relating to service of original notices upon any person or corporation owning or operating any railway or canal, steamboat, or other river craft, or any telegraph, telephone, stage coach or car line, express company or foreign corporation..... Took effect by publication, March 22, 1907.		3529
164	An act to amend section 3540 of the code, relating to publication of original notices in actions against unknown defendants..... Took effect July 4, 1907.		3540
165	An act to amend section 3656 of the code, relating to the appearance term for certain actions..... Took effect July 4, 1907.		3656
166	An act to amend section 3853 of the code, relating to recovery of costs by successful party..... Took effect July 4, 1907.		3853
167	An act to amend section 3955 of the code, relating to the issuance of an execution when an outstanding execution is lost or destroyed..... Took effect July 4, 1907.		3955
168	An act to amend section 4341 of the code, relating to actions of mandamus..... Took effect July 4, 1907.		4341
169	An act to repeal section 4600 of the code, relating to justices of the peace and constables, and to enact a substitute therefor..... Took effect July 4, 1907.	1-4	4600 -4600-c

THIRTY-SECOND GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
170	An act defining desertion, providing punishment therefor, and permitting a husband or wife to be a witness in such cases..... Took effect by publication, March 28, 1907.	1-6	4775-a -4775-f
171	An act to punish burglary where explosives are used..... Took effect July 4, 1907.		4799-a
172	An act to amend chapter 132 of the acts of the thirtieth general assembly, relating to the unlawful taking of steam or steam heat from the pipes of steam heating companies..... Took effect July 4, 1907.		4852-c
173	An act to define and punish lewd, immoral and lascivious acts... Took effect by publication, March 14, 1907.		4938-a
174	An act to repeal section 4969 of the code, providing for the punishment of cruelty to animals..... Took effect July 4, 1907.		4969
175	An act to define "bucket shop" and "bucket shopping" and making it a crime to maintain and operate the same..... Took effect by publication, April 6, 1907.	1-5	4975-d a4975-h
176	An act to prevent the adulteration, misbranding and imitation of drugs, and to repeal sections 4983, 4986 and 4988 of the code... Took effect July 4, 1907.	1-10	4999-a32 -4999-a41
177	An act to amend sections 7 and 8 of chapter 166 of the acts of the thirty-first general assembly, relating to pure food..... Took effect July 4, 1907.	1 2	4999-a21 4999-a22
178	An act to amend section 8 of chapter 166 of the acts of the thirty-first general assembly, and adding to said chapter, and to repeal section 9 of said chapter, relating to pure food, and to enact a substitute therefor..... Took effect July 4, 1907.	1 2 3	4999-a23 4999 a22 4999-a31
179	An act to amend section 13 of chapter 166 of the acts of the thirty-first general assembly, relating to pure food..... Took effect July 4, 1907.		4999-a27
180	An act to amend section 14 of chapter 166 of the acts of the thirty-first general assembly, relating to the sale of canned goods..... Took effect July 4, 1907.		4999-a28
181	An act to define the relation between employer and employe, with respect to assumption of risk, and to provide what shall constitute notice thereof..... Took effect July 4, 1907.		4999-a3
182	An act to prevent the distributing of samples of drugs and medicine in private or public places..... Took effect July 4, 1907.	1 2	4999-a42 4999-a43
183	An act to prohibit the corrupt influencing of agents, representatives, employes and officers of private corporations, or public officers acting on behalf of a principal, in any business transaction Took effect July 4, 1907.	1 2	5028-n 5028-o

THIRTY-SECOND GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
184	An act to amend section 1 of house file number 14 (being chapter 183 of the acts of the thirty-second general assembly), relating to the corrupt influencing of agents, representatives, employees and officers Took effect July 4, 1907.		5028-o
185	An act to prohibit the use and sale of toy pistols, firecrackers, dynamite caps, and blank cartridges..... Effective January, 1, 1908.	1-3	5028-p -5028-r
186	An act preventing the desecration of memorial day..... Took effect by publication, March 16, 1907.		5040-a
187	An act to amend section 5062 of the code, relating to penalty for combinations, pools, and trusts..... Took effect by publication, April 6, 1907.		5062
188	An act to prohibit any person, company, partnership, association or corporation, engaged in the business of dealing in grain or operating grain elevators, from entering into any contract, trust or pool to fix the prices to be paid for grain, etc..... Took effect July 4, 1907.	1-3	5077-a3 -5077-a51
189	An act relating to agricultural seeds, and concentrated commercial feed stuffs..... Took effect July 4, 1907.	1-19	5077-a6 -5077-a24
190	An act requiring a stamp or label on every ball of binding twine sold or offered for sale within the state..... Took effect July 4, 1907.	1-3	5077-a25 -5077-a27
191	An act to amend sections 5663 of the supplement to the code, relating to the number of guards in the state penitentiaries..... Took effect July 4, 1907.		5663
192	An act relating to the sentence and commitment of persons convicted of crime, and to provide for a system of parole, and to create the necessary officers therefor, defining their powers and duties Took effect by publication, April 3, 1907.	1-21	5718 a4 -5718-a26
193	An act relating to the place of confinement of females who are convicted of felonies and sentenced to confinement in the penitentiary Took effect July 4, 1907.	1	5718-a27
194	An act to authorize the employment of convict labor in the care of the state's property, and for other purposes..... Took effect by publication, April 18, 1907.	1	5718 a28
195	An act to grant officers and guards of the penitentiaries at Anamosa and Fort Madison an annual vacation of fifteen days with pay Took effect July 4, 1907.	1 2	5718-a29 5718-a30
196	An act to amend section 1 of chapter 186 of the acts of the thirtieth general assembly, relating to meandered lakes and lake beds... Took effect by publication, April 5, 1907.		2900 a19
197	An act to amend section 7 of chapter 186 of the acts of the thirtieth general assembly, relating to meandered lakes and lake beds..... Took effect by publication, March 2, 1907.		2900-a25

THIRTY-SECOND GENERAL ASSEMBLY—CONTINUED.

Chap.	TITLE—TIME OF TAKING EFFECT.	SECS.	SECS. OF THIS WORK
221	An act to provide for the compilation and publication of the laws of the thirtieth, thirty-first and thirty-second general assemblies, and the laws as they appear in the code supplement..... Took effect by publication, February 21, 1907.	pp.	1, 2
247	An act legalizing the making of certain plats by county auditors, and the recording of the same by county recorders..... Took effect by publication, March 2, 1907.	1-3	924-a -924-c
248	An act to legalize conveyances of real estate by executors, administrators and guardians in this or foreign states..... Took effect July 4, 1907.		2 942-
249	An act to legalize certain acknowledgments and administration of oaths by mayors and notaries public..... Took effect by publication, March 4, 1907.		2942-k
250	An act to legalize the acts of certain homes for destitute or unfortunate women, orphaned or abandoned children, and the amendment of articles of incorporation thereof..... Took effect by publication, April 18, 1907.	1 2 3	1642-a 1642-b 1642-c

A TABLE

Showing sections and parts of the Code of 1897 that have been amended, added to or repealed, and substitute enactments passed by the twenty-seventh, twenty-eighth, twenty-ninth, thirtieth, thirty-first and thirty-second general assemblies; also showing sections and parts of Code Supplement of 1902 that have been amended, added to or repealed, and substitute enactments passed by the thirtieth, thirty-first and thirty-second general assemblies, giving the chapter of the acts of the general assembly where the same appear. The letter S, following sections, denotes Code Supplement of 1902.

Provisions relating to the Code.

- 18: Amd. 31 G. A. c. 1.
 19: Amd. 31 G. A. c. 1.
 27: 27 G. A. c. 1; 28 G. A. c. 1.
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- 36: Amd. 32 G. A. c. 1.
 41: Rep. and Subst. 27 G. A. c. 2.
 41-a. S: Rep. and Subst. 30 G. A. c. 1.
 55: Amd. 30 G. A. c. 2.
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- 65: Amd. 29 G. A. c. 1.
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 68: Amd. 32 G. A. c. 13.
 70: Amd. 31 G. A. c. 3.
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 87: Amd. 32 G. A. c. 2.
 88: Amd. 31 G. A. c. 4.
 89: Par. 8: Amd. 28 G. A. c. 2.
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- Tit. II, c. 4: 29 G. A. c. 3; G. A. c. 4.**
- 104: Amd. 27 G. A. c. 3.
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- Tit. II, c. 5: 29 G. A. c. 8; 30 G. A. c. 6.**
- 113: Amd. 30 G. A. c. 3.
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- 136: Amd. 28 G. A. c. 5; 29 G. A. c. 7.
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 165: Amd. 29 G. A. cc. 10, 11.
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 168S: Amd. 32 G. A. c. 6.
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- 1347-a. S: Rep. and Subst. 30 G. A. c. 48; Rep. and Subst. 32 G. A. c. 59.
- 1348: Amd. 28 G. A. c. 46.
- 1360: Amd. 27 G. A. c. 30.
- 1361: Amd. 27 G. A. c. 30.
- 1371: Amd. 27 G. A. c. 33.
- 1372: Amd. 27 G. A. c. 30.
- 1373: Amd. 32 G. A. c. 60.
- 1378: Amd. 32 G. A. c. 5.
- 1380: Rep. and Subst. 27 G. A. c. 34.
- 1382: Amd. 32 G. A. c. 5.
- 1383: Amd. 30 G. A. c. 50.
- 1385: Rep. and Subst. 28 G. A. c. 47.
- 1389: Rep. and Subst. 28 G. A. c. 48.
- 1391: Rep. and Subst. 31 G. A. c. 51.
- 1400: Amd. 29 G. A. c. 59.
- Tit. VII, c. 2: 28 G. A. c. 50; 32 G. A. c. 62.
- 1407: Amd. 31 G. A. c. 53.
- 1419: Amd. 30 G. A. c. 2.
- 1432: Amd. 32 G. A. c. 61.
- 1433: Rep. and Subst. 32 G. A. c. 61.
- 1436: Amd. 27 G. A. c. 35.
- 1441: Amd. 30 G. A. c. 2.
- 1457: Amd. 27 G. A. c. 36.
- 1460: Rep. 32 G. A. c. 63.
- 1467: Amd. 30 G. A. c. 51; 31 G. A. cc. 54, 55.
- Tit. VII, c. 4: 27 G. A. c. 37; 28 G. A. c. 51; 29 G. A. c. 63.
- 1476: Amd. 27 G. A. c. 37.
- Tit. VIII, c. 1: 32 G. A. cc. 65, 66.
- 1483: Rep. and Subst. 32 G. A. c. 64.
- 1495: Amd. 30 G. A. c. 2.
- 1528: Amd. 29 G. A. cc. 53, 64.
- 1530: Amd. 29 G. A. c. 65.
- 1530S: Amd. 31 G. A. c. 56; 32 G. A. c. 67.
- 1532: Rep. and Subst. 29 G. A. c. 53.
- 1533: Amd. 29 G. A. cc. 53, 64.
- 1533S: Amd. 30 G. A. c. 50; 31 G. A. cc. 57, 58.
- 1538: Amd. 31 G. A. c. 59.
- 1540: Rep. and Subst. 29 G. A. c. 53.
- 1540-a. S: Amd. 31 G. A. c. 58.
- 1541: Rep. 29 G. A. c. 53.
- 1542: Amd. 29 G. A. c. 53; Rep. and Subst. 29 G. A. c. 64.
- 1545: Amd. 29 G. A. c. 53.
- 1546: Rep. 29 G. A. c. 53.
- 1550: Amd. 31 G. A. c. 60.
- 1551: Amd. 29 G. A. c. 53.
- 1553: Rep. 29 G. A. c. 53.
- 1554: Amd. 29 G. A. cc. 53, 64.
- 1560: Amd. 28 G. A. c. 52.
- 1562: Amd. 27 G. A. c. 39.
- Tit. VIII, c. 2: 27 G. A. c. 37; 28 G. A. c. 139; 30 G. A. c. 53; 31 G. A. cc. 62, 63; 32 G. A. c. 69.
- 1563: Amd. 28 G. A. c. 53.
- 1566-a. S: Amd. 31 G. A. c. 61.
- 1567: Rep. 29 G. A. c. 53.
- 1570: Amd. 28 G. A. c. 54.
- 1571: Amd. 28 G. A. c. 55.
- 1571S: Amd. 30 G. A. c. 52.
- Tit. IX: 30 G. A. c. 66.
- Tit. IX, c. 1: 30 G. A. cc. 49, 55; 32 G. A. cc. 71, 72, 73, 74.
- 1610: Amd. 27 G. A. cc. 40, 41; 29 G. A. c. 66.
- 1610S: Amd. 32 G. A. c. 70.
- 1612: Amd. 31 G. A. c. 64.
- 1613: Amd. 29 G. A. c. 67.
- 1618: Amd. 28 G. A. c. 56; 29 G. A. c. 66, See 31 G. A. c. 65.
- 1618:S: Amd. 30 G. A. c. 2.
- 1627: Amd. 28 G. A. c. 57.
- 1641: Rep. and Subst. 30 G. A. c. 54.
- 1653: Rep. 28 G. A. c. 58.
- 1654: Rep. and Subst. 27 G. A. c. 42; Rep. 28 G. A. c. 58.
- 1655: Rep. 28 G. A. c. 58.
- 1656: Rep. 28 G. A. c. 58.
- 1657: Rep. 28 G. A. c. 58.
- 1657-d. S: Amd. 31 G. A. c. 66.
- 1657-n. S: Amd. 31 G. A. c. 67; 32 G. A. c. 70.
- 1658: Amd. 28 G. A. c. 59.
- 1659: Amd. 28 G. A. c. 59.
- 1660: Amd. 32 G. A. c. 17.
- 1661: Rep. and Subst. 27 G. A. c. 43; Amd. 28 G. A. c. 59.
- 1672: Amd. 29 G. A. c. 68.
- 1673: Amd. 29 G. A. c. 68.
- 1674: Rep. 28 G. A. c. 58.
- 1675: Amd. 29 G. A. c. 69.
- 1679: Amd. 28 G. A. c. 58.
- 1681: Amd. 28 G. A. c. 58.
- 1682: Rep. 28 G. A. c. 58.
- 1683: Rep. 28 G. A. c. 58.
- Tit. IX, c. 4: 29 G. A. c. 73; 30 G. A. cc. 56, 57, 58; 32 G. A. cc. 74, 76, 77, 79.
- 1689: Amd. 31 G. A. cc. 68, 84.
- 1709: Amd. 28 G. A. c. 60; 29 G. A. cc. 70, 71.
- 1709S: Par. I: Amd. 31 G. A. c. 72.
Par. 4: Amd. 31 G. A. c. 69.
Par. 5: Amd. 31 G. A. cc. 70, 71.
Par. 7: Amd. 31 G. A. c. 72.
- 1710: Amd. 28 G. A. c. 61; 29 G. A. c. 72.
- 1710S: Rep. Subst. 31 G. A. c. 71; Amd. 31 G. A. c. 70.
- 1720: Rep. and Subst. 28 G. A. c. 62.
- 1737: Rep. and Subst. 31 G. A. c. 73.

- 1743: Amd. 28 G. A. cc. 63, 64.
 1743S: Amd. 32 G. A. c. 75.
 1744: Amd. 27 G. A. c. 44.
 1752: Amd. 27 G. A. c. 45.
 Tit. IX, c. 5: 30 G. A. cc. 56, 57, 58; 32 G. A. c. 77; Rep. and Subst. 32 G. A. c. 80.
 1759: Amd. 29 G. A. c. 74.
 1759S: Rep. and Subst. 32 G. A. c. 80.
 1760: Rep. and Subst. 32 G. A. c. 80.
 1761: Rep. and Subst. 32 G. A. c. 80.
 1762: Rep. and Subst. 32 G. A. c. 80.
 1763: Rep. and Subst. 32 G. A. c. 80.
 1764: Rep. and Subst. 32 G. A. c. 80.
 1765: Rep. and Subst. 32 G. A. c. 80.
 1766: Rep. and Subst. 32 G. A. c. 80.
 1767: Rep. and Subst. 32 G. A. c. 80.
 Tit. IX, c. 6: 30 G. A. cc. 56, 57, 58, 59; 31 G. A. c. 74; 32 G. A. cc. 74, 77.
 1768: Amd. 32 G. A. c. 81.
 1771: Amd. 29 G. A. c. 75.
 1782: Amd. 27 G. A. c. 46.
 Tit. IX, c. 7: 28 G. A. c. 65; 30 G. A. cc. 56, 57, 58; 32 G. A. cc. 74, 77, 83.
 1784: Amd. 28 G. A. c. 65; 31 G. A. c. 75.
 1784S: Rep. and Subst. 31 G. A. c. 76.
 1784-a. S: Rep. 31 G. A. c. 76.
 1784-b. S: Rep. 31 G. A. c. 76.
 1784-c. S: Rep. 31 G. A. c. 76.
 1784-d. S: Rep. 31 G. A. c. 76.
 1784-e. S: Rep. 31 G. A. c. 76.
 1784-f. S: Rep. 31 G. A. c. 76.
 1784-g. S: Rep. 31 G. A. c. 76.
 1784-h. S: Rep. 31 G. A. c. 76.
 1784-i. S: Rep. 31 G. A. c. 76.
 1784-j. S: Rep. 31 G. A. c. 76.
 1784-k. S: Rep. 31 G. A. c. 76.
 1784-l. S: Rep. 31 G. A. c. 76.
 1784-m. S: Rep. 31 G. A. c. 76.
 1784-n. S: Rep. 31 G. A. c. 76.
 1784-o. S: Rep. 31 G. A. c. 76.
 1788: Amd. 30 G. A. c. 60.
 1794: Amd. 32 G. A. c. 82.
 Tit. IX, c. 8: 30 G. A. cc. 56, 57, 58; 32 G. A. cc. 74, 84, 85.
 1806: Amd. 28 G. A. c. 66.
 1806S: Rep. and Subst. 31 G. A. c. 77.
 Tit. IX, c. 9: 30 G. A. cc. 61, 63; 32 G. A. cc. 86, 87, 88, 89.
 1832: Amd. 27 G. A. c. 47.
 1832S: Rep. and Subst. 30 G. A. c. 62.
 Tit. IX, c. 10: 28 G. A. c. 67.
 1842: Amd. 30 G. A. c. 2.
 1843: Amd. 30 G. A. c. 2.
 1848: Amd. 28 G. A. c. 67.
 1850: Amd. 31 G. A. c. 78.
 1852: Amd. 28 G. A. c. 67.
 1855: Rep. 32 G. A. c. 90.
 1864: Amd. 31 G. A. c. 9.
 1869: Amd. 31 G. A. c. 70; Rep. and Subst. 32 G. A. c. 91.
 1870: Amd. 29 G. A. c. 76.
 1871: Amd. 31 G. A. c. 80.
 1873: Amd. 32 G. A. c. 92.
 1875: Rep. and Subst. 30 G. A. c. 64; Amd. 31 G. A. c. 81.
 1876: Rep. and Subst. 30 G. A. c. 64; Amd. 31 G. A. c. 81.
 1889: Amd. 28 G. A. c. 68; 30 G. A. c. 65.
 Tit. IX, c. 13: 28 G. A. c. 69; 29 G. A. c. 77.
 1898: Amd. 27 G. A. c. 48; 28 G. A. c. 69.
 Tit. X, c. 2: 30 G. A. cc. 68, 69, 70; 31 G. A. cc. 85, 86; 32 G. A. cc. 93, 94, 95.
 1940: Amd. 31 G. A. c. 9.
 1944: Amd. 31 G. A. c. 9.
 1946: Amd. 29 G. A. c. 78; 30 G. A. c. 67.
 1948: Amd. 29 G. A. c. 78.
 1951: Amd. 29 G. A. c. 78.
 1968: Amd. 31 G. A. c. 82.
 1969: Amd. 31 G. A. c. 82.
 1971: Amd. 31 G. A. c. 82.
 1972: Amd. 31 G. A. c. 82.
 1976: Rep. and Subst. 31 G. A. c. 83.
 1977: Amd. 31 G. A. c. 83.
 1979: Rep. and Subst. 31 G. A. c. 83.
 1981: Amd. 31 G. A. c. 9.
 1982: Rep. and Subst. 31 G. A. c. 83.
 1984: Rep. and Subst. 31 G. A. c. 83; Amd. 32 G. A. c. 93.
 1985: Amd. 32 G. A. c. 93.
 1986: Amd. 31 G. A. c. 83; 32 G. A. c. 93.
 Tit. X, c. 4: 29 G. A. cc. 80, 83; 30 G. A. cc. 71, 72, 73; 32 G. A. c. 98.
 1998: Amd. 28 G. A. c. 70; 29 G. A. c. 79.
 2003: Amd. 31 G. A. c. 9.
 2022: Amd. 32 G. A. c. 96.
 2026: Amd. 29 G. A. c. 81; 31 G. A. c. 87; Rep. and Subst. 32 G. A. c. 97.
 2028: Amd. 29 G. A. c. 82.
 Tit. X, c. 5: 27 G. A. c. 50; 29 G. A. cc. 81, 84, 87; 32 G. A. cc. 103, 104, 105.
 2051: Amd. 32 G. A. c. 99.
 2052: Amd. 31 G. A. c. 88.
 2057: Rep. and Subst. 32 G. A. c. 100.
 2071: Amd. 27 G. A. c. 49.
 2074: See 30 G. A. c. 74; Rep. and Subst. 31 G. A. c. 89; Amd. 32 G. A. c. 101.
 2076: Rep. and Subst. 32 G. A. c. 102.
 2077: Rep. and Subst. 32 G. A. c. 102.
 2078: Rep. and Subst. 30 G. A. c. 75.
 2080: See 27 G. A. c. 50.
 2083: See 27 G. A. c. 51.
 2084: Amd. 29 G. A. c. 85.
 2085: Ext. 29 G. A. c. 85.
 2086: Ext. 29 G. A. c. 85; Amd. 29 G. A. c. 86.
 2087: Ext. 29 G. A. c. 85.
 2088: Ext. 29 G. A. c. 85.
 2089: Ext. 29 G. A. c. 85.
 2090: Ext. 29 G. A. c. 85.
 2091: Ext. 29 G. A. c. 85.
 2093: Amd. 31 G. A. c. 9.
 Tit. X, c. 6: 32 G. A. cc. 108, 109, 110.
 2113: Rep. and Subst. 32 G. A. c. 106.
 2116: Amd. 32 G. A. c. 107.
 2121: Amd. 32 G. A. c. 2.
 Tit. X, c. 7: 28 G. A. c. 71; 30 G. A. c. 76; 31 G. A. c. 90; 32 G. A. cc. 112, 113, 114, 115.
 2153: Rep. and Subst. 32 G. A. c. 111.
 2155: Rep. and Subst. 32 G. A. c. 111.
 2165: Rep. and Subst. 32 G. A. c. 116.
 2166: Rep. and Subst. 32 G. A. c. 116.

- Tit. XI, c. 1: 30 G. A. c. 77.
 Tit. XI, c. 2: 29 G. A. c. 90.
 2168: Rep. and Subst. 29 G. A. c. 88.
 2169: Rep. and Subst. 29 G. A. c. 88.
 2169-aS: Rep. and Subst. 30 G. A. c. 77;
 Amd. 31 G. A. c. 91.
 2173: Amd. 28 G. A. c. 72; Rep. and
 Subst. 29 G. A. c. 88.
 2173-aS: Rep. and Subst. 30 G. A. c. 77;
 Amd. 31 G. A. c. 91.
 2174: Amd. G. A. c. 88.
 2174S: Rep. and Subst. 31 G. A. c. 91.
 2175: Amd. 29 G. A. c. 88.
 2175S: Rep. and Subst. 30 G. A. c. 77;
 Amd. 31 G. A. c. 91.
 2176: Rep. and Subst. 28 G. A. c. 72.
 2176-aS: Rep. and Subst. 30 G. A. c. 77;
 Rep. and Subst. 31 G. A. c. 91.
 2178: Amd. 28 G. A. c. 72.
 2178S: Rep. and Subst. 30 G. A. c. 77;
 Rep. and Subst. 31 G. A. c. 91.
 2179: Rep. and Subst. 28 G. A. c. 72; 29
 G. A. c. 88.
 2179-a. S: Rep. and Subst. 30 G. A. c. 77.
 2180: Amd. 28 G. A. c. 72.
 2181: Rep. and Subst. 28 G. A. c. 72;
 Amd. 29 G. A. c. 88.
 2181-aS: Rep. and Subst. 30 G. A. c. 77;
 Rep. and Subst. 31 G. A. c. 91.
 2188: Rep. and Subst. 30 G. A. c. 77.
 2184: Rep. and Subst. 30 G. A. c. 77;
 Amd. 31 G. A. c. 91.
 2188: Rep. and Subst. 30 G. A. c. 77.
 2189: Rep. 31 G. A. c. 91.
 2190: Rep. and Subst. 31 G. A. c. 91.
 2192: Rep. and Subst. 31 G. A. c. 91.
 2192: Amd. 31 G. A. c. 91.
 2199: Amd. 29 G. A. c. 88.
 2201: Amd. 31 G. A. c. 91.
 2203: Amd. 28 G. A. c. 72.
 2203S: Rep. and Subst. 31 G. A. c. 91.
 2204: Amd. 29 G. A. c. 89.
 2204S: Rep. and Subst. 31 G. A. c. 91.
 2211: Rep. and Subst. 28 G. A. c. 72.
 2211S: Amd. 31 G. A. c. 91.
 2212: Amd. 28 G. A. c. 72.
 2212S: Rep. and Subst. 30 G. A. c. 77;
 Amd. 31 G. A. c. 91.
 2213: Amd. 28 G. A. c. 73.
 2213S: Rep. and Subst. 30 G. A. c. 77;
 Rep. and Subst. 32 G. A. c. 117.
 2214: Amd. 29 G. A. c. 89.
 2214S: Rep. and Subst. 30 G. A. c. 77;
 Amd. 31 G. A. c. 91; 32 G. A. c.
 117.
 Tit. XII: 27 G. A. cc. 52, 53; 28 G. A.
 c. 93; 31 G. A. cc. 35, 120.
 Tit. XII, c. 2: 28 G. A. c. 144; 29 G. A.
 c. 93; 30 G. A. c. 78.
 Tit. XII, c. 2-a. S: 30 G. A. c. 80; 31
 G. A. cc. 95, 96, 97.
 2253: Rep. and Subst. 29 G. A. c. 91.
 2267: Amd. 29 G. A. c. 92.
 2270: Amd. 32 G. A. c. 113.
 2283: Amd. 31 G. A. c. 92.
 2287: Amd. 30 G. A. c. 79; Rep. and
 Subst. 31 G. A. c. 93.
 2291: Rep. and Subst. 27 G. A. c. 54; 28
 G. A. c. 140.
 2292: Rep. and Subst. 31 G. A. c. 94.
 2308: Amd. 27 G. A. c. 55.
 2340: Amd. 30 G. A. c. 81.
 2341: Rep. and Subst. 31 G. A. c. 98;
 Rep. and Subst. 32 G. A. c. 120.
 2342: Rep. and Subst. 31 G. A. c. 98;
 Rep. and Subst. 32 G. A. c. 120.
 2348: See 32 G. A. c. 121.
 2359: Amd. 31 G. A. c. 9.
 2372: Amd. 31 G. A. c. 9.
 2374: Amd. 31 G. A. c. 9.
 Tit. XII, c. 6: 30 G. A. c. 84; 32 G. A.
 cc. 123, 124.
 2382: Amd. 28 G. A. c. 74.
 2386: Amd. 27 G. A. c. 56.
 2388: Amd. 30 G. A. c. 2.
 2390: Amd. 28 G. A. c. 75.
 2392: Amd. 27 G. A. c. 57.
 2393: Amd. 28 G. A. c. 75.
 2400: Amd. 27 G. A. c. 58.
 2401: Amd. 28 G. A. c. 76.
 2403: Amd. 28 G. A. c. 77; Rep. and
 Subst. 32 G. A. c. 122.
 2403S: Rep. and Subst. 32 G. A. c. 122.
 2406: Amd. 30 G. A. c. 82.
 2410: Amd. 29 G. A. c. 94.
 2433: Amd. 29 G. A. c. 95.
 2435: Amd. 29 G. A. c. 95.
 2437: Amd. 30 G. A. c. 83.
 2438: Amd. 30 G. A. c. 83.
 2439: Amd. 31 G. A. c. 99.
 2448: Amd. 29 G. A. c. 96.
 Par. 2: Amd. 31 G. A. c. 100.
 2450: Amd. 31 G. A. c. 101.
 2451: Amd. 28 G. A. c. 78.
 2467: Amd. 32 G. A. c. 125.
 2468: Amd. 32 G. A. c. 125.
 Tit. XII, c. 8: 31 G. A. c. 103; 32 G. A. c.
 128.
 2469: Amd. 31 G. A. c. 102.
 2470: Amd. 29 G. A. c. 97.
 2470S: Amd. 31 G. A. c. 102.
 2471: Amd. 29 G. A. c. 97.
 2472: Amd. 29 G. A. c. 97.
 2477: Rep. and Subst. 30 G. A. c. 85;
 Amd. 32 G. A. cc. 126, 127.
 Tit. XII, c. 9: 28 G. A. c. 82; 29 G. A. cc.
 98, 100; 32 G. A. c. 130.
 2479: Rep. and Subst. 29 G. A. c. 98.
 2479-a. S: Amd. 30 G. A. c. 86.
 2482: Amd. 29 G. A. c. 99.
 2483: Amd. 28 G. A. c. 79.
 2483S: Amd. 32 G. A. c. 129.
 2488: Amd. 27 G. A. c. 59.
 2490: Amd. 28 G. A. cc. 80, 81.
 2494: Amd. 27 G. A. c. 60.
 2495: Rep. and Subst. 27 G. A. c. 60.
 2500: Rep. and Subst. 31 G. A. c. 104.
 2501: Rep. and Subst. 31 G. A. c. 104.
 2502: Rep. and Subst. 31 G. A. c. 104.
 Tit. XII, c. 11: Rep. and Subst. 30 G. A.
 c. 87; Amd. 31 G. A. c. 106.
 2503: Amd. 27 G. A. c. 61.
 2503S: Rep. and Subst. 30 G. A. c. 87;
 Amd. 31 G. A. c. 105.
 2504: Rep. and Subst. 30 G. A. c. 87.
 2505: Rep. and Subst. 30 G. A. c. 87.
 2506: Rep. and Subst. 30 G. A. c. 87.
 2507: Rep. and Subst. 30 G. A. c. 87.

- 2508: Amd. 27 G. A. c. 62; 28 G. A. c. 83; 29 G. A. c. 101; Rep. and Subst. 30 G. A. c. 87.
- 2508S: Rep. and Subst. 30 G. A. c. 87.
- 2508-a. S: Rep. and Subst. 30 G. A. c. 87.
- 2509: Rep. and Subst. 30 G. A. c. 87.
- 2510: Rep. and Subst. 30 G. A. c. 87; Amd. 31 G. A. c. 105.
- 2510-a. S: Rep. 32 G. A. c. 131.
- 2510-b. S: Rep. 32 G. A. c. 131.
- 2510-c. S: Rep. 32 G. A. c. 131.
- 2510-d. S: Rep. 32 G. A. c. 131.
- 2510-e. S: Rep. 32 G. A. c. 131.
- 2512: Amd. 28 G. A. c. 84.
- 2513: Amd. 28 G. A. c. 84.
- 2514: Amd. 28 G. A. c. 84.
- Tit. XII, c. 13: 31 G. A. c. 107.
- 2515: Amd. 28 G. A. c. 85.
- 2515S: Amd. 30 G. A. c. 88; 32 G. A. c. 132.
- 2522: Amd. 29 G. A. c. 102.
- Tit. XII, c. 14: 28 G. A. c. 93.
- 2529: Amd. 32 G. A. c. 133.
- 2530: Amd. 32 G. A. c. 133.
- 2533: Rep. and Subst. 32 G. A. c. 133.
- 2534: Amd. 32 G. A. c. 133.
- 2536: Amd. 27 G. A. c. 63.
- 2536S: 30 G. A. c. 89.
- 2538: Rep. and Subst. 32 G. A. c. 133.
- 2538-i. S: Amd. 30 G. A. c. 90.
- 2538-j. S: Amd. 30 G. A. c. 91.
- 2538-p. S: Amd. 30 G. A. c. 91.
- Tit. XII, c. 15: 27 G. A. c. 65; 28 G. A. c. 86, 87; 29 G. A. c. 103; 30 G. A. c. 96; 31 G. A. c. 108; 32 G. A. c. 134.
- 2539: Amd. 27 G. A. c. 64; 29 G. A. c. 103.
- 2540: Amd. 27 G. A. c. 64; 29 G. A. c. 103.
- 2540S: Amd. 30 G. A. cc. 92, 93.
- 2546: Amd. 29 G. A. c. 103.
- 2546S: 30 G. A. c. 94.
- 2547: Amd. 29 G. A. c. 104.
- 2551: Amd. 27 G. A. c. 66; 29 G. A. c. 103; 30 G. A. c. 92.
- 2552: Amd. 30 G. A. c. 95.
- 2556: Amd. 29 G. A. c. 103.
- 2559: Amd. 27 G. A. c. 64.
- 2561: Amd. 29 G. A. c. 103.
- Tit. XII, c. 16: 29 G. A. c. 108; 30 G. A. cc. 99, 100, 101; 31 G. A. cc. 109, 113; 32 G. A. cc. 138, 139, 140.
- 2564: Amd. 27 G. A. c. 67; 28 G. A. c. 88; 30 G. A. c. 97.
- 2566: Rep. 31 G. A. c. 109.
- 2567: Rep. and Subst. 31 G. A. c. 109; Amd. 31 G. A. c. 110.
- 2570: Rep. and Subst. 29 G. A. c. 105.
- 2570-a. S: Amd. 30 G. A. c. 98; Rep. and Subst. 31 G. A. c. 111.
- 2570-b. S: Rep. 30 G. A. c. 98; 31 G. A. c. 111.
- 2571: Amd. 29 G. A. c. 106.
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- 2578: Rep. and Subst. 32 G. A. c. 141.
- 2581: Amd. 29 G. A. c. 109.
- 2582: Amd. 28 G. A. c. 89.
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- 2606: Amd. 31 G. A. c. 119.
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- 2608: Amd. 27 G. A. c. 72; 29 G. A. c. 113.
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Showing where all general legalizing acts of conveyances may be found.

- AN ACT relating to the acknowledgment and recording of deeds in certain cases, and rendering valid the acknowledgment of deeds and instruments in writing. 13 G. A., Ch. 160. Took effect by publication April 28, 1870.
- AN ACT concerning acknowledgments of deeds and other instruments in writing, executed in foreign countries. (The same legalized.) 14 G. A., Ch. 32. Took effect by publication April 9, 1872.
- AN ACT providing for the acknowledgment and recording of deeds in certain cases, and rendering valid the acknowledgments of deeds and instruments in writing. (Deeds executed according to laws of state where executed and the record thereof legalized. Also all acknowledgments of deeds and instruments in writing duly recorded, legalized.) 14 G. A., Ch. 110. Took effect by publication April 30, 1872.
- AN ACT to legalize the acknowledgments of deeds by deputy clerks of court, county auditors and deputy county auditors. 17 G. A., Ch. 164. Took effect July 4, 1878.
- AN ACT to legalize acknowledgments by county auditors, deputy county auditors, and deputy clerks of the district court. 18 G. A., Ch. 103. Took effect by publication March 27, 1880.
- AN ACT relating to conveyances of real estate by foreign executors and trustees, and to amend section 2352 of the Code of Iowa. (And legalizing all conveyances heretofore made by such officers in certain cases.) 18 G. A., Ch. 162. Took effect by publication April 7, 1880.
- AN ACT to legalize deeds by counties of swamp and other lands owned and conveyed by such counties. 18 G. A., Ch. 180. Took effect July 4, 1880.
- AN ACT legalizing conveyances. (Relates to all deeds, mortgages and conveyances made, filed, recorded and proved according to laws of the state, territory or country where acknowledged and proved.) 20 G. A., Ch. 203. Took effect July 4, 1884.
- AN ACT to legalize certain orders and judgments of circuit courts and judges in probate matters. (Relates to hearings, orders and proceedings had outside of the particular county, but within the judicial circuit.) 21 G. A. Ch. 40. Took effect by publication April 1, 1886.
- AN ACT to legalize acknowledgments by county auditors and deputy county auditors in the state of Iowa. (Relates to acknowledgments of school fund mortgages and contracts.) 21 G. A., Ch. 163. Took effect by publication April 17, 1886.
- AN ACT to legalize conveyances of real property by executors or trustees under foreign wills. 23 G. A., Ch. 38. Took effect July 4, 1890.
- AN ACT to amend section 1967 of the Code of 1873, relative to defective acknowledgments of deeds, mortgages and other instruments in writing. (It strikes out the words, "thirteenth day of April, 1872," and inserts in lieu thereof the following, "first day of February, 1892.") 24 G. A., Ch. 42. Took effect July 4, 1892.
- AN ACT to amend section 1967 of the Code of Iowa, of 1873, as amended by chapter 42 of the acts of the 24th General Assembly. (It strikes out the "first day of February, 1892," and inserts in lieu thereof the following, "the first day of March, 1894.") 25 G. A., Ch. 49. Took effect by publication May 5, 1894.
- AN ACT to repeal chapter 103 of the acts of the 21st General Assembly of the state of Iowa, relating to release of judgments, mortgages and deeds of trust, by administrators, executors and guardians in other states and countries and to enact a substitute therefor. (Legalizes all releases and discharges of record of any judgment, mortgage, deed of trust heretofore made.) 25 G. A., Ch. 51. Took effect July 4, 1894.

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- AN ACT relating to certain additional justices of the peace and constables, legalizing their official acts and the official acts of canvassing boards with reference thereto. 26 G. A., Ch. 217. Took effect by publication April 17, 1896.
- AN ACT to legalize acknowledgments of instruments in writing heretofore taken by notaries public. 26 G. A., Ch. 23. (Ext. Sess.) Took effect by publication February 27, 1897.
- AN ACT to legalize acknowledgments taken and certified according to the form and provisions of the Code of 1873, and by the officers therein authorized to take and certify acknowledgments. 27 G. A., Ch. 165. Took effect by publication April 13, 1898.
- AN ACT to legalize acknowledgments of deeds and conveyances. (Relates to acknowledgments taken by notaries who were at the time an officer or stockholder in a corporation interested in such instrument.) 27 G. A., Ch. 166. Took effect July 4, 1898.
- AN ACT to legalize conveyances of real property by executors or trustees under foreign wills. 27 G. A., Ch. 182. Took effect July 4, 1898.
- AN ACT granting the right to corporations organized under the laws of a foreign country, and corporations organized under the laws of this country, one-half of the stock of which is owned and controlled by non-resident aliens, to hold and dispose of real property, and to legalize certain contracts and conveyances of such corporations. (Amendatory of chapter 1, title XIV of the Code, relating to rights of aliens.) 28 G. A., Ch. 117. Took effect by publication March 16, 1900.
- AN ACT to validate certain conveyances of real estate in which the husband or wife conveyed the inchoate right of dower of the other spouse. 29 G. A., Ch. 237. Took effect by publication April 2, 1902.
- AN ACT to legalize certain instruments in writing which were defectively acknowledged. (Relates to instruments where the acknowledgment is defective in form.) 29 G. A., Ch. 249. Took effect July 4, 1902.
- AN ACT to amend section seven hundred twenty-eight (728) and section seven hundred thirty (730) of the Code, relating to library trustees and library treasurer, and to legalize the maintenance and control under joint ownership and control of cities and towns and institutions of learning. 30 G. A., Ch. 24. Took effect July 4, 1904.
- AN ACT to legalize acknowledgments of instruments in writing heretofore taken by notaries public. (Additional to section twenty-nine hundred and forty-two (2942) of the Code.) 31 G. A., Ch. 146. Took effect by publication March 23, 1906.
- AN ACT to legalize the official acts of certain persons acting as notaries public. (Relates to acts done after July 4, 1903, before qualification.) 31 G. A., Ch. 223. Took effect July 4, 1903.
- AN ACT to legalize certain acknowledgments and administrations of oaths. (Relates to acknowledgments taken by mayors, and notaries after July 4, 1906, and before qualification.) 32 G. A., Ch. 249. Took effect by publication, March 14, 1907.
- AN ACT to legalize conveyances of real estate by executors, administrators, and guardians in this or foreign states. 32 G. A., Ch. 248. Took effect July 4, 1907.

TABLE OF CORRESPONDING SECTIONS

In the fore part of McClain's Code of 1888 will be found a table of corresponding sections based on the Code of 1851 with the Code of 1873; also a table based on the Revision of 1860 with the Code of 1873. In the fore part of the third volume of McClain's Digest will be found a table based on the Code of 1873 with the Code of 1897.

The following table of consecutive sections of the Code of 1897 and Code Supplement of 1907 shows the corresponding sections of McClain's Code of 1888, the Code of 1873, the Revision of 1860, the Code of 1851, and chapter of the Statutes of 1843. The table also gives the Session Laws of the general assemblies since 1860, by number, chapter and section, enacting or amending the law. The Statutes of 1843, not being sectionized, reference to it is made to the chapter where corresponding or kindred matter is found.

The Revision of 1860 contains the laws of the first to eighth general assemblies, inclusive; the Code of 1873, the ninth to fourteenth, inclusive; McClain's Code of 1888, the fifteenth to twenty-second, inclusive; the Code of 1897, the twenty-third to twenty-sixth, inclusive; the Supplement of 1902, the twenty-seventh to twenty-ninth, inclusive, and the Supplement of 1907, the twenty-seventh to thirty-second, inclusive.

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6	6	6	14	5		
7	7	7	15	6		
8	8	8	4	7		
9	9	9	5	8		
10	10	10	7	10		
11	11	11	6	9		
12	12	12	18	11		
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16	16					15-3-4
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48-Par. 24		45	4124			
48-Par. 25		45	4123			
49	50-52	46-8	30-2	27-9		
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51	54	50	34	31, 2514		
52	51	51	35	32		
53	56	52	36	33		
54	57	53	38	35		
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56	60					19-7-1, 16-144-2
57	61					16-144-3
58	63					19-7-2
59	62					16-144-4
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64	69	60	45	41		
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66	70, 111	61	59	42		18-206-2
67	74	65	1046			
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S116-c-----	-----	-----	-----	-----	-----	29-177-3
S116-d-----	-----	-----	-----	-----	-----	28-146-1
S116-e-----	-----	-----	-----	-----	-----	28-146-2
S116-f-----	-----	-----	-----	-----	-----	28-146-3
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129-----	129	-----	-----	-----	-----	22-82-15
130-----	130	-----	-----	-----	-----	22-82-16
131-----	131	-----	-----	-----	-----	22-82-17
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197	181	142	2630	1554		
198	182	143	2636-7	1560-1		
199	183	144	2638	1562		
200	184	145				
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3464	3754	2549	2753	1680		
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3469	3759	2554	2789	1695		
3470	3760	2555	2790	1696		
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3474	3764	2559	2784			
3475	3765	2560	2793			
3476	3766	2561	2794	1698		
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3478	3768	2563	2774	1687		
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3576	3871	2665	2895	1741		
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3598	3893	2687	2973	1757		
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3668	3961	2754	3016			
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3670	3963	2756	3018			
3671	3964	2757	3019			
3672	3965	2758	3020			
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3679	3971	2764	3029	2974		
3680	3972	2765	3030	2975		
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3731	4019	2812	3084	1790		
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4265	4536	3300	3622	2044	110	
4266	4537	3301	3633	2055	110	
4267	4538	3302	3634	2056	110	
4268	4539	3303	3635	2057	110	
4269	4540	3304	3636	2058	110	
4270	4541	3305	3632	2054	110	
4271	4542	3306	3630	2052	110	
4272						
4273	4543	3307	3649	2071		
4274	4544	3308	3650	2072		
4275	4545	3309	3651	2073		
4276	4546	3310	3652	2074		
4277	4547	3311	3653	2075		
4278	4548	3312	3654	2076		
4279						
4280	4549	3313	3655	2077		
4281	4550-1	3314-15	3656-7	2079-80		
4282	4552	3316	3658	2081		
4283	2553	3317	3659	2082		
4284	4554	3318	3673	2096		
4285						
4286						
4287	4555	3319	3660, 3673, 4179	2083, 2096	103	

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4288	4556	3320	3663	2086	103	
4289	4557	3321	3661	2084	103	
4290	4558	3322	3662	2085	103	
4291	4560	3324	3666	2089	103	
4292	4559	3323	3665	2088	103	
4293	4561	3325	3667	2090	103	
4294	4560	3326	3668	2091	103	
4295	4563	3327	3670	2093	103	25-53
4296	4564	3328			56, 103	
4297	4565	3329	3671	2094	103	
4298	4566	3330	3672	2095	103	
4299						26-73-1
4300						26-73-2
4301						26-73-3
4302	4567	3331	3713-15	2131-3		
4303	4568	3332	3716	2134	157	
4304	4569	3333	3717	2135	157	
4305	4570	3334	3718	2136	157	
4306	4571	3335	3719	2137		
4307	4573	3337	3721	2139		
4308	4574	3338	3722	2140		
4309	4575-7	3339-41	3723-5	2141-3		
4310	4578	3342	3726	2141		
4311	4579	3343				
4312	4580	3344				
4313	4581	3345	3732, 3757	2151, 2175	122	
4314	4582	3346	4180		122	
4315	4583	3347	3733-4	2152-3	122	
4316	4584	3348	3735		122	
4317	4585	3349	3736-8	2154-6	122	
4318	4586	3350	3746	2164	122	
4319	4587	3351	3739	2157	122	
4320	4588	3352	3743	2161	122	
4321	4589	3353	3740	2158	122	
4322	4590	3354	3731	2159	122	
4323	4591	3355	3742	2160	122	
4324	4592	3356	3744	2162	122	
4325	4593	3357	3745	2163	122	
4326	4594	3358	3747	2165	122	
4327	4595	3359	3755	2173	122	
4328	4596	3360	3748	2166	122	
4329	4597	3361	3749	2167	122	
4330	4598	3362	3750	2168	122	
4331	4599	3363	3751	2169	122	
4332	4600	3364	3752	2170	122	
4333	4601	3365	3753	2171	122	
4334	4602	3366	3754	2172	122	
4335	4603	3367	3756	2174	122	
4336	4604	3368	3727	2145		
4337	4605	3369	3728	2147		
4338	4606	3070	3729	1158	82	
4339	4607	3371	3730	2149		
4340	4608	3372	3731	2150		
S4341	4609	3373	3761, 3763	2180		32-168
4342	4610	3374	3761, 3764	2179, 2181		
4343	4611	3375	3767			
4344	4612	3376	3765	2182		
4345	4613	3377	3761			
4346	4614	3378	3762			
4347	4615	3379	3766			
4348	4616	3380	4181			
4349	4617	3381	3768			

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4351	4619	3383	3770			
4352	4620	3384	3771			
4353	4621	3385	3772			
4354	4622	3386	3773, 3778	2180	104	
4355	4623	3387	3775	2191	104	
4356	4624	3388			104	
4358	4626	3390			104	
4359	4627	3391			104	
4360	4628	3392				
4361	4629	3393	3790	2206		
4362	4630	3394	3776	2192	104	
4363	4631	3395	3777	2193	104	
4364	4632	3396	3778	2179	104	
4365	4632	3396	3778	2179		
4366	4633	3397	3779	2195		
4367	4634	3398	3781	2197	104	
4368	4635	3399	3782	2198	104	
4369	4636	3400	3783	2199		
4370	4637	3401	3784	2200		
4371	4638	3402	3793			
4372	4639	3403	3785	2201	104	
4373	4640	3404	3786	2202	104	
4374	4641	3405	3787	2203	104	
4375	4642	3406	3788	2204	104	
4376	4643	3407	3789	2205	104	
4377	4644	3408	3408	1843		
4378	4645	3409	3409	1844		
4379	4646	3410	3410	1845		
4380	4647	3411	3411			
4381	4648	3412	3412			
4382	4649	3413	3413			
4383	4650	3414	3414			
4384	4651	3415	3415			
4385	4652	3416	3675	2098	4	
4386	4653	3417	3676-7	2099, 2100	4	
4387	4654	3418	3678	2101	4	
4388	4655	3419	3679	2102	4	
4389	4656	3420	3680	2103	4	
4390	4657	3421	3681	2104	4	
4391	4658	3422	3683	2106	4	
4392	4659	3423	3683	2106	4	
4393	4660	3424	3684	2107	4	
4394	4661	3425	3685	2108	4	
4395						
4396	4662	3426	3686	2109	4	
4397	4663	3427	3687	2110	4	
4398	4664	3428	3688	2111	4	
4399	4665	3429	3689	2112	4	
4400	4666	3430	3690	2113	4	
4401	4667	3431	3692	2115	4	
4402	4681, 4694	3432, 3445, 3447	3693, 3698, 3700	2116	25	
4403	4682	3433	3701	2121	25	
4404	4683	3434	3702		25	
4405	4684	3435	3703	2122	25	
4406	4685	3436	3704		25	
4407	4686	3437	3705	2123	25	
4408	4687	3438	3706	2124	25	
4409	4688	3439	3707	2125	25	
4410	4689	3440	3708	2126	25	
4411	4690	3441	3709	2127	25	

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4412	4691	3442	3710	2128	25	
4413	4692	3443	3711	2129	25	
4414	4693	3444	3712	2130	25	
4415	4695, 4698	3446	3699		25	
4416	4697	3448	4130		25	
4417	4698	3449	3801	2213		
4418	4699	3450	3802	2214		
4419	4700	3451	3803	2215		
4420	4901	3452	3805	2217		
4421	4702	3453	3806	2218		
4422	4703	3454	3809	2221		
4423	4704	3455	3807	2219		
4424	4705	3456	3868	2220		
4425	4706	3457	3810	2222		
4426	4707	3458	3811	2223		
4427	4708	3459	3828	2240		
4428	4709	3460	3812	2224	77	
4429	4710	3461	3813	2225	77	
4430	4711	3462	3814	2226	77	
4431	4712	3463	3815	2227	77	
4432	4713	3464	3816	2228	77	
4433	4714	3465	3817	2229	77	
4434	4715	3466	3822	2234	77	
4435	4716	3467	3841	2253	77	
4436	4717	3468	3842	2254	77	
4437	4718	3469	3818	2230	77	
4438	4719	3470	3819	2231	77	
4439	4720	3471	3820	2232	77	
4441	4722	3473	3823	2235	77	
4442	4723	3474	3824, 4182	2236	77	
4443	4724	3475	3825	2237	77	
4444	4725	3476	3826	2238	77	
4445	4726	3477	3827	2239	77	
4446	4727	3478	3829	2241	77	
4447	4728	3479	3830	2242	77	
4448	4729	3480	3831	2243	77	
4449	4730	3481	3832	2244	77	
4450	4731	3482	3833	2245	77	
4451	4732	3483	3834	2246	77	
4452	4733	3484	3835	2247	47, 77	
4453	4734	3485	3836	2248	47	
4454	4735	3486	3837	2249	47, 77	
4455	4736	3487	3838	2250	77	
4456	4737	3488	3839	2251	77	
4457	4739	3489	3840	2252	77	
4458	4739	3490	3843	2253		
4459						
4460	4740	3491	2688	1598		
4461	4741	3492	2689	1599		
4462	4742	3493	2690	1600		
4463	4743	3494	2691	1601		
4464	4744	3495	2692	1602		
4465	4745	3496	2693	1603		
4466	4746	3497	2694	1604		
4467	4747	3498	2695	1605		
4468	4748	3499	2696	1606		
4469	4749	3500	2697	1607		
4470	4750	3501	2698	1608		
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S4471-e						30-127-5
S4471-f						30-127-6
S4471-g						30-127-7
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4474	4754	3505	3847	2259		30-2-12
4476	4756	3507	3849	2261	86	
4477	4757	3508	3850	2262	86	
4478	4758	3509	3851	2263	86	
4479	4759	3510	3852	2264	86	
4480	4760-1	3511-12	3853-4	2265-6	86	
S4481	4762	3513	3855	2267	86	30-128
4482	4763	3514	3856	2268	86	
4483	4885	3635				
4484	4764	3515	3857	2269	86, 127	
4485	4765	3516	3858	2270	86	
4486	4767				86	
4487	4767	3518	3860	2272	86	
4488	4768	3519	3861	2273	86	
4489	4769	3520	3862	2274	86	
4490	4770	3521	3863	2275	86	
4491	4771	3522	3864	2276	86	
4492	4772	3523	3865	2277	86	
4493	4773	3524	3866	2278	86	
4494	4774	3525	3867	2279	86	
4495	4775	3526	3868	2280	86	
4496	4776	3527	3869	2281	86	
4497	4777	3528	3870	2282	86	
4498	4778	3529	3871	2283	86	
4499	4779	3530	3872	2284	86	
4500	4780	3531	3873	2285		
4501	4781	3532	3874	2286		
4502	4782	3533	3875			
4503	4783	3534	3876			
4504						
4505	4784	3535	3877-8	2287-8		
4506	4785	3536	3879	2289		
4507	4786	3537	3880	2290		
4508	4787	3538	3881	2291		
4509	4788	3539	3882	2292		
4510	4789	3540	3883	2293		
4511	4790	3541	3884	2294		
4512	4791	3542	3885	2295		
4513	4792	3543	3886	2296		
4514	4793	3544	3887	2297		
4515	4794	3545	3888	2298		
4516	4795	3546	3889	2299		
4517	4796	3547	3890	2301	28, 83	
4518	4797	3548	3891	2302	83	
4519	4798	3549	3892	2303		
4520	4799	3550	3893	2304		
4521	4800	3551	3894	2305		
4522	4801	3552	3895	2306	86	
4523	4802	3553	3896	2307	86	
4524	4803	3554	3897	2308	86	
4525	4804	3555	3898	2309	86	
4526	4805	3556	3899	2310	86	
4527	4806	3557	3900	2311	86	
4528	4807	3558	3901	2312	86	
4530	4809	3560	3903	2314	86	
4531	4810	3561	3904	2315	86	

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4532	4811	3562	3905	2316	86	
4533	4812	3563	3906	2317	86	
4334	4813	3564	3907	2318	86	
4535	4814	3565	3908	2319	86	
4536	4815	3566	3397,	1837,	86	
4537	4816	3567	3909	2320	86	
			3401	1841		
S4538	4817	3568	3910	2321	86	27-107-1
4539	4818	3569	3911	2322	86	
4540	4819	3570	3912	2323	28,	
					86	
4541	4820	3571	3913	2324	86	
4542	4821	3572	3914	2325	86	
4543	4822	3573	3915	2326	86	
S4544						29-141-1
4545	4823	3574	3916	2327		
4546	4824	3575	3917	2328	86	18-163
4547	4824	3575	3917	2328	86	
4548	4825	3576	3918	2329	86	
4549	4826	3577	3919	2330	86	
4550	4827	3578	3920	2331	86	
4551	4828	3579	3921	2332	86	
4552	4829	3580	3922	2333	86	
4553	4830,	3581,	3923,	2334,	86	
	4833	3584	3936	2337		
4554	4831	3582	3924	2335	86	
4555	4832	3583	3925	2336	86	
4556	4834	3584	3927	2338	86	
4557	4835	3586	3928	2339	86	
4558	4836	3587	3929	2340	86	
4559						
4560	4837	3588	3930	2341	86	
4561	4838	3589	3931	2342	86	
4562	4839	3590	3932	2343	86	
4563	4840	3591	3933	2344	86	
4564	4841	3592	3934	2345	86	
4565	4842	3593	3935	2346	86	
4566	4843	3594	3936	2347	86	
4567	4844	3595	3937	2348	86	
4568	4845	3596			86	
4569	4846	3597	3938	2349	86	
4570	4847	3598	3939	2350	86	
4571	4848	3599	3940	2351	86	
4572	4849	3600	3941	2352	86	
4573	4850	3601	3942	2353	86	
4574	4851	3602	3943	2354	86	
4575					86	
4576	4852	3603	3944	2355	86	
4577	4853	3604	3945	2356	86	
4578	4854	3605	3946	2357	86,	
					127	
4579	4249,	3024,	3245,	1884,	86	
	4855	3606	3947	2358		
4580	4856	3607	3948	2360	86	
4581	4857	3608	3949	2361	86	
4582	4858	3609	3950		86	
4583	4859	3610	3951		86	
4584	4875	3625	3967	2377	86	
4585	4876	3626	3968	2378	86	
4586	4877	3627	3969	2379	86	
4587	4878	3628	3970-1	2380-1		
4588	4879	3629	3972	2382		
4589	4880	3630	3973			
4590	4831	3631	3974	2384		
4591	4882	3632	3975	2385	28	

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4593	5087	3811	4154	2545		
4594	4884	3634	3977	2387		
4595	5091	3815				19-151-1
4596	5093	3816	352			
4597	5080	3804			56	
4598	5081	3805			56	
4599	5082	3806				
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4601	4886	3636	3978	2388	71	
4602	4887	3637	3979	2389		
4603	4888	3638	3980			
4604	4889	3639	3982			
4605	4890	3640				
4606	4891	3641	3983	2391		27-108-1, 15-33
4607	4892	3642	3984	2392		
S4608	4893	3643	3985-6	2393-4		28-125-1
4609	4894	3644	3987	2395		
4610	4895	3645	4005	2408		
4611	4896	3646	3988	2396		
4612	4897	3647	3989	2397	76	
4613	4898	3648	3990	2398		
4614	4899	3649	3991			
4615	4900	3650	3992	2399		
4616	4901	3651	3993	2400		
4617	4902	3652	3994	2401		
4618	4903	3653	3995	2402		
4619	4904	3654	3996	2403		
4620	4905	3655	3997	2404		
4621	4906	3656	4000	2407		
4622	4907	3657	3998	2405		
4623	4908	3658	3999	2406		
4624	4919	3668	199, 4011	2414		
4625	4914-15	3663-4	406-7	2409-10	75	
4626	4916	3665	4008	2411	75	
4627	4917	3666	4009	2412	75	
4628	4918	3667	4010	2413	75	
4629	4909	3659	4001	1227		
4630	3388, 4910	2197, 3660	2528, 4002	1228, 1476		
4631	4911	3661	4003	1229		
4632	4912	3662	4004	1230		
4633	4913					31-159
4634	4952	3701	4046	2431		
4635	4953	3702	4047	2432		
4636	3119, 4955	3704	4049			18-186-1
4637	4956	3705	4050			
4638	4957	3706	4051	2433		
4639	4958	3707	4052			
4640	4959	3708	4053	2434		
4641	4960	3709	4050	2435	95	
4642	4961	3710	4055		95	
4643	4962	3711	4056	2436		
4644	4963	3712	4057	2437		
4645	4964	3713	4058	2438		
4646	4965	3714	4059	2439		
4647	4966	3715	4060	2440		
4648	4920	3669	4120	2512		
4649	4967	3716	4061	2441		
4650	4968	3717	4062	2442		

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4652	4970	3719	4064	2444	138	
4653	4971	3720	1076			
4654	4936	3685	4026	2423	112	
4655	4937	3686	4027	2424	112	
4656	4938	3687	4028	2425	112	
4657	4939	3688	4029	2426	112	
4658	4922	3671	4012		28, 112	
4659	4923	3672	4013	2415	28, 112	
4660	4924	3673	4014	2416	28, 112	
4661	5090	3814	4153	2544	28, 56, 112	16-62
4662	4925	3674	4015	2417	28, 56, 112	
4663	5094	3817			28, 56, 112	
4664	4926	3675	4016	2418	28, 112	
4665	4927	3676	4017	2419	56	
4666	4928	3677	4018	2420		
4667	4934	3683	4024	2421		
4668	4935	3684	4025	2422		
4669						
4670	4929	3678	4019			
4671	4930	3679	4020			
4672	4931-3	3680-2	4021-3	2477-9	57	
4673	4940-1	3689-90	4030, 4035			
4674	4942	3691	4036	2475		
4675	4943	3692	4038	2480		
4676	4944	3693	4039	2481		
4677	4945	3694	4040	2482		
4678	4946	3695	4041	2483		
4679	4947	3696	4037	2416		
4680	4948	3697	4042	2427		
4681	4949	3698	4043	2428		
4682	4950	3699	4044	2429		
4683	4951	3700	4045	2430		
4684	4972	3721	4065	2445	57	
4685	4973-4	3722-3	4066-7	2446-7	57	
4686	4975	3724	4068	2448	57	
4687	4972	3721-2	4065-6	2445-6	57	
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4689	4978	3727	4071, 4092	2450, 2465	57	
4690	4976	3725	4069	2449	57	
4691	4977	3726	4070	2450	57	
4692	4979	3728	4072	2452	57	
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4904	5273	3965	4301	2674		
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S5077-a17						32-189-12
S5077-a18						32-189-13
S5077-a19						32-189-14
S5077-a20						32-189-15
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5079	5471	4090	4410	2760		
5080	5472	4091	4411	2761	76	26-82
5081	5473	4092	4412	2762		
5082	5474	4093	4413	2763		
5083	5475	4094	4414	2764		
5084	5476	4095	4415	2765		
5085	5477	4096	4416	2766		
5086	5478	4097	4417	2767		
5087	5479	4098	4418	2768		
5088	5480	4099	4419	2769		
5089	5481	4100	4420	2770		
5090	5482	4101	4421	2771		

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5095-----	5487-----	4106-----	4431-----	2819-----	-----	
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5098-----	5490-----	4108-----	4439, 4447-----	2778, 2823-----	-----	
5099-----	5491-----	4109-----	4440-----	2830-----	28, 139-----	
5100-----	5492-----	4110-----	4441-----	-----	-----	
5101-----	5493-----	4111-----	4530-----	2822-----	-----	
5102-----	5494-----	4112-----	4442-----	-----	-----	
5103-----	5495-----	4113-----	4443-----	-----	-----	
5104-----	5496-----	4114-----	4444-----	-----	-----	
5105-----	5497-----	4115-----	4447-54-----	-----	-----	
5106-----	5498-----	4116-----	4455-----	-----	-----	
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5108-----	5500-----	4118-----	4457-----	-----	-----	
5109-----	5501-----	4119-----	4458-----	-----	-----	
5110-----	5502-3-----	4120-----	4459-60, 4464-----	-----	-----	
5111-----	5504-----	4122-----	4461-----	-----	-----	
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5113-----	5506-----	4124-----	4463-----	-----	-----	
5114-----	5507-----	4125-----	4465-----	-----	-----	
5115-----	5508-----	4126-----	4466-----	-----	-----	
5116-----	5509-----	4127-----	4467-----	-----	-----	
5117-----	5510-----	4128-----	4468-----	-----	-----	
5118-----	5511-----	4129-----	4469-----	-----	-----	
5119-----	5512-----	4130-----	4470-----	3310-----	154-----	
5120-----	5513-----	4131-----	4471-----	3311-----	-----	
5121-----	5514-----	4132-----	4472-----	-----	-----	
5122-----	5515-----	4133-----	4473-----	-----	-----	
5123-----	5516-----	4134-----	4474-----	-----	-----	
5124-----	5517-----	4135-----	4475-----	3312-----	-----	
5125-----	5518-----	4136-----	4476-----	3313-----	-----	
5126-----	5519-----	4137-----	4477-----	3314-----	-----	
5127-----	5520-----	4138-----	4478-----	3315-----	154-----	
5128-----	5521-----	4139-----	4479-----	3316-----	154-----	
5129-----	5522-----	4140-----	4480-----	3317-----	154-----	
5130-----	5523-----	4141-----	4481-----	3318-----	154-----	
5131-----	5524-----	4142-----	4482-----	3319-----	-----	
5132-----	5525-----	4143-----	4483-----	3320-----	-----	
5133-----	5526-----	4144-----	4484-----	3321-----	-----	
5134-----	5527-----	-----	-----	-----	-----	
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5137-----	-----	-----	-----	-----	-----	
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5139-----	-----	-----	-----	-----	-----	
5140-----	-----	-----	-----	-----	-----	
5141-----	-----	-----	-----	-----	-----	
5142-----	-----	-----	-----	-----	-----	
5143-----	5529-----	4145-----	4489-----	2793-----	-----	
5144-----	5530-----	4146-----	4490-----	2794-----	-----	
5145-----	5531-----	4147-----	4491-----	2795-----	-----	
5146-----	5532-----	4148-----	4492-----	2796-----	-----	
5147-----	5533-----	4149-----	4493-----	2797-----	-----	
5148-----	5534-----	4150-----	4494-----	2798-----	-----	

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5151	5537	4153	4497	2801		
5152	5538	4154	4498	2802		
5153	5539	4155	4500	2803	47	
5154	5540	4156	4502		47	
5155	5541	4157	4505	2804	47	
5156	5542	4158	4506	2805	47	
5157	5543	4159	4507	2806	47	
5158	5544	4160	4508	2807	47	
5159	5463, 5545	4161	4309	2808	47	16-102-2
5160	5546	4162	4510	2809	47	
5161	5547	4163	4511	2810	47	
5162	5548	4164	4512		47	
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5164	5550	4166	4514	2812	47, 93	
5165	5551	4167	4515	2813	47, 93	
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5167	5553	4169	4516	2814		
5168	5554	4170	4517	2815	47	
5169	5555	4171	4518	3282	74	17-65
5170	5556-7	4172-3	4519-20		74	
5171	5558	4174	4521			
5172	5559	4175	4522	3283		
5173	5560	4176	4523	3284	74	
5174	5561	4177	4524	3285	74	
5175	5562	4178	4525	3286	74	
5176	5563	4179	4526	3287	74	
5177	5564	4180	4527	3288	74	
5178	5565	4181	4528	3289	74	
5179	5566	4182	4529	3290	74	
5180	5567	4183			74	
5181	5568	4184			74	
5182	5569	4185				
5183	5570	4186	4534	2827		
5184	5571-2	4187-8	4535-6	2828-9		
5185	5573	4189	4537			
5186	5574	4190	4538			
5187	5575	4191	4539	2831		
5188	5576	4192	4540	2832		
5189	5577	4193	4541	2833		
5190	5578	4194	4542	2834		
5191	5579	4195	4543	2835		
5192	5580	4196	4544	2836		
5193	5581, 5587	4197, 4203	4545, 4551	2837, 2850		
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5195	5582	4198	4546			
5196	5583-4	4119, 4200	4742-8	2840		
5197	5585	4201	4549	2846		
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5200	5589	4205	4553	2844		
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5203	5592	4208	4556			
5204	5596	4212	4560			

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5208	5602	4218	4566			
5209	5603-4	4219-20	4567-8			
5210	5604	4220	4568			
5211	5605	4221	4569			
5212	5606	4222	4570			
5213	5607	4223	4571			
5214	5608	4224	4572			
5215	5609	4225	4573			
5216	5610-12	4226-8	4575-7	2852-4		
5217	5612	4228	4577	2854		
5218	5613-14	4229-30	4578-9	2855-6		
5219	5615	4231	4380	2857		
5220	5616	4232	4582	2859		
5221	5617	4233	4583	2860		
5222	5618	4234				
5223	5619	4235				
5224	5620	4236				
5225	5622	4239	4591	2867		
5226	5623	4240	4592			
5227	5624	4241	4593	2868		
5228	5625	4242	4594	2869-70		
5229	5626	4243	4595	2871		
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5232	5631	4248	4601	2876		18-130
5233	5632	4249	4602	2877		
5234	5633	4250	4603	2878		
5235	5634	4251	4604	2879		
5236	5635	4252	4605	2880		
5237	5636	4253	4607			
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5249	5651	4268	4621	2892	47	
5250	5652	4269	4622	2893	47	
5251	5653	4270	4623	2894	47	
5252	5654	4271	4625	2896	47	
5253	5655	4272	4626	2897	47	
5254	5656	4273	4627	2899	47	18-130-2
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5260	5660	4277	4631	2901	47	
5261	5661	4278	4632	2902	47	
5262	5662	4279	4633	2903	47	

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5264	5664	4281	4635	2905	47	
5265	5665	4282	4636	2906	47	
5266	5666	4283	4637		47	
5267	5667	4284	4638	2907	47	
5268	5668	4285	4639	2908	47	
5269	5669	4286	4640	2909		
5270	5670	4287	4641		47	
5271	5671	4288	4642		47	
5272	5672	4289	4643		47	18-130-3
5273	5673	4290	4644		47	
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5276	5676, 5679	4293-4	4647-8	2913-14	47	18-130-4
5277	5676	4293	4647	2913		18-130-4
5278	5677				47	18-130-5
5279	5680	4295	4649	2915	47	
5280	5681	4296	4650		47	
5281	5682	4297	4651		47	
5282	5683	4298	4652		47	
5283	5684	4299	4653		47	
5284	5685	4300	4654	2917	47	
5285	5686	4301	4655		47	
5286	5687	4302	4656		47	
5287	5688	4303	4657		47	
5288	5689	4304	4658	2919	47	
5289	5690	4305	4659	2916	47	
5290	5691	4306	4660	2920	47	
5291	5692	4307	4661	2921	47	
5292	5693	4308	4662	2922	47	
5293	5694	4309	4663	2923	47	
5294	5695	4310	4664	2924	47	
5295	5696	4311	4665	2925	47	
5296	5697	4312	4666	2926	47	
5297	5810	4425	4790	2996	47	
5298	5698	4313	4667	2927	47	
5299	5699	4314	4668	2928	47	
5300	5700	4315	4669	2929	47	
5301	5701	4316	4670	2930	47	
5302	5702	4317	4671		47	
5303	5703	4318	4672			
5304	5704	4319	4673			
5305	5705	4320	4674			
5306	5706	4321	4675			
5307	5707-9	4322-4	4676-8	2935		
5308	5710	4325	4679			
5309	5711	4326				
5310	5712	4327	4680	2931		
5311	5713-14	4328-9	4681-2	2932		
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5316	5719	4334	4687	2939		
5317	5720	4335	4688	2940		
5318	5721	4336	4689-90	2941-2		
5319	5722	4337	4691	2943		
5320	5723	4338	4692			
5321	5724	4339	4693			
5322	5725	4340	4695	2945		
5323	5726	4341	4696	2946		
5324	5727	4342	4697	2947		
5325	5728	4343	4698	2948		

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5331	5739-42	4354-7	4709-12	2954		
5332	5743	4358	4713	2955		
5333	5644	4359	4714	2957	47	
5334	5745-6	4360-1	4715-16		47	
5335	5644-5	4359-60	4714-15	2957	47	
5336	5752	4367	4722	2963	47	
5337	5747	4362	4717	2961	47	
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5340	5750	4365	4720			
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5378-----	5814	4429	4808			
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5383-----	5819	4434	4802	3011-----	47	
5384-----	5820	4435	4803	3012-----	47	
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5389-----	5828	4443	4804	3013-----		
5390-----	5829	4444	4793	3002-----		
5391-----	5830	4445	4794	3003-----		
5392-----	5831	4446	4795	3004-----		
5393-----	5832	4447	4796	3005-----		
5394-----	5833	4448	4797	3006-----		
5395-----	5834	4449	4798	3007-----		
5396-----	5835	4450	4799	3008-----		
5397-----	5836	4451	4816	3020-----		
5398-----	5837-8	4452-3	4817-18	3021-2		
5399-----	5839	4454	4819	3023-----		
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5411-----	5855	4470	4840	3043-----		
5412-----	5856	4471	4841			
5413-----	5858	4473	4843	3045-----		
5414-----	5857	4472	4842	3044-----		
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5417-----	5867	4482	4847		47	
5418-----	5868	4483	4848	3047-----	47	
5419-----	5869	4484	4849		47	
5420-----	5870	4485	4850		47	
5421-----	5871	4486	4851		47	
5422-----	5872	4487	4852	3050-----		
5423-----	5873	4488	4853	3051-----		
5424-----	5874	4489	4854	3052-----		
5425-----	5875	4490	4855	3053-----		
5426-----	5876	4491	4856	3054-----	47	
5427-----	5877	4492	4857	3055-----	47	
5428-----	5878	4493	4858	3057-----	47	
5429-----	5879	4494	4859		47	
5430-----	5880	4495	4860			
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5436	5889	4504	4871			
5437	5890	4505	4872			
5438	5891-2	4506-7	4873-4	3066		
5439	5893	4508	4880	3070		
5440	5894	4509	4881	3071		
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5451	5911	4526	4917			
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5463	5924	4539	4926			
5464	5925-6	4540	4927	3099		
5465	5926	4541	4928	3100		
5466	5927-8	4542-3	4929-30	3101-2		
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5468	5930	4545	4932			
5469	5931	4546	4937			
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5473	5939, 5949	4554	4948	3165		21-151-1
5474	5940	4555	4949	3167		
5475	5935-6	4550-1	4941-2	3159-60		
5476	5937	4552	4943	3161		21-91-3
5477	5938, 5942	4553	4944	3162		21-91-2
5478	5942, 5946, 5951-2					21-91-2, 5, 7, 21-151-3, 4
5479	5968	4570	4959			21-91-4
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5482	5947, 5953					21-91-8, 21-151-3
5483	5811, 5954	4426, 4556	4805			17-168-2
5484	4886, 5954	3636	3978	2388	47	17-168-1
5485	5621	4238				
5486	5955	4557				
5487	5956	4558	4101	2997		
5488	5958	4560	4103	2999		25-100

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5491	5812	2427	4806			
5492	5959-60, 5967, 5095	3818, 4561-2, 4569	4950-1, 4958	3168, 3170	47	18-207
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5494	5963	4565	4954	3176		
5495	5964	4566	4955	3174		
5496	5965	4567	4956	3175		
5497	5966	4568	4957			
5498	5969	4571	4960			
5499	5970	4572	4961			
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5500	5971	4573	4967	3216-18		
5501	5972	4574	4968	3219		
5502	5980	4582	4976	3227	47	
5503	5981	4583	4977	3228	47	
5504	5982	4584	4978	3229		
5505	5983	4585	4979			
5506	5985	4587	4966, 4981			
5507	5973	4575	4960	3220		
5508	5974	4576	4970	3221		
5509	5975-6	4577-8	4971-2	3222-3		
5510	5977	4579	4073	3224		
5511	5978	4580	4974	3225		
5512	5978-9	4581	4975	3226		
5513	6004-5	4606-7	5000-1			
5514	6006	4608	5002			
5515	5994	4596	4990		47	
5516	5995	4597	4991		47	
5517	5996	4598	4991		47	
5518	5997	4599	4993		47	
5519	5998	4600	4994			
5520	5999	4601	4995	3243		
5521	6000	4602	4996	3244		
5522	6001	4603	4997	3245		
5523	6002-3	4604-5	4998-9	3246-7		
5524	5987	4589	4983	3232		
5525	5988	4590	4984	3233		
5526	5989	4591	4985	3234		
5527	5990	4592	4986	3235		
5528	5991	4593	4987	3236	47, 133, 134	
5529	5992	4594	4988	3237	47, 133, 134	
5530	5993	4595	4989	3238	47, 133, 134	
5531	6007	4609	5003			
5532	6008	4610	5004			
5533	6009	4611	5005	3268		
5534	6010	4612	5006	3269		
5535	6011	4613	5007	3248		
5536	6012	4614	5008	3249		
5537	6013	4615	5009	3250		
5538	6014	4616	5010		133, 134	
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5543	6023-6	4625-8	5020-3	3264-7		
5544						
5545	6027	4629	5024	3291		
5546	6028	4630	5025	3292		
5547	6029	4631	5026	3293		
5548	6030	4632	5027	3294		
5549	6031	4633	5028	3295		
5550	6032	4634	5029	3296		
5551	6034	4636	5031			
5552	6035	4637	5032	3297		
5553	6036	4638	5033	3298		
5554	6037	4639	5034			
5555	6038	4640	5035			
5556	6039	4641	5036	3299		
5557	6040	4642	5037	3300		
5558	6041	4643	5038	3301		
5559	6042	4644	5039	3302		
5560	6043	4645	5040	3303		
5561	6044	4646	5041	3304		
5562	6045	4647	5042	3305		
5563	6046	4648	5043	3306		
5564	6047	4649	5044	3307		
5565	6048	4650	5045	3308		
5566	6049	4651	5046			
5567	6050	4652	5047	3309		
5568	6051	4653	5048			
5569	6052	4654	5049	3253		
5570	6053	4655	5050	3254		
5571	6054	4656	5051	3255		
5572	6055	4657	5052	3256		
5573	6056	4658	5053	3257		
5574	6057	4659	5054	3258		
5575	6058	4660	5055	3332	86	
5576	6059	4661	5056	3323		
5577	6060	4662	5057	3324		
5578	6061	4663	5058	3325		
5579	6062	4664	5059	3326		
5580	6063	4665	5060	3327		
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5582	6065	4667	5062	3329		
5583	6066	4668	5063	3330		
5584	6067	4669	5064	3331		
5585	6068	4670	5065			
5586	6069	4671	5066			
5587	6070	4672	5067	3332		
5588	6071	4673	5068	3333		
5589	6072	4674	5069	3334		
5590	6073	4675	5070	3335		
5591	6078	4680	5075	3340		
5592	6074	4676	5071	3336		
5593	6075	4677	5072	3337		
5594	6076	4678	5073	3338		
5595	6077	4679	5074	3339		
5596	6079	4681	5076	3341		
5597	6080	4682	5077	3342		
5598	6081	4683	5078	3343		
5599	6082	4684	5079	3344		
5600	6083	4685	5080	3345		
5601	6084	4686	5081	3346		
5602	6085	4687	5082	3347		
5603	6086	4688	5083	3348		
5604	6087	4689	5084			
5605	6088	4690	5085	3350		
5606	6089	4691	5086			
5607	6090	4692	5087	3351		

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5608	6091	4693	5090	3351		
5609	6092	4694	5091	3355		
5610	6093	4695	5092	3356		
5611	6094	4696	5093	3357		
5612	6095	4697	5095			
5613	6096	4698	5096	3359		
5614	6097	4699	5097			
5615	6098	4700	5098			
5616	6099	4701	5099	3360		
5617	6100	4702	5100	3661-4		
5618	6101	4703	5101			
5619	6102	4704	5102			
5620	6103	4705	5103	3366		
5621	6104	4706	5104	3367		
5622	6106	4708	5106			
5623	6107	4709	5107			
5624	6108	4710	5108			
5625	6109	4711	5109			
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5627	6111	4713	5120		47	
5628	6112	4714	5121	3279	47	
5629	6113	4715	1416	848	52	
5630	6114	4716	1417	849	52	
5631	6115	4717	1418	850	52	
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5635	6119	4721	1423-4	855-6	52	
5636	6120	4722			52	
5637	6121	4723	5122	3103		
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5639	6126-7					21-176
5640	6122	4724	5123	3104		
5641	6123	4725	5124	3105		
5642	6124	5726	5125	3106		
5643	6125	4727	5127	3108		
5644	6128	4728	5128	3109		
5645	6129	4729	5129	3110		
5646	6130	4730	5130	3111		
5647	6131	4731	5131	3112		
5648	6132	4732	5132	3113		
5649	6133	4733	5133	3114		
5650	6134	4734	5134	3115		
5651	6135	4735	5135	3116		
5652	6136	4736	5136	3107		
5653	6137	4737				
5654	6138	4738				
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5656	6140	4740				
5657	6141	4741				
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5659	6143	4743				
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5680	6175	4775	5149	3135		
5681	6176	4776	5160	3147		
5682	6177	4777	5161	3148		
5683	6178	4778	5162	3149		
5684	6179	4779	5163	3150		15-48
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5690	6192	4792	5150	3137		
5691	6193	4793	5153	3140		
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5693	6195	4795	5156	3143		26-105-1, 3, 4
5694	6196	4796	5157	3144		
5695	6197	4797	5158	3145		
5696	6198	4798	5159	3146		
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PROVISIONS

RELATING TO THE CODE SUPPLEMENT OF 1907.

AN ACT to provide for the compilation of the laws of the Thirtieth, Thirty-first and Thirty-second General Assemblies and the laws as they appear in the code supplement; to annotate the same and the code and rules of the supreme court to and including the May term, 1907, of the supreme court, and to publish the said compilations and annotations as a "supplement to the code, 1907," and to provide for the appointing of a supervising committee and establish a salary for the editor of such supplement to the code and making an appropriation therefor.

Be it Enacted by the General Assembly of the State of Iowa:

SECTION 1. That within five days after this act becomes a law the lieutenant governor and the present speaker of the house shall each appoint from the senate and house respectively, three members as a joint committee to be known as the "Code Supplement Supervising Committee." Vacancies shall be filled in the same manner. The committee shall be allowed expenses as hereinafter provided.

SEC. 2. Said committee shall have general supervision of the work of compiling the acts of general and permanent nature of the thirtieth, thirty-first and thirty-second general assemblies and the laws as they appear in the code supplement, annotating the same and the code and the rules of the supreme court, and indexing and publishing such compilations as hereinafter provided.

SEC. 3. The editor shall prepare the compilation of the supplement to be published under this act and the index and annotations and have general supervision of the work under the direction of the committee. His compensation shall be fifteen hundred dollars (\$1,500). The secretary of state shall deliver to the editor the enrolled bills for use in proof reading, which shall be by the enrolled bills. The compilation shall be known and designated as "supplement to the code, 1907." The editor shall copyright the said supplement, its index, numbers, chapters, sections, annotations, and its entire arrangement and publication and assign such copyright to the state of Iowa. In case of neglect or inability to act on the part of the editor said committee may discharge him and employ another one instead.

SEC. 4. Said committee shall cause to be prepared a compilation of the laws of a general and permanent nature of the thirtieth, thirty-first and thirty-second general assemblies and the laws as they appear in the supplement to the code of Iowa as authorized by the code and the twenty-ninth general assembly, arranged into sections, chapters, and titles, and numbered so as to conform with the code; also annotations thereof and of the code and rules of the supreme court to and including the decisions handed down at the May term, 1907, of said court. Said annotations shall be arranged in appropriate sections or section numbers and rules as the case may be.

SEC. 5. Sections of the code and laws of the subsequent general assemblies which have been amended shall be given in said compilation as amended. Where additional sections have been added to any section, chapter, or title the same shall be appropriately placed and numbered thus: (Section 51-a, 51-b, 51-c, as the case may be). If there are neither amendments nor annotations to a section of the code, the number thereof may be omitted in such compilation.

SEC. 6. The committee shall also cause to be prepared a complete index to said supplement including such revision and reprinting of the index to the code as it may deem necessary.

SEC. 7. Said committee for the purpose of accomplishing such work may employ such competent annotators, editorial assistants, stenographers, and clerks as may be necessary to complete the work within the time hereinafter required. The said committee may purchase such compilations, annotations, or index, or any part thereof, as may be deemed for the best interests of the state.

SEC. 8. The committee shall cause the said supplement of the code to be well made of first-class material, printed from electro-plates, bound in full law sheep, hand-sewed and in accordance with the best workmanship and methods of publishing law books. In size, type, catch words, numbering, paper, binding and other materials, the same shall conform as near as may be to the code. The plates shall be preserved.

SEC. 9. The said supplement shall be distributed to persons, sold and accounted for, except as to the price, in the manner provided in sections sixteen to twenty inclusive of an act of the twenty-sixth general assembly, extra session, "to provide for the annotation, indexing, publication, distribution and sale of the code and statutes hereafter enacted, the appointing of a supervising committee and the election of an editor, and the prescribing of their duties," which took effect May 5, 1897. The distribution to the members of the general assembly shall commence with the thirty-second general assembly.

SEC. 10. The supplement to the code by this act provided to be published and distributed shall be the official edition and authoritative publication of the existing laws of the state, and no other publication of the laws of the state except the session laws and the code shall be used in the courts or referred to by title, chapter or section in the reports of the same. Said supplement shall be received in evidence in all courts and tribunals of the state as the official publication of such laws of the state. Neither said supplement nor any part thereof shall be published except in the manner now provided by law for the publication of the code and parts thereof. Said supplement shall be sold for three dollars (\$3.00) per volume.

SEC. 11. An edition of twelve thousand copies of said code supplement shall be printed and the first copies shall be bound and ready for distribution on or before October 1, 1907.

SEC. 12. The members of the committee shall be allowed three cents a mile for the distance actually traveled, also expenses incurred in the performance of their duties, and may draw their requisitions for all necessary codes, session laws, printing, postage and supplies.

SEC. 13. All bills for the expenses of the committee and editor and expenditures in connection with said work shall be verified. The same shall be approved by the committee and executive council and the auditor shall draw warrants therefor on the state treasurer and the same shall be paid out of the treasury.

SEC. 14. There is hereby appropriated out of the treasury from funds not otherwise appropriated, a sum sufficient to pay the cost and expenses of preparing, publishing and distributing said supplement of the code.

SEC. 15. This act, being deemed of immediate importance, shall take effect and be in force from and after its passage and publication in the Register and Leader and Des Moines Capital, newspapers published in Des Moines, Iowa.

Approved February 19, A. D. 1907.

I hereby certify that the foregoing act was published in the Register and Leader and the Des Moines Capital, February 21, 1907.

W. C. HAYWARD,
Secretary of State.

PROVISIONS

RELATING TO THE CODE SUPPLEMENT OF 1902.

AN ACT to provide for the compilation of the laws of the twenty-seventh, twenty-eighth and twenty-ninth general assemblies, to annotate the same and the code and rules of the supreme court to and including the May term, 1902, of the supreme court, and to publish said compilation and annotations as a supplement to the code, and to provide for the appointment of a supervising committee, and making an appropriation therefor.

Be it Enacted by the General Assembly of the State of Iowa:

SECTION 1. That within five days after this act becomes a law the president of the senate and the speaker of the house shall each appoint from the senate and house respectively, three members as a joint committee to be known as the "Code Supplement Supervising Committee." Vacancies shall be filled in same manner. The committee shall be allowed expenses as hereinafter provided.

SEC. 2. Said committee shall have general supervision of the work of compiling the acts of a general and permanent nature of the twenty-seventh, twenty-eighth and twenty-ninth general assemblies, annotating the same and the code and the rules of the supreme court, and indexing and publishing such compilation as hereinafter provided.

SEC. 3. The editor shall prepare the compilation of said supplement and the index and annotations and have general supervision of the work under the direction of the committee. His compensation shall be fifteen hundred dollars (\$1,500.00). The secretary of state shall deliver to the editor the enrolled bills for use in proof reading, which shall be by the enrolled bills.

The editor shall copyright the said supplement, its index, numbers, chapters, sections, annotations and its entire arrangement and publication and assign such copyright to the state of Iowa.

In case of neglect or inability to act on the part of the editor said committee may discharge him and employ another one instead.

SEC. 4. Said committee shall cause to be prepared a compilation of the laws of a general and permanent nature of the twenty-seventh, twenty-eighth and twenty-ninth general assemblies, arranged into sections, chapters and titles and numbered so as to conform to the code: Also, annotations thereof and of the code and rules of the supreme court to and including the decisions handed down at the May, 1902, term. Said annotations shall be arranged under the appropriate sections or section numbers of the code and rules as the case may be.

SEC. 5. Sections of the code which have been amended shall be given in said compilation as amended. Where additional sections have been added to any section, chapter or title, the same shall be appropriately placed and numbered thus: (Section 51-a, 51-b, 51-c, as the case may be.) If there are neither amendments nor annotations to a section, the number thereof may be omitted in such compilation.

SEC. 6. The committee shall also cause to be prepared a complete index to said supplement including such revision and reprinting of the index to the code as it may deem necessary.

SEC. 7. Said committee for the purpose of accomplishing such work, may employ such competent annotators, editorial assistants, stenographers, and clerks as may be necessary to complete the work within the time herein-

after required. The said committee may purchase such compilation, annotations or index, or any part thereof, as may be deemed for the best interests of the state.

SEC. 8. The committee shall cause said supplement to the code to be well-made of first-class material, printed on electro-plates and bound in full law sheep in one volume, hand-sewed and in accordance with the best workmanship and methods of publishing law books. In size, type, catch words, numbering, paper, binding and other materials, the same shall conform as near as may be to the code. The plates shall be preserved.

SEC. 9. Said supplement shall be distributed to the persons, sold and accounted for, except as to the price, in the manner provided in section sixteen to twenty inclusive of an act of the twenty-sixth general assembly, extra session, "to provide for the annotation, indexing, publication, distribution and sale of the code and statutes hereafter enacted, the appointment of a supervising committee and the election of an editor, and prescribing their duties," which took effect May 5, 1897. The distribution to the members of the general assembly shall commence with the twenty-ninth general assembly.

SEC. 10. The supplement to the code as herein provided to be published and distributed shall be the official edition and the only authoritative publication of the existing laws of the state and no other publication of the laws of the state except the session laws and code shall be used in the courts or referred to in the decisions by title, chapter or section in the reports of the same. Said supplement shall be received in evidence in all courts and tribunals of the state as the official publication of such laws of the state. Neither said supplement nor any part thereof shall be published except in the manner now provided by law for the publication of the code and parts thereof. Said supplement shall be sold for two dollars (\$2) per volume.

SEC. 11. An edition of 15,000 copies of said code supplement shall be printed, and the first copies shall be bound and ready for distribution on or before September 1st, 1902.

SEC. 12. The members of the committee shall be allowed three cents a mile for distance actually traveled, also expenses actually incurred in the performance of their duties, and may draw their requisitions for all necessary codes, session laws, printing, postage and supplies.

SEC. 13. All bills for expenses of the committee and editor and expenditures in connection with said work shall be verified. The same shall be approved by the committee and executive council and the auditor shall draw warrants therefor upon the state treasurer and the same shall be paid out of the treasury.

SEC. 14. There is hereby appropriated out of the treasury from funds not otherwise appropriated, a sum sufficient to pay the costs and expenses of preparing, publishing and distributing said supplement to the code.

SEC. 15. This act being deemed of immediate importance shall take effect and be in force from and after its passage and publication in the Iowa State Register and Des Moines Leader, newspapers published at Des Moines, Iowa.

Approved February 24th, 1902.

I hereby certify that the foregoing act was published in the Iowa State Register and the Des Moines Leader, February 25, 1902.

W. B. MARTIN,
Secretary of State.

PROVISIONS

RELATING TO CODE AND SUBSEQUENT STATUTES.

SECTION 18. The secretary of state may also deliver to each county auditor such number of copies of the code as, in his judgment, will be required to supply the demand, who shall sell such copies at the price fixed under the provision of section sixteen hereof, at not more than five dollars per copy, and pay the proceeds into the county treasury, on or before the first Monday in January of each year. Each county auditor shall, upon receipt of the copies transmitted to him, execute receipts therefor in duplicate, one of which he shall immediately transmit to the secretary of state, and the other to the state auditor. [26 G. A., Ext. Ses., ch. 20, § 18.] [31 G. A., ch. 1.]

SEC. 19. The said county auditor shall also, on or before the first Monday in January of each year, make out in writing under oath a statement of the number of copies sold by him and not before accounted for, and the number remaining on hand, and the amount paid to the county treasurer, and transmit such statement to the auditor of state, who shall charge the county treasurer with such amount, and the secretary of state shall certify to the auditor the number of copies transmitted to each county auditor, and the state auditor shall charge each county auditor therewith, and subsequently credit him with such as may be sold or otherwise lawfully disposed of. [26 G. A., Ext. Ses., ch. 20, § 19.] [31 G. A., ch. 1.]

SEC. 27. The code, as herein provided to be published and distributed, shall be the official edition and the only authoritative publication of the existing laws of the state, and no other publication of the laws of the state shall be used in the courts or referred to in the decisions, by title, chapter or section, in the reports of the same; and the secretary of state and all other persons are hereby prohibited from delivering or permitting to be copied any acts or resolutions, or copies thereof passed at this special session of the general assembly, except as herein provided, until after the code goes into effect; and the code or any part thereof shall be published only in the manner herein or hereafter provided by the general assembly; and the rules of the supreme court providing for the citations of sections of the laws of this state shall designate the same as contained and numbered in the official code of 1897. No public money shall be paid or expended for any publication of the laws of the state except for those published by authority of the state, and any such purchase or publication herein prohibited shall be a misdemeanor. But this section shall not prohibit the publication by the several state officers and commissions in their annual or biennial reports of extracts from the laws pertaining to their respective departments. Such extracts may be published in pamphlet form by such officers or commissions with the consent of the executive council and the same shall be paid for under the provisions of section one hundred twenty (120) of the code. The executive council may also authorize the publication by private individuals of extracts from the laws. [27 G. A., ch. 1; 28 G. A., ch. 1.] • [31 G. A., ch. 2.]

[The amendment by the 31 G. A., ch. 2, ignored code supplement, but amended ch. 1 of the Acts of 27 G. A. where the matter stricken, and supplanted by new matter, appears in lines 12 and 13, while in above section the same was in lines 20 and 21.]

SEC. 29-a. The secretary of state is hereby authorized to distribute copies of the code and the supplement thereto, the publication of which has heretofore been authorized by law, to any foreign country or province, in exchange for similar publications by such country or province, and all publications received as the result of such exchange shall be deposited in the state library, and shall become a part of such library. [30 G. A., ch. 142, § 1.]

SEC. 29-b. It shall be the duty of the secretary of state, upon approval of the executive council, to forward to the librarian of any duly incorporated college within this state, copies of the code and laws, together with sets of the bound state documents, as the same are issued. [30 G. A., ch. 142, § 2.]

SEC. 29-c. Upon application, in writing, from the librarian or chief executive officer of any incorporated college in this state, the secretary of state shall, upon the approval of the executive council, forward to said applicant, without charge, bound volumes of the laws heretofore enacted. [30 G. A., ch. 142, § 3.]

AN ACT to provide for the publication of an edition of seven thousand and five hundred (7,500) copies of the code.

Be it Enacted by the General Assembly of the State of Iowa:

SECTION 1. That the Code Supplement Supervising Committee appointed under the provisions of "An act to provide for the compilation of the laws of the twenty-seventh, twenty-eighth and twenty-ninth general assemblies, to annotate the same and code and rules of the supreme court to and including the May term, 1902, of the supreme court and to publish said compilation and annotations as a supplement to the code, and to provide for the appointment of a supervising committee, and making an appropriation therefor," enacted by the twenty-ninth general assembly of the state of Iowa, shall cause to be published an edition of seven thousand and five hundred (7,500) copies of the code, in accordance with the provisions of "An act to provide for the annotation, indexing, distribution and sale of the code and statutes hereafter enacted, and the appointment of a supervising committee, and the election of an editor and prescribing their duties," enacted by the twenty-sixth general assembly, extra session, and which took effect May 5th, 1897, so far as applicable. Said committee may cause the plates to be corrected where errors in print occur, also may change the citations therein from Northwestern Reporter to Iowa Reports, and may print therewith the new index prepared for the supplement to the code or omit the index and may publish therewith references to amendments and subsequent enactments. [29 G. A., ch. 211, § 1.]

SEC. 2. This act being deemed of immediate importance shall take effect and be in force from and after its publication in the Iowa State Register and the Des Moines Leader, newspapers published in Des Moines, Iowa.

Approved March 22nd, 1902.

I hereby certify that the foregoing act was published in the Iowa State Register and the Des Moines Leader, March 25, 1902.

W. B. MARTIN,
Secretary of State.

CONSTITUTION OF IOWA

State Boundaries.

The boundary between Iowa and Missouri re-established. *Missouri v. Iowa*, 165 U. S., 118.

ARTICLE 1.

BILL OF RIGHTS.

SECTION 1. Rights of persons.

Courts have an undoubted right to inquire into the objects of a tax and to declare invalid all taxes that are levied for other than governmental purposes, and a tax may be held invalid on account of some implied prohibition of the constitution, but a court will not interfere unless it is clear that the legislature has exceeded its power. *Youngerman v. Murphy*, 107-686.

A right of contract exists as a necessary inference from the express guaranty of property rights, but this right, like all others, is held subject to such reasonable restrictions and regulations as may be imposed for the public good. *McGuire v. Chicago, B. & Q. R. Co.*, 131-340.

The right of the state to regulate liberty of contract is peculiarly applicable to

corporations. Corporations and natural persons do not stand in the same relation to the power which inheres in the state to regulate their conduct or methods of business. The corporate person has no rights except those with which it is endowed by the law-making power, and the power of creation necessarily implies the right of regulation. *Ibid.*

The provisions of Code § 2071, forbidding any contract between a railroad company and its employee, limiting its liability for injuries resulting from negligence of a co-employee, are not unconstitutional as interfering with freedom of contract. *Mumford v. Chicago, R. I. & P. R. Co.*, 128-685.

SEC. 6. Laws uniform.

Uniformity of operation of general laws. The constitutional requirement that all laws of a general nature shall have a uniform operation means that every law shall have a uniform operation upon all citizens, persons or things of any class upon which it purports to act, and that there shall not be granted to any person or class of persons privileges which upon the same terms may not be enjoyed by all. But the legislature may classify the subjects of legislation, provided such classification is not purely arbitrary or unreasonable. *Des Moines v. Bolton*, 128-108.

A law is uniform which applies to every one of a defined class of cases, provided the classification is reasonable. *Wooster v. Bateman*, 126-552.

Special privileges and monopolies are always obnoxious, and discriminations against persons or classes still more so. Exclusive privileges and franchises cannot be granted except when absolutely necessary. Therefore held that the exception in Code § 2508, relating to the use of the "Welsbach Hydrocarbon Incandescent

Lamp" in burning the lighter forms of petroleum was unconstitutional. *State v. Santee*, 111-1.

A statutory provision, operating alike upon all persons in all stations, is of uniform operation, within the language of constitutional provisions. *Cook v. Marshall County*, 119-384.

A statute giving to a land owner double damages for trespass in removing coal from his land is not unconstitutional as amounting to class legislation. *Mier v. Phillips Fuel Co.*, 130-570.

The provisions of Code § 2579 as to required qualifications for the practice of medicine are not unconstitutional under this section. *State v. Bair*, 112-466.

The provisions of Code § 4764, making it criminal for a man who shall marry a woman for the purpose of escaping prosecution for seduction to afterwards desert her without good cause, is not open to the objection of want of uniformity in its operation. *Morris v. Stout*, 110-659.

The statute (27 G. A. ch. 108) regulating the admissibility of evidence of husband and wife in actions to set aside

fraudulent conveyances from one to the other, is not unconstitutional as class legislation since it applies to every person coming within the relation and circumstances provided for. *Burk v. Putnam*, 113-232.

The right to hold office is not a natural or personal right in such sense that the statute granting preference to honorably discharged veterans of the civil war in the appointment to minor offices is unconstitutional. *Shaw v. Marshalltown*, 131-128.

The provisions of Code § 1347, requiring all peddlers carrying on a business outside of any city or town to secure a license from the county auditor and pay a tax therefor, but exempting from the payment of such tax persons who have served in the Union army or navy, is unconstitutional because not of uniform operation. *State v. Garbroski*, 111-496.

An ordinance requiring persons riding bicycles on the streets at night to carry a light is not unconstitutional, although no similar provision is made as to persons on other silently running vehicles. *Des Moines v. Keller*, 116-648.

An ordinance as to rates of fare on a street railway providing lower fares by way of commutation tickets to citizens of the city, not to be enjoyed by other citizens of the state, held invalid by reason of want of uniformity of operation. *State ex rel. v. Omaha & Council Bluffs R. & B. Co.*, 113-30.

The provisions as to jurisdiction of superior courts are not unconstitutional under this section. *Page v. Millerton*, 114-378.

A curative statute legalizing the exercise in a particular case of authority given to counties in general held not to be invalid under this section. *Witter v. Board of Supervisors*, 112-380.

Corporations: While a corporation is not a citizen, it is a person, and as such may not rightfully be denied the protection of the laws of the state upon equal terms with all other persons upon like circumstances and conditions. *McGuire v. Chicago, B. & Q. R. C.*, 131-340.

But the reasonable classification of persons for the purpose of legislation, according to occupation, business or other circumstances, by which one class or portion of the people is differentiated from other portions or classes, is not a violation of the constitutional guaranty. *Ibid.*

Legislation imposing upon railway companies special restrictions, obligations and liabilities not generally applicable to other

persons or corporations, is not a denial of the equal protection of the laws. *Ibid.*

Therefore held that the so-called Temple Amendment to Code § 2071 prohibiting railroad companies from limiting their liability by contracts of insurance or relief is not invalid. *Ibid.*

It is not necessary that the law should apply alike to all persons or all corporations in the state. If it is applicable to every person or corporation brought within the relations and circumstances provided for by the law, it is constitutional. *Scottish U. & N. Ins. Co. v. Herriott*, 109-606.

The state is not prohibited from discriminating in the privileges it may grant to foreign insurance companies as a condition of their doing business within the limits of the state. *Ibid.*

There is no requirement of either the federal or state constitution that taxes on business or privileges shall be uniform. *Ibid.*

A statute making special provision as to the rate of charge for loans by building and loan associations is not unconstitutional. *Iowa Sav. & L. Assn. v. Heidt*, 107-297.

The statutory provision prohibiting combinations between insurance companies is not open to the objection that it is not of uniform operation. *Greenwich Ins. Co. v. Carroll*, 125 Fed., 121.

The requirement as to uniformity of laws does not prevent provisions as to the business of unincorporated associations which are different from those applicable to the same business conducted by corporations. *Brady v. Mattern*, 125-158.

Taxation: The legislature has plenary power in classifying property for taxation, and may make this classification dependent not only upon use, but upon ownership as well. *Waterloo & C. F. R. T. Co. v. Board of Supervisors*, 131-237.

The legislature may impose a higher rate of tax upon foreign corporations than it does upon corporations organized under the laws of the state. *Scottish U. & N. Ins. Co. v. Herriott*, 109-606.

The eastern half of the Union Pacific Company's bridge across the Missouri river, although within the corporate limits of the city of Council Bluffs, is not subject to municipal taxation, as it is separated from the city by a large body of land used for agricultural purposes, and does not receive either fire or police protection from the city. *Arnd v. Union Pac. R. Co.*, 120 Fed., 912.

SEC. 7. Liberty of speech and the press.

Freedom of speech must be exercised with due regard for the rights of all people. *State v. Heacock*, 106-191.

While the press enjoys the utmost lati-

tude in reviewing the action of the courts and may after the particular litigation is ended assail with just criticism opinions, rulings and judgments with the weapons

of reason, ridicule or sarcasm, it is an act of contempt to publish and distribute in such way that it is likely to fall into the hands of jurors and witnesses matter which reflects upon one of the parties to the litigation and is intended to indicate the result which should be reached. *Field v. Thornell*, 106-7.

The truth can be shown as a defense only when the publication is made with good motives and for justifiable ends. Except as thus modified the common law re-

lating to libel governs. *State v. Haskins*, 109-656.

The right to plead the truth of a libel is restricted to publications made with good motives and for justifiable ends. The liberty of the press does not mean that the publisher of a newspaper shall be any less responsible than another person would be for publishing otherwise the same libelous matter. *Morse v. Times-Republican Printing Co.*, 124-707.

SEC. 8. Personal security.

Searches and seizures: The guaranty against search, except on warrant issued on probable cause, applies to the person of the defendant in a criminal case as well as to his papers, and while it is well settled that when one is charged with an offense the officers may, without further legal procedure, seize the weapons with which the crime is committed, property which has been obtained by means of the criminal act, or articles which may give a clue to the commission of the crime or identification of the criminal, and that the officer making such search may testify as to any facts, even though crinating, which were discovered thereby, yet compulsory examination of the person of the defendant is not authorized, and evidence procured by means of such compulsory

examination should be excluded. *State v. Height*, 117-650.

Evidence obtained by a search of defendant's house under a search warrant unlawfully issued is inadmissible as against the defendant in a criminal prosecution. *State v. Sheridan*, 121-164.

A description which points out or identifies the place to be searched with such reasonable identity as will obviate any mistake in locating it is all that is required. *State v. Moore*, 125-749.

The invasion of a dwelling without lawful reason or proper procedure is a wrong for which recovery may be had in damages, unless the owner has voluntarily consented to such invasion. *McClurg v. Brenton*, 123-368.

SEC. 9. Trial by jury—due process of law.

Jury trial: It is no violation of the general constitutional provision as to due process of law to provide that an appeal from the action of the board of supervisors on an application to secure a drainage of wet lands, shall be tried without a jury. It is only as to damages that there is a constitutional right to jury trial. *In re Bradley*, 108-476.

Within the meaning of the constitution the right of trial by jury extends only to those cases where a jury was necessary according to the course of procedure at common law. Therefore jury trial is not essential in a proceeding by appeal to question the legality of special assessments for public ditches. *Sisson v. Board of Supervisors*, 128-442.

Due process: The privilege of pleading usury is not a vested right which cannot be taken away by subsequent legislation. So held as to an act legalizing loans by building and loan associations providing for the payment of more than lawful interest on the sum borrowed. *Iowa Sav. & L. Assn. v. Heidt*, 107-297.

The right of the owner of the bed of a non-navigable stream to fish over his own land is subject to legislative control. *State v. Beardsley*, 108-396.

The legislature cannot, by a change in the statute as to limitation of actions, cut

off instantly the remedy by suit upon an existing cause of action. A reasonable time must be given within which to prosecute the action under the new statute. *Cassady v. Grimmelman*, 108-695.

Confiscation of property without a judicial hearing, after due notice, is not due process of law, and a collateral inheritance tax authorized to be imposed without notice to those claiming the inheritance is invalid, where such a tax is in effect a property tax, and not a tax upon the right of succession. But such a tax may be rendered valid where the estate has not yet been fully settled by a curative act providing for such notice. *Ferry v. Campbell*, 110-290.

The legislature cannot by a retrospective statute require payment of higher fees in case of renewal of a corporation than those provided for by law at the time the legal steps for renewal were taken and tender of the fees then required by law was made. *Lamb v. Dobson*, 117-124.

The right to an appeal from one court or tribunal to another has never been held to be in itself essential to due process of law. *Ross v. Board of Supervisors*, 128-427.

The fact that superior courts are given concurrent jurisdiction with the district courts throughout the county, even in

cases where there are two divisions of the county for district court purposes, does not render the statutory provisions as to superior courts unconstitutional under this section. *Page v. Millerton*, 114-378.

The salary of an officer is property for which he is entitled to the protection of due process of law. *State v. Miller*, 132-587.

In criminal cases: Due process of law, as guaranteed by the constitution, has received a very broad and liberal interpretation. Every one is entitled to the protection of those principles of liberty and justice which lie at the basis of all our civil and political institutions. *State v. Height*, 117-650.

Fundamental principles of judicial procedure, whether in civil or criminal cases, as they existed and were recognized in the courts of England and the American colonies prior to the adoption of the federal and state constitutions, are intended to be preserved by this guaranty, and while forms may change, essential guaranties cannot be taken away, even by attempted legislative enactment. *Ibid.*

The rule that involuntary confessions cannot be shown as against the defendant in a criminal prosecution, although not recognized in our constitution or statutory provisions, is essentially involved in the guaranty of due process of law. *Ibid.*

Likewise the rule against requiring a witness to give self-incriminating evidence in any judicial proceeding, is fundamental, although not specifically guaranteed. And held, therefore, in a criminal prosecution, it was not competent for the state to prove the result of a compulsory examination of the person of the defendant. *Ibid.*

The provision for the trial and punishment of constructive contempts by the court without a jury does not deprive a person charged with such contempt of his liberty or property without due process of law. *Drady v. District Court*, 126-345.

Presence of the judge in the court room in a criminal case is essential unless waived by defendant. *State v. Hammer*, 116-284.

To admit as against a defendant in a criminal prosecution evidence procured by an unlawful search of his premises under a pretended search warrant would amount

to a denial of due process of law. *State v. Sheridan*, 121-164.

A corporation is a person within the constitutional provisions as to due process of law, and a statutory provision prohibiting agreements between insurance companies as to the rates of commissions to agents is unconstitutional as depriving them of the right of contract. *Greenwich Ins. Co. v. Carroll*, 125 Fed., 121.

The statutory provision imposing upon relatives the expense of the maintenance of an insane person at the state hospital is not unconstitutional as depriving a person upon whom such obligation is imposed of his property without due process of law. *Guthrie County v. Conrad*, 133-171.

Taxation and assessments: The treasurer may be authorized to assess the tax due on property which the owner has failed to disclose to the assessor. *Galusha v. Wendt*, 114-597.

Although the treasurer is allowed a commission on taxes collected he is not thereby disqualified from acting under Code § 1374 in enforcing payment of taxes on omitted property. *Beresheim v. Arnd*, 117-83.

A statute is not unconstitutional which provides for the collection of a tax by summary proceedings. *Hodge v. Muscatine County*, 121-482.

In a proceeding for the establishment of a county ditch a landowner whose property has been included within the drainage district and which is generally benefited by the improvement may be assessed for the cost thereof, although his property is not directly benefited by the specific improvement. *Oliver v. Monona County*, 117-43.

A statute providing for the assessment of the expenses of constructing a ditch upon lands not abutting, the owners of which have received no notice of the proceedings, is unconstitutional as depriving such owners of their property without due process of law. *Beebe v. Magoun*, 122-94.

When the amount of tax to be exacted depends upon the exercise of judgment and discretion of those fixing the value of the property or benefits by which such amount is to be measured, an opportunity for correction must be afforded. *Ibid.*

SEC. 10. Rights of persons accused.

Copy of indictment: Where a copy of the indictment is delivered to an attorney for the defendant there is a sufficient compliance with the constitutional requirement that defendant be furnished with a copy of the indictment against him. *State v. McClain*, 130-73.

Whether the copy of the indictment delivered to the defendant is a correct copy is a matter to be determined by the trial court when any question is raised with

reference thereto. *State v. Hatlestad*, 132-188.

Further as to furnishing defendant with a copy of the indictment, see Code § 5274 and notes.

Public trial: It rests within the sound discretion of the trial court to exclude the witnesses and send the jury from the room pending argument on a question. The constitutional guaranty is for the purpose of securing to the accused a fair

and honest consideration by the jury of the charges made against him. *State v. Worthen*, 124-408.

Speedy trial: It is not competent on appeal in a criminal case for the supreme court to dismiss the proceeding on the ground that the defendant had not been given a speedy trial. *State v. Sloan*, 131-676.

Issue of fact: The court has no power to instruct that an essential fact is established notwithstanding all the evidence tends to prove such fact. *State v. Lightfoot*, 107-344. And on this point see also notes to Code § 5386.

Waiver: The defendant in a criminal case may waive the benefit of a statutory provision intended for the protection of his rights. *State v. Smith*, 132-645.

Constitutional provisions for the benefit of persons accused may be waived and the conviction based on such waiver will be valid, provided it is pronounced by a court having jurisdiction and duly constituted to try the case. *Busse v. Barr*, 132-463.

Waiver of trial by jury: On an appeal to the district court from a conviction before the mayor for violation of a city ordinance, the defendant may waive a jury trial. *Lovilia v. Cobb*, 126-557.

The court is wholly without jurisdiction to hear or try an issue of fact in a criminal case without the aid of a jury, and consent or waiver of the defendant does not estop him from taking advantage of the error. *State v. Rea*, 126-65.

Confronting witnesses: Defendant is not deprived of privilege of confronting witnesses by provision for admitting testimony of absent witnesses as set out in

application for continuance. *State v. Wiltsey*, 103-54.

The right of the defendant to be confronted with the witnesses against him in a criminal case is one which may be waived. *State v. Smith*, 124-334.

A proceeding to disbar an attorney is not a criminal prosecution, and the requirement that accused be confronted by the witnesses against him has no application. *State v. Mosher*, 128-82.

The right to be confronted by a witness against him may be waived by defendant, as for instance by a stipulation for the admission of a transcript of the evidence taken on a former trial. *State v. Olds*, 106-110.

Swearing of witnesses: To allow a material witness for prosecution to give testimony without being sworn is ground for new trial. *State v. Lugar*, 115-268.

Attendance of witnesses: The statutory provision that defendant asking for a continuance on the ground of the absence of a witness must set out what he expects to prove by such witness, and that a continuance shall not be granted if the opposite party admits the testimony thus set out, is not unconstitutional as depriving defendant in a criminal case of the right to have his witnesses present. *State v. Wiltsey*, 103-54.

Assistance of counsel: Although the constitution guarantees to the defendant the right to the assistance of counsel, it is competent for the legislature to reasonably regulate and prescribe the manner of the appointment of such counsel. *Korf v. Jasper County*, 132-682.

SEC. 11. When indictment necessary.

Constitutional provisions for the benefit of persons accused may be waived, and the conviction based on such waiver will be valid, provided it is pronounced by a court having jurisdiction, and duly constituted to try the case. *Busse v. Barr*, 132-463.

Objection to the selection of the grand jury may be waived by a failure to make such objection at the proper time, and an objection thus waived cannot afterwards be made a ground for release on habeas corpus from the enforcement of the sentence imposed in a trial had under the indictment. *Ibid.*

SEC. 12. Twice tried—bail.

An act may constitute two offenses, one against the state and the other against a city or town; and conviction of one may not be pleaded as constituting former jeopardy in a prosecution for the other. *Nicola v. Reichart*, 131-492.

While in general an acquittal in a criminal case is not a bar to a subsequent civil action founded on the same facts,

Jurisdiction of justice of the peace: A statute providing for the punishment of an offense before a justice of the peace may provide for charging different violations in separate counts, although the aggregate fines which may be imposed under such information may exceed \$100. *State v. Denhardt*, 129-135.

Where an ordinance provided for cumulative penalties for a continuing act, which might amount to more than \$100, held that the offense was not one within the jurisdiction of a justice of the peace. *State v. Babcock*, 112-250.

yet, where the civil action is to secure a forfeiture which would have been a part of the penalty to be imposed in the criminal proceeding, and is between the same parties, the previous acquittal is a bar. *State v. Meek*, 112-338.

On reversal of a conviction for manslaughter under an indictment charging murder in the first degree, the defendant

can only again be put on trial for the offense of which he was convicted, and he is only entitled to the number of peremptory

challenges allowed in case of a prosecution for such offense. *State v. Smith*, 132-645.

SEC. 18. Eminent domain.

The power of taking private property for public use may be delegated through an act of the legislature, and it is for that body to determine in the first instance what are the public uses to subservise which a grant of power may properly be made. Interference on the part of the courts with the exercise of this legislative power will not be warranted except where there is a clear, plain and palpable transgression of the constitutional rule. *Sisson v. Board of Supervisors*, 128-442.

That a use for which private property is authorized to be taken shall be a public use, it is not essential that the entire community or any considerable portion of it should directly enjoy or participate in the improvement or enterprise, nor that each person to be benefited shall be affected in precisely the same manner or in the same degree. *Ibid.*

The substitution of one public use to the exclusion of other public uses is not an invasion of a right of property; therefore held that a statute giving to the board of park commissioners of Des Moines jurisdiction over the banks and bed of the river authorized such board to regulate the taking of ice from the river within such limits. *Board of Park Commissioners v. Diamond Ice Co.*, 130-603.

An ordinary servitude for a street railway is not an additional use of streets dedicated to public purposes. *Snyder v. Ft. Madison Street R. Co.*, 105-284.

Consequential injury to the property owner's entire premises, due to the taking of a portion thereof as a part of the site for a public school building, should be considered in estimating the damages resulting from the taking of his property. *Haggard v. Independent Sch. Dist.*, 113-486.

SEC. 21. Attainder—ex post facto law—obligation of contract.

Ex post-facto: A statute which increases the punishment of an offense already committed is unconstitutional. Therefore held that a statute by which an offense previously punishable as petit larceny on information before a justice of the peace was made indictable on account of three previous convictions was not applicable to an offense committed before the statute went into effect. *State v. Dale*, 110-215.

Retroactive laws: A statute affecting the remedy only is not unconstitutional as applied to a right existing before the statute is passed. *Allerton v. Monona County*, 111-560.

Benefits will not be taken into account in estimating such consequential injuries. *Ibid.*

Benefits from the improvement are not to be considered. *Lough v. Minneapolis & St. L. R. Co.*, 116-31.

A statute requiring the construction of fishways in dams already constructed or owned by authority of the state, is not unconstitutional. *State v. Meek*, 112-338.

In determining, as between the state and a telephone company, the right to use the public highways, the question of damages to abutting owners will not be considered. *State v. Nebraska Tel. Co.*, 127-194.

The provision in the statute for special assessments for public ditches, that the damages shall be secured to be paid upon such terms and conditions as the county auditor may deem just and proper is not unconstitutional. *Sisson v. Board of Supervisors*, 128-442.

A tax for a combination railroad and toll bridge is not unconstitutional. *Pritchard v. Magoun*, 109-364.

The land owner is entitled to a trial by a jury of twelve on appeal to the district court, and this proceeding is removable to the federal court in a proper case. *Kirby v. Chicago & N. W. R. Co.*, 106 Fed., 551.

The improvement of a street to the damage of an abutting property owner does not constitute a taking of private property without compensation, although no provision is made for the reimbursement of such owner for the damage suffered, even though by excavation in the street to its full width his property is deprived of lateral support. *Talcott v. Des Moines*, 109 N. W. 311.

The constitution does not forbid the enactment of retroactive laws, and the validity of such statutes has frequently been upheld. *Ross v. Board of Supervisors*, 128-427.

A statute relating simply to the remedy, such as the statute of limitations, may apply to causes of action previously existing, but a statute affecting the terms of a previous contract, for instance, one which extends the term of limitation of action fixed in a policy of insurance, will not be applied to contracts already made. *Farmers' Co-op. Creamery Co. v. Iowa State Ins. Co.*, 112-603.

The term of limitation for bringing action under provisions of an insurance policy cannot be extended by statute. *Ibid.*

Statutory provisions as to collection of taxes on omitted property are not unconstitutional, though given retrospective operation. *Galusha v. Wendt*, 114-597.

One who acquires by grant from the state the right to maintain a dam already erected by the state, takes such right subject to the police power of the state to require the construction of a fishway. *State v. Meek*, 112-338.

Legalizing acts: A curative act may be valid. *Iowa Saving & Loan Assn. v. Selby*, 111-402.

The bringing of suit vests no right in a particular decision, and a curative act may be effectual to obviate the effect of defective or unauthorized proceedings of a municipal corporation, even after the bringing of suit in which the legality of the corporate act is brought in question, provided no contract or vested right is affected. *Windsor v. Des Moines*, 110-175.

The defect in the collateral inheritance tax law, consisting of failure to provide for notice to those taking the inheritance, held cured by a retrospective statute providing for notice, so that in a case where the estate was not settled the supreme court might on appeal reverse the judgment entered in the lower court based on the failure of the law to provide for such notice. *Ferry v. Campbell*, 110-290.

The legislature may legalize the recording of instruments defectively acknowledged, and held that such a statute was applicable to an instrument of adoption. *Bresser v. Saarman*, 112-720.

The legislature may legalize any act which it might lawfully have authorized in the first instance, and held that it could provide retrospectively that a notice to nonresidents by publication was valid, a proceeding in which such notice might have been authorized. *Fair v. Buss*, 117-164.

The legislature may by amendment cure a constitutional defect in a statute, the main purpose of which is within the scope of legislative power, and give such amendment retroactive effect upon cases already begun and pending. *Ross v. Board of Supervisors*, 128-427.

Where a curative act has removed the invalidity of a contract, such invalidity is not restored by repeal. *Edworthy v. Iowa Sav. & L. Assn.*, 114-220.

Obligation of contracts: Where city warrants are issued at a time when the statutes required their payment in the order of presentation, such provision is a part of the warrant, and subsequent legislation subordinating prior warrants to those for subsequent years would be unconstitutional as to warrants issued be-

fore the statute went into effect. *Phillips v. Reed*, 109-188.

A statute which is found in its application to a particular case to impair the obligation of a contract, may be held unconstitutional in that respect, although valid in other cases. *Brady v. Mattern*, 125-158.

A judgment rendered upon a tort or other cause of action not entitled to protection as a contract may be impaired without violating the constitutional inhibition. *Ferry v. Campbell*, 110-290.

Whether a judgment is a contract within the constitutional provision, *quaere*. *Wooster v. Bateman*, 126-552.

Change of judicial decision cannot constitute the impairment of the constitutional obligation of contracts. *Swanson v. Ottumwa*, 131-540.

The period of limitation may be reduced without impairing the obligation of an existing contract, provided a reasonable period within which to maintain action on such contract is preserved. *Wooster v. Bateman*, 126-552.

In determining what is a reasonable time, the period which has elapsed between the enactment of the statute and its taking effect may be considered. *Ibid.*

Where there is a contract to pay for services out of a specified fund of a building and loan association, such associations being expressly made subject to legislative control, the act of the legislature in abolishing the fund from which payment could be made is not invalid as impairing the obligation of a contract. *Wood v. Iowa Bldg. & Loan Assn.*, 126-464.

As corporate charters are subject to legislative control, the provision in a franchise granted to a street railway company that it shall not be liable for the expense of street improvements otherwise than as specified in such franchise, does not prevent subsequent regulations imposing additional obligations on such company. *Marshalltown Light, P. & R. Co. v. Marshalltown*, 127-637.

Where a county had contracted with agents to discover property omitted or concealed from taxation, for a compensation to be determined by a percentage of the taxes collected from such property, held that a subsequent statute limiting the percentage which could thus be contracted for was not valid as to services previously rendered under a valid contract. *Shinn v. Cunningham*, 120-383.

A resolution of a city council directing the removal from the streets of the tracks of a street railway company is a law of the state within the constitutional prohibition of the impairment of the obligations of contract. *Des Moines City R. Co. v. Des Moines*, 151 Fed., 854.

ARTICLE 2.

RIGHT OF SUFFRAGE.

SECTION 1. Electors.

The right of suffrage is not a natural or personal right, and does not come within the scope of constitutional guaranties

as to equal privileges. *Shaw v. Marshalltown*, 131-128.

SEC. 6. Ballot.

Voting by means of a voting machine is voting by ballot. The constitutional provision that elections shall be by ballot was intended to require and protect the secrecy of the ballot, with the general purpose of guarding against intimidation, securing

freedom in the exercise of the elective franchise, and reducing to a minimum the incentives to bribery. *United States Standard Voting Mch. Co. v. Hobson*, 132-38.

SEC. 7. General elections.

The biennial election amendment was properly submitted as one proposition, although it involved changes in different

sections of the constitution. *Lobaugh v. Cook*, 127-181.

ARTICLE 3.

OF THE DISTRIBUTION OF POWERS.

SECTION 1. General assembly.

A statute authorizing the county auditor to exercise judicial powers in the assessment of property for taxation is not open to attack on the ground that it is in contravention of the constitutional provision distributing the powers among the three departments. *Clark v. Horn, Auditor*, 122-375.

The delegation by the legislature of the power to tax may be made to a municipal corporation, but not to other agencies, and such power cannot be vested in a board of trustees not elected by the peo-

ple of the municipality. *State ex rel. v. Mayor of Des Moines*, 103-76.

The legislature may give to executive officers a discretion in determining the conditions to be imposed on the conducting of a business which is subject to legislative control. *Brady v. Mattern*, 125-158.

The legislature may prescribe for the punishment as a misdemeanor of the offense of violating the rules of the state board of health, adopted and published as authorized by statute. *Pierce v. Doolittle*, 130-333.

SEC. 29. Acts—one subject—expressed in title.

Title of statute—one subject: The intention of this constitutional provision is to prevent the union in the same act of incongruous matter, but it is a unity of object which is to be looked for in the ultimate purpose to be attained and not in the details for accomplishing such purpose. *Beresheim v. Arnd*, 117-83.

Titles of legislative acts are to be liberally construed. *Ibid.*

The subject of an act is required to be expressed in the title only by the use of general terms. But where the purpose is not so expressed the act is void. *Ree Lumber Co. v. Reed*, 107-111.

In the absence of any showing of defects in the enactment of the Code, either as a whole or by titles and chapters, the court is not justified in holding that any section or chapter of the Code is void because the subject-matter is not embraced in the title. *State v. Schlenker*, 112-642.

The requirement is that the act shall embrace but one subject, and matters properly connected therewith. *Guaranty S. & L. Assn. v. Ascherman*, 108-150.

Provisions relating to the means and manner of making effective the general purpose of the act as expressed in the title do not render the act invalid, because such provisions are not included therein. *Boggs v. School Township*, 128-13.

The intention of the constitutional provision was to prohibit the insertion in an act of incongruous matter having no connection or relation with the general subject as expressed in the title. Accordingly the title is sufficient, although confined to general terms if it answers as a key to the subject-matter of the act. *Sisson v. Board of Supervisors*, 128-442.

It is the subject-matter of the act and not all matters properly connected therewith which are to be expressed in the title.

Newton v. Board of Supervisors, 112 N. W., 167.

The title of an act (24 G. A., chap. 36) relating to counterfeiting of union labels, held sufficient to cover provisions of the act relating to damages or penalty for violation thereof. *Beebe v. Tolerton & Stetson Co.*, 117-593.

The provision that every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title, does not render invalid the provision of Code §§ 5007-8 with reference to the sale of cigarettes, by which it is provided that it shall be criminal for any one to make such sale who has not paid a mulct tax, notwithstanding the fact that this provision is contained in the title of the Code relating to crimes and punishments. *Cook v. Marshall County*, 119-384.

The title of the Code "Of the Practice of Medicines" sufficiently covers provisions relating to itinerant physicians professing or attempting to treat, cure or heal diseases. *State v. Edmunds*, 127-333.

Amendments: A title which simply

SEC. 30. Laws general and uniform.

General and special laws: Where a general law could not have been made applicable to remedy the difficulty to be cured by legislation a special statute is not unconstitutional. *McCain v. Des Moines*, 128-331.

The legislature may legalize a defective notice in proceedings for establishment of a highway without making such legalizing act applicable to other cases. Such a statute cannot be made of general application. *Fair v. Buss*, 117-164.

For incorporation of cities and towns: It was not intended by the provision of the constitution of 1857 forbidding the granting of special charters to cities to render invalid the charters already granted. *Ulbrecht v. Keokuk*, 124-1.

Municipal corporations: A curative statute legalizing the exercise in a particular case of authority given to counties in general held not to be invalid under this section. *Witter v. Board of Supervisors*, 112-380.

A statute making special provisions as to one particular city with reference to the granting of a franchise to own and operate waterworks, is invalid. *Cedar Rapids Water Co. v. Cedar Rapids*, 118-234.

A legalizing act, the effect of which is to except or release a certain city from the operation of a general statute, which remains in full force against all other municipalities of the state, is an evasion of the provisions of article 3, section 30, as to special legislation and invalid. *Ibid.*

The constitutional provision seems to have been framed with special reference to the preservation of merely local inter-

names or describes an amending act as such without stating the specific character or subject of the amendment is sufficient. It is only the general purpose which is to be expressed in the title, and not the methods or provisions by which that purpose is to be accomplished. *McGuire v. Chicago, B. & Q. R. Co.*, 131-340.

The amendment of an act in general, or of a particular section thereof, implies merely a change of its provisions upon the same subject to which the act or section relates. *State v. Bristow*, 131-664.

A provision for issuance of bonds by any city of a certain class for the erection of a city hall, held sufficiently embraced within the title of the act which authorized the erection of a city hall and the levy of a special tax therefor. *Beaner v. Lucas*, 112 N. W., 772.

The title, "An act to amend § 1898 of the Code, relating to building and loan association," held sufficient to cover curative provisions relating to such associations. *Iowa Saving & Loan Assn. v. Selby*, 111-402.

ests from legislative interference, except through the medium of general laws having a uniform operation throughout the state. *Ibid.*

A statute applicable only to cities under special charter is not invalid for want of uniformity of operation. *Ulbrecht v. Keokuk*, 124-1.

Uniform operation: An inheritance tax imposed on the value of the estate of the decedent above a certain exemption and applicable to that part of such estate not distributed to certain named relatives is not unconstitutional because not of uniform operation. *In re McGhee's Estate*, 105-9.

Discriminations between unincorporated associations and corporations conducting the same business when based on a reasonable distinction involving the public welfare are not prohibited. *Brady v. Mattern*, 125-158.

The statutory provision prohibiting combinations among insurance companies is not unconstitutional because not applicable to other forms of business. *Greenwich Ins. Co. v. Carroll*, 125 Fed. 121.

Taxation—what is: The license which a city may impose on vehicles using its streets is authorized under the police power, if the fee is only such as will cover the expense of enforcing the regulation as to a particular calling, but when the fee is larger than is necessary for such purpose and is exacted for the purpose of revenue, the license is issued under the taxing power. *Des Moines v. Bolton*, 128-108.

ARTICLE 4.

EXECUTIVE DEPARTMENT.

SECTION 16. Pardons.

A pardon may be conditional and may be revoked without a judicial proceeding on breach of the condition, such revocation being provided for in the pardon itself. But the acceptance of a conditional pardon does not bind the prisoner to for-

feiture of his statutory right to diminution of his term of imprisonment on account of good conduct so far as the right to diminution has accrued prior to the granting of the conditional pardon. *State v. Hunter*, 124-569.

ARTICLE 5.

JUDICIAL DEPARTMENT.

SECTION 1. Courts.

The establishment of superior courts is not in contravention of the provisions of this section. *Page v. Millerton*, 114-378.

A court cannot be authorized to perform a non-judicial function not connected with the exercise of its judicial power. Therefore held that a statute authorizing the judges of the district court to appoint trustees of city waterworks, to control and operate such works for the city, was unconstitutional. *State ex rel. v. Barker*, 116-96.

Although the power to punish for contempt is inherent in the courts it is within the province of the legislature to regulate the procedure. *Drady v. District Court*, 126-345.

Courts interfere with legislative action on the ground that it is unconstitutional only when some provision of the fundamental law is violated or when the act is clearly in violation of some implied prohibition of the constitution. *Youngerman v. Murphy*, 107-686.

SEC. 3. Judges elected.

It was not improper to embody the provision for changing the method for determining who should be chief justice of

the supreme court in the amendment providing for biennial elections. *Lobaugh v. Cook*, 127-181.

SEC. 4. Jurisdiction.

The supreme court has no jurisdiction to correct findings of fact made by the jury, and it cannot consider the question whether the verdict is supported by the evidence unless that question has been presented to the lower court. *Schulte v. Chicago, M. & St. P. R. Co.*, 124-191.

The supreme court, being given supervisory control over all inferior judicial tribunals, has the power to revise the action of such tribunal where no appeal is

provided for. *Home Sav. & T. Co. v. District Court*, 121-1.

The jurisdiction conferred by the constitution in equity suits is that possessed by chancery courts at the time of the adoption of the constitution, and, in the absence of restriction, an appeal brings the whole case before the supreme court for review and retrial of facts as well as of law. *Lessenich v. Sellers*, 119-314.

SEC. 8. Style of process.

Where the mode of enforcing an ordinance is prescribed by charter, that mode should be pursued, and if thus author-

ized the prosecution may be in the name of the state. *State v. Wilson*, 109-93.

ARTICLE 7.

STATE DEBTS.

SECTION 7. Tax imposed distinctly stated.

Statutory provisions authorizing cities to impose a tax for waterworks, to be constructed under contracts to be made in the future on approval of the electors, are not in violation of this section. *Youngerman v. Murphy*, 107-686.

It is doubtful whether the provision of the constitution relating to laws which

embody taxes has any application to license taxes. *State v. Edmunds*, 127-33.

The provisions requiring relatives of an insane person to pay for the support of such person at the hospital for the insane do not constitute the imposition of a tax. *Guthrie County v. Conrad*, 133-171.

ARTICLE 8.

CORPORATIONS.

SECTION 2. Property taxable.

The provision of Code § 1333 for payment by insurance companies of a per cent of gross earnings in lieu of all other state, county and local taxes, except taxes on real estate and special assessments, is unconstitutional, as in violation of the provisions of this section. *Hawkeye Ins. Co. v. French*, 109-585.

But such provision is not unconstitutional as authorizing unequal taxation. *Manchester Ins. Co. v. Herriott*, 91 Fed. 711.

A provision by which telegraph and telephone companies are required to pay taxes directly to the state and in so far were exempted from local taxes, was held to be invalid as providing for the taxation

of the property of corporations on a different basis from that of individuals. *Layman v. Iowa Telephone Co.*, 123-591.

It is not required that taxes on business or on privileges shall be uniform, and the state may impose a special tax on the business of foreign insurance companies within the state. *Scottish U. & N. Ins. Co. v. Herriott*, 109-606.

The provision of the constitution that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals has no application to a business or license tax, such as the taxation of an insurance company based on its gross receipts. *Iowa Mut. Tornado Assn. v. Gilbertson*, 129-658.

SEC. 12. Amendment or repeal of charters—exclusive privileges.

The terms of a franchise granted to a street railway company are subject to modification by subsequent legislation.

Marshalltown Light, P. & R. Co. v. Marshalltown, 127-637.

ARTICLE 9.

EDUCATION AND SCHOOL LANDS.

1. Education.

SECTION 15. Board may be abolished.

The general authority to regulate the conduct of pupils is vested in the school board as representing the school district.

Kinzer v. Independent School District, 129-441.

ARTICLE 10.

AMENDMENTS TO THE CONSTITUTION.

SECTION 1. How proposed—submission.

A proposed amendment, providing for biennial elections, held not constitutionally adopted because not entered in full on the

house journal. *State ex rel. v. Brookhart*, 113-250.

SEC. 2. More than one.

The purpose of the provision as to submission of amendments is to exact the submission of each amendment to the constitution on its merits alone, and to secure the free and independent expression

of the will of the people as to each; but if one change necessitates other corresponding changes in the constitution they may all be embodied in one proposition to amend. *Lobaugh v. Cook*, 127-181.

ARTICLE 11.

MISCELLANEOUS.

SECTION 1. Jurisdiction of justice of the peace.

The action of forcible entry and detainer is a summary proceeding involving only the fact of possession, and not necessarily the right of possession, and it may therefore be properly maintained before a jus-

tice of the peace. *Herkimer v. Keeler*, 109-680.

Where the question of unlawful detention after the expiration of a lease is alone involved, the constitutional provision

limiting the jurisdiction of the justice to a certain sum does not apply. *Ibid.*

If the notice of action in the court of a justice of the peace requires the defendant

to appear or judgment will be rendered against him for \$100 and interest, the justice does not acquire jurisdiction. *Evans v. Murphy*, 133-550.

SEC. 3. Indebtedness of political or municipal corporations.

What indebtedness excessive: All property within the corporate limits, whether subject to assessment for city purposes or not, is to be taken into account in determining whether the indebtedness exceeds the five per cent limit. *Windsor v. City of Des Moines*, 110-175.

The limitation has reference to the actual value and not to the value at which the property is to be assessed under Code § 1305, providing for assessment at 25 per cent of the actual value at which it is listed. *Halsey v. Belle Plaine*, 128-467.

A county may not incur pecuniary liability by bonds or notes or by express or implied promises in excess of the constitutional limitation of liability. *Reynolds v. Lyon County*, 121-733.

The issuance of bonds in excess of the constitutional limitation for the purpose of taking up outstanding bonds which are valid is not justified where the new bonds are issued as binding obligations without a cancellation or surrender of the old ones. By such an arrangement a new debt is for the time being created. *Ibid.*

A judgment in the federal court in an action on interest coupons as to the validity of the bonds with reference to the constitutional limit of indebtedness is binding in a subsequent action in the state court on the bonds and their coupons, wherein the same defenses are urged as were determined in the federal court. *Ibid.*

If the city has on hand or in prospect at the time of the issue of warrants funds with which to meet them without trenching on the rights of creditors for current expenses of the city, such warrants are valid although such funds may afterwards have been wrongfully applied to other purposes. *Phillips v. Reed*, 107-331; *Phillips v. Reed*, 109-188.

New bonds issued in exchange for bonds which were in excess of the constitutional limit of indebtedness when issued are subject to the constitutional objection. *Salmon v. Rural Ind. School Dist.*, 125 Fed., 235.

The holder of bonds issued in excess of the constitutional limitation has the burden of proving that he acquired them for value and without notice of invalidity. *Ibid.*

The recital in new bonds that they are in conformity with the constitutional requirement does not give the holder any better right than he had under his original bonds not containing such recital. *Ibid.*

The purchaser of bonds is not entitled to rely on the recitals therein that the

debt created does not exceed the constitutional limit. *Fairfield v. Rural Ind. Sch. Dist.*, 111 Fed., 453.

The purchaser of bonds is bound to take notice of the value of the taxable property of the municipality. *Burlington Sav. Bank v. Clinton*, 111 Fed., 439.

This section does not prevent a city already indebted to the constitutional limit from becoming liable to a contractor for improvements, the cost of which is to be assessed to abutting owners and payment for which is to be made by special assessments, if the city fails to make valid assessments against the abutting property. The constitutional prohibition does not apply to a liability arising from such wrongful act of the city. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 115-568.

If warrants are only drawn where there is an appropriation to meet them, outstanding warrants are not to be included in estimating the indebtedness of a city. *Windsor v. Des Moines*, 110-175.

An option to purchase real estate, under which the city is not obligated to make additional payments, except as it voluntarily elects to do so, does not constitute an indebtedness. *Ibid.*

Where it is contended that contracts for grading, and the like, which are to be paid for out of the general revenues, are not to be included under the general indebtedness, the burden is on the city to show that the amounts to be paid will be covered by the current revenues. *Ibid.*

An obligation of the city to erect an electric light plant by issuing warrants and levying a tax for the payment of the same, and pledging future revenues also for such payment, held to create an indebtedness of the city. *Ibid.*

There is a distinction between a contract to procure light for a city and its inhabitants, and a contract for the construction of an electric light plant. A contract for the latter purpose, by which time of payment is postponed to a later date, and no special levies for the purpose of erecting such works is authorized, creates a municipal indebtedness. Such a purpose is not one for which the city may anticipate its general revenues. *Ibid.*

Recovery cannot be had upon a series of bonds which of themselves exceed the constitutional limitation by simply saying that the series were sold for cash and that if the county official had properly used the proceeds in payment of existing indebtedness the total debt of the corporation would not have been increased. The party advancing money

under such bonds is bound to take notice of the constitutional limitation and is charged with the knowledge that, to create a valid claim against the corporation, the money he advances must be used in payment of valid indebtedness. *Aetna L. Ins. Co. v. Lyon County*, 82 Fed., 929.

The action of the bondholder who can thus show that the money advanced by him was used in the extinguishment of valid indebtedness is properly founded on his bonds and he is not limited to an action for money had and received. His action is therefore not barred by the statute of limitations until the statutory period has run against the bonds. *Ibid.*

Where bonds are void because issued in excess of the constitutional limitation, they are not to be considered in estimating the amount of indebtedness, and the fact that subsequently these bonds have been paid by money obtained from the selling of another series of void bonds which have since been repudiated will be immaterial. *Ashuelot Nat. Bank v. Lyon County*, 81 Fed., 127; *Lyon County v. Ashuelot Nat. Bank*, 87 Fed., 137.

Bonds which are invalid when issued are to be treated as invalid for all purposes, even though they have subsequently been paid by the corporation, without question as to their validity. *German Ins. Co. v. Manning*, 95 Fed., 597.

Warrants outstanding at the time of the issuance of bonds do not constitute an indebtedness if there is money in the treasury to meet them, and the burden is upon the corporation to prove that such warrants relied upon by it as constituting a part of the indebtedness of the corporation exceeded the cash in the treasury available for their payment, the presumption being in favor of the validity of the bonds. *Ibid.*

A school district cannot defend against payment of its equitable portion of the indebtedness of the district which has been created by division on account of the excess of indebtedness beyond its constitutional limit. *Taylor v. School Dist.*, 97 Fed., 753.

Warrants for ordinary current expenses which, together with other like expenses, are within the limit of the current revenue of such special taxes as the municipality may legally and in good faith have levied, do not constitute an indebtedness within the meaning of the constitutional provision. *Cedar Rapids v. Bechtel*, 110-196.

Refunding bonds to cover warrants of this kind, valid when issued, cannot be considered as an increase of the city indebtedness. *Ibid.*

The provisions of Code § 745, as amended by 27 G. A., chap. 23, and Code § 894, with reference to contracting for the erection of waterworks, contemplate the levying of a tax, to be paid in in-

stalments in the future, and an appropriation of the proceeds of such tax to the erection or procuring of waterworks, and do not involve the assumption of any indebtedness on the part of the city, and they are not therefore unconstitutional as in violation of the provision limiting municipal indebtedness. *Swanson v. Ottumwa*, 118-161. (Contra: *Ottumwa v. City Water Supply Co.*, 119 Fed., 315; *City Water Supply Co. v. Ottumwa*, 120 Fed., 309, noted below.)

The fact that certificates, warrants or bonds are issued, payable out of the proceeds of such a tax, and not out of the treasury of the corporation, does not render the arrangement one involving municipal indebtedness. *Swanson v. Ottumwa*, 118-161.

The constitutional provision does not impose a limitation upon taxation, but only a limitation upon indebtedness of the corporation. *Ibid.*

Bonds issued in pursuance of statutory provisions authorizing the levy of taxes in the future for the construction of waterworks, with a provision that when the bonds are paid by the proceeds of such tax, the waterworks shall become the property of the city, are not invalid as in excess of the statutory limitation of indebtedness. *Ottumwa v. City Water Supply Co.*, 119 Fed., 315; *City Water Supply Co. v. Ottumwa*, 120 Fed., 309.

A tax, in the legal sense, is not a debt within the meaning of the constitutional provision limiting municipal indebtedness. *Grunewald v. Cedar Rapids*, 118-222.

A contract by a city to pay rentals for fire hydrants at stated times in the future is one for a current expenditure and does not create an indebtedness. *Centerville v. Fidelity Trust & Guar. Co.*, 117 Fed., 332.

Where the city assumes liability to the contractor for cost of street improvement, such liability becomes the indebtedness of the city. *Allen v. Davenport*, 107-90.

Contracts for street improvements to be paid for by certificates of assessments on abutting property are not to be considered as involving municipal indebtedness, even if any deficiency is to be paid out of a fund raised by taxation. *Corey v. Ft. Dodge*, 133-666.

Funding bonds: Funding bonds neither create nor increase the indebtedness of the municipality. *Independent Sch. Dist. v. Rew*, 111 Fed. 1.

If the bonds appear to have been issued in the refunding of a lawful indebtedness the fact that their proceeds were diverted to an unlawful purpose will not render them invalid. *Ibid.*

Negotiable refunding bonds, authorized by statute to be issued in exchange for valid outstanding evidences of indebted-

ness in the hands of purchasers for value before maturity will be presumed to have been so issued, and not to have increased the indebtedness of the corporation. *Lyon County v. Kene Five Cent Sav. Bank*, 100 Fed., 337.

Bonds issued in exchange for outstanding warrants will not be held invalid unless it is shown that the warrants for which they were issued were also invalid. *Reynolds v. Lyon County*, 97 Fed., 155.

A purchaser of bonds reciting their issuance for the funding of outstanding indebtedness is not chargeable with notice of the invalidity of the indebtedness refunded. *Keene Five Cent Sav. Bank v. Lyon County*, 97 Fed., 159.

The amount of outstanding illegal warrants cannot be taken into account in determining whether bonds are in excess of the limitation of indebtedness, even though the proceeds of the bonds are used in extinguishing such warrants. *Ibid.*

A municipal corporation already in debted beyond the constitutional limit may issue bonds for the purpose of funding an outstanding judgment which is valid. *Jamison v. Independent Sch. Dist.*, 90 Fed., 387.

Funding bonds neither create nor increase the indebtedness of the municipality, but merely change its form. *Fairfield v. Rural Ind. School Dist.*, 116 Fed., 838.

An innocent purchaser of municipal bonds, which recite that they were issued to fund the debt of the municipality, is not required to consider or inquire concerning the excessive indebtedness of the municipality. *Ibid.*

Estoppel: Possibly the county may be estopped from denying the validity of bonds executed for refunding purposes, the proceeds of which are actually used in satisfying existing debts within the constitutional limit. *Reynolds v. Lyon County*, 121-733.

The corporation will not be estopped by the action of its officers in acknowledging the validity of warrants, although in good faith, from interposing the defense that such warrants are in excess of the constitutional limitation of liability. Nor will a taxpayer be estopped from interposing such defense if the officers refuse to do so. *Farmers' Savings Bank v. Independent School District*, 122-99.

Portion valid: Where it is claimed that a portion of an issue of bonds is invalid because in excess of the constitutional limit of indebtedness, a court of equity

may inquire into the facts to ascertain what part, if any, of the debt is enforceable. *Everett v. Independent School District*, 109 Fed., 697.

Such bonds may be enforced to the extent that their proceeds were used in paying off valid prior indebtedness. *Ibid.*

The limitation against such action commences to run only from the maturity of the bonds. *Ibid.*

Where a portion of the bonds are in excess of the constitutional limit, the holders of the entire series of bonds may join in maintaining a suit in equity to determine the portion of the debt which is valid and enforceable, and to have such amount apportioned between the different holders. *Everett v. Independent School District*, 102 Fed., 529.

Limitations of the statute against such an action do not commence to run until the maturity of the bonds. *Ibid.*

Holders of bonds which are to some extent in excess of the constitutional limitation may maintain an action in equity to ascertain what portion of the debt is enforceable, and the statute of limitations does not begin to run against such action until the maturity of the bonds. *Aetna Life Ins. Co. v. Lyon County*, 95 Fed., 325.

Holders of bonds which are invalid because in excess of the constitutional limitation are not entitled to subrogation to the rights of creditors whose claims have been paid from the proceeds of such bonds. But so far as the proceeds of the bonds have been used to pay obligations which were not in excess of the constitutional limitation, such bonds are valid. *Ibid.*

A paving contract, obligating the city to pay the cost of paving certain street intersections, is not wholly void, although the city is already indebted beyond its constitutional limit, and the contractor may take advantage of any portion of the contract which the city had power to make. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 115-568.

An issue of bonds which is in excess of the constitutional limit is valid so far as the amount thereof is not in excess of the limit. *Reynolds v. Lyon County*, 121-733.

Personal liability of officers: City officials, contracting within the general scope of their jurisdiction, in behalf of the city, and for a lawful purpose, do not render themselves personally liable, although the indebtedness is in excess of the constitutional limitation. *Lough v. Estherville*, 122-479.

SEC. 5. Oath of office.

One who is appointed treasurer of a commission created by law, no such officer of the commission being provided for by

statute, is not a public officer. *State v. Spaulding*, 102-639.

AMENDMENTS TO THE CONSTITUTION

ARTICLE 3.—LEGISLATIVE DEPARTMENT.

Number of senators. SECTION 34. The senate shall be composed of fifty members to be elected from the several senatorial districts, established by law and at the next session of the general assembly held following the taking of the state and national census, they shall be apportioned among the several counties or districts of the state, according to population as shown by the last preceding census.

Number of representatives—districts. SEC. 35. The house of representatives shall consist of not more than one hundred and eight members. The ratio of representation shall be determined by dividing the whole number of the population of the state as shown by the last preceding state or national census, by the whole number of counties then existing or organized, but each county shall constitute one representative district and be entitled to one representative, but each county having a population in excess of the ratio number, as herein provided of three-fifths or more of such ratio number shall be entitled to one additional representative, but said addition shall extend only to the nine counties having the greatest population.

Ratio and apportionment. SEC. 36. The general assembly shall, at the first regular session held following the adoption of this amendment, and at each succeeding regular session held next after the taking of such census, fix the ratio of representation, and apportion the additional representatives, as hereinbefore required.

[Above sections were submitted to electors at general election of 1904, and adopted.]

ARTICLE 12.—SCHEDULE.

Biennial elections. SECTION 16. The first general election after the adoption of this amendment shall be held on the Tuesday next after the first Monday in November in the year one thousand nine hundred and six, and general elections shall be held biennially thereafter. In the year one thousand nine hundred and six there shall be elected a governor, lieutenant-governor, secretary of state, auditor of state, treasurer of state, attorney-general, two judges of the supreme court, the successors of the judges of the district court whose terms of office expire on December 31st, one thousand nine hundred and six, state senators who would otherwise be chosen in the year one thousand nine hundred and five, and members of the house of representatives. The terms of office of the judges of the supreme court which would otherwise expire on December 31st, in odd numbered years, and all other elective state, county and township officers, whose terms of office would otherwise expire in January in the year one thousand nine hundred and six, and members of the general assembly whose successors would otherwise be chosen at the general election in the year one thousand nine hundred and five, are hereby extended one year and until their successors are elected and qualified. The terms of office of senators whose successors would otherwise be chosen in the year one thousand nine hundred and seven are hereby extended one year and until their successors are elected and qualified. The general assembly shall make such changes in the law governing the time of election and terms of office of all other elective officers as shall be necessary to make the time of their election and terms of office conform to this amendment, and shall provide which of the judges of the supreme court shall serve as chief justice. The general assembly shall meet in regular session on the second Monday in January, in the year one thousand nine hundred and six, and also on the second Monday in January in the year one thousand nine hundred and seven, and biennially thereafter.

[Above section was submitted to electors at general election of 1904, and adopted.]

This act applies only to general elections. *Lobaugh v. Cook*, 127-181.

SUPPLEMENT
TO
The Code of Iowa

As Authorized by the Code and the Thirty-second
General Assembly.

PART FIRST.

PUBLIC LAW.

TITLE I.

OF THE SOVEREIGNTY AND JURISDICTION OF THE STATE AND THE
LEGISLATIVE DEPARTMENT.

CHAPTER 1.

OF THE SOVEREIGNTY AND JURISDICTION OF THE STATE.

SECTION 4-a. Jurisdiction ceded to United States. That whenever the title to any real property, situated within the state of Iowa, shall become vested in the United States of America, to be used as a barracks, drill-ground, or fort, or for other military purposes, the full, exclusive, and complete jurisdiction is hereby granted and ceded to the United States of America over such real property, and full consent to the acquisition of such real property is hereby given and granted by the state of Iowa to the United States, and all jurisdiction of the state of Iowa over such real property is hereby ceded and surrendered. All claims or right to levy taxes against said real property is also hereby fully released and surrendered. [28 G. A., ch. 182, § 1.]

SEC. 4-b. Consent to acquisition of lands. That the consent of the state of Iowa is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in this state required for sites for custom houses,

court houses, postoffices, arsenals, or other public buildings whatever, or for any other purposes of the government. [29 G. A., ch. 213, § 1.]

SEC. 4-c. Exclusive jurisdiction. That 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 the service upon such cites of all civil and criminal process of the courts of this state; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands. [29 G. A., ch. 213, § 2.]

SEC. 4-d. Exempt from taxation. The jurisdiction 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 the authority of this state. [29 G. A., ch. 213, § 3.]

CHAPTER 3.

OF THE STATUTES.

SECTION 36. Acts taking effect by publication—Secretary of state may designate other papers. Acts which are to take effect from and after publication in newspapers shall be published in two or more papers, one at least of them at the seat of government, and in case either or both of the papers named in the act should fail or decline to publish said act as required therein, the secretary of state may designate another paper or papers in which publication shall be made and, if such papers are not designated in the act, the same may be designated by the secretary of state, and the act published accordingly. All such acts shall take effect from and after the date of the last publication, and the secretary of state shall make and sign on the original roll of each of such acts a certificate, stating in what papers it was published, and the date of the last publication in each of them, which certificate and the printing thereof at the foot of the act shall be presumptive evidence of the facts therein stated. [C., '73, § 33; R., § 24; C., '51, § 21.] [32 G. A., ch. 1.]

Where the publication clause provided known as the "Souvenir", published at for publication in "The Jefferson Souve- Jefferson, was sufficient. *District Town-* nir", held, that publication in a paper ship v. Wiggins, 110-702.

SEC. 41-a. Repeal—amendments—repeals—references. That the law relating to the amendment and repeal of statutes, which appears as chapter two (2), of the laws of the twenty-seventh (27) general assembly, and as section forty-one-a (41-a), of the supplement to the code, be and the same is hereby repealed, and the following enacted in lieu thereof:

"Every act passed in amendment, modification or repeal of a law, shall in its title and in the body of the act itself, refer to the law so amended, modified or repealed, as follows:

1. An act which amends, modifies or repeals a law which appears as a section or sections of the code, shall refer to such section or sections of the code.

2. An act which amends, modifies or repeals a law which appears as a chapter of the code, shall refer to such chapter and title of the code.

3. An act which amends, modifies or repeals a law which appears as a section or sections of the supplement to the code, shall refer to the section or sections of the said supplement to the code, as numbered therein.

4. An act which amends, modifies or repeals a law which appears as a chapter of the supplement to the code, shall refer to the chapter and title of such supplement to the code, as numbered therein.

5. An act which amends, modifies or repeals any part or all of any act of the general assembly, not contained in the code or supplement to the code, shall refer to the chapter of the act, and number of the general assembly which passed the act so amended, modified or repealed.

6. If such reference be omitted in the title, the secretary of state shall, in preparing such act for publication, supply the omission.

7. Whenever reference is made to any section, chapter or title, as herein-before provided, the number of the same shall be expressed in words followed by the figures in parentheses." [30 G. A., ch. 1, § 1.]

SEC. 41-b. Applicable to future acts. The provisions of paragraphs three and four of section one of this act, shall be applicable to the passage of any act that may be passed after any further compilation and publication of a supplement to the code, that may be made by the authority of, and as provided by law. [30 G. A., ch. 1, § 2.]

SEC. 48. Construction.

Par. 1. Repeal — effect of: A statute relating simply to the remedy, such as the statute of limitations, may apply to causes of action previously existing, but a statute affecting the terms of a previous contract, for instance, one which extends the term of limitation of action fixed in a policy of insurance, will not be applied to contracts already made. *Farmers' Co-op. Creamery Co. v. Iowa State Ins. Co.*, 112-608.

Where by curative act the defense of usury to certain loans of building and loan associations was removed, held that such act did not repeal the usury laws as to such loans, and the repeal of the curative act left the statutes as to usury applicable as before. *Edworthy v. Iowa Sav. & Loan Assn.*, 114-220.

The repeal of prior tax laws, and the simultaneous re-enactment of substantially similar ones, held not to relieve a taxpayer from any duty under the former law. *Robinson v. Ferguson*, 119-325.

Repeals by implication are not favored. *State v. Higgins*, 121-19.

Par 2. Words and phrases: Where a statute made special provision as to the use of a certain lamp by name by which it was admitted described that lamp only, held that it was not competent to extend the provision so as to include other lamps constructed on the same principle. *State v. Santee*, 111-1.

Words having an appropriate meaning in law should be construed in accordance with that meaning. *Jewell v. Board of Trustees*, 113-47.

Section applied. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112-300.

Words and phrases are to be construed together according to the context and approved usage of language, but technical

words and phrases and such words as may have acquired appropriate and peculiar meaning in law should be construed according to such meaning. *In re Appeal of Bailies*, 127-124.

While in statutory construction the word "may" has sometimes a meaning equivalent to the word "must" in its ordinary acceptation, such a construction should not be given if it would be inconsistent with the manifest intention of the legislature or repugnant to the text of the statute. *State v. Hortman*, 122-104.

Par 3. Number and gender: The statutory phrase "to any person," held applicable to include more than one person, when such construction was required to give the statute the effect it was intended to have. *In re McGhee's Estate*, 105-9.

Words importing the plural number may be applied to one person or thing. *Grunevald v. Cedar Rapids*, 118-222.

Par 5. Highway—road: The terms "highway" and "road" include a street in a city. All streets are highways. And a highway or a street includes bridges therein. *Sachs v. Sioux City*, 109-224.

The term "road" as used in the code means any public highway unless otherwise specified. *Nichols v. Chicago, M. & St. P. R. Co.*, 125-236.

Par. 7. Issue: In construing statutes, the word "issue" as applied to the descent of estates, includes all lawful lineal descendants. *Rice v. Burkhart*, 130-520.

Par. 9. Personal property: Promissory notes are evidences of debt, and things in action are therefore personal property, within the statutory definition of the term. *Nordyke v. Charlton*, 108-414.

Par 21. Executor—administrator: This section applied. *Ellyson v. Lord*, 124-125.

Par 23. Computing time: Where proof of loss under a policy of insurance was mailed on Saturday, the last day for making the same being Sunday, and it was received by the insurance company on Monday, held that it was on time. *McKibben v. Des Moines Ins. Co.*, 114-41.

While for some purposes the law does not recognize fractions of a day in computing time, this principle is not universal. If the exact time is an important element in determining a right of action, the exact time will be considered. *Roeletsen v. Pella*, 121-153.

CHAPTER 4.

OF THE CODE AND ITS OPERATION.

SECTION 49. Citations—repeal of prior statutes.

This section is an express repeal of statutes previously in force. *West v. Bishop*, 110-410.

Section applied. *Greaves v. Posner*, 111-651.

SEC. 51. Existing rights not affected.

The proceedings in pending actions are to be conformed to the provisions of the new code as far as consistent. *State v. Dorland*, 106-40.

This provision saves rights, not remedies, except where suit or proceeding has been had or commenced. No one has a vested right in a particular remedy. Therefore held that the provision of Code § 1744, by which the time after a loss under a fire insurance policy before suit could be brought thereon was reduced from 90 to 40 days was applicable to an action brought after the taking effect of the Code on a loss sustained prior to the time when the Code took effect. *Jones v. German Ins. Co.*, 110-75.

The assessment of an attorney's fee in a liquor prosecution relates solely to the remedy, and is to be regulated by the provisions of this Code, even in proceedings already commenced before the Code took effect. *Carter v. Bartel*, 110-211.

The right to sell intoxicating liquors, notwithstanding the prohibitory law, resulting from compliance with the provisions of the mulct law in force prior to the taking effect of the present Code, was not a right accruing, or which had accrued so as to be preserved from the effect of the repeal of prior laws resulting from the adoption of such Code. *West v. Bishop*, 110-410.

A limitation of action is not a vested right which remains unaffected by subsequent change of the statute, but so far as such limitation affects an obligation already accrued it is not affected by such repeal. *Norris v. Tripp*, 111-115.

A statute affecting the remedy only is not unconstitutional as applied to a right existing before the statute is passed. *Allerton v. Monona County*, 111-560.

So far as Code § 2978 restricts the extent of a homestead within a town plat it is not applicable to homesteads already existing. *Sayers v. Childers*, 112-677.

Where the prior statute gives a mere privilege, and not a contract or vested right, such privilege is not preserved by this section after the repeal of the statute by the adoption of the Code. *Miller v. Hagemann*, 114-195.

A mere change in the mode of redemption from a mortgage foreclosure is applicable to a right to redeem already existing, notwithstanding the provision of this section. *Jack v. Cold*, 114-349.

Liability of parties with reference to work done under ordinance authorizing special improvements at the expense of abutting property owners is not affected by the repeal by the Code of the statutes under which such ordinance was passed. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 115-568.

Prior to the adoption of the Code of '73, the period of limitation in an action on a judgment was twenty years; held, that the adoption of that Code by which it was provided that no action on a judgment should be brought within fifteen years after its rendition did not apply to extend the period of limitation applicable to judgments rendered before that time. *Wilson v. Tucker*, 105-55.

CHAPTER 5.

SUBMISSION OF CONSTITUTIONAL AMENDMENTS.

SECTION 55. Publication—record kept. Whenever any proposition to amend the constitution has passed the general assembly and been

referred to the next succeeding legislature, the secretary of state shall cause the same to be published, once each week, in two newspapers of general circulation in each congressional district in the state, for the time required by the constitution; and proof of the publication shall be made by the affidavits of the publishers thereof, and such affidavits, with the certificate of the secretary of state of the selection of such newspapers therefor, shall be filed in his office, recorded in a book kept for that purpose, and preserved, and he shall report to the following legislature his action in the premises. [16 G. A., ch. 144, § 1; 30 G. A., ch. 2, § 1.]

TITLE II.

OF THE EXECUTIVE DEPARTMENT.

CHAPTER 1.

OF THE GOVERNOR.

SECTION 62. May offer rewards for arrests.

A reward may be offered by way of proclamation. *McPeck v. Western U. Tel. Co.*, 107-356. Such proclamation may be deposited with the secretary of state and may be proved by the record in his office. *Ibid.*

SEC. 65. Salaries. The salary of the governor shall be five thousand dollars per annum; and that of his secretary, eighteen hundred dollars per annum. [21 G. A., ch. 118, § 1; C., '73, § 3755; R., § 41; C., '51, § 37.] [29 G. A., ch. 1, § 1.] [32 G. A., ch. 2, § 1.]

CHAPTER 2.

OF THE SECRETARY OF STATE.

SECTION 66. Duties—records to be kept.

A proclamation by the governor should be preserved in the office of the secretary of state and a certified copy thereof is admissible in evidence in lieu of the original. *McPeck v. Western U. Tel. Co.*, 107-356.

SEC. 68. Must countersign and register commissions. All commissions issued by the governor shall be countersigned by the secretary, who shall register each commission in a book to be kept for that purpose, specifying the office, name of officer, date of commission, and tenure of office; provided, however, that notarial commissions shall be registered only in the office of the governor. [C., '73, § 62; R., § 60; C., '51, § 44.] [32 G. A., ch. 13, § 5.]

SEC. 70. Must publish and distribute "Iowa Official Register." He is hereby authorized and directed to compile and publish, biennially, in the odd-numbered years, forty thousand copies of the "Iowa Official Register," to contain historical, political and other statistics and facts of general value, but nothing of a partisan character. [24 G. A., ch. 64, § 1.] [31 G. A., ch. 3, § 1.]

SEC. 71. Distribution of register. The distribution shall be as follows: To members of the general assembly last elected, sixty copies each; the balance to be distributed to the newspapers of the state, to county officers, each school library, public libraries, colleges, seminaries and state institutions, and other citizens or institutions, either private or public, at the discretion of the secretary of state. [24 G. A., ch. 64, § 2.] [31 G. A., ch. 3, § 2.]

SEC. 82. Secretary to make lists of lands—effect of.

Whenever a question arises as to the character of land which is claimed by the state under the swamp land grant, it is competent for the governor to submit the matter to the land department, and the finding of that department that the land is swamp land is conclusive. *Rood v. Wallace*, 109-5.

SEC. 87. Deputy—qualification—bond—duties—salary. He may appoint, in writing, any person, except one holding a state office, as deputy, for whose acts he shall be responsible, and from whom he shall require bonds, which appointment and bond must be approved by the officer having the approval of the principal's bond, and such appointment may be revoked in the same manner,—both the appointment and revocation to be filed with and kept by such officer. The deputy shall qualify by taking the oath of the principal, to be indorsed upon and filed with the certificate of appointment, and when so qualified he shall, in the absence or disability of the secretary, perform all the duties of the secretary pertaining to his office, and shall receive a salary of eighteen hundred dollars a year. [21 G. A., ch. 118, § 2; C., '73, §§ 776-8, 770, 3756; R., §§ 642-4, 647; C., '51, §§ 411, 412, 413, 416.] [32 G. A., ch. 2, § 2.]

SEC. 88. Clerk for land department—salary. He shall be allowed one clerk to perform the work pertaining to the land department and such other duties as he may direct, whose salary shall be fifteen hundred dollars per annum. [18 G. A., ch. 206, §§ 3, 4.] [31 G. A., ch. 4.]

CHAPTER 3.

OF THE AUDITOR OF STATE.

SECTION 89. Office—duties. The auditor shall keep his office at the seat of government. He is the general accountant of the state, and it is his duty:

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

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

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

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

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

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

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

8. *To draw warrants—form of—report to treasurer.* To draw warrants on the treasurer for money directed by law to be paid out of the treasury, as the same may become payable. Each warrant shall bear on the face thereof its proper number, date, amount, name of payee, and a reference to the law under which it is drawn, and a statement indicating the purpose for which warrant is issued, whether for salaries or wages, services or supplies, and what kind of supplies, and for what office or department, or for any other general or special purpose whatsoever, which particulars shall be entered in a book kept for that purpose, in the order of issuance; and, as soon as practicable after issuing such warrant, he shall certify the above particulars to the treasurer;

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

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

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

12. *To apportion school fund interest.* He shall, on the first Monday of March and September of each year, apportion the interest of the permanent school fund among the several counties in proportion to the number of persons between five and twenty-one years of age in each, as shown by the last report filed with him by the superintendent of public instruction. [22 G. A., ch. 82, § 27; C., '73, § 66; R., §§ 71, 1967; C., '51, § 50.] [28 G. A., ch. 2.]

SEC. 99. Deputy—qualification—bond—duties—salary. The auditor may appoint, in writing, any person, except one holding a state office, as deputy, for whose acts he shall be held responsible, and from whom he shall require bond, which appointment and bond must be approved by the officer having the approval of the principal's bond, and such appointment may be revoked in the same manner,—both the appointment and revocation to be filed and kept in the office of the secretary of state. The deputy shall qualify by taking the oath of the principal, to be indorsed upon and filed with the certificate of appointment, and when so qualified he shall, in the absence or disability of the auditor, perform all the duties of the auditor pertaining to his office, and receive a salary of eighteen hundred dollars a year. [21 G. A., ch. 118, § 3; C., '73, §§ 766-8, 770, 3757; R., §§ 642-4, 647; C., '51, §§ 411, 412, 413, 416.] [32 G. A., ch. 2, § 3.]

CHAPTER 4.

OF THE TREASURER OF STATE.

SECTION 104. Payment of warrants—interest on when no funds. He shall pay no money from the treasury but upon the warrants of the auditor, and only in the order of their presentation; or, if there is no money

in the treasury from which such warrants can be paid, he shall, upon request of the holder, indorse upon the warrant the date of its presentation and sign it, from which time the warrant shall bear interest at the rate of five per cent. per annum until the time directed in the next section. [C., '73, § 78; R., § 86; C., '51, § 65.] [27 G. A., ch. 3.]

SEC. 106. Must report to and account with auditor. Once in each week he shall certify to the auditor the number, date, amount and payee of each warrant taken up by him, with the date when taken up, and the amount of interest allowed; and on the first Monday of January, and the first day of April, July and October, annually, he is directed to account with the auditor and deposit in his office all such warrants received at the treasury, and take the auditor's receipt therefor. [17 G. A., ch. 116; C., '73, § 80; R., § 88; C., '51, § 67.] [29 G. A., ch. 2, § 1.]

SEC. 113. Collections through depositaries—interest on deposits. The treasurer of state, on the receipt of any draft, check or certificate of deposit on account of state dues, may place the same in such depositary for collection, and it shall be the duty of such depositary to collect the same without delay, and charge no greater per cent. for such collection than the minimum per cent. charged to other parties, and notify the treasurer when collected. On the receipt of such notice, the treasurer shall issue his receipt to the party entitled thereto, as now required by law. On the moneys remaining on deposit, such depositary shall pay to the treasurer of state, for the use of the state, interest at such rate, and at such times, as shall be agreed upon between said treasurer and the depositary aforesaid, with the approval of the executive council. [17 G. A., ch. 57, § 3.] [30 G. A., ch. 3.]

SEC. 115-a. Appropriation—for bonds. That there is hereby appropriated for the payment on the bond of the state treasurer and deputy state treasurer, out of any money in the state treasury, not otherwise appropriated, annually, the sum of two thousand dollars (\$2,000.00), or so much thereof as is necessary to pay the bond of the state treasurer and deputy state treasurer. [30 G. A., ch. 4.]

SEC. 116. Deputy—qualification—duty—salary. The treasurer of state may appoint in writing any person, except one holding a state office, as deputy, for whose acts he shall be held responsible, and from whom he shall require bond, which appointment and bond must be approved by the officer having the approval of the principal's bond, and such appointment may be revoked in the same manner,—both the appointment and revocation to be filed and kept in the office of the secretary of state. The deputy shall qualify by taking the oath of the principal, to be indorsed upon and filed with the certificate of appointment, and, when so qualified, he shall, in the absence or disability of the treasurer, perform all of the duties of the treasurer pertaining to his office, and receive a salary of eighteen hundred dollars a year. [21 G. A., ch. 118, § 4; C., '73, §§ 766-8, 770, 3758; R., §§ 642-4, 647; C., '51, §§ 411, 412, 413, 416.] [32 G. A., ch. 2, § 4.]

CHAPTER 4-A.

OF THE TIME AT WHICH ALL ANNUAL APPROPRIATIONS SHALL BEGIN.

SECTION 116-a. Fiscal year—quarters. That after the taking effect of this act all annual appropriations shall be for the fiscal year beginning with July 1st, and ending with June 30th, of the succeeding year and when such appropriations are made payable quarterly, the quarters shall end with September 30th, December 31st, March 31st and June 30th, but nothing in this act shall be construed as increasing the amount of any annual appropriation. [29 G. A., ch. 177, § 1.]

SEC. 116-b. Pro rata disbursements. Annual appropriations hereafter made shall be disbursed in accordance with the provisions of the acts granting the same pro rata from the time such acts shall take effect up to the first day of the succeeding quarter as provided in section one of this act. [29 G. A., ch. 177, § 2.]

SEC. 116-c. Repeal—acts in conflict. All acts or parts of acts in conflict with this act are hereby repealed. [29 G. A., ch. 177, § 3.]

CHAPTER 4-B.

RELATIVE TO PAYMENT OF SWAMP LAND INDEMNITY MONEY TO COUNTY AUTHORITIES.

SECTION 116-d. Treasurer of state to notify county auditor and treasurer of receipt. Whenever the treasurer of state receives money known as swamp land indemnity, which is paid to the state of Iowa by the United States government under the provisions of acts of congress approved March 2, 1849, March 2, 1855, and March 3, 1857, or other acts of congress relating thereto, the same being purchase money for swamp lands situated in the state of Iowa which were duly claimed by the state but subsequently disposed of by the United States, the treasurer of state shall duly notify in writing the auditor and treasurer of the county wherein such swamp land was situated and in whose favor the commissioner of the general land office of the United States awarded such swamp land indemnity, of the receipt of the same. [28 G. A., ch. 146, § 1.]

SEC. 116-e. Duties of county authorities. Upon receipt of such information the county auditor as clerk of the board of supervisors shall communicate such information to the supervisors of his county at their first regular meeting thereafter; and the board of supervisors shall thereupon authorize by resolution the county treasurer to present an order to the treasurer of state for the aforesaid money belonging to their county. Upon the presentation of such order accompanied by a copy of the resolution of the board duly certified to by the clerk of the board under the seal of said county, together with receipts therefor in duplicate, the treasurer of state shall issue his check payable to said county treasurer for the amount of the swamp land indemnity fund awarded to said county by the land commissioner of the government of the United States, the proceeds thereof to be applied by the authorities of the [county] receiving the same as directed by the provisions of chapter one hundred and sixty (160) acts of the ninth general assembly, and chapter seventy-nine (79) of the acts of the eleventh general assembly, or other acts relating thereto. [28 G. A., ch. 146, § 2.]

SEC. 116-f. Repeal—treasurer to pay direct to county authorities. The provisions of section nine (9), chapter one hundred and sixty (160) of the acts of the ninth general assembly, providing for the appointment of an agent by the county receiving swamp land indemnity money who shall go to Des Moines and obtain the same, are hereby repealed, and the treasurer of state is hereby directed to disburse swamp land indemnity money received from the national government under the provisions of the acts of congress aforesaid, direct to the county authorities as hereinbefore prescribed. [28 G. A., ch. 146, § 3.]

CHAPTER 4-C.

RELATING TO THE DEFENSE OF THE TREASURER OF STATE IN CERTAIN CASES, AND THE PAYMENT AND SATISFACTION OF JUDGMENTS RENDERED AGAINST HIM.

SECTION 116-g. Defense—appeal. Whenever any taxes or fees have been collected by the treasurer of state of this state, acting under the

authority of the code, or any act of the general assembly, and covered into the state treasury, and any suit or action is brought against said treasurer, either as such, or as an individual, to recover back such taxes or fees so collected and covered into the treasury of the state, whether the term of office of such treasurer has expired or not, it shall be the duty of the attorney-general, upon the request of the defendant, to appear and make defense to such action. If, upon final hearing of such suit or action, it shall be determined that such taxes or fees were wrongfully collected and covered into the state treasury, it shall be the duty of the attorney-general to appeal said suit or action to the supreme court, unless in his opinion such appeal would be useless, in which case he shall render his opinion, with a copy of the proceedings had in court, to the executive council, who may either order the appeal to be taken, and that the attorney-general shall proceed therewith, or accept the decision, and their order shall be final. If appeal be taken by the defendant it shall supersede execution, without bond. [29 G. A., ch. 3, § 1.]

SEC. 116-h. Satisfaction of judgment. In case the executive council shall decide that no appeal shall be taken, or in case an appeal shall be taken and result in an affirmance, then the attorney-general shall prepare and present before the executive council a transcript of the judgment with costs, under the seal of the court in which the same is rendered, and the said council shall cause the same to be entered of record, and shall, by order duly entered of record, direct the auditor of state to draw his warrant on the treasurer of state for a sum sufficient to satisfy the said judgment, which said warrant shall, by the treasurer of state, be paid to the attorney-general, who shall therewith satisfy said judgment, taking duplicate receipts from the clerk of the court in which the final judgment is had, and he shall file one of said receipts with the executive council and one with the treasurer of state. [29 G. A., ch. 3, § 2.]

SEC. 116-i. Plaintiff—rights of. Nothing herein contained shall be construed to give the plaintiff in such action any other or greater rights than he might have if this act were not in existence. [29 G. A., ch. 3, § 3.]

SEC. 116-j. Retroactive—expiration of office. This act is hereby made to apply to suits brought or that may be brought, as defined in section one hereof, against any treasurer of state whose term of office has expired prior to the enactment hereof. [29 G. A., ch. 3, § 4.]

SEC. 116-k. Appropriation. There is hereby appropriated out of any funds not otherwise appropriated sufficient to pay all such judgments as may come within the provisions of this act. [29 G. A., ch. 3, § 5.]

CHAPTER 5.

OF THE PUBLIC PRINTING AND BINDING.

SECTION 118. How work to be delivered. The state printer shall promptly deliver to the state binder the printed sheets of laws, journals, and other publications, as the work progresses, as well as all other work requiring stitching, or binding, and the state binder shall, upon the completion of the work as required, deliver to the secretary of the state, at the document room, all documents, journals, reports, official registers, laws, and all other publications which the secretary of state is, or may hereafter be required, by law, to distribute, taking his duplicate receipt for the same, one copy of which shall be delivered to the secretary of the executive council, who shall give the printer credit for the paper necessarily used in the manufacture of said publication; and it is the duty of the secretary of

state to see that the proper number of copies is so delivered. All other printing shall be promptly delivered to the secretary of the executive council, at the supply department, by the state printer and state binder. The state printer shall make certificate to the secretary of the executive council, of the paper necessarily used in the printing of each and every job or publication upon the presentation of the same, and after delivery of the work, the secretary of the executive council shall credit the state printer with the paper necessarily so used. [22 G. A., ch. 82, § 4.] [29 G. A., ch. 4, § 1.]

SEC. 119. Printing—how ordered and delivered. No work shall be ordered of the state printer except upon a regular form of blank furnished by the secretary of executive council and kept in his office. Whenever printing is ordered by either house of the general assembly, the secretary or clerk thereof shall immediately notify the secretary of executive council of such order, and, when such printing is done, the same shall be delivered to the secretary of executive council for distribution, subject to the instructions of the house ordering the printing. [Same, § 5.] [29 G. A., ch. 4, § 2.]

SEC. 120. Secretary of state to examine and certify work. The secretary of state, upon the completion of any printing or binding for the state, or the presentation of any bill for such printing or binding, shall make examination of the work done, and ascertain whether it has been done in accordance with the provisions of this chapter. If he finds there has been a compliance herewith, he shall certify the same, stating the amount to which the officer presenting the bill is entitled. In case such work has not been properly done, or any item of said bill has not in his judgment been earned, he shall refuse to certify as to such item, or shall state what reduced amount, if any, the officer is entitled to as compensation for such defective work. The secretary of state shall certify quarterly to each state department, board or commission the character of the printing and binding ordered and completed during that quarter for such department, board or commission, giving the amounts paid therefor to the state printer for composition, press work and stock, and to the state binder for binding and extras; which certificate shall be official notice to such department, board or commission of its expenditures for printing and binding, and shall be used by such department, board or commission in preparing the biennial report of expenditures to the executive council in accordance with the provisions of chapter six (6) of the acts of the twenty-eighth general assembly. The secretary of state shall make a certified report to each department of the cost of printing and binding done from and after July 1, 1901, to the date this enactment becomes operative. [Same, § 6.] [29 G. A., ch. 5, § 1.]

While the determination by the secretary of state that public printing and binding had been done in compliance with law is not subject to collateral attack, yet he has no authority to authorize compensation to be paid in accordance with the qualifica-

tions not corresponding to the statutory provisions; and payments made at a higher rate than that authorized by law may be recovered back. *State v. Young*, 110 N. W. 292.

SEC. 122. Biennial reports of officers—when made. The regular biennial reports of the various officers, inspectors, commissions, boards or other bodies required to be made by law shall be laid before the governor of the state, in the even-numbered years, at the following times:

1. On or before August fifteenth, those of all boards of trustees of state institutions, except the agricultural college;

2. On or before September fifteenth, those of the fish commissioner, the board of health, the commission of pharmacy, the oil inspector, the mine inspectors, the visiting committee to the hospitals for the insane, the wardens of the penitentiaries, the state veterinary surgeon, and the board of curators of the historical society;

3. On or before October first, those of the state librarian, and the commissioner of labor statistics, and that of the secretary of state pertaining to the land office;

4. On or before November first, those of the auditor of state, the treasurer of state, the superintendent of public instruction, the university and the normal school;

5. On or before November fifteenth, that of the board of dental examiners;

6. On or before December first, that of the board of trustees of the agricultural college, that of the adjutant-general, and that of the secretary of state pertaining to criminal convictions. [22 G. A., ch. 82, § 8.] [31 G. A., ch. 5.]

SEC. 123. Biennial fiscal term—reports to cover. The biennial fiscal term of the state ends on the thirtieth day of June in each odd-numbered year, and the succeeding fiscal term begins on the day following; and the reports required in the preceding section shall cover the period thus indicated, except when otherwise provided by law, and shall show the condition of such offices and institutions, respectively, on that day. The maximum amount named as appropriations made for the support of inmates or for pay of officers or teachers or for any other purpose whatever connected with the operating of any state institution under the control of the board of control of state institutions shall be available until used for the purpose for which said appropriation was made, and no part of the same shall be, by the auditor of state or treasurer of state, charged off as an unexpended balance unless said officers shall be notified in writing by said board that said balance so unexpended will not be needed, and any sums charged off as unexpended balance by the auditor or treasurer of state, since chapter one hundred and eighteen (118), acts of the twenty-seventh general assembly, took effect, shall still be available and subject to the provisions of this section. [22 G. A., ch. 82, § 9.] [28 G. A., ch. 3, § 1.]

SEC. 123-a. Acts in conflict repealed. All acts and parts of acts inconsistent with this act are hereby repealed. [28 G. A., ch. 3, § 2.]

SEC. 125. Repeal—reports—number of copies to be printed. That the law as it appears in section one hundred and twenty-five (125) of the supplement to the code be, and the same is hereby repealed and the following enacted in lieu thereof:

“There shall be printed of the various public documents the number of copies hereinafter designated, to-wit: Of the biennial message, two thousand five hundred copies; of the inaugural address, two thousand copies; of the biennial report of the auditor of state, two thousand five hundred copies; of the biennial report of the treasurer of state, two thousand copies; of the report of the superintendent of public instruction, four thousand copies; of the report of the agricultural college and of the report of the state board of health, two thousand five hundred copies each; of the report of the bureau of labor statistics, three thousand five hundred copies; of the annual reports of the auditor of state upon insurance, four thousand five hundred copies each; of the report of the commissioners of pharmacy, two thousand five hundred copies; of the report of the railroad commissioners, three thousand copies, of which two thousand copies shall be bound in cloth; of the report of the board of control, three thousand copies, of which

two thousand copies shall be bound in cloth; of the annual report of the geological survey, three thousand copies, of which twenty-two hundred copies shall be bound in cloth; of the report of the annual assessment of railway property, two thousand copies; of the report of the secretary of state pertaining to lands, of the report of the secretary of state pertaining to the inspection of oils, of the state dairy commissioner's report four thousand copies, to be bound in paper covers, and of the report of the state board of dental examiners, fifteen hundred copies each; of the proceedings of the pioneer lawmakers' association, twelve hundred copies, of which five hundred copies shall be delivered to the association; and of all other reports not herein or otherwise specified, fifteen hundred copies each, unless the executive council shall direct a greater number to be printed, not exceeding four thousand. The executive council shall reduce the number of copies of any report herein provided, whenever the books of the document accountant in the office of the secretary of state show that a less number will supply all the necessary needs for such publication. Of said reports five hundred copies each of the biennial message, inaugural address, auditor's biennial report, treasurer's biennial report, attorney-general's biennial report, the report of the superintendent of public instruction, agricultural college, board of health, commissioners of pharmacy, secretary of state pertaining to lands, secretary of state's report of criminal convictions, the auditor's annual reports pertaining to insurance, the report of the bureau of labor statistics, the report of the state librarian and the report of the adjutant-general, shall be bound in cloth, all other reports shall be bound in paper covers." [31 G. A., ch. 3, § 3.] [32 G. A., ch. 3, § 1.]

[By section 1, chapter 3, the thirty-second general assembly attempted to amend the above section by striking out the word "two" in the twenty-second line and inserting in lieu thereof the word "four." The word two does not occur in the twenty-second line, but does appear in the twenty-seventh line, and the change has been made there, as it is manifest that such was the intent of the general assembly.]

SEC. 126. Repeal—distribution of reports and documents—by and to whom. That the law as it appears in section one hundred and twenty-six (126) of the supplement to the code, and as amended by chapter five (5) of the acts of the thirtieth general assembly, be and the same is hereby repealed and the following enacted in lieu thereof:

"The secretary of state shall make distribution of the various public documents turned over to him as follows:

1. The secretary of state shall distribute to each member of the general assembly one copy of the various public documents and upon request, such additional number as the secretary of state may provide for, and such remaining number as is not necessary to be retained for future general assemblies shall be distributed [the remaining copies to be distributed] upon the requisition of the reporting officer or department under the provisions of chapter five (5), acts of the thirtieth general assembly. The entire edition of the reports of the geological survey shall be distributed only upon requisition of the state geologist.

2. One thousand copies shall be stitched and bound in half-sheep, containing a copy of each report, to be arranged in the necessary number of volumes under the direction of the secretary of state. Each volume shall contain a table of contents of all the volumes, and the various reports are to be arranged in the order they appear in the table of contents.

3. The foregoing one thousand copies shall be distributed as follows: One copy to the lieutenant-governor, to the speaker, to each member of the general assembly, to the secretary of the senate and to the clerk of the house of representatives; one copy each to the governor of the state, and his

private secretary, the secretary of state, the auditor of state, the treasurer of state, the attorney-general, the superintendent of public instruction, the clerk and reporter of the supreme court and each of their deputies, the commissioner of labor statistics, the adjutant-general, the custodian of the capitol, and the fish and game warden; one copy to each judge of the supreme court; one copy to each railroad commissioner, mine inspector, and commissioner of pharmacy; one copy to the state librarian, and the secretary of the board of health, respectively; one copy to each state institution, to remain therein; one copy to the office of each county auditor, to remain therein; forty copies to the historical society; one copy to each of the other states and each territory reciprocating the same, and to each foreign nation or province desiring to exchange like reports; twenty-five copies to the state library; one copy to each public library and one copy to each college library within the state; the remaining copies to be placed under the control of the secretary of state, for distribution under the provisions of chapter five (5), acts of the thirtieth general assembly. The transportation charges on all matter distributed under this section shall be paid for by the state.

4. He shall furnish to the library of congress two copies of all legislative journals and reports of state officers, immediately upon their publication." [31 G. A., ch. 3, § 4.] [32 G. A., ch. 3, §§ 2, 3.]

SEC. 126-a. Secretary of state to act as custodian. It shall be the duty of the secretary of state to act as custodian of all state documents and publications. He shall receive the same in the manner provided in section one of chapter four (4) acts of the twenty-ninth general assembly, at the state storage building or at such other places as the executive council may direct, charging himself with the number of each publication received in books provided for the purpose by the executive council, and crediting himself with the number of books distributed, under the provisions of the statutes or upon the requisitions of the reporting officers, commissioners, boards and societies. [30 G. A., ch. 5, § 1.]

SEC. 126-b. Classified and catalogued—distribution. All state documents and other state publications shall be by the secretary of state systematically arranged, classified and placed in convenient and orderly position in such place as the executive council may provide and catalogued according to the arrangement and order of the "check list of state publications of 1904," so far as possible, and shall be distributed as provided by existing statutes and upon the requisitions of the reporting officers, commissioners, boards and societies. [30 G. A., ch. 5, § 2.]

SEC. 126-c. Requisitions. It shall be the duty of the secretary of state to supply each officer, commissioner, board and society having reports or publications in the possession of said secretary of state, with a book of blank requisitions, wherein is provided blanks for the names, addresses and for shipping directions, to be used in the distribution of all documents and publications not distributed otherwise under the express provisions of existing laws. On the receipt of a requisition from an officer, commissioner, board or society having books subject to requisition in the charge of the secretary of state, the secretary of state shall, without unnecessary delay, ship the reports or documents or publications according to the directions of the requisition. The secretary of state may issue his requisition for reports and documents required to be distributed by him, under the provisions of code section one hundred twenty-six and for the requirements of the general assembly. [30 G. A., ch. 5, § 3.]

SEC. 126-d. Report—reserve list—biennial report. The secretary of state shall when the systematic arrangement is completed as contem-

plated in the preceding section make a full and complete report to the executive council showing number, kind and date of all publications on hand. The executive council may fix the number of all documents, reports and publications that are now on hand or are hereafter published, that shall be known as the reserve list, to be thereafter distributed only upon requisition approved by the executive council. The secretary of state shall on January 1st preceding the convening of the legislature make a biennial report to the governor of all documents, reports and publications on hand. [30 G. A., ch. 5, § 4.]

SEC. 136. Report of academy of sciences—distribution. There shall be published, with necessary illustrations and bound in boards, in the same form as the acts of the general assembly are, by the state and under the supervision of the Iowa academy of sciences, one thousand copies of its annual report, to contain not more than three hundred pages, to be distributed as follows: To the governor, lieutenant-governor, secretary of state, auditor of state, state treasurer, each member of the general assembly, horticultural society, agricultural society, state library, university, agricultural college and the normal school, one copy each; to each public library and each incorporated college of the state, one copy; the remainder to be distributed by the secretary of state, as directed by the secretary of said academy, for exchange and such other purposes as the academy may specify; the exchanges and reports received to be preserved in the capitol for the benefit of the state at large. [25 G. A., ch. 86.] [28 G. A., ch. 5, § 1.] [29 G. A., ch. 7, § 1.] [32 G. A., ch. 4.]

[The amendment by the 32nd G. A. was by striking out the words "copies" in lines 10 and 11, and substituting the words "copy." The words "copies" appear in lines 9 and 10, and have been changed there.]

SEC. 137. Repeal—number of copies to be fixed by the executive council—how distributed. That section one hundred thirty-seven, of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"That there shall be published annually by the state, under the supervision of the superintendent of public instruction, a sufficient number of copies, such number to be fixed by the executive council, of not to exceed three hundred (300) pages each, of the proceedings of the state teachers' association, to be distributed as follows: One copy each to the governor, lieutenant-governor, auditor of state, secretary of state, treasurer of state, each member of the general assembly, each enrolled member of the state teachers' association, each public library in the state; one hundred (100) copies for the executive council for reserve and one hundred (100) copies for distribution by the superintendent of public instruction." [31 G. A., ch. 6.]

SEC. 137-a. Illustration of publications—how paid. That the executive council of Iowa is authorized to procure, purchase or authorize the purchase, when in its judgment the use of the same is expedient, the necessary engravings, plates, or cuts required to illustrate any publication authorized to be printed under the general printing statutes of the state and the cost of the said engravings, plates or cuts shall be audited and paid in the same manner as claims for state printing. [29 G. A., ch. 8, § 1.]

SEC. 138. Prices for state printing. The state printer shall be paid the following prices for all work done for the state in an acceptable manner, as hereinbefore provided, and no more:

1. For hand composition on laws, journals, reports and all other printed matter, except blanks, forty-eight cents per thousand ems, and sixty cents

per thousand for figure work when figures are arranged in columns, and three or more justifications are required, and eighty cents per thousand ems for rule and figure work. But plain indexes, such as those of the statutes of this state, shall be reckoned as ordinary composition;

2. For book press work, the compensation shall be two dollars for the first one thousand impressions of sixteen pages, and one dollar and twenty-five cents per thousand for each additional one thousand impressions from the same form. If in finishing a job of press work it shall be necessary to print an eight-page form, the compensation shall be the same as for a sixteen-page form, and, if there shall not be one thousand impressions in any one book form, the compensation shall be the same as for one thousand. No extra charge shall be allowed for dry pressing of sheets, which shall be done in all cases when so directed by the secretary of state;

3. For printing blanks, including composition and press work on one side of a sheet of folio post or larger paper, two dollars and fifty cents for the first one hundred impressions; for the next four hundred impressions, forty cents for each hundred, and fifteen cents for each additional one hundred impressions above five hundred. On paper smaller than folio post, for blanks or circulars, including composition and press work, two dollars for the first one hundred impressions; for the next four hundred impressions, thirty cents for each hundred, and ten cents for each additional one hundred impressions above five hundred. When both sides of a blank can be printed at once, only one impression shall be paid for;

4. For printing twelve hundred copies or less of the docket for the supreme court, including press work and composition, the docket page to conform in size and form with the dockets of 1896, two dollars for each printed page contained in a single volume thereof. For printing senate or house bills, five hundred or less, including composition and press work, two dollars and twenty-five cents for each printed page contained in a single bill, and for each additional one hundred, twenty-five cents. For briefs to the supreme court, fifty copies or less, of size and form prescribed by the rules of the supreme court, ninety cents per printed page contained in a single volume. For letter heads, envelopes, labels and postal cards, including composition and press work, one dollar and fifty cents for each one thousand impressions or less, and one dollar and twenty-five cents for each additional thousand; and when postal cards are printed upon both sides, two press works shall be paid for. [22 G. A., ch. 82, § 23.] [31 G. A., ch. 7.]

SEC. 141. Compensation of state binder. The state binder shall be paid the following prices for all work done for the state in an acceptable manner, as in this chapter provided:

1. For folding and trimming all documents not stitched, ten cents per hundred copies;

2. For folding, trimming and stitching documents not covered, fifteen cents per one hundred copies;

3. For folding, stitching, and binding in paper covers all messages, reports, documents, not exceeding one sheet, allowing sixteen pages for a sheet, eighty cents per hundred copies of sixteen pages or less, and for each additional sheet of sixteen pages or less, eighteen cents per one hundred copies, the cover not to be counted;

4. For folding, sewing, and binding in paper covers the journals of the two houses, sixteen cents per copy;

5. For folding, sewing, and binding in muslin or cases, with gilt letters, the lettering and general style of the books to be the same as reports heretofore published, fifteen cents per copy for a volume of one hundred and

fifty pages or less; twenty-one cents per copy for a volume containing one hundred and fifty pages, and not more than four hundred pages, and for each additional one hundred pages or fraction thereof, four cents; for folding, sewing and binding agricultural and horticultural society reports in board covers with muslin backs, similar in style with the acts of the general assembly, eighteen cents per copy;

6. For folding, sewing, and binding in half-sheep, with gilt letters for title, the lettering and general style of the books to be the same as documents heretofore published, twenty-six cents per copy for each volume of four hundred pages or less, and four cents for each additional hundred pages or fraction thereof;

7. For folding, stitching and binding the acts and resolutions of each general assembly in boards, with muslin backs and paper sides, same as laws of 1886, ten cents per copy;

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

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

10. For folding, sewing and binding the Iowa official register in cloth or cases regular document size, with gilt letters on the back thereof, the kind and quality of the cloth and the style of the lettering to be as directed by the secretary of state, fifteen cents per copy for a volume containing four hundred pages and not over six hundred pages, and for each additional one hundred pages or fraction thereof, two cents. [24 G. A., ch. 64, § 3; 22 G. A., ch. 82, § 25.] [31 G. A., ch. 3, § 5.]

SEC. 144-a. Compensation of printer and binder. That section one hundred and forty-four of the code be and the same is hereby repealed. [27 G. A., ch. 5, § 1.]

SEC. 144-b. List of useless documents or laws. The secretary of state shall accompany any report of state documents, publications or laws, he may be required by law to make to the executive council or governor of the state of Iowa, with a list of any of said documents, publications or laws, that he may deem not required for the future public uses. Said list shall show the entire number of each of said documents, publications or laws in his custody and the number he may deem not required for public uses. [30 G. A., ch. 6, § 1.]

SEC. 144-c. Committee to determine. Upon the receipt of any list of state documents, publications or laws, not required for future public uses, as provided in section one (1) of this act, by the governor or executive council, the same shall be, by the executive council referred to a committee consisting of the state librarian, the curator of the state law library and the curator of the historical department who shall examine the said list and determine by majority vote of said committee what part, if any, of said documents, publications or laws are not required for the public uses and report their findings to the executive council. [30 G. A., ch. 6, § 2.]

SEC. 144-d. Disposition by executive council. The executive council is empowered to dispose of any state documents, publications or laws that the committee named in section two (2) of this act may recommend for disposition. It shall be unlawful for any state officer to sell, destroy or otherwise dispose of state documents, publications or laws, except as provided in this act or other laws providing for the sale or disposition of the same. [30 G. A., ch. 6, § 3.]

CHAPTER 6.

OF THE CUSTODIAN OF PUBLIC BUILDINGS.

SECTION 146. Term of office—vacancies. The term of office of the custodian of public buildings and property, appointed by the governor, with the advice and consent of the senate, for the biennial period commencing on the first day of April, 1906, shall expire on the 31st day of March, 1907. Thereafter his term of office shall be for two years, which shall expire on the 31st day of March of each odd-numbered year; but he may be removed at any time for cause by the governor. If a vacancy should occur in said office when the general assembly is not in session, it shall be filled by appointment by the governor, but the person so appointed shall hold his office only until the next general assembly shall have been permanently organized, when the vacancy shall be filled by appointment of the governor by and with the advice and consent of the senate, which appointment shall be for the unexpired portion of the term for which the appointment had been made. [21 G. A., ch. 148, § 2.] [31 G. A., ch. 8.]

SEC. 152. Officers of senate and house—use and control of apartments in capitol—rooms for board of control. Either house of the general assembly may employ such officers and janitors as it shall deem necessary for the conduct of its business; and every officer, board, court or commission may control the official apartments assigned to them by the executive council, but shall have no right to employ any janitor, clerk or person, except as authorized by joint resolution as provided in this title. The senate chamber, the hall of the house of representatives and the committee rooms shall be used only for legislative purposes, and official apartments shall be used only for the purpose of conducting the business of the state. The executive council be, and they are hereby authorized to permit the board of control to use such of the committee rooms of the capitol for office purposes, as in their judgment can be used advantageously, provided, however, said committee rooms shall not be used for such purposes during any session of the general assembly. [21 G. A., ch. 148, § 8; 20 G. A., ch. 140, § 2.] [27 G. A., ch. 7, § 1.]

SEC. 152-a. Assignment of rooms at state house. That the rooms in the capitol building, numbers eleven and twelve, on the first floor, now occupied by the state agricultural society; room number eleven as a library and exhibition room, and room number 12 as a business room; be and the same are hereby assigned to the said state agricultural society for its permanent use and occupation, subject only to the action of the general assembly of the state of Iowa. [27 G. A., ch. 6, § 1.]

CHAPTER 7.

OF THE EXECUTIVE COUNCIL.

SECTION 156. Repeal—secretary, how chosen. That section one hundred and fifty-six (156) of the code be, and hereby is, repealed and the following enacted in lieu thereof:

“The executive council shall choose a secretary who shall hold office during its pleasure.” [32 G. A., ch. 5, § 1.]

SEC. 157. Repeal—secretary—duties. That section one hundred and fifty-seven (157) of the code be, and hereby is, repealed and the following enacted in lieu thereof:

“The secretary of the executive council shall perform the following duties and such others as are now or may hereafter be prescribed by law or directed by the executive council:

1. *Record of proceedings—certified statements.* He shall keep a complete record of the proceedings of the executive council and of the state board of review and shall, upon the completion of the work of said board of review, immediately transmit to the auditor of state a certified statement of the percentage to be added to or deducted from the valuation of each kind or class of property in the several counties of the state, and, to each county auditor of the state a like statement for his county.

2. *Assessment record.* He shall keep an assessment record, wherein shall be recorded the detailed proceedings relating to, and all valuations and assessments of properties made, taxes levied and levies determined by the executive council and shall certify to the several county auditors all property assessments and levies so made by the executive council, that by law are required to be certified to the said county auditors.

3. *Register of claims.* He shall keep a register of all claims required by law to be approved by the executive council, upon which register shall be shown the name of each claimant or in the case of pay rolls the name of the department or where there are several claimants the first name on the list, the amount claimed and the amount allowed with the date of the allowance and a citation of the statute under which the same is allowed.

4. *System of accounts.* He shall keep the following systems of accounts:

(a) A system of ledger accounts with all appropriations against which the executive council is, by law, authorized to audit claims;

(b) Accounts showing in detail all items of printing materials delivered by the state to the printer and all credits due said printer for the materials used in printing done for the state;

(c) A stock book record and ledger accounts of all supplies and postage received and issued by the supply department;

(d) Such further accounts as may be prescribed by the executive council.

5. *Vouchers and forms.* He shall prepare and maintain, under the direction of the executive council, the following systems of vouchers and forms:

(a) For the various claims required to be approved by the executive council;

(b) For the requisitions for supplies for state officers and members of the general assembly and paper for the state printer and contractors;

(c) For official orders for printing done by the state printer and contractors;

(d) For vouchers between the state printer, state binder, contractors and the state for printing or binding done for the state;

(e) For forms for the expense reports to be made by state officers to the executive council;

(f) For forms for reports of railways, express, equipment and sleeping car, telegraph, telephone and all other companies required by law to report to the executive council;

(g) All vouchers or forms that may be prescribed by the executive council.

6. *Report for publication in Iowa Official Register.* He shall, on or before the 15th day of January in each odd-numbered year, prepare a report of the doings of the executive council for the two preceding calendar years; which report shall include a statement of the assessments of railroads, sleeping and dining cars, express companies' property, equipment cars and telegraph property by companies or lines; the aggregate assessment of

telephone properties by classes; the official canvass of the votes cast at the last general election; a statement of the cities and towns the class of which may have been changed; and a classified and condensed statement of the expenditures made or approved by the executive council and a condensed statement of all other acts of the said council that are of general interest. This report so made and approved by the executive council shall be published in the Iowa Official Register.

7. *Biennial report of itemized expenses.* He shall, under the direction of the executive council, compile and have published, as required by law, the biennial reports of the itemized expenses of all state officers, boards and commissions.

8. *Annual assessment reports.* He shall, under the direction of the executive council, annually compile and have printed, detailed reports of the assessment of railways; sleeping, dining and equipment cars; express properties, telegraph and telephone properties.

9. *Supplies, postage and printing.* He shall have charge of the supplies, postage and printing papers purchased for state uses and shall account for the same.

10. *Bond.* He shall give a bond to the state, in an amount to be determined and approved by the executive council, for the faithful discharge of his duties." [32 G. A., ch. 5, § 2.]

SEC. 161-a. Repeal—settlement state officers—expert accountant—assistant—powers of executive council—appropriation. That section one hundred sixty-one of the code be repealed and the following enacted in lieu thereof:

"The executive council shall annually, and oftener in its discretion, make a full settlement between the state of Iowa and all state officers, commissioners, boards, departments and all persons receiving, handling or expending state funds except institutions under the control of the board of control.

For that purpose, an expert accountant at a salary not exceeding six dollars per day and an assistant at a salary not exceeding four dollars per day, may be employed to examine the records and accounts of all of said state officers, commissioners, boards, persons and departments. The expert accountant so appointed shall report in writing to the executive council the facts found, with suggestions as to improvements in methods of book-keeping and shall also report the facts as to any practices in administration, not authorized by statute or contrary to good business methods.

The executive council shall have authority to direct the manner in which the records and accounts of state departments shall be kept, when the statute does not prescribe the same; to require a compliance with the provisions of law when the statute prescribes duties as to methods and accounts and to require the keeping of the necessary records and accounts to enable said officers to make all reports required of them by law.

There is hereby appropriated out of any money not otherwise appropriated, sufficient to pay the per diem of the expert accountant and assistant herein provided for, on their statements of the actual time necessarily consumed, verified by oath and approved by the executive council, and warrants to be drawn by the auditor of state." [29 G. A., ch. 9, § 1.]

SEC. 163-a. Biennial reports by state officers—publication by executive council—what to contain. All state officers, boards, commissions, and institutions, except those under the management of the board of control, shall biennially, on or before September 1st of each year prior to the convening of the general assembly, make to the executive council, for the preceding biennial period ending June 30th, an itemized and classified report, verified by oath, of all salaries and expenses paid, including sup-

plies and paper drawn and printing and binding done. The report shall show out of what particular funds, fees, or moneys such expenditures have been made, also the disposition in detail of all fees and moneys collected. [28 G. A., ch. 6, § 1.]

SEC. 163-b. How published—distribution. The executive council shall cause the reports provided for in section one (1) hereof to be published in pamphlet form immediately after the same are received, in an edition of five thousand (5,000) copies, to be distributed as other state documents. [28 G. A., ch. 6, § 2.]

SEC. 163-c. Repeal. Section one hundred and sixty-three (163) of the code is hereby repealed. [28 G. A., ch. 6, § 3.]

SEC. 164. Supervision of capitol—contracts—auditing of bills. The executive council is empowered to assign apartments in the capitol building to the several state officers, commissions and boards; and such assignment shall be subject to change by it, from time to time, when required in the interest of the public service. It shall also make for the state all contracts for lighting and repairing the capitol building and other buildings belonging to the state situate in the city of Des Moines, and grounds connected therewith, and for the necessary telephone, telegraph and water service therein; but the cost of such service shall not exceed the minimum amounts paid by private parties for like service. The bills for such service shall be itemized, subscribed and sworn to by the persons entitled thereto, and filed with the council, who shall audit the same and order a warrant drawn upon the treasury therefor, payable out of the amount appropriated by the general assembly for that purpose, and not otherwise. [29 G. A., ch. 10, § 1.]

SEC. 165. Purchase of supplies—executive council—authority to sell. The council is also empowered and authorized to purchase the necessary furniture, fuel, stores and supplies for the capitol building and other buildings belonging to the state situate in the city of Des Moines, and grounds connected therewith, and for the use of the general assembly, public offices at the seat of government, and the supreme court, and all paper needed for the public printing. All paper purchased for the use of the state shall have a distinguishing mark or water line by which it can be identified, and all furniture, stores or supplies for use in and about the capitol shall, when practicable, be marked with the word "Iowa." The executive council shall have authority to sell, exchange or otherwise dispose of any article of furniture, stores or supplies when the same have become, for any reason, unfit for further use by the state. [C., '73, § 121; R., §§ 61, 81, 2170; C., '51, §§ 45, 60.] [29 G. A., ch. 10, § 2.] [29 G. A., ch. 11, § 1.]

SEC. 166. Advertise for sealed proposals. The council shall, from time to time, make estimates of the kind, quantity and quality of the articles needed and authorized to be purchased by it, as provided in the preceding section, and shall cause the secretary thereof to advertise for sealed proposals therefor in two newspapers published at the seat of government, and such others as it may deem expedient, except that postage stamps, postal cards, and stamped envelopes may be purchased without advertising, at the government prices, and the executive council may audit bills for postage, necessarily required for state purposes, at the time the same is ordered. When so audited the auditor of state shall draw warrants for the same upon the proper fund, which the treasurer of state shall pay upon presentation. Such advertisement shall state the kind, quantity and quality, and time and place of delivery, of the articles to be purchased, and that such proposals shall be filed with the secretary of the council, the time and

place where all bids will be opened, and such other matters as the council may direct. Bills for such advertising shall be subscribed and sworn to by the persons entitled thereto, and, when the same are audited by the executive council, the auditor shall draw warrants therefor. [C., '73, § 121; R., § 2169.] [28 G. A., ch. 7, § 1.]

SEC. 168. Supplies and postage—to whom furnished. The executive council shall take charge of all property purchased under the provisions of this chapter, and shall keep a full, accurate, complete and itemized account of all such property, with the cost and disposition thereof. The council shall supply the governor, secretary, auditor, treasurer, judges of the supreme court and clerk thereof, attorney-general, supreme court reporter, superintendent of public instruction, railroad commissioners, adjutant-general, the dairy commissioner, the historical department, the mine inspectors, the labor commissioner, the horticultural department, traveling library and Iowa library commission, the educational board of examiners and other officers entitled thereto by law, the general assembly, its committees, and the clerks, secretaries and special and standing committees of either house thereof, with all such articles required for the public use, and necessary to enable them to perform the duties imposed upon them by law. Postage shall not be furnished to the general assembly, its officers, employes, or to any committee of either branch thereof. It shall also furnish the public printer with all paper required for the various kinds of public printing, in such quantities as may be needed for the prompt discharge of his duties. Supplies, including postage and stationery, shall be furnished to the officers and persons entitled thereto by law, only in the manner provided in this chapter. [20 G. A., ch. 119; C., '73, § 122; R., § 2170.] [29 G. A., ch. 173, § 8.] [32 G. A., ch. 6, § 1.]

SEC. 170-a. Executive council—auditor's warrants. The executive council shall have power and authority to issue and negotiate warrants, bearing interest not to exceed five (5) per cent. per annum, in anticipation of the general revenues of the state for the fiscal year in which such warrants are issued; but the aggregate amount of such warrants shall not exceed the estimated revenue of the state for said year. Said executive council shall issue and negotiate such warrants only at such times as current revenues may be insufficient to pay all warrants issued by the auditor of state. Whenever it becomes necessary to sell such warrants the executive council shall advertise for sealed bids and shall dispose of the warrants to the highest bidder or bidders and shall keep the bids on file and a record of the same and of the parties purchasing the warrants. [27 G. A., ch. 8, § 1.]

SEC. 170-b. Levy—duty of executive council. The executive council shall in the year nineteen hundred two (1902) fix the rate per centum to be levied upon the valuation of the taxable property of the state necessary to yield for general state purposes approximately the sum of two million three hundred thousand dollars (\$2,300,000.00) and in the year nineteen hundred three (1903) shall fix the rate necessary to yield approximately the sum of two million dollars (\$2,000,000.00). [29 G. A., ch. 176, § 1.]

SEC. 170-c. Shall certify rate. The executive council shall certify the rate necessary to the auditor of each county. [29 G. A., ch. 176, § 2.]

SEC. 170-d. Fees. That all boards, commissions, departments and officers of state, elective or appointive, shall turn into the state treasury on or before the fifteenth day of each month all fees, commissions or moneys collected or received during the preceding calendar month with an itemized statement of sources from which received; and shall also file with the auditor of state a duplicate of such statement; provided, however, that the

provisions of this act shall not apply to the state agricultural society, regents of the state university, trustees of the state college of agriculture and mechanic arts and of the state normal school, horticultural society, supreme court reporter and inspector of passenger boats. [30 G. A., ch. 7, § 1.]

SEC. 170-e. Statement of per diem and expenses. That all members of boards, commissions or departments of state, and all state officers, who are authorized to contract expense accounts in the service of the state, and all who are allowed a per diem for services, instead of a fixed compensation, shall, on or before the end of each month, file with the secretary of the executive council an itemized and sworn statement of all expenses and days service, with dates and amounts, for the preceding calendar month. [30 G. A., ch. 7, § 2.]

SEC. 170-f. Approval—how paid. That the executive council shall examine all statements referred to in section two (2) of this act that shall have been filed with the secretary of the council, and for all items of per diem and expenses approved and amounts allowed by a majority of said council the auditor of state shall draw warrants payable by the treasurer of state out of such funds as are now, or may hereafter be, provided by law. The treasurer of state and auditor of state shall each keep an account of the moneys paid in under the provisions of this act and where the law now provides, or may hereafter provide, that the amounts allowed for per diem and expenses shall be limited to or paid from fees collected, the auditor's warrant shall be drawn against the funds realized from such fees and shall not exceed the amount thereof. [30 G. A., ch. 7, § 3.]

SEC. 170-g. Acts in conflict repealed. All acts or parts of acts in conflict with this act are hereby repealed. [30 G. A., ch. 7, § 4.]

CHAPTER 8.

OF THE CENSUS.

SECTION 171. Repeal—executive council to provide blank forms—schedules. That chapter eight (8) of title two (II) of the code be, and the same is hereby repealed, and there is hereby enacted in lieu thereof, the following:

The executive council shall cause to be prepared and printed, blank forms, suitable for the purpose of taking the census, to enable the assessors to make uniform returns of population and agriculture for the census. The schedules relating to the population shall comprehend, for each inhabitant, the name, age, color, sex, conjugal condition, place of birth, and place of birth of parents, whether alien or naturalized, number of years in the United States, occupation, months unemployed, literacy, school attendance, and ownership of farms and homes; and the executive council may use its discretion as to the construction and form and number of inquiries necessary to secure information under the topics aforesaid. The schedules relating to agriculture shall comprehend the following topics: Name of occupant of each farm, color of occupant, tenure, acreage, value of farm and improvements, acreage of different products, quantity and value of products and number and value of live stock. All questions as to quantity and value of crops shall relate to the year ending December 31st next preceding the enumeration. The specific form and division of inquiries necessary to secure information under the foregoing topics, shall be in the discretion of the executive council. Such blanks must be furnished to the respective county auditors, and by them to the township assessors, on or before the first Monday in January of the year in which the census is to be

taken. In addition to the matters specified to be enumerated in this bill, there shall be blanks for the ex-soldiers of the United States living in Iowa, which shall contain the name, company and regiment to which the soldier belonged, and his present place of residence. [30 G. A., ch. 8, § 1.]

SEC. 172. Assessor to fill and return blanks. The assessor shall at the time of assessing property in the year nineteen hundred and five, and every ten years thereafter, take such census in his township, municipality, or division thereof, and make entry upon such blanks of all matters therein required to be enumerated or returned, and return the same to the county auditor on or before the first day of June of the census year. [30 G. A., ch. 8, § 2.]

SEC. 173. When assessor fails. When any assessor fails to perform the duties required in this chapter such auditor shall appoint some suitable person to take the census, as provided herein, at as early a day as practicable, at the expense of the county. [30 G. A., ch. 8, § 3.]

SEC. 174. Returns to be forwarded—provision for failure. The county auditor shall forward such return to the secretary of state as soon as possible, and not later than the first day of July following. If such returns, or any of them are not received by the fifteenth day of July, the executive council may cause such census to be made in said county, or any township, municipality, or division thereof, or the returns brought up, at the expense of the delinquent county. All of such returns shall be filed and preserved by the secretary of state. [30 G. A., ch. 8, § 4.]

SEC. 175. Abstracts to be made. The executive council shall cause abstracts or compilations of said census to be prepared, which shall be recorded by the secretary of state in a book to be kept by him for that purpose. The executive council may add to such compilation such other statistics in reference to banking, railroads, insurance, manufactures, education and other matters of public interest, as they may be able to procure from the heads of the various departments of the state, and other sources, and which they may consider of sufficient value to be included in the census. [30 G. A., ch. 8, § 5.]

SEC. 175-a. Stenographers and accountants. In preparing said abstracts, the executive council shall employ only such persons as are fully qualified by their education and skill to rapidly and accurately perform the duties of stenographers and accountants. [30 G. A., ch. 8, § 6.]

SEC. 176. Census of Iowa. It shall be the duty of the executive council when said census shall have been compiled as aforesaid, to cause the same to be published in a book to be known as the "Census of Iowa"; and when the printing is completed, the secretary of state shall certify that the same includes the census publication required by law, and such certificate, with the date and signature shall be printed on the page following the title page thereof. [30 G. A., ch. 8, § 7.]

SEC. 177. Census publication to be evidence. Wherever in the code or the supplement to the code, the population of any county, city or town is referred to, it shall be determined by the publication above provided for as of the date of said certificate, and such census publication shall be evidence of all matters therein contained, and of said certificate thereto. [30 G. A., ch. 8, § 8.]

Whenever the number of inhabitants or the population of counties, cities or towns is to be determined, the last census, as shown by the Official Register, will control. *In re Sale of Intoxicating Liquors*, 108-368.

SEC. 177-a. Co-operation with United States Census Bureau. So far as practicable, the executive council is authorized to co-operate with the

Census Bureau of the United States in the gathering, compilation and publication of census statistics. [30 G. A., ch. 8, § 9.]

SEC. 177-b. Appropriation. To enable the executive council to collect and compile the census of nineteen hundred and five, and to read the proof of the same, there is hereby appropriated from any funds in the state treasury not otherwise appropriated, the sum of fifteen thousand (\$15,000) dollars, or so much thereof as shall be necessary to properly collect, compile and proof-read the census of nineteen hundred and five. [30 G. A., ch. 8, § 10.]

TITLE III.

OF THE JUDICIAL DEPARTMENT.

CHAPTER 1.

OF THE ORGANIZATION OF THE SUPREME COURT.

SECTION 192-a. Terms of court. There shall be three regular terms of the supreme court in each year to be held as follows, to wit: The first term beginning with the second Tuesday in January, and ending with the first Monday of May; the second beginning with the first Tuesday after the first Monday of May, and ending with the third Monday of September; and the third beginning with the first Tuesday after the third Monday of September and ending with the third Saturday of December. [29 G. A., ch. 12, § 1.]

SEC. 192-b. Recess or adjournment. The court shall not be required to continue in actual public session during an entire term, but may adjourn from time to time as by order or rule it shall direct. Provided, however, that no such recess or adjournment shall be taken for more than thirty days at one time, except during the period from the first Monday in July to the third Monday in September in each year. [29 G. A., ch. 12, § 2.]

SEC. 193-a. Causes assigned and submitted. At each regular or adjourned session of a term of court, causes pending therein may be assigned and submitted, but no more submissions shall be taken or allowed at any one session, than, in the judgment of the court can be properly considered and determined before the next succeeding session. [29 G. A., ch. 12, § 3.]

SEC. 193-b. Rules. The court shall by appropriate rules provide for the assignment of causes for hearing at the regular and adjourned sessions thereof, and for reasonable notice to counsel of the time or times at which their cases will be called. [29 G. A., ch. 12, § 4.]

SEC. 195. Divided court.

In case of equal division of the judges, the decision of the lower court is affirmed by operation of law. *Staber v. Collins*, 124-543; *Chicago, M. & St. P. R. Co. v. Davenport*, 127-677; *Chicago & N. W. R. Co. v. Cedar Rapids*, 127-678; *Clark v. Wabash R. Co.*, 132-11.

The announcement in an opinion filed with the clerk that the judges of the supreme court are equally divided in opinion, and that the judgment of the trial court stands affirmed by operation of law, con-

stitutes a judgment of affirmance on which the execution of the sentence may be ordered. *Busse v. Barr*, 132-463.

Such division of opinion does not entitle the defendant to discharge on the ground that there is reasonable doubt as to his guilt. The provisions relating to reasonable doubt are applicable only to the jury trying the questions of fact, and not to the court deciding questions of law. *Ibid.*

SEC. 198. Opinions to be filed.

No written opinion is required where no question of law is involved rendering an

opinion necessary. *Clay v. Maynard Sav. Bank*, 104-748.

SEC. 203-a. Salaries. Each judge of the supreme court hereafter elected shall receive a salary of six thousand dollars per year. [29 G. A., ch. 12, § 5.]

SEC. 203-b. No other compensation. That no member of the supreme court shall be paid any compensation for services other than the salary herein provided. [29 G. A., ch. 12, § 8.]

SEC. 203-c. Repeal. All acts and parts of acts in conflict with or inconsistent with the provisions of this act are hereby repealed. [29 G. A., ch. 12, § 6.]

SEC. 203-d. In effect. This act shall take effect and be in force on and after January 1st, 1904. [29 G. A., ch. 12, § 7.]

SEC. 205. Salary of clerk and deputy—fees to be collected. The salary of the clerk of the supreme court shall be twenty-two hundred dollars per annum, and the salary of the deputy clerk of the supreme court shall be eighteen hundred dollars per annum. The clerk shall collect the following fees and account for them as provided in section one hundred and ninety-one, of chapter nine, of title two of this code, and shall also keep account of and report in like manner all uncollected fees:

Upon filing each appeal, three dollars;

Upon entering judgment when the the cause has been tried on its merits, two dollars;

Upon each continuance, one dollar;

Upon issuing each execution, one dollar and twenty-five cents;

Upon entering satisfaction of each judgment, fifty cents;

Upon each writ, rule or order to be served upon any person not in court, twenty-five cents;

For copying an opinion to be transmitted to an inferior court upon reversal of a judgment or an order, to be paid by the party against whom the costs are adjudged, or for a copy of such opinion or any record made at the request of any person, for each hundred words, ten cents. [21 G. A., ch. 118, § 6; 19 G. A., ch. 117, § 2; 17 G. A., ch. 74, § 1; C., '73, § 3771; R., §§ 2949, 4134-5; C., '51, §§ 2525-6.] [32 G. A., ch. 2, § 6.]

CHAPTER 3.

OF THE ATTORNEY-GENERAL.

SECTION 208. Office—duties.

The attorney general has nothing to do with an appeal in a criminal case until it reaches the supreme court. It is within the duty of the county attorney to take the appeal and give notice thereof. *State v. Grimmel*, 116-596.

SEC. 212. Assistant—salary. He shall be supplied with an assistant, whose annual salary shall not exceed eighteen hundred dollars. [30 G. A., ch. 10.]

CHAPTER 5.

OF THE DISTRICT COURT.

SECTION 225. Jurisdiction—civil, criminal, probate.

Criminal: The criminal jurisdiction of the district court attaches at the time of the service of the warrant issued upon an indictment, and from that time it has control of the person of defendant, not only for the purpose of criminal investigation

but for all matters incident to such control. Therefore authority cannot be given by statute to commissioners of insanity to determine the question of insanity of a prisoner under arrest. *Stone v. Conrad*, 105-21.

Probate: Jurisdiction to grant administration on the estate of a deceased person is in the district court of the county in which the deceased resided at the time of his death. The district court of another county acquires no jurisdiction in such case by the fact that there is property of the deceased in such county. *In re King's Estate*, 105-320.

While a probate court cannot foreclose a mortgage in favor of the estate against a person claiming a share in the estate, it may determine the indebtedness of such person to the estate and deduct the amount thereof from his share. *Prouty v. Matheson*, 107-259.

A court taking jurisdiction in probate is presumed to have found facts such as to give it jurisdiction. *McFarland v. Stewart*, 109-561.

An order in a guardianship matter, under the provision of Code § 3261 with reference to probate jurisdiction, may be made by consent of parties in another county in the same district, and will become a valid and binding adjudication when entered on the record in the proper county. *Steiner v. Lentz*, 110-49.

The fact that the case is brought before the court in an action in equity which should have been presented in probate does not go to the jurisdiction of the court. *Easton v. Somerville*, 111-164.

An action brought by a widow for an order upon her deceased husband's admin-

istrator to pay her distributive share of the assets of the estate, is properly on the probate docket. *Duffy v. Duffy*, 114-581.

The objection that a proceeding relating to the construction of a will should have been in probate rather than in equity is not available on appeal, if not made in the trial court. *Filkins v. Severn*, 127-738.

While proceedings in probate are to be distinguished from proceedings at law or in equity, the court in which they are tried is the same. *Tucker v. Stewart*, 121-714.

Absence of the judge from the court room during argument of counsel, held not to constitute error where it appeared that the judge was within the hearing of counsel and heard all that was said. *State v. Porter*, 105-677.

During the argument of a case the judge should remain within hearing that he may not even temporarily relinquish control of the proceedings or the conduct of the trial. At all times he must be in readiness to assert authority in keeping the argument within legitimate limits and to interpose whenever the conduct of officers of the court, jurors or spectators may require. *State v. Carnagy*, 106-483.

Absence of the judge from the court room during the arguments to the jury will not be a ground for a new trial where it appears that no prejudice resulted. *Allen v. Ames & College R. Co.*, 106-602.

The court may do many things which a judge cannot do. The petition for the incorporation of a municipal corporation being required to be presented to the court, an allowance thereof by the judge not sitting as a court will not be sufficient. *State ex rel. v. Council*, 106-731.

SEC. 226. City or town to provide court room.

The county is liable for the expenses of the court, held as provided by law at the county seat, and by analogy the county is held liable for the reasonable compensation of an attorney appointed by the court to act in behalf of the public in prosecuting proceedings for the disbarment of an at-

torney. *Hyatt v. Hamilton County*, 121-292.

The statutory provisions of 22 G. A., chap. 37, with reference to the holding of court at Avoca, in Pottawattamie county, are not repealed, but on the contrary are recognized by this section. *State v. Higgins*, 121-19.

SEC. 227. Judicial districts. For judicial purposes, the state is hereby divided into twenty judicial districts, as follows:

The first district shall consist of the county of Lee, and have one judge.

The second district shall consist of the counties of Lucas, Monroe, Wapello, Jefferson, Davis, Van Buren and Appanoose, and have four judges.

The third district shall consist of the counties of Wayne, Decatur, Clarke, Union, Ringgold, Taylor and Adams, and have two judges.

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

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

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

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

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

The ninth district shall consist of the county of Polk, and have four judges.

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

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

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

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

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

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

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

The seventeenth district shall consist of the counties of Tama, Benton and Marshall, and have two judges.

The eighteenth district shall consist of the counties of Linn, Jones and Cedar, and have three judges.

The nineteenth district shall consist of the county of Dubuque, and have two judges.

The twentieth district shall consist of the counties of Des Moines, Henry and Louisa, and shall have two judges.

The district judge shall be a resident of the district in which he is elected, and each judge shall hold office until the expiration of the term for which he has been heretofore elected. Each district judge hereafter elected, except to fill a vacancy, shall hold office four years and until his successor is elected and qualified. Each judge elected to fill a vacancy shall hold for the unexpired term and until his successor is elected and qualified. [26 G. A., chs. 121, 122; 25 G. A., chs. 66, 67, 68; 24 G. A., chs. 53, 54, 55; 21 G. A., ch. 134, §§ 3, 4.] [27 G. A., ch. 10, § 1.] [27 G. A., ch. 11, § 1.] [28 G. A., ch. 8, § 1.]

SEC. 227-a. Twelfth district — additional judge — appointment — election. The governor shall appoint a judge for said twelfth judicial district in conformity herewith, who shall hold his office until the election and qualification of his successor, as herein provided. At the general election in eighteen hundred and ninety-eight, a judge shall be elected in said district, who shall hold his office for the term of four years, as provided by law. [27 G. A., ch. 10, § 2.]

SEC. 227-b. Acts in conflict repealed. All acts or parts of acts in conflict with this act and provisions are hereby repealed. [27 G. A., ch. 10, § 3.]

SEC. 227-c. Eighteenth district—additional judge—election. At the general election in the year 1898 a judge of the district court shall be elected in said district, whose first term of office shall expire at the same time as do the terms of the present judges of said district, and thereafter the term of office of said judge shall be four years. [27 G. A., ch. 11, § 2.]

SEC. 228. Terms where two county seats.

The district court for Pottawattamie county is the same court and presided over by the same judge whether held at Avoca or at Council Bluffs, and when parties stipulate in a proceeding pending in the court at Avoca that a hearing thereof

shall be had before a judge of the court at a term to be held at Council Bluffs, the hearing so held is a hearing before the court and not a hearing before the judge in vacation. *Ferguson v. Wheeler*, 126-111.

SEC. 232. Judges to prepare schedule—printing—distribution. On or before the first day of October in each odd-numbered year, the judges shall meet in their respective districts and determine the times and places of holding their courts during the two succeeding calendar years. The plan or schedule thus agreed upon, or ordered by the chief justice of the supreme court when they cannot agree, shall be forthwith forwarded by the district judges to the secretary of state and the clerk of the district court in each county in such district, and the clerk shall file the same and enter it of record in the journal of the court, and cause such order to be published once each week for four weeks in some weekly newspaper published in such county, if there be any such published. The secretary of state shall, within ten days after receiving said orders, or before the first Monday in December after said orders are made, prepare a tabular statement of the times of holding the several courts, as fixed by the several orders in his office, and have printed one thousand copies thereof, which shall be distributed as follows: One copy to each state officer, the state library, the library of the law department of the university, each clerk of the district court and sheriff, and the residue to the county auditors, in proportion to the population of each county, for gratuitous distribution among the attorneys of the county. In preparing said plan or schedule, the judges shall so arrange, if practicable, that each judge shall hold at least one term of court during the year in each of the several counties of his district. [21 G. A., ch. 134, § 6; 15 G. A., ch. 12, § 1; C., '73, § 165; R., §§ 2654-5; C., '51, §§ 1567-8.] [31 G. A., ch. 9, § 8.]

SEC. 235. When special adjournment ordered.

Authority to postpone the term is conferred on the judge who is to preside

thereat. *State v. McPherson*, 126-77.

SEC. 238. Regular adjournment—business continued.

Adjournments: This section is applicable to the hearing of an application for permit to sell intoxicating liquors, where a remonstrance has been filed. *Cox v. Burnham*, 120-43.

An adjournment of court is a final ad-

journalment for the term unless there is some provision in the order itself or by statute that the court shall reconvene for the transaction of the business of that term. *Marengo Sav. Bank v. Byington*, 112 N. W. 192.

SEC. 241. Judges not to sit together.

One judge is not bound to follow the ruling of another judge in a prior stage of the proceedings in the same case. *Seery v. Murray*, 107-384.

Where one judge succeeds another of the same district in conducting the pro-

ceedings of a court, there is no error in the succeeding judge doing that which the trial judge might have done, and at the suggestion of such trial judge. *Renner v. Thornburg*, 111-515; *State v. Jones*, 115-113.

SEC. 242. Record to be signed.

Even where the record of a judgment does not follow the written directions of the judge, it must be treated, in the absence of any showing to the contrary, as truly evidencing the decision of the court, for a change in the views of the judge will be presumed rather than that the record is other than valid. *Christie v. Iowa L. Ins. Co.*, 111-177.

The provision as to the signing of the record is directory only, and a failure

on the part of the presiding judge to sign the record does not prevent other proceedings being had which could have been predicated upon a signed record. *Donnelly v. Smith*, 128-257.

A judgment may be appealed from although the journal entry has not yet been signed by the judge. The statutory provisions as to the signing of the record by the judge are directory only. *In re Estate of Jones*, 130-177.

SEC. 243. Court controls record.

A court may vacate and set aside its judgment when such judgment is unwarranted by the record. *Cooper v. Disbrow*, 106-550.

Where the decree in an action allowing a minor to redeem from a tax sale fixed the time of redemption, held that the court might, at the next term before, the record was signed, modify the decree so as to extend such time. *Hartley v. Bart-ruff*, 112-592.

There is no provision by which the signing of the record is to be postponed beyond the succeeding term, and the action of the court in modifying its judgment after the expiration of several terms can not be sustained on a motion made at the succeeding term. *Perry v. Kaspar*, 113-268.

It is doubtful whether the district court has inherent power to suspend or supersede its judgments and orders pending an appeal; but at any rate a judge in vacation and acting in another county has no power to suspend the operation of a decree of the court duly entered. *Whitlock v. Wade*, 117-153.

SEC. 244. Corrections.

Mistake of the court in a matter of law cannot be corrected under this section. *Manning v. Nelson*, 107-34.

A court may during the term without notice modify a decree already entered. The record referred to in this and the preceding section is not the formal decree signed by the judge and kept in the record, but the record itself as found in the books which clerks are authorized to keep, and this record may be amended and corrected at any time before it is signed. Such correction may be made by a court on its own motion. If made at a subsequent term it must as a general

A court has inherent power to do many things which a judge may not do and while a court may set aside an order theretofore made by it, a judge as such has no power to vacate, modify or suspend a judgment or order of the court. *Ibid.*

A court may set aside a default or vacate a judgment upon cause shown, or, if satisfied that a mistake or wrong has been done, may make such order upon its own motion. *Streeter v. Gleason*, 120-703.

The court may modify its decision at any time before it is spread upon the record. *Hull v. Eby*, 123-257.

A court may make orders relating solely to the enforcement of a decree, although by appeal it has lost jurisdiction to retry the issues, and the case has not been remanded to it for that purpose. *Swan v. Harvey*, 123-192.

The judge sitting as a court in one county cannot act as the judge of the court in another county. *Williams v. Dean*, 111 N. W. 931.

rule be with notice to the parties interested. *McConnell v. Avey*, 117-282.

An amendment to a decree made at a subsequent term of court and without notice to the defendant is of no validity as to him. *Browne v. Kiel*, 117-316.

After the expiration of the term at which judgment is rendered a party is not required to take notice of other proceedings in the case. *McConkie v. Landt*, 126-317.

The power of the court to correct its records as to a mistake of the clerk is not limited to the next succeeding term. *Graezel v. Price*, 112 N. W. 827.

SEC. 245-a. Reporters' notes as evidence. That the original shorthand notes of the evidence, or any part thereof, heretofore or hereafter taken upon the trial of any cause or proceeding, in any court of record of this state, by the shorthand reporter of such court, or any transcript

thereof, duly certified by such reporter, when material and competent, shall be admissible in evidence on any retrial of the case or proceeding in which the same were taken, and for purposes of impeachment in any case, and shall have the same force and effect as a deposition, subject to the same objections so far as applicable. It shall be the duty of any such reporter, upon demand by any party to any cause or proceeding, or by the attorney of such party, when such shorthand notes are offered in evidence, to read the same before the court, judge, referee, or jury, or to furnish to any person when demanded a certified transcript of the shorthand notes of the evidence, of any one or more witnesses, upon payment of his fees therefor. When the reporter taking such notes in any case or proceeding in court has ceased to be the reporter of such court, any transcript by him made therefrom, and sworn to by him before any person authorized to administer an oath as a full, true, and complete transcript of the notes of the testimony of the witness a transcript of whose testimony is demanded, shall have the same force and effect as though duly certified by the reporter of said court. When any exhibit, record, or document is referred to in such shorthand notes or transcript thereof, the identity of such exhibit, record, or document, as the one referred to by the witness, may be proven either by the reporter, or any other person who heard the evidence of the witness given on the stand. No portion of the transcript of the shorthand notes of the evidence of any witness shall be admissible as such deposition, unless it shall appear from the certificate or verification thereof that the whole of the shorthand notes of the evidence of such witness, upon the trial or hearing in which the same was given, is contained in such transcript, but the party offering the same shall not be compelled to offer the whole of such transcript. [27 G. A., ch. 9, § 1.]

The provisions of 27 G. A., chap. 9, as to the introduction on a subsequent trial of the shorthand reporter's notes of testimony, has no application except on the retrial of the same case, or where the transcript of the evidence in another case is used for the purpose of impeachment. *Walker v. Walker*, 117-609.

Under these provisions the transcript of the testimony of a witness on a former trial is not admissible on a subsequent trial if the witness is present and competent to testify and if under such circumstances a deposition of the witness would not be admissible. *Lanza v. Le-Grand Quarry Co.*, 124-659.

The translation of the shorthand reporter's notes of the testimony given on a former trial cannot be offered in evidence as the testimony of a witness subsequently deceased, unless the proceeding in which such transcript is offered is the same proceeding as that in which the testimony was first given. *In re Will of Wiltsey; Wiltsey v. Wiltsey*, 122-423.

The transcript of shorthand notes of the testimony of a witness given on a former trial may be read in evidence as his testimony on retrial of the case if he is not present in the court room at the time it is offered. It is not necessary to show the grounds required for making a deposition admissible in evidence in a law case. *Fitch*

v. Mason City & C. L. Traction Co., 124-665.

In the absence of any special showing of prejudice, held not reversible error to allow a transcript of the evidence on a former trial to be introduced over the objection of the opposite party and afterwards withdrawing it from the jury and allowing the witnesses to be called. *Bell v. Clarion*, 120-332.

Where a transcript of evidence on a former trial was sought to be introduced by virtue of 27 G. A., chap. 9, for the purpose of impeaching a witness on a subsequent trial, held that such transcript was not admissible where the certificate did not show that the whole of the shorthand notes of the evidence of the witness was included in the transcript. *Connell v. Connell*, 119-602.

The transcript of a party's testimony on a former trial is admissible as against him for the purpose of establishing admissions against interest. *Lush v. Parkersburg*, 127-701.

The shorthand reporter called to testify as a witness may, without the introduction of his transcript of the evidence, testify to admissions made by a witness. The act has no application to such a case. *Frick v. Kabaker*, 116-494.

Where in a proceeding to contest a will contestant's widow and children were er-

reoneously substituted on his death and evidence was taken in a trial under such substitution, held that the shorthand notes of such evidence might be used in a retrial after the widow had been properly substituted as administratrix. *In re Wiltsey's Will*, 109 N. W., 776.

The provision authorizing the use of the reporters' notes as evidence on a subsequent trial is intended to furnish a convenient means of proving the testimony

of a witness on a former trial of the same case when the witness is not able to testify by reason of death, insanity or other intervening cause, and where a party becomes incompetent to testify as to conversations or transactions with one who is deceased at the time of the subsequent trial, (under Code § 4604) his testimony on a former trial cannot be used. *Greenlee v. Mosnat*, 111 N. W. 996.

SEC. 247. Decisions in vacation.

Attorneys cannot by agreement not reduced to writing nor entered on the records of the court agree to the submission of a case to be determined in vacation. *Whitlock v. Wade*, 117-153.

A judge in vacation and acting in another county cannot suspend the decree of a court duly entered. A judge in vacation has no authority except such as is expressly given him by statute. *Ibid.*

Where the trial judge filed with the clerk a finding of facts with his conclusions of law, ending with a direction that judgment be entered, but no judgment was entered in accordance therewith, held that there was not a decision of the case

in vacation. *Christie v. Iowa L. Ins. Co.*, 111-177.

The power of a judge in vacation to make orders or exercise judicial functions is that only which is conferred by statute. *In re Guardianship of Kimble*, 127-665.

A ruling or decree in vacation is invalid unless the case has been submitted for such determination. *Marengo Sav. Bank v. Byington*, 112 N. W., 192.

A judge while holding court in one county has no power to make an order for the correction of the record in another county even in the same district. *Williams v. Bean*, 111 N. W. 931.

SEC. 250. Probate powers conferred on clerk.

The clerk may act for the court in the matter of endorsing an order for publication of notice of administration on the letters of administration issued by him, and although the order as endorsed is in the name of the court, the signature of the clerk is sufficient. No record of such order is required to be kept. *Mosher v.*

Goodale, 129-719.

Any person interested may appear in the probate proceeding and contest the appointment of an administrator; but the regularity of the appointment cannot be attacked in a collateral proceeding on the ground of insufficiency of the bond. *Beresford v. American Coal Co.*, 124-34.

SEC. 253. Salary of judges. The salary of each judge of the district court shall be three thousand five hundred dollars per year. [21 G. A., ch. 134, § 12.] [29 G. A., ch. 13, § 1.]

SEC. 254. Compensation of shorthand reporters.

The application for an order for a transcript at the expense of the county for the purpose of prosecuting an appeal should be made to the trial judge. The expense of the transcript, if the order is made, should be paid by the county in which the case is tried, although it is brought to that county on change of venue. *State v. Cater*, 109-69.

The reporter is entitled to compensation for each day of attendance under direction of the judge without regard to the services actually performed. *Ferguson v. Pottawattamie County*, 126-108.

While the judge may have some discretion as to ordering a transcript at the

expense of the county, yet if he finds that the defendant is unable to pay for such transcript, he should order it without regard to his judgment as to whether defendant has had a fair trial. *State v. Robbins*, 106-688.

It is for the court to determine whether the defendant in a criminal case is unable to pay for a transcript, and unless it appears on appeal that the finding of his inability to do so is unsupported by the evidence, an order allowing such transcript at the county's expense will not be interfered with on appeal. *State v. Steidley*, 133-31.

SEC. 254-a1. Repeal. That section two hundred and fifty-four (254) of the code be and the same is hereby repealed and the following enacted in lieu thereof. [29 G. A., ch. 14, § 1.]

SEC. 254-a2. Reporter—compensation. Shorthand reporters of the district courts shall be paid six (\$6.00) dollars per day for each day's attendance upon said court, under the direction of the judge, out of the county treasury where such court is held, upon the certificate of the judge holding the court; and in case the total per diem of each reporter shall not amount to the sum of one thousand two hundred dollars (\$1,200.00) per year, the judge appointing him shall at the end of the year apportion the deficiency so remaining unpaid among the several counties of the district, if there be more than one county in such district, in proportion to the number of days of court actually held by said judge in such counties, which apportionment shall be by him certified to the several county auditors, who shall issue warrants therefor to said reporter, which warrants shall be paid by the county treasurers out of any funds in the treasury not otherwise appropriated.

Shorthand reporters shall also receive six cents per hundred words for transcribing their official notes, to be paid for in all cases, by the party ordering the same. If a defendant in a criminal cause has perfected an appeal from a judgment against him and shall satisfy a judge of the district court from which the appeal is taken that he is unable to pay for a transcript of the evidence, such judge may order the same made at the expense of the county where said defendant was tried. [29 G. A., ch. 14, § 2.]

SEC. 254-a3. Taxed as part of costs. A charge of six dollars (\$6.00) per day for reporting in all cases, except where the defendant in a criminal case is acquitted, shall be taxed as part of the costs in the case by the clerk of the court and paid into the county treasury when collected. [29 G. A., ch. 14, § 3.]

CHAPTER 5-A.

OF APPOINTMENT OF TRUSTEES BY DISTRICT COURT TO MANAGE, CONTROL AND INVEST CEMETERY FUNDS.

SECTION 254-a4. Trustee—appointment. Any owner or owners of any cemetery, or any party or parties interested therein, may by petition presented to the district court of the county where the cemetery is situate, have appointed a trustee with authority to receive any and all moneys that may be donated for and on account of said cemetery or any part thereof and to invest, manage and control same under the direction of the court; but he shall not be authorized to receive any gift, except with the understanding that the principal sum is to remain and be a permanent fund, and only the net proceeds therefrom to be used in carrying out the purpose of the trust created, and all such funds shall be exempt from taxation so far as consistent with the regulations governing the association owning or controlling the ground where the lot is located. [29 G. A., ch. 15, § 1.]

SEC. 254-a5. Receipt attested by clerk — "Cemetery Record." Every such trustee shall execute and deliver to the donor a receipt showing the amount of money received, and the use to be made of the net proceeds from same. Such receipt shall be duly attested by the clerk of the court granting letters of trusteeship and a copy thereof signed by the trustee and so attested shall be filed with and recorded by the clerk in a book to be known as the "Cemetery Record," and in which shall be recorded all reports and other papers, including orders made by the court or judge relative to cemetery matters. [29 G. A., ch. 15, § 2.]

SEC. 254-a6. Loans—security. It shall be the duty of such trustee to loan all moneys received by him, under the direction and with the approval of the court, but only as same may be secured by first mortgage upon Iowa real estate, and no loan shall be made or approved, unless it be made to appear upon oath of three disinterested citizens that such real estate is worth at least double the amount of the loan applied for, and that the title to same is good of record and in fact in the party making application therefor. [29 G. A., ch. 15, § 3.]

SEC. 254-a7. Bond—approval—oath. Every such trustee, before entering on the discharge of his duties or at any time thereafter when required by the court or judge must give bond in such penalty as may be required by the court, to be approved by the clerk, conditioned for the faithful discharge of the duties imposed on him by law and take and subscribe an oath the same in substance as the condition of the bond, which oath and bond must be filed with the clerk. [29 G. A., ch. 15, § 4.]

SEC. 254-a8. Clerk—duty of—additional bond. It shall be the duty of the clerk at the time of filing each and every receipt mentioned in section two of this act, to at once advise the court or judge as to the amount of the principal fund in the hands of such trustee, the amount of bond filed, and whether or not it is good and sufficient for the amount given, to the end that the court or judge may, if to him it seems best, require a new or additional bond. [29 G. A., ch. 15, § 5.]

SEC. 254-a9. To serve without compensation—expenses. Trustees appointed under this act shall not be entitled to receive any compensation for services rendered, but may out of the income received pay all proper items of expense incurred in the performance of their duties, including cost of bond, if any. [29 G. A., ch. 15, § 6.]

SEC. 254-a10. Annual report. It shall be the duty of every such trustee to make full report of his doings in the matter of his trusteeship in the month of January following his appointment and in January of each successive year. In each of said reports he shall apportion the net proceeds received from the sum total of the permanent fund and make proper credit to each of the separate funds assigned to him in trust. [29 G. A., ch. 15, § 7.]

SEC. 254-a11. Removal. Any such trustee may be removed by the court or judge thereof at any time for cause and in the event of removal or death the court or judge must appoint a new trustee and require his predecessor or his personal representative to make full accounting with him for all the property belonging to such trusteeship. [29 G. A., ch. 15, § 8.]

SEC. 254-a12. County auditor to act as trustee—when. In case no trustee is appointed by said court, or if so appointed does not qualify as provided in this chapter then such funds as are therein mentioned or any funds donated by any person or estate to improvement of cemeteries, shall be placed in the hands of the county auditor who shall receipt for, loan, and make annual reports of such funds in manner as provided by the law as it appears in sections two hundred and fifty-four-e (254-e), two hundred and fifty-four-f (254-f) and two hundred and fifty-four-j (254-j), of the supplement to the code. The said auditor shall annually turn over the accrued interest in his hands to the cemetery association or other person having control of the cemetery entitled thereto who shall use the same in carrying out the provisions of said trust, and who shall file a written report annually with the county auditor. [30 G. A., ch. 12.]

CHAPTER 5-B.

OF JUVENILE COURTS, DETENTION HOMES AND SCHOOLS.

SECTION 254-a13. Jurisdiction—“Juvenile court record.” The district court is hereby clothed with original and full jurisdiction to hear and determine all cases coming within the purview of this act, and the proceedings, orders, findings and decisions of said court shall be entered in a book or books to be kept for the purpose and known as the Juvenile Court Record. Said court shall always be open for the transaction of business coming under the purview of this act, but the hearing of any matter requiring notice shall be had only in term time or at such time and place as the judge may appoint. [30 G. A., ch. 11, § 1.]

SEC. 254-a14. Terms defined. This act shall apply only to children under the age of sixteen years, not at the time inmates of a state institution or any industrial school for boys or for girls, or any institution incorporated under the laws of this state, and shall apply to all children of said age, except such as are charged with a commission of offenses punishable under the laws of the state with life imprisonment, or with the penalty of death. For the purpose of this act, the words “dependent children” or “neglected children” shall mean any child who for any reason is destitute or homeless or abandoned; or dependent upon the public for support; or who has not the proper parental care or guardianship; or who habitually begs or receives alms; or who is found living in any house of ill fame, or with any vicious or disreputable person; or whose home, by reason of neglect, cruelty or depravity on the part of its parents or guardian or other person in whose care it may be, is an unfit place for such child; and any child under the age of ten years, who is found begging, or giving any public entertainment upon the street for pecuniary gain for self or another; or who accompanies or is used in aid of any person so doing; or who, by reason of other vicious, base or corrupting surroundings, is, in the opinion of the court, within the spirit of this act. The words “delinquent child” shall include any child under the age of sixteen years, who violates any law of this state, or any city or village ordinance; or who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons, or who is growing up in idleness or crime; or who knowingly frequents a house of ill fame; or who patronizes any policy shop or place where any gaming device is, or shall be operated; or who habitually wanders about any railroad yards or tracks, gets upon any moving train or enters any car or engine without lawful authority. The word “child” or “children” may mean one or more children, and the word “parent” or “parents” may be held to mean one or both parents when consistent with the intent of this act. The word “association” shall include any corporation which includes in its purposes the care or disposition of children coming within the meaning of this act. [30 G. A., ch. 11, § 2.]

SEC. 254-a15. Petition in writing. Any reputable person being a resident of the county, having knowledge of a child in his county who appears to be either dependent, neglected or delinquent, may, without fee, file with the clerk of the court having jurisdiction of the matter, a petition in writing, setting forth the facts, verified by affidavit; it shall be sufficient if the affidavit is upon information and belief. [30 G. A., ch. 11, § 3.]

SEC. 254-a16. Summons—trial—statutes applicable—costs—appeals. Upon the filing of the petition the court may cause a summons to issue requiring the person having custody or control of the child or with whom the child may be, to appear with the child at a time and place stated in the summons. The parents of the child, if living, and their residence is

known, or its legal guardian, if one there be, or if there is neither parent nor guardian or if his or her residence is not known, then some relative, if there be one and his residence is known, shall be notified of the proceedings, and in any case the judge may appoint some suitable person to act in behalf of the child. If the person summoned as herein provided shall fail to appear or bring the child, without reasonable cause, and abide the order of the court, he may be proceeded against as in case of contempt of court. In case the summons cannot be served or the party served fails to obey the same, and in any case when it shall be made to appear to the court that such summons will be ineffectual, a warrant may issue on the order of the court, either against the parent or guardian or the person having custody of the child or with whom the child may be, or against the child itself. On the return of the summons or other process, or as soon thereafter as may be, the court shall proceed to hear and dispose of the case in a summary manner, provided, however, that when the child is brought before the court, charged with the commission of a crime, not punishable with imprisonment for life, or the penalty of death, the court may, and if the child, its parent or guardian demands, shall place the child on trial for the commission of such offense. Where the penalty for the offense committed, exceeds a fine of one hundred dollars, or imprisonment for thirty days, the court shall make an examination and in conducting same shall be governed by the provisions of section five thousand two hundred and sixteen (5216), five thousand two hundred and eighteen (5218), five thousand two hundred and nineteen (5219), five thousand two hundred and twenty-one (5221), five thousand two hundred and twenty-two (5222), five thousand two hundred and twenty-three (5223), five thousand two hundred and twenty-four (5224), five thousand two hundred and twenty-five (5225), five thousand two hundred and twenty-six (5226), five thousand two hundred and twenty-seven (5227), and five thousand two hundred and thirty-nine (5239) of the code and shall make certificate, order of discharge or commitment, issue warrant, require undertakings of witnesses and security and commit witnesses as provided by sections five thousand two hundred and twenty-eight (5228) to five thousand two hundred and thirty-five (5235) of the code inclusive. If the child is unable to furnish the required bail, the child may, pending the final disposition of the case, be detained in the possession of the person having charge of the same, or may be kept in a suitable place provided by the city or county authorities. If the crime is not triable on indictment or if it appears on the examination that a public offense has been committed which is not triable on indictment the court may order any peace officer to file an information against the child before him and shall proceed to try the case before a jury of twelve men, selected as in a justice's court. The proceedings, costs and taxation thereof, shall be as provided for trials in the district court and the defendant shall be entitled to his exceptions and right of appeal. [30 G. A., ch. 11, § 4.]

SEC. 254-a17. Discretionary powers of court. When any such boy or girl shall be found guilty of the commission of a crime, not punishable with imprisonment for life, or the penalty of death, the court in its discretion, may, instead of entering judgment of conviction, make order concerning such child in manner as hereinafter provided. [30 G. A., ch. 11, § 5.]

SEC. 254-a18. Probation officers—compensation. The court shall have authority to appoint or designate one or more discreet persons of good character to serve as probation officers during the pleasure of the court; said probation officers to receive no compensation from the public treasury;

provided, however, that the district court, in any county of this state having a population of more than fifty thousand (50,000), may designate and appoint not to exceed two (2) persons, of good character and special fitness, to serve as probation officers during the pleasure of the court, who are hereby vested with all of the powers and authority of sheriffs in and about the discharge of their duties as probation officers, and who shall each receive a compensation, to be fixed by the court, not to exceed seventy-five dollars (\$75) per month. Any probation officer, provided for by this section, when performing the duties of his office under the order of the juvenile court or a judge thereof, shall be allowed such necessary expenses as may be authorized by the judge of said juvenile court, and the same shall be paid out of the county treasury as other court costs. In case a probation officer shall be appointed by any court, it shall be the duty of the clerk of the court, if practicable, to notify the said probation officer in advance when any child is to be brought before the said court; it shall be the duty of said probation officer to make such investigation as may be required by the court; to be present in court in order to represent the interests of the child when the case is heard; to furnish to the court such information and assistance as the judge may require, and to take such charge of any child before and after trial as may be directed by the court. [30 G. A., ch. 11, § 6.] [32 G. A., ch. 7, § 2.]

SEC. 254-a19. Exclusion from court room. The judge of such court shall designate a certain time for the hearing of such cases and is hereby empowered, when tried in a summary manner as provided in section four (4) hereof, to exclude from the court room at such hearing any and all persons that in his opinion, are not necessary for the hearing of the case. The probation officer shall be present at every hearing in the interest of the child. [30 G. A., ch. 11, § 7.]

SEC. 254-a20. Commitment. When any child of the age stated in section two (2), hereof, shall be found to be dependent or neglected, within the meaning of this act, the court may make an order committing the child to the care of some suitable state institution, or to the care of some reputable citizen of good moral character, or to the care of some industrial school, as provided by law, or to the care of some association willing to receive it, embracing in its objects the purpose of caring for and obtaining homes for dependent and neglected children, which association shall have been accredited as hereinafter provided. The court may, when the health or condition of the child may require it, cause the child to be placed in a public hospital or institution for treatment or special care, or in a private hospital or institution which will receive it for like purposes without charge. [30 G. A., ch. 11, § 8.]

SEC. 254-a21. Guardianship—decree for adoption. In any case where the court shall award a child to the care of any association or individual in accordance with the provisions of this act, the child shall, unless otherwise ordered, become a ward and subject to the guardianship of the association or individual to whose care it is committed. Such association or individual shall have authority to place such child in a family home, with or without indenture, and may be made party to any proceedings for the legal adoption of the child, and may by his or its attorney or agent appear in any court where such proceedings are pending and assent to such adoption. And such assent shall be sufficient to authorize the court to enter the proper order or decree for adoption. Such guardianship shall not include the guardianship of any estate of the child. [30 G. A., ch. 11, § 9.]

SEC. 254-a22. Disposition of child by agreement. It shall be lawful for the parent, parents, guardian or other person having a right to dispose of [a] dependent or neglected child to enter into an agreement with any association or institution incorporated under any public law of this state for the purpose of aiding, caring for or placing in home such children, and being approved as herein provided, for the surrender of such child to such association or institution, to be taken and cared for by such association or institution or put in a family home. Such agreement may contain any and all proper stipulations to that end, and may authorize the association or institution, by its attorney or agent, to appear in any proceeding for the legal adoption of the child and consent to its adoption, and the order of the court made upon such consent shall be binding upon the child and its parents or guardian or other person the same as if such person were personally in court and consented thereto, whether made party to the proceeding or not. [30 G. A., ch. 11, § 10.]

SEC. 254-a23. Optional commitments—parole. In the case of a delinquent child, the court may continue the hearing from time to time, and may commit the child to the care or custody of a probation officer, and may allow said child to remain in its own home subject to the visitation of the probation officer; such child to report to the probation officer as often as may be required, and subject to be returned to the court for further or other proceedings whenever such action may appear to be necessary; or the court may cause the child to be placed in a suitable family home, subject to the friendly supervision of the probation officer and the further order of the court; or it may authorize the child to be boarded out in some suitable family home, in case provision is made by voluntary contribution or otherwise for the payment of the board of such child, until a suitable provision may be made in a home without such payment; or the court may commit such child, if a boy, to an industrial school for boys; or, if a girl, to an industrial school for girls; or the court may commit the child to any institution within the county, incorporated under the laws in this state, that may care for delinquent children, or be provided by a city or county, suitable for the care of such children, or to any state institution which may be established for the care of delinquent boys or girls over the age of ten years. In no case shall a child be committed beyond his or her minority. A child committed to such institution shall be subject to the control of the board of managers thereof, and said board shall have power to parole the child on such conditions as it may prescribe; and the court shall, on the recommendation of the board, have power to discharge such child from custody whenever, in the judgment of the court, his or her reformation is complete; or the court may commit the child to the care and custody of some association that will receive it, embracing in its objects the care of neglected or dependent children, and that has been duly accredited as hereinafter provided. [30 G. A., ch. 11, § 11.]

SEC. 254-a24. Custody of child. No court or magistrate shall commit a child not yet having reached his seventeenth birthday, to jail or police station, but if such child is unable to give bail it may be committed to the care of the sheriff, police officer, probation officer, or other person, who shall keep such child in some suitable place provided by the city or county, outside the enclosure of any jail or police station. When any child shall be sentenced to confinement in any institution to which adult convicts are sentenced, it shall be unlawful to confine such child in the same yard or enclosure with such adult convicts, or to bring such child into any yard or building in which adult convicts may be present. Any such child, taken before any justice of the peace or police court, in such counties, charged

with misdemeanor, shall, together with the case, be at once transferred by said justice of the peace or police court, to said district court and proper order shall be made therefor. [30 G. A., ch. 11, § 12.]

SEC. 254-a25. Support of child. In any case in which the court shall find a child dependent, neglected or delinquent, it may, in the same or subsequent proceedings, upon the parents of said child or either of them, being duly summoned or voluntarily appearing, proceed to inquire into the ability of such parent or parents to support the child or contribute thereto, and if the court shall find such parent or parents able to support the child or contribute to its support, the court may enter such order or decree as shall be according to equity in the premises, and may enforce the same by execution or in any way in which a court of equity may enforce its orders or decrees. [30 G. A., ch. 11, § 13.]

SEC. 254-a26. Supervision of institutions—annual reports. The board of control shall designate and approve the institutions and associations to have charge of juveniles under this act and shall have supervision, oversight and right of visitation (by all or any of its members or by such persons as it shall appoint thereto) to all institutions and associations having charge of juveniles under this act, and said court, institutions and associations shall make annual reports in the first fifteen days in January of each year to said board of control. The report of the court shall include the number of juveniles of each sex brought before it, the number for whom homes have been obtained, the number sent to state institutions, and the number under charge of such association. [30 G. A., ch. 11, § 14.]

SEC. 254-a27. Religious belief. The court in committing children shall place them as far as practicable in the care and custody of some individual holding the same religious belief as the parents of said child, or with some association which is controlled by persons of like religious faith with the parents of said child. [30 G. A., ch. 11, § 15.]

SEC. 254-a28. Statutes construed liberally. This act shall be construed liberally to the end that its purpose may be carried out, to-wit: that the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents, and in all cases where it can properly be done, the child to be placed in an approved family home and become a member of the family by legal adoption or otherwise. [30 G. A., ch. 11, § 16.]

SEC. 254-a29. Detention home and school in certain counties. In any county of this state, having a population of more than fifty thousand (50,000), it shall be the duty of the board of supervisors to provide and maintain, separate, apart and outside the enclosure of any jail or police station, a suitable detention home and school for dependent, neglected and delinquent children. [32 G. A., ch. 7, § 1.]

SEC. 254-a30. Tax for enforcement purposes. For the purpose of providing for the enforcement of this act in all its parts the board of supervisors may levy a tax each year, in the counties of this state to which this act is applicable, not to exceed one (1) mill on the dollar in any year, in addition to the taxes which they are now authorized to levy. [32 G. A., ch. 7, § 3.]

CHAPTER 6.

OF THE SUPERIOR COURTS.

SECTION 255. Establishment and effect of. Any city in this state containing four thousand inhabitants, whether organized under a special

charter or the general law for the incorporation of cities and towns, may establish a superior court as hereinafter provided, which, when established, shall take the place of the police court of such city. [21 G. A., ch. 2; 19 G. A., ch. 24, § 1; 16 G. A., ch. 143, § 1.] [29 G. A., ch. 16, § 1.] [32 G. A., ch. 8, § 1.]

SEC. 256-a. Repeal—submission to voters—election of judges—term—commission. The law, as it appears in section two hundred fifty-six-a (256-a) of the supplement to the code, is hereby repealed and there is enacted in lieu thereof the following:

“Upon petition of a hundred (100) citizens of any such city, the mayor, by and with the consent of the council, may, at least ten (10) days before any general or city election, issue a proclamation submitting to the qualified voters of any city, the question of establishing said court. Should a majority of all the votes cast at such election upon such proposition be in favor of said court, the same shall be established. The terms of the judges of all superior courts other than those whose terms expire after the first Monday in January, 1908, shall terminate on the first Monday in January, 1907, and there shall be elected at the general election in November, 1906, for a term of four (4) years the successors of those judges whose terms of office under this act are made to expire on the first Monday in January, 1907. Except as above provided, the judges of the superior courts now or hereafter established shall be elected at the last general election preceding the expiration of the term of office of the incumbent. The names of candidates for judge shall be placed upon the same ballot as used in the city for state, county and township officers. The vote shall be returned and canvassed in the same manner as provided for county officers. Certificates of nomination of candidates for judge by conventions or primaries of political parties and nominations by petition shall be fixed with the auditor of the county in which said city is situated within the same time as provided by law for the filing of certificates of nomination and nominations by petition for offices to be filled by the electors of counties. Each judge shall qualify and hold his office for the term of four years from the first Monday in January next ensuing after said election and until his successor is elected and qualified. Immediately after the election of any judge, the board of supervisors of said county shall transmit a certificate of the election of said judge to the governor of the state, who shall thereupon issue to him a commission empowering him to act as judge, as herein provided. The terms of all judges who are now holding over by reason of the failure to elect their successors in the fall of 1905 are hereby extended until the first Monday in January, 1907.” [31 G. A., ch. 10.] [32 G. A., ch. 8, § 2.]

SEC. 258-a Repeal—vacancy—inability. That section two hundred fifty-eight (258) of the code is hereby repealed and the following enacted in lieu thereof:

“That in case of vacancy in said office the governor shall appoint a judge who shall hold the office until the next general election, and in case of inability of any judge to act through sickness or any other cause a judge shall be appointed by the governor to hold during such inability.” [26 G. A., ch. 77; 16 G. A., ch. 143, § 4.] [28 G. A., ch. 9, § 2.]

SEC. 260. Jurisdiction.

The provisions of this chapter as to jurisdiction of superior courts are not unconstitutional. *Page v. Millerton*, 114-378.

Under Code § 261 as amended by 28th.

G. A., ch. 10, a defendant in an action brought in the superior court who is non-resident of the city may have the venue changed to the district court upon showing such fact. *Woodring v. Rooney*, 121-595.

SEC. 261. Changes of venue—change of venue for non-residents—no jury in criminal cases. Changes of venue may be taken from said court in all civil actions to the district court of the same or another county, in the same manner, for like causes and with the same effect as the venue is changed from the district court. But in all civil cases where any party defendant shall, before any pleading is filed by him, file in said cause a motion for a change of venue to the district court of the county, supported by affidavit showing that such party defendant was not a resident of the city where such court is held, at the time of the commencement of the action, the cause, upon such motion, shall be transferred to the district court of the county. All criminal actions, including those for the violation of the city ordinances, shall be tried summarily and without a jury, saving to the defendant the right of appeal to the district court, which appeal shall be taken in the same time and manner as appeals are taken from justices' courts in criminal actions. [22 G. A., ch. 40, § 2; 19 G. A., ch. 24, § 4; 16 G. A., ch. 143, § 7.] [28 G. A., ch. 10, § 1.]

SEC. 263. Court of record—laws relating to district court to apply.

Statutes covering procedure in the district court as to setting aside default are also applicable in the superior court and a judgment by default may be set aside

although a transcript of such judgment has been filed in the district court. *Klepfer v. Keokuk*, 126-592.

SEC. 266. Marshal as sheriff.

A constable is not authorized to act as officer of the superior court, and a writ of attachment issuing from such

court should not be directed to such officer. *Freeman v. Lind*, 112-39.

SEC. 273. Judgments made liens by transcript.

The effect of the filing of a transcript of the judgment of the superior court in the district court is to transfer to the district court the power to enforce the judgment of the superior court. No further proceedings can be had on the judgment in the superior court. *Oyster v. Bank*, 107-39.

A creditor who has recovered judgment in a superior court which has not been filed in a district court so as to become a lien on real property cannot proceed by equitable action to subject real property to payment of his claim. *Peterson v. Gittings*, 107-306.

Judgments of superior courts are to be treated as judgments of the district court only when transcripts thereof are filed in the district court of the county in which the superior court has jurisdiction, and thereafter they are to be treated in all respects as judgments rendered in the district court. Before the transcript of a

judgment is thus filed, the judgment can only be enforced through process issued out of the superior court which may be levied on personal property only. *Drahos v. Kopesky*, 132-497.

Therefore held that in an action to set aside a fraudulent conveyance of real estate, the plaintiff did not by showing judgment of the superior court, no transcript of which had been filed in the district court, establish his right to levy on the property. *Ibid.*

An action to enjoin the enforcement of the judgment of a superior court cannot, after transcript thereof has been filed in the district court, be maintained in the district court of another county in the state. *Brunk v. Moulton Bank*, 121-14.

The power of the superior court to set aside a default is not lost by the filing of a transcript of the default judgment in the district court. *Klepfer v. Keokuk*, 126-592.

SEC. 275. Shorthand reporters—compensation.

The shorthand reporter appointed by the judge is entitled to compensation for the time of his attendance upon the court under the order of the judge without re-

gard to the services actually performed. *Ferguson v. Pottawattamie County*, 126-108.

SEC. 276. Question of abolishing court to be submitted. Upon the petition of one-third of the qualified electors of any city in which a su-

perior court is now or hereafter established, the mayor, by and with the consent of the council of such city, shall, at least ten days before any general election or election for city officers, issue a proclamation submitting to the qualified voters of said city the proposition to abolish the superior court. The ballots shall be printed, and in the following form: "Shall the proposition to abolish the superior court of _____ be adopted?" and the election shall be conducted in all respects in accordance with the provisions of the election law. [24 G. A., ch. 5, § 1.] [28 G. A., ch. 9, § 3.]

CHAPTER 7.

OF GENERAL PROVISIONS.

SECTION 281. Judges not to practice. No judge of any court of record shall practice as an attorney or counselor at law, or give advice in relation to any action pending or about to be brought in any of the courts of this state, but nothing contained in this section shall be construed to prohibit judges of police courts from the practice as attorneys and counselors at law in civil matters. [C., '73, § 187; R., § 2674; C., '51, § 1587.] [32 G. A., ch. 9.]

A judge has no right to give advice out of court to a receiver. Directions to the receiver should be reduced to writing and entered of record. *State Central Sav. Bank v. Fanning Ball-Bearing Chain Co.*, 118-698.

SEC. 283. Judicial proceedings public.

A proceeding to impanel a grand jury is not invalid although by reason of the lack of capacity in the room occupied for the purpose some persons are unable to gain access thereto. *State v. Richards*, 126-497.

SEC. 284. When judge disqualified.

A justice is not disqualified from certifying to a transcript of a judgment rendered by his predecessor by reason of the fact that he was a party to the action, his act of certification being one which is purely ministerial. *Hass v. Leverton*, 128-79.

The fact that the judge has previously

been one of counsel for one of the parties in a previous litigation not involving the same issues does not disqualify him under the strict terms of the statute and he is not disqualified under the spirit of the statute if his connection with the previous proceedings has been nominal only. *In re Estate of Glass*, 127-646.

SEC. 285. No business done on Sunday, except.

Judicial business may be transacted on the fourth of July and a witness may be punished for contempt in not appearing on that day in response to a subpoena. *Chambers v. Oehler*, 107-155.

A ministerial act, such as the service of a notice, not forbidden on Sunday, will not be illegal because performed on that

day. *State v. Ryan*, 113-536.

Trial of causes on legal holidays other than Sunday is not prohibited, and the overruling of a motion for a continuance on the ground that the cause is set for trial on such holiday is not error. *Michel v. Boxholm Co-operative Creamery*, 128-706.

SEC. 286. Courts to be held at places provided, except.

It is not unlawful for a court to transact its business in a different room of the courthouse from that specially set aside

for occupancy by the court. *State v. Richards*, 126-497.

CHAPTER 8.

OF THE CLERK OF THE DISTRICT COURT.

SECTION 287. Office—duties.

While it may be that the clerk of the court cannot be properly appointed receiver because as clerk he would be required to pass upon the sufficiency of the bond to be given by him as receiver, yet this objection cannot be raised by way of

collateral attack in an action brought by him as receiver to collect indebtedness. His actions as receiver may be valid *de facto* although his appointment is erroneous. *Metropolitan Nat. Bank v. Commercial State Bank*, 104-682.

SEC. 288. Records—books to be kept.

What constitutes the record: An original decree, signed by the judge before it is entered in the proper record, is not a judgment. *McGlasson v. Scott*, 112-289.

The record book is the best evidence of a judgment, and it, or a certain transcript thereof, is alone admissible to show the judgment where there is no reason for introducing secondary evidence. *Baxter v. Pritchard*, 113-422.

Depositions, when filed, become a part of the records of the court, even though not used as evidence on the trial of the case in which they are taken, and if removed from the files without leave of court by the party filing them they may be required to be returned. *Howe v. Mutual Reserve Fund L. Assn.*, 115-285.

A record showing the dismissal of an action made without authority will not prevent the action being notice to purchasers of property affected thereby after the case is noticed for trial. *Furry v. Ferguson*, 105-231.

The record is the only proof of a judgment. It cannot be established by entries in the judge's calendar, or a form for the entry of judgment signed by the judge. *Callanan v. Votruba*, 104-672; *King v. Dickson*, 114-160.

Neither the mental conclusion of the judge presiding at the trial, nor the oral announcement of such conclusion, nor his written memorandum entered in his calendar, nor the abstract entered in the judgment docket, constitutes a judgment. A judgment cannot be said to be entered until it is spread by the clerk upon the record book. *Kennedy v. Citizens' Nat. Bank*, 119-123.

Where the judgment or conclusion of the court is reduced to writing and filed with the clerk, it becomes a judgment of the court, although not yet formally entered on the records. So held in a proceeding to punish for contempt in the violation of a temporary injunction, which had been dissolved by a written decision of the court deposited with the clerk. *Coffey v. Gamble*, 117-545.

A judgment or decree is not rendered so that an appeal may be taken therefrom until it is entered of record as provided by statute. *Martin v. Martin*, 125-73.

Where the order for the hearing of an application for discharge of receiver was not entered of record until after the discharge was granted and publication of the notice of such application was not made until after the order was entered, held that the court was without jurisdiction and the discharge was void. *Williams v. Des Moines Loan & Trust Co.*, 126-22.

The judgment may be valid, although the clerk's record entry thereof is not signed and approved by the court until the next term after the entry in the judge's calendar. *Percival v. Yousting*, 120-451.

The clerk should record the judgment in accordance with the memorandum of the judge, not only as to its substance, but also as to its date; but the record should show the actual date of final recording, and an appeal taken prior to such date is premature. *Hoffman-Bruner Guaranty Co. v. Stark*, 132-100.

Whether a transcript of evidence on a previous trial is admissible under a stipulation, is to be determined by the court, and it may take judicial notice of the record in the case and of the stipulation thereby shown. The record and stipulation need not be formally proved. *State v. Olds*, 106-110.

While the pleadings in a case are part of the record, a duly authenticated copy of the judgment is a specific item of evidence, admissible in itself without regard to the record in the case. *Alexander v. Grand Lodge A. O. U. W.*, 119-519.

Judgment rendered upon constructive or substituted service will not be binding upon a defendant not properly named in the record. *Thornily v. Prentice*, 121-89.

Thus where the service purported to be upon W. M. Thornily and judgment was entered against Wm. M. Thornily, held that the judgment was not valid as against Willis H. Thornily; the doctrine of *idem sonans* having no application. *Ibid.*

Where an amendment to the pleadings is treated by the parties as filed and the case is tried on the issues raised thereby, it cannot afterwards be objected that the filing of the amendment was not entered on the appearance docket. *Foley v. Cedar Rapids*, 133-64.

Entries nunc pro tunc: While a court may order a correction of its record of a prior date to conform to the facts as they existed at that date it cannot by such order change its records so as to show that a fact existed on a prior date that did not then in truth exist. *First Nat. Bank v. Redhead*, 103-421.

Therefore held that failure to file a certificate of the evidence in an equity case within six months after the trial could not be cured by a *nunc pro tunc* order making such certificate of record of a date prior to the date of its actual filing. *Ibid.*

Where a decree was prepared and signed by the judge and given to the clerk who filed but failed to record it, held, that it might subsequently be made of record by a *nunc pro tunc* order as of the date when it should have been recorded. *Day v. Goodwin*, 104-374.

While courts possess the power to enter judgments *nunc pro tunc* yet the exercise of such power presupposes the actual rendition of a judgment; the mere right to a judgment which never was rendered will not furnish the basis for such an entry. *Doughty v. Meek*, 105-16; *Graham Paper Co. v. Wahlwend*, 116-358.

But a court may enter judgment *nunc pro tunc* on a confession of judgment where the clerk has failed to enter judgment thereon. *Doughty v. Meek*, 105-16.

Mere formal or clerical errors or omissions or mistakes in the entries of the clerk concerning matters of procedure, even in criminal cases, may be corrected by *nunc pro tunc* orders. *Smith v. District Court*, 132-603.

Where upon the death of plaintiff in an action an order to substitute his administrator was made but judgment was entered in the name of the deceased plaintiff, held, that the defect in the judgment and in proceedings thereunder might be cured by a *nunc pro tunc* entry correcting the judgment so as to show that it was in fact entered in favor of the substituted plaintiff. *Hunt v. Johnston*, 105-311.

An order *nunc pro tunc* will be made to avoid the effects of a delay by the court or of a delay or omission of its clerk, but

rarely, if ever, to remedy a delay or omission due to a party or his attorney. *Newbury v. Getchell & Martin Lumber etc. Co.*, 106-140.

The time for taking an appeal is determined by the actual entry of the judgment and it cannot be made to relate back so as to cut off a right of appeal which until the entry of the judgment has not existed. *Stutsman v. Sharpless*, 125-335.

An order for a judgment entry *nunc pro tunc* cannot be made to relate back for the purposes of an appeal. *Hoffman-Bruner Guaranty Co. v. Stark*, 132-100.

Courts have inherent power to make *nunc pro tunc* orders, and are not limited by special statutory provisions as to the time when application for modification of the record is to be made. *Hofacre v. Monticello*, 128-239.

If no action of the court is in fact taken, there can be no entry *nunc pro tunc* as to such action, but if in fact taken and the particular evidence thereof is wanting, it may subsequently be supplied so as to relate back to the time when the act was in fact done. *Ibid.*

Lost records: If the short hand notes or transcript in an equity case are lost the court may order a substitution and will not be without jurisdiction to do so in a proceeding commenced within the time allowed for taking appeal although the final order for substitution is not entered until the time for the appeal in which it is desired to make use of the evidence has expired. *Ormsby v. Graham*, 123-202.

An order for the substitution of lost records in a case is not a matter of absolute right, but rests in the sound discretion of the court. *First National Bank v. Reid*, 122-280.

Judgment docket: The clerk of the court is required to keep a book in his office containing an abstract of judgments rendered, and costs in the case may properly be entered thereon in connection with the entry of the judgment. *Hayes v. Clinton County*, 118-569.

A judgment though improperly indexed may be valid between the parties, and as to everyone save a *bona fide* purchaser or incumbrancer without notice. *State Savings Bank v. Shinn*, 130-365.

Liability of clerk: The clerk may be liable in an action for damages brought by a party injured, for failing to enter a transcript from a justice's court on the judgment index. *Lougee v. Reed*, 133-48.

SEC. 291. Pleadings—when deemed filed—dates to be entered.

A pleading cannot be considered unless entered as filed in the appearance docket.

Johnson v. Berdo, 131-524.

SEC. 296. Fees to be collected and paid to county—when payable by county. The clerk of the district court shall be entitled to charge and receive the following fees:

1. For filing any petition, appeal or writ of error and docketing the same, one dollar and fifty cents;
 2. For every attachment, fifty cents;
 3. For every cause tried by jury, one dollar and fifty cents;
 4. For every cause tried by the court, seventy-five cents;
 5. For every equity case, one dollar and fifty cents;
 6. For each injunction or other extraordinary process or order, one dollar.
 7. For all causes continued on application of a party by affidavit, fifty cents;
 8. For all other continuances, fifteen cents;
 9. For entering any final judgment or decree, seventy-five cents;
 10. For taxing costs, fifty cents;
 11. For issuing execution or other process after judgment or decree, fifty cents;
 12. For filing and properly entering and indorsing each mechanic's lien, one dollar, and in case a suit is brought thereon, the same to be taxed as other costs in the action;
 13. For certificate and seal, fifty cents;
 14. For filing and docketing transcript of judgment from another county or a justice of the peace, fifty cents;
 15. For entering any rule or order, twenty-five cents;
 16. For issuing writ or order, not including subpoenas, fifty cents;
 17. For issuing commission to take depositions, fifty cents;
 18. For entering sheriff's sale of real estate, fifty cents;
 19. For entering judgment by confession, one dollar;
 20. For entering satisfaction of any judgment, twenty-five cents;
 21. For all copies of record, or papers filed in his office, transcripts, and making complete record, ten cents for each hundred words;
 22. For taking and approving a bond and sureties thereon, fifty cents;
 23. For declaration of intention by an alien to become a citizen, twenty-five cents;
 24. For all services on naturalization of aliens, including oaths and certificates, fifty cents;
 25. For certificates and seal to applications to procure pensions, bounties or back pay for soldiers or other persons entitled thereto, ten cents;
 26. For making out transcripts in criminal cases appealed to the supreme court, when the defendant is unable to pay, for each one hundred words, ten cents, to be paid by the county;
 27. In criminal cases, and in all causes in which the state or county is a party plaintiff, the same fees for same services as in suits between private parties. When judgment is rendered against the defendant, the fees shall be collected from such defendant. Where the state fails, the clerk's fees shall be paid by the county.
- In addition to the foregoing, he shall charge and collect:
28. For issuing marriage licenses, one dollar each;
 29. For all services performed in the settlement of the estate of any decedent, except where actions are brought by the administrator or against him, or as may be otherwise provided herein, where the value of the estate does not exceed three thousand dollars, three dollars; where such value is between three and five thousand dollars, five dollars; where such value is between five and seven thousand dollars, eight dollars; where the value exceeds seven thousand dollars, ten dollars;

30. In addition to the foregoing, for making a complete record in cases where the same is required by law or directed by an order of the court, for every one hundred words, ten cents.

All of which fees shall be paid into the county treasury. [C., '73, §§ 3781-2, 3787; R., §§ 430, 436, 1852, 4136, 4140-1; C., '51, §§ 2531-2.] [29 G. A., ch. 17, § 1.]

SEC. 297. Compensation of clerk.

The fact that duties are required of the clerk for which no compensation is provided does not authorize the allowance of exaction of compensation in addition to that provided by statute. Therefore, *held*, that one who becomes entitled to a

fund in the hand of the clerk received in his official capacity is entitled also to the interest on such fund earned while it is on deposit with a bank in the clerk's name. *Rhea v. Brewster*, 130-729.

SEC. 298. Deputies—appointment—compensation—qualification.

The clerk, with the consent of the board of supervisors, may, when necessary, appoint a deputy, or employ a clerk or clerks, who shall not be a county officer. A certificate of such appointment and of the revocation thereof, when made, shall be filed with the county auditor. In counties of twenty thousand population or less, such deputy or clerk shall receive a salary not to exceed one-half the sum allowed to the principal. In counties having a population above twenty thousand and not exceeding thirty-five thousand, one or more deputies or clerks may be employed, their total compensation not to exceed fifteen hundred dollars, except that, where court is held at two places in a county, it may be any sum not exceeding two thousand dollars. In counties having a population of thirty-five thousand and less than forty thousand, one or more deputies may be employed, their total compensation not to exceed the sum of two thousand dollars. In counties having a population exceeding forty thousand, one or more deputies or clerks may be employed, whose total compensation shall not exceed five thousand dollars. The compensation of such deputy or clerk shall be fixed by the board of supervisors at the time of the consent to the appointment. The deputy shall take the same oath as his principal, to be indorsed on the certificate of his appointment, and may perform the duties of his principal. Clerks' and deputies' salaries to be paid out of the county treasury in equal monthly installments. [22 G. A., ch. 36, §§ 1, 2; 18 G. A., ch. 184, § 1; C., '73, §§ 766-8, 770, 3784; R., §§ 644-5; C., '51, §§ 411-14, 416.] [27 G. A., ch. 12, § 1.]

CHAPTER 9.

OF COUNTY ATTORNEYS AND THEIR DUTIES.

SECTION 301. Duties.

The county attorney cannot be called upon to perform any duty save such as may be enjoined upon him by law. He is not required to follow a case into another county on change of venue. *Bevington v. Woodbury County*, 107-424.

Therefore a contract for extra compensation for services to be rendered in a case in another county is valid. *Ibid.*

It is within the duties of the county attorney to take an appeal and give notice thereof in a criminal case. *State v. Grim-*

mell, 116-596.

A proceeding to punish for violation of a liquor injunction is not a criminal prosecution in which the county attorney is required to appear. Such a prosecution may be carried on by a citizen through an attorney employed by him. *Brennan v. Roberts*, 125-615.

Communications made to a county attorney, with a view to his taking steps for the prosecution of a crime, are privileged. *Gabriel v. McMullin*, 127-426.

SEC. 302. To give opinions.

The county attorney has no authority to appear for the county in proceedings to levy a special assessment for the con-

struction of a ditch. *Yockey v. Woodbury County*, 130-412.

SEC. 303. Deputies—assistance.

The provision of Code § 5372, that the opening and closing arguments are to be made by the county attorney does not prevent such arguments being made by an attorney hired by private prosecutors to assist the county attorney. *State v. Novak*, 109-717.

The assistant county attorney appointed

with the approval of the court may represent the state in the investigation of the charge by the grand jury. *State v. Tyler*, 122-125.

The validity of the indictment is not affected by the fact that it is signed by the deputy county attorney. *State v. Matthews*, 133-398.

SEC. 303-a. Repeal—assistant—deputies—compensation. That section three hundred and three (303) of the code be and the same is hereby repealed and the following enacted in lieu thereof. In counties having a population of thirty-six thousand (36,000) or more, the county attorney thereof, with the approval of the board of supervisors, may appoint a practicing attorney who is a resident of his county, as his assistant, whose salary shall be fixed at a reasonable figure by the board of supervisors at the time of his appointment and approval, but not to exceed ten hundred dollars (\$1,000.00) per annum. In counties of less than thirty-six thousand (36,000) he may appoint deputies who shall act without any compensation from the county, to assist him in the discharge of his duties. In any county with the approval of the district court, he may procure such assistance in the trial of a person charged with a felony as he shall deem necessary and such assistant, upon presenting to the board of supervisors a certificate of the district judge before whom said cause was tried, certifying to the service rendered, shall be allowed a reasonable compensation therefor, to be fixed by the board of supervisors; but nothing in this section shall prevent the board of supervisors from employing an attorney to assist the county attorney in any cause or proceeding in which the state or county is interested. [29 G. A., ch. 18, § 1.]

A county attorney is now authorized, subject to the approval of the court, to procure assistance in the trial of a person charged with a felony, and it is not

necessary that such assistant be employed before the beginning of the trial. *State v. Cobley*, 128-114.

SEC. 304. Substitute in case of disability—compensation.

The authority of a substitute appointed by the court to act for the county attorney will be presumed until his want of authority is shown in an issue properly made. *Lake City Electric Light Co. v. McCrary*, 132-624.

The county attorney is entitled to be heard when the question arises as to whether he is under disability in a particular case and a substitute should be appointed whose compensation is to be taken from his salary. *State v. Miller*,

132-587.

Where the county attorney, prior to his election to the office, had been consulted by a client with reference to his criminal liability in a transaction, held that on subsequently becoming the county attorney he was disqualified from conducting the prosecution against such client for the crime involved, and should have asked for the appointment of a substitute. *State v. Rocker*, 130-239.

SEC. 305. Prohibitions.

Where objection is not made during the trial to the appearance for the state of an attorney interested in a civil suit involving the same matter, such objection

cannot be made for the first time in a motion for a new trial. By failing to object to the appearance of such attorney within a reasonable time after defendant

is informed of his relations in the civil suit he waives all right of objection. *State v. Smith*, 108-440.

A county attorney in whose term a person is indicted for illegal sale of intoxicating liquors, is not prohibited from be-

ing an attorney for the wife in her action against such person for sales of liquor to her husband, such sales not being connected with the sales for which the indictment was procured. *Bellison v. Ap-land*, 115-599.

SEC. 307. Attend grand jury.

When the county attorney is disqualified from acting in the prosecution of a crime, he should not appear before the

grand jury with reference thereto, and if he does so the indictment should be set aside on motion. *State v. Rocker*, 130-239.

SEC. 308. Compensation. County attorneys shall be allowed an annual salary, in counties having a population less than fifteen thousand (\$900), nine hundred dollars (\$900); in counties of fifteen thousand (15,000) and under 25,000, one thousand dollars (\$1,000); in counties of 25,000 and under 35,000, twelve hundred fifty dollars (\$1,250); in counties of 35,000 and under 45,000, fifteen hundred dollars (\$1,500); in counties of 45,000 and under 55,000, seventeen hundred fifty dollars (\$1,750); in counties of 55,000 and under 65,000, two thousand dollars (\$2,000); and in all counties of 65,000 and over, twenty-five hundred dollars (\$2,500); provided, that in counties having a population exceeding 30,000 and under 35,000 the board of supervisors may pay not to exceed fifteen hundred dollars (\$1,500) annually, and in counties having a population exceeding 40,000 and under 45,000 the board of supervisors may pay not to exceed seventeen hundred and fifty dollars (\$1,750) annually. Said salary shall be paid quarterly out of the general fund of the county, and shall be due at the end of each quarter, namely: March thirty-first, June thirtieth, September thirtieth, and December thirty-first. In addition to the salary above provided, he shall receive the fees as now allowed to attorneys for suits upon written instruments where judgment is obtained, for all fines collected where he appears for the state, but not otherwise, and school fund mortgages foreclosed, and his necessary and actual expenses incurred in attending upon his official duties at a place other than his residence and the county seat, which shall be audited and allowed by the board of supervisors of the county. [21 G. A., ch. 73, § 11.] [29 G. A., ch. 18, § 2; 31 G. A., ch. 11.] [32 G. A., ch. 10, § 1.]

The board of supervisors may contract to pay extra compensation for following a case into another county on change

of venue. *Bevington v. Woodbury County*, 107-424.

SEC. 308-a. When effective. The provisions of this act shall become operative and be in force and effect on and after the fourth day of July, 1907. [32 G. A., ch. 10, § 2.]

CHAPTER 10.

OF ATTORNEYS AND COUNSELORS.

SECTION 310. Qualifications. Every applicant for such admission must be at least twenty-one years of age, of good moral character, and an inhabitant of this state, and must have actually and in good faith pursued a regular course of study of the law for at least three full years, either in the office of a member of the bar in regular practice of this state or other state, or of a judge of a court of record thereof, or in some reputable law school in the United States, or partly in such office and partly in such law

school; but, in reckoning such period of study, the school year of any such law school, consisting of not less than thirty-six weeks exclusive of vacations, shall be considered equivalent to a full year. Every such applicant for admission must also have actually and in good faith acquired a general education substantially equivalent to that involved in the completion of a high-school course of study of at least four years in extent. [20 G. A., ch. 168, § 2.] [28 G. A., ch. 11, § 1.] [32 G. A., ch. 11, § 1.]

[The amendment by the 32 G. A. changed the word "three" in the last line of the section to "four," the change to become effective after July 1, 1909. See section 310-a.]

The possession of a good general moral bar. *State v. Mosher*, 128-82. character is requisite for admission to the

SEC. 310-a. When effective. This act shall take effect, and be in force on and after July 1, 1909. [32 G. A., ch. 11, § 2.]

SEC. 311. Examinations. Every such applicant shall also be examined by the court, or by a commission of not less than five members constituted as hereinafter provided, as to his learning and skill in the law; and the court must be satisfied, before admitting to practice, that the applicant has actually and in good faith devoted the time hereinbefore required to the study of law, and possesses the requisite learning and skill therein, and has also the general education required by this act. The sufficiency of the general education of the applicant may be determined by examination before the commission, or in such other manner as the supreme court may by rule prescribe. [20 G. A., ch. 168, § 1.] [28 G. A., ch. 11, § 2.]

SEC. 311-a. Commission—how constituted—term—oath—compensation—temporary examiners. The attorney-general shall, by virtue of his office, be a member of, and the chairman of, the commission provided for by the chapter of the code above referred to as amended by this act, and the court shall appoint from the members of the bar of this state at least four other persons who, with the attorney-general, shall constitute said commission, which shall be known as the board of law examiners. Of the persons first appointed as commissioners two shall be designated by the court to serve for one year; the remaining members shall serve for two years; and thereafter each person appointed shall serve for two years, except that in case of a vacancy during the term of office of any commissioner his successor shall be appointed only for the remainder of such term. The members thus appointed shall take and subscribe an oath to be administered by one of the judges of the supreme court to faithfully and impartially discharge the duties of the office, and shall receive such compensation as may be allowed by the supreme court out of the fund arising from the examination fees hereinafter provided for. The supreme court may also appoint, from time to time, when necessary, temporary examiners to assist the commission, who shall serve for one examination only, and shall receive such compensation as the court may allow, to be paid from the fund aforesaid. [28 G. A., ch. 11, § 5.]

SEC. 311-b. Fees—how used. Each applicant for admission shall pay to the clerk of the supreme court an examination fee of five dollars, payable before the examination is commenced. The fees thus paid to said clerk shall be retained by him as a special fund to be appropriated as provided for in the preceding section, and for other expenses incident to the examinations provided for in this chapter; and any amount thereof remaining in his hands unappropriated on the thirtieth day of June shall be turned over to the state treasury. [28 G. A., ch. 11, § 6.]

SEC. 311-c. Acts in conflict repealed. All acts or parts of acts in conflict with the provisions of this act are hereby repealed. [28 G. A., ch. 11, § 8.]

SEC. 312. Of students in law department of university. Students in the law department of the state university, who are recommended by the faculty of said department as candidates for graduation and as persons of good moral character, who have actually and in good faith studied law for the time and in the manner required by statute, at least one year of such study having been as a student in said department, may be examined at the university by not less than three members of said commission with the addition of such temporary members as may be appointed by the court in accordance with the provisions of this act, and upon the certificate of such examiners, that such candidates possess the learning and skill requisite for the practice of law, they shall be admitted without further examination. [20 G. A., 168, § 4.] [28 G. A., ch. 11, § 3.]

SEC. 315. Mode of examination. The supreme court may by general rules prescribe the mode in which examinations under this chapter shall be conducted, and in which the qualifications required as to age, residence, character, general education and term of study shall be proved, and may make any other and further rules, not inconsistent with this chapter, for the purpose of carrying out its object and intent. [20 G. A., ch. 168, § 7.] [28 G. A., ch. 11, § 4.]

SEC. 316. Attorneys resident in other states—must appoint local attorney. Any member of the bar of another state, actually engaged in any cause or matter pending in any court of this state, may be permitted by such court to appear in and conduct such cause or matter while retaining his residence in another state, without being subject to the foregoing provisions of this chapter. Provided that at the time he enters his appearance he files with the clerk of such court the written appointment of some attorney resident in the county where such suit is pending, upon whom service may be had in all matters connected with said action, with the same effect as if personally made on such foreign attorney within such county. In case of failure to make such appointment, such attorney shall not be permitted to practice as aforesaid, and all papers filed by him shall be stricken from the files. [20 G. A., ch. 168, § 8.] [28 G. A., ch. 12, § 1.]

SEC. 317. Duties of attorneys and counselors.

Duties and liabilities: Under code § 3851 an attorney is not competent as a surety on a bond for appeal from a justice of the peace. *Hudson v. Smith*, 111-411.

The relations between attorney and client require the utmost fairness and good faith on the part of the attorney, and the burden of proving the entire fairness of the transactions between them rests upon the attorney. A contract between attorney and client with reference to the property of the client is presumed to be fraudulent. *Shropshire v. Ryan*, 111-677.

It is not negligence on the part of an attorney to decline to proceed further in a case, and such refusal will not render him liable in damages for a subsequent adverse result therein. *Cullison v. Lindsay*, 108-124.

In an action to recover on account of the negligence of an attorney in defending an action it is not sufficient to show the negligence of the attorney and the fact that judgment was recovered in the action. The plaintiff must go further in establishing that he has suffered damage by reason of such negligence. *Getchell & Martin Lumber etc. Co. v. Employers Liability Assur. Co.*, 117-180.

Where an attorney received money from his client to be applied to a specific purpose, held, that he could not lawfully enter into an agreement for the appropriation of the money when received for the benefit of another to whom he owed no duty. *Farrar v. Farrar*, 104-621.

An attorney who has been employed by and received the confidence of his client is incompetent to accept a retainer from the

other party in the same matter, even though he may have been discharged from the first employment, and does not violate any confidence thus obtained. *Whitcomb v. Collier*, 133-303.

Compensation: The importance of the litigation, the success attained, and the benefit which it had secured may be considered in estimating the compensation to which the attorney who conducted it is entitled for the services he rendered. *Clark v. Ellsworth*, 104-442.

Where the subject-matter of the litigation is of great importance to the litigants, and of a character to lead them to use every legitimate effort to succeed, the wealth of the party and his consequent ability to make a severe contest may be considered in connection with his disposition to do so as tending to show the importance and value of services which the attorney for whose compensation he was responsible was required to render. *Ibid.*

Not only the amount and character of the services and the results attained, but also the professional ability and standing of the attorney, his learning, skill and proficiency in his profession and his experience may be considered in estimating the reasonable value of his services. *Ibid.*

In an action to recover compensation for services wherein the attorney had testified to the amount of time spent out of court in preparing for trial of the case, *held*, that evidence that the time thus testified to as having been spent was an unreasonable time for the preparation of the trial of the case was admissible. *Ibid.*

The attorney is entitled to recover from the person who is liable for the services rendered by him any advances which he has made which were reasonably necessary in procuring information upon which to act. Whether, if a non-resident of the county in which the case is tried, he is entitled to recover for hotel bills and other expenses depends upon the usage in the locality, but he is not entitled to expenses of traveling outside the county where it does not appear that the services of competent attorneys in the county could not have been procured. *Ibid.*

The wealth of the client cannot be taken into consideration in fixing the value of legal services. *Ibid.*

A contract by an attorney for contingent fee consisting of a certain proportion of

the amount of recovery in the case, but not requiring of him the payment of any portion of the costs, is not unlawful. *Dunham v. Bentley*, 103-136.

A contract for a contingent fee, consisting of a specific share of the recovery, is not void as champertous. *Rickel v. Chicago, R. I. & P. R. Co.*, 112-148.

The fact that an attorney makes advancements in the way of paying the filing fee, and for the attendance of witnesses, and for other necessary expenses incident to the preparation and trial of the case, does not make the contract between the attorney and client as to fees illegal and immoral. *Wallace v. Chicago, M. & St. P. R. Co.*, 112-565.

An attorney who is required by the court to perform services for the public in a disbarment proceeding is entitled to reasonable compensation therefor from the county. *Hyatt v. Hamilton County*, 121-292.

An attorney who has faithfully discharged his duties under a contract for conducting a case to its conclusion until discharge, without ground by the client, may recover the entire compensation agreed upon. *Spurrier v. Bullard*, 131-123.

A power of attorney by which the attorney for a consideration paid or promised obtains an interest in the subject-matter, with an agreement to indemnify his principal against liability for costs and expenses in connection therewith, is irrevocable, and operates as an assignment by the principal to the attorney. *Blondel v. Ohlman*, 132-257.

An attorney who has once been made the recipient of the confidence of a client concerning a certain subject-matter is thereafter disqualified from acting for any other party adversely interested in such subject-matter. Therefore, *held*, that an attorney who had been consulted by a client with reference to a matter involving the criminal liability of the latter was disqualified on becoming county attorney from prosecuting the client for the crime involved. *State v. Rocker*, 130-239.

Attorney employment: An attorney who is employed by another attorney in the case as associate counsel and whose services are accepted by the client may recover from the client the value of his services. *Door v. Dudley*, 112 N. W. 203.

SEC. 318. Deceit or collusion—punishment.

The facts in a particular case held sufficient to justify disbarment of an attorney for making a false affidavit, although under an agreement with the party to whom

the affidavit was given that it should not be used in the state. It is not necessary under this section that a crime be committed. *State v. Howard*, 112-256.

SEC. 319. Authorities of attorneys and counselors.

An attorney does not have implied authority to confess or consent to judgment against his client. *First Nat. Bank v. Bourdelais*, 109-497.

An attorney under general employment has no authority to consent to judgment against his client, or waive any cause of action or defense in his case. *Kilmer v. Gallaher*, 112-583.

Attorneys cannot by agreement not reduced to writing nor entered on the records of the court agree to the submission of a case for a decree to be entered in vacation. *Whitlock v. Wade*, 117-153.

It is within the scope of authority of an attorney to make an agreement as to the record in the case. *American Emigrant Co. v. Long*, 105-194.

An agreement between counsel not reduced to writing nor made matter of record cannot be enforced. *Baily v. Birkhofer*, 123-59.

An agreement between attorneys not in writing may be shown by the admissions of one of them as against his client. *Johnson v. Nash-Wright Co.*, 121-173.

A party who has been represented by an unauthorized attorney should disavow and disaffirm his action promptly upon receiving knowledge thereof, and if he is made a party plaintiff with knowledge of the fact, he will be bound by the judgment if he does not disavow or disaffirm the action. *Oxtoby v. Henley*, 112-697.

Where an attorney has appeared in an action for defendant, authority for doing so will be presumed, and the burden is upon the defendant to show that no such authority in fact existed. *Uehlein v. Burk*, 119-742.

Clients cannot in reason expect that every act in connection with the business affairs entrusted by them to an attorney will be done by him personally. Therefore held that an attaching creditor, found to have unlawfully sued out an attachment, was liable for the negligent or wrongful acts of an assistant of the attorney employed by him, although such assistant was not a licensed attorney. *Lord, Owen & Co. v. Wood*, 120-303.

SEC. 320. Proof of authority may be required.

This section points out the exclusive method of testing the authority of the attorney to appear in behalf of the client, and the want of authority of the attorney cannot be raised by plea in abatement. *State v. Beardsley*, 108-396.

The authority of an attorney to prose-

cute an appeal to the supreme court may be called in question in a motion to dismiss the appeal, and if it affirmatively appears that such appeal was taken without authority, it will be dismissed. *Yockey v. Woodbury County*, 130-412.

SEC. 321. Attorney's lien—notice.

The statute as to the lien of an attorney is a substantial enactment of the common law with the requirement concerning notice added. *Foss v. Cobler*, 105-728.

An attorney has no common law lien on money due his client, and can only enforce a claim against such a fund under the statutory provisions. *Kerr v. Kennedy*, 119-239.

A new contract as to fees, made after the filing of an attorney's lien, does not defeat the lien. *Wallace v. Chicago, M. & St. P. R. Co.*, 112-565.

Where an attorney's lien has been filed, it makes no difference whether the money paid in settlement of the action is in fact paid before or after the dismissal of the action, if it appears that the payment was made in settlement of the claim and to prevent further litigation. *Ibid.*

This section makes no provision for a lien on real estate, and the attorney for a wife who sues for divorce and alimony, and asks to have set aside an alleged fraudulent conveyance of land by her husband, cannot on the dismissal of the action

by the wife intervene for the purpose of having a lien in his favor enforced on such land. *Keehn v. Keehn*, 115-467.

An attorney's lien is simply the right to hold or retain in the attorney's possession the money or property of client until his proper charges have been adjusted and paid. The lien may be enforced as a judgment, or by summary proceedings against a sheriff who has collected the money on execution, or in an action against the client or the adverse party, or, if it is a specific fund, by motion and order to get the necessary amount set aside for payment of the claim. The attorney's claim for services is properly triable by a jury. *Sweeley v. Sieman*, 123-183.

The lien is on the money due to the client, and not on the judgment or amount recovered in the action in which the attorney is employed. The client cannot by dismissing the action and employing another attorney defeat the lien for actual services rendered while the employment of the attorney giving the notice continues.

But notice given by one attorney does not give rise to a lien for services rendered by him and another attorney jointly. *Gibson v. Chicago, M. & St. P. R. Co.*, 122-565.

The lien of an attorney attaches only to money or property coming into the possession of the attorney claiming such lien. *Atlee v. Bullard*, 123-274.

A notice of an attorney's lien signed by the attorney as attorney for the party and not for himself will nevertheless be sufficient. *Gibson v. Chicago, M. & St. P. R. Co.*, 122-565.

The lien of the attorney attaches to the money paid by the judgment debtor to the

clerk in satisfaction of the judgment. The creditor cannot complain of such payment. *Hubbard v. Ellithorpe*, 112 N. W. 796.

Such lien attaches to the alimony awarded in a final decree of divorce. *Ibid.*

The right of an attorney under his lien is subject to any set-off which the debtor has against his client. The attorney as assignee of the judgment in favor of his client is in no better situation than the client as against an equitable right of set-off existing against the judgment debtor at the time of the assignment. *De Laval Separator Co. v. Sharpless*, 111 N. W. 438.

SEC. 322. How lien released.

Where a suit is brought in equity to enforce an attorney's lien the client is not entitled to have the action transferred to

the law docket on filing a bond, as authorized by this section. *Crissman v. McDuff*, 114-83.

SEC. 323. License to practice may be revoked.

In a proceeding under this section, where the court fails to find the defendant guilty, it has no power, on dismissing the charges, to render judgment that the defendant be reprimanded and tax costs to the defendant. *State v. Tracy*, 115-71.

Notwithstanding the provision of Code

§ 309, giving to the supreme court exclusive authority to license persons to practice law, any court of record has authority to revoke or suspend such license, and the district court therefore has jurisdiction to try and determine disbarment proceedings. *State v. Mosher*, 128-82.

SEC. 324. Grounds for revocation.

Judgment of disbarment should only be pronounced upon clear and convincing proof. *State v. Howard*, 112-256.

The evidence in a particular case considered and held sufficient to sustain a judgment of disbarment. *State v. Mosher*, 128-82.

The statute does not purport to include all the grounds for the revocation of licenses to practice as an attorney, and although ceasing to be of good moral char-

acter is not within the causes stated, a court has jurisdiction to disbar an attorney on that ground. The moral delinquencies must be such, however, as shall unfit the person accused for the proper discharge of the trust imposed in him. Among these are the absence of common honesty and veracity, especially in professional intercourse. *State v. Mosher*, 128-82.

SEC. 325. Proceedings—how begun—costs—how paid. The proceedings to remove or suspend an attorney may be commenced by the direction of the court or on motion of any individual. In the former case, the court must direct some attorney to draw up the accusation; in the latter, the accusation must be drawn up and sworn to by the person making it. If an action is commenced by direction of the court, the costs shall be taxed and disposed of as in criminal cases; provided, however, that no allowance shall be made in such case for the payment of attorney fees. [C., '73, § 219; R., § 2712; C., '51, § 1622.] [29 G. A., ch. 19, § 1.]

The court may properly appoint more than one attorney to take charge of the proceedings and draw up the proper accusation. *State v. Howard*, 112-256.

The judge sitting as court may direct disbarment proceedings to be begun in the name of the state and appoint attorneys to prosecute the case, although his attention to the misconduct of the attorney has been called by an affidavit pre-

sented to him in vacation. *State v. Tracy*, 115-71.

The order appointing attorneys to draw an accusation in a disbarment proceeding need not contain a recital of facts upon which the prosecution is to be based, but the attorneys appointed may include therein such matters as they deem proper. *State v. Mosher*, 128-82.

An attorney appointed by the court to act for the public in the prosecution of a disbarment proceeding is entitled to rea-

sonable compensation to be paid by the county. *Hyatt v. Hamilton County*, 121-292.

SEC. 326. Notice.

The statute contemplates an examination of the accusation by the court, and a finding as to its sufficiency before the accused is ordered to answer; but where the order to answer is previously made

and defendant tests the sufficiency of the accusation by motion or otherwise, the irregularity is waived. *State v. Mosher*, 128-82.

SEC. 327. Pleading—trial—evidence preserved.

The defendant in a disbarment proceeding, who has been acquitted, is not entitled to have the evidence taken on a hearing extended into longhand at the expense of the county, and preserved in that form for future reference. The provision as to the preservation of the evidence is for the purpose of appeal only. *State v. Tomlinson*, 131-617.

such witnesses may be offered in the form of depositions. *State v. Mosher*, 128-82.

Where the evidence is taken in shorthand, duly certified, and the transcript thereof filed with the clerk within a reasonable time, there is compliance with the statutory requirement that all evidence be reduced to writing, filed and preserved. *Ibid.*

A disbarment proceeding is not criminal in its nature, but a special civil proceeding, and defendant is not necessarily entitled to be confronted in court by the witnesses against him. The evidence of

A sworn denial by the accused of the accusations does not prevent an investigation thereof on the issue raised by such denial. *State v. Mosher*, 128-82.

SEC. 329. Appeal.

The provision for appeal contemplates a hearing in the supreme court *de novo*.

State v. Mosher, 128-82.

SEC. 329-a. Clerk to certify order or judgment. When a judgment has been entered in any court of record in the state of Iowa revoking or suspending the license of any attorney at law to practice in the said court, the clerk of the court in which the judgment is rendered shall immediately certify to the clerk of the supreme court the order or judgment of the court in said cause. [30 G. A., ch. 13.]

SEC. 331. When not guilty.

The client is not required to give bond for the discharge of the attorney's lien before proceeding by motion to compel the attorney to pay over the money. *Union*

Bldg. & Sav. Assn. v. Soderquist, 115-695.

Further as to compelling attorneys on motion to pay over money of the client, see notes to § 3826.

CHAPTER 11.

OF JURORS.

SECTION 332. Competency to act.

Inability to read and write the English language is a ground of challenge, but the mere fact that the juror is shown to have signed his name by a mark on several occasions, does not prove his inability to write. *State v. Greenland*, 125-141.

The discretion of the trial court in passing upon the competency of a person to act as a juror on challenge will not generally be interfered with on appeal. *Harris v. Moore*, 112 N. W. 163.

SEC. 337. Judges of election to return names—if they fail, supervisors supply names. The auditor shall, at the time of furnishing

the poll-books to the judges of election, furnish them also a statement of the number of persons apportioned to their respective precincts to be returned for each of the said jury lists, together with the names of all persons who have served as grand or petit jurors since January first preceding, which latter names shall be furnished to him by the clerk of the district court. The judges shall thereupon make the requisite selection, and return lists of names so selected to the auditor with the returns of elections; and in case the judges of election shall fail to make and return said lists as herein required, the board of supervisors shall, at the meeting held to canvass the votes polled in the county, make such lists for the delinquent precincts, and the auditor shall file such lists in his office, and cause a copy thereof to be recorded in the election book. Should no general election be held in the year one thousand nine hundred and five, the board of supervisors shall meet on the first Monday in December of said year and prepare the grand and petit jury lists from the poll-books returned from the various voting precincts of the county in the year one thousand nine hundred and four. Such lists shall be composed only of persons competent and qualified to serve as jurors; and the judges of election or boards of supervisors shall omit from said lists the name of any person who has served as a grand or petit juror in a court of record since January first preceding. And if the name of any such person is returned, the fact that he has requested to be so returned, or has served as such juror in a court of record during the jury year, as defined in this chapter, shall be a ground for challenge for cause. The members of the election board, or the board of supervisors, when certifying to such lists, shall state that the lists do not contain the name of any person who requested, directly or indirectly, that his name appear thereon. If the boundaries of any voting precinct shall be changed, it shall be the duty of the auditor, in making the apportionment of grand and petit jurors and talesmen, to assign to the new voting precincts the total number of grand and petit jurors and talesmen to which all the former precincts affected by the change were entitled, giving to each new precinct an equal number as nearly as possible. [26 G. A., ch. 61, § 6; C., '73, § 238; R., §§ 2727-8; C., '51, §§ 1637-8.] [29 G. A., ch. 20, § 1.]

Objections to a juror because he was the officer at the election required to return names of jurors, and requested a return of his own name, cannot be made after the examination of the jurors, although the fact is not known until after verdict. *In re Goldthorp's Estate*, 115-430.

The act relating to selection of grand jurors which took effect July 1, 1895, did not render illegal grand juries which had already been selected for the year under the old law. *State v. Wiltsey*, 103-54.

While the law requires grand jurors to be electors of the county, it does not re-

quire that a person must have voted or that his name be found upon the poll books, to make him eligible. Therefore a showing that the sheriff was unable to find a person of the name in the ward or city from which he was drawn, or that the county auditor could find no such name on the poll books does not show that the juror was not properly selected. *State v. Harris*, 122-78.

An order of the district court setting aside the jury list for irregularities is not binding on persons not parties to the proceedings. *Polk County v. District Court*, 133-710.

SEC. 337-a. District court to order lists prepared. Wherever it has been or hereafter shall be found or determined by the district court in any county that, for any cause, the lawfully constituted grand jury or a like petit jury has not or cannot be obtained by drawing from the names returned by the election officers to the county auditor to serve as jurors, or that lawfully qualified talesmen cannot be selected by drawing from the list of names, or that the term for which such lists were drawn has expired, the said court may order the board of supervisors of said county to prepare lists of names of persons having the qualifications required by law for

grand jurors, petit jurors and talesmen. The court ordering shall fix the time of meeting of said board of supervisors therefor and shall prescribe the time and manner of notice thereof to be given the several members of such board. Said notice may be served by any person and proof of service shall be the same as that of original notice. [32 G. A., ch. 12, § 1.]

SEC. 337-b. Supervisors to prepare lists—meeting. It is hereby made the duty of the members of said board of supervisors to obey the order of the district court made in accordance with the authority granted it in section one (1) hereof, and they are hereby empowered and authorized to hold a meeting of said board for the said purpose and the preparation of jury lists by said board at said meeting shall have precedence over all other business. [32 G. A., ch. 12, § 2.]

SEC. 337-c. Apportionment. The names to be drawn for grand jurors, petit jurors and talesmen shall be the number now required by law; they shall be apportioned among the several voting precincts by the county auditor as required by law, and such apportionment shall be certified by the auditor to the board of supervisors. [32 G. A., ch. 12, § 3.]

SEC. 337-d. Names selected—lists certified—filed with county auditor. In preparing such lists the board of supervisors shall select the names from the qualified electors from the several precincts as shown by the poll lists of the last preceding general election, selecting for grand jury, petit jury and talesmen lists, the number in each precinct shown by the auditor's apportionment provided for in this act. Such lists shall be separately certified by the board of supervisors, in substance and in form, as election officers are now required to certify lists returned by them and the lists shall be filed with the county auditor and recorded by him in the proper record, and shall stand as the regular jury list for the county for the year in which it is selected and shall be used therefor and juries chosen therefrom, in all respects except as to time of selection of list and panel and summoning of the jurors, as is now provided by law; the time of selection of list and panel and summoning of the jurors to be under the order of the court. [32 G. A., ch. 12, § 4.]

SEC. 339. Grand jurors—panel of twelve for each year.

The objection that two memoers of the grand jury were residents of the same township will be waived if not urged before pleading to the indictment, unless it

appears that defendant did not know of the irregularity before pleading. *State v. Kouhns*, 103-720.

SEC. 340-a. Repeal. That section three hundred and forty of the code be, and the same is, hereby repealed. [27 G. A., ch. 114, § 3.]

SEC. 342. When, how and by whom drawn.

In a county having two county seats, the county recorder discharging the duties of his office at one county seat, and his deputy at the other, held that the

deputy might act in the drawing of jurors at the latter county seat. *State v. Turner*, 114-426.

SEC. 346. Number of jurors to be drawn.

The provisions of 22 G. A., chap. 37, relating to the drawing of jurors in Pottawattamie county, are still in force, although not expressly retained in the pres-

ent Code. Such provisions were in the nature of a special statute, and were not repealed by the Code. *State v. Higgins*, 121-19.

SEC. 347. Others drawn when necessary.

It is not error for the court, before the beginning of trial, to order an additional panel to be drawn from the jury box and summoned for the trial of the case, the jurors so summoned becoming a part of

the panel for the term or particular case as the order may direct, and not until the panel as thus increased has been exhausted should talesmen be called. *State v. John*, 124-230.

SEC. 348. Court controls number.

Where the jurors are excused for the time when their services are not needed, they are not entitled to compensation for such time. *Venett v. Jordan*, 111-409.

SEC. 349. Talesmen—when and how drawn—waiver.

The statute requires the drawing to be in the presence of the court, and it will be presumed, unless otherwise shown by bill of exceptions (and not by affidavits) that the statutory direction was followed. *Moss v. Appanoose County*, 109-671.

While the statute authorizes the court to direct the clerk in calling talesmen to omit names of any whom he knows to be exempt from jury service, and does not authorize a direction to omit names of those known to be unable to serve, yet such misdirection will not constitute error in the trial of a case, where it appears that the complaining party did not exhaust his challenges, and that the jurors before whom the case was tried were legally qualified to sit, and that no exception to any member of the jury, nor to the jury

as a whole, was taken. *State v. McIntosh*, 109-209.

It is not necessary to call talesmen in the order in which their names are drawn from the box. It is not objectionable to draw a sufficient number of talesmen all at once to meet the requirements of a particular case. *State v. Minor*, 106-642.

Where the names of the talesmen are drawn from the proper box they may be used as they appear without their names being again drawn. *State v. Wolf*, 112-458.

If the court orders an additional panel to be drawn from the jury box before the commencement of the trial, talesmen should not be called until the panel, as thus increased, has been exhausted. *State v. John*, 124-230.

SEC. 350. Disposition of ballots drawn.

Where the drawing was set aside and the persons whose names were so drawn did not serve, held not error to return

their names to the jury box. *State v. Johnson*, 111 N. W. 827.

SEC. 354. Fees of jurors. Jurors shall receive the following fees:

1. For each day's service or attendance in courts of record, including jurors summoned on special venire, two dollars, and for each mile traveled from his residence to the place of trial, the sum of ten cents;

2. For each day's service before a justice of the peace, one dollar.

3. No mileage shall be allowed talesmen or jurors before justices. Immediately after the adjournment of each term of a court of record, the clerk thereof shall certify to the county auditor a list of the jurors, with the number of days' attendance to which each one is entitled. [C., '73' § 3811; R., § 4154; C., '51, § 2545.] [30 G. A., ch. 14.]

Where the jurors are excused for a time, as provided in Code § 348, they are not

entitled to compensation for such time. *Venett v. Jordan*, 111-409.

CHAPTER 12.**OF SECURITIES AND INVESTMENTS.****SECTION 355. Security to be by bond.**

A surety company furnishing an official bond under a contract with the person for whom the bond is furnished that he will indemnify it against all losses, attorneys' fees, and expenses sustained by reason of the execution of the bond, may in the absence of bad faith recover against such

person its attorneys' fees expended in a suit on the bond, although the principal in the bond has also employed counsel and notified the company of that fact. *United States Fidelity & Guaranty Co. v. Hittle*, 121-352.

SEC. 357. Defects rectified.

The amendment of an affidavit will not be effectual to cure an error against a party who has already acquired rights. *McGillivray v. Case*, 107-17.

A bond which is essentially insufficient for the purpose for which it is given cannot be made sufficient by amendment after the time for giving such bond has expired. *Sutton v. Bower*, 124-58.

SEC. 359. Affidavit of sureties.

Affidavit by the surety is not essential to the validity of the appeal bond in jus-

tices' court. *Porter v. Western Union Tel. Co.*, 133-747.

SEC. 370. Administrator, trustee, etc., may deposit with clerk—effect. Whenever any administrator, guardian, trustee or referee shall desire to make his final report, and shall then have in his possession or under his control any funds, moneys or securities due, or to become due, to any heir, legatee, devisee or other person, whose place of residence is unknown to such administrator, guardian, trustee, or referee or to whom payment of the amount due cannot be made as shown by the report on file, such funds, moneys or securities may upon order of the court and after such notice as the court may prescribe, be deposited with the clerk of the district court of the county wherein such appointment was made, and, if he shall otherwise discharge all the duties imposed upon him by such appointment, he may take the receipt of the clerk of the district court for such funds, moneys or securities so deposited, which receipt shall specifically set forth from whom said funds, moneys or securities were derived, the amount thereof, and the name of the person to whom due or to become due, if known. Thereupon said administrator, guardian, trustee or referee may file such receipt with his final report, and, if it shall be made to appear to the satisfaction of the court that he has in all other respects complied with the law governing his appointment and duties, the court may approve such final report and enter his discharge; but notice of such contemplated deposit, and of final report, shall be given for the same time and in the same manner as is now required in cases of final report by administrators. [22 G. A., ch. 41, § 1.] [28 G. A., ch. 13, § 1.]

SEC. 371. Duty and liability of clerk as to deposits. The clerk of the district court with whom any deposit of funds, moneys or securities shall be made, as provided by any law or an order of court, shall enter in a book, to be provided and kept for that purpose, the amount of such deposit, the character thereof, the date of its deposit, from whom received, from what source derived, to whom due or to become due, if known. He shall be liable upon his bond for all such funds, moneys or securities which may be deposited with him, and shall make complete verified statements thereof to the board of supervisors at the January and June sessions each year. If the funds, moneys or securities so deposited with the clerk shall not be paid to the person or persons to whom the same is due, or to become due, within six months from the date of its deposit, the clerk shall then, unless otherwise ordered by the court or judge, deposit such funds, moneys or securities with the county treasurer for the use of the county wherein such appointment was made, taking the treasurer's receipt therefor, countersigned by the county auditor, who shall thereupon charge upon the books of his office and against the treasurer the amount named in such receipts. [22 G. A., ch. 41, § 1.] [28 G. A., ch. 14, § 1.]

CHAPTER 13.

OF NOTARIES PUBLIC.

SECTION 373. Repeal—appointment—commissions expire—notice. That section three hundred and seventy-three (373) of the code be repealed and the following enacted in lieu thereof:

“The governor may appoint and commission one or more notaries public in each county and may at any time revoke such appointment. The commission of all notaries public heretofore or hereafter issued prior to the fourth day of July, A. D. 1909, shall expire on that day, and commissions subsequently issued shall be for no longer period than three years, and all such commissions shall expire on the fourth day of July in the same year. The governor shall, on or before the first day of May, A. D. 1909, and every three years thereafter, notify each notary when his commission will expire, sending such notice by mail and accompanying the notice with a blank application for re-appointment and a blank bond.” [32 G. A., ch. 13, § 1.]

A notary public acting for a bank which holds a draft for collection, in presenting the draft is not the mere agent of the bank, but is a public officer for whose negligence the bank will not be liable. It makes no difference that the notary is also an employe of the bank. *First Nat. Bank v. German Bank*, 107-543.

The court takes judicial notice that a person whose name appears to the jurat was a notary public in and for the county named therein, and it presumes that he acted within the county of his jurisdiction. *Black v. Minneapolis & St. L. R. Co.*, 122-32.

SEC. 374. Repeal—conditions. That section three hundred and seventy-four (374) of the code be repealed and the following enacted in lieu thereof:

“Before any such commission is delivered to the person appointed, he shall:

1. Procure a seal on which shall be engraved the words ‘Notarial Seal’ and ‘Iowa,’ with his surname at length and at least the initials of his christian name;
2. Execute a bond to the state of Iowa in the sum of five hundred dollars conditioned for the true and faithful execution of the duties of his office, which bond, when secured by personal surety, shall be approved by the clerk of the district court of the county of his residence; all other bonds shall be approved by the governor.
3. Write on said bond, or a paper attached thereto, his signature and place thereon a distinct impression of official seal;
4. File such bond with attached papers, if any, in the office of the governor;
5. Remit to the governor the fee required by law.

When the governor is satisfied that the foregoing requirements have been fully complied with, he shall execute and deliver a commission to the person appointed.” [32 G. A., ch. 13, § 2.]

SEC. 375. Repeal—certificate of appointment filed with clerk. That section three hundred and seventy-five (375) of the code be repealed and the following enacted in lieu thereof:

“When the governor delivers a commission to the person appointed, he or his secretary shall make a certificate of such appointment and forward the same to the clerk of the district court of the proper county, who shall file and preserve the same in his office, and it shall be deemed sufficient evidence to enable such clerk to certify that the person so commissioned is a notary public during the time such commission is in force.” [32 G. A., ch. 13, § 3.]

SEC. 376. Repeal—revocation—notice. That section three hundred and seventy-six (376) of the code be repealed and the following enacted in lieu thereof:

“Should the commission of any person appointed notary public be revoked by the governor, he shall immediately notify such person and also the clerk of the district court of the proper county, through the mail.” [32 G. A., ch. 13, § 4.]

SEC. 378. Record to be kept.

The requirement as to keeping a record of the demand and protest. *First Nat. Bank v. German Bank*, 107-543.

of notices sent is for the purpose of perpetuating proof of the notice, as well as

CHAPTER 15.

OF THE ADMINISTRATION OF OATHS.

SECTION 393. Who may administer.

The jurat to a statement for confession of judgment is sufficient if it show that such statement was subscribed and sworn to without reciting the name of the person subscribing and swearing to the jurat. It will be presumed that it was sworn to by the person whose name is affixed thereto. *Briggs v. Yetzer*, 103-342.

An affidavit is a written declaration under oath signed by the affiant and where

the declaration is not signed a jurat showing that it is sworn to is not sufficient. *Dyer v. Des Moines Ins. Co.*, 103-524.

A deputy clerk has power to administer oaths. *Wheelock v. Hull*, 124-752.

The court will take judicial notice of the fact that the clerk of the court has authority to administer oaths in proceedings before the court. *State v. Harter*, 131-199.

TITLE IV.

OF COUNTY AND TOWNSHIP GOVERNMENT.

CHAPTER 1.

OF COUNTIES.

SECTION 394. Body corporate.

Aside from statutory provision, a county would be a quasi-corporation, and not a municipal corporation. *Hanson v. Cresco*, 132-533.

A county is a corporate person which can speak and act only through its appropriate officers and agents. *State v. McKinney*, 130-370.

A county has no such general financial interest in the expenses of the courts as to authorize it to interfere by certiorari to test the validity of the order of a judge declaring the jury lists illegal. *Polk County v. District Court*, 133-710.

SEC. 395-a. Jurisdiction in border counties. That the jurisdiction of the courts of the state of Iowa, in counties bordering on the Missouri river, in all civil and criminal actions and proceedings, is hereby declared to extend to the center of the main channel of the Missouri river, where the same now is or may hereafter be, and to all lands and territory lying along said river, which have been adjudged by the United States supreme court or the supreme court of this state to be within the state of Iowa, and to such other lands and territory along said river over which the courts of this state have heretofore exercised jurisdiction. [27 G. A., ch. 14, § 1.]

SEC. 396. Relocation of county seat.

The board of supervisors cannot change location of court house without submit-

ting question to vote. *Way v. Fox*, 109-340.

SEC. 398. Remonstrance.

A remonstrance may properly be circulated and signed while the petition for relocation is being likewise circulated and before it is presented to the board of supervisors. *Willing v. Rye*, 123-471.

Parties who have signed a remonstrance cannot withdraw their names therefrom after it has been presented and before the board has acted. *Ibid.*

SEC. 399. Notice of hearing. Upon the filing of such petition, sixty days' notice thereof and of the date of hearing shall be given by the auditor by publishing, once each week, for three (3) consecutive weeks in a newspaper, if there be one printed in the county; if not, then by posting the same in every township in the county, and on the door of the court house therein. [C., '73, § 284.] [31 G. A., ch. 9, § 12.]

SEC. 400. Hearing—notice of election. Upon the hearing of such petition and remonstrance, if no objections are filed to either, the board shall proceed to determine whether the petition has been signed by one-half of all the legal voters in the county as shown by the last census, either

state or federal, after deducting therefrom all names appearing on the remonstrance which also appear on the petition, and also to determine whether more legal voters have signed the petition than have signed the remonstrance. If the requisite notice has been given, and the board shall find that one-half of all the legal voters, after making said deduction, have signed said petition, and that said one-half exceeds the number that have signed the remonstrance, the board shall order that, at the next general election, a vote shall be taken between said place and the existing county seat, and shall require a constable of each township in the county to post notices of such order in three public places in such township, at least fifty days before said election, and shall also publish a notice of such election in some newspaper, if there be one published in the county, once each week, for four consecutive weeks, the last publication to be at least twenty days before said election; but if objections are made, either as to petition or remonstrance, the board shall inquire into and hear additional evidence with reference to the fact as to whether the names appearing on either petition or remonstrance were the names of legal voters at the time they were placed on the petition or remonstrance, and whether the signatures are genuine. [25 G. A., ch. 10, § 4; C., '73, § 285.] [31 G. A., ch. 9, § 13.]

SEC. 403. County bonds—form of. Whenever the outstanding indebtedness of any county on the first day of January, April, June or September in any year exceeds the sum of five thousand dollars, the board of supervisors, by a two-thirds vote of all its members, may fund or refund the same, and issue the bonds of the county therefor in sums not less than one hundred dollars nor more than one thousand dollars each, payable at a time stated, not more than twenty years from their date. In counties containing a city or cities of the first class, the indebtedness incurred in the making and repairing of the bridges may be refunded whenever such outstanding indebtedness equals or exceeds the sum of five thousand (\$5,000.00) dollars, the tax to pay such bonds and interest to be levied under the provisions of section four hundred and six (406) of the code, but only on the assessable property in the county outside of the limits of said city or cities of the first class.

Said bonds shall bear interest not exceeding six per cent. per annum, payable semiannually, and be substantially in the following form, but subject to changes that will conform them to the resolution of the said board, to-wit:

No., Iowa,

The county of, in the state of Iowa, for value received, promises to pay to bearer.....dollars, lawful money of the United States of America, on....., with interest on said sum from the date hereof until paid at the rate of.... per cent. per annum, payable..... annually on the first days of.....and.....in each year, on presentation and surrender of the interest coupons hereto attached. Both principal and interest payable at.....

This bond is issued by the board of supervisors of said county pursuant to the provisions of section four hundred and three, chapter one, title four of the code of Iowa, and in conformity to a resolution of said board duly passed.

And it is hereby certified and recited that all acts, conditions and things required by the laws and constitution of the state of Iowa to be done precedent to and in the issue of this bond have been properly done, happened and been performed in regular and due form, as required by law, and that the total indebtedness of said county, including this bond, does not exceed the constitutional or statutory limitations.

In testimony whereof, said county, by its board of supervisors, has caused this bond to be signed by the chairman of the board and attested by the auditor, with the county seal attached, this day of

Chairman Board of Supervisors.

Attest:

County Auditor, County, Iowa.

(Form of Coupon.)

The treasurer of county, Iowa, will pay to bearer dollars, on, at, for annual interest on its bond, dated

No. County Auditor.

[26 G. A., ch. 76; 25 G. A., chs. 54, 55, 56, 57; 24 G. A., ch. 17; 22 G. A., ch. 91; 21 G. A., chs. 14, 22; 20 G. A., chs. 80, 175; 19 G. A., ch. 147; 18 G. A., ch. 183; 17 G. A., chs. 58, 154; 16 G. A., ch. 125; 15 G. A., ch. 9; C., '73, § 289.] [30 G. A., chs. 15, 16.]

SEC. 407. Redemption—notice—interest stopped. Whenever the amount in the hands of the treasurer belonging to the bond fund, after setting aside the sum required to pay interest maturing before the next levy, is sufficient to redeem one or more bonds, which by their terms are subject to redemption, he shall notify the owner of such bond or bonds, in the manner hereinbefore prescribed, that he is prepared to pay the same, with all the interest accrued thereon. If not presented for payment or redemption within thirty days after the date of such notice, the interest on such bond shall cease, and the amount due thereon shall be set aside for its payment whenever presented. All redemptions shall be made in the order of their numbers. [17 G. A., ch. 58, § 4; C., '73, § 292.] [27 G. A., ch. 15, § 1.]

CHAPTER 2.

OF THE BOARD OF SUPERVISORS.

SECTION 410. How constituted—number—how determined. The board of supervisors in each county shall consist of three persons, except where the number may heretofore have been or hereafter be increased in the manner provided by this chapter. They shall be qualified electors, and be elected by the qualified voters of their respective counties, and shall hold their office for three years. The board of supervisors of any county may, and, when petitioned to do so by one-fourth of the electors of said county, shall submit to the qualified voters of the county, at any regular election, one of the following propositions, as such board may elect in the absence of a petition, or as may be requested in said petition: "Shall the proposition to increase the number of supervisors to five be adopted?" or, "Shall the proposition to increase the number of supervisors to seven be adopted?" as the board shall elect in submitting the question. If the majority of the votes cast shall be for the proposition so submitted, then, at the next ensuing election for a supervisor, the requisite additional supervisors shall be elected, whose terms of office shall be determined by lot, in such a manner that one-half of the additional members shall hold their office for three years, and one-half for two years. In any county where the number of

supervisors has been increased to five or seven, the board of supervisors, on the petition of one-fourth of the legal voters of the county, shall submit to the qualified voters of the county, at any regular election, one of the following propositions, as the same may be requested in such petition: "Shall the proposition to reduce the number of supervisors to five be adopted?" or, "Shall the proposition to reduce the number of supervisors to three be adopted?" If a majority of the votes cast shall be for the decrease, then the board of supervisors shall be reduced to the number indicated by such vote, and thereafter there shall be biennially elected the number requisite to keep the board full. [C., '73, §§ 294, 299.] [31 G. A., ch. 12, § 1.]

SEC. 411. Repeal—election—term of office. That section four hundred and eleven (411) of the code, be and the same is hereby repealed, and the following enacted in lieu thereof:

"At the general election in the year 1906 there shall be elected for a term of two years, members of the county board of supervisors to succeed those whose terms were extended one year by the biennial election amendment. At the general election in the year 1906, and biennially thereafter, there shall be elected members of the board of supervisors for a term of three years to succeed those whose terms of office will expire on the first Monday in January following said election; there shall also be elected members for a term of three years to succeed those whose terms will expire on the first Monday in January one year later than the aforesaid date. It shall be specified on the ballot when each shall begin his term of office. No member shall be elected who is a resident of the same township with either of the members holding over (but a member-elect may be a resident of the same township as the member he is elected to succeed), except that, in counties having five or seven supervisors, and having therein a township embracing an entire city of thirty-five thousand inhabitants or over, he may be a resident of the same township; and in no case shall there be more than two supervisors from such township." [31 G. A., ch. 12, § 2.]

SEC. 412. Repeal—meetings. That section four hundred and twelve (412) of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"The members of the board of supervisors shall meet at the county seat of their respective counties on the second secular day in January and on the first Monday in April and June and the second Monday in September in each year, and on the first Monday in November in the odd-numbered years, and on the first Monday after the general election in the even-numbered years, and shall hold such special meetings as are provided by law." [32 G. A., ch. 14.]

SEC. 420. Special meetings—how called—business done.

The canvassing of a statement of consent under the mulct liquor law, which is required to be at a regular meeting (Code § 2450) may be made at an adjourned meeting provided for at a regular meeting. *Butterfield v. Treichler*, 113-328.

SEC. 422. Powers specified. The board of supervisors at any regular meeting shall have the following powers, to-wit:

1. To appoint one of its number chairman in the absence of the regular chairman, and a clerk, in the absence of the auditor or his deputy;
2. To adjourn from time to time, as occasion shall require;
3. To make such orders concerning the corporate property of the county as it may deem expedient;
4. To examine and settle all accounts of the receipts and expenditures of the county, and to examine, settle and allow all claims against the county, unless otherwise provided for by law;

5. To build and keep in repair the necessary buildings for the use of the county and of the courts;

6. To cause the county buildings to be insured in the name of the county, or otherwise, for its benefit, and, in case there are no county buildings, to provide suitable rooms for county purposes;

7. To set off, organize and change the boundaries of townships in the respective counties, designate and give names thereto, and define the place of holding the first election;

8. To grant licenses for keeping ferries in the respective counties, as provided by law;

9. To purchase, for the use of the county, any real estate necessary for the erection of buildings for county purposes; to remove the site of, or designate a new site for, any county buildings required to be at the county seat, when such site shall not be beyond the limits of the town, village or city at which the county seat is located, and to permit any person, persons, or corporation to use any portion of the lands owned by the county for ornamental or art purposes, or for the erection of any monument or fountain under such restrictions and regulations as the board of supervisors may from time to time enact, provided that such use does not interfere with the use for which such real estate was originally acquired by the county.

10. To require any county officer to make a report, under oath, to it on any subject connected with the duties of his office, and to require any such officer to give such bonds, or additional bonds, as shall be reasonable or necessary for the faithful performance of his duty; any such officer who shall neglect or refuse to make such report or give such bonds within twenty days after being so required, may be removed from office by the board by a vote of a majority of the members elected thereto;

11. To represent the respective counties, and to have the care and management of the property and business thereof, in all cases where no other provision shall be made;

12. To manage and control the school fund of the respective counties as shall be provided by law;

13. To appoint commissioners to act with similar commissioners duly appointed in any other county or counties, and to authorize them to lay out, alter or discontinue any highway extending through their own and one or more other counties, subject to the ratification of the board;

14. To fix the compensation of all services of county and township officers not otherwise provided for by law, and to provide for the payment of the same;

15. To authorize the taking of a vote of the people for the relocation of the county seat, as provided by law;

16. To alter, vacate or discontinue any state or territorial highway within their respective counties;

17. To lay out, establish, alter or discontinue any county highway heretofore laid out, or hereafter to be laid through or within the county, as may be provided by law;

18. To provide for the erection of all bridges which may be necessary, and which the public convenience may require, within their respective counties, and to keep the same in repair, except as is otherwise provided by law;

19. To determine what bounties, in addition to those already provided by law, if any, shall be offered and paid by the county on the scalps of such wild animals taken and killed within the county as it may deem it expedient to exterminate, but no such bounty shall exceed five dollars;

20. To purchase for the use of the county any real estate necessary for the erection of buildings for the support of the poor of the county, and for a farm to be used in connection therewith, and make appropriations not exceeding three hundred dollars in any one year for the growing of experimental crops thereon under the direction of the board;

21. To have and exercise all the powers in relation to the poor given by law to the county authorities;

22. To make such rules and regulations, not inconsistent with law, as it may deem necessary for its own government, the transaction of business, and the preservation of order;

23. To purchase real estate for county fairs. The title of such real estate to be in the name of the county. [18 G. A., ch. 46; 16 G. A., ch. 80; C., '73, § 303; R., § 312.] [31 G. A., ch. 13.] [31 G. A., ch. 14, § 2.] [32 G. A., ch. 15.] [32 G. A., ch. 17, § 1.]

[By section 2, chapter 14, of the 31 G. A., subdivision 22, of above section was changed to 23, and a new subdivision was supplied to take the place of 22. By section 1, chapter 16, 32 G. A., section 2, chapter 14, 31 G. A., was stricken out. Section 1, chapter 17, 32 G. A., added a new subdivision as 24, but as subdivision 22 of 31 G. A. was stricken the old numbering has been retained and subdivision 24 by 32 G. A. is given as 23.]

In general: The act of the individual members of the board of supervisors, even though concurred in by majority, is not binding upon the county. *Modern Steel Structural Co. v. Van Buren*, 126-606.

Par. 4. Claims: The duty of the board of supervisors to audit and allow claims against the county cannot be delegated to any other person or officer and the board cannot, therefore, resolve in advance of the contracting of claims that they shall be paid by the county without further allowance. *Heath v. Albrook*, 123-559.

Par. 9. Purchase of real estate: The power to purchase real estate needed for the erection of buildings for county purposes carries with it as a necessary incident the power to create an indebtedness therefor, and to evidence the same by some form of non-negotiable instrument, but held that under the provisions of Code §§ 447, 448, the board had no authority to issue negotiable bonds for such indebtedness without compliance with the provisions of those sections. *Witter v. Board of Supervisors*, 112-380.

Par. 11. General powers: The powers granted to or implied in a municipal or quasi corporation are only such as are necessary to make those expressly granted applicable; therefore it has no authority to execute a deed with covenants of warranty unless such authority is expressly given, and it will not be liable for breach of such a warranty. *Harrison v. Palo Alto County*, 104-383.

Nor will it be liable for failure of title to land conveyed by it at least where the nature of its title was known to the grantee. *Ibid.*

The mere fact of making a conveyance of land the title of which subsequently

fails will not constitute such fraud as to render the corporation liable. *Ibid.*

A county may be liable under implied contract for sand and gravel taken by its agents in the construction of the approach to a county bridge. *Ibid.*

The care and management of the property and the business of the county is intrusted to the board and while the courts may inquire into a gross abuse of the power thus granted, they cannot substitute themselves for the board in determining as to the proper disposition of the property of the county. *Nelson v. Harrison County*, 126-436.

In an action to restrain the issuance of bonds on the allegation that warrants for which they were to be issued were illegal, held that the holder of warrants were necessarily parties. *Ibid.*

Boards of supervisors have the care and management of property belonging to the county, and should provide sidewalks in front of premises in a city belonging to the county and used for court house purposes, and the county is liable to special assessments for improvements on the streets abutting such premises. *Edwards & Walsh Const. Co. v. Jasper County*, 117-365.

A county may employ agents other than the county attorney to prosecute claims for the county. *Galusha v. Wendt*, 114-597; *Disbrow v. Board of Supervisors*, 119-538; *Shinn v. Cunningham*, 120-383.

Par. 18. Liability as to bridges: Where the traveler had the option of crossing the stream under the bridge and incurring the risk of going up a steep bank in doing so or to go upon the bridge along the approach which was not guarded by a railing, held, that he was not guilty of

contributory negligence in using the approach to the bridge, it not appearing that he had reason to anticipate any danger on the approach by reason of want of proper guarding rails. *Morgan v. Dallas County*, 103-57.

The contingency of horses becoming frightened on a bridge or the approach thereto and backing the vehicle to the side is one which should be foreseen and the danger thereof provided against by suitable barriers, and the county may be held liable for failure to provide a reasonable barrier as a protection against such danger. *Faulk v. Iowa County*, 103-442.

Where an accident happened by reason of the railing not being strong enough to resist the ordinary pressure from the backing of the vehicle under such circumstances, held, that the defective condition of the railing might be shown for the purpose of charging the county with notice. *Ibid.*

An approach to a bridge essential to enable persons on the highway to reach the main structure, and without which the main structure would be incomplete, constitutes a part of the bridge. *Eginoire v. Union County*, 112-558.

Although a horse being driven across an approach to the bridge becomes frightened by objects along the road, and gets beyond the control of the driver, yet, if the vehicle is thrown from the approach by reason of the want of proper railings, the county will be liable. *Ibid.*

When two causes combine to produce an injury to a traveler upon a bridge both of which are in their nature proximate, the one being a culpable defect in the bridge and the other some occurrence for which neither is responsible, the municipality is liable, provided the injury would not have been sustained but for such defect. *Walrod v. Webster County*, 110-349.

Where the owner of a steam threshing machine runs it over a highway bridge without complying with the statutory provision requiring him to place planks under his engine (Code § 1571), he may nevertheless recover damages resulting from defects in the bridge for which the county is liable, if his violation of the statute has not directly contributed to the injury. *Tackett v. Taylor County*, 123-149.

Under the provisions of Code § 757, the city is liable for negligence in failing to keep in repair the bridges not coming within the description of county bridges. *Freeman v. Independence*, 123-1.

One who makes use of a bridge after repair and removal of barricades is not

charged with contributory negligence by knowledge that prior to such repair and barricading the bridge was in defective condition. *Jones v. Shelby County*, 124-551.

To avoid the use of a bridge which has been known to be defective the traveler is not bound to commit trespass on private property, the bridge being apparently open to public travel. *Ibid.*

Failure to use reasonable care in making repairs of a bridge which is known to the county authorities to be unsafe, renders the county liable for injuries resulting from its unsafe condition after such repair has been attempted and the county will not be relieved by the action of its agents in reporting it as safe after inspection. *Schlesig v. Monona County*, 126-625.

The use of the county bridges for the passing of traction engines being well known, it is negligence on the part of the county to open for public use a bridge which is unsafe for the passage of such engines. *Ibid.*

The power to build and repair bridges carries with it corresponding duties, so that the county may be held liable for damages resulting from negligence in building or failing to repair, but there is no such obligation with reference to highways. *Wilson v. Wapello County*, 129-77.

Whatever may be the liability of a county for failure of the board of supervisors to maintain a county bridge in safe condition, the board cannot be compelled by mandamus, at the suit of a property owner, to build or restore a bridge which has become impassable, that being a matter of discretion with the board, to be exercised in view of the public interest. *Leonard v. Wakeman*, 120-140.

If a bridge stands for such a length of time that the natural processes of decay have weakened it to the point of danger, and the exercise of reasonable care in oversight and inspection will reveal such condition to the proper officers, the county cannot rely upon the want of notice as excusing it from the charge of negligence in not maintaining the bridge in safe condition. *Perry v. Clarke County*, 120-96.

The streets within a city or town pass under the control of the board of supervisors of the county, when the corporate existence of the city or town is terminated. *Chrisman v. Brandies*, 112 N. W. 833.

SEC. 423. Expenditures for improvements—when vote necessary. The board of supervisors shall not order the erection of a court-house, jail, poor-house or other building, or bridge, except as provided in section four

hundred and twenty-four (424) of the code, when the probable cost will exceed five thousand dollars, nor the purchase of real estate for county purposes exceeding two thousand dollars in value, until a proposition therefor shall have been first submitted to the legal voters of the county, and voted for by a majority of all persons voting for and against such proposition at a general or special election, notice of the same being given for thirty days previously, in a newspaper, if one be published in the county, and, if none be published therein, then by written notice posted in a public place in each township in the county. [18 G. A., ch. 46; 16 G. A., ch. 80; C., '73, § 303; R., § 312.] [29 G. A., ch. 21, § 1.]

The limitation of the expense of erecting a court house, without submission to vote, does not apply to expenditure of money donated by private citizens. *Way v. Fox*, 109-340.

While an alteration in the contract for the construction of a court house which involves an expenditure beyond the amount voted for that purpose may be invalid. Warrants for the construction cannot be enjoined unless it appears that such

warrants represent unlawful expenditure. *Zerwekh v. Thornburg*, 123-254.

The board may expend money for the furnishing of a court house without vote of the electors notwithstanding a provision in a proposition submitted for the erection of the court house that no additional appropriation or expenditure for furnishing will be made. There is no authority in the statute for submitting a proposition to limit the power of expenditure for proper purposes. *Ibid.*

SEC. 424. Appropriations for county bridges—limitations.

Where two adjoining counties having equal interests in maintaining a boundary line road and the bridges thereon have proceeded, each relying on the action of the other to order a construction or repair of the common way, and each has bound itself by making an appropriation of money therefor or by taking any action obligating itself to make such appropriation for the common benefit, neither is permitted without the consent of the other

to withdraw from the enterprise and thereby prevent its accomplishment, or cast the entire burden of such accomplishment on the other. Therefore, the board of supervisors of one of the counties committed to such a common enterprise cannot release such county from its obligation to contribute by rescinding the resolution by which the concurrent action of the two counties was initiated. *Bremer County v. Walstead*, 130-164.

SEC. 427. Highways established to avoid bridging.

This section does not require that the road be constructed on the immediate bank of the stream, but a road within a reasonable distance of the stream is within its provisions. Nor does the statute con-

template the abandonment of the highway in place of which a new one is established under this section. *Stahr v. Carter*, 116-380.

SEC. 430. Dependent soldiers' and sailors' tax. A tax of one-half mill upon the dollar, or such less sum as may be needed, may be levied by the board of supervisors upon all taxable property within the county, to be collected at the same time and in the same manner as other taxes, to create a fund for the relief of and to pay the funeral expenses of honorably discharged, indigent United States soldiers, sailors and marines, and their indigent wives, widows, and minor children not over fourteen years of age, if boys, nor over sixteen years, if girls, having a legal residence in the county. [24 G. A., ch. 69, § 1; 22 G. A., ch. 105, § 1.] [30 G. A., ch. 17, § 1.]

SEC. 432. Meetings—report to supervisors—disbursements—how made. The commission shall meet annually at the county auditor's office, on the second Monday in September, and at such other times as may be necessary, at which annual meeting it shall determine who are entitled to relief, and the probable amount required to be expended therefor, which sum it shall certify to said board, together with a list of those found to be

entitled to relief, and the sum to be paid in each case, the aggregate not to exceed the amount to be raised by the tax levy authorized; and it, at its regular September meeting, shall levy a sufficient tax to raise this amount. Upon the filing of the list with the board of supervisors, the county auditor shall, within twenty days thereafter, transmit to the township clerks in the county the names of those, if any, to whom relief has been awarded, and the amount. On the first Monday of each month after the fund is ready for distribution, the auditor shall issue his warrant upon the county treasurer to the commission for the sums thus awarded, and it shall proceed to disburse the same to the parties named in the list, taking receipts therefor, or distribution may be made in any other manner the commission may direct. Should it appear to the commission that any person entitled to assistance will not properly expend the same, then the payment may be made to some suitable person, who shall, as directed by it, make the disbursements thereof, for the use and benefit of such person. The amount awarded to any party may be increased, decreased or discontinued by the commission at any regular meeting. New names may be added and certified thereat, and it shall, at the close of the year, make annual detailed reports of its work, which shall be accompanied with the proper vouchers for all moneys received by it. [24 G. A., ch. 69, § 2; 22 G. A., ch. 105, § 3.] [32 G. A., ch. 18.]

SEC. 433. Burial of indigent soldiers and sailors. The board of supervisors shall designate some suitable person in each township to cause to be decently interred the body of any honorably discharged soldier, sailor or marine who served in the army or navy of the United States during any war, who may hereafter die without leaving sufficient means to defray the expenses of his funeral. Such burial shall not be made in any cemetery or burying-ground or part thereof used exclusively for the burial of the pauper dead. The expenses of such burial shall in no case exceed the sum of thirty-five dollars, and in case surviving relatives of the deceased shall desire to conduct the funeral, and are unable or unwilling to pay the charges therefor, they shall be permitted to do so, and the expenses shall be paid as herein provided. [20 G. A., ch. 178, § 1.] [30 G. A., ch. 17, § 2.]

SEC. 441. Official newspapers—how selected—what published in—printed in foreign languages—compensation. The board of supervisors of each county shall, at its January session in each year, select two newspapers published within the county, or one, if there be but one published therein, having the largest number of *bona fide* yearly subscribers within the county, which circulation shall be determined as follows: In case of contest, the applicants shall each deposit with the county auditor, on or before a day named by the board of supervisors, a certified statement, subscribed and sworn to before some competent officer, giving the names of the several post-offices, and the number and the names of the *bona fide* yearly subscribers receiving their papers through each of said offices living within the county; such statements to be in sealed envelopes, and opened by the county auditor upon direction of the board of supervisors; and the two applicants thus showing the greatest number of *bona fide* yearly subscribers living within the county shall be the county official papers, in which all the proceedings of the county board of supervisors, the schedule of bills allowed, and the reports of the county treasurer, including a schedule of the receipts and expenditures, shall be published at the expense of the county during the ensuing year, and the costs of such publication shall be thirty-three and one-third cents for each ten lines of brier type, or its equivalent; but in counties having a population of fifteen thousand or more, three papers, not more than two of which shall be published in the

same town, shall be selected, in which such proceedings shall be published, with the same limitation as to compensation; and, in counties having two county seats, each district shall be regarded as a county for the purposes of such publication. The county auditor shall furnish all such papers selected a copy of such proceedings for that purpose. In case a contest is made by a publisher, the board shall receive other evidence of circulation, and he shall have the right of appeal to the district court, to be taken as in ordinary actions. Neither publisher to the contest shall receive pay for publishing such proceedings until the case is finally disposed of.

And in counties where a newspaper of general circulation is printed in a foreign language, the board may, in addition to those already provided for in this section, select one of such newspapers as one in which the proceedings of the board of supervisors may be published, in a foreign language, and said newspaper shall receive the same compensation therefor as is paid the official papers of said county for such publication, not exceeding thirty-three and one-third (33 1-3) cents per square. Provided that said paper shall have at least 600 actual *bona fide* yearly subscribers residing within said county, and shall file a list thereof as provided by law. [21 G. A., ch. 86, § 2; 20 G. A., ch. 197, § 2; C., '73, § 307.] [29 G. A., ch. 22, § 1.] [30 G. A., ch. 18.] [31 G. A., ch. 15.]

Where the board has authority, on account of the population of the county, to select a third paper, such third paper is to be selected in the same manner as the other two are selected. It is not intended that any two or more papers may combine their *bona fide* subscription lists and be selected by virtue thereof. *Packard v. Schmidt*, 110-628.

As to measurement for purpose of determining amount of compensation, see *Brown v. Lucas County*, 94-70.

The appeal is triable in the district court *de novo*, and the court should not approve the action of the board of supervisors unless the paper selected by the board makes such showing in the district court as entitles it to be selected. *Young v. Rann*, 111-253.

In determining who are yearly subscribers under the statute it is not necessary to show that such subscribers have already taken the paper for a year. *Ibid.*

The appeal must be taken within six months. *Ibid.*

The procedure to be adopted on appeal from the action of the board of supervisors in awarding the public printing is analogous to rather than identical with the methods employed to perfect an appeal from a justice of the peace. *Sturges v. Vail*, 127-705.

The bond may be approved by the county auditor with whom it is to be deposited. *Ibid.*

The filing and approval of the bond perfects the appeal and the transcript of the

proceeding is necessary only for the purpose of presenting to the district court the facts on which the decision of the board of supervisors was based. *Ibid.*

The lists of subscribers which are to be considered by the board must be filed on or before the time named for hearing, and after the contestants have filed their respective lists the board has no authority to receive additional lists on a continuation of the hearing. One who has filed no such list at the time fixed for the hearing is not in a position to contest the selection subsequently made by the board. *Sturges v. Vail*, 127-705.

The person to whom the public printing is awarded takes such privilege in the exercise of a public function or employment and is not entitled to the fees authorized unless it appears that he holds the position by good title, even though he has performed the service as *de facto* officer. On the other hand one who has good claim to the office, but has not performed the service for which he claims the possession of the office, cannot recover from the county fees for the services which he had a right to perform. *Smith v. Van Buren County*, 125-454.

The provisions as to compensation for official publication in a newspaper fix a maximum limit to the cost of such publication, and leave it to the discretion of the board to fix the amount to be paid within such limits. *Wooster v. Mahaska County*, 122-300.

SEC. 442. Books to be kept by board.

As the appointment of a deputy sheriff is required by Code § 510 to be filed in the

auditor's office and approved by the board of supervisors, the fact that such appoint-

ment is not shown by the records of the board to have been approved is *prima facie* evidence that it was never made. *Buck v. Hawley*, 129-406.

As to amendment of the records of the board of supervisors as kept by the auditor, see Code § 470 and the notes.

SEC. 446. Manner of submitting questions to vote. The mode of submitting such questions to the people shall be the following: The whole question, including the sum desired to be raised, or the amount of tax desired to be levied, or the rate per annum, and the whole regulation, including the time of its taking effect or having operation, if it be of a nature to be set forth, and the penalty for its violation if there be one, shall be published, once each week, for at least four weeks in some newspaper printed in the county. If there be no such newspaper, the publication shall be by being posted up in at least one of the most public places in each township in the county, and, in addition, in at least five among the most public places in the county, one of them being at the door of the courthouse, for at least thirty days prior to the time of taking the vote. All such notices shall name the time when such question will be voted upon, and the form in which the question shall be taken, and a copy of the question submitted shall be posted up at each place of voting during the day of election. [C., '73, § 310; R., § 251; C., '51, § 115.] [31 G. A., ch. 9, § 14.]

SEC. 448. Rate of such tax. The rate of tax shall in no case be more than one per cent. on the county valuation in one year. When the object is to borrow money for the erection of public buildings, as above provided, the rate shall be such as to pay the debt in a period not exceeding ten years; but in counties having a population of twenty-five thousand or over, and where it is proposed to expend one hundred thousand dollars or over, the rate of levy shall be such as to pay the debt in not exceeding twenty-five years. In issuing bonds for such indebtedness, when voted, the board of supervisors may cause portions of said bonds to become due at different definite periods. But none of such bonds so issued shall be due and payable in less than five or more than twenty-five years from date. When the object is to construct, or to aid in constructing, any highway or bridge, the annual rate shall not be less than one mill on the dollar of the assessed valuation; and any of the above taxes becoming delinquent shall draw the same interest as the ordinary taxes. [23 G. A., ch. 32; C., '73, § 312; R., § 253; C., '51, § 117.] [32 G. A., ch. 19.]

Although the board of supervisors, under Code § 422, Par. 9, has power to create an indebtedness evidenced by non-negotiable instruments for the purchase of real estate necessary for the erection of

buildings for county purposes, it has not power to issue negotiable bonds therefor without compliance with the provisions of these sections. *Witter v. Board of Supervisors*, 112-380.

SEC. 451. Rescission by subsequent vote.

Although the statute embodied in this section was enacted before that embodied in Code § 423, authorizing the levying of a tax by popular vote for the erection of court-houses, both being now re-enacted

in the Code, are to be construed together, and a tax levied for such purpose may be rescinded by vote of the electors. *Windsor v. Polk Co.*, 115-738.

SEC. 452. Board must submit questions on petition.

In a particular case held that the petition on which it was desired that the board should act had never been presented to the

board, and no action thereon was required. *Windsor v. Polk Co.*, 115-738.

SEC. 458. Repeal—supervisors to tax dogs. Sections four hundred and fifty-eight (458) and four hundred fifty-nine (459) of the code are hereby repealed and the following is enacted in lieu thereof:

The board of supervisors of each county shall at its September session, each year, when levying other taxes, levy a tax of one dollar (\$1.00) on each male and spayed female and three dollars (\$3.00) on each female dog listed by the assessor, which shall constitute a special fund to be disposed of as provided for in this act. [32 G. A., ch. 20, § 1.]

SEC. 458-a. County auditor to prepare assessor's book. It shall be the duty of each county auditor to provide suitable columns properly headed in the assessor's book to carry out the provisions of this act. [32 G. A., ch. 20, § 2.]

SEC. 458-b. Domestic animal fund. The treasurer of each county may, if not otherwise used, upon the taking effect of this act transfer all taxes collected on dogs during the year nineteen hundred and six and subsequent years to a separate fund to be known as the Domestic Animal Fund, and hereafter on receiving the tax books for the collection of other taxes shall collect the tax herein provided for as other taxes are collected and keep the same as a separate fund to be known as the Domestic Animal Fund. [32 G. A., ch. 20, § 3.]

SEC. 458-c. Injuries to domestic animals—claims for damages—how allowed and paid. Any person damaged by the killing or injury of any domestic animal or fowl by dog, dogs or wolves may present to the board of supervisors of the county in which such killing or injury occurred, a detailed statement and account of such killing or injury, stating the amount of damage claimed therefor and verified by affidavit such claim to be filed with the county auditor not later than ten (10) days from the time such killing or injury occurred or was known to be the owner or his agent. Claims filed as herein provided shall be heard by the board of supervisors at the first regular session after the filing thereof or at such time as the board of supervisors may determine upon, and the same may be established by affidavit if less than ten dollars (\$10) in amount, if more than ten dollars (\$10) to be established by oral proof or affidavit as may be determined or required by board of supervisors. No claim shall be allowed where it is shown that the injury and damage complained of was caused by a dog or dogs owned or controlled by the claimant. The board shall hear and determine said claims as soon as practicable after they are filed, and shall allow the same or such portion thereof as they may deem just, and shall find and enter of record the value of each animal killed or the amount of damage done thereto, and shall authorize the auditor to issue warrants for not exceeding seventy-five per cent. (75) of the amount of damages thus found, the same to be paid by the county treasurer out of the Domestic Animal Fund, and if disallowed they shall so enter it upon their record. [32 G. A., ch. 20, § 4.]

SEC. 458-d. Warrants—how drawn and paid—balance. The county auditor shall on the first day of July, 1907, and on the first day of January and July of each year thereafter furnish an itemized statement to the county treasurer of all warrants that have been issued for the six (6) months preceding such date as provided herein, and the treasurer shall on or before the tenth (10) day of each of said months pay said warrants issued by the auditor, as aforesaid, out of the Domestic Animal Fund, provided, however, that if such fund is then insufficient to pay said warrants in full he shall pay on each pro rata, and provided further, that no claim shall be allowed under the provisions of this act for any damages sustained for animals killed or damaged prior to the taking effect of this act. When the balance in the Domestic Animal Fund after paying the warrants issued thereto, as hereinbefore provided exceeds the sum of five hundred dollars (\$500.00) the board of supervisors may transfer the excess to the general county fund. [30 G. A., ch. 20, § 5.]

SEC. 459. Repealed—treasurer to collect. [32 G. A., ch. 20, § 1.]

SEC. 468-a. Contracts by supervisors and trustees prohibited. Members of boards of supervisors and township trustees shall not buy from, sell to, or in any manner become parties directly, or indirectly, to any contract to furnish supplies, material, or labor to the county or township in which they are respectively members of such board of supervisors or township trustees. [27 G. A., ch. 13, § 1.]

Members of the board of supervisors are prohibited from becoming parties, directly or indirectly, to contracts for labor or material furnished to the county. *Nelson v. Harrison County*, 126-436.

The acts of a township trustee in furnishing men and teams to perform labor

for the township under a contract with the road superintendent, to be paid for out of township funds, is a violation of this provision. *State v. York*, 131-635.

Labor contracts between a member of the board and the county are invalid. *Harrison County v. Ogden*, 133-677.

SEC. 469. Repeal—compensation of supervisors. That section four hundred sixty-nine (469) of the code be, and the same is hereby repealed, and the following enacted in lieu thereof:

“The members of the board of supervisors shall receive four dollars per day each for each day actually in session, and three dollars per day exclusive of mileage when not in session but employed on committee service, and five cents for every mile traveled in going to and from the regular, special and adjourned sessions thereof and in going to and from the place of performing committee service. But in counties having a population of ten thousand or less they shall not receive compensation for session service of more than thirty days in the year; in counties having population of more than ten and less than twenty-three thousand, for not more than forty-five days of such service in a year; in counties having a population of twenty-three and not over forty thousand, for not over fifty-five days of such service in a year; in counties having a population of forty and not over sixty thousand, for not more than sixty-five days of such service in a year; in counties having a population of sixty and not over eighty thousand, for not more than seventy-five days of such service in a year; in counties having a population of eighty and not over ninety thousand, for not more than ninety days of such service in a year; in counties having a population of over ninety thousand for not more than one hundred days of such service in a year. The time spent by the board of supervisors as a ditch or drainage board and in considering drainage matters whether as a single board or jointly with one or more other boards, shall not be counted in computing the number of days which any board has been in session, but the members of the board shall be entitled to compensation at the same rate for the time spent in ditch and drainage matters in addition to the compensation allowed as hereinbefore set forth, but in no case shall said board be allowed more than fifty days additional time in one year for time spent in drainage matters. If on the same day the board acts both as a county board and also for the purpose of considering drainage matters, the board shall be paid for one day only, and from the general fund or drainage fund as the board may order.” [32 G. A., ch. 21.]

CHAPTER 3.

OF THE COUNTY AUDITOR.

SECTION 470. Duties defined.

The appeal bond in a proceeding for the selection of an official newspaper should be filed with and approved by the auditor,

he being the ministerial officer of the board. *Sturges v. Vail*, 127-705.

While the right of officers to amend

records kept by them is generally recognized, yet such amendment cannot be resorted to for the purpose of making a new record retrospectively in order to sustain the action of a board of supervisors in levying assessments for a public ditch. *Tod v. Crisman*, 123-693.

If the records of the auditor do not show the filing of the appointment of a deputy sheriff as required by Code § 510, this is *prima facie* evidence that no such appointment was ever made. *Buck v. Hawley*, 129-406.

SEC. 479. Repeal—compensation. That section four hundred seventy-nine (479) of the code be and is hereby repealed, and the following enacted in lieu thereof:

“County auditors shall receive as full annual compensation for all services the following: In counties having a population of less than ten thousand, twelve hundred dollars per annum; in counties having a population of ten thousand and not exceeding twenty-five thousand, the sum of fourteen hundred dollars per annum; in counties having a population of more than twenty-five thousand, the board of supervisors may allow such additional compensation to the auditor, deputy or clerks as they [it] may deem reasonable.” [30 G. A., ch. 19.]

SEC. 480-a. Financial report—what to contain. The county auditor shall during the month of January of each year, compile and prepare a financial report, which report shall contain a schedule showing the amount of the various classes of warrants drawn on the county fund, except for court expenses during the preceding year, including therein, among other items, the total amount paid each county officer also their deputies and extra help, also other employes of the county and amounts paid for rent and various other expenses, including printing and stationery, furniture and fixtures, publishing proceedings of the board of supervisors, postage allowed each county official, complete election expenses, including printing of ballots, expenses of registration and items of like nature; a schedule showing the amount of warrants drawn on the county fund for various court expenses, which shall include among other items the salary paid the county attorney and the amounts received by him as commission on fines and from other sources, and the amount paid to assistant counsel; also amount paid jurors in the district court, amount paid witnesses in the district court, amount paid bailiffs in district court, amount paid for shorthand reporting, amount paid for printing and stationery, amount paid for attorney fees for defending criminals, amount paid for meals for jurors and items of like nature; a schedule showing the expenses of the grand jury, stating amounts paid grand jurors, bailiffs, witnesses and items of like nature; a schedule showing the expenses of the coroner’s court, stating amount paid coroner, coroner’s clerk, constable fees, witness fees and items of [items of] like nature; a schedule showing the expenses of justice courts, stating amounts paid various justices, constables, total amount paid witnesses, jurors, attorney fees, for printing and items of like nature; a schedule showing the amount drawn by each member of the board of supervisors from the several funds of the county for services during the preceding year; a schedule, being a recapitulation of the total amount of warrants drawn on the county fund with a comparison with the amount of warrants drawn on the county fund each year for the last five years; a schedule showing the various classes of warrants drawn on the pauper fund for the preceding year, with a comparison with the total amount of warrants drawn on the pauper fund each year for the last five years; a schedule showing the amount of warrants drawn on the insane fund for the preceding year, including the amount received by each commissioner as fees and expenses, fees of witnesses, sheriff’s fees and expenses, the cost of transportation and items of like nature; also total

cost of maintenance of insane at county asylum, with number confined therein, and total paid the various state hospitals for the insane, with the number of patients from the county confined in such hospitals; a schedule showing the amount paid the various state institutions during the preceding year; a schedule showing the amounts paid the sheriff for boarding prisoners during the preceding year, together with the amount paid the sheriff as jail expenses, with a comparison with the amounts paid for boarding prisoners and for jail expenses each year during the last five years; a schedule showing the amounts paid for the condemning of intoxicating liquors during the preceding year, also costs of convictions, both in justice courts and in the district court, for the violation of the laws relating to the sale of intoxicating liquors, together with the amount of fines collected for such violation and the amounts received as mulct tax, if any; a schedule showing the amount of warrants drawn on the county road fund and each of the various other funds of the county. Said financial report shall also contain the report of the county auditor as required by section four hundred and seventy-five (475) of the code, also the various reports of magistrates and other officers as required by section one thousand three hundred and two (1302) of the code, also the various reports made during the preceding year, by the county treasurer, county auditor, county recorder, sheriff, clerk of the district court and the soldiers' relief commission, as required by law. It shall also contain the reports of the various committees that may be appointed by the board of supervisors to examine the affairs and accounts of the various county officials and employes. It shall also contain such other and further matters and information as the board of supervisors may direct or the county auditor may deem advisable. The comparison herein provided for shall not be required in the first report published; the second report need only contain a comparison with the preceding year, the third report with the last two years, the fourth report with the last three years and the fifth report with the last four years. [29 G. A., ch. 23, § 1.]

SEC. 480-b. Printing and distribution. Said financial report shall be ordered printed by the board of supervisors in pamphlet form in such numbers as the board may direct, for distribution among the tax payers of the county. [29 G. A., ch. 23, § 2.]

SEC. 481. Deputy — qualifications — compensation — other assistants.

One who is orally designated as deputy, and to whom the oath is orally administered, and of whom no bond is exacted,

but who in fact performs the duties of deputy, is an officer *de facto*. *Murphy v. Lentz*, 131-328.

SEC. 482. Duties in general.

The deposit by a county treasurer of funds in a bank in his name as treasurer would not constitute a conversion thereof, or render him liable for embezzlement. (Overruling *Lowry v. Polk County*, 51 Iowa, 50.) So held *arguendo* in a case involving the legality of such deposit by a

school treasurer. *Hunt v. Hopley*, 120-695.

It is not competent for the board of supervisors to contract to pay a tax collector for making delinquent tax lists, that being a matter pertaining to the office of treasurer. *Massie v. Harrison County*, 129-277.

CHAPTER 4.

OF THE COUNTY TREASURER.

SECTION 483. As to warrants presented but not paid. When a warrant drawn by the auditor on the treasurer is presented for payment, and

not paid for want of money, the treasurer shall indorse thereon a note of that fact and the date of presentation, and sign it, and thenceforth it shall draw interest at the rate of five per cent. He shall keep a record of the number and amount of the warrants presented and indorsed for non-payment, which shall be paid in the order of such presentation. [21 G. A., ch. 84, § 1; C., '73, § 328; R., § 361; C., '51, § 153.] [29 G. A., ch. 24, § 1.]

SEC. 484. Calls for outstanding warrants—interest stopped.

The statute of limitations runs against a warrant without regard to whether it has been called by the treasurer for payment. *Bodman v. Johnson County*, 115-296.

SEC. 490. Compensation. Each county treasurer shall receive for his services the following compensation:

1. Three-fourths of one per cent. of all money collected by him as taxes due any city or town, to be paid out of the same;

2. Three per cent. of all taxes collected by him for all other tax funds, to be paid out of the county treasury;

3. For each certificate of purchase issued for lands sold for non-payment of taxes, twenty cents;

4. For paying money into the state treasury, when required by law or the auditor of state, such compensation as the board of supervisors shall allow, not exceeding one-fourth of one per cent. on the amount so paid, which allowance shall be paid by the county;

5. When the aggregate amount of compensation allowed exceeds fifteen hundred dollars in any year, the excess shall be paid into the county treasury; but in counties where the population does not exceed ten thousand, the salary shall not exceed thirteen hundred dollars, and in such counties there shall not be allowed for deputy or clerk hire more than the amount provided in the next section. But in counties having a population of thirty thousand or over the board of supervisors may allow such additional compensation as it may deem proper. [18 G. A., ch. 184, § 2; 17 G. A., ch. 122, § 3; C., '73, § 3793; R., § 777.] [27 G. A., ch. 16, § 1.]

Although a commission is allowed to the county treasurer for taxes collected, he has not such an interest in the taxes as to be disqualified to act under Code § 1374 in collecting taxes on omitted property. His interest in the result is remote and incidental. *Beresheim v. Arnd*, 117-83.

That portion of the regular annual mulct tax which the county is required by

law to pay to the city is not subject to the county treasurer's charge of three-fourths of one per cent for collection. *Waverly v. Bremer County*, 126-98.

The compensation to which the treasurer is entitled for collecting special assessments certified to him by the city cannot be included in the levy of the assessment upon property. *Higman v. Sioux City*, 129-291.

CHAPTER 5.

OF THE COUNTY RECORDER.

SECTION 494. Office—duties. The recorder shall keep his office at the county seat, and shall record at length, and as speedily as possible, all instruments in writing which may be delivered to him for record, in the manner directed by law. If in the recording of any such instrument heretofore recorded or hereafter to be filed for record, the recording fee for which has once been paid, the recorder shall commit an error in making the record thereof it shall be his duty to re-record such instrument upon the presentation of the original by the owner thereof, without further compensation;

and he shall also enter upon the margin of the new record a reference to the original record, and upon the margin of the original record a reference to the new record, giving the book and page thereof. When an error has been made in indexing any instrument, it shall be the duty of the recorder to re-index the same without further compensation. [C., '73, § 335; R., § 358; C., '51, § 150.] [30 G. A., ch. 20.]

SEC. 495. Fees to be reported and paid to county—compensation. The recorder shall report quarterly, under oath, to the board of supervisors, on blanks furnished by the auditor, all fees collected by him, and certify under oath that he has collected all fees for recording instruments provided by law; shall make annual settlement with the board of supervisors on the first Monday in January of each year, and pay into the county treasury all fees received by him. And the recorder shall receive as full compensation for all services the sum of twelve hundred dollars (\$1,200), per annum in counties having a population of less than twenty-five thousand (25,000), and fifteen hundred dollars (\$1,500), in counties having a population of over twenty-five thousand (25,000), and less than thirty-five thousand (35,000), and sixteen hundred dollars (\$1,600), in counties having a population of over thirty-five thousand (35,000), and less than fifty thousand (50,000), and eighteen hundred dollars (\$1,800), in counties having a population of over fifty thousand (50,000), and less than sixty thousand (60,000), and two thousand dollars (\$2,000), in counties having a population of sixty thousand (60,000), or over. [25 G. A., ch. 76, § 1.] [30 G. A., ch. 21, § 1.] [32 G. A., ch. 22.]

SEC. 496. Deputies — qualifications—compensation—other assistants. Each county recorder may, in writing, with the consent of the board of supervisors, appoint any one not holding a county office his deputy, for whose acts he shall be responsible, and from whom he shall require bond, which bond shall be approved by the officer who has the approval of the principal's bond, and such appointment may be revoked in writing; which appointment and revocation shall be filed and kept in the auditor's office. The person thus appointed shall qualify by taking the same oath as his principal, indorsed upon the certificate of appointment. The deputy, in the absence or disability of his principal, may perform all the duties of the principal pertaining to his office, and shall receive a salary not exceeding nine hundred dollars a year, to be fixed by the board of supervisors. In counties where no deputy is appointed, or in counties having a population of thirty-five thousand (35,000) or over, the recorder may, with the approval of the board of supervisors, temporarily employ one or more assistants, when the pressure of business in his office renders it necessary, and he shall file a bill for such service at the next regular meeting of the board of supervisors, who shall make a reasonable allowance therefor. [25 G. A., ch. 76; 18 G. A., ch. 184, § 2; 17 G. A., ch. 122, § 3; 16 G. A., ch. 4; C., '73, §§ 766-8, 770-1; R., §§ 421, 463-5, 467-8; C., '51, §§ 411, 414, 416, 417.] [29 G. A., ch. 25, § 1.] [30 G. A., ch. 21, § 2.]

In a county where the district court is held at two places, and the county recorder is in the discharge of his office at one place, and his deputy at another, held that the deputy might act in drawing a jury. *State v. Turner*, 114-426.

No allowance can be made for an assistant except for services for the quarter of a year preceding the time when the bill is filed. The provision of the statute in this respect is mandatory. *Allen v. Adams County*, 120-63.

Where a proper claim is filed by the recorder, it is not necessary, in order to be entitled to an allowance, that the claim be made by the person who rendered the services, or that the recorder show that the services have been paid for. It is proper for the recorder to present the claim in his own name for services of an assistant necessarily employed, and the board can allow only the reasonable value of the services necessarily procured. *Ibid.*

SEC. 498. Fees to be collected—fee book. The recorder shall be entitled to charge and receive the following fees:

1. For recording each instrument containing four hundred words or less, fifty cents;

2. For every additional hundred words or fraction thereof, ten cents.

3. He shall keep a fee book which shall be ruled in appropriate columns in which he shall enter each and every instrument filed for record, each instrument shall be numbered in numerals from one consecutively through the year, and shall commence with number '1' on and immediately after the date of settlement with the board of supervisors each year. He shall enter on said fee book from left to right in appropriately ruled columns as follows: the number of the instrument, grantor, grantee and character of instrument, carrying out in separate columns the fee charged in dollars and cents in each case and said fee book shall be a part of the records of the office of the county recorder and shall be kept and maintained therein as the other books and records thereof. He shall also enter or cause to be entered at the top of the page where the permanent record of the instrument begins, these words "Recording fee—————" and place on blank line the exact amount charged in dollars and cents for each instrument recorded. [C., '73, § 3792; R., § 4143; C., '51, § 2534.] [31 G. A., ch. 16.]

CHAPTER 6.

OF THE SHERIFF.

SECTION 508. Fees to be reported and paid to county. Quarterly itemized reports under oath, upon blanks to be furnished by the county auditor, shall be made to the board of supervisors by the sheriff, of all fees and mileage charged or taxed, and all that are collected by him and his deputies, including all sums for which the county is liable, except for dieting and lodging prisoners; and at the time of making such quarterly reports he shall make full settlement with said board, filing therewith the receipts of the county treasurer for all moneys paid over to him. [25 G. A., ch. 75, § 1.] [29 G. A., ch. 26, § 1.]

SEC. 510-a. Repeal—compensation. That section five hundred and nine (509) and section five hundred and ten (510) of the code be repealed and the following substituted therefor:

In counties having a population of over forty-five thousand the sheriff shall receive in full compensation for his services, except the expenses hereinafter provided for, thirty-five hundred dollars per annum, to be paid out of the receipts of the office. In counties having a population of over twenty-eight thousand and less than forty-five thousand the sheriff shall receive in full compensation for his services, except the expenses hereinafter provided for, three thousand dollars per annum, the same to be paid out of the receipts of the office. In counties having a population of over eleven thousand and less than twenty-eight thousand the sheriff shall receive in full compensation for his services, including the salary provided by section five hundred and eleven (511) of the code, the sum of two thousand dollars per annum, the same to be paid out of the receipts of the office. And any excess over the sums provided in all counties shall be paid into the county treasury annually. In all counties, the expenses necessarily incurred and actually paid while engaged in the performance of official duties in serving criminal process, or commitments to the penitentiaries, industrial schools or asylums, shall be allowed by the board of supervisors, and paid as other claims against the county and he shall be allowed to retain all mileage collected

by him in the service of civil process. Provided, that in counties having a population of less than eleven thousand in which the receipts of the office, together with the salary allowed under section five hundred eleven (511) of the code, do not amount to the sum of fifteen hundred dollars in any year, the board of supervisors shall, at the January session thereof, allow the sheriff a sum which added to the receipts of the office for the previous year will amount to the sum of fifteen hundred dollars and that in counties having a less population than twenty-eight thousand, in which the receipts of the office and salary allowed under section five hundred and eleven (511) of the code do not amount to the sum of eighteen hundred dollars per annum, the board of supervisors shall, at the January session thereof following, make an allowance to the sheriff of a sum equal to the difference between the receipts of the office in the previous year, and eighteen hundred dollars. And in counties having a population of more than twenty-eight thousand and less than forty-five thousand, in which the receipts of the office and salary allowed by the board, do not in any year amount to the sum of two thousand dollars, the board of supervisors shall, at the January session thereof following, make an allowance to the sheriff of a sum equal to the difference between the receipts of the office for the previous year, and two thousand dollars. And in counties having a population of more than forty-five thousand in which the receipts of the office do not in any one year amount to the sum of thirty-five hundred dollars, the board of supervisors shall at the January session following make an allowance to the sheriff of a sum sufficient to make his salary equal to the sum of thirty-five hundred dollars. And provided further, that all fees earned and uncollected at the end of each year shall belong to the county, and when paid shall be by the clerk of the district court be reported to the board of supervisors and paid into the county treasury. [29 G. A., ch. 27, § 1.]

Where the county is entitled to the fees for service of process in criminal cases, the sheriff is entitled to allowance by way of expenses of the amounts necessarily

paid out by him for railroad fare, livery hire and hotel bills, while traveling for the purpose of serving criminal process. *Bybee v. Marion County*, 128-610.

SEC. 510-b. Deputies—qualification—compensation. In all counties the sheriff shall in writing appoint one or more persons, not holding a county office, as deputy or deputies, for whose acts he shall be responsible and from whom he shall require a bond, which appointment and bond shall be approved by the officer having the approval of the principal's bond; and such appointment may be revoked in writing, which appointment and revocation shall be filed and kept in the auditor's office. In all cases the board of supervisors shall fix the number of deputies and shall fix the salary of such deputies at not exceeding one thousand dollars per annum in counties having a population of over twenty-eight thousand, and at not exceeding six hundred dollars per annum each in counties having a population of less than twenty-eight thousand; and in all counties the chief deputy shall be paid by the sheriff out of the compensation allowed him under the provisions of the preceding section, and all other deputies shall be paid by the county. [29 G. A., ch. 27, § 2.]

A bailiff employed at a monthly salary cannot properly draw compensation for fees earned by him when actually serving in that capacity. *State v. Welch*, 109-19.

Under statutory provisions which were superseded by the adoption of the Code, held that the sheriff in a county not containing twenty-eight thousand inhabitants, and who was not therefore a salaried offi-

cer, was nevertheless entitled to an allowance for a deputy. *Mentzer v. Marion County*, 114-478.

The fact that the records of the auditor and of the board of supervisors do not show the filing of the appointment of a deputy sheriff is *prima facie* evidence that no such appointment was made. *Buck v. Hawley*, 129-406.

SEC. 511. Fees to be collected. Each sheriff is entitled to charge and receive the following fees:

1. For attending the supreme court, to be paid out of the amount appropriated for contingent expenses of said court, two dollars per day;
2. For serving a notice and making return thereof, for the first person served, fifty cents, and for each additional person, twenty-five cents;
3. For each warrant served, two dollars, and the repayment of any amount actually paid by him as necessary expenses in executing such warrant, as sworn to by the sheriff; if service of the warrant cannot be made, the repayment of all necessary expenses actually paid by the sheriff, while attempting in good faith to serve such warrant within this state, and such reasonable compensation as the board of supervisors may deem just and equitable;
4. For serving and returning a subpoena, for each person served, twenty cents;
5. For summoning a grand or trial jury, for each person served, sixty cents, to be paid out of the county treasury; and such sum shall be in full compensation for such service;
6. For summoning a jury to assess the damages to the owners of lands taken for public improvements, and attending them, five dollars per day. This paragraph shall not be so construed as to allow a sheriff to make separate charges for different assessments, which can be made by the same jury and completed in one day of ten hours;
7. For serving an execution, attachment, or order for the delivery of personal property, injunction, or any order of court, and making return thereof, two dollars;
8. For collecting and paying over money, on the first five hundred dollars or fraction thereof, two per cent.; on all in excess of five hundred dollars and under five thousand dollars, one per cent.; on all over five thousand dollars, one-half per cent.;
9. For making and executing a certificate or deed for lands sold on execution, or a bill of sale for personal property sold, one dollar;
10. For the time necessarily employed in making an inventory of personal property attached or levied upon, twenty-five cents per hour;
11. For a copy of any paper required by law, made by him, for each one hundred words, ten cents;
12. Mileage in all cases required by law, going and returning, five cents per mile;
13. For taking each bond required by law, twenty-five cents;
14. For each commitment to jail, twenty-five cents; discharge from same, twenty-five cents;
15. For receiving a prisoner on surrender by bail, fifty cents;
16. For boarding a prisoner, a compensation to be fixed by the board of supervisors, of not to exceed twelve and one-half cents for each meal, and not to exceed three meals in twenty-four consecutive hours; and not to exceed twelve and one-half cents for each night's lodging;
17. For waiting on and washing for prisoners, the sheriff shall have such reasonable compensation as shall be allowed by the board of supervisors;
18. For attending before any judge with a prisoner, one dollar per day;
19. For attending sale of property, for each day, one dollar;
20. For conveying one or more convicts to either of the penitentiaries of the state, or any prisoner to any county jail outside of the county in which said sheriff resides, or any insane person or persons to any insane asylum in the state, or person or persons to either of the industrial schools, he shall be allowed, as full compensation therefor, his necessary traveling expenses

actually paid by him, including board and railroad fare for himself and such person or persons, or any other necessary expenses, and, in addition thereto, forty cents per hour for the time necessarily employed in going to and from said prisons, asylums, or schools, to be certified by the affidavit of such sheriff, accompanied by the proper vouchers, to the board of supervisors of the county from which the persons were committed. Should the sheriff need any assistance in taking prisoners to the penitentiary or insane persons to the asylum, the same shall be furnished at the expense of the county, the compensation to be fixed by the board of supervisors;

21. He shall be allowed for serving any warrant for the seizure of intoxicating liquors, one dollar; for the removal and custody of such liquor, actual and reasonable expenses; for the destruction of such liquor under the order of the court, his actual and reasonable expenses, and one dollar; for posting and leaving notices in such cases, one dollar;

22. The jailer may be furnished a dwelling in connection with the jail, or as convenient thereto as practicable, in the discretion of the board of supervisors;

23. The sheriff is also entitled, for attending the district court, and for other service for which no compensation is allowed by law, except in counties having a population of over twenty-eight thousand, an annual salary, which shall be fixed by the board of supervisors, but in no case less than two hundred dollars nor more than four hundred dollars. When sheriffs perform official duties in justices' courts, their fees shall be the same as allowed constables. [25 G. A., ch. 83; 23 G. A., ch. 41; 19 G. A., ch. 94, §§ 2-23; C. '73, § 3807; R., § 1570.] [27 G. A., ch. 17, §§ 1, 2.]

Where an order of court fixed the time when persons who had signed affidavits in support of an application for change of venue should appear for cross-examination, held, that service of subpoenas on such persons should not be taxed as the service of an order of court. *Spangler v. Beaver*, 106-744.

The fees of the sheriff for performing the duties of constable (as authorized in Code § 4591) are to be accounted for by him as fees of his office. *Jones County v. Arnold*, 111 N. W. 973.

CHAPTER 7.

OF THE CORONER.

SECTION 515. Inquest—when held—warrant for jurors.

It is the province of the coroner to determine whether a *post-mortem* examination shall be made. *Finarty v. Marion County*, 127-543.

SEC. 520. Witnesses — shorthand reporter — compensation. The coroner shall issue subpoenas for such witnesses as have knowledge touching the manner of the death of the person whose inquest is being held, returnable at such time and place as he may direct. They shall be sworn as in other cases, and their evidence reduced to writing under the direction of the coroner, subscribed by them, and returned to the district court, with the verdict and all other papers in the case. For the purpose of preserving the testimony of such witnesses, and all the acts and doings of the coroner and jury, the coroner may appoint a shorthand reporter at a compensation of not to exceed fifty cents (50c) per hour, for time actually employed in any inquest or investigation, and for extending the notes, and when such reports are extended into longhand by the said shorthand reporter and certified to by the coroner and said reporter to the effect that they contain a full, true and complete report of all proceedings, they shall be the official

record of the said inquest or investigation. The said shorthand reporter shall before entering upon his duties as such reporter, take an oath to be administered by the coroner, that he will faithfully take down in shorthand the evidence as it is given by the witnesses at such inquest or investigation, and that he will correctly extend the same into longhand. The coroner may enforce the attendance of witnesses and jurors, and punish them for contempt in disobeying his process, in like manner as a justice of the peace may do in a criminal proceeding before him. [C., '73, §§ 356-8; R., §§ 400-2, 409; C., '51, §§ 190-2, 199.] [32 G. A., ch. 23.]

SEC. 529. Physician employed—fees.

The physician is entitled to recover his compensation from the county for making a *post-mortem* examination at the direction of the coroner without regard to the question as to whether the circumstances were such as to warrant the coroner in ordering such inquest. *Finarty v. Marion County*, 127-543.

CHAPTER 8.

OF THE COUNTY SURVEYOR.

SECTION 538. Record to be furnished—presumptive evidence.

The survey, to be entitled to the presumption here contemplated, must have been made with the knowledge of the party sought to be bound, and recorded as here provided. *McAnich v. Hulse*, 113-58.

In a particular case held that even though the survey was admissible in evidence under this section there was sufficient evidence of its incorrectness to overcome the presumption in its favor. *Ibid.*

CHAPTER 9.

OF THE DUTIES OF COUNTY OFFICERS.

SECTION 550-a. Auditor of state to prescribe system of accounts—advisory committee. The auditor of state is hereby authorized and directed to formulate and prescribe a system of books, blanks, records, vouchers, receipts, etc., for the use of county auditors, county treasurers and clerks of the district court, which system shall be adopted and used by all county auditors, county treasurers and clerks of the district court of the state from and after January 1, 1908. To assist in the preparation of the forms above contemplated, the auditor of state is hereby authorized to appoint a committee of not less than five nor more than seven persons, each of whom shall have had at least one term's experience either as county auditor, county treasurer or clerk of the district court, or who shall be [an] expert accountant. The committee thus appointed shall serve without compensation except that the necessary traveling, hotel and other expenses of the members for a period of not more than thirty (30) days shall be paid by the state and the auditor of state is hereby authorized to draw warrants upon the treasurer of state for the payment of such expenses upon receipt of vouchers therefor properly filed with and approved by the executive council. [32 G. A., ch. 24, § 1.]

SEC. 550-b. Forms furnished—expenses—how paid. The auditor of state, shall as soon as practicable after the same have been prepared, furnish each county auditor, county treasurer and clerk of the district court

with a complete set of all forms prescribed under the provisions of this act pertaining to the affairs of his office and the expense thereof shall be paid in the same manner as other like expenses of the office of the auditor of state. [32 G. A., ch. 24, § 2.]

CHAPTER 10.

OF TOWNSHIPS AND TOWNSHIP OFFICERS.

SECTION 551. Supervisors divide county into townships.

A township is not a body corporate for any purpose. It is a mere subdivision of the county for governmental purposes, and it is not therefore a municipal corporation. *Hanson v. Cresco*, 132-533.

SEC. 555. Notice. Notice of the time when such petition shall be presented shall be given by publication, once each week, for two consecutive weeks in a newspaper published in the township, the last of which publications shall be at least ten days prior to the time fixed for the presentation of such petition; or if no paper is printed in such township, or the papers therein printed refuse to make such publication, the notice herein contemplated shall be given by posting in five public places in the township, two of which shall be without, and three within, such corporate limits. [C. '73, § 383.] [31 G. A., ch. 9, § 2.]

SEC. 560. Township and city coterminous—clerk and trustees abolished. Where a town or a city, not acting under a special charter, constitutes one or more civil townships the boundary lines of which coincide throughout with the boundary lines of the town or city, the offices of township clerk and trustee are abolished. [24 G. A., ch. 10, § 1.] 30 G. A., ch. 22,]

SEC. 576. Clerk to keep record. The township clerk shall keep a record of all the proceedings and orders of the trustees, and of all acts done by him, including the filing of certificates of official oaths having been taken before other officers, and perform such other acts as may be required of him by law. It shall be the duty of each township clerk to receive, collect, preserve, and disburse, under the orders of the township trustees, all funds belonging to his township, including the cemetery fund, and those which are now or may hereafter be by law created or authorized. [C. '73, §§ 392, 395-6; R., §§ 445, 448-9; C. '51, §§ 223, 226-7.] [28 G. A., ch. 15, § 1.]

SEC 579. Constable—duties.

A writ of attachment from a district or superior court cannot be directed to a constable. *Freeman v. Lind*, 112-39.

SEC. 583. Cemeteries—plat—record of.

Action of township trustees with reference to boundaries of cemetery lots will not be binding on parties who do not have notice. *Hassenlever v. Romkey*, 133-470.

SEC. 584. Conveyance of lots—record of.

A lot owner in a cemetery established by the township trustees does not require fee title to such lot by his deed. *Ander-son v. Acheson*, 132-744.

SEC. 585. Trustees condemn lands. The township trustees are hereby empowered to condemn, or purchase and pay for out of the general fund, and enter upon and take, any lands within the territorial limits of

such township for the use of cemeteries, in the same manner as is now provided for cities and towns. Civil townships are hereby authorized and empowered to receive by gift, devise, or bequest, money or property for the purpose of establishing and maintaining libraries, township halls, cemeteries, or for any other public purpose. All such gifts, devises, or bequests, shall be effectual only when accepted by resolution of the board of trustees of such township. [16 G. A., ch. 130, § 3.] [31 G. A., ch. 17.]

SEC. 586. Tax to pay for—adjoining townships. They shall, at the regular meeting in April, levy a tax sufficient to pay for any such lands so condemned or purchased, or for the necessary improvement and maintenance of cemeteries thus established, or for the maintenance and improvement of cemeteries so established in adjoining townships in case they deem such action advisable. They shall have power to control any such cemeteries, or appoint trustees for the same, or sell them to any private corporation for cemetery purposes. They shall also have power to levy a tax not to exceed one (1) mill to improve and maintain any cemetery not owned by the township, provided the same is devoted to general public use. [16 G. A., ch. 130, § 4.] [29 G. A., ch. 28, § 1.] [30 G. A., ch. 23.]

SEC. 591. Compensation of clerk. The township clerk shall receive:

1. For each day of eight hours necessarily engaged in official business, where no other compensation or mode of payment is provided, to be paid from the county treasury, two dollars;

2. For all money coming into his hands by virtue of his office, except money received from his predecessor in office, unless otherwise provided by law, two per cent;

3. For filing each application for a drain or ditch, fifty cents;

4. For making out and certifying the papers in any appeal taken from an assessment by the trustees of damages done by trespassing animals, such additional compensation as the board of supervisors may allow. [16 G. A., ch. 61; C., '73, § 3809; R., §§ 909, 911.] [32 G. A., ch. 25.]

SEC. 592-a. Township trustees—power to contract for use of public libraries. The township trustees shall have power to contract with the trustees of any free public library for the use of said library by the people residing outside the corporate limits of the town or city in which such free public library is located, upon the same terms and conditions as those granted to residents in said town or city, and to pay such library such an amount, as may be agreed upon therefor; and may, at the April meeting, levy a tax not exceeding one mill on each dollar of taxable property of the township outside the city or town in which such library is located, the fund derived therefrom constituting a special fund to be known as a library fund which shall be used for no purpose other than is contemplated in this section, this being additional to chapter ten (10) of title four (4) of the code. [31 G. A., ch. 14, § 3.] [32 G. A., ch. 16.]

[The amendment by chapter 16 of the 32 G. A., to the above section, it being section 3, chapter 14 of the 31 G. A., was by striking out all after the word "meeting" in line six down to the comma before the word "levy" in line 9. The word "levy" does not appear in line 9, but does in line 8, and the change has been made there.]

SEC. 592-b. Township hall funds—transfer authorized—how made. That whenever there is now, funds in the hands of any township clerk, when same was raised under the provisions of sections five hundred and sixty-seven (567) and five hundred and sixty-eight (568) of the code, when same is not desired for the purposes set forth in above mentioned sections, then said fund may be transferred to road fund of any township wherein same was raised, when a petition is presented to the trustees, signed by a majority of the electors of said township, that voted at the last

regular election, prior to the signing of said petition, as shown by the poll books of said township. Said transfer of funds to be made by the township clerk, upon the filing of said petition with said clerk, upon order of the trustees. [31 G. A., ch. 18.]

CHAPTER 11.

OF GENERAL REGULATIONS AFFECTING COUNTIES AND TOWNSHIPS.

SECTION 596. Officers not to purchase warrants.

The statute prohibits the purchase at a discount by an officer of any claim against the county, whether it be evidenced in writing or not. *Harrison County v. Ogden*, 133-666.

TITLE V.

OF CITY AND TOWN GOVERNMENT.

CHAPTER 1.

OF INCORPORATION.

SECTION 599. How effected.

The petition is to be presented to the district court and not to the judge. *State ex rel v. Council*, 106-731.

SEC. 600. Commissioners—notice. Upon compliance with the provisions of the preceding section, the court shall at once appoint five commissioners, who shall at once give notice of an election for incorporation, for not less than three successive weeks preceding the same, by posting notices in three public places within the limits of the proposed town, and by publication, once each week, for three (3) consecutive weeks in one or more newspapers published in the county where the court is held; which notice shall state the time and place of holding the election, and a description of the limits of the proposed town, and that a plat and description thereof is on file in the office of the clerk of the district court. The court is vested with power to change or limit the territory proposed to be incorporated, before appointing the commissioners as herein provided. [C. '73, § 422.] [31 G. A., ch. 9, § 20.]

SEC. 602. Notice of election of officers—council to elect assessors. If a majority of the ballots cast at such election be in favor of the incorporation, and the same has been confirmed and approved as above provided, the court, or a judge thereof in vacation, shall order the election of a council, mayor, clerk and treasurer. The commissioners shall give notice for two consecutive weeks of the time and place of holding the election of councilmen and the aforesaid officers, by publication, once each week, in a newspaper published in the county where the court is held, and by posting the same in five public places within the limits of such town, at which the qualified electors residing within such limits shall elect such councilmen and officers, who shall hold their offices until the first regular election thereafter. Said commissioners shall act as judges and clerks of the election, and shall have the same power and discharge the same duties as clerks in city or town elections, and such election shall be conducted, as far as practicable, in the manner prescribed by law for the election of town councilmen and officers. When the election of town officers as provided by this section shall be held on, or after, the date of the annual election for towns and prior to January first following, the council of said town so elected and confirmed by the court shall, at a regular meeting held prior to the first day of November following their election, elect an assessor for said town, who shall hold office for one year commencing on the first day of January next after his said election. The council shall elect the said

assessor in the manner provided by subdivision nine (9) of section six hundred sixty-eight (668) of the code. [C. '73, §§ 423, 425.] [28 G. A., ch. 16, § 1.] [31 G. A., ch. 9, § 28.]

SEC. 608. Publication. When the incorporation of any city or town shall have been discontinued, the clerk of the court shall cause a notice thereof to be published, once each week, for four consecutive weeks in a newspaper published in the county where the court is held, and shall also certify the fact to the secretary of state and to the recorder of the county. [C. '73, § 452.] [31 G. A., ch. 9, § 21.]

SEC. 611. By proceedings in court. When any city or town shall desire to annex abutting and contiguous territory which has been laid out in lots or parcels, not within the limits of a city or town, the council thereof may present to the district court of the county in which the city or town is situated a petition, describing the territory to be annexed, and stating that the same had been laid out as above mentioned, the facts constituting the desirability of annexation, the name of each owner of any portion thereof, if there is more than one such owner, and the particular portion of such territory owned by each, which petition shall have attached thereto a plat thereof. Notice of the filing of such petition shall be served, by publication in one newspaper published in the city or town, once each week, for four consecutive weeks, and by posting in five public places in the territory desired to be annexed for the same period; the corporation shall be plaintiff, the owners defendants, and issues joined and the case tried as an ordinary action, as far as applicable, except that no judgment for costs shall be rendered against any defendant who does not make defense. If the court finds the allegations of the petition true, and that justice requires the annexation of said territory or any part thereof, a decree shall be entered accordingly, and from that time the territory therein described shall be included in such corporation. The same record and certified copies shall be made and filed as provided in the preceding section. [C. '73, § 431.] [31 G. A., ch. 9, § 22.]

SEC. 614. Indebtedness—how paid.

The remedy of the holder of bonds issued by a city subsequently annexed to another, and which has ceased to have officers of its own, is by a suit in equity against the city to which the annexation is made, which is to be deemed in equity

a trustee for the creditor, charged with the duty of collecting the amount adjudged to be due him. *Burlington Sav. Bank v. Clinton*, 106 Fed., 269. And see S. C. 111 Fed. 439.

SEC. 615. Extension—how effected. Any city or town may have its limits enlarged by resolution of the council, fixing the boundaries of the city or town, to the proposed extent, which shall, as far as practicable, be terminated by straight lines drawn parallel, respectively, to the corresponding lines of the government survey, and the question must then be submitted to the vote of the electors of the city or town as thus proposed to be enlarged, on a day fixed by resolution of the council, and notice thereof given by proclamation of the mayor of the time and place of holding the same, setting forth the exact question to be presented to the electors for determination, which shall be published in some newspaper published in said city or town, once each week, for four weeks, consecutively. The council shall select three judges and two clerks for said election, whose duties shall be the same as prescribed by law for judges and clerks of election. If at such election a majority of the votes cast are for such extension, the mayor shall issue a proclamation announcing that fact, and from thenceforth the limits of said city or town shall be enlarged as proposed. [17 G. A., ch. 169, §§ 1-3; 16 G. A., ch. 47, §§ 1-3.] [31 G. A., ch. 9, § 23.]

A resolution providing for the submission of the question of extending the boundaries to the vote of the electors is simply a step to an election, and citizens in general have no right to be heard on the question of the adoption of such reso-

lution. *Moore v. City Council*, 119-423.

The legality of the action of the council with reference to the extension of city limits may be tested by an action of *certiorari*. *Ibid.*

SEC. 616. Taxation of lands.

The mere temporary occupancy and use for agricultural purposes of annexed land will not prevent its being subject to municipal assessments. *Allen v. Davenport*, 107-90.

The exemption of agricultural lands, owned in tracts of ten acres, or more, from city taxes, does not apply to property which is used for city residence purposes. *Windsor v. Polk County*, 109-156.

SEC. 622. Severance—application. When the inhabitants of a part of any town or city, whether the same is or is not laid out in lots and blocks, desire to have the part thereof in which they reside severed therefrom, they may apply by petition in writing, signed by a majority of the resident property holders of that part of the territory of such city or town, to the district court of the county, which petition shall describe the territory proposed to be severed, and have attached thereto a plat thereof, and shall name the person or persons authorized to act in behalf of the petitioners in the prosecution of said petition. Where the property sought to be severed has not been subdivided into lots or blocks and there are no owners residing upon any portion of the same, the petition may be signed and the proceedings maintained in like manner by a majority of the owners of the property sought to be severed. [C. '73, § 440; R., § 1048.] [31 G. A., ch. 19.]

This section does not require that the reasons for desiring a severance shall be stated, and it evidently is not intended that the ordinary rules of pleading shall apply in such cases. *Luick v. Belmont*, 109-361.

It is for the court to determine whether control over the territory proposed to be severed is important to the proper exercise of police powers on the part of the city, and whether if desirable for residence purposes it is likely to be so occupied in the future; and the finding of the court or jury will not ordinarily be disturbed in the absence of a showing of abuse of discretion. If however the interest of the city in retention of the territory is only for the purpose of deriving taxes therefrom, the severance should be granted. *Johnson v. Forest City*, 129-51.

Difference in the rate of assessments between property within the corporate limits and outside property will not be a ground for severing territory which by reason of its use is not subjected to city taxation. *Hanson v. Cresco*, 132-533.

In such a proceeding, the question as to how the territory came to be annexed to the corporation is immaterial. *Ibid.*

The fact that a portion of the territory proposed to be severed is necessary for sewer outlets, garbage disposal, and the location of a pest house, will not make such severance improper in view of the fact sewers may be maintained through territory outside of the corporate limits, and outside property may be held by the municipality for garbage disposal and location of a pest house. *Ibid.*

SEC. 625. Trial—commissioners appointed.

On an application to have territory detached from a city on the ground that the land included therein was not platted and was used exclusively for agricultural purposes and not needed for any possible increase of city population, held, that it did not sufficiently appear that the land was

not needed for the city and that it would not be presumed that it would be taxed unreasonably, and the judgment of the court on a verdict of the jury that the territory should not be severed was sustained. *Christ v. Webster City*, 105-119.

SEC. 633. Proclamation—notice. The mayor, or, in case there is no mayor, the president of the council, shall at once issue a proclamation giving notice of such election, of the question submitted to the electors,

and of the time and place of holding the election, which proclamation shall be published, once each week, for four consecutive weeks in some newspaper published in such city or town, and, if there is none published therein, then such proclamation shall be published by posting a copy thereof in five public places within the corporate limits of such city or town, one of which shall be on the door of the mayor's office. [C., '73, § 436.] [31 G. A., ch. 9, § 24.]

CHAPTER 2.

OF ORGANIZATION AND OFFICERS.

SECTION 641. Wards. Cities may be, by the council thereof, divided into wards, new ones created, or the boundaries changed, but in all cases, whether it be the creation of wards or the changing of the boundaries thereof, the same shall be laid off, as nearly as may be, in a rectangular form, conforming the lines to the center of the streets or alleys, and giving to each ward, as far as practicable, an equal population; but in cities of the second class the number shall not be increased beyond five nor decreased to less than two. [18 G. A., ch. 26; C., '73, § 520; R., § 1092.] [32 G. A., ch. 26, § 1.]

The city council has power to create new wards by ordinance but not by resolu-

tion. *Cascaden v. Waterloo*, 106-673.

SEC. 642. Regular elections.

The residence of an elector, if an unmarried man, having no other home, is in the ward in which he rooms, and not in

that of the boarding house at which he takes his meals. *State v. Savre*, 129-122.

SEC. 645. Repeal—council—how composed. That section 645 of the supplement to the code be repealed and the following enacted in lieu thereof:

"City and town councils shall be composed as follows: In cities, two councilmen at large and one councilman from each ward; in towns, five councilmen at large." [32 G. A., ch. 26, § 2.]

SEC. 646. Repeal—election of councilmen—terms of office. That section six hundred and forty-six (646) of the code be repealed and the following enacted in lieu thereof.

"On the organization of a city or town or on its re-organization after the change of its class, or at the first regular municipal election hereafter, a council shall be elected as follows, except that in those cities of the second class that elect a mayor in odd numbered years, the term of those councilmen and officers expiring in 1908, is extended one year; in those cities of the second class that elect a mayor in even numbered years, the term of those councilmen and officers expiring in 1909, is extended one year; and at the municipal election at which a mayor is elected in 1909 or 1910, as the case may be, the council shall be elected in accordance with the provisions of this act: By the election of two councilmen at large, but if any city embraces within its limits the whole or part of two or more townships, two of which contain one thousand or more electors, only one of the councilmen at large shall be chosen from any one township. There shall also be elected at the same time one councilman from each ward, who shall be chosen by the electors residing within the limits thereof. Thereafter, the successors of such councilmen at large and ward councilmen and officers shall be chosen at the regular biennial elections and shall hold office for two years.

In towns in which a mayor is elected in the even-numbered years the officers and councilmen shall be elected under the provisions of this act in the year 1910, and the councilmen and officers to be elected in 1908 shall be elected for a term of two years, and the term of councilmen and officers whose terms expire in 1909 shall be extended one year. In towns in which a mayor is elected in odd-numbered years the officers and councilmen shall be elected under the provisions of this act in 1911, and the councilmen and officers to be elected in 1908 shall be elected for a term of three years. The councilmen and officers to be elected in 1909 shall be elected for two years, and the term of councilmen and officers whose term expires in 1910 shall be extended one year. All town offices elected in 1910 or 1911, as the case may be, and thereafter under the provisions of this act, shall be elected for the term of two years." [32 G. A., ch. 26, § 3.]

SEC. 647. Repeal—elective officers in cities of first class. That section six hundred and forty-seven (647) of the code be repealed and the following enacted in lieu thereof:

"In all cities of the first class there shall be elected biennially a mayor, solicitor, treasurer, auditor, city engineer, assessor, and in cities where there is no superior court a police judge." [32 G. A., ch. 26, § 4.]

SEC. 648. Repeal—elective officers in cities of second class. That section six hundred and forty-eight (648) of the code is hereby repealed and the following enacted in lieu thereof:

"In cities of the second class there shall be elected biennially a mayor, solicitor, treasurer and assessor, except that in cities of four thousand population or less, the solicitor shall be appointed by the council." [32 G. A., ch. 26, § 5.]

SEC. 649. Repeal—elective officers in towns. That section six hundred and forty-nine (649) of the code is hereby repealed and the following enacted in lieu thereof.

"In towns there shall be elected, biennially, a mayor, treasurer and assessor." [32 G. A., ch. 26, § 6.]

SEC. 651. Repeal—officers appointed by council. That section six hundred and fifty-one (651) of the code is hereby repealed and the following enacted in lieu thereof:

"In all cities and towns, the council, at its first meeting after the biennial election, shall appoint a clerk; and in cities of four thousand population or less, shall appoint a solicitor." [32 G. A., ch. 26, § 7.]

SEC. 652. Repeal—officers appointed by the mayor. That section six hundred and fifty-two (652) of the code is hereby repealed and the following enacted in lieu thereof:

"The officers to be appointed by the mayor shall be as follows:

1. The mayor of each city or town shall appoint a health physician, street commissioner and a marshal who shall be ex-officio chief of police, and may also appoint one or more deputy marshals. In cities and towns he shall appoint as many policemen as the council, by general ordinance, shall direct, and such officers shall hold their positions during the pleasure of the mayor. He shall also appoint such officers as shall be provided by ordinance. He may also, in cases of emergency, appoint such number of special policemen as he may think proper, reporting such special appointment to the council at its next regular meeting. All such special appointments to continue in force until such meetings, unless sooner terminated by the mayor. In cities having a board of police and fire commission, policemen shall be appointed as provided in the act creating such board.

2. In cities of the first class, he shall appoint when deemed necessary, a wharf master. If there is a board of public works, such board shall appoint the street commissioner." [32 G. A., ch. 26, § 8.]

The marshal in towns, being an appointee of the mayor, a contract between the city council and a person to act as marshal at a stipulated salary is not valid. *Baxter v. Beacon*, 112-744.

SEC. 654. Police matrons—appointment—number. In cities having a population of twenty-five thousand or more, for each station-house provided therein for the detention or imprisonment of women or children under arrest, the mayor may, and in cities having a population of thirty-five thousand or over shall appoint one or more women, residents of the city, as police matrons, who shall be over thirty years of age. The appointees shall be, so far as applicable, subject to the same regulations and restrictions as policemen, and hold their positions during good behavior, unless by reason of age or infirmity they become incapacitated to perform the duties of the position. [25 G. A., ch. 15, §§ 2, 3, 5.] [27 G. A., ch. 18, § 1.]

A city may by ordinance provide for the appointment of a police matron, without regard to statutory authority, and may by contract fix her compensation at a different rate than that fixed by statute. *Daniels v. Des Moines*, 108-484.

SEC. 654-a. Police matrons—appointment—compensation. The provisions of the law as it appears in section six hundred fifty-four (654) of the supplement to the code, and section six hundred seventy-two (672) of the code, are also made applicable to cities acting under special charters. [32 G. A., ch. 27.]

SEC. 655. Other officers. Cities and towns may, by general ordinance, provide for the appointment, by the mayor, of such additional officers, including superintendent of markets, harbor-masters and port wardens, usual and proper for the regulation and control of navigation, trade or commerce, or needful and proper for the good government of the city or town, or the due exercise of its corporate powers, and fix their term of office, as they may deem necessary. [16 G. A., ch. 33, §§ 1, 2; C., '73, §§ 514, 524, 528; R., §§ 1084, 1095, 1098.] [32 G. A., ch. 26, § 9.]

SEC. 657. Repeal—removal of appointive officers. That section six hundred and fifty-seven (657) of the code be repealed and the following enacted in lieu thereof.

"All persons appointed to office in any city or town may be removed by the officer or body making the appointment, but every such removal shall be by written order which shall give the reasons therefor and be filed with the city clerk." [32 G. A., ch. 26, § 10.]

SEC. 658. Mayor—powers and duties. In cities and towns, the mayor shall have powers and perform duties as follows:

1. *Executive officer—magistrate.* He shall be a conservator of the peace, and, within the limits of the same, shall have all the powers conferred upon sheriffs to suppress disorders. He shall be the chief executive officer thereof, and it shall be his duty to enforce all regulations and ordinances; he may, upon view, arrest any one guilty of a violation thereof, or of any crime under the laws of the state, and shall, upon information supported by affidavit, issue process for the arrest of any person charged with violating any ordinance of the city; shall supervise the conduct of all corporate officers, examine into the grounds of complaint made against them, and cause all neglect or violation of duty to be corrected, or report the same to the proper tribunal, that they may be dealt with as provided by law. [C., '73, §§ 506, 519, 537; R., §§ 1085, 1091, 1102, 1105.]

Par. 1. Executive officer — magistrate: Where the mayor of a town causes the arrest of a property owner for resisting eviction from a portion of the premises occupied by him, which is claimed by the

town as a street, the official position of the mayor will not relieve him from liability if the arrest is wrongful and without jurisdiction. *Young v. Gormley*, 120-372.

2. **Office.** He shall keep an office at some convenient place in the city or town, to be provided by the council, and keep the corporate seal thereof in his charge. [16 G. A., ch. 58; C., '73; § 518; R., § 1091.]

Par. 2. Office: Where a city fails to furnish a proper office for its mayor he may furnish one and collect the actual

and reasonable expense thereof from the city. *Hill v. Clarinda*, 103-409.

3. **Signature.** He shall sign all commissions, licenses and permits granted by the authority of the council, and do such other acts as by law or ordinance may require his signature or certificate. [16 G. A., ch. 58; C., '73, § 518; R., § 1091.]

4. **Other duties.** He shall also perform such other duties compatible with the nature of his office as the council may from time to time require. [C., '73, § 519; R., § 1091.]

5. **Repeal—mayor—powers and duties.** That paragraph five (5) of section six hundred and fifty-eight (658) of the supplement to the code be repealed and the following enacted in lieu thereof:

“He shall be the presiding officer of the council with the right to vote only in case of a tie.” [32 G. A., ch. 26, § 11.]

Par. 5. Presiding officers — vote: The mayor is the presiding officer of the city council when acting as a board of review for the equalizing of taxes. *Frost v. Board of Review*, 113-547.

The right of the mayor to a casting vote is limited to cases where there is in fact a tie. *State v. Alexander*, 107-177.

Under the Code of '73, the mayor of a city of the second class, being a member of the city council, though only voting in case of tie, held, that he must be included with the council in determining whether a proposition was carried by a three-fourths vote. *Griffin v. Messenger*, 114-99.

6. **Report.** He shall, at the first regular meeting of the newly elected council in April, and at such other times as he may deem expedient, report to it concerning the municipal affairs of the city or town, and recommend such measures as to him may seem advisable. [C., '73, § 534; R., § 1105.]

7. **Hold police court.** Until a police judge or judge of superior court shall be elected and qualified in cities entitled to elect such officer, he shall have all the powers and jurisdiction and shall hold the police court in such manner as is required of such judge. [C., '73, § 547; R., § 1121.]

8. **Station-houses for women.** In all cities containing a population of twenty-five thousand or more, he shall designate one or more station-houses within such city for the detention or imprisonment of all women and children under arrest in said city, and see that provisions are made by which the rooms or cells set apart for them shall be separate from and out of sight of the rooms or cells in which male prisoners are imprisoned. [25 G. A., ch. 15, § 1.]

SEC. 658-a. Legalizing certain proceedings. That all acts, motions, proceedings, resolutions and ordinances heretofore passed or adopted by the council of any city, including cities acting under special charter, and incorporated towns in the state on the supposition that the mayor was not a member of such council, and which would conform to the law if the mayor had not been a member of said council, shall for all purposes from the date of such act, motion, proceeding, resolution or ordinance, be considered as valid and legal as they would have been had the mayor not been a member of such body. [29 G. A., ch. 224, § 1.]

SEC. 659. Clerk—duties.

The clerk is to keep an accurate record of proceedings under the supervision of the council, and the council, on hearing the record read by the clerk, may correct it. The council has the control of the

record of its proceedings, and until such record is approved it is open to such modifications as may be necessary to truthfully exemplify what has been done. *Mann v. LeMars*, 109-251.

SEC. 660. Treasurer—duties.

The preference given to warrant holders by this section applies only as between warrants issued in any given year. Holders of warrants for the expenses of one year have no claim on the funds of a sub-

sequent year, at least until the expenses of the latter year are paid. *Phillips v. Reed*, 107-331. And see *Phillips v. Reed*, 109-188.

SEC. 661. Assessor—duties—deputies—officer — supplies. All assessors elected by cities and towns shall perform the same duties as township assessors. They may appoint such number of deputies as the council shall authorize. Except that in cities of the first class having a population of sixty thousand or over the board of supervisors of the county shall furnish the assessor with supplies and an office. And said assessor shall appoint such number of deputies as the board of supervisors may authorize, such appointments to be approved by the said board. If any city or town is situated in two or more counties, the assessor shall make returns of the assessment to the proper county. [19 G. A., ch. 110; 18 G. A., ch. 201, §§ 1, 2; 16 G. A., ch. 6; C., '73, § 390.] [29 G. A., ch. 30, § 1.] [32 G. A., ch. 26, § 12.]

SEC. 662. Marshal—duties.

The town council is given no power to appoint a marshal. *Baxter v. Beacon*, 112-744.

A marshal arresting a person without warrant will be liable in damages for false

arrest if he does not take the prisoner before a magistrate and make complaint before him. *Stewart v. Feeley*, 118-524.

SEC. 663. Deputy marshals—duties.

A deputy marshal held not to be a peace officer under the provisions of § 4109 of Code of '73, and therefore not entitled to

fees for the arrest of vagrants under 23 G. A., ch. 43. *Twinam v. Lucas County*, 104-231.

SEC. 666. Other officers—powers and duties.

A street commissioner has apparent authority to grade the streets, and if he does so in a case where the grading is unlawful, and his acts are known to the city council and not objected to, his authority will be presumed and the city will be liable. *Brown v. Webster City*, 115-511.

The act of the city engineer or chief of

fire department in directing a water company as to the pressure to be maintained at certain hydrants or in certain districts does not amount to a waiver of the terms of a contract between the company and the city as to the water pressure to be maintained. *Cedar Rapids Water Co. v. Cedar Rapids*, 117-250.

SEC. 668. City and town councils—powers and duties. All legislative and other powers granted to cities and towns shall be exercised by the councils, except those conferred upon some officer by law or ordinance. They shall perform the duties required in this code including the following:

1. *Organization.* The members of such council shall, on the first Monday after their election, assemble and organize the council. [C., '73, § 522; R., § 1093.]

2. *Quorum.* In all cities or towns, a majority of the whole number of members to which such corporation is entitled, including the mayor, shall

be necessary to constitute a quorum. [17 G. A., ch. 9; C., '73, §§ 511, 522; R., §§ 1081, 1093.]

3. *Meetings.* They shall determine the time and place of holding their meetings, which shall at all times be open to the public, and, in the absence of the mayor or clerk, shall appoint a temporary chairman or clerk from their own number, which appointment shall be entered of record. [C., '73, § 524; R., § 1095.]

4. *Special meetings.* The mayor or any three members of the council shall call special meetings by notice to each of the members, personally served, or left at his usual place of residence, of which service a record shall be made by the clerk. [C., '73, § 524; R., § 1095.]

5. *Rules—journal.* They shall determine the rules of their own proceedings, and keep a journal thereof, which shall be open to the inspection and examination of any citizen. [C., '73, § 522; R., § 1093.]

6. *Attendance of members.* They may compel the attendance of absent members in such manner and under such penalties as they may prescribe. [C., '73, § 522; R., § 1093.]

7. *Seal.* Each council shall cause to be provided a seal, in the center of which shall be the name of the city or town, and around the margin the words, "city seal" or "town seal," as the case may be, which shall be affixed to all transcripts, orders or certificates which it may be necessary or proper to authenticate. [C., '73, §§ 454, 523; R., §§ 1047, 1094.]

8. *Election of officers.* All appointments or elections of officers, except for the purpose of filling vacancies, in offices not filled by election by the council, shall be made *vica voce*, and the concurrence of a majority of the whole number of members of the council shall be required. On the vote resulting in an election or appointment, the name of each member and for whom he voted shall be recorded. [18 G. A., ch. 146, § 3; C., '73, § 493; R., § 1134.]

9. *Filling vacancies.* In selecting persons to fill vacancies in offices not filled by election by the council, it shall vote by ballot, and the person receiving a majority of the votes of the whole number of members shall be declared elected to fill such vacancy. [19 G. A., ch. 124, § 2.]

10. *Terms of officers.* They shall fix by ordinance the terms of service, not exceeding one year, except in cities holding biennial elections, where such term shall not exceed two years, of all officers appointed or elected, whose terms are not prescribed by law. [C., '73, §§ 514, 524, 528; R., §§ 1084, 1095, 1098.]

11. *Powers of officers.* They shall prescribe by ordinance the powers to be exercised and duties to be performed by the officers appointed or elected, so far as such powers and duties are not defined by law. [C., '73, §§ 514, 524-5, 528; R., §§ 1084, 1095, 1098, 1695.]

12. *Police force.* They shall have power to establish a police force, and to organize the same under the general supervision of the marshal, and to provide one or more station-houses. [C., '73, §§ 525, 542; R., §§ 1116, 1695.]

13. *Control of finances.* They shall have the management and control of the finances and all the property, real and personal, belonging to the city or town. [C., '73, § 524; R., § 1095.]

14. *Members not interested.* No member of any council shall, during the time for which he has been elected, be appointed to any municipal office which shall be created, or the emoluments of which shall be increased, during the term for which he shall have been elected; nor shall he be interested, directly or indirectly, in any contract or job for work, or the profits thereof, or services to be performed for the corporation. [C., '73, § 490; R., § 1122.]

15. *Provide for custody of women and children.* In cities having a population of twenty-five thousand inhabitants or more, the council shall appropriate annually such sums as may be necessary for the arrangements needed to secure separate care and confinement in the station-houses of all women and children under arrest, and for the appointment, salary and maintenance of police matrons. [25 G. A., ch. 15, § 6.]

16. *Appropriations.* In cities of the first and second class, the council shall make the appropriation for all the different expenditures of the city government for each fiscal year at or before the beginning thereof, and it shall be unlawful for it or any officer, agent or employe of the city to issue any warrant, enter into any contract, or appropriate any money, in excess of the amount thus appropriated, for the different expenses of the city, during the year for which said appropriation shall be made. Any such city shall not appropriate, in the aggregate, an amount in excess of its annual legally authorized revenue; but nothing herein shall prevent such cities from anticipating their revenues for the year for which such appropriation is made, or from bonding or refunding their outstanding indebtedness. The council of such cities shall advertise in at least two newspapers published in said cities for three weeks, two insertions for each week, for bids for furnishing all supplies of every kind for the several departments of the city, not required to be advertised for by the board of public works; said advertisements to be published two weeks before the beginning of each fiscal year. [22 G. A., ch. 4.] [32 G. A., ch. 28.]

Par. 1. Organization: In exercising their powers in respect to the control of utilities in which the city or town enjoys a proprietary interest, the governing bodies may, in the absence of statutory restrictions, delegate all functions purely ministerial or administrative to committees of their own members, by whose action the corporation will be bound as absolutely as though these bodies had acted directly. *Burge v. Rockwell City*, 120-495.

Ordinarily all members of a committee should be notified of the time and place of its proposed meeting, even though a majority will control. The minority ought to have an opportunity of being heard. *Ibid.*

A committee having authority to make a contract, has also authority to change the terms thereof. *Ibid.*

Par. 4. Special meetings: A meeting of the council may be called by the mayor or any three members of the council, and at such called meeting all legitimate business may be considered. If all the members attend such meeting, failure to give notice thereof is immaterial. *Moore v. City Council*, 119-423.

Par. 8. Election of officers: A record showing the election of an officer is not conclusive where it shows proceedings inconsistent with such election. *State v. Alexander*, 107-177.

The mayor cannot cast the deciding vote in case of a tie in the election of an officer. *Ibid.*

The method of voting by the city council in the election of officers rests very largely within the discretion of the majority, and

the fact that the mayor, with the approval of the majority of the council, refuses to allow a member to change his vote will not invalidate the election of the person thus declared to be elected. *Mann v. Le-Mars*, 109-251.

As the appointment of a marshal in towns is with the mayor, and not with the council, held that a contract made with the council to act as marshal on a salary named was invalid. *Baxter v. Beacon*, 112-744.

Par. 14. Members not interested: Where the council of a city was by statute authorized to fix the salaries of city officers, but the members of the council were forbidden to vote upon any question in which they were directly or indirectly interested, held, that the action of the members of the council in increasing their salaries was unlawful and that in receiving the increased salaries thus voted to themselves they were guilty of a misdemeanor in doing an act forbidden by law. *State v. Shea*, 106-735.

A contract for sale of lumber to a city for sidewalks, etc., by a member of the city council is void. *Bay v. Davidson*, 133-688.

Par. 16.- Appropriations: The object of this subdivision requiring expenditures only as the result of appropriations, is to place municipal corporations on a cash basis, preventing the accumulation of a floating indebtedness. *Windsor v. Des Moines*, 110-175.

Notwithstanding the provisions of Code § 660 that warrants which have been indorsed "not paid for want of funds" shall

be paid in order of their presentation, warrants for the expenses of one year do not take priority over the warrants for the expenses of a subsequent year with reference to the funds available for payment of the expenses of the latter year. *Philips v. Reed*, 107-331.

The effect of the previous statutory provision that warrants should be paid in the order of presentation was to create a contract with the warrant holders which could not be impaired by subsequent legislation. *Ibid.*

SEC. 669. Compensation of councilmen—how paid. Councilmen in cities of the first class shall be paid an amount prescribed by ordinance, not in excess of two hundred and fifty dollars per annum, which shall be in full compensation of all services of such councilmen of every character connected with their official duties; and in all other cities and towns they shall receive not to exceed one dollar each for every regular or special meeting, and in the aggregate not exceeding fifty dollars in any one year; but in such cities and towns the members shall be paid in addition to the foregoing, for services as members of the board of review, an amount not exceeding one dollar for each session of not less than three hours, and the compensation for services as members of the board of review shall be paid out of the county treasury. [22 G. A., ch. 24, § 1; C., '73, § 505; R., § 1095.] [28 G. A., ch. 17, § 1.]

The compensation to be paid to a councilman is fixed by statute, and it cannot be increased either by direct payment or

indirectly through the medium of profit on the sale of goods. *Bay v. Davidson*, 133-688.

SEC. 672. Compensation of police matrons.

If a police matron is appointed under statutory provisions, her compensation cannot be affected by contract, but to avail herself of this rule it must appear that she was appointed in virtue of the statute.

The city need not necessarily act under the statute in making such appointment, and if it does not, a contract regulating her compensation will be valid. *Daniels v. Des Moines*, 108-484.

SEC. 673. Fees of marshal and deputy.

The county is not liable for statutory fees of the city marshal in liquor seizure

cases. *Des Moines v. Polk County*, 107-525.

SEC. 674. Compensation of assessors and deputies. City and town assessors and their deputies shall receive the same compensation as township assessors, which shall be determined in the same manner and payable from the county treasury. Except, that in cities of the first class having a population of sixty thousand or over the compensation of the assessor shall not be more than fifteen hundred dollars per annum, to be fixed by the board of supervisors, and that of the deputies at not more than two dollars and fifty cents (\$2.50) per calendar day, Sundays excepted, to be fixed by the board of supervisors. [C., '73, § 390.] [29 G. A., ch. 30, § 2.]

SEC. 675. Salaries in lieu of fees.

Where salaries are provided for police judge and marshal, the city becomes entitled to the fees thereof in criminal cases, and may recover the same in an action against the county. *Des Moines v. Polk County*, 107-525.

A statute granting certain cities the power to fix the compensation of mayors by ordinance, and limiting the salary to the amount so fixed, held not to take effect in any particular city until passage of an ordinance therein adopting that plan of compensation. *State v. Olinger*, 109-669.

SEC. 676. Compensation of other officers.

Special policemen at elections, appointed under the provisions of Code § 1125, are not entitled to compensation from either

the city or the county as no provision for such compensation is made under the statute. *Mousseau v. Sioux City*, 113-246.

CHAPTER 2-A.

OF BOARD OF POLICE AND FIRE COMMISSIONERS IN CERTAIN CITIES OF THE FIRST CLASS.

SECTION 679-a. Board created. That there is hereby created and established a board of police and fire commissioners in cities of the first class and cities under special charter which, according to any state or national census heretofore or hereafter taken, are shown to have a population of more than twenty thousand. [29 G. A., ch. 31, § 1.] [32 G. A., ch. 29, § 1.]

SEC. 679-b. Commissioners—term—vacancies. Said board of police and fire commissioners shall consist of three members, who shall be citizens of the state of Iowa and who shall have been residents of the city in which they are appointed for more than five years next preceding their appointment; they shall, except as hereinafter specified, hold their office for six years and until their respective successors have been appointed and qualified. All vacancies in such board by death, resignation, removal, or for any other cause, shall be filled as soon as practicable in the same manner as provided for appointment. Said commissioners shall receive no compensation for their services. [29 G. A., ch. 31, § 2.]

SEC. 679-c. Commissioners must qualify. Before entering upon the duties of their office each of said commissioners shall take and subscribe an oath, which shall be filed and kept in the office of the city clerk, to support the constitution of the United States and of the state of Iowa, to obey the laws, and in all of his official acts and judgments to aim only to secure and maintain an honest and efficient police and fire force, free from partisan distinction or control, and to perform the duties of his office to the best of his ability, and shall execute a bond payable to the city in which he is appointed, in the penal sum of five thousand dollars, with sureties to be approved by the city council of said city. The expense for said bond shall be paid by said city. [29 G. A., ch. 31, § 3.]

SEC. 679-d. Mayor to appoint—terms—how selected—chairman—quorum—removal. Immediately upon the taking effect of this act the mayor of such city shall appoint said board of police and fire commissioners, who shall be confirmed by the city council, and the said commissioners so appointed shall hold their office, one of them until the first Monday in April, 1904, one of them until the first Monday in April, 1906, and one of them until the first Monday in April, 1908; and on the last Monday in March, 1904, and on the same day in each even numbered year, thereafter, the mayor shall appoint one commissioner in such city to take the place of the commissioner whose term of office expires the first Monday in April following such appointment, and the members so appointed shall serve for the term of six years following the said first Monday in April. The chairman of the board for each biennial period shall be the member whose term first expires. The said commissioners shall be selected from the two leading political parties, so that, as far as practicable, two members of the board shall be members of the dominant political party and one member of the board shall be a member of the political party next in numerical strength, as shown by the votes cast at the last state or national election. And any commissioner who during his term of office becomes a candidate for or accepts any other place of public trust or emolument, or who during the same period knowingly consents to his nomination for any office elective by the people, or fails to publicly decline the same within twenty days succeeding such nomination, shall be deemed to have thereby vacated his

office, and a successor shall be appointed as provided in this act. The majority of said board shall constitute a quorum for the transaction of business. Any of said commissioners may be removed for misconduct or malfeasance in office, by the mayor of said city, with the consent and approval of a majority of the city council. [29 G. A., ch. 31, § 4.]

SEC. 679-e. Board to conduct examinations—results certified—preference given. Said board shall, on the first Monday of April and October of each year, or oftener if they shall deem it necessary, under such rules and regulations as it may prescribe, hold examinations for the purpose of determining the qualifications of applicants for positions on the police and fire force of said city, which examinations shall be practical in their character and shall relate to those matters which will fairly test the fitness of the persons examined to discharge the duties of the position to which they seek to be appointed; such examination shall cover the physical, as well as other qualifications of the applicants. Said board shall, as soon as possible after such examinations, certify to the chief of police and the chief of the fire department the names of the ten persons who, according to its records, have the highest standing as a result of said examination, and all vacancies which occur in the police and fire force prior to the date of the next regular examination shall be filled from said list so certified; provided, however, that should said list for any cause become reduced to less than three, then the chief of police or the chief of the fire department, as the case may be, may temporarily fill a vacancy until the next examination of the board.

In all examinations and appointments under the provisions of this act honorably discharged soldiers, sailors or marines of the regular or volunteer army or navy of the United States shall be given a preference, if otherwise qualified. [29 G. A., ch. 31, § 5.]

SEC. 679-f. Police and fire departments—officers—salaries—clerk of board—record. The officers of the police force in said city shall be a marshal who shall be *ex officio* chief of police, and shall be appointed by the mayor of said city, and such other officers as the city council may designate; and the officers of the fire department shall be chief of the fire department, who shall be appointed by the board of police and fire commissioners, and such other officers as the city council may designate. The city council of said city shall fix the salary of the marshal and of the chief of the fire department, and shall fix the number of policemen and firemen for the police and fire force, and shall fix the salaries to be paid to each. The city council shall also provide a suitable room in which the said board of police and fire commissioners may hold its meetings, and the board may appoint a clerk, whose salary shall be fixed by the city council. Said board shall keep a record of all its meetings and proceedings. [29 G. A., ch. 31, § 6.] [32 G. A., ch. 29, § 2.]

SEC. 679-g. Appointments—how and by whom made. The law as it appears in section six hundred and seventy-nine-g (679-g) of the supplement to the code is hereby amended so that the same shall read as follows. "The chief of police shall appoint the police force for said city and the chief of the fire department shall appoint the fire force for said city." [29 G. A., ch. 31, § 7.] [32 G. A., ch. 29, § 3.]

SEC. 679-h. Removals and discharges—appeal. All police officers and policemen, except the chief of police, and all firemen, including the chief of the fire department, shall be subject to removal by the board of police and fire commissioners for misconduct or failure to perform their duty, under such rules and regulations as may be adopted by said board whenever said board shall consider and declare said removal necessary for

the proper management or discipline of said department; but the chief of police or the chief of the fire department may peremptorily suspend or discharge any member of his force for misconduct or neglect of duty or disobedience of orders; provided, that any person so suspended or discharged, within five days thereafter may appeal to said board and said board shall investigate the causes of his removal or discharge, and if the same are found insufficient, he shall be reinstated.

The board shall have the power to enforce the attendance of witnesses and the production of books and papers and to administer oaths in the same manner and with like effect and under the same penalties as in the case of magistrates exercising civil or criminal jurisdiction under the statutes of Iowa. [29 G. A., ch. 31, § 8.] [32 G. A., ch. 29, § 4.]

SEC. 679-i. Present officers continued in office. The present chief of the fire department and the members of the police and fire department of each of the cities affected by this act, and the acts of which it is amendatory, other than the chief of police shall be continued in their present positions without further appointment or examination subject, however, to all rules and regulations adopted for the government of said departments under this act and the provisions of chapter thirty-one (31), acts of the twenty-ninth (29th) general assembly. [32 G. A., ch. 29, § 5.]

SEC. 679-j. Qualifications of appointees—political contributions. No person shall be appointed or employed on the police or fire force of said city who is not a citizen of the United States and who has not been a resident of said city for more than one year next preceding said appointment, and who is not able to read and write the English language, and who is not of good moral character, or who is addicted to the use of intoxicating liquor as a beverage. No member of said police or fire force shall directly or indirectly contribute any money to any person for nomination or election purposes, and no person shall be appointed to or removed from said police or fire forces on account of his political beliefs. [29 G. A., ch. 31, § 9.]

SEC. 679-k. Penalty. Any person violating the provisions of this act shall be guilty of a misdemeanor, and upon conviction shall pay a fine not to exceed one hundred dollars (\$100), or be imprisoned in the county jail not to exceed thirty days. [29 G. A., ch. 31, § 10.]

SEC. 679-l. Board of public works. In any city having a population of thirty thousand or more the council may by ordinance establish a board of public works and in cities having a population of fifty thousand or more, there is hereby created a board of public works. Such board of public works shall consist of two members residents of the city, to be appointed by the mayor, and upon the establishment of said board one member shall be appointed for two years, and one for three years, and their successors shall be appointed for three years. The members shall hold office until their successors are appointed and qualified. The mayor shall have the power to remove any member of the board of public works for cause at any time. Vacancies shall be filled by the mayor. No member of the council or city official shall be a member of such board. The provisions of this section shall not affect the terms of those now constituting the board of public works in those cities in which a board of public works has heretofore been established by ordinance, but the successors to such members shall be appointed under the provisions of this act. [32 G. A., ch. 26, § 13.]

CHAPTER 3.

OF ORDINANCES, COURTS AND FINES.

SECTION 680. Power to pass ordinances—penalties.

In general: An ordinance is not generally necessary to determine the action of the council in carrying out, in a particular instance, the power expressly granted to it by the legislature. *Shelby v. Burlington*, 125-343.

Where the city is authorized to exercise a power by general ordinance, an ordinance is essential before the city can act; and an ordinance may be necessary though the statute conferring the power does not specifically direct that it shall be exercised by means of a general ordinance as the statute is not specific as to the methods to be adopted in carrying out the power. But if the method to be adopted, as in the case of special assessments for street improvements, is specifically pointed out by statute, no ordinance is necessary. All that can be essential in such a case is that the city take the steps provided by the statute. *Martin v. Oskaloosa*, 126-680.

When a city provides by ordinance for the assessments of the costs of a permanent sidewalk upon abutting property, and specifies the notice to be given to owners of abutting property, the giving of such notice as required is an essential condition of the levying of the assessment upon the property. *Zalesky v. Cedar Rapids*, 118-714.

The grade of a street cannot be established or changed without an ordinance or resolution authorizing it. *Eckert v. Walnut*, 117-629; *Caldwell v. Nashua*, 122-179.

The creating or changing of the boundary of wards must be by ordinance and cannot be by resolution. *Cascaden v. Waterloo*, 106-673.

The city having the power to construct sewers and to make ordinances with reference to the preservation of the health and convenience of the people has implied authority to borrow money for the purpose of constructing a plant for the disposition of sewage. *Glocuse Sugar Ref. Co. v. Marshalltown*, 153 Fed. 620.

The invalidity of one provision of an ordinance does not necessarily render the remaining portions of the ordinance invalid. *Davenport Gas Elec. Co. v. Davenport*, 124-22.

Punishing offenses: A city has power to enact an ordinance prohibiting the keeping open on Sunday of places resorted to for the drinking of intoxicating liquors.

Such an ordinance is not inconsistent with the statutes of the state relating to the sale of intoxicating liquors. *Lovilia v. Cobb*, 126-557.

The general policy of the law being to give municipalities full power and adequate means to protect themselves against unlawful disturbances of the peace and good order within their corporate limits, an ordinance providing for the punishment of assault and battery, which does not impose a different penalty from that provided by statute, is valid. *Avoca v. Heller*, 129-227.

The power of punishing gambling being unqualifiedly conferred on the city, it has authority to provide for such punishment by ordinance not inconsistent with the statutes of the state relating to the same offense. *Blodgett v. McVey*, 131-552.

An act may be punishable under a city ordinance although its punishment is also provided for by statute, if the ordinance is not inconsistent with the statutory provision. *Neola v. Reichart*, 131-492.

The city council cannot in the exercise of its general powers pass an ordinance providing a penalty for keeping saloons open on election day, as such an ordinance would be in conflict with the state law on the same subject. (See Code § 2448.) *Iowa City v. McInnery*, 114-586.

It may be provided in an ordinance for regulating or prohibiting the running at large of dogs, that the owner of a dog shall be guilty of a misdemeanor in allowing it to run at large unmuzzled. *Sibley v. Lastrico*, 122-211.

Under the authority to provide for the safety of its inhabitants a city has authority to pass an ordinance requiring bicycles on the streets after dark to carry lights. *Des Moines v. Keller*, 116-648.

The violation of a municipal ordinance enacted by the authority of the state is a crime and proceedings for its punishment are criminal. *Ewing v. Webster City*, 103-226.

Violation of ordinance negligence per se: Where the owner of a horse or his employee in charge thereof leaves the horse unfastened in the street in violation of the provisions of an ordinance, such owner is liable to one who is injured in consequence of the horse running away. *Healy v. Johnson*, 127-221.

SEC. 681. Adoption of ordinances.

In general: Omissions and irregularities in the adoption of an ordinance may be cured by a legalizing act. *Marion Water Co. v. Marion*, 121-306.

Failure to comply with a directory statute with reference to the recording of ordinances does not affect their validity. *Allen v. Davenport*, 107-90.

An ordinance which it is within the power of the city to pass will not be declared void in a *quo warranto* proceeding. *State v. Nebraska Tel. Co.*, 127-194.

Title: The requirement that an ordinance shall not contain more than one subject which must be expressed in the title is a limitation on the power of the council to enact ordinances, and an ordinance passed in violation of it is inoperative for want of power. *Marion Water Co. v. Marion*, 121-306.

The title of an ordinance describing it as relating to obstructions of or injury to streets, alleys and sidewalks, sufficiently covers a prohibition as to the leaving of horses in the streets without being properly fastened. *Healy v. Johnson*, 127-221.

Where the granting of certain rights and privileges to a telephone company is the subject matter expressed in the title

of an ordinance, the grant of the use of the streets is sufficiently covered by such title. *State v. Nebraska Tel. Co.*, 127-194.

An ordinance "concerning misdemeanors" may include provisions as to keeping open a place of business on Sunday. *Lo-vilia v. Cobb*, 126-557.

The title of "an ordinance to regulate bicycles" is sufficient to cover provisions requiring riders of bicycles to carry a sufficient light after dark. *Des Moines v. Keller*, 116-648.

Amendment or repeal: Except as to rights acquired under an ordinance which a repeal cannot destroy or impair, the power of the city council to repeal ordinances is no less broad than its power to enact them. *Snouffer v. Cedar Rapids & M. C. R. Co.*, 118-287.

In amending, repealing or suspending an ordinance with reference to a matter which can be regulated by ordinance only, the council must act by ordinance and cannot proceed by resolution. *Cascaden v. Waterloo*, 106-673.

The amending ordinance must contain the entire ordinance or section revised or amended. *Ibid.*

SEC. 683. Adoption—majority vote. No resolution or ordinance for any of the purposes hereinafter set forth shall be adopted without the concurrence of a majority of the whole number of members elected to the council, to-wit:

1. To pass or adopt any by-law or ordinance;
2. To pass or adopt any resolution or order to enter into a contract;
3. To pass or adopt any ordinance for the appropriation or payment of money; but in towns, by-laws, ordinances, and the resolutions and orders set forth in this section, shall require for their passage or adoption a concurrence of four councilmen, or of three councilmen and the mayor. On the passage or adoption of every by-law, ordinance, and every such resolution or order, the yeas and nays shall be called and recorded. No money shall be appropriated except by ordinance. In towns money may be appropriated by resolution. [18 G. A., ch. 146, §§ 2, 3; C., '73, §§ 489, 493; R., §§ 1122, 1134.] [27 G. A., ch. 19, § 1.]

The concurrence of a majority of the whole number of the council is required for the adoption of a resolution. *Cascaden v. Waterloo*, 106-673.

In the absence of any statutory or charter restrictions a majority of a quorum of the council is sufficient for the adoption of a resolution. *Thurston v. Huston*, 123-157.

Except as otherwise specified by statute the proceedings of the council are to be governed by the parliamentary rules generally recognized by the courts as applicable to the action of legislative bodies. *Ibid.*

The ayes and nays on the adoption of an ordinance must be entered at large on the

minutes. *Cook v. Independence*, 133-582.

The yeas and nays should be called and recorded on the passage of an ordinance authorizing the execution of a contract. *Marion Water Co. v. Marion*, 121-306.

Where the record shows the presence of a majority of the council and the vote on the passage of the ordinance is recorded as unanimous, it sufficiently appears that the ordinance is adopted by the concurrence of a majority of the council. *Ibid.*

If the record shows the names of the members present, and that the roll was called and the vote was unanimous, it sufficiently appears that the members recorded as present voted in the affirmative. *Ibid.*

Where the record of the adoption of the ordinance gives the names of the members of the council present and shows that there was a corresponding number of votes in favor of the passage of the ordinance and none against it, it is not essential that there be an express record also of the names of those voting in the affirmative. *State v. Nebraska Tel. Co.*, 127-194.

Where the minutes of the action of the council show the names of the members

voting, it will be presumed that the vote was by yeas and nays. *German Ins. Co. v. Manning*, 95 Fed., 597.

A majority vote in favor of the motion to reconsider an affirmative vote on a resolution to adopt and approve a street improvement as made according to contract, held to render the resolution of approval ineffectual. *Wingert v. Tipton*, 108 N. W. 1035; 111 N. W. 432.

SEC. 684. Two-thirds vote.

The mayor being a member of the council in cities of the second class, under Code of '73, held that in determining whether there had been a three-fourths vote of the council to dispense with a rule as to read-

ing an ordinance on three successive days, the mayor should be included, although not entitled to a vote except in cases of a tie. *Griffin v. Messenger*, 114-99.

SEC. 685. Signing by mayor—veto—passing over veto.

The requirement that the mayor sign resolutions or ordinances of the city council before they take effect is mandatory, and the successor of the mayor in office when the ordinance or resolution is passed has no power to make it valid by his signature. *Altman v. Dubuque*, 111-105.

There is a broad distinction between the requirement that the mayor shall sign ordinances simply as a means of authentication, and a requirement that he shall sign as evidence of his approval. The former may well be said to be ministerial and directory only, while the latter is undoubtedly mandatory. *Moore v. City Council*, 119-423.

The legislature has not authorized the

signing of ordinances by the temporary chairman of the meeting of the council at which the ordinance is adopted. *Moore v. City Council*, 119-423.

Action of a city council in allowing a claim against the city is a "resolve," and requires the signature of the mayor. Without such signature, or facts making the resolve valid notwithstanding the want of approval, the action of the council is invalid. *Stutsman v. McVicar*, 111-40.

Under prior statutory provisions held that in cities of the second class having less than 8,000 inhabitants, the signature of the mayor to a resolution passed by the council was not necessary. *Bennett v. Marion*, 106-628.

SEC. 686. Recording—publishing.

A resolution or ordinance making a special assessment may be proven by parol evidence. *Edwards & Walsh Const. Co. v. Jasper County*, 117-365.

Publication as required by statute is essential to the validity of an ordinance, and held in a particular case that the publication in an extra edition of a daily paper,

only a few copies of which were issued and sold, was not such publication as contemplated by law. *State v. Omaha & C. B. R. & B. Co.*, 113-30.

Until a resolution or ordinance becomes effective there is no authority for its publication. *Moore v. City Council*, 119-423.

SEC. 687. Published ordinances.

The provision for the publication of ordinances of a city does not contemplate

the necessity of a re-adoption of the ordinances. *Gallagher v. Jefferson*, 125-324.

SEC. 692. Procedure—appeal—judicial notice.

The town or city court has always taken judicial notice of the ordinances of the municipality in which it sits, as it stands in the same relation to these as does the state court to public statutes, and under the provision of this section the district court on appeal is required likewise to take judicial notice of such ordinances. *Scranton v. Danenbaum*, 109-95.

In a prosecution for violation of an or-

dinance the ordinance must be pleaded. Courts will not take judicial notice of an ordinance, except in case of appeals from inferior tribunals. *State v. Olinger*, 109-669.

On an appeal from a conviction before the mayor for violation of an ordinance, the defendant may waive a jury trial. *Lovilia v. Cobb*, 126-557.

SEC. 694-a. Appropriation authorized—purposes. Cities and towns, including cities under special charter, may by resolution appropriate money out of the general fund to pay a membership fee and dues in the League of Iowa Municipalities not to exceed annually five dollars for each one thousand population or fraction thereof of such city or town or city under special charter, and to pay the actual expenses of not more than two delegates to the meetings of such league. [32 G. A., ch. 30.]

CHAPTER 4.

OF GENERAL POWERS.

SECTION 695. Bodies corporate—name—authority.

Extent of powers: Municipal corporations have and can exercise such powers only as are expressly granted by their charters or legislative acts, or are necessarily implied therefrom, or are necessarily incidental thereto. *Aldrich v. Paine*, 106-461.

The power to levy taxes may be delegated to a municipal corporation, but not to a board or tribunal not elected by the people of the municipality. *State ex rel. v. Mayor, etc., of Des Moines*, 103-76.

The city council, having the right to order a work of public improvement and having adopted an ordinance and resolution directing the work according to certain specifications, acquires jurisdiction over the property involved. *Allen v. Davenport*, 107-90.

A taxpayer may maintain an action to enjoin the carrying out of a resolution increasing the number of wards in a city, there being no authority to change the wards by resolution. *Cascaden v. Waterloo*, 106-673.

A municipality cannot exercise a power unless it be expressly conferred by the legislature or absolutely necessary to carry out some other power expressly conferred. In case of doubt the existence of the power will be denied. *Cherokee v. Perkins*, 118-405.

A municipal corporation will not be allowed to repudiate a contract which has been carried out by the other party, on the ground that such party stood in a fiduciary or official relation to the corporation with which the contract was made, without surrendering the benefits received. Nor will a taxpayer be allowed to maintain an action in the interest of the corporation to recover the compensation paid to a contractor under such contract. *Kagy v. Independent Dist.*, 117-694.

Any contract of a municipal corporation for which there is no express or implied statutory authority is invalid. *Cedar Rapids Water Co. v. Cedar Rapids*, 118-234.

A person dealing with a municipal corporation is held to know the extent of the power of such corporation, and if, with such knowledge, he obtains a grant for which there is no legal authority, or which is in violation of an express statute, he does so at his peril and obtains no right which is enforceable in the courts. *Ibid.*

Such a contract cannot be held to give color of right to the privilege thus attempted to be granted. *Ibid.*

A municipal corporation may be said to possess a dual character. In one capacity it is a property holder and mere business agency, and is charged with the management of the financial and business interests of the municipality; in another capacity it is an arm of sovereignty, and is charged with legislative and governmental powers. Contracts wrongfully made by it in the first capacity are as obligatory and inviolable as contracts made between private individuals, but, in the absence of statutory authority, any contract or agreement, whether in the form of an ordinance or otherwise which directly or indirectly surrenders or materially restricts the exercise of the governmental or legislative function or power, may at any time be terminated or annulled by the municipality, though such action may, under some circumstance, involve liability for compensation to persons who have acted upon and in good faith of the validity of such contract. *Snouffer v. Cedar Rapids & M. C. R. Co.*, 118-287.

Liability for acts of officers: A municipal corporation is not as a general rule liable for the negligence or carelessness of its agents or servants in handling its fire apparatus. The service performed is one in which it has no particular interest, and from which it derives no special benefit in its corporate capacity. Such employes are not agents and servants of the city, but act as officers charged with a public service, for whose negligence no action will lie against the city. Where the powers conferred are governmental in nature

the city cannot be made liable for the execution thereof. *Saunders v. Ft. Madison*, 111-102.

The city is not liable for the acts of its officers in making an arrest without legal cause or excuse, and unlawfully, cruelly and inhumanly treating such person by imprisoning him in an unsuitable place. *Lahner v. Inc. Town of Williams*, 112-428.

Where a city contracting for macadamizing streets undertakes to furnish the use of a steam roller in charge of its own employes it is liable for damages by fire set out by sparks by reason of the defective condition of the engine. *McMahon v. Duouque*, 107-62.

A city is thus liable where it is engaged in doing with its own instrumentality that which it was authorized to contract with another to do at the expense of the abutting lot owners, and the work was voluntarily assumed and carried on for compensation. *Ibid.*

The city having power to make excavations in the streets is liable for the wrongful acts of its officers or agents in making such excavations. *Millard v. Webster City*, 113-220.

A municipal corporation is not estopped by the acts of its officers done without authority. *Cedar Rapids Water Co. v. Cedar Rapids*, 107-250.

The city having power to prevent injury or annoyance from any nuisance, has no authority to permit the stretching of a wire over the public street on which a performance is permitted, resulting in injury to persons in the street. *Wheeler v. Ft. Dodge*, 131-566.

The statutory authority to provide places for the interment of the dead, and to adopt regulations for their burial will not be construed to authorize the creation and maintenance of either a public or a private nuisance. *Payne v. Wayland*, 131-659.

SEC. 696. Prevention of nuisances—regulation of slaughter houses. They shall have power to prevent injury or annoyance from anything dangerous, offensive or unhealthy, and to cause any nuisance to be abated; to provide for the destruction of weeds and other noxious growths upon any of the lots and parkings therein, and to provide for the assessment of the cost thereof to the property; to provide for the immediate seizure and destruction of tainted or unsound meat or other provisions; to establish all needful regulations as to the management of packing and slaughter houses, renderies, tallow chandleries and soap factories, bone factories, tanneries, and manufactories of fertilizers and chemicals, within the limits of such cities or towns; to regulate and restrain the deposit and removal of all offensive material and substances, and the engendering of offensive odors and sights therefrom, so as to protect the public against the same; to establish and regulate slaughter houses; and, in cities having five thousand or more inhabitants, to build and control the same. [22 G. A., ch. 16, § 1; 19 G. A., ch. 89, § 9; C., '73, §§ 456, 526; R., §§ 1057, 1096.] [27 G. A., ch. 22, § 1.]

SEC. 697. Burial of dead—cemeteries.

The provisions as to providing and regulating places for the burial of the dead are inconsistent with the acquirement of a fee by the lot owner. *Anderson v. Acheson*, 132-744.

SEC. 698. Filling or draining lots.

This section relates to water standing in depressions or pools and not to large areas of low, wet or swampy land. The authority of the council is limited to obviating the nuisance occasioned by the standing of stagnant water. *Aldrich v. Paine*, 106-461.

SEC. 699. Drainage preserved.

The provisions of this section are intended to restore the natural courses for surface or other water in case it has been obstructed by grading or filling. *Aldrich v. Paine*, 106-461.

The city cannot require the owner of

property abutting on a street to construct drains to carry off the surface water accumulated by improvements of the street. The provisions of this section relate to natural water courses. *Hoffman v. Muscatine*, 113-332.

SEC. 700. Regulations—licenses—engineers—examinations. They shall have power to regulate, license and tax hotels, restaurants and eating houses; to define by ordinance who shall be considered transient merchants; to regulate, license and tax their sales and those of auctioneers, bankrupt and dollar stores, and the like, but the exercise of such power shall not interfere with sales made by sheriffs, constables, coroners, marshals, executors, guardians, assignees of insolvent debtors or bankrupts, or any other person required by law to sell real or personal property; to regulate, license and tax peddlers, house movers, plumbers, bill-posters, itinerant doctors, itinerant physicians and surgeons, junk dealers, scavengers, pawnbrokers, and persons receiving actual possession of personal property as security for loans, with or without a mortgage or bill of sale thereon, and to provide for the examination and licensing engineers of stationary engines; to license and regulate all keepers of intelligence or employment offices, bureaus and agencies, as well as all persons doing the business of seeking employment for others, or procuring or furnishing employers for others, or giving information whereby employes or employers may be obtained. [22 G. A., ch. 16, § 1; 19 G. A., ch. 89, § 1, 16 G. A., ch. 24; C., '73, §§ 462-3; R., § 1063.] [27 G. A., ch. 21, § 1; 27 G. A., ch. 22, § 2.] [32 G. A., ch. 31.]

This provision does not cover the case of an itinerant dentist. *Cherokee v. Perkins*, 118-405.

The city may, by ordinance, impose a license upon one engaged in taking orders for goods on his own account to be secured by him from a wholesale house and shipped to him for delivery to the purchasers, he paying for the goods at wholesale and collecting the retail price. *Cedar Falls v. Gentzer*, 123-670.

The business of a traveling optician who merely prescribes and collects for eye glasses to be furnished to his patients is not a merchant who must procure a license as an itinerant merchant. *Waukon v. Fisk*, 124-464.

One engaged simply in soliciting orders or making delivery of goods on behalf of another is not a peddler, nor a transient merchant. *State v. Nelson* 128-740.

While a city has power to define by ordinance who shall be considered transient merchants, it cannot by ordinance declare those persons to be merchants who by universal acceptance in the business world are not such. *Ibid.*

Under an ordinance imposing a license on peddlers with packs or with vehicles, a license cannot be exacted of one who simply solicits orders for goods as an employe, and occasionally makes delivery of the same while so soliciting. *State v. Smithart*, 128-631.

SEC. 700-a. Public dance halls, etc.—regulation—license. Cities and towns shall have power to regulate, define, tax, license or prohibit public dance halls, skating rinks, fortune-tellers, palmists, and clairvoyants. [32 G. A., ch. 32, § 1.]

SEC. 700-b. Bill-boards—regulation—license. Cities and towns shall have the power to regulate the construction and location of bill-boards and the power to license and tax the owners thereof or persons maintaining the same. [32 G. A., ch. 32, § 2.]

SEC. 702. Billiard saloons—gaming.

The city may by ordinance provide for the punishment of gambling, although the same act constitutes a criminal offense un-

der the statutes of the state. *Blodgett v. McVey*, 131-552.

SEC. 703. Circuses—theaters—shows.

The city having power to regulate, license or prohibit shows and exhibitions, may render itself liable by permitting a

performance on a wire stretched over the street resulting in injury to persons in the street. *Wheeler v. Ft. Dodge*, 131-566.

SEC. 704. Gambling houses—disorderly houses. They shall have power to suppress, restrain and prohibit gambling houses, disorderly houses, houses of ill fame, opium or hop joints, or places resorted to for

the use of opium or hasheesh, and punish the keepers thereof, and persons resorting thereto. [C., '73, § 456; R., § 1057.] [28 G. A., ch. 18, § 1.]

SEC. 707. Dogs.

The power to regulate or prohibit the running at large of dogs may be exercised by making it a misdemeanor on the part of the owner to allow a dog to run at large unmuzzled. *Sibley v. Lastrico*, 122-211.

SEC. 711. Fires—electric apparatus—fire limits.

A building erected in violation of an ordinance fixing fire limits may be torn down or removed without any judicial proceeding whatever. But one who is erecting a building with the intention of complying with the law has a reasonable time within which to put his building into the condition required by ordinance. *Lemmon v. Guthrie Center*, 113-36.

SEC. 716-a. Levy for fire fund. That any city of the second class may levy a tax in any one year of not more than one mill on the dollar of the assessed valuation of the taxable property within the corporate limits for the purpose of maintaining a fire department; and the money so raised shall constitute a fire fund, and shall be applied to no other purpose. [27 G. A., ch. 20, § 1.]

SEC. 717. Markets.

A city may require that any person buying or selling by weight within the city limits shall have the commodity bought or sold weighed on the public scales and the fact that a grain buyer has a place of business remote from the public scales so that he suffers a disadvantage by being compelled to have the grain which he buys weighed at such scales will not be a ground for enjoining the enforcement of such ordinance. *Ewing v. Webster City*, 103-226.

lishing and regulating a city market is specifically given and this power necessarily carries with it the power to prohibit the sale or weighing of commodities elsewhere than at the place established as such public market. *State v. Smith*, 123-654.

The establishment of a public market on one of the streets of a city does not constitute a nuisance *per se*, even though it results in temporary or partial obstruction of the street. *Ibid.*

The power to enact an ordinance estab-

SEC. 720. Heating plants—water or gas works—electric plants. They shall have power to purchase, establish, erect, maintain and operate, within or without the corporate limits of any city or town, heating plants, waterworks, gas works or electric light or electric power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus and other requisites of said works or plants, and lease or sell the same. They may also grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than twenty-five years, and may renew or extend the term of such grant; but no exclusive franchise shall be thus granted, extended or renewed. No such works or plants shall be authorized, established, erected, purchased, leased or sold, or franchise extended or renewed, unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election. [26 G. A., ch. 13; 22 G. A., ch. 11, §§ 1, 2; 22 G. A., ch. 26; C., '73, §§ 471-3.] [28 G. A., ch. 19, § 1.]

Although the city attempts to give an exclusive monopoly to a water company, that fact will not nullify the portions of the contract giving the company the right to furnish water. *Kimball v. Cedar Rapids*, 100 Fed. 802.

Under § 471 of the Code of 1873, the city council might by affirmative vote of four-fifths of the members authorize the construction of waterworks. *Marion Water Co. v. Marion*, 121-306.

But the passage of an ordinance by the

requisite vote approving a contract for the furnishing of water to the city does not constitute an authorization of the erection of waterworks as required by the statute. *Ibid.*

Notwithstanding the failure of a council to authorize the erection of waterworks as provided by statute, the company with whom a contract to furnish water to the city is made may recover under such contract for water actually furnished. *Ibid.*

The assignee of such a contract may recover against the city for water furnished under its provisions. *Ibid.*

Under a contract to furnish water to the city the water company is not limited in its recovery of compensation for water furnished to the proceeds of the five mill water tax authorized by statute. *Marion Water Co. v. Marion*, 121-306.

The city may have power to contract for a water supply for a long term of years, but does not necessarily have the right to fix the rate in advance to be paid under such contract for a long period. It may, however, make the contract exclusive. *Davenport Gas & Elec. Co. v. Davenport*, 124-22.

The grant of a franchise to build and operate waterworks is limited to twenty-five years, and no privilege under such grant can continue for a longer time. *Cedar Rapids Water Co. v. Cedar Rapids*, 118-234.

The power to contract for water for

municipal purposes and for the rate which shall be charged other consumers is to be exercised in the interests and for the benefit of the inhabitants of the city, including public corporations, and a provision in such contract that water be furnished free to public schools is not invalid. *Independent School Dist. v. LeMars City Water & Light Co.*, 131-14.

Every consumer of water is privy to such contract to such an extent as to be entitled to enforce the provisions for his benefit. *Ibid.*

A contract to furnish free water to public schools is not affected by the fact that a sewerage system is subsequently installed for school buildings, making necessary a larger supply of water. *Ibid.*

The water supplied to a city or town at public expense may properly be used in sprinkling the streets. *McAllen v. Hamilton*, 129-329.

Under statutory provision authorizing cities to contract with a company for the erection of waterworks and furnishing water for public use, and providing that the city might levy a tax to pay for water taken for public use, not in excess of five mills on the dollar for any one year, held that the power to levy the tax was not a limitation on the power to contract, and that the city might be liable for the contract price in excess of the proceeds of the tax. *Fort Madison Water Co. v. Ft. Madison*, 110 Fed. 901; *Ft. Madison Water Co. v. Ft. Madison*, 114 Fed. 292.

SEC. 721. Question submitted—notice—how given. The council may order any of the questions provided for in the preceding section submitted to vote at a general election, or at one specially called for that purpose; or the mayor shall submit said question to such vote upon the petition of twenty-five property owners of each ward in the city, or of fifty property owners of any incorporated town. Notice of such election shall be given in two newspapers published in said city or town, if there are two, if not, then in one, once each week for at least four consecutive weeks. But if no such newspaper is published within the limits of the corporation, then such notice may be given by posting copies thereof in three public places within the limits of said corporation, two of which places shall be the postoffice and the mayor's office of such city or town. The party asking for a renewal or extension of such franchise shall pay the cost incurred in holding such election. [22 G. A., ch. 11, § 4.] [29 G. A., ch. 32, § 1.]

Where the question submitted was whether the town should issue bonds for the purpose of erecting, maintaining and operating a system of waterworks, held that this was not a submission of the question whether such waterworks should be constructed by the town, and the adoption of the proposition did not authorize such construction. The precise question to be passed upon should be placed in plain terms before the voters. *Brown v. Carl*, 111-608.

Also held that the incorporation into such question of the proposition that the proceeds of the bonds should be used to some extent in the maintenance of the waterworks was improper, and being in the nature of an inducement to the voter to cast an affirmative ballot, vitiated the acceptance of the proposition. *Ibid.*

Under Code § 955, providing for notice of application for waterworks franchises in cities under special charter, which section contains provisions similar to this

section, held that the notice provided for is one not only advising the property owners that the franchise is desired, but also of the very terms of such franchise. *Hall v. Cedar Rapids*, 115-199.

SEC. 722. Condemning land. They shall have power to condemn and appropriate so much private property as shall be necessary for the construction and operation of said works or plants, and for the purpose of constructing and maintaining dams across the non-navigable waters and water courses of the state in forming reservoirs and sources of water to supply such water works and plants, as provided for the condemnation of land for city purposes; to issue bonds for the payment of the cost of establishing the same, including the cost of land condemned on which to locate them, and to confer by ordinance the power to appropriate and condemn private property for such purpose upon any individual or corporation authorized to construct and operate such works or plants. [23 G. A., ch. 13, § 1; 22 G. A., ch. 10, § 1; 22 G. A., ch. 11, §§ 2, 3; C., '73, § 474.] [31 G. A., ch. 20.]

The city is authorized to condemn lands to protect, maintain and continue its water supply. *La Plante v. Marshalltown*, 111 N. W. 816.

SEC. 724. Rates—taxes. They shall have power, when operating such works or plants, to assess from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water, gas, heat, light or power, reasonable rents or rates fixed by ordinance, and to levy a tax, as hereafter provided, to pay or aid in paying the expenses of running, operating, renewing, extending and repairing such works or plants owned and operated by such city or town, and the interest on any bonds issued to pay all or any part of the cost of their construction. [22 G. A., ch. 11, § 2; C., '73, § 475.] [28 G. A., ch. 19, § 1.] [29 G. A., ch. 33, § 1.]

SEC. 725. Regulation of rates and service. They shall have power to require every individual or private corporation operating such works or plant, subject to reasonable rules and regulations, to furnish any person applying therefor, along the line of its pipes, mains, wires, or other conduits, with gas, heat, water, light or power, and to supply said city or town with water for fire protection, and with gas, heat, water, light or power for other necessary public purposes, and to regulate and fix the rent or rate for water, gas, heat, light or power; to regulate and fix the rents or rates of water, gas, heat and electric light or power; to regulate and fix the charges for water meters, gas meters, electric light or power meters, or other device or means necessary for determining the consumption of water, gas, heat, electric light or power, and these powers shall not be abridged by ordinance, resolution or contract. [22 G. A., ch. 11, § 2; 22 G. A., ch. 16, § 1; C., '73, §§ 473, 475.] [28 G. A., ch. 19, § 1.]

A contract by which the city is required to pay excessive rental for hydrants for a period of years held invalid. *Hall v. Cedar Rapids*, 115-199.

SEC. 727. Public library—bequests—conditions of—how enforced. Cities and towns shall have power to provide for the formation and maintenance of a free public library, open to the use of all the inhabitants, under proper regulations, and may purchase land and erect buildings, or hire buildings or rooms, suitable for that purpose, and provide for the compensation of the necessary employes; may receive, hold or dispose of any and all gifts, donations, devises and bequests that may be made to them for the purpose of establishing, increasing or improving any such library; and when the conditions of such gifts, donations, devises, and bequests have once been accepted by the council, the performance of such conditions may

be enforced at the instance of the library board by mandamus and by other due process of law; and the council may apply the profits, proceeds, interest and rents accruing therefrom in such manner as will best promote the prosperity and utility of such library; but no money can be appropriated for such purpose until the electors of such city or town shall, at a general or special election, have voted for the establishment of such library. [C., '73, § 461.] 29 G. A., ch. 34, § 1.]

SEC. 727-a. Special charter cities. This act shall apply to cities acting under special charter. [29 G. A., ch. 34, § 2.]

The power to levy taxes for library purposes cannot be vested by the legislature in the board of library trustees not elected by the people, but appointed by the mayor

with the advice and consent of the council. *State ex rel. v. Mayor, etc., of Des Moines*, 103-76.

SEC. 728. Library trustees. In any city or town in which a free library has been established, there shall be a board of library trustees, consisting of nine members, to be appointed by the mayor, by and with the approval of the council. Of said trustees first appointed, one-third shall hold office for two, one-third for four, and one-third for six, years, from the first day of July following their appointment; and, at their first meeting, shall cast lots for the respective terms, reporting the result of such lot to the council. Biennially thereafter, before the first day of July, the mayor shall appoint, by and with the approval of the council, three trustees to succeed the trustees retiring on the following first day of July, each of whom shall hold office for six years from such first day of July, and until his successor is appointed and qualified. Vacancies occurring in the board shall be filled by appointment by the mayor, such appointees to fill out the unexpired term for which the appointment is made. *Bona fide* citizens and residents of the city or town, male or female, over the age of twenty-one years, are alone eligible to membership. The removal of any trustee permanently from the city shall render his office as a trustee vacant. Members of said board shall receive no compensation for their services. Provided that in cities and incorporated towns where a college or university is located, it shall be lawful for the city or town and such institution of learning to jointly establish and maintain a public library for their mutual benefit, upon such terms and conditions as regards maintenance, control, appointment of library trustees and other incidents of joint control as may in any lawful manner be mutually agreed upon between them; but no city or town may undertake to contribute toward the maintenance more than the amount produced by a rate of taxation therefor allowed by law, and no persons shall be appointed or confirmed as library trustees other than such having the qualifications required by law. [25 G. A., ch. 41, § 1.] [30 G. A., ch. 24, § 1.]

SEC. 729. Powers. Said board of library trustees shall have and exercise the following powers: To meet and organize by the election of one of their number as president of the board, and by the election of a secretary and such other officers as the board may deem necessary; to have charge, control and supervision of the public library, its appurtenances and fixtures, and rooms containing the same, directing and controlling all the affairs of such library; to employ a librarian, such assistants and employes as may be necessary for the proper management of said library, and fix their compensation; but, prior to such employment, the compensation of such librarian, assistants and employes shall be fixed for the term of employment by a majority of the members of said board voting in favor thereof; to remove such librarian, assistants or employes by a vote of two-thirds of such board for misdemeanor, incompetency or inattention to the

duties of such employment; to select and make purchases of books, pamphlets, magazines, periodicals, papers, maps, journals, furniture, fixtures, stationery and supplies for such library; to authorize the use of such libraries by non-residents of such cities and towns and to fix charges therefor; to make and adopt, amend, modify or repeal by-laws, rules and regulations, not inconsistent with law, for the care, use, government and management of such library and the business of said board, fixing and enforcing penalties for the violation thereof; and to have exclusive control of the expenditures of all taxes levied for library purposes as provided by law, and of the expenditure of all moneys available by gift or otherwise, for the erection of library buildings and of all other moneys belonging to the library fund. Said board shall keep a record of its proceedings. [26. G. A., ch. 50, § 1.; 25 G. A., ch. 41, § 2.] [28 G. A., ch. 20, § 1.] [31 G. A., ch. 14, § 1.]

SEC. 729-a. Powers of library trustees. Said board of library trustees shall have power to contract with the trustees of the township or the board of supervisors of the county in which the library is situated, or of adjacent townships or counties, or with the trustees or governing bodies of neighboring towns or cities not having library facilities for the public, to loan the books of said library, either singly or in groups, upon such terms as may be agreed upon in such contract. [31 G. A., ch. 14, § 1.]

[By section 1, chapter 14, acts of the 31 G. A., the above section was designated as added to section 729, as paragraph 729-d, but as other sections would appear before the above, in their regular order, it was deemed best to number the additional matter as section 729-a.]

SEC. 729-b. Library buildings—condemnation of ground for location of. In any city or town in which a free library has been or may hereafter be established, the board of library trustees shall have the power to condemn real estate in the name of the city or town for the location and construction of library buildings and for branch libraries, and for the purpose of enlarging the grounds for such library buildings and branch libraries. [29 G. A., ch. 35, § 1.]

SEC. 729-c. Condemnation proceedings. Proceedings for condemnation of land as contemplated in this act, shall be in accordance with the provisions of the code relating to taking private property for works of internal improvement, except that no attorney's fee shall be taxed or allowed for the owner of the real estate. [29 G. A., ch. 35, § 2.]

SEC. 729-d. Special charter cities. This act shall apply to cities acting under special charter. [29 G. A., ch. 35, § 3.]

SEC. 729-e. Powers of library trustees. Whenever a local county historical association shall be formed in any county having a free public library, the trustees of such library are hereby authorized to unite with such historical association and to set apart the necessary room and to care for such articles as may come into the possession of said association; said trustees are also authorized to purchase necessary receptacles and materials for the preservation and protection of such articles as are in their judgment of a historical and educational nature and pay for the same out of the library fund. [32 G. A., ch. 33.]

SEC. 730. Library fund—treasurer. All moneys received and set apart for the maintenance of such library shall be deposited in the treasury of such city or town to the credit of the library fund, and shall be kept by the treasurer separate and apart from all other moneys, and paid out upon the orders of the board of trustees, signed by its president and secretary. Provided that in any city or incorporated town where is maintained jointly by the city or town and an institution of learning a free public library, for the support and maintenance of which both the city and the

institution of learning contribute, the library trustees may elect a library treasurer therefor, and it shall be the duty of the city treasurer to pay over to said library treasurer any and all library taxes that may be collected by him monthly. [25 G. A., ch. 41, § 3.] [30 G. A., ch. 24, § 2.]

SEC. 730-a. Contracts, elections and ordinances legalized. Where cities or incorporated towns and institutions of learning have established or contracted to establish public libraries to be maintained and controlled jointly as contemplated by this act, all contracts, elections, ordinances and other proceedings made, held or passed in the manner provided by law are hereby declared as valid and obligatory upon the parties thereto as though the same had been made, held or passed after the taking effect of this act. [30 G. A., ch. 24, § 3.]

SEC. 732. Repeal—library tax—additional support. That the law as it appears in section seven hundred and thirty-two (732) of the supplement to the code be and the same is hereby repealed and the following enacted in lieu thereof:

“Sec. 732. The board of trustees shall, before the first day of August in each year, determine and fix the amount or rate, not exceeding three mills on the dollar in all cities and incorporated towns having a population of not more than six thousand (6000), and not exceeding two mills on the dollar in all other cities, of the taxable valuation of such city or town, to be levied, collected and appropriated for the ensuing year for the maintenance of such library; and in cities and towns also the amount or rate, not exceeding three mills on the dollar of the taxable valuation of such city, to be levied, collected and appropriated for the purchase of real estate and the erection of a building or buildings thereon for a public library, or for the payment of interest on any indebtedness incurred for that purpose, and for the creation of a sinking fund for the extinguishment of such indebtedness; and shall cause the same to be certified to the city council, which shall levy such tax or so much thereof as it may deem necessary to promote library interests for each of said purposes so determined and fixed, and certify the percentum thereof to the county auditor, with the other taxes for said year.”

In any city or town under special charter where the mulct law is in force, the city or town council may, in addition to the tax hereinbefore provided for, appropriate not to exceed twenty per cent. (20%) of the total amount of the mulct tax received by said municipality, for the support the maintenance of its free public library including the purchase of books and furniture. [30 G. A., ch. 25.] [31 G. A., ch. 21.]

[The last sentence of the above section, commencing with the word in, after the word year, in line 19, was enacted by the 30 G. A. as additional to section 732, but the 31 G. A., by chapter 21, repealed section 732 of the supplement to the code, without referring to or specifically repealing the amendment enacted by the 30 G. A., so it was deemed best to show both enactments.]

SEC. 732-a. Special charter cities. This act shall apply to cities acting under special charter. [28 G. A., ch. 22, § 2.]

[Section 732-a is section 2 of chapter 22 of the acts of the 28th G. A. Section 1 of the same chapter amended section 732 by inserting the clause, “such tax or so much thereof as it may deem necessary to promote library interests.” Section 732 was repealed by the 31 G. A., chapter 21, but nothing was done with the above section.]

SEC. 737. Plumbing—inspector. They shall have power by ordinance to prescribe rules and regulations for all plumbing connecting any building with sewers, water mains and gas pipes; and may prescribe the kind and size of materials to be used in such plumbing, and the manner in which the same shall be done; and to appoint an inspector thereof, and define his duties and powers; and to provide for the assessment of the cost

of such inspection and replacing of the pavement to the property; and to prescribe penalties for the violation of such ordinance. Nothing herein shall be construed as authorizing the annulment of any rules or regulations relating to such plumbing made by the local or state board of health, but such ordinance shall conform to and enforce the same. [26 G. A., ch. 14.] [27 G. A., ch. 22, § 3.]

SEC. 738. Repeal—sewers in towns and smaller cities. That section seven hundred and thirty-eight (738) and seven hundred and thirty-nine (739) of the code be and the same are hereby repealed. [30 G. A., ch. 26.]

SEC. 739. Repealed—regulations as to construction and use. [30 G. A., ch. 26.]

SEC. 740. Power to take property by gift or bequest—how administered. Counties, cities, towns and school corporations, are authorized to take and hold property, real and personal, derived by gifts and bequests; and to administer the same through their proper officers in pursuance of the terms of the gift or bequest; and when made for the establishing of institutions of learning or benevolence, and there is no provision made in the gift or bequest for the execution of the trust, the court having charge of the probate proceedings in the county shall appoint three trustees, residents of said county, who shall have charge and control of the same, and who shall continue to act until removed by the court. And they shall give bond as required in case of executors, to be approved in the same manner as in case of executors' bonds, and said trustees shall be subject to the orders of said court. [26 G. A., ch. 20.] [28 G. A., ch. 23, § 1.]

SEC. 741-a. Accounts—how kept—receipts and vouchers. That all cities and towns, including cities acting under special charter, shall establish and keep their accounts so the same shall exhibit a true and detailed statement of all public funds collected, received and expended on account of such municipality for any purpose, whatever, by any and all public officers, employes or other persons. Such accounts shall show the receipt, use and disposition of all public property, and the income, if any, derived therefrom, and of all sources of public income and the amount due and received from each source. All receipts, vouchers and other documents kept, or that may be required to be kept, necessary to prove the validity of every transaction and the identity of every person having any beneficial relation thereto, shall be filed and preserved in the office of the clerk or recorder as the case may be. [29 G. A., ch. 37, § 1.]

SEC. 741-b. Separate accounts. Separate accounts shall be kept for every appropriation, showing date and manner of each payment made out of the funds provided by such appropriation, the name and address of each person or corporation to whom paid, and for what purpose paid. Separate accounts shall be kept for each department, public improvement, or undertaking and for each public utility owned or operated by the said municipality. Said separate accounts for each public utility shall show the true and entire cost of the said utility and operation thereof, the amount collected annually by general or special taxation for the services rendered to the public, and the amount and character of the service rendered therefor, and the amount collected annually from private users, if any, for the services rendered to them, and the amount and character of the services rendered therefor. [29 G. A., ch. 37, § 2.]

SEC. 741-c. Annual report—publication. Each municipality shall make an annual public report, which shall contain an accurate statement, in summarized form, of all collections made or receipts of such municipality from all sources, all accounts due the public, but not collected, and all expenditures for every purpose; and a statement in detail of the cost and

operation and all income of each public utility operated or owned by the municipality. Said report shall further show in detail the entire public debt of such municipality, and the amount of debt, which the municipality may under the law contract for the year for which the report is made. Said report shall be published annually at the close of the fiscal year in at least two newspapers of general circulation in said city or town as the case may be, but if only one paper is so published, then in one, and if none be published, then by posting a copy in three public places in said city or town. [29 G. A., ch. 37, § 3.]

SEC. 741-d. City hall. Cities having a population of fifty (50) thousand or over shall have the power to erect a city hall and to purchase the ground therefor. [32 G. A., ch. 34, § 1.]

SEC. 741-e. Special tax. For the purpose of paying for the construction of such building and the purchase price of such ground, such cities shall have the power to levy upon all the property within the corporate limits of such cities and towns subject to taxation for said purposes in addition to all other taxes now provided by law, a special tax not exceeding in any one year two mills on the dollar for a period of years not exceeding twenty. [32 G. A., ch. 34, § 2.]

SEC. 741-f. Bonds. Any city desiring to construct such a building or to purchase ground therefor may issue bonds in anticipation of the special tax authorized in the preceding section. Such bonds shall be known as city hall bonds and shall be issued and sold in accordance with the provisions of chapter 12 of title V of the code of Iowa, and acts amendatory thereto. In issuing such bonds, the city council may cause portions of said bonds to become due at different, definite periods, but none of such bonds so issued shall be due and payable in less than five (5) or more than twenty (20) years from date. [32 G. A., ch. 34, § 3.]

SEC. 741-g. Question submitted. No building shall be erected under the provisions of this act unless a majority of the legal voters voting thereon vote in favor of the same at a general city election or at a special election. [32 G. A., ch. 34, § 4.]

SEC. 741-h. Notice—form. The question provided in the preceding section to be submitted may be ordered by the city council submitted to a vote at a general city election or at one specially called for that purpose. Notice of such election shall be given by publication in two newspapers published in said city once each week for not less than four consecutive weeks, and the election shall be held not less than seven nor more than ten days after the completion of such publication. The question to be submitted shall be in the following form:

Shall the city of.....erect a city hall at a cost not exceeding \$..... [32 G. A., ch. 35, § 5.]

SEC. 741-i. Repeal—acts in conflict. Chapter 27 of the acts of the thirtieth general assembly and all other acts or parts of acts inconsistent herewith are hereby repealed. [32 G. A., ch. 35, § 6.]

SEC. 741-j. Tax for buildings and grounds in cities of the second class and towns. Cities of the second class and towns shall have the power to levy a tax not exceeding three mills on the dollar upon all the property within the corporate limits of said cities and towns, excepting lots greater than ten acres in area used for agricultural and horticultural purposes for the purpose of creating a sinking fund to be used as provided in this chapter for the purchase or erection of a city building or fire station or both, and necessary ground therefor. [30 G. A., ch. 28, § 1.]

SEC. 741-k. Subsequent levies. Cities of the second class and towns are hereby authorized to purchase buildings and grounds or to erect build-

ings specified in section one (1) of this chapter and are authorized to continue the levying of the three mill tax herein provided for until the purchase price principal and interest or the cost incurred in the erection of said buildings is fully paid and discharged. [30 G. A., ch. 28, § 2.]

SEC. 741-l. Contracts—bonds or warrants. Cities of the second class and towns levying such sinking fund tax are hereby authorized to let a contract or contracts for the purchase or erection of said buildings and purchase of grounds and upon the approval and adoption of said contract or contracts as hereinafter provided to apply such sinking fund on the cost thereof and cities and towns so purchasing or constructing such buildings or grounds are authorized to pledge the proceeds of the continuing three mill levy provided for in this chapter and shall have the right to issue bonds or warrants to secure the payment of the purchase price of said buildings or grounds or the cost of constructing said buildings provided that said bonds or warrants shall bear not more than five per cent. interest per annum but no part of the general fund of such city or town shall be applied on such bonds or warrants or upon the purchase price of buildings or grounds or cost of erection of said buildings. In the payment thereof the city or town and holders of said contracts, bonds or warrants shall be restricted to the proceeds of said taxes. [30 G. A., ch. 28, § 3.]

SEC. 741-m. Question submitted. Said contract or contracts shall not be binding on said city or town until the same shall have been approved by the city or town council at a regular meeting or a special meeting called for such purpose and shall have been adopted by a majority of the electors of said city or town voting at a general or special election which shall have been duly called after thirty days notice by said city or town. Proposition to be submitted at said election and the form of ballot shall be: Shall the contract or contracts approved by the city or town council in relation to the purchase of buildings or grounds or erection of buildings be adopted? The proposition shall be printed and placed on the ballots and the voter shall designate his choice and the election shall be conducted in the manner provided in the chapter on elections. [30 G. A., ch. 28, § 4.]

SEC. 741-n. City or town councils—power to contract for use of public libraries. They shall have the power to contract with the trustees of any free public library for the use of said library by the people of the city or town not having the use of a free library, upon the same terms and conditions as those granted to residents in the city or town where the library is located, and to pay such library such an amount as may be agreed upon therefor, and to levy a tax not exceeding one mill on each dollar of taxable valuation of the city or town for payment therefor. This shall be additional to chapter four (4), title five (5) of the code. [31 G. A., ch. 14, § 4.]

SEC. 741-o. Hospital trustees. Cities having a population of over five thousand may by ordinance provide for the election at a general or special election of three hospital trustees, whose terms of office shall be six years, one to be elected each even-numbered year, but at the first election three shall be elected and hold their office, respectively, for two, four and six years, and who shall by lot determine their respective terms. [31 G. A., ch. 22, § 1.] [32 G. A., ch. 35, § 1.]

[See note under Sec. 741-r.]

SEC. 741-p. Hospital board—organization—officers—duties. The said trustees shall within ten days after their election, qualify by taking the oath of office and organize as a hospital board, by the election of one of their number as chairman and one as secretary, but no bond shall be re-

quired of them. They shall also elect a treasurer not one of their number who shall give bonds in the sum of twenty-five thousand dollars, the penalty of which may be increased by the board. The treasurer shall receive and pay out all the moneys under the control of the said board as ordered by it, but shall receive no compensation for his services. No commissioner shall receive any compensation for his services performed, but he may receive reimbursement for any cash expenses actually made for personal expenses incurred as such trustee, but an itemized statement of all such expenses and moneys paid out shall be made under oath by each of such trustees and filed with the secretary and allowed only by the affirmative vote of the full board. Said board of trustees shall be vested with authority to provide for the management, control and government of such city hospital and shall provide all needed rules and regulations for the economic conduct thereof. In the management of said hospital no discrimination shall be made against practitioners of any school of medicine recognized by the laws of the state of Iowa. [31 G. A., ch. 22, § 2.]

SEC. 741-q. Question submitted—tax—how levied and collected—hospital fund. The council of such city may by resolution submit to the qualified electors of the same at a regular or special election, the question whether there shall be levied upon the assessed property thereof a tax not exceeding three mills on the dollar in cities having a population of over twenty-two thousand not exceeding two mills on the dollar in cities having a population of over five thousand, and less than twenty-two thousand, for the purchasing of real estate for hospital purposes, and for the construction of such hospital and for maintaining the same, or for either or all of such purposes. The said proposition shall be submitted in the manner provided for similar propositions in the chapter on elections. The council shall in the resolution ordering such election, specify the rate of taxation proposed and the number of years the same shall be levied not exceeding (15) fifteen years. If a majority of the votes cast at such election on the proposition so submitted shall be in favor of the proposition for taxation the council shall levy the tax so authorized which shall be collected and paid over to the treasurer of such hospital board in the same manner as other taxes are collected. Such taxes shall be known as a "hospital fund" and shall be paid out on the order of the trustees for the purposes authorized by this act and for no other purpose, whatever. [31 G. A., ch. 22, § 3.] [32 G. A., ch. 35, § 1.]

[See note under Sec. 741-r.]

SEC. 741-r. Bonds. Whenever any city having a population of over twelve thousand five hundred shall by ordinance provide for the election of hospital trustees, and has voted a tax for a term of years not exceeding (15) fifteen years, for hospital purposes as authorized by law, the said city may issue bonds in the name of such city in anticipation of the collection of such tax in such sums and amounts as the city council thereof may deem necessary for the purposes contemplated by such tax, but such bonds in the aggregate shall not exceed the amount which might be realized by said tax based on the amount which may be yielded on the property valuation in the year in which the tax is voted, and such bonds shall mature in fifteen years from date, and shall be in sums of not less than one hundred, nor more than one thousand, dollars, bearing interest at a rate not exceeding five per cent. per annum, payable annually or semi-annually; said bonds may be payable at pleasure of city after five years and shall not be sold for less than par. Said city, after the issuance of any such bonds shall each year for 10 years before the maturity thereof, set aside out of the tax levied by it a sum equal to one-tenth of the principal thereof, which sum shall be applied after five

years from date of issue in payment of the principal whenever the amount on hand shall be sufficient to pay one or more of said bonds and each of said bonds shall provide that it is subject to this condition. [31 G. A., ch. 22, § 4.]

[By chapter 35 the 32 G. A. changed the words "twelve thousand five hundred," in sections 741-o and 741-q, respectively, to "five thousand," but made no change of the words "twelve thousand five hundred," in the above section.]

SEC. 741-s. Condemnation proceedings. If the board of hospital trustees and the owners of any property desired by them for hospital purposes cannot agree as to the price to be paid therefor, the city council of said city shall cause the same to be condemned in the manner provided for taking land for public purposes by cities. [31 G. A., ch. 22, § 5.]

SEC. 741-t. Jurisdiction of cities over hospital lands. The jurisdiction of such cities and towns shall extend over all lands used for hospital purposes without the corporate limits if so located, and all ordinances of such cities and towns shall be in full force and effect in and over the territory occupied by such hospitals. [31 G. A., ch. 22, § 6.]

SEC. 741-u. Appropriation for improvements and maintenance. In cities exercising the rights by this act, the council may appropriate each year, not exceeding five per cent. of its general fund for the improvement and maintenance of any hospital so established. [31 G. A., ch. 22, § 7.]

SEC. 741-v. Indebtedness. Cities of the second class shall be allowed to become indebted for the purposes provided in this act to an amount aggregating with all other indebtedness of the said city, in a sum not exceeding two and one-half per centum of the actual value of the property within said city, to be ascertained by the last state and county tax list previous to the incurring of such indebtedness, provided that before an indebtedness shall be contracted in excess of one and one-fourth per centum of the actual value of the taxable property ascertained as provided in section two of chapter 41 as found in section 1306-b of the supplement to the code, a petition signed by a majority of the qualified electors of such city shall be filed with the council of such city, asking that an election shall be called, stating the purposes for which the money is to be used and that the said hospital cannot be purchased, built or maintained within the limit of one and one-fourth per centum of valuation of the taxable property of such city. If two-thirds of all the electors voting at such election, vote in favor of such indebtedness at such election, the council of such city shall issue the bonds as provided in this act to the limit as herein provided. [31 G. A., ch. 22, § 8.]

CHAPTER 5.

OF THE PURCHASE AND CONSTRUCTION OF WATER WORKS.

SECTION 742. Tax—sinking fund. Cities of the first class shall have power to levy, in addition to the regular water tax authorized by law, a tax of two mills upon the dollar upon all the property within the corporate limits of said cities, excepting lots greater than ten acres in area, used for horticultural or agricultural purposes, for the purpose of creating a sinking fund, to be used as provided in this chapter for the purchase or erection of water works in such cities, or for the payment of any indebtedness incurred by such cities for water works now owned by the same. The proceeds of such two-mill levy shall be deposited in one or more solvent banks or trust companies of the city making such levy, at a rate of interest not less than

three per cent. per annum, compounded semi-annually, and payable, principal and interest, on demand, after sixty days' notice in writing. The city treasurer depositing the proceeds of such tax shall exact from the bank or trust company wherein such money is deposited a satisfactory bond, payable to the city, to be approved by the treasurer and mayor of such city, and to be filed in the office of the city treasurer. [26 G. A., ch. 1, § 1.] [27 G. A., ch. 23, § 1; 28 G. A., ch. 24, § 1.]

A city may provide for a tax to be levied before the contract for the purchase or construction of the works is entered into. The council may first determine the kind and cost of the works to be erected, the amount of tax to be levied and other incidental matters before submitting the matter to the voters. *Youngerman v. Murphy*, 107-686.

The fact that proceedings to erect and establish waterworks are irregular and the bonds issued for the erection of such works are void, does not authorize an injunction against the city, to restrain it from using and operating such works. *Ramsay v. Marble Rock*, 123-7.

SEC. 742-a. Special charter cities. This act shall apply to cities acting under special charter. [28 G. A., ch. 24, § 2.]

[Section 742-a is section two of chapter 24 of the acts of the 28 G. A. Section one of said chapter amends section 742 of the code by changing the rate of interest from four to three per cent.]

SEC. 742-b. Authority to loan—conditions. That wherever any corporation engaged in maintaining and operating a water works plant within any city of this state where the United States has or may hereafter establish a military reservation within a distance of five miles from either of the boundaries of said city and such city has either under the provisions of chapter one (1) of the acts of the twenty-sixth (26th) general assembly or of section seven hundred and forty-two (742) of the code levied taxes for the purpose of creating a sinking fund to be used for the purchase or erection of water works therein, such city shall be authorized to loan a portion not however to exceed fifty thousand dollars of the proceeds of the taxes so levied to such corporation so maintaining and operating such water works plant, with interest at a rate not less than two per cent. per annum, for a period of not more than ten years from the date of the passage of this act upon such terms as the city council of such city may approve. Provided, however, that such corporation shall apply the proceeds of every such loan to the laying of a main with the necessary attachments and usual branches to hydrants from its pumping station or other connection with its mains to the said military reservation and to make the changes in its plant which may be required to furnish the service demanded by the United States at such reservation. [29 G. A., ch. 38, § 1.]

SEC. 742-c. Reversion of funds loaned. That when the funds that have been loaned as provided in section one (1) of this act, and the interest thereon, are repaid to the city to which they belong, said funds together with all interest derived therefrom shall immediately revert to the fund for which the said taxes were levied and thereafter be used for no other purpose than as authorized by chapter one (1) of the acts of the twenty-sixth general assembly or section seven hundred and forty-two (742) of the code. [29 G. A., ch. 38, § 3.]

SEC. 742-d. Water for military reservations—how furnished. That all individuals or private corporations to which any city in this state has granted authority to erect and maintain water works with all the necessary reservoirs, mains, filters, pipes and other appurtenances in such city, including the Des Moines Water Works company now owning and operating such a plant in the city of Des Moines, shall whenever the United

States has, or may hereafter establish a military reservation within a distance of five miles from either of the boundaries of such city, be authorized to use said water works plant in said city, and the mains now or hereafter laid in the highways of said city for the purpose of furnishing water to such military reservation, such authority to continue so long as under franchises now held or hereafter granted such individuals or corporations shall be authorized to maintain and operate such water works plant in such cities. [29 G. A., ch. 207, § 1.]

SEC. 742-e. Mains in highways. The board of supervisors of any county in which such military reservation is or may hereafter be located, shall have the power to authorize any such individual or corporation to lay its mains in any of the highways of the county for the purpose of extending the same to any such military reservation. [29 G. A., ch. 207, § 2.]

SEC. 744. Purchase or erection—indebtedness heretofore incurred. Cities of the first class are hereby authorized to purchase or erect water works, under the provisions of this chapter, for the purpose of supplying said cities and the inhabitants thereof with water, and are authorized to continue the levy of the two-mill tax herein provided for until the purchase price, principal and interest, or the cost incurred in the erection of said works, or the indebtedness heretofore incurred for and on account of such works, is fully paid and discharged. [26 G. A., ch. 1, § 3.] [27 G. A., ch. 23, § 2.]

SEC. 745. Contracts—bonds—cities procuring or owning water works. Cities levying such sinking fund tax are hereby authorized to let a contract or contracts for the purchase or erection of water works, and, upon the approval and adoption of such contract or contracts as hereinafter provided, to apply such sinking fund upon the cost thereof, and cities so purchasing or constructing and those now owning such water works are authorized to pledge the proceeds of the continuing two-mill levy provided for in this chapter, and the regular water levy, and the net revenues derived from the operation of the water works, and shall have the right to mortgage or bond such works, to secure the payment of the purchase price or the cost of constructing such water works, or the cost of making necessary extensions and improvements of such water works, and such cities shall have the right to execute additional mortgage or mortgages or bonds upon such works for the purposes above set forth. Provided that said additional mortgage or mortgages or bonds shall bear not more than six per cent. interest per annum; but no part of the general fund of such city shall be applied upon such contracts, bonds or mortgage. In the payment thereof, the city and holders of said contracts, bonds or mortgages shall be restricted to the proceeds of the said taxes and the net revenues of the said water works, as hereinbefore provided; and such contract, contracts or bonds shall not bear a higher rate of interest than five per cent. per annum, payable semi-annually. Cities of the first class which have adopted or may adopt an ordinance availing themselves of the privileges conferred herein, shall in addition thereto have and possess the following powers:

A—In addition to mortgage on the water plant to secure the bonds hereinbefore authorized, the said city may in addition to the security of said mortgage and as a part thereof, grant a franchise to maintain and operate said plant on foreclosure sale under said mortgage, said franchise to become effective only on the passing of title under the said foreclosure sale and to continue for a period of not exceeding twenty-five (25) years thereafter; providing that the granting of such franchise shall be approved by a majority of the electors of said city, voting at an election thereon, which election shall be held as provided in section seven hundred and forty-six (746), supplement of the code.

B—They shall have power to issue the general bonds of the city creating an indebtedness of said city to an amount which, with its other existing indebtedness, shall not exceed five per cent (5%) of the actual value of the taxable property of said city, as shown by the last preceding assessment. The said bonds or proceeds of sale thereof to be used in the purchase or construction of a water plant, as herein provided, provided, however, that such bonds can be issued by order of the city council of said city only after a contract for the purchase or construction of a water plant and providing for the issuance of such bonds has been approved by the majority of the electors of said city voting at an election thereon to be held in accordance with the provisions of section seven hundred and forty-six (746), supplement of the code. Neither the said bonds nor the proceeds thereof shall be diverted to an other purpose than as herein provided. Said cities may purchase or contract a water plant and pay for the same partly out of the water bonds and partly out of the general bonds herein provided, or wholly out of either class of bonds or proceeds thereof, as such city may determine. The general bonds of the city herein provided shall bear interest at not exceeding five per (5%) cent per annum, payable semi-annually, and shall be payable not more than twenty (20) years after date and in the general form of bonds provided by section four hundred and three (403) of the code, with such changes as may be necessary to conform the same to this statute and the ordinances or contract of the city under which they are issued. [26 G. A., ch. 1, § 4.] [27 G. A., ch. 23, § 3.] [29 G. A., ch. 39, § 1.] [29 G. A., ch. 40, § 1.] [31 G. A., ch. 23, § 1.]

Bonds issued in pursuance of statutory provisions authorizing the levy of taxes in the future for the construction of waterworks, with a provision that when the bonds are paid by the proceeds of such tax, the waterworks shall become the property of the city, are invalid as in excess of the constitutional limitation of indebtedness. *Ottumwa v. City Water Supply Co.*, 119 Fed. 315; *City Water Supply Co. v. Ottumwa*, 120 Fed. 309.

The provisions of this section 745, as amended by 27 G. A., chap. 23, indicating the intention of the legislature to empower cities of the first class to purchase or erect waterworks and provide a plan by which the cost of such improvement may be met, held not to create an indebtedness, within the meaning of the constitution, article 11, section 3, prohibiting municipal corporations from becoming indebted to an amount in the aggregate exceeding five per cent on the value of the taxable property. *Swanson v. Ottumwa*, 118-161.

Such provisions contemplate the levying

SEC. 745-a. Repeal—acts in conflict. All acts and parts of acts, so far as the same are in conflict with the foregoing, are hereby repealed. [31 G. A., ch. 23, § 2.]

SEC. 745-b. Special charter cities. This act shall apply to cities acting under special charter. [29 G. A., ch. 40, § 2.]

[The above section is section 2, chapter 40, of the acts of the 29 G. A., making said act applicable to cities under special charters.]

SEC. 746. Question submitted. Said contract or contracts shall not be binding upon said city until the same shall have been approved by the

of a tax, payable in installments in the future, to be appropriated, as they are collected, to the payment of the amount necessary to secure the waterworks which may be provided for by contract. But as the corporation is not under obligation to pay, except as money may be provided out of the collection of such taxes, there is no such obligation as to constitute an indebtedness. *Ibid.*

Under statutory provision authorizing cities to contract with a company for the erection of waterworks and furnishing water for public use, and providing that the city might levy a tax to pay for water taken for public use, not in excess of five mills on the dollar for any one year, held that the power to levy the tax was not a limitation on the power to contract, and that the city might be liable for the contract price in excess of the proceeds of the tax. *Fort Madison Water Co. v. Ft. Madison*, 110 Fed. 901; *Ft. Madison v. Ft. Madison Water Co.*, 114 Fed. 292.

city council at a regular meeting, or a special meeting called for such purpose, and shall have been adopted by a majority of the electors of said city voting at a special election, which shall have been duly called after thirty days' notice by said city. The proposition to be submitted at said election, and the form of ballot, shall be: "Shall the contract or contracts approved by the city council in relation to the water works be adopted?" The proposition shall be printed and placed on the ballots, and the voter shall designate his choice, and the election shall be conducted, in the manner provided in the chapter on elections. [26 G. A., ch. 5, § 1.] [29 G. A., ch. 39, § 1.]

[Section 747 was repealed by chapter 41, acts of the 29 G. A., which took effect by publication March 15, 1902, while chapter 39, acts of the 29 G. A., which took effect by publication March 28, 1902, amends, or attempts to amend, said section 747, which had been repealed by chapter 41, aforesaid.]

The electors do not determine the abstract question of waterworks or no waterworks. They simply approve or disapprove of the particular contracts submitted to them. The ultimate question of the establishment of such works rests with the city council. *Youngerman v. Murphy*, 107-686.

An ordinance passed after the adoption by the electors of a proposition to grant a waterworks franchise, which differs in detail, but not substantially from the one submitting the matter to a vote, will not be invalid on account of such slight variance. *Centerville v. Fidelity Trust & Guar. Co.*, 118 Fed. 332.

SEC. 747. Trustees.

A resident and taxpayer has such interest in the matter as to be entitled to institute proceedings by *quo warranto* to test the validity of the appointment of trustees under this section. *State ex rel. v. Barker*, 116-96.

The provisions of this section, as amended by acts of 27 G. A., chap. 23, and 28 G. A., chap. 25, are unconstitutional

because they take the control and management of the waterworks away from the city council and also because they provide for the exercise by the judges of the district court of authority not judicial in its nature nor connected with the exercise of the judicial power conferred on the courts by the constitution. *Ibid.*

SEC. 747-a. Repeal—trustees—appointment—term — vacancies—compensation—bond—removal. That section seven hundred forty-seven (747) of the code as amended, be and the same is hereby repealed, and the following enacted in lieu thereof:

The water works now owned or hereafter purchased or erected by such cities shall be managed and operated by a board of water works trustees, which shall be composed of three resident electors, appointed for the term of six years by the mayor of said city. Upon the taking effect of this act, in cities now owning such water works, or upon the approval of the contract for the purchase or erection of water works by cities as herein provided, the mayor thereof shall, within ten days thereafter, appoint such board of water works trustees, the first appointees thereto to hold office for the following designated terms, namely, one for two years, one for four years, and one for six years. All vacancies occurring on said board, occasioned by expiration of term, by death, resignation or removal, shall be filled by appointment of the mayor of such city. The compensation of said trustees shall be three hundred dollars per year to each member of said board. Each of the said trustees shall execute and furnish to the city an official bond in the sum of five thousand dollars, to be approved by the mayor and filed with the city clerk. Such trustees may be removed from office for proper cause under the provisions of chapter eight (8) of title six (VI) of the code. [26 G. A., ch. 1, §§ 6, 7, 12.] [27 G. A., ch. 23, § 4.] [28 G. A., ch. 25, § 1.] [29 G. A., ch. 39, § 1.] [29 G. A., ch. 41, § 1.]

SEC. 747-b. Special charter and first class cities. All the provisions of this act shall be held and construed as applying to cities of the first class and to cities acting under special charters. [29 G. A., ch. 41, § 2.]

SEC. 748. Powers—water works fund—how disbursed. The said board of trustees shall have the power to carry into execution the contract or contracts for the purchase or erection of such water works, and to employ a superintendent and such other employes as may be necessary and proper for the operation of such works, for the collection of water rentals, and for the conduct of the business incident to the operation thereof. The said board of trustees shall require of the superintendent, and of the other employes as they may deem proper, good and sufficient bonds, the amount thereof to be fixed and approved by said board, for the faithful performance of their duty, such bonds to run in the name of the city and to be filed with the city treasurer and kept in his office. All money collected by the board of water works trustees shall be deposited at least weekly by them, with the city treasurer; and all money so deposited and all tax money received by the city treasurer from any source, levied and collected for and on account of the water works, shall be kept by the city treasurer as a separate and distinct fund. The city treasurer shall be liable on his official bond for such funds the same as for other funds received by him as such treasurer. Such moneys shall be paid out by the city treasurer only on the written order of the board of water works trustees, who shall have full and absolute control of the application and disbursement thereof for the purposes prescribed by law, including the payment of all indebtedness arising in the construction of such works, and the maintenance, operation, and extension thereof. [26 G. A., ch. 1, §§ 8, 9.] [28 G. A., ch. 25, § 2.] [29 G. A., ch. 39, § 1.] [29 G. A., ch. 161, § 1.]

SEC. 748-a. Special charter cities. That the provisions of said section, as amended, shall be applicable to cities under special charters. [29 G. A., ch. 161, § 2.]

SEC. 748-b. Special charter cities. That chapter twenty-five (25), of the acts of the twenty-eighth (28) general assembly, relating to water works, be and the same is hereby made applicable to cities under special charters. [29 G. A., ch. 162, § 1.]

[The latter portion of section 748, beginning with the words, "all money collected," is section 2 of chapter 25, acts of the 28 G. A. Section 1 of the same chapter amended section 747 of the code, which is now repealed.]

CHAPTER 6.

OF STREETS AND PUBLIC GROUNDS.

SECTION 751. Establishment—improvements.

Boundaries: The planting of trees and the construction of temporary sidewalks by an abutting owner does not constitute such assertion of title as against the city that the acquiescence therein by the city will give rise to estoppel as to the line claimed by such abutting owner to be his boundary line. *Vorhes v. Ackley*, 127-658.

The width of streets in a city is matter of proof, and the court cannot take judicial notice thereof. *Coe College v. Cedar Rapids*, 120-541.

Laying out and changing: In an incorporated town the county board of supervisors has no authority to lay out a public highway. *Philbrick v. University Place*, 106-352.

A city may by ordinance changing the course of a street give to an abutting proprietor the title to a portion thereof. *Ottumwa Brick & Const. Co. v. Ainley*, 109-386.

Dedication and acceptance: The provision of § 527 of the Code of '73 that no

street dedicated to public use in any city shall be deemed public unless accepted by ordinance is intended for the protection of a city from liability for not keeping such street in good condition. It has reference only to streets and alleys which are dedicated by the land owner and not to such as are acquired by the city by purchase or by prescription, and in the latter case no acceptance by ordinance is necessary. It seems that such provision is applicable to cities only and not to towns. *Burlington, C. R. & N. R. Co. v. Columbus Junction*, 104-110.

The dedication of a street in a plat may be subsequently accepted by a city so as to make the dedication effectual, even as against one who has in the meantime acquired title to the adjoining lot, and taken possession of the dedicated street. *Backman v. Oskaloosa*, 130-600.

A city may accept and improve a portion only of a street dedicated on a plat. *Ibid.*

Acceptance of an alley under a common law dedication may be shown by other acts than the adoption of a formal notice. It may be inferred from public use, or other acts indicative of an intention on the part of the city to treat it as a public alley. *Keokuk v. Gosgrove*, 116-189.

The approval of the plat provided for in Code § 915 does not involve the question of accepting the streets and alleys. *Giltner v. Albia*, 128-658.

Where a contract of conveyance provided that the grantor should procure the dedication of a portion of the property as a street, or that such portion be included in the sale with the understanding that the same be dedicated for street purposes, held that both parties construed the contract to mean a dedication of the streets accepted by the city. *McCormick v. Merritt*, 131-160.

Vacation: The validity of proceedings to vacate a street should be tested by certiorari and not by an equitable action to restrain. *McLachlan v. Gray*, 105-259.

The general assembly has plenary power over streets and may vacate or discontinue the public easement in them and may invest municipal corporations with this authority. *Ibid.*

While the power to vacate is not arbitrary, and must be exercised only for some public purpose, yet in a proper case it is not unlawful for the city to vacate a street for the use of a railroad company for depot purposes. So held where a street was vacated for such purpose on conditions in behalf of the city imposed on the railroad company. *Spitzer v. Runyan*, 113-619.

When a city or town plat is filed the

streets therein become county highways and on the termination of the corporate existence of the city or town pass completely under the control of the county board of supervisors. *Chrisman v. Brandes*, 112 N. W., 833.

The power to vacate a street is expressly conferred by statute, and when all property owners are affected alike by such vacation, though in different degrees, there is no ground on which to base a remedy. But in so far as the street is necessary to the free and convenient travel to and from the premises of a particular owner, his right to use the city property is an individual property right appurtenant to his premises which cannot be taken away without the payment of damages. *Borghart v. Cedar Rapids*, 126-313.

On the vacation of a street the title to the portion of land which has constituted such street does not revert in abutting owner, but remains in the city and may be disposed of for other purposes. And if a railroad company is permitted to use the land thus vacated the abutting owner has no action against a railroad company for damages for obstruction of the street. *Harrington v. Iowa Cent. R. Co.*, 126-389.

Upon vacation of a street the title thereto does not revert in the original dedicator, nor in the grantee of abutting lots. *Lake City v. Fulkerson*, 122-569.

As to vacation of a street by act of the owner in vacating a plat, see notes to § 919.

Improvements: A city whose finances will admit of doing so may pay for street improvements out of the general fund, or it may guarantee such payment. *Ottumwa Brick & Const. Co. v. Ainley*, 109-386.

The right to construct sewers to carry off the surface water and filth is usually regarded as incident to the power of maintaining the streets, but there is no provision for the construction of sewers through private property within incorporated towns, though the power to condemn for this purpose is conferred upon cities. *Alldrich v. Paine*, 106-461.

The insertion in a contract for street paving of a stipulation that it shall be kept in repair for a specified period is not invalid as in violation of the provision that repairs shall be paid out of the general fund. *Allen v. Davenport*, 107-90.

Any power attempted to be exercised with reference to street improvements under the provisions of this section must be exercised by means of a general ordinance for no provision is made by statute as to the method of exercising that power.

But so far as the power is conferred in chapter 7 of the Code the method is specifically prescribed and no ordinance is necessary. *Martin v. Oskaloosa*, 126-680.

The legislature has imposed on the city council the power of determining how the cost of street improvements shall be met and for this purpose a resolution is

sufficient. *Shelby v. Burlington*, 125-343.

In the exercise of its power to improve the streets a city may excavate the street to its full width without being liable in damages to an abutting property owner for depriving his property of its lateral support. *Talcott v. Des Moines*, 109 N. W. 311.

SEC. 753. Supervision—repair.

Supervision: The statute of limitations will not run to defeat the city in the exercise of its governmental authority with reference to streets. *Chicago, R. I. & P. R. Co. v. Council Bluffs*, 109-425.

The power given to cities and towns to control their streets, contract for their improvement, and regulate their use, is a legislative power, and the burden is not cast upon the city to show that its exercise of such power is reasonable. The presumption is in favor of its reasonableness. *Snouffer v. Cedar Rapids & M. C. R. Co.*, 118-287.

As a city has authority to care for its streets, keep them free from rubbish and prohibit stone or other material being thrown thereon, it may provide by ordinance for the punishment of persons who negligently allow stones to fall and remain upon the street, and one who, in violation of such ordinance, allows stones to fall from wagons used in transporting them, and to remain on the street an unnecessary length of time, may be liable in damages to one who is injured by reason of running into such obstruction. *Overhouser v. American Cereal Co.*, 118-417.

A municipality has the power to provide for the sprinkling of its streets, and for payment of the costs thereof, out of the general fund; and no ordinance nor resolution to authorize such service is necessary. *McAllen v. Hamblin*, 129-329.

The use of water procured at the public expense for such purpose is authorized. *Ibid.*

Such service is in the nature of a public and not a private benefit. *Ibid.*

Use of streets other than for travel: There is no statutory authority for granting to individuals the right to the use of city streets for private purposes, and the city is not estopped from the use or improvement of the streets for public purposes by reason of a privilege given to an abutting owner to construct and maintain a private drain in such streets. *Bennett v. Mt. Vernon*, 124-537.

Cities and towns are required to keep all streets and public places within their limits, and which are open for public use, free from dangerous obstructions and pitfalls, and in a condition of reasonable repair; and this requirement is broad

enough to cover not only the purposes of public travel, but any use to which the street may be subject not in itself violative of any established rule of law and hence improper and illegal. *Nocks v. Whiting*, 126-405.

Therefore, held that the owner of a horse which has escaped from his control may recover for injuries to the animal caused by a defect in the street. *Ibid.*

While streets and alleys may be devoted to other purposes than public travel, yet such use is the paramount object in maintaining and establishing them and all other uses must be subordinated thereto. *Young v. Rothrock*, 121-588.

The abutting owner is not necessarily guilty of obstructing the street so as to constitute a nuisance rendering him liable in damages by placing a wire around the parking along the sidewalk. *Snyder v. Ward*, 125-146.

The public right to the use of the street goes to the full width and extends indefinitely upward and downward, so far as to prohibit encroachment upon said limits by any persons, by any means by which the enjoyment of the public right is or may be in any manner hindered or obstructed, or made inconvenient or dangerous. *Wheeler v. Ft. Dodge*, 131-566.

Therefore, held that the act of the city in permitting a wire to be stretched above the street on which a dangerous performance was to be carried on was unlawful, and rendered the city liable for an injury to a person in the street resulting from such attempted performance. *Ibid.*

A court of equity has jurisdiction to enquire into the reasonableness of the exercise of power on the part of a city in regulating the obstruction of streets by railway trains. The control of the streets by the city is in the exercise of a trust for the general public and it may not by ordinance or otherwise destroy or unnecessarily or unreasonably abridge the right of the public to the free and unobstructed use of the streets. *Gilcrest Co. v. Des Moines*, 128-49.

The statutory provisions authorizing the construction of street railways over the streets of a city leaves in the general public the right of unrestricted use of the entire street from curb to curb, subject

to the right of the company to the proper use of its track. *Snouffer v. Cedar Rapids & M. C. R. Co.*, 118-287.

The right of a street railway company in the streets is subordinate to the power of the city to control and improve such streets, and this power of the city cannot be abrogated by ordinance or relinquished by contract. *Ibid.*

Trees in street: The lot owner has a property interest in the shade trees standing in the street in front of his lot, and if they are so located as not to be an obstruction to the proper use of the roadway or sidewalk, the city may not arbitrarily destroy or remove them. If, however, the city duly adopts a plan for the improvement of the street by grading or otherwise which necessarily requires the destruction of the trees, their removal and the prosecution of such work affords no cause of action to the lot owner. *Kemp v. Des Moines*, 125-640.

The city does not lose control of its streets by consent to or acquiescence in the planting of trees by an abutting owner within the limits of the street, and if such trees become an obstruction to public travel or interfere with proper street improvements, they may be removed, but even where the right to remove exists, it must be exercised reasonably and not to the injury of trees further than may be necessary. *Gallaher v. Jefferson*, 125-324.

Trees in a street are not necessarily a nuisance where they do not obstruct travel, and it is in accordance with public policy to preserve them, if practicable. A city or town should not require the removal of trees, nor the grading of a sidewalk so as to cause their destruction, unless necessary in the reasonable improvement of the street. *Burget v. Greenfield*, 120-432.

The interest of the property owner in the grading of a street in front of his premises and in the preservation of the trees growing there, so far as they do not constitute a nuisance, can be interfered with or affected only in the mode pointed out by statute and ordinances adopted in pursuance thereof. *Ibid.*

A property owner has such interest in the grade of his sidewalks and the preservation as against the improper action of the city as against the improper action of the council by injunction. *Ibid.*

Change of grade: The general control of the streets, which is vested in a municipal corporation, does not authorize it to change the grade otherwise than by ordinance. *Caldwell v. Nashua*, 122-179.

In grading streets the city may assume that the abutting owner will improve his property in conformity therewith and if no injury would have resulted had the

abutting property been so improved there can be no recovery of damages on account of surface water flowing over the premises. But the fact that abutting property is brought to the level with the street at the lot line only does not prevent the owner from recovering damages for surface water thrown upon his land by an improper obstruction in the street. *Monarch Mfg. Co. v. Omaha, C. B. & S. R. Co.*, 127-511.

As the corporation is given the right to grade its streets the rule as to liability for throwing surface water upon the premises of an adjoining owner to his damage is not applicable as between the city and the owner of the premises abutting upon the street. *Keck v. Venghaus*, 127-529.

Estoppel: Mere lapse of time without assertion of public right to land designated on a plat as intended for public purposes will not of itself estop a city from asserting the existence of the public right, but it may be taken into account in determining whether the right has been established by clear and unequivocal testimony. *Mt. Vernon v. Young*, 124-517.

The public right to the use and occupancy of streets and other lands dedicated to the public use may be lost by estoppel where the person claiming adversely to the public has made valuable improvements without objection on the part of the city. *Sioux City v. Chicago & N. W. R. Co.*, 129-694.

Where a strip of land has been dedicated and accepted for a street, and occupied by the public as such, the act of the city in levying taxes thereon will not estop it from asserting its rights thereto as a street. *Hanger v. Des Moines*, 109-480.

While lapse of time or failure to assert a public right will not of itself estop a city from claiming the existence of a street or street line, it does afford good ground for insisting that before dispossessing a citizen of property over which he has long been exercising ownership the public right shall be established by evidence of a clear and unequivocal character. *Eldora v. Edgington*, 130-151.

Moreover, a city may abandon a portion of a street or by non-user forfeit its right thereto, and it may be foreclosed by agreement or acquiescence as to the true line. *Ibid.*

Further as to estoppel, see notes to section 917.

Liability for defects and obstructions: A city is not an insurer against all accidents on its streets, and is responsible only when it fails to use reasonable care to keep its streets in reasonably safe condition for public travel. But if it fails in this, and injury results, not due to want of ordinary care on the part of the person in-

jured, the city is responsible. So held where an injury resulted by reason of a horse becoming unmanageable through fright, and throwing the vehicle over the edge of an embankment, which was not as wide as required by law. *Harvey v. Clarinda*, 111-528.

In such case it is for the jury to say whether the accident would have happened but for the defective condition of the street. *Ibid.*

A municipal corporation is liable for defects and obstructions in a street, left in its natural condition, which has been opened to public use. If used for the ordinary purposes of a street, it is the duty of the corporation to keep it in reasonably safe condition for that purpose. *Lamb v. Cedar Rapids*, 108-629.

Where the excavating of a street is done by a person with the knowledge of the city, it is liable for injuries resulting from a defective condition of the street due to such excavating. *Keyes v. Cedar Falls*, 107-509.

The city is liable for the unlawful grading of streets in front of the premises of a complaining owner, and where such grading was done by the street commissioner, with the knowledge of the council, held that authority of the officer to act would be presumed and his wrongful acts would be charged to the city. *Brown v. Webster City*, 115-511.

One who, without negligence on his part, is injured by stepping into a hole in the portion of the street used for a driveway, is entitled to recover if the city is negligent in that respect. *Finnegan v. Sioux City*, 112-232.

It is not contributory negligence to walk in the driveway. *Ibid.*

The street includes the bridges located therein. *Sachs v. Sioux City*, 109-224.

The mere fact of tearing up or obstructing a street even to the full width thereof, if done under the authority of the city, does not in itself constitute negligence. *Stevens v. Citizens' Gas & Elec. Co.*, 132-597.

Cities being given the care of public highways, streets and alleys, and being required to keep the same in repair, and free from nuisance, a city is liable for injuries resulting from its negligence in failing to keep in repair a bridge which does not come within the description of a county bridge. *Freeman v. Independence*, 123-1.

It is negligence in the city to leave a ridge of dirt in the center of a traveled street such as to make it unsafe to drive thereon. *Streeter v. Marshalltown*, 123-449.

Although a street or part thereof may be abandoned by a city or town, nevertheless such city or town has no right to

erect and maintain obstructions in such street, to the damage of a property owner, and will be liable in damages as a private individual would be. *Pettit v. Grand Junction*, 119-352.

If the city allows structures to remain in the street with the knowledge that they had been unlawfully placed there, and were dangerous, it renders itself liable to anyone receiving injuries by reason thereof. *Farrell v. Dubupue*, 129-447.

Ordinances of the city prohibiting such obstructions in the street are admissible in evidence to show that the action of those erecting such structures was unlawful and therefor negligent. *Ibid.*

A town is not liable for injury resulting to one passing along the street from negligence of a contractor in not barricading an opening made for purpose of building, unless the town authorities are charged with notice that the contractor has been negligent in failing to barricade such openings. *Bender v. Minden*, 124-685.

The authority to keep the streets free from nuisances carries with it the affirmative duty of obligation to keep and maintain the public ways in reasonably safe condition, or free from nuisances, and for violation of this duty an individual suffering injury therefrom may recover damages. *Wheeler v. Ft. Dodge*, 131-566.

Whether or not a given structure or performance in the street endangers the public safety is under ordinary circumstances a question for the jury. *Ibid.*

To render a city liable for injuries received on a sidewalk by reason of its negligence in maintaining the same, it is not necessary to show that the city has acquired perfect title to the street by dedication or otherwise. It is sufficient if that which is assumed to be a street is open and used as such and so recognized by the city, and the control over the same has been assumed and exercised by it. *Kircher v. Larchwood*, 120-578.

Although the city may be required to keep its streets in a reasonably safe condition only for travelers with horses, teams and carriages, and may be under no obligation to maintain them in safe condition for use by bicycle riders, nevertheless, if it permits obstructions in the street which cause injury to the rider of a bicycle, without negligence on his part, it will be liable therefor. *Overhouser v. American Cereal Co.*, 118-417.

Use of sidewalks: An ordinance prohibiting the use on sidewalks of "all varieties of vehicles known by the general term 'bicycle,'" does not apply to tricycles. *Wheeler v. Boone*, 108-235.

Persons who have a right to ride on sidewalks in vehicles which may properly be used thereon may rely, as footmen may,

on the sidewalks being in suitable condition for people to walk over, and have the same rights in case of injuries resulting from neglect. *Ibid.*

The city council may permit reasonable use of sidewalks by an abutting owner in obtaining access to all parts of their property by the construction of areas, cellar stairways and otherwise, but it has no authority to permit the use, by one property owner, of the street, so as to interfere with its reasonable use by another property owner, or to permit an obstruction of the reasonable use of the street or sidewalk by the public. *Perry v. Castner*, 124-136; S. C., 130-703.

Defective and obstructed sidewalks: The duty to keep sidewalks in repair being mandatory and not discretionary, the city is liable for injuries received by reason of the defective condition of a sidewalk due to the negligence of the city. *Parmenter v. Marion*, 113-297.

A platform projecting over the sidewalk from the second story of a building is not necessarily a nuisance, and held that the city was not liable for the wrongful act of the owner of such building in throwing a bale of hay from the platform to the street without proper care as to safety of persons who might be below. *Ibid.*

It cannot be said as a matter of law that a town is, because of the smallness of its population, not liable for defects in sidewalks. *Graham v. Oxford*, 105-705.

Where a sidewalk is constructed by a city not in accordance with a general plan or grade, but as a temporary expedient, it is liable for damages resulting from such plan of construction as renders it unsafe, and it is competent to show that it was so sloping as to be dangerous and also to show that it lacked appurtenances which were required to make it safe. *Ford v. Des Moines*, 106-94.

While it may be that the city will not be liable for defects in the sidewalk resulting from the adoption of a plan prepared by a competent engineer, and in accordance with which the work is done, yet it cannot make this defense where the plan of the sidewalk is left entirely to the direction or discretion of the city engineer. If the design is left to the whim or fancy of a single individual it cannot be said that the sidewalk is constructed to accordance with a plan, within the meaning of such rule. *Hodges v. Waterloo*, 109-444.

Where a sidewalk is built under the direction of the town officials and they assume jurisdiction thereof and it is used by the public, the town may be assumed to be liable for negligence in keeping it in repair, although it is not upon ground which has been lawfully dedicated to

public use. *Harrison v. Ayrshire*, 123-528.

When the municipal corporation has allowed a sidewalk to be built for the use of the public, its duty is to see that it is kept in safe condition. *Brown v. Chillicothe*, 122-640.

A city is bound only to use reasonable diligence in making discovery of existing defects in sidewalks. *Belken v. Iowa Falls*, 122-430.

A city is not bound to do more than to keep its sidewalks in a reasonably safe condition for travel, and it is error to instruct the jury on the assumption that the walk was not in a reasonably safe condition where there is a conflict in evidence as to the city's negligence. *Bauer v. Dubuque*, 122-500.

When the municipality has exercised reasonable care to make and keep its sidewalks safe, it has discharged the duty of keeping them in a reasonably safe condition. *Crandall v. Dubuque*, 112 N. W. 555.

Where the petition in an action for injuries from a defective sidewalk sufficiently points out the location and nature of the defect, it is not necessary to specifically describe in detail the defect complained of. *Brown v. Chillicothe*, 122-640.

Negligence in allowing a ring and staple to remain near the edge of a sidewalk some considerable distance above the level of the street may constitute negligence, the injury being the result of the distance which a person tripped on such obstruction would fall rather than in the fact that a fall was likely to be occasioned by such obstruction. *Schnee v. Dubuque*, 122-459.

The liability of a city for an injury resulting from a trap door maintained in the sidewalk by an abutting property owner for access to the basement of his building is dependent upon knowledge on the part of the city, express or implied, that the trap was frequently left open without proper guards. *Earl v. Cedar Rapids*, 126-361.

It is immaterial in such case whether the person who falls into the trap does so while passing from street to the adjoining building or from the building to the street or whether the trap is only partly in the street and partly on the adjoining premises. *Ibid.*

An obstruction in the portion of the street set apart for a sidewalk and used for passing if negligently allowed to remain will render the city liable for resulting injury. *Rea v. Sioux City*, 127-615.

It cannot be said as a matter of law that an obstruction in a sidewalk or street crossing two inches high cannot be such defect, but upon the effects which may exist may be liable for injuries which it causes. The liability in such case does not

necessarily depend upon the size of the defect, but upon the effects which may reasonably be apprehended from it upon persons who use the walk or crossing in a particular manner. *Baxter v. Cedar Rapids*, 103-599.

In an action to recover for injuries received by slipping on an approach from the street to the sidewalk, held that there was no evidence of negligence in the construction of the approach such as to warrant a recovery. *Lush v. Parkersburg*, 127-701.

Snow and ice: The fact that walks are made slippery by melting snow is a fact of common knowledge and should be taken into account by the city in constructing walks, especially those which have sloping surfaces and in consequence are liable to be dangerous when slippery. *Ford v. Des Moines*, 106-94.

A city is not relieved from liability for a defect in a sidewalk which causes an injury because of the icy condition of the walk which contributes to the accident. If the walk, by reason of its defective construction, or by reason of previous snow or ice thereon, which should not have been allowed to remain, is dangerous to pedestrians under the prevailing climatic conditions, then the city is liable. *Hodges v. Waterloo*, 109-444.

Even though the fall of a person on a sidewalk is caused in some part by snow thereon, if it is caused also in part by a dangerous slant in the walk the corporation may be liable. *Sylvester v. Casey*, 110-256.

Whether, under all the circumstances, it was negligence in the city not to anticipate the dangerous condition of a walk, due to water running thereon and freezing, and in not providing against such danger, is a question for the jury. *Shumway v. Burlington*, 108-424.

Municipal corporations are chargeable with negligence in permitting the accumulation of snow and ice in uneven and irregular masses upon the streets. *Sankey v. Chicago, R. I. & P. R. Co.*, 118-39.

The mere fact that a sidewalk is dangerous because of the presence of snow and ice is not sufficient to establish negligence on the part of the city even though the snow and ice are not removed within a reasonable time. But if by reason of travel or the action of the elements the snow becomes ice and is allowed to remain in a dangerous condition, the city cannot escape liability by showing that the condition was caused by natural causes as by rain and sleet or sudden changes of weather. *Templin v. Boone*, 127-91.

If ice on a sidewalk is produced by artificial causes, such as the discharge of water from an eave-trough, and the city has

notice thereof or should have had notice in the exercise of reasonable care, and there has been a reasonable time within which to remove it before the accident occurred, failure to do so constitutes negligence, rendering the city liable for resulting injuries. *Hofacre v. Monticello*, 128-239.

The city is only negligent with reference to snow or ice on the sidewalk when it has become rough and uneven by travel, and allowed to remain and freeze in that condition, so that one in the exercise of ordinary care cannot safely pass over it. The burden is on the plaintiff to prove that the injury was caused by such condition of the walk, due to defendant's neglect. *Tobin v. Waterloo*, 131-75.

The city is liable for injuries resulting from the slippery and uneven surface due to failure of the city to remove snow from the sidewalks within a reasonable time. *Crandall v. Dubuque*, 112 N. W. 555.

Proximate cause: A fall on a sidewalk which is in dangerous condition, but which results from dizziness to which the person is subject by reason of a previous fall chargeable to the negligence of the city in maintaining safe walks, is not to be considered as the proximate result of the previous injury. *Watters v. Waterloo*, 126-199.

Evidence of the defective condition of the sidewalk some distance from the place of the accident is admissible where it appears that the entire walk was out of repair and in a dangerous condition. *Bailey v. Centerville*, 108-20.

Where the question is whether a walk was defective, an ordinance of the city regulating the laying of walks, and passed prior to the construction of the walk in question, may be introduced in evidence as bearing on the question whether the walk as constructed was sufficient. *Shumway v. Burlington*, 108-424.

Evidence that a walk, as it existed at the time of the accident, has subsequently been taken out, may be introduced as showing how witnesses knew the condition of the walk, where it is not attempted thereby to prove an admission that the walk was defective. *Frohs v. Dubuque*, 109-219.

Evidence as to the original construction of a walk may be admissible to show, not that it was originally defective, but as bearing upon the question of notice to the city as to its condition. *Ibid.*

Evidence that another person tripped upon the same loose board a few days before the accident is admissible, where such evidence is not relied upon as substantive proof of the actionable defect, but to show the existence of this particular loose board prior to the injury, and the

manner in which it was discovered by the witness. *Ibid.*

Where the city offers evidence tending to show that the sidewalk was in good repair before, at and after the time of the injury complained of, the plaintiff may prove that repairs have been made at and near the place in question after the accident. *Parker v. Ottumwa*, 113-649.

Evidence of subsequent repair of the defective walk by the city is competent as bearing upon the actual condition at the time of the accident and that it must have been in such condition for such length of time as to charge the city with notice. *Patton v. Sanborn*, 133-50.

An ordinance passed after the construction of a sidewalk is not to be considered in determining whether the sidewalk was constructed in a proper method. *McCartney v. Washington*, 124-382.

While evidence of subsequent changes or repairs is not admissible to show defective condition at the time of an injury, yet if such evidence is competent for any purpose it is not to be excluded on the ground that it is incompetent to show the negligence of the city. *Achey v. Marion*, 126-47.

Evidence as to the condition of the walk after the accident is admissible where by other evidence it is made to appear that the condition was practically the same when examined by the witnesses as when the accident occurred. *Harrison v. Ayrshire*, 123-528.

Where plaintiff contends that the entire walk was out of repair, testimony as to prior accidents happening on the same walk is admissible, although they appear not to have occurred at the same place on the walk. *Yeager v. Spirit Lake*, 115-593.

Evidence as to the condition of the walk, and repairs thereto prior to the time of the accident is admissible for the purpose of showing knowledge of its condition on the part of the city. *Ibid.*

In an action for personal injuries resulting from defect in the street, evidence of similar accidents at the same place is not admissible. *Streeter v. Marshalltown*, 123-449.

It is the duty of a city to exercise ordinary care to discover latent as well as apparent defects in a sidewalk. *Anders v. West Union*, 131-192.

But proof that upon tearing up a walk the stringers were found in a decayed condition, held not of itself sufficient to show negligence on the part of the city. *Ibid.*

Evidence considered as tending to show negligence of the city in the construction and maintenance of the walk causing injury to the plaintiff. *Goucher v. Sioux City*, 115-639.

For witnesses to state that a walk was defective is to announce a conclusion, and therefore such testimony is not admissible, but the witness may say that the walk was sound and in good condition, as it would be impossible to describe absence of defects which did not exist. *Brooks v. Sioux City*, 114-641.

Witnesses may testify as to the life and durability of timber and nails, such as were used in the walk. *Patton v. Sanborn*, 133-650.

Notice: Whether, in view of the continuous bad condition of a sidewalk, the city is chargeable with notice of defects therein, is for the jury. *Bailey v. Centerville*, 108-20.

Evidence in a particular case held sufficient to charge the town with notice of the defective condition of the sidewalk in question. *Hoover v. Mapleton*, 110-571.

Evidence in a particular case held sufficient to show knowledge by the city of the defective condition of the sidewalk. *Beaver v. Eagle Grove*, 116-485.

For the purpose of showing notice to the city, witnesses may testify as to their having tripped and fallen over the same defect in the sidewalk prior to the injury for which plaintiff seeks to recover. *Wilberding v. Dubuque*, 11-484.

Where a defect in original construction of the sidewalk is shown the city is conclusively presumed to have notice thereof. *Evans v. Iowa City*, 125-202.

Notice of the defective condition of a sidewalk generally is notice of a included particular defect. *Ibid.*

Constructive notice to the city of defective condition of a walk is not to be founded upon the condition of the particular plank causing the injury. The general condition at such point may be considered. *Hoover v. Mapleton*, 110-571.

Evidence of the condition of the sidewalk near the place of the defect which causes the accident is admissible for the purpose of showing whether the officers of the city should have discovered the defect in question in time to repair it before the accident. *Spicer v. Webster City*, 118-561.

Evidence as to the condition of the walk near the place where the injury was received is competent upon the question of knowledge on the part of the city as to the condition of the walk at the point of the accident, but it is competent for no other purpose, and if the defendant requests an instruction limiting the effect of such evidence it should be given. *Kircher v. Larchwood*, 120-578.

Evidence of the condition of the sidewalk prior to the time of plaintiff's injury is admissible as showing notice of the defective condition. *Hofacre v. Monticello*, 128-239.

In an action for injury caused by an accumulation of snow and ice upon a sidewalk, it is proper to show the icy condition of the walk at the place of the accident at other times as tending to charge the city with notice of the dangerous condition. *Hanousek v. Marshalltown*, 130-550.

Where the plaintiff in an action against the city for injuries received by reason of a defective sidewalk alleged knowledge on the part of the city of such defect, and there is a general denial of plaintiff's allegations, it is competent for the plaintiff to prove the condition of the sidewalk at or near the place of the injury, provided the dangerous and defective condition thus shown was reasonably observable by the officers of the city in the exercise of ordinary care, and had been in existence for such length of time as to charge the city with notice. *Clark v. Cedar Rapids*, 129-358.

In such action it is competent to prove the condition of the sidewalk at the place of the accident as it was found soon after the accident occurred, there being no indication of any substantial change in the condition. *Ibid.*

In an action to recover damages for injuries received by the falling of a structure permitted to be erected on the street, held that evidence of the dangerous construction of other structures of the same character was competent as tending to show notice to the city. *Farell v. Dubuque*, 129-447.

Declarations of the sidewalk inspector with reference to the dangerous condition of the sidewalk by reason of such structure held admissible as against the city. *Ibid.*

Evidence as to the general condition of the walk is properly admissible as tending to show knowledge on the part of the town of a defective condition. *Harrison v. Ayrshire*, 123-528.

Where the negligence charged consists in improper construction and maintenance and not in want of repair, the question whether the improper condition has existed for such length of time that the officers of the city in the exercise of reasonable diligence should have known thereof, is not involved. *Achey v. Marion*, 126-47.

A municipal corporation charged with the duty of maintaining its streets in reasonably safe condition for public use, is held to have notice of dangerous defects therein, and especially defects arising from natural wear and decay, whenever such condition has existed so long that, in the exercise of reasonable oversight and care by the officers of the municipality it should have been discovered and repaired. *Smith v. Sioux City*, 119-50.

Notice of defect in a sidewalk may be inferred from lapse of time and the character and location of the walk. The negli-

gence of the city may consist in its not acquiring notice of defects in its walks. *Padelford v. Eagle Grove*, 117-616.

When a defect has existed for such a length of time that the officers of the city should have discovered the defect, if they had exercised ordinary care and diligence, then the law presumes notice to them, whether the defect has been reported to them or not, and whether they actually knew it or not. *Wilberding v. Dubuque*, 111-484.

Evidence that a defect apparent to observation has existed in a sidewalk for six months will warrant the jury in finding knowledge thereof by municipal authority. *Brown v. Chillicothe*, 122-640.

Service of notice on the owner of property to construct a permanent sidewalk may be shown in an action against the city to recover damages for injuries received from a defective sidewalk in front of the premises of such owner, as tending to show knowledge of the defective condition of the walk on the part of the city. *Wilson v. Cedar Rapids*, 123-10.

Contributory negligence: One who has full knowledge of a defect in a sidewalk and afterwards without necessity passes over the place where such defect exists without any precaution or excuse for want of precaution, is guilty of such contributory negligence with reference to a resulting injury as to defeat recovery. *Barce v. Shenandoah*, 106-426; *Marshall v. Belle Plaine*, 106-508.

It does not necessarily constitute contributory negligence to use a defective street, although the person using it has knowledge of the defect and there is another reasonably convenient way by which such person might reach his destination. *Harvey v. Clarinda*, 111-528.

It is not true that one who knows of a defect in a walk is necessarily guilty of negligence in attempting to pass over it. Much depends upon the character of the defect, the occasion for passing over it and the care used in doing so. If a person knows of a defect in a walk, but believes that it can be passed in safety with the exercise of ordinary care and is justified as a reasonably prudent man in holding that belief he is not negligent in attempting to pass over it in an ordinarily careful manner. *Graham v. Oxford*, 105-705.

One who knows a walk to be unsafe, and that it is imprudent to attempt to pass over it, is guilty of contributory negligence in attempting to do so, but knowledge of unsafe condition is not enough as matter of law to establish contributory negligence. *Yeager v. Spirit Lake*, 115-593.

It is error to charge that if plaintiff knew the walk to be unsafe he was required to use more than ordinary care in

passing over it. *Hoover v. Mapleton*, 110-571.

In such case the court may leave it to the jury to say whether there was contributory negligence in passing over the walk, known to be dangerous, where it is shown that there was another and a convenient way by which the plaintiff might have proceeded to his destination. *Ibid.*

While in some cases the nature of the defect in the sidewalk may suggest that a person going upon the walk with knowledge of the defect will be deemed as matter of law guilty of contributory negligence, in general it must appear that the person using the walk regarded it as dangerous or considered it to be imprudent to go upon it at the time he did. *Slyvester v. Casey*, 110-256.

Intoxication does not in itself constitute contributory negligence on the part of a person injured on a sidewalk, unless the evidence shows that his intoxication in some way aided in bringing about the injury, or it appears that it was negligent for him to be on the walk in an intoxicated condition. *Ibid.*

It is not negligent for a person to pass over streets or sidewalks of a city at night. A person has the right to rely upon the assumption that the city has done its duty in keeping the streets in order. *Keyes v. Cedar Falls*, 107-509.

It is not negligence, as matter of law, for one to pass over a defective sidewalk. Whether or not it is imprudent for plaintiff to pass over a sidewalk in a defective condition is for the jury. *Cox v. Des Moines*, 111-646.

One who passes over a defective walk with reasonable care under the circumstances is not guilty of contributory negligence, although charged with knowledge that the walk is defective. *Bailey v. Centerville*, 115-271.

One who is injured in passing over a defective sidewalk is not guilty of contributory negligence if he exercised the care an ordinarily prudent person would exercise in passing over the walk. *Rusch v. Dubuque*, 116-402.

The fact that the person injured knew of the defect which caused the injury does not render his action in using the walk negligent if in view of the condition he used reasonable care. *Van Camp v. Keokuk*, 130-716.

The action of another in pushing by the person using the walk under such circumstances may constitute such diverting cause as to excuse failure to avoid the known defect. *Ibid.*

A pedestrian is not required to be on the lookout for hidden dangers in the street. He is only required to walk with his eyes open, observing his natural course

in the usual way. *Earl v. Cedar Rapids*, 126-361.

A pedestrian is not as a matter of law required to inspect a walk before passing over it, but may assume that it is in repair, and the question whether he might have discovered the defect with ordinary attention to his own safety so as to have avoided the injury is for the jury. *Machacek v. Hall*, 131-412.

Mere knowledge of the condition of a walk on the part of a person injured will not, as matter of law, constitute contributory negligence in the use of such sidewalk. *Sachra v. Manilla*, 120-562.

Testimony on the part of plaintiff in an action to recover for injuries due to a defective sidewalk, that he knew the condition of the walk, and that it was dangerous, will not justify the taking of the case from the jury. The question of contributory negligence in such a case is one of fact. *Carter v. Lineville*, 117-532.

The mere knowledge of a pedestrian that a walk over which he assumes to pass is not safe is not sufficient alone to establish negligence on his part as a matter of law. *Arnold v. Waterloo*, 128-410.

One may go upon a dangerous and unsafe walk without being necessarily negligent in doing so unless he knew or should have known in the exercise of ordinary care for his own safety that it was imprudent for him to attempt to pass over the same. *Templin v. Boone*, 127-91.

It is not knowledge of a defect which renders a foot passenger negligent in attempting to use a defective sidewalk, but failure to use ordinary care in avoiding the defect either by taking another way or by passing around the defect or otherwise endeavoring to escape the danger incident thereto. *Rea v. Sioux City*, 127-615.

One is not guilty of contributory negligence as a matter of law in passing over a defective sidewalk, rather than taking another way, where the defect is not known to him. *Considine v. Dubuque*, 126-283.

The question of contributory negligence of a person injured by a defect in a street is usually one for the jury and if it appears by the uncontradicted testimony of the plaintiff that he did not know of an excavation in the street until he fell into it, he is not to be held guilty of contributory negligence in attempting to use the street, although there was another safe and convenient way. *Bussell v. Ft. Dodge*, 126-308.

To constitute contributory negligence in using a sidewalk known to be defective there must be not only knowledge of the defect, but also an appreciation of the danger reasonably to be apprehended therefrom, and if the person using the defective walk is justified in believing and does

believe that by the exercise of ordinary care he can pass over it in safety and he does in fact exercise such care he cannot be charged with negligence. *Evans v. Iowa City*, 125-202.

If a defect in the walk known to the person using it does not render it so dangerous that he is necessarily guilty of contributory negligence in attempting to pass it in the exercise of due care, it is for the jury to say whether there is under the circumstances such contributory negligence as to defeat recovery for an injury resulting from such defect. *Brown v. Chillicothe*, 122-640.

The mere fact that a walk is in an unsafe condition will not preclude its use where there is no other convenient way for the passer to reach his destination. *Houseman v. Belle Plaine*, 124-510.

Knowledge of defects in a street is not alone sufficient to bar recovery for injuries received by reason thereof. It must also be shown that plaintiff knew it was imprudent to try to pass over the same and that there was another way comparatively safe which he might have taken to reach his destination. *Hollingsworth v. Fort Dodge*, 125-627.

One who steps into an opening in the street of which he has knowledge is guilty of contributory negligence, although for the moment he may have forgotten the existence of such opening. *Bender v. Minden*, 124-685.

If the walk is not so openly and visibly dangerous that no prudent person would attempt to make use of it the mere fact of using it does not constitute negligence *per se*. *Crandall v. Dubuque*, 112 N. W. 555.

Though a sidewalk is defective a traveler has the right to pass over it and if he does so it is usually for the jury to say whether in doing so he used due care. *Cook v. Hedrick*, 112 N. W. 157.

The person injured is competent to testify as to want of knowledge of the defective condition of the walk. *Patton v. Sanborn*, 133-650.

It is not negligence for one driving along a traveled street to cross from the right to the left side to avoid a rapidly approaching hosecart. *Streeter v. Marshalltown*, 123-449.

It is not contributory negligence on the part of one crossing the street to attempt to reach the sidewalk at a place other than a street crossing. *Rea v. Sioux City*, 127-615.

It is not negligence to cross a street in a diagonal direction and step upon a sidewalk at a place which is not a street crossing. *Bell v. Clarion*, 113-126; *Bell v. Clarion*, 115-357.

It is not contributory negligence to walk in the driveway. *Finnegan v. Sioux City*, 112-332.

A blind person making use of the streets or sidewalks of a city is not required to use a higher degree of care and caution than a person having full possession of his sense of sight, but the fact of his blindness is to be taken into account in determining whether he did or did not act with the care which a reasonably prudent man would ordinarily exercise when burdened by such infirmity. *Hill v. Glenwood*, 124-479.

Failure to anticipate an unusual danger in passing along a sidewalk does not constitute contributory negligence. *Kaiser v. Hahn*, 126-561.

One who relies upon defective sight as an excuse for failing to observe an obstruction from which an injury has resulted must show corresponding caution on account of such defective sight. *Ibid.*

The fact that an approach to the street, causing the injury to the plaintiff complained of, was similar to the approaches used generally in the city at the time of and long prior to the accident is admissible on the question whether the person injured had knowledge or should have had knowledge of the improper construction so as to be charged with contributory negligence in using such approach. *Keim v. Ft. Dodge*, 126-27.

So also it is competent to show that the corner at which the injury was received was not well lighted for the purpose of indicating a duty on the part of the plaintiff to exercise greater care. *Ibid.*

One passing along a sidewalk who steps over a foundation wall in process of construction adjoining the walk and falls into the excavation for the proposed building while trying to keep upon the walk, being misled by the darkness and the presence of obstructions, is not a trespasser in such sense that he cannot recover for injuries received on account of the obstructions in the walk which he is attempting to follow. *Dodge v. Lamont*, 130-721.

An instruction that a person in passing along a public street is required to use more caution and be more watchful when it is dark than in the day time may be proper, but will not be necessary under all circumstances. *Baxter v. Cedar Rapids*, 103-599.

Under the facts of a particular case, held, that the person injured by defect in a sidewalk had not been guilty of contributory negligence in failing to discover the defect. *Ibid.*

While the burden is on the plaintiff to negative want of due care, it is for the defendant to establish plaintiff's subsequent negligence respecting the consequences of the injury. *Wissler v. Atlantic*, 123-11.

SEC. 754. Regulation of conveyances and transportation.

The provision authorizing cities to regulate, license and tax vehicles kept for hire is not limited to those let out or rented, but includes conveyances used by the owner for conveying persons or property for hire. *Des Moines v. Bolton*, 128-108.

The city may graduate the scale of fees and exempt from license all vehicles, the ordinary use of which will not materially wear its streets or destroy the free use thereof. *Ibid.*

SEC. 756. Lighting.

The power being given to provide lights for streets necessarily implies power to purchase the light of others and enter into a contract for such service. *Davenport Gas & Elec. Co. v. Davenport*, 124-22.

years for the lighting of its streets, but it does not necessarily have power to fix the rate of compensation for a long period in advance.

Such a contract may be exclusive. *Ibid.*

The city may contract for a period of

SEC. 757. Care, construction and repair of bridges.

A bridge is a part of the street in which it is situated. *Sachs v. Sioux City*, 109-224.

to keep in repair bridges and culverts within the city limits, which are not of such size as to constitute county bridges. *Freeman v. Independence*, 123-1.

A city is liable for negligence in failing

SEC. 758-a. Bridge tax—levy authorized. When the whole or any part of the cost of building or reconstruction of any bridge by a city of the first class shall be ordered paid from the city bridge fund, to be levied upon all the property within any such city, it shall have the power, after the completion of the work, by ordinance or resolution, to levy at any one time the whole or any part of the cost of such improvement upon all of the taxable property within such city and determine the whole percentage of tax necessary to pay the same, and the percentage to be paid each year, not exceeding two-thirds of the maximum annual limit of the tax such city may levy for a bridge fund, and the number of years, not exceeding twenty-five, given for the maturity of each installment thereof, but no part of such costs shall be levied against property owned by the city, county, state or the United States. Certificates of such levy shall be filed with the auditor of the county or counties in which said city is located, setting forth the amount or percentage and maturity of said tax, or each installment thereof, upon the assessed valuation of all the property in said city, certified as correct by the city clerk or auditor, and thereupon said tax shall be placed upon the tax lists of the proper county or counties. [32 G. A., ch. 36, § 1.]

SEC. 758-b. Bridge certificates or bonds. Any such city may anticipate the collection of taxes authorized to be levied for a city bridge fund and for that purpose may issue bridge certificates or bonds with interest coupons, and the provisions of chapter twelve (12), title five (5), of the code shall be operative as to such certificates, bonds and coupons in so far as they may be applicable. [32 G. A., ch. 36, § 2.]

SEC. 758-c. How paid. Said certificates, bonds and interest thereon shall be secured by said assessments and levies and shall be payable only out of the funds derived from such levies and pledged to the payment of the same, and no certificates or bonds shall be issued in excess of taxes authorized and levied to secure the payment of the same. It shall be the duty of such city to collect such funds, with interest thereon, and to hold the same separate and apart in trust for the payment of said certificates, bonds and interest and to apply the proceeds of said funds pledged for that purpose to the payment of said certificates, bonds and interest. [32 G. A., ch. 36, § 3.]

SEC. 759. Aiding county bridge.

Under these provisions aid may be given to a toll bridge. *Pritchard v. Magoun*, 109-364.

SEC. 760. Question submitted.

Prior to the adoption of the present Code it was not required that the ballots at a special election, such as here contemplated, should be in accordance with

the Australian ballot law. *Pritchard v. Magoun*, 109-364.

Also held that notices of such election posted in hotels were posted in public places, as required by the statute. *Ibid.*

SEC. 766-a. Additional tax. That any city in this state which has voted aid to any company for the construction of a highway or combination bridge across any navigable boundary river of this state; a condition of which vote, or the granting or acceptance of such aid, was that the city should have the right to purchase such bridge from the company so aided, its successors or assigns; may, at any time after such taxes voted in aid are collected, vote an additional tax of not exceeding five per centum of the assessed value of the taxable property of such city for the purpose of securing the funds necessary to enable it to make such purchase. Such taxes shall be payable in such annual installments not less than ten as the electors may determine. [29 G. A., ch. 42, § 1.]

SEC. 766-b. Question submitted. The question of whether or not such additional taxes shall be voted shall be submitted to the electors of such city before the city elects to make such purchase and the submission thereof shall be governed in all respects by sections seven hundred sixty (760), seven hundred sixty-one (761), seven hundred sixty-two (762), seven hundred sixty-three (763) and seven hundred sixty-four (764) of the code so far as the same are applicable. [29 G. A., ch. 42, § 2.]

SEC. 766-c. Bonds or warrants—tolls. After such taxes are voted the city may issue its bonds, warrants or other certificates drawing such interest not exceeding six per cent per annum as the city council may determine, payable from such taxes as they are collected, and from no other source, and pledging them for their payment. Such taxes shall be used for no other purpose and such bonds, warrants or certificates shall not be sold for less than their par or face value with accrued interest. The city council shall fix the rate of tolls or charges for passing over the bridge, and such tolls shall be large enough to pay the interest upon the bonds, warrants or certificates issued for its purchase together with the expense of maintaining and operating it. [29 G. A., ch. 42, § 3.]

SEC. 766-d. Vote of tax in cities after annexation. In any case where aid has been extended and bridges erected in two separate cities and subsequent thereto, one of such cities has been annexed to the other, the electors residing in the territory which comprise either of the separate cities before annexation, may vote taxes upon the property in such territory for the purchase of such bridge, and the proceedings in such case shall be the same as in the preceding sections of this act provided, except that the petition to the city council shall be signed by a majority of the resident freehold taxpayers of the territory in which the vote is to be had, and the taxes, when voted and properly certified, shall be levied only upon the property in such territory. [29 G. A., ch. 42, § 4.]

SEC. 767. Railway tracks—street railways.

An ordinary use of the street by a railway operated by trolley wires carried upon poles set at the side of the street is not

a new or additional burden upon the public easement in a street entitling the abutting property owner to additional dam-

ages even though he is the owner of the fee. *Snyder v. Ft. Madison Street R. Co.*, 105-284.

A railroad company may acquire a right of way over private property and across streets of a city with its tracks in the occupation of such right of way without securing the consent of property owners, if in crossing the street it does not construct its line in front of abutting property. *Morgan v. Des Moines Union R. Co.*, 113-561.

The owner of abutting property upon a street may recover damages against a railroad company for obstructing the street by an embankment, although the track is not laid on the street in front of such abutting property owner's premises. *Dairy v. Iowa Cent. R. Co.*, 113-716.

The railroad track in the street for which damage must be paid to abutting property owners includes cuts, fills and other structures constituting the roadbed. *Middleton v. Mason City*, 127-433.

A city may condemn land for a public landing and grant a railway company a right of way over the same. *Diamond Jo Line Steamers v. Davenport*, 114-432.

Where land is dedicated to a city for public highway and other public purposes, the city may permit its use by a railway for the purpose of facilitating the business of such railway. *Burlington Gas Light Co. v. Burlington, C. R. & N. R. Co.*, 165 U. S., 370.

The franchise to lay its tracks on the streets of a city having been granted to a street railway company, permission to lay such tracks on a street not already occupied may be granted by the city council by resolution. *Thurston v. Huston*, 123-157.

The right of a street railway under its franchise to occupy such streets as the council in the reasonable exercise of its discretion may designate is not inconsistent with the existence of another street railway system in the same city operating under another franchise. *Ibid.*

It is the duty of a street railway company to so construct and operate its railway as not to interfere unnecessarily with the right of abutting property owners to use and enjoy their property and it may

be enjoined from maintaining a trolley pole in front of a dwelling house of plaintiff without necessity therefor in a manner to annoy him and injure and depreciate the value of his property. *Snyder v. Fort Madison Street R. Co.*, 105-284.

While a city has authority to grant the use of the streets for railway purposes, and the power so granted carries with it the implied power to permit temporary and not unreasonable use thereof for standing trains, yet under this power the city may not entirely obstruct the public use of a street, nor permit such use as shall constitute a private nuisance, and a court of equity has jurisdiction to restrain the continuance of a public or private nuisance thus created. *Gilcrest Co. v. Des Moines*, 128-49.

The statutory provisions authorizing the construction of street railways over the streets of a city leaves in the general public the right of unrestricted use of the entire street from curb to curb, subject to the right of the company to the proper use of its track. *Snouffer v. Cedar Rapids & M. C. R. Co.*, 118-287.

If, in reliance upon a valid ordinance, a street railway company, in good faith and without notice that the authority to lay its tracks in the streets of a city is to be modified or withdrawn, proceeds to act in reliance on such authority, the city cannot afterwards require the tracks to be removed, except upon the principle of fair indemnity. But the right of the railway company in the streets is subject to the general control of the city as to their reasonable use and improvement and this power of the city cannot be abrogated by ordinance or relinquished by control. *Ibid.*

A franchise granted to a street car company which was subsequently made exclusive for the term of thirty years, held in the absence of statutory or other limitation to be a perpetual franchise having been recognized by the city after the expiration of the thirty years' term, and therefore a contract which the city could not impair by ordering the company to remove its tracks from the streets. *Des Moines City R. Co. v. Des Moines*, 151 Fed. 854.

SEC. 768. Street car vestibules. On and after November 1, 1907, every person, partnership, company or corporation owning or operating a street railway in this state shall, from November first of each year to April first following, provide all cars, except trailers, used for the transportation of passengers, with vestibules inclosing the front platform on [at least] all sides, for the protection of employes operating such cars. Any violation of this section shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars for each day said cars are operated in violation hereof. [32 G. A., ch. 37.]

SEC. 771. Repeal—assessment of damages. That section seven hundred seventy-one (771) of the code supplement is hereby repealed and the following enacted in lieu thereof:

“When a viaduct shall be by ordinance declared necessary for the safety and protection of the public, the council shall provide for appraising, assessing and determining the damages which may be caused to any property by reason of the construction of the same and its approaches. The proceedings for such purpose shall be the same as are provided in case of taking private property for works of internal improvement, and the damages assessed shall be paid by the city out of the general bridge fund, or in cities having a population of twelve thousand or over from any other fund or funds legally available therefor.” [32 G. A., ch. 38, § 1.]

SEC. 771-a. Repeal—viaduct fund. That section one (1) of chapter twenty-nine (29) of the acts of the thirtieth general assembly is hereby repealed and the following enacted in lieu thereof:

“In cities having a population of twelve thousand or over, where a viaduct is required to be constructed, and the plans therefor have been approved, and there are no available funds in the general bridge fund, or any fund or funds of said city which may be legally used for the payment of such damages, such city may levy an annual tax not exceeding two mills on the dollar for the purpose of creating a fund to be known as a “viaduct fund,” for the payment of damages caused to property by reason of the construction of such viaduct and approaches thereto.” [32 G. A., ch. 38, § 2.]

SEC. 773. Apportionment of cost—use of—compensation for—repairs. When two or more railroad companies own or operate separate lines of track to be crossed by a viaduct, the proportion thereof, and the approaches thereto to be constructed by each, or the cost to be borne by each, shall be determined by the council. The council shall fix a time and place where it will consider such matters and any objections that may be made to the construction of such viaduct and the approaches thereto. Not less than twenty days written notice of such hearing shall be given to the company or companies owning or operating the track or tracks over or under which it is proposed to construct such viaduct. Said notice may be served in the same manner and upon the same persons or officers as in the case of an original notice. Such cities shall have power to regulate the use of such viaducts and to authorize or forbid the use thereof by street railway companies and to require the payment of compensation for such use. After the completion thereof, any revenue derived therefrom by the crossing thereon of street railway lines shall constitute a special fund, and shall be applied in making repairs to such viaduct. One-half of all ordinary repairs to such viaduct or its approaches shall be paid out of such fund, or be borne by the city, and the remaining half by the railroad company; and if the track of more than one company is crossed, the costs of such repairs shall be borne by such companies in the same proportion as was the original cost of construction. [22 G. A., ch. 32, § 4.] [29 G. A., ch. 43, § 2.]

SEC. 774. Refusal to comply. If any railroad company neglects or refuses, for more than thirty days after such notice as may be prescribed by ordinance, to comply with the requirements of any ordinance passed under the provisions of this chapter, the city may enforce the construction, maintenance or repair of such viaduct and approaches by proceedings in mandamus and the court shall require the issues to be made up at the first term to which such action is brought and shall give the same precedence over other civil business. Refusals to comply with, or violations of, the orders of the court in such proceedings may be punished as contempts, by fine and imprisonment as provided in section two thousand one hundred and nine-

teen (2119) of the code; or the city may construct or repair the viaduct or approaches, or any portion thereof, which such railroad company was required to construct or maintain, and recover the cost thereof from such company. [22 G. A., ch. 32, § 6.] [29 G. A., ch. 43, § 3.]

SEC. 776. Granting franchise—question submitted. No franchise shall be granted, renewed or extended by any city or town for the use of its streets, highways, avenues, alleys or public places, for any of the purposes named in the preceding section, unless a majority of the legal electors voting thereon vote in favor of the same at a general or special election. The council may order the question of granting, renewal or extension of any such franchise submitted to a vote at a general election, or at one specially called for that purpose; or the mayor shall submit said question to such vote upon the petition of twenty-five property owners of each ward in a city, or fifty property owners in any incorporated town. Notice of such election shall be given in two newspapers published in said city or town, if there are two, if not, then in one, once each week for at least four consecutive weeks. But if no such newspaper is published within the limits of the corporation, then such notice may be given by posting thereof in three public places within the limits of said corporation, two of which places shall be the postoffice and the mayor's office of such city or town, and by publication for four consecutive weeks in a newspaper of general circulation in the county. The clerk shall prepare the ballots, and the proposition shall be submitted as provided for in the chapter on elections. The party applying for the franchise, or for a renewal or extension thereof, shall pay all expenses incurred in holding the election. [32 G. A., ch. 39.]

The franchise to lay its tracks on the streets of a city having been granted to a street railway company, permission to lay such tracks on a street not already occu-

ried may be granted by the city council by resolution. *Thurston v. Huston*, 123-157.

SEC. 777. Temporary sidewalks. They shall have power to provide for the laying, relaying and repairing of temporary sidewalks upon any street, avenue, public ground, wharf, landing or market place within the limits of such city or town, at a cost not exceeding forty cents a linear foot, to prescribe a uniform width thereof, and to regulate the grade of the same, and to provide for the assessment of the cost thereof on the property in front of which the same shall be laid, in proportion to the special benefits conferred upon the property thereby and not in excess thereof, and the city or town clerk shall certify the amount of such assessment to the county auditor, and it shall be collected the same as other taxes. [C., '73, § 468.] [28 G. A., ch. 26, § 1.]

Where an ordinance provides for ordering the construction of temporary sidewalks at the expense of the abutting property owners upon resolutions of the council, a notice of such order and service of notice of the resolution is necessary before the assessment can be enforced. *Haw-*

ley v. Fort Dodge, 103-573.

Where no permanent grade is established the council cannot require the construction of a temporary plank sidewalk above the natural surface so as to bring it on a line with improvements on the street. *Hartrick v. Farmington*, 108-31.

SEC. 777-a. Special charter cities. The provisions of this act are also made applicable to cities acting under special charters. [28 G. A., ch. 26, § 2.]

[Section 777-a is section 2 of chapter 26 of the acts of the 28 G. A. Section 1 of the same chapter amended section 777 of the code, by striking out the word "plank" in the second line of said section, and inserting the clause "in proportion to the special benefits conferred upon the property thereby and not in excess thereof" near the end of said section.]

SEC. 779. Permanent sidewalks—city clerk to certify assessment—special tax. They shall have power to provide for the construction, reconstruction and repair of permanent sidewalks upon any street, highway, avenue, public ground, wharf, landing or market place within the limits of such city or town; but the construction of permanent sidewalks shall not be made until the bed of the same shall have been graded so that, when completed, such sidewalks will be at the established grade; and to assess the cost thereof on the lots or parcels of land in front of which the same shall be constructed; and the city clerk shall certify the amount of such assessment to the county auditor, and it shall be collected the same as other taxes. But, in cities having a city collector or treasurer who collects city taxes, the city clerk shall certify the amount of such assessment to such collector or treasurer, and the same shall be collected as other city taxes. Towns shall have the power to make the street improvements provided for in chapter seven of this title, and pay for the same, or any part thereof, out of the general fund, or to assess, levy and collect special taxes for the cost, or any part thereof, against the abutting property, in the manner provided in the said chapter. But unless the owners of a majority of the linear feet of the property fronting on the improvements referred to in this section petition the council therefor, the same shall not be made unless three-fourths of all the members of the council shall by vote order the making thereof. [20 G. A., ch. 20, § 1; C., '73, § 466.] [28 G. A., ch. 27, § 1.]

In exercising the taxing power the city must pursue the manner pointed out in the statute, and if assessment is made for the reconstruction of a sidewalk, and not merely for repair, then it must be based upon petition of the owners of the majority of the frontage. *Farraher v. Keokuk*, 111-310.

An ordinance is essential to the right of the city to build permanent sidewalks or to require the same to be built. *Gallagher v. Jefferson*, 125-324.

An ordinance establishing the street grade is also an essential prerequisite to the work of excavating for a sidewalk. *Ibid.*

Where a city has undertaken to avail itself of the provisions of statute as to construction of permanent sidewalks, and has fixed in its general ordinance the mode of procedure, it is limited to the mode prescribed in the ordinance. And if a particular form of notice is specified before the construction of a permanent sidewalk can be required, such notice must be given. *Burget v. Greenfield*, 120-432.

It is not contemplated that a permanent sidewalk at grade shall be required until the city or town is prepared to bring the

SEC. 780. Repair of sidewalks.

Repairs without notice can be assessed to abutting property, but not the expense of reconstruction unless the provisions of

SEC. 782. Grades and grading.

Although the specific provision of § 465 of the Code of 1873 with reference to the

street itself to grade and has graded the bed of the sidewalk. *Ibid.*

The council has no authority to establish a wholly artificial grade line, and then proceed to compel the construction of permanent sidewalks, not in accordance with this grade, but in accordance with some grade to be fixed upon by the council or its sidewalk committee, with the penalty that if the property owner does not comply with such direction he shall be compelled to construct his walk at the artificial grade, without regard to his own convenience or the public welfare. *Ibid.*

A city council may not only provide for the construction of permanent sidewalks, but, as a necessary incident thereto, for the time, place and manner of such construction, and when the work shall be done by the city, whether the cost thereof shall be paid from general funds or assessed upon abutting lots or parcels of land. But if the ordinance with reference thereto specifies the character of notice to be given to the property owner in case the costs are to be thus assessed, the giving of such notice is an essential prerequisite to the enforcement of the tax against the abutting property. *Zalesky v. Cedar Rapids*, 118-714.

the preceding section are complied with. *Farraher v. Keokuk*, 111-310.

power of a city to provide for the grading of a street only by resolution is omitted

from this section, nevertheless the rights of holders of property abutting on streets are too important to permit cities and towns to establish and alter the grades of such streets without the certainty and publicity given by the passage of some ordinance or resolution with reference thereto. *Eckert v. Walnut*, 117-629.

The failure to adopt a resolution before proceeding with the work of grading a street amounts at best to nothing more than a failure to observe and comply with a matter of form incident to the proceedings to carry into effect a legal right of which the city was already in full enjoyment. No special damages arising out of the failure to adopt a resolution ordering the work done being alleged or proved, an abutting property owner cannot recover damages as against a city for proceeding with the work without such resolution. *Wibur v. Ft. Dodge*, 120-555.

No remedy exists at common law to recover damages for injury to abutting property caused by bringing streets into conformity with the established grade. Nor is there any such remedy under statute, unless improvements were made with reference to a previously established grade. *Reilly v. Ft. Dodge*, 118-633.

The fact that no resolution is passed before the grading is done will not entitle an abutting property owner to recover damages against the city. *Ibid.*

An ordinance establishing a street grade is an essential prerequisite to the work of excavating for the construction of a permanent sidewalk. *Gallaher v. Jefferson*, 125-324.

The establishment of a grade for the center of a street operates also as the establishment of the grade for that portion of the street designed to be occupied by sidewalks and parking. *Ibid.*

The establishment of a grade for a permanent sidewalk is included and implied in the establishment of a street grade. *Gallaher v. Jefferson*, 125-324.

The city is liable to an abutting property owner for damage to his property from cutting down a street on which no grade

has been established. *Millard v. Webster City*, 113-220.

As a general rule a city is not liable for damages occasioned by the mere grading of a street, if this is done in a prudent manner, but the city will not be permitted to divert a large quantity of surface water from its natural course in another direction so as to flow on a lot owner's land in destructive quantities through a drain or channel. *Hoffman v. Muscatine*, 113-332.

Excavation in the street made in grading which allows the collection and standing of water may constitute such wrong on the part of the city as to sustain a judgment for damages. *Howard v. Lamon*, 124-348.

The street grade having been properly established, the grade of the curb line is to be fixed with reference to the street grade according to approved methods of construction. *Shelby v. Burlington*, 125-343.

Where an abutting property owner is damaged by the unlawful grading of a street the city is liable if the grading is done by its authority, and where done by the street commissioner, with knowledge of the city council, and without objection by the council, authority will be presumed. *Brown v. Webster City*, 115-511.

A city is liable for damages occasioned to an abutting property owner by cutting down the street in front of his premises except for the purpose of bringing the street to an established grade fixed by valid ordinance. *Markham v. Anamosa*, 122-689.

But the abutting owner does not acquire title by adverse possession to the land lying between his lot line and the edge of the sidewalk merely by occupancy and assertion of title and cannot therefore recover damages for the mere removal of the dirt between the lot line and the sidewalk. *Ibid.*

The fact that a city excavates the street to an established grade so that abutting property is deprived of its lateral support does not entitle the owner to compensation by way of damages. *Talcott v. Des Moines*, 109 N. W. 311.

SEC. 785. Change of grade—damages.

The grade of street cannot properly be changed except by an ordinance. *Caldwell v. Nashua*, 122-179.

The grade of a street can neither be established nor changed save by ordinance. The city can acquire no rights as against a property owner by virtue of a change of grade claimed to arise by implication only. *Morton v. Burlington*, 106-50.

That plaintiff's property was made

more difficult of access, and that a retaining wall was rendered necessary and that certain shade trees in the street, not obstructing travel, were injured or destroyed, held elements of damage for which recovery could be had under this section. *Richardson v. Webster City*, 111-427.

Where the work was done by the street commissioner, extending over a period of

about six weeks, and the city disposed of some of the dirt taken from the excavation, held that there was sufficient evidence *prima facie* to show that the change was by the authority of the city. *Ibid.*

A witness should not be asked to state how much less in value the premises were worth after the change than before. *Ibid.*

Mere adoption of an ordinance changing the grade gives no right of action to a property owner, and if the city proceeds to change the grade to some extent, without making the complete change necessary to conform the street to the established grade, the property owner can only recover damages resulting from such actual change. *Buser v. Cedar Rapids*, 115-683.

An abutting property owner is not entitled to recover damages until the change of grade is made effectual by change in the physical surface of the street; but his right of damages accrues when such actual change of grade is effected, although he has, between the time the change of grade is ordered and the time it is carried into execution voluntarily conformed his improvements to the paper grade. *York v. Cedar Rapids*, 130-453.

Where the physical change of grade is made in pursuance of one general plan of improvement, the damages to be paid to the abutting property owner are indivisible, and the cause of action therefor does not arise until the improvement has been completed. *Foley v. Cedar Rapids*, 133-64.

One who improves his property with reference to the natural grade of the street, which does not conform to the grade established by ordinance, cannot recover damages occasioned by the act of the city in bringing the street to the established grade. *Farmer v. Cedar Rapids*, 116-322.

If the land of the abutting owner is in fact benefited by the change of grade which improves the means of access to his property, that fact may be considered in fixing the amount of damages to be recovered for such change of grade. *Morton v. Burlington*, 106-50.

If a property owner makes improve-

ments before the grade for a street is established, he cannot recover damages occasioned by the work of bringing the street to the grade as thereafter legally established. *Wilbur v. Ft. Dodge*, 120-555.

The fact that the work of bringing a street to the grade established by city ordinance is begun without the adoption of a resolution ordering the work, does not create a right of action, not otherwise existing, in favor of a property owner for damages resulting from the bringing of such street to grade. *Ibid.*

But the city may be liable for damages caused by the grading of a street, even though done in accordance with the provisions of ordinance, if thereby the natural drainage is destroyed and no adequate means are provided for the escape of surface water. *Ibid.*

So the city may be liable for injury to abutting property by grading work done in a street, for which no legal grade has been established by ordinance, as required by law. *Ibid.*

To entitle a lot owner to damages for change of grade, the improvements must have been erected in accordance with the previous grade of the street; but it is not essential that such improvements shall have been made at the grade if they have been made with respect to a convenient use of the street, and damages thereto resulting from a change of grade may be recovered, although when made they were in fact below the established grade. *Stevens v. Cedar Rapids*, 128-227.

The property owner cannot complain of the improvement of the street in accordance with an established street grade, and the council may determine the grade of the curb line with reference to such street grade according to approved methods of street construction. The property owner alone and not a general taxpayer may complain of an improper method of construction. *Shelby v. Burlington*, 125-343.

The city and the property owner may agree as to the damages to be awarded for change of grade, and a taxpayer has no occasion for complaint in the absence of fraud. *Shelby v. Burlington*, 125-343.

SEC. 788. Assessment.

[Attention is called to section 792-a, *infra*, and note following said section.]

SEC. 791-a. Objections. All objections to the cost of construction of permanent sidewalks, as provided by the code, against the lots or parcels of land in front of which the same are constructed and all objections to the prior proceedings, on account of errors, irregularities or inequalities, must be made in writing and filed with the city clerk prior to the date fixed for said assessment; and all objections not so made shall be deemed waived; except where fraud is shown. [30 G. A., ch. 30, § 1.]

SEC. 791-b. Tax—how paid. If the owner of any lot or parcel of land against which an assessment for permanent sidewalks is made shall, at the time of making said special assessment, promise and agree in writing, endorsed on a certificate, or in a separate agreement, that in consideration of having the right to pay his assessment in installments, he will not make any objection of illegality or irregularity as to the assessment or levy of such tax upon and against his property, and will pay said assessment, with interest thereon at such rate, not exceeding six per cent. per annum, as shall by ordinance, or resolution of the council be prescribed, such tax, so levied against the lot or parcel of land of such owner, shall be payable in seven equal installments, the first of which shall mature and be payable on the date of said assessment and the others, with interest on the whole amount unpaid, annually thereafter, at the same time and in the same manner as the March semiannual payment of ordinary taxes; but where no such promise and agreement in writing shall be made by the owner of any lot or parcel of land, then the whole of said assessment so levied upon and against the property of such owner, shall be assessed and collected as provided for in section seven hundred and seventy-nine (779) of the code and amendments thereto. All such taxes, with interest, shall become delinquent on the first day of March next after their maturity and shall bear same rate of interest, with same penalties as ordinary taxes. [30 G. A., ch. 30, § 2.]

SEC. 791-c. Certificates of levy—lien upon property. A certificate of levy of such special assessment, fixing the number of installments and the time when payable, certified as correct by the city clerk, shall be filed with the auditor of the county, or each of the counties in which the city is situated and thereupon said special assessment, as shown therein, shall be placed on the tax list of the proper county and said taxes and special assessment, with all interest and penalties thereon, shall become and remain a lien upon such lot or parcel of land until the same is paid; and said lien shall have precedence over all other liens, except ordinary taxes. [30 G. A., ch. 30, § 3.]

SEC. 791-d. Interest—rate. Each installment of any such special assessment shall bear interest from the date of the assessment, not to exceed six per cent. per annum, which shall become due and payable at the March semiannual payment of ordinary taxes. Upon the payment of any installment there shall be computed and collected the installment and interest on the whole assessment remaining unpaid up to the first day of April following. [30 G. A., ch. 30, § 4.]

SEC. 791-e. Payment of assessment, interest, costs and penalties. The owner of any property against which said special assessment is made and levied shall have the right to pay the same, or the unpaid installments thereof, with all interest up to the time of said payment, with any penalties and the cost of any proceedings for the sale of the property for such special assessment or installments. [30 G. A., ch. 30, § 5.]

SEC. 791-f. Tax sale. Property against which a special assessment has been levied for permanent sidewalks, may be sold for any sum of principal or interest due and delinquent at any regular or adjourned tax sale, in the same manner, with the same forfeitures, penalties and rights of redemption and certificates and deeds on such sales shall be made in the same manner and with like effect, as in case of sales for the non-payment of ordinary taxes. [30 G. A., ch. 30, § 6.]

SEC. 791-g. Sidewalk certificates. The council may provide, by ordinance or resolution, for the issuance of permanent sidewalk certificates in the same manner and to the same effect as street improvement and sewer

certificates provided for in chapter eight (8) title five (V) of the code. [30 G. A., ch. 30, § 7.]

SEC. 791-h. Special charter cities. The provisions of this act shall apply to cities under special charter. [30 G. A., ch. 30, § 8.]

SEC. 791-i. Railroad right of way subject to special assessments. That the right of way of any railroad company fronting or abutting upon a street, highway, avenue, alley, public ground, wharf, landing or market place within the limits of any city or town shall be subject to special assessments for sidewalks and street improvements authorized to be made under the provisions of chapters six (6) and seven (7) title five (5) of the code and amendatory acts thereto the same as any land or lot therein, and any special assessment made against any railroad right of way under any of the provisions of said chapters six (6) and seven (7) title five (5) of the code shall be a debt due personally from the railroad company owning or leasing such right of way, and unless the same is paid by such railroad company as a special assessment it may be collected in the name of the city or town levying such assessment in any court having jurisdiction. [32 G. A., ch. 40, § 1.]

CHAPTER 7.

OF STREET IMPROVEMENTS, SEWERS AND SPECIAL ASSESSMENTS.

SECTION 792. Assessing costs of improvements.

The term "paved," as applied to streets, avenues and highways refers to the laying of some hard substance upon the earth so as to make a finished surface for travel, and does not apply to the re-flooring of a bridge. *Cedar Rapids v. Cedar Rapids & Marion City R. Co.*, 108-406.

While permanent paving is not to be done until after the bed of the street shall have been brought so near to the grade as established by ordinance as that paving when fully completed shall bring the street fully up to the established grade, and the cost of grading is not to be assessed as part of the improvement; yet if the grade is established at such time as that the improvement may be made with reference thereto it is sufficient. *Allen v. Davenport*, 107-90.

The city has the power to make permanent improvements only where they are constructed upon the established grade. Otherwise no assessment for such improvements can be made on abutting property. *Hubbell v. Bennett*, 130-66.

The right of the municipality to levy special assessments depends on statutory enactment, and has no existence unless there be a valid statute conferring it. General authority to levy taxes for municipal purposes is not sufficient to confer the power, and the statute which does confer it is to be strictly construed in favor of the person against whom the assessment

is levied. When express power is given, however, substantial compliance with the statute is all that is required. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112-300.

The whole theory of special assessments is based on the doctrine that the property against which they are levied derives some special benefit from the improvement. *Ibid.*

A mere easement is not a lot, nor a parcel of land, within the terms of this section, and therefore held that a railroad was not subject to special assessment for improvement of a street abutting its right of way. It would be otherwise as to property of the company used for warehouses, depots, or other like purposes. *Ibid.*

Where the validity of the assessment is conceded to depend upon a valid ordinance or resolution, the invalidity of the ordinance or resolution on account of irregularity in the method of adoption in an essential particular will defeat the assessment. *Cook v. Independence*, 133-582.

The statutory provisions as to the procedure in making special assessments are sufficiently definite without the aid of a resolution. *Stutsman v. Burlington*, 127-563.

The method of making the special assessments authorized in this section, being specifically pointed out in subsequent sections, no ordinance is necessary to enable the city to act in the exercise of that power. All that is essential is that the

city take the steps provided by the statute. *Martin v. Oskaloosa*, 126-680.

Under prior statutes it has been held that a special assessment cannot be enforced against lots which do not abut upon the improvement. *Smith v. Des Moines*, 106-590.

A provision requiring the city council to ascertain the entire cost of the improvement, and what portion may be assessable on adjacent property, and to assess such portion as provided by law or ordinance, does not violate the Fourteenth Amendment to the federal constitution. *Burlington Sav. Bank v. Clinton*, 106 Fed. 269.

A conveyance which is but an artifice, and not effectual to transfer title will not relieve the property owner from liability for special assessments. *Ransom v. Burlington*, 111-77.

An assessment certificate becomes affected in the hands of a holder with the terms of the law and ordinances under which it is issued, and also with any agreement of the property owner made in pursuance of such ordinances, fixing the time of payment of the assessments. *Talcott v. Noell*, 107-470.

A city may by contract render itself liable on implied guaranty for the costs of an improvement in front of property, not subject to the assessment, or which is of such value that the lien of the tax thereon cannot be successfully enforced. *Ottumwa Brick & Const. Co. v. Ainley*, 109-386.

And where the city by reason of its own fault issues certificates for such costs which are invalid, it is liable to the contractor for the amount thereof. *Fort Dodge Electric L. Co. v. Fort Dodge*, 115-568.

The expense of paving in front of a court house square may be assessed against the county. *Edwards & Walsh Const. Co. v. Jasper County*, 117-365.

Under prior statutes authorizing collection of the assessment by equitable proceedings, held that the city might proceed in equity although the taxes had been certified to the county treasurer and the necessary steps had been taken for the sale of the property for the tax. *Smith v. Des Moines*, 106-590.

Where paving and the curbing are provided for in separate proceedings, it is not objectionable to levy the curbing tax before the paving is completed. *Higman v. Sioux City*, 129-291.

In a proposal for bids for macadamizing a street the expense of grading should not be included except in so far as grading is necessary merely to prepare the street for

the improvement, and an assessment for the expense of macadamizing, which under the contract included the bringing of the street to grade, is void. *Gallaher v. Garland*, 126-206.

Where the vendor in a contract to convey had subsequently been assessed for street improvements which it was presumed had materially increased the value of his property, held that the contract to convey could not be specifically enforced as against him, and that in the action for specific enforcement the validity of the assessment which he had not contested but to which he had waived objection, could not be inquired into. *King v. Raab*, 123-632.

Where a re-assessment is proper the city council may no doubt be compelled to make it by proceeding by mandamus, but no such remedy is available to enforce an assessments of benefits where the contractor has not complied with his contract, and no assessment as provided by statute can therefore be made. *Crawford v. Mason*, 123-301.

The fact that street improvements have been paid for out of the general fund to which an abutting property owner has contributed, does not preclude the adoption of the plan of special assessments as to further improvements. *Shelby v. Burlington*, 125-343.

A city may provide for parking the center of a public street and require an abutting property owner to pay for the expense of a curb along such park. *Downing v. Des Moines*, 124-289.

Where power is given a city to provide for improvement of the streets it is ordinarily within the discretion of the council to determine when and where the work shall be done and to provide the plan thereof. *Ibid.*

It is not for the court to say whether the determination of a city to grade any particular street is reasonable or unreasonable, but it does have the power to say that the city must take reasonable care to do the work in a manner to avoid unnecessary injury to shade trees growing in front of a residence lot which do not obstruct the use of street or sidewalk. *Kemp v. Des Moines*, 125-640.

The authority of the city to grade its streets extends to the removal or destruction of trees which have been planted therein by an adjoining owner with the express or implied consent of the city, but the right should be exercised so as not to cause greater damage to the trees than necessary in the proper improvement of the street. *Gallaher v. Jefferson*, 125-324.

SEC. 792-a. Special assessment—rate. When any city or town council or board of public works levies any special assessment for any public im-

provement against any lot or tract of land, such special assessment shall be in proportion to the special benefits conferred upon the property thereby and not in excess of such benefits. Such assessment shall not exceed twenty-five per centum of the actual value of the lot or tract at the time of levy, and the last preceding assessment roll shall be taken as *prima facie* evidence of such value. [28 G. A., ch. 29, § 1.]

[By the title of the act (chapter 29, 28 G. A.), the act seems to have been intended as amendatory of chapters 7 and 8 of the code, only, while the wording of the above section would seem to include any special assessment for any public improvement.]

Prior to the enactment of this section it was held that the front foot rule of assessment without regard to benefits was not unconstitutional. *Allen v. Davenport*, 107-90.

The value of the lots as shown by the assessment roll is *prima facie* evidence of the value for the purpose of determining whether the assessment exceeds 25 per cent of the actual value. *Baily v. Sioux City*, 133-276.

The valuation of the lot for the purpose of determining the proportion of benefit should be confined to that portion subject to the assessment. *Rawson v. Des Moines*, 133-514.

In determining the benefits the council may consider the size, shape and location of the lot. *Reed v. Cedar Rapids*, 111 N. W. 1013.

The size of parcels of ground adjoining the street improved may be taken into account in determining the assessment to be made thereon for the improvement. *Minneapolis & St. L. R. Co. v. Lindquist*, 119-144.

In making permanent improvements, account may be taken, not only of present conditions, but also as to future benefits. *Ibid.*

The city council may act upon its own judgment regarding the value of property and the amount of benefit conferred, and in the absence of fraud its judgment is conclusive unless an appeal is taken therefrom. *Owens v. Marion*, 127-469.

The front foot rule of assessment for

street improvements cannot equitably be applied where the property of the owner against whom it is sought to enforce such assessment is a strip of land practically useless and without market value. *Iowa Pipe & Tile Co. v. Callanan*, 125-358.

The abutting owner seeking relief in equity from assessment for street improvement is not bound to tender any specific sum as representing the benefits received, less than that for which he is assessed. *Ibid.*

This act was evidently passed to provide for assessments according to benefits as distinct from the front foot rule, but it did not operate to repeal the sections of the chapter relating to special charter cities on that subject. *Diver v. Keokuk*, 126-691.

The manner of assessing the expenses of the improvement is prescribed by statute, but what shall be taken into consideration in determining to what extent the property has been enhanced in value by the improvement must depend on the circumstances of each particular case. Everything else being equal the front foot rule is just in apportioning the cost among the several lot owners. *Stutsman v. Burlington*, 127-563.

Where it appears from the recital of the resolution by the council that the assessment is in proportion to the special benefits from the improvement as found by it, such recital is sufficient to show that the assessment is in accordance with the benefits. *Higman v. Sioux City*, 129-291.

SEC. 792-b. Deficiencies—how paid. If the special assessment which may be levied against any lot or tract of land shall be insufficient to pay the cost of the improvement, the deficiency shall be paid out of the general fund, or for sewers out of the sewer fund provided for in section eight hundred and thirty-one (831), or subdivision three (3) of section eight hundred and ninety-four (894), or section nine hundred and seventy-eight (978), or subdivision three (3) of section ten hundred and five (1005), or for other improvements out of the improvement fund provided for in section eight hundred and thirty (830), or subdivision two (2) of section eight hundred and ninety-four (894), or section nine hundred and seventy-seven (977), or subdivision two (2) of section ten hundred and five (1005) of the code, and acts amendatory thereof as the case may be. If there be property against which no special assessment can be levied the proportion of the cost of the improvement which might otherwise be assessed against such property shall be paid in like manner. [28 G. A., ch. 29, § 2.]

SEC. 792-c. What statutes govern. So far as applicable, sections eight hundred and twenty-one (821), eight hundred and twenty-two (822), eight hundred and twenty-three (823), eight hundred and twenty-four (824), eight hundred and twenty-nine (829), and eight hundred and thirty-nine (839) of the code shall govern all special assessments made in cities and towns unless otherwise specially provided. Upon appeal the court shall determine all questions, including that of benefits to the property assessed. [28 G. A., ch. 29, § 3.]

SEC. 792-d. Enforcement of certain statutes not affected. Nothing in this act shall be construed to interfere with the enforcement of the provisions of sections eight hundred and thirty-four (834) and eight hundred and thirty-five (835), of the code. [28 G. A., ch. 29, § 4.]

SEC. 792-e. Special charter cities. This act shall apply to cities acting under special charter. [28 G. A., ch. 29, § 5.]

SEC. 794. Sewers.

A sewer is usually closed but not necessarily so, and the term is usually applied to drains in a city, whether for water or filth or both; but there is no provision for the construction of sewers through private property within incorporated towns, though the power to condemn for this purpose is conferred on cities. *Aldrich v. Paine*, 106-461.

The authority of a board of supervisors under Code § 1939 to provide for the construction of ditches or drains within the county extends to cities and towns, and a county ditch may properly be constructed and the cost thereof assessed to abutting property through the limits of an incorporated town. *Ibid.*

A temporary gutter for surface drainage may be constructed in the street without the passage of a special ordinance authorizing it, and without compliance with the provisions as to sewers. Even if a resolution for such improvement should be necessary, the acceptance of the work by the city would be a ratification of the act of the street commissioner in constructing it without such resolution. If such drain or gutter is negligently constructed, one injured thereby may recover damages in an action, but is not entitled to have it abated as a nuisance. *Cooper v. Cedar Rapids*, 112-367.

The entire city may be made one sewer district, and the cost of constructing a

sewer, which is beneficial to the entire city, may be provided for by a sewer tax on the entire real property within the limits of the city. *Grunewald v. Cedar Rapids*, 118-222.

Where an abutting property owner connected his cellar with a sewer, with knowledge that the sewer was not sufficient to carry off the surface water and sewage, due to extraordinary rains, held that he was not entitled to recover damages by reason of the insufficiency of the sewer for the purpose. *Sheriff v. Oskaloosa*, 120-442.

The city council, in attempting to contract for the city with reference to the construction of sewers beyond the limit of its powers, does not bind the city to the payment of the certificates issued in pursuance of such contract and there can be no recovery either on the certificates or upon *quantum meruit*. *Citizens' Bank v. Spencer*, 126-101.

The city having authority to provide for the construction of sewers has implied authority to borrow money for the purpose of constructing a plant for the disposition of sewage. *Glucose Sugar Ref. Co. v. Marshalltown*, 153 Fed. 620.

A sewer, though in itself properly constructed, may be so planted as to create a nuisance which may be abated. *Rand Lumber Co. v. Burlington*. 122-203.

SEC. 797. Changing water courses.

Where a city in the exercise of statutory authority has fixed the channel of a water course through which surface water flows, a property owner has no right by filling his lot and obstructing such channel to throw such surface water out of the

course thus fixed. *Waverly v. Page*, 105-225.

The power to change a water course is not conferred on incorporated towns. *Aldrich v. Paine*, 106-461.

SEC. 799. Question submitted—special election. If the council on receiving the plans, specifications, and estimate of the expenses to be incurred, referred to in the last preceding section, shall still be of the opinion

that the work should be done as proposed, it shall call a special election of the entire city or of any sewer district thereof in which the proposed work is to be done to finally determine the same question, and also the question of levying a special tax upon the property of the city or such sewer district, in addition to all other taxes now provided for by law, for that purpose. If the council shall determine that the estimated cost is greater than should be levied and collected in a single year, it may fix the yearly proportion, and determine in what years the same shall be levied and collected, and provide by ordinance or resolution the time of submitting the question to a vote. [23 G. A., ch. 6, § 3.] [28 G. A., ch. 28, § 1.]

SEC. 801. Damages assessed. After the plat and notes of the survey are made and filed, the council shall appoint five commissioners, resident freeholders of the city, not interested in any property abutting on said stream, who shall be sworn faithfully and impartially to perform the duties that may be required of them, either by this chapter or any ordinance passed in pursuance hereof, who shall determine what lot, lots or lands abutting on said stream will be benefited or damaged by doing the work, the amount of benefit or damages which will accrue to or be sustained by each and every lot, lots or lands, and the owners thereof, and make report in writing of their findings. In determining any question as to whether benefits accrue to or damages are sustained by such lot, lots or lands, or the owners thereof, the said commissioners shall consider the amount of land reclaimed or lost, the expense that will be incurred by the owners thereof in doing said work, and the advantages accruing from the removal of the easement of said water course, and any other matter that they may think proper to be considered for such purpose, but no damages shall be awarded for the cost of filling said channel. The commissioners shall give notice of the time and place of their meetings to determine what lot, lots and lands are benefited or damaged, by publication thereof at least five days successively prior thereto, in some newspaper of general circulation in said city; and, for the purpose of enabling them to determine the fact of benefit or damage, may take any competent evidence which the owner of any property affected may see fit to offer. The findings of the commissioners shall be returned to the council, and it may approve, reject or modify the same. Notice of the hearing before the council, upon the report so made, shall be given by publication in a newspaper of general circulation in the city for five successive days, which last publication shall be ten days before such hearing, and if, after this hearing, it shall conclude to reject the report, it shall resubmit the matter to other commissioners, who shall proceed as in the first instance. If the council shall approve or modify this second finding, it shall proceed to assess the amount of benefits so found against said abutting lot, lots or lands, and the channel to be filled or reclaimed. Any person aggrieved by the action of the council in making said assessment may appeal therefrom to the district court of the county in which it is made, within twenty days from the date of the assessment, and also have the right to review the action of the council in said court in the manner now provided by law. In the event that there is no daily newspaper published in the city or town then the notices provided for by section eight hundred one (801) of the code may be given by one publication thereof in a weekly newspaper of general circulation published in such city or town. Such publication to be made at least five, and not exceeding ten, days prior to the hearing or meeting referred to in said section. [26 G. A., ch. 6, § 5.] [31 G. A., ch. 25.]

It is immaterial that the assessment names the property upon which it is assessed as belonging to an owner deceased. *Smith v. Des Moines*, 106-590.

SEC. 810. Street improvements and sewers—preliminary notice.

Establishment of the grade prior to the resolution providing for the improvement is not jurisdictional, and if the grade is established at such time that the improvement may be made with reference thereto it is sufficient. *Allen v. Davenport*, 107-90.

While cost of grading cannot be assessed as part of the street improvement, yet a reasonable amount of excavating in order to prepare the surface of the street for the finished improvement may be charged as part of the cost of paving. *Ibid.*

Failure of the notice to correspond with the ordinances and resolutions is such a

defect as to vitiate the assessment. *Gal-
laher v. Garland*, 126-206.

The published notice in a particular case held sufficient. *Arnold v. Ft. Dodge*, 111-152.

The statutory provisions as to special assessments must be strictly complied with. Unless the preliminary notice is given as required the council acquires no jurisdiction to act. *Reed v. Cedar Rapids*, 111 N. W. 1013.

The council may select for street improvement a patented article or process without rendering the assessment void. *Saunders v. Iowa City*, 111 N. W. 529.

SEC. 811. Resolution.

No particular form of expression is necessary in the resolution ordering the street improvement. If it indicates that the improvement is to be made in accordance

with the resolution, of necessity that is sufficient. *Stutsman v. Burlington*, 127-563.

SEC. 812. Contract.

A valid contract in compliance with the provisions of the statute is a jurisdictional prerequisite to the exercise by the city of the power to make a special assessment on abutting property for the cost of paving. *Allen v. Davenport*, 132 Fed. 209.

The acceptance of curbing under a contract is vitiated by proof of fraud of the contractor in not using the amount of cement required by the contract, whereby the work done is inferior to that contracted for, and such fraud will not be waived by the action of the city authorities in accepting the curbing. *Mason v. Des Moines*, 108-658.

The fact that the contract for the work requires that all the laborers employed shall be citizens of the city does not constitute such invalidity as to defeat recovery by the contractor after the work has been performed and accepted. *Edwards & Walsh Const. Co. v. Jasper County*, 117-365.

In an action by a contractor to recover the reasonable value of the improvements made under a contract which is void, he is entitled to the cost of the material and labor. *Davenport v. Allen*, 120 Fed. 172.

The city's right of action against the property owner for money thus paid to the contractor commences to run at the time such payment is made. *Ibid.*

Under the terms of a particular contract for laying brick paving, held that nothing but a final acceptance of the completed work would constitute a waiver of the conditions of the contract as to the material used, and therefore a failure to object

during the progress of the work would not be presumed to be an approval thereof. *Atkinson v. Davenport*, 117-687.

A stipulation in the contract providing for the maintenance of the improvement in good condition for the term of five years, held not to invalidate the contract, as it was in the nature of a guaranty and not an independent contract for repairing. *Osborn v. Lyon*, 104-160.

The fact that property owners knew that the improvements in question were being made and did not object thereto, held, not to constitute an estoppel against them to question the validity of the contract, it not appearing that they had knowledge of the defects therein. *Ibid.*

The contract may properly provide for such grading and filling as is necessary to form the subgrade for the pavement. *McCain v. Des Moines*, 128-331.

In a particular case, held that there was such failure to comply with the specifications of the contract that the special assessment was invalid. *McCain v. Des Moines*, 128-331.

A contract for a street improvement is not necessarily invalid because it requires the contractor to keep the improvement in repair for a specified period. *Diver v. Keokuk*, 126-691.

Provisions of the contract not authorized by statute cannot be complained of after the work has been completed by a property owner, who has made no objection in the method pointed out by statute. *Ibid.*

Where the city assumes liability to the contractor for the cost of street improve-

ments such liability becomes indebtedness within the constitutional limitation; and the contract will be invalid if the indebted-

ness thus incurred is in excess of the constitutional limit. *Allen v. Davenport*, 107-90.

SEC. 813. Bids.

Under statutory provisions requiring improvements to be made by bids advertised for by the board of public works upon plans and specifications furnished by the city engineer, the plans and specifications may be sufficient, although they are not as full and complete as they might possibly be made. *Jenney v. Des Moines*, 103-347.

Where the publication of the notice for bids did not state at what time the bids would be acted on and when the work should be done and the contract as let fixed a different date for the completion of the work from that referred to in the ordinance under which the improvement was to be made, held that the contract was invalid. The statutory provisions as to the method of letting such contracts are mandatory. *Osburn v. Lyons*, 104-160.

Where a notice for bids for street improvements did not specify when the work should be done nor at what time the proposals would be acted upon, held, that it was insufficient and the assessments made

for such improvements were invalid. *Polk v. McCartney*, 104-567.

Where the notice is defective in not corresponding with the ordinance and resolutions, the acceptance of bids in pursuance of such notice does not furnish a sufficient basis for an assessment. *Gallaher v. Garland*, 126-206.

The requirement that notice of the letting be given "for at least ten days by two publications" means two publications, the last of which is at least ten days before the date specified. *Comstock v. Eagle Grove*, 133-589.

The contract is not invalid because it requires specifically the doing of acts of construction, implied but not expressed in the notice, or work for which no charge is made. *Comstock v. Eagle Grove*, 133-589.

The fact that the council selects for the paving a patented article or process does not render the contract invalid. *Saunders v. Iowa City*, 111 N. W., 529.

SEC. 814. Contractor's bond to repair. All contracts for the making or reconstruction of street improvements or sewers may contain a provision obligating the contractor and his bondsmen to keep such improvement or sewer in good repair for not less than one year after the acceptance of the same by the city, and the bond shall be so conditioned as to conform to such contract. [27 G. A., ch. 24, § 1.]

SEC. 816. Lien of tax.

Under 25 G. A., chap. 7, sec. 12, which provided that the assessment should be a lien upon the property abutting upon the street on which the improvement was made, it was held that the cost of street improvements could not be assessed upon a lot not abutting upon the street, no matter how nearly adjoining it might be. *Smith v. Des Moines*, 106-590.

The liens of special assessments take priority in order of time. *Des Moines Brick Mfg. Co. v. Smith*, 108-307.

A conveyance which is but an artifice and not effectual to transfer title will not relieve the property owner from liability for special assessments. *Ransom v. Burlington*, 111-77.

A special assessment for the construction of a sidewalk becomes a lien on abutting property only upon the filing with the county auditor of a copy of the record of the city council directing a construction of the walk. *Cemansky v. Fitch*, 121-186.

SEC. 818. Cost of improvements—how paid.

The provisions of this section, authorizing apportionment of the cost on abutting lots, according to their frontage, is not un-

constitutional. *Hackworth v. Ottumwa*, 114-467.

SEC. 820. Assessments of cost.

Permanent street improvements for which assessment can be made upon abutting property can be provided for only at the established grade. Improvements otherwise than at the established grade are

temporary only, and assessments therefor cannot be made on property owners. *Hubbell v. Bennett*, 130-66.

Property owners cannot be heard to complain of a part of the assessment with-

out tendering payment of the portion of the assessment which is valid. *Allen v. Davenport*, 107-90.

It is not until the completion of the work that the council is required to determine the cost and authorized to assess such cost upon abutting property. It is not contemplated that the assessment be made for the estimated cost. *Sanborn v. Mason City*, 114-189.

Statutes authorizing special assessments for improvements must be strictly construed, and when any of their substantial requirements are departed from, the pro-

ceeding is void. *Gill v. Patton*, 118-88.

If the city acts in excess of its authority in assessing abutting property for street improvements, such void assessments may be enjoined. *Hubbell v. Bennett*, 130-66.

The cost of collection should not be made a part of the assessment. *Higman v. Sioux City*, 129-291.

To render special assessments when certified to the county auditor a lien upon the property must have been assessed in strict conformity to the statute. *Fitzgerald v. Sioux City*, 125-396.

SEC. 821. Plat and schedule.

The provisions of this section require that the city council shall cause to be made and file for public inspection a plat of the land on which it is proposed to levy a special assessment, showing the street lots or parcels of ground subject to assessment for the improvement. It is therefore improper to assess platted lots collectively or in pairs. *Gill v. Patton*, 118-88.

The lots or parcels of land to be charged with the special assessment are to be assessed separately and not several together. *Stutsman v. Burlington*, 127-563.

Only that portion of a lot which is subject to assessment should be considered in determining the valuation as limiting the amount for which it may be assessed. *Rawson v. Des Moines*, 133-514.

SEC. 823. Notice of assessment. After filing the plat and schedule, the council shall give notice by two publications in each of two newspapers published in the city, if there be that number, otherwise in one, and by hand-bills posted in conspicuous places along the line of such street improvement or sewer, that said plat and schedule are on file in the office of the clerk, and that within twenty days after the first publication all objections thereto, or to the prior proceedings, on account of errors, irregularities or inequalities, must be made in writing and filed with the clerk; and the council, having heard such objections and made the necessary corrections, shall then make the special assessments as shown in said plat and schedule, as corrected and approved. [25 G. A., ch. 7, §§ 11, 18; 22 G. A., ch. 5, § 6; 22 G. A., ch. 6, § 5; 21 G. A., ch. 168, §§ 11, 19.] [29 G. A., ch. 44, § 1.]

If the property owner has notice and an opportunity to be heard before the assessment attaches and becomes a lien upon his property, this is all the law requires. *Arnold v. Ft. Dodge*, 111-152.

A property owner who has had notice during the progress of the work of the grade adopted, and in accordance with whose request the grade has been modified, cannot afterwards complain that the improvement is not in accordance with the established grade. *Ibid.*

Proof of the posting of notice may be made by parol evidence. *Owens v. Marion*, 127-469.

A record of the special assessment resolution reciting the posting of notices as required by law is sufficient to establish such fact. *Ibid.*

Objections to the form of notice must be made under the provisions of Code § 824. A defect as to the form will not render the proceedings void. *Ibid.*

Although by 28 G. A., chap. 29, the provisions of this section as to notice of special assessments are made applicable to cities under special charters, nevertheless, Code § 971 on the same subject in the chapter relating to special chartered cities is not thereby repealed. *Diver v. Keokuk*, 126-691.

Under prior statutory provisions held that a mere mistake in name of the owner to whom notice was directed would not invalidate the assessment. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112-300.

SEC. 824. Objections.

One who, having proper notice of a special assessment, fails to resort to the statutory remedy for the purpose of cor-

recting error in such assessment, cannot have relief in equity. *Minneapolis & St. L. R. Co. v. Lindquist*, 119-144.

The legislature having provided a tribunal for the determination of all controversies growing out of special assessments, a party complaining of such assessment must resort to that tribunal for the correction of all errors, irregularities or inequalities in the assessment itself or in any of the prior proceedings or notices, in the absence of fraud or of such a showing as deprives the tribunal of the right to act. Without resorting to such tribunal the property owner cannot complain of a defective notice. *Owens v. Marion*, 127-469.

Failure to appear before the city council and object to the making of a contract for improvements does not waive the right to enjoin a special assessment if defects in the proceedings are such as to render the assessment void. *Gallaher v. Garland*, 126-206.

The property owner is not bound to make any tender for benefits received in resisting the enforcement of a special assessment which is void. *Ibid.*

Complaints as to irregularities in the assessment of benefits as against a street railway company must be made before the city council, and must be specific as to the objection insisted upon. *Marshalltown Light P. & R. Co. v. Marshalltown*, 127-637.

Defects in the contract rendering it

SEC. 825. Levy of assessment—installments.

Under the provision by which the owner of the property may by waiving objections to assessments have the right to pay in installments, a lessee is not such owner as to be entitled to file a waiver and thus make the assessment payable in installments. So held where a tenant under obligation to pay all taxes and assessments imposed on the property during the term of the lease attempted by signing a waiver to make the assessment payable in installments and thus escape liability for installments which would under such arrangements not become payable during his term. *Vorse v. Des Moines Marble & Mantel Co.*, 104-541.

The certifying of the assessment to the auditor is not a duty enjoined, but a right conferred, and its exercise is discretionary. *Talcott v. Noell*, 107-470.

A resolution or ordinance making a special assessment may be proven by parol evidence. *Edwards & Walsh Const. Co. v. Jasper County*, 117-365.

The council has no authority to include the expense of collecting the special assessment in the assessment itself which is levied on the property. *Higman v. Sioux City*, 129-291.

Where the vendor in a contract to convey had been subjected to special assessments which it was presumed had materi-

avoidable and not void must be taken advantage of by a property owner by filing objections. No objection having been interposed until the work is performed, the property owner cannot complain. *Diver v. Keokuk*, 126-691.

The errors and irregularities which are cured by failure to make objection as specified in the statute are such as the council might cure if attention were called thereto. Jurisdictional defects in the proceedings are not thus cured. *Comstock v. Eagle Grove*, 133-589.

Where the improvement is unauthorized and the tax void, the property owner complaining thereof is not bound to appear before the council to make objections but may proceed in equity to have the enforcement enjoined. *Carter v. Cemansky*, 126-506.

One who resists the enforcement of a special assessment against his property is not estopped from doing so by the fact that an installment of such assessment has been paid by one under whom he claims title. *Ibid.*

Failure of a property owner to object before the council to the character of the work does not estop him from insisting, in resistance to the payment of the special assessment, that the contractor has not complied with his contract. *Wingert v. Tipton*, 108 N. W. 1035; 111 N. W. 432.

ally increased the value of his property, and on that ground resisted specific performance of his contract, held that the validity of the assessment could not be inquired into, such owner having waived any question as to their validity. *King v. Raab*, 123-632.

When it is sought to charge a property owner for the cost of works of public improvement, the power must be exercised strictly in the manner prescribed by law, and if by ordinance and resolution notice is specified as a condition for the levying of such special tax, the council has no jurisdiction to impose a tax, unless the notice is given as required. *Zalesky v. Cedar Rapids*, 118-714.

Although the resolution levying the special tax does not specify the names of owners, and description of their lots, yet if it makes reference to a plat and schedule previously filed which is approved, and which contains sufficient specifications, it is not objectionable. *Higman v. Sioux City*, 129-291.

A motion to reconsider the resolution adopting a pavement having been sustained by a majority vote of council, held that there was no valid approval. *Wingert v. Tipton*, 108 N. W. 1035; 111 N. W. 432.

SEC. 829. Sale for assessment.

Where a special assessment is enforced by action, only six per cent. interest can be collected. *Des Moines Brick Mfg. Co. v. Smith*, 108-307.

Where special assessments are certified for collection, the property owner is not required to pay interest or penalty, except as provided in the special assessment statutes. *Edwards & Walsh Const. Co. v. Jasper County*, 117-365.

One who has paid taxes which he claims to have been unlawfully assessed by the city cannot recover back the money paid, unless it appears that there was no authority to assess the tax, that the money sued for has been actually received by the city, and that the payment was upon compulsion. *Hawkeye L. & B. Co. v. Marion*, 110-468.

A roadbed or right of way, or other property so connected with the operation of a railway as that its loss by conveyance or sale would necessarily dismember and break up the entirety and utility of the road as a line of travel and commercial intercourse, should not be sold for a special assessment thereon. *Minneapolis & St. L. R. Co. v. Lindquist*, 119-144.

Whether the roadbed of a railway company, constructed through property to which the company has a fee simple title, may be sold for special assessments on such property for the improvement of abutting streets, *quaere*. But the portion of such premises not used for railroad purposes may be sold for such assessments, like any other property. *Ibid*.

Where a special tax has not become a lien on property in such sense that the property could be sold therefor at the time of sale for general taxes, the lien of the special tax is not effectual as against the purchaser at the sale. *Harrington v. Valley Sav. Bank*, 119-312.

Under a void assessment the certificate holder is not entitled to recover on *quantum meruit* for benefits conferred on the owner of the property by the improvement. *Carter v. Cemansky*, 126-506.

Special assessments not certified or brought forward so as that they constitute a lien on the property at the time of the tax sale and not included in such sale are cut off so far as the tax purchaser is concerned. *Fitzgerald v. Sioux City*, 125-396.

SEC. 830. Levy for city improvement fund.

The city improvement fund out of which deficiencies in the special assessment for street improvements may be paid is the

fund provided for in Code § 894 to cover costs at street intersections and similar places. *Cory v. Ft. Dodge*, 133-666.

SEC. 831. Levy for sewer fund.

A district sewer tax is enforceable only against the real property within the sewer district. Therefore it cannot be enforced as against a railroad company which is

taxed under Code § 1336 on its real and personal property collectively. *Chicago, M. & St. P. R. Co. v. Phillips*, 111-377.

SEC. 832. Cost of repairs.

The expense of repairing may be paid out of the general fund or the improve-

ment fund. *Shelby v. Burlington*, 125-343.

SEC. 833. Assessments not to be diverted.

A court of equity has jurisdiction to compel a city to perform its duty as trustee to collect and properly apply such assessments. *Vickry v. Sioux City*, 104 Fed. 164.

A city which has issued bonds to be paid for by the collection of special assessments

is a trustee, charged with the duty of collecting and applying such assessments, and equity has jurisdiction over a suit by the holder of such bonds to require an accounting in respect to such trust and for the enforcement of the same. *Farson v. Sioux City*, 106 Fed. 278.

SEC. 834. Assessments on railways and street railways.

This section has reference to assessment of railways and street railways for the improvement of streets occupied by their tracks, and not to assessment of special taxes upon right of way abutting upon the street improvement. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112-300.

This section is applicable to street improvements undertaken in pursuance of authority conferred by the Code. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 115-568.

When the contractor has agreed to take certificates in payment of his work in pav-

ing a street and the city, having authority to assess the entire amount upon abutting property, improperly issues certificates against the street railway company for a share of the expense, which certificates are invalid, it becomes liable to the contractor for the amount of the invalid certificates. *Ibid.*

A provision in a franchise exempting a street railway company from any require-

ment to pave except as provided therein does not constitute a contract on which the company may rely as against subsequent provisions with regard to assessing the expense of a street improvement in part upon the property of the company thus occupying such street. *Marshalltown Light, P. & R. Co. v. Marshalltown*, 127-637.

SEC. 835. Cost of paving already laid. Before any street railway company shall lay its track upon any street that has been paved, and which at the time is not being repaved, it shall pay into the city treasury the value of all paving between its tracks, and one foot outside thereof, which value shall be determined by the city council, but in no case shall exceed the original cost of the paving, and the money thus paid shall be refunded to the abutting property owners on said street in proportion to the amounts originally assessed against the property abutting thereon. The company or any person affected by or interested in such determination of the value of such pavement may appeal therefrom to the district court within thirty days thereafter and in the manner provided in section eight hundred and thirty-nine of the code. [30 G. A., ch. 32.]

SEC. 836. Relevy.

An irregularity in an assessment does not affect the jurisdiction of the city in the proceeding, and may be cured. *Ottumwa Brick & Const. Co. v. Ainley*, 109-386.

Where a special assessment has been adjudged illegal because of some defect in the proceedings not going to the jurisdiction or power of the city to act in the premises, the legislature may, by general or special statute, provide for reassessment, but where the validity of an assessment has been finally determined by proceedings in court, the legislature cannot by subsequent action give validity to such assessment. *McManus v. Hornaday*, 124-267.

The statutory provision for reassessment is applicable where a valid assessment might have been made in the first

place, but it does not authorize an assessment for the benefits conferred by the improvement where the contractor is not entitled to compensation under the contract. *Crawford v. Mason*, 123-301.

Where a legal assessment might have been made a reassessment is authorized. *Martin v. Oskaloosa*, 126-680.

There may be a re-levy of a special assessment, even after the original levy of such assessment has been declared invalid by action in court. *Gill v. Patton*, 118-88.

These provisions have no application where an essential requisite of jurisdiction to impose an assessment has been omitted, such as the giving of notice, as required by ordinance and resolution. *Zalesky v. Cedar Rapids*, 118-714.

SEC. 839. Appeal.

On the appeal the court has no power to make an entirely new assessment. *Berry v. Des Moines*, 115-44.

The provisions of this section are limited to assessment proceedings under the provisions of the Code. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 115-77.

Where the assessment is made without any authority, then the property owner can enjoin the enforcement of the assessment without resorting to the remedy by appeal. *Ibid.*

One who might by appeal have an error in a special assessment corrected, cannot ask relief in equity. *Minneapolis & St. L. R. Co. v. Lindquist*, 119-144.

If the assessment is void for want of jurisdiction of the city council to act, the objection need not be raised before the council nor by appeal; but if defective only on account of irregularities or erroneous judgment on the part of the council, objection and appeal are the only remedies. *Owens v. Marion*, 127-469.

SEC. 840-a. Repeal—statutes applicable to towns. That chapter thirty-one (31) of the laws of the thirtieth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

“That all of the provisions of section[s] seven hundred and ninety-two (792) to section eight hundred and forty-nine (849) inclusive, of chapters seven (7) and eight (8) of title five (5) of the code and that subdivision three (3) of section eight hundred and ninety-four (894) of the code granting to cities of the first and second classes the power to construct sanitary sewers and assess the cost of the same to the real property abutting on, adjacent to or benefited by such sewers, and providing for a tax on the assessed valuation of all property therein when the entire city comprises one sewer district, shall be applicable and apply to incorporated towns.” [31 G. A., ch. 24.]

SEC. 840-b. Main sewer fund. Any city of the first class shall have power to levy annually a tax not exceeding five (5) mills on the dollar on the assessed valuation of all property therein, for a main sewer fund, to be used to pay the whole or any part of the cost of the making, reconstruction or repair of any main sewer within the limits of the city. [31 G. A., ch. 26, § 1.]

SEC. 840-c. Terms defined. A “main sewer” as referred to in this act shall be held to mean any sewer that is commonly referred to by any one of the following terms: “intercepting sewer, out-fall sewer, or trunk sewer.” [31 G. A., ch. 26, § 2.]

SEC. 840-d. Statutes applicable. The provisions of chapter seven (7), of title five (5), of the code shall be applicable to providing for the making, reconstruction or repair of main sewers, the whole or any part of the cost of the making, reconstruction or repair of which shall be ordered paid from the main sewer fund herein provided for, to the same extent and in the same manner as the provisions of said chapter seven (7), of title five (5), of the code are now applicable to providing for the making, reconstruction or repair of sewers, the whole or any part of the cost of the making, reconstruction or repair of which may be ordered paid from the city sewer fund. [31 G. A., ch. 26, § 3.]

SEC. 840-e. Same—main sewer certificates or bonds. The provisions of chapter twelve (12), of title five (5), of the code shall be applicable to taxes authorized to be levied for the main sewer fund. Certificates or bonds issued in anticipation of the collection of taxes authorized to be levied for the main sewer fund shall be denominated “main sewer certificates” or “main sewer bonds.” [31 G. A., ch. 26, § 4.]

SEC. 840-f. Aggregate tax for all sewer funds. The aggregate tax levied by any city of the first class in any one year for a city sewer fund, a district sewer fund, and a main sewer fund, shall not exceed [eight] (8) mills on the dollar on the assessed valuation of all the property therein. [31 G. A., ch. 26, § 5.]

SEC. 840-g. Tax levy authorized. Cities of the second class, and towns, shall have the power to levy annually a tax not exceeding three mills on the dollar to be used solely for the purpose of constructing outlets and purifying plants for sewers. The levy made under this act shall not be considered a part of the levy made for a sewer fund under the provisions of paragraph three (3) of section eight hundred ninety-four of the supplement to the code. [32 G. A., ch. 41, § 1.]

CHAPTER 8.

OF STREET IMPROVEMENT AND SEWER BONDS AND CERTIFICATES.

SECTION 841. Certificates issued.

Where a contractor agrees to take certificates in full payment for the work done, and the city, having authority to assess the entire cost on abutting property and

issue certificates therefor to the contractor, attempts to issue illegal certificates for a portion of the amount against a street railway company not liable for the payment of any portion of the assessment, the city is bound to pay to the contractor the amount of the illegal certificates. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 115-568.

The contractor by accepting the illegal certificates does not preclude himself from remedy against the city, inasmuch as he is not bound to know that the necessary steps to render the certificates valid and binding have been taken. *Ibid.*

The city is liable to the contractor for assessment certificates which have been

improperly issued by it against property subject to assessment for the improvement. *Iowa Pipe & Tile Co. v. Callanan*, 125-358.

The city is not liable to a contractor on certificates which are invalid because proper steps have not been taken in ordering the improvement for which the certificates are issued. The contract with the contractor being invalid, no liability under the certificates arises. *Citiens' Bank v. Spencer*, 126-101.

Action against the city on implied contract is barred after five years from the time of the making of the improvement. *Ibid.*

SEC. 842. Bonds.

Where the city by contract has rendered itself liable for the cost of street improvements, bonds to cover such cost will be invalid if in excess of the constitutional limit. *Allen v. Davenport*, 107-90.

Where the statutes of the state and the ordinances of the city under which the

bonds were issued, and the recitals of the bonds themselves, do not limit the right of recovery of the bond holder to a specific fund, the bonds are to be deemed an indebtedness of the city. *Vickery v. Sioux City*, 115 Fed. 437.

SEC. 847. Bonds paid.

In equity the bond holder has the right to call upon the city to employ for his protection every power and right a city can exercise to levy and collect from the

property benefited by the improvement the cost thereof which is in fact and in truth represented by the bonds issued. *Burlington Sav. Bank v. Clinton*, 111 Fed. 439.

CHAPTER 8-A.

OF PROTECTION OF CITY PROPERTY FROM FLOODS.

SEC. 849-a. Protection authorized. That in addition to the powers they now have all cities in this state shall have power in accordance with the provisions of this act to protect lots, lands and property within their limits from danger and damage from floods and high water by deepening, widening, straightening, altering or changing and otherwise improving water courses within their limits and by constructing levees, embankments and other works, and to provide for the levy of special assessments and other taxes and the issuance of bonds and certificates to defray the expense of such improvements. [30 G. A., ch. 33, § 1.]

SEC. 849-b. Petition—plans and specifications. Whenever a petition requesting the exercise of the powers named in section one of this act and signed by one hundred resident taxpayers of said city shall be presented to the city council of said city, the council shall direct the city engineer, if there is one, and if not, one employed by it to make the proper plans and specifications for doing the work, with an estimate of the cost thereof, including damages to property if any, and a map or plat showing the boundaries of the territory or district which will be benefited by such improvement and showing as near as may be the name of the owner and the value of each lot or parcel of land, and other property therein as shown by the last assessment roll. [30 G. A., ch. 33, § 2.]

SEC. 849-c. Resolution—notice—hearing—question submitted. If the council upon receiving such plans, specifications, estimate and map shall approve or modify and approve the same and be of opinion that the work should be done as proposed it shall in a proposed resolution declare the necessity or advisability of such improvement, describing the same in general terms and stating the estimated cost thereof, and the boundaries or other description of the territory or district which will be benefited, and shall cause twenty days notice of the time when said resolution will be considered by it for passage to be given by two publications in each daily newspaper of general circulation published in the city, the last of which publications shall be not less than two, or more than four weeks, prior to the time fixed for consideration of said resolution, at which time the owners of property benefited or affected by such improvement, may appear and make objections in writing to the contemplated improvement and the passage of said proposed resolution, at which hearing the resolution may be amended and passed or passed as proposed. The council shall after adopting said resolution submit to the electors of said city for final determination the question of whether said improvement shall be made as proposed and of levying for that purpose a special tax of not more than four (4) mills in any one year, in addition to all other taxes now provided by law. If the council shall determine that the estimated cost is greater than should be levied and collected in a single year, it may fix the yearly proportion and determine in what years the same shall be levied and collected. The percentage or rate of tax levied on property within the territory or district benefited by such improvement shall be double the percentage or rates levied upon property outside such territory or district. The council shall provide by resolution or ordinance the time of submitting the question to a vote. Said question shall be submitted either at the general city election, or at a special election, or at the general November election in the manner provided by law. When said question is to be voted upon at the general November election the county auditor shall cause the same to be printed on the official ballot to be voted at the several precincts within said city and the returns shall be certified by the auditor to the city council. [30 G. A., ch. 33, § 3.]

SEC. 849-d. Contracts. If the majority of the votes cast on such proposition shall be in favor of the same the council may by ordinance or resolution order the making or construction of such improvement and thereupon the council, or board of public works where such board exists, shall contract for furnishing labor and material and for the making or construction either of the entire improvement in one contract or in separate and specified sections. Such contract or contracts shall be made as nearly as may be in the manner provided for contracting for street improvements in section[s] eight hundred and twelve, eight hundred and thirteen, eight hundred and fourteen and eight hundred and fifteen of the code and acts amendatory thereof. [30 G. A., ch. 33, § 4.]

SEC. 849-e. Levy of tax—placed on tax list. As soon as may be after such improvement or specified section thereof has been contracted for, the council, or board of public works, where such board exists, shall ascertain as near as may be the cost thereof, including cost of property purchased or appropriated for the purpose of carrying into effect the provisions of this act and including the costs of plans, specifications, estimates, notices, inspection and preparing plats, schedules and assessments and thereupon the council shall by resolution levy the whole of said cost at one time as a special tax, of not more than four (4) mills in any one year, upon all taxable

property within said city and upon all taxable property within the territory or district benefited by such improvement, and shall determine the whole percentage of tax necessary to pay the same and the percentage to be paid each year, and the number of years not exceeding ten given for maturity of each installment thereof. But such percentage of tax and such number of years shall not exceed the percentage of tax and the number of years authorized under the provisions of section three of this act, but no part of said cost shall be levied upon property owned by the city, the state or the United States and the percentage or rate levied upon property within the territory or district benefited by such improvement shall be double the percentage or rate levied upon property outside such territory or district. Certificates of such levies shall be filed with the auditor of the county in which the city is located, setting forth the boundaries of the territory or district benefited by such improvement and the amount or percentage and maturity of said tax, or each installment thereof, upon the assessed valuation of all property in said city and upon the assessed valuation of all property within said territory or district benefited, certified as correct by the city clerk and thereupon said tax shall be placed upon the tax list of the proper county. The proceeds of such tax shall be kept as a separate fund and shall be used for the purpose of paying for the cost of said improvement or in paying bonds and certificates issued thereupon and for no other purpose whatsoever. [30 G. A., ch. 33, § 5.]

SEC. 849-f. Diversion of stream. Whenever in making such improvement a stream shall be diverted from its old channel or any part thereof, the city shall have and may exercise in respect thereto all the powers named in sections eight hundred and two and eight hundred and three of the code. [30 G. A., ch. 33, § 6.]

SEC. 849-g. Purchase or condemnation of private property. Said cities may also purchase or condemn and appropriate so much private property as may be necessary to carry into effect the provisions of this act, and the cost thereof shall be included in and paid as a part of the cost of said improvement. [30 G. A., ch. 33, § 7.]

SEC. 849-h. Bonds and assessment certificates. Any city constructing any improvement authorized by this act may issue bonds and assessment certificates in anticipation of any special tax or special assessment: said bonds and certificates shall be issued and sold in accordance with and be governed by the provisions of sections eight hundred and forty-one, eight hundred and forty-two, eight hundred and forty-three, eight hundred and forty-four, eight hundred and forty-five, eight hundred and forty-six and eight hundred and forty-seven of the code and acts amendatory thereof. [30 G. A., ch. 33, § 8.]

SEC. 849-i. Costs—how paid. The entire cost of constructing any improvement authorized by this act and any bonds or certificates issued in anticipation thereof shall be paid out of the special taxes and special assessments authorized by this act and no part of said cost or of any such bond or certificate shall ever be a charge upon or paid out of any other fund or the proceeds of any other assessment, tax or levy. [30 G. A., ch. 33, § 9.]

CHAPTER 9.

OF PARK COMMISSIONERS AND BOARD OF PUBLIC WORKS.

SECTION 850-862. Repeal. That sections 850 to 862 of the code inclusive and sections 850 to 862 of the supplement to the code inclusive and

amendments thereto, be repealed and the following enacted in lieu thereof: [32 G. A., ch. 42, § 1.]

SEC. 850-a. Park commissioners—election. There shall be elected at the regular municipal election in each city containing a population of forty thousand or over, and all other cities and towns may, by ordinance provide for the election of three park commissioners whose terms of office shall be six years, one to be elected at each regular municipal election but at the first election three shall be elected and hold their offices respectively for two, four and six years, their respective terms to be decided by lot and their successors shall be elected for the full term of six years, provided however that in all cities and towns not now having park commissioners the ordinance establishing such park commissioners shall not be in force until it has been submitted to the voters at a special or regular municipal election and approved by a majority of the votes cast at such election. [32 G. A., ch. 42, § 2.]

SEC. 850-b. Qualification—organization—treasurer—compensation. The commissioners shall, within ten days after their election, qualify by taking the oath of office and organize as a board by the election of one of their number as chairman and one as secretary, but each commissioner, before he enters upon the duties of his office, shall give a bond with sureties to be approved by the council, in the penal sum of one thousand dollars, conditioned for the faithful discharge of his office. The city treasurer shall be the treasurer of said board and pay out all moneys under the control of the board as ordered on orders signed by the chairman and secretary, but shall receive no compensation for his services as such treasurer. Each of the commissioners shall receive such salary as shall be fixed by the city council, not to exceed in the aggregate annually ten dollars for each one thousand population or fraction thereof according to the last state or federal census. Said compensation to be paid out of the park fund. [32 G. A., ch. 42, § 3.]

SEC. 850-c. Tax certified. The board shall on or before the first day of August of each year, determine and fix the amount or rate not exceeding two mills on the dollar in all cities and towns on the valuation of such city or town to be levied, collected and appropriated for the ensuing year, for park purposes, and shall cause the same to be certified to the city or town council, which shall levy such tax or so much thereof as it may deem necessary to promote park interests, and certify the per cent. thereof to the county auditor, and the other taxes for said year. In cities having a population of over twenty-five thousand said board is further authorized in its discretion to certify to the county auditor in the year 1907, and to cause to be collected an additional tax for park purposes of one mill on the dollar on all taxable property of the city, but the power to levy such additional tax shall cease at the end of the year above specified. [32 G. A., ch. 42, § 4.]

SEC. 850-d. Park fund—how expended. No money of this fund shall be appropriated or expended for any purpose except as provided in this chapter. Such fund may be used in purchasing or acquiring real estate for park purposes including streets or highways to connect one park with another or to connect a park with streets or highways or for other purposes necessary and incident to the establishment and maintenance of parks and paving streets adjacent thereto and for the purpose of improving and maintaining the same and defraying the necessary expenses connected therewith, including the compensation of the board, its officers and employees and when any annual tax or part thereof has been pledged for the payment of any bonds or the interest thereon, such tax or part thereof shall be devoted to no other purpose. For the payment of one or more park policemen to be recommended by the board and appointed by the mayor.

For the purpose of paying for the necessary lights as fixed by the park board and paying for such water supply as may be necessary in such parks. [32 G. A., ch. 42, § 5.]

SEC. 850-e. Acquisition of real estate—powers of board. Said park board may acquire real estate within or without the city for park purposes, by donation, purchase or condemnation and take the title to the same in the name of the board in trust for the public and hold the same exempt from taxation. It may sell, subject to the approval of the city council, exchange or lease any real estate acquired by it which shall be found unfit or not desirable for park purposes; shall keep a report of all transactions; shall have exclusive control of all parks and pleasure grounds acquired by it or of any other ground owned by the city and set apart for like purposes and may make contracts, sue and be sued, but shall incur no indebtedness in excess of the amount of taxes already levied and available for the payment thereof except bonds hereby authorized. It shall make an annual detailed report of the amounts of money expended and the purposes for which used, to the council at the regular April meeting, and such annual statement shall be published as part of the annual municipal report. For the purpose of paying for real estate it may issue bonds for such sums and amounts as found necessary but the aggregate annual interest of all bonds issued by it and at any time outstanding shall not exceed one-fifth of the amount of the annual tax authorized by this chapter. [32 G. A., ch. 42, § 6.]

SEC. 850-f. Bonds—lien on property—mortgage. Bonds issued under the provisions of this chapter shall be a lien upon all of the real estate acquired by the commissioners therewith or with the proceeds thereof and such bonds or proceeds shall be used for the purchase of real estate only. The board shall have the power to mortgage any real estate purchased by such proceeds to a trustee for the purpose of securing the payment of said bonds and after the issuance there shall be pledged for the payment of the interest thereon such amount of the annual tax levied by virtue of this chapter as shall be necessary to make such payment, and the residue of said tax may be used by the board for the payment of such bonds, for the purchase of real estate or improvement of the park and pleasure grounds of the city. [32 G. A., ch. 42, § 7.]

SEC. 850-g. Jurisdiction. The jurisdiction of such board shall extend over all lands used for parks within or without the corporate limits and all ordinances of such cities and towns shall be in full force and effect in and over the territory occupied by such parks. Any person who shall, except by the authority of such commissioners, cut, break or deface any tree or shrub growing in such park or parks, or any avenue thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding thirty days. [32 G. A., ch. 42, § 8.]

SEC. 850-h. Rules and regulations. The board may in writing prescribe rules and regulations for the government of the parks or public grounds under their control and persons resorting thereto, which rules and regulations shall be in force when entered in the record of the proceedings of the board, and a copy thereof signed by the commissioners has been posted at each gate or principal entrance to any such park or public grounds, and a willful violation thereof shall be a misdemeanor, punishable by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding thirty days. [32 G. A., ch. 42, § 9.]

SEC. 850-i. City engineer—poles and wires on park grounds. The board shall be entitled to the services of the city engineer, when requested, without expense to it. It shall have the power to regulate or forbid the

erection of poles or the stretching of wire for electric light, street railway, or other corporations or persons in such parks or in or along streets, highways or over public places laid out or controlled by it. [32 G. A., ch. 42, § 10.]

SEC. 850-j. Park districts—condemnation of property. Where any such city shall contain more than one organized township, at least one commissioner shall be a resident of each of said townships, and unless all of the commissioners shall agree upon the location of one park for a whole city, each township shall constitute a separate park district, and the proceeds of any bonds shall be apportioned to and expended in each district, in proportion to the tax levied thereon, and all funds received from taxes collected shall be expended in the same manner. If said board and the owners of any property desired by it for park purposes cannot agree as to the price to be paid therefor, it may cause the same to be condemned in the manner provided for taking land for municipal purposes. [32 G. A., ch. 42, § 11.]

SEC. 850-k. Appropriation for park purposes. In cities and towns not having a park board the council may appropriate each year not exceeding five per cent. of the general fund for the improvement and maintenance of public parks. [32 G. A., ch. 42, § 12.]

SEC. 850-l. How expended. Said fund so appropriated shall be expended under the direction of a committee of three persons, consisting of the mayor, one member of the council appointed by the council, and one resident property owner of such city or town appointed by the council, which committee shall receive no compensation for their services. [32 G. A., ch. 42, § 13.]

SEC. 850-m. Existing contracts and bonds. Nothing in this act shall be construed to affect any contracts heretofore entered into by any park board or any bonds issued by such boards but all such contracts shall be carried out and all such boards [bonds] shall be paid under the terms thereof. [32 G. A., ch. 42, § 14.]

SEC. 850-n. Repeal—acts in conflict—tenure of office. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed, but nothing in this act shall be construed as affecting the tenure of office of park commissioners heretofore elected in cities or towns heretofore having a park commission. [32 G. A., ch. 42, § 15.]

SEC. 852. Tax certified—rate in certain cities—purposes—additional tax. The board shall, on or before the first Monday in September of each year, certify to the county auditor the per cent. of taxes it may fix for park purposes, not exceeding three mills on the dollar in cities having a population of over twenty-two thousand, and not exceeding one mill in cities having a population under twenty-two thousand, on all taxable property of the city, to be known as "park fund" and, when collected, to be paid over to the treasurer of the board, and by him paid out on its orders, which shall state the name of the payee and the amount, and the purposes for which such amount has been expended. No money of this fund shall be appropriated or expended for any purpose except as provided in this chapter. Such fund may be used in purchasing or acquiring real estate for park purposes, including streets or highways to connect one park with another, or to connect a park with streets or highways, or for other purposes necessary and incident to the establishment and maintenance of parks, and for the purpose of improving and maintaining the same and defraying necessary expenses connected therewith, including the compensation of the board, its officers and employes; but when any annual tax or part thereof has been pledged for the payment of any bonds or the interest thereon, such tax or part thereof shall be devoted to no other purpose. In cities having a popu-

lation of over twenty-five thousand said board is further authorized in its discretion to certify to the county auditor in the years 1904, 1905, 1906 and 1907, and cause to be collected, an additional tax for park purposes of one mill on the dollar on all taxable property of the city, in the manner provided by this section as hereby amended, and said board is further authorized after the expiration of the period for which it is authorized to levy, certify and collect said additional tax, as provided by chapter 34, acts of the thirtieth general assembly to continue to levy, certify and collect said additional tax in the years 1908, 1909, 1910, and 1911. [25 G. A., ch. 1, § 2; 25 G. A., ch. 2, § 1; 24 G. A., ch. 1, §§ 3, 4; 20 G. A., ch. 151, §§ 3-5.] [28 G. A., ch. 30, § 3.] [28 G. A., ch. 31, § 1.] [29 G. A., ch. 163, § 1.] [30 G. A., ch. 34, § 1.] [32 G. A., ch. 43.]

[Sec. 852, which was amended by 32 G. A., chapter 43, was repealed by chapter 42 of the acts of the 32 G. A. Chapter 43 was approved April 1, 1907, and chapter 42 April 13, 1907. Section 4 of chapter 42 is the substitute for 852, and appears as section 850-c hereof.]

SEC. 853. Acquisition of real estate—powers of board.

Under 28 G. A., ch. 179, giving the board of park commissioners of Des Moines jurisdiction of the portions of the banks and bed of the Des Moines river below high water mark within the limits of the city, held that while the board might not deny the right to take ice from the river within such limits, yet such right was subject to reasonable regulation by the board; and held that such statute was not unconstitutional. *Board of Park Com-*

missioners v. Diamond Ice Co., 130-603.

Under the provisions of 28 G. A., ch. 179, vesting the board of park commissioners of Des Moines with jurisdiction and control over the Des Moines river and the bed and banks thereof within certain limits, held that such jurisdiction and control extends to high water mark on each side of the river. *Board of Park Commissioners v. Taylor*, 133-453.

SEC. 862-a. City council may appropriate. In towns and cities of five thousand population, or less, the council may appropriate each year not exceeding five per cent. of the general fund for the improvement and maintenance of public parks. [29 G. A., ch. 47, § 1.]

SEC. 862-b. How expended. Said fund so appropriated shall be expended under the direction of a committee of three persons, consisting of the mayor, one member of the council appointed by the council, and one resident property owner of such city or town appointed by the council, which committee shall receive no compensation for their services. [29 G. A. ch. 47, § 2.]

SEC. 865. Repeal—consultation with city engineer. Section 865 of the code is hereby repealed and the following enacted in lieu thereof:

The board shall consult the city engineer regarding the plans and specifications and the advisability of doing or making contemplated improvements or work, and he shall from time to time furnish it with estimates of the cost of material and plans and specifications for any work to be ordered or advertised to be done, and report to the board whether such improvement or work is made and completed according to contract. Whenever the members of the board of public works are unable to agree upon any matter which is before it for decision including the appointing of agents and employes, the city engineer shall decide such matter or appointment, and his decision shall be the decision of the board of public works. Such decision shall be rendered in writing and shall be filed in the office of the board of public works and when so filed shall have the force and effect of a finding or determination by the board of public works. [32 G. A., ch. 26, § 14.]

SEC. 867. Bids. It shall advertise for bids and make all contracts on behalf of the city for all work, and for material and work for public im-

provements in excess of two hundred dollars, whenever the same shall be ordered by the council or voted for at any election. Proposals for bids shall be published once each week for two weeks in two of the daily newspapers therein, which shall be completed at least two weeks before the making of any contract, which proposals shall state the amount and kinds of material to be furnished, the kind of improvement, and the time and conditions upon which bids will be received, all of which may be rejected. All contracts shall be made with the lowest responsible bidder, but it shall not be necessary before proposals are published or bids received to determine specifically the kind of material to be used. [22 G. A., ch. 1, §§ 5 and 6.] [32 G. A., ch. 26, § 15.]

SEC. 870. Public works.

Bridges will not be regarded for all purposes as parts of the street under this section. So held with reference to provisions for paving. *Cedar Rapids v. Cedar Rapids & M. R. Co.*, 108-406.

Without actual fraud there may be such inattention, neglect of duty, or other mis-

conduct on the part of the person or body authorized to accept the improvement as to amount to legal fraud which will defeat the right of the municipality to collect a special assessment. *McCain v. Des Moines*, 128-331.

SEC. 871. Expenditures. It shall control and direct all expenditures to be made by its department, and sign and draw orders for the same, and all orders given and bills and accounts created by it shall first be indorsed by each of the members thereof, or their reasons stated in writing for not doing so, and approved by the council, before the same shall be ordered paid. No claim for any work done or material furnished in the construction of any public improvement shall be allowed by the council unless the same has first been approved by the board of public works. [22 G. A., ch. 1, § 11.] [32 G. A., ch. 26, § 16.]

SEC. 873. Appointing powers. It shall have power to appoint agents and employes necessary for the doing of its work. [22 G. A., ch. 1, § 13.] [32 G. A., ch. 26, § 17.]

CHAPTER 9-A.

OF IMPROVEMENT OF THE CHANNELS OF MEANDERED STREAMS WITHIN THE CORPORATE LIMITS OF CERTAIN CITIES.

AN ACT TO AUTHORIZE THE IMPROVEMENT OF THE CHANNELS OF MEANDERED STREAMS DIVIDING THE TERRITORY WITHIN THE CORPORATE LIMITS OF CERTAIN CITIES AND TO AUTHORIZE THE RECLAIMING OF LANDS BETWEEN THE MEANDERED LINES OF SAID STREAMS WITHIN SAID CORPORATE LIMITS AND TO CREATE A COMMISSION THEREFOR AND DEFINING ITS POWERS AND PRESCRIBING ITS DUTIES.

WHEREAS the title to the beds of the meandered streams in Iowa, including all the land between the meandered lines of such streams is vested in the state of Iowa and under control of the legislature, and

WHEREAS much of said lands between the meandered lines of such streams is land, not needed by the waters of such streams for channels or water courses, and

WHEREAS such lands as lie within the corporate limits of said cities would be of great value to the public if reclaimed by walls or embankments to secure an adequate channel for such streams, and

WHEREAS the courses of such streams through such cities could be beautified and made regular and sanitary and the expense of bridging greatly reduced, where they are now unsightly, irregular, unsanitary and of such great width that the expense of bridging and maintaining bridges is very great, and

WHEREAS the state can make no use of said lands and has an interest in the improvement of the channels of streams, therefore

Be it Enacted by the General Assembly of the State of Iowa:

SECTION 879-a. Petition — river front improvement commission. That whenever five hundred electors of any city whose corporate limits are divided by a meandered stream, shall, in writing, petition the governor of this state for the appointment of a commission, as provided for by this act, he shall within one month thereafter, appoint three electors, residents of the city of the said electors so petitioning, who shall constitute a body corporate, to be known as the river front improvement commission of _____, inserting in said blank the name of the city of the said electors so applying. [29 G. A., ch. 210, § 1.]

SEC. 879-b. Election. That one commissioner shall be elected at each biennial city election after the passage of this act to succeed one of the commissioners so appointed, whose term shall expire when his successor is elected and qualified. [29 G. A., ch. 210, § 2.]

SEC. 879-c. Organization—secretary—treasurer. The commissioners shall, within ten (10) days after their appointment, qualify by taking the oath of office, determine, by lot, the order of the expiration of their terms, and organize by the election of one of their number as chairman; they shall also elect a secretary, not one of their number; and shall also elect a treasurer, not one of their number, who shall give bonds in the sum of twenty-five thousand dollars (\$25,000) the penalty of which may be increased by the commission. The treasurer shall receive and pay out all moneys under the control of said commission as ordered by it, but shall receive no compensation for his services. Each of the commissioners shall be reimbursed for the actual expenses incurred or money paid out by him in connection with the discharge of his official duties, but shall receive no compensation for his services. An itemized statement of all expenses and moneys received and paid out shall be made under oath and filed with the secretary and allowed by the commission. [29 G. A., ch. 210, § 3.]

SEC. 879-d. Title to river bed. That when said commissioners have been so appointed and qualified, the fee simple title to the bed of the meandered stream, separating the corporate limits of the city, for which they are appointed, shall immediately vest in the commission in trust for the public and the same while held by the commission shall be exempt from taxation, provided that the fee title to the channel or bed of the stream to be located and preserved as hereinafter provided shall remain in the state, and provided also, that the vested rights of riparian owners and owners of water powers, shall not be injuriously affected by this act. [29 G. A., ch. 210, § 4.]

SEC. 879-e. Powers. Said commission may redeem lands between the meandered lines of such stream, construct, regulate and maintain dams across such streams, provide for and protect, by secure walls or banks, a channel adequate to carry flood waters of a volume equal to all reasonable expectations, based on past experience, and the area drained by such stream, according to expert authority; beautify such walls or banks; and park so much thereof as public interest may require; and where circumstances permit, make any part of the area redeemed and acquired suitable for sites for public buildings. [29 G. A., ch. 210, § 5.]

SEC. 879-f. Profiles and specifications—approval. That said commission may adopt plans, profiles and specifications for the improvement of

the said river channel and banks, and the reclaiming of lands between the meandered lines of said stream within such city, and the construction of dams; but before the beginning of the execution of the same, such plans, profiles and specifications shall be approved by the executive council of Iowa. [29 G. A., ch. 210, § 6.]

SEC. 879-g. Additional powers—annual report. Said commission may acquire real estate and riparian and other rights within such city in the vicinity of such stream by donation, or purchase, or by condemnation for the public uses herein authorized in the manner provided by law for the taking of private property for public use, and shall take the title to property in the name of the commission and its successors, in trust for the public, and hold the same exempt from taxation. It may sell and convey or lease, or exchange any property acquired by it, by virtue of this act and otherwise. It shall have exclusive control of all the lands acquired by it, and of the banks and waters of such stream for carrying out the purposes of this act, may make contracts and sue and be sued. It shall keep a record of all its transactions, which shall during ordinary business hours be open to inspection by the public and shall make an annual report of all moneys received and expended by it and for what general purposes, and of all moneys owing to it and by it and for what general purposes, to the city council at the regular November meeting, and publish such report in some newspaper in the city. [29 G. A., ch. 210, § 7.]

SEC. 879-h. Bonds—mortgages. For the purpose of paying for real estate and improvements and accomplishing the purposes of its creation, said commission may issue bonds in such amounts as it may deem necessary, and may execute trust deeds or mortgages upon its property acquired by virtue of this act and otherwise or any part thereof to secure the payment of said bonds and interest thereon. [29 G. A., ch. 210, § 8.]

SEC. 879-i. Cities may aid in making improvements. That such city shall not be liable for any indebtedness incurred by said commission or for any bond issued by said commission. That such cities are hereby authorized to aid in making the improvements specified in this act by appropriating money from its general fund or from the surplus remaining at the end of the fiscal year in any special fund, except in cases where such diversion of moneys is especially prohibited by statute, and may appropriate in aid of the improvements herein provided for, the reasonable saving effected in the building of bridges and otherwise by reason of said improvements. [29 G. A., ch. 210, § 9.]

SEC. 879-j. Rules and regulations—penalty. Said commission may, in writing, prescribe rules and regulations for the government of the public grounds under their control and persons resorting thereto, which rules and regulations shall be enforced when entered in the record of the proceeding of the commission, and a copy thereof signed by the commissioners has been posted at each gate or principal entrance to any such public grounds and a wilful violation thereof shall be a misdemeanor, punishable by fine not exceeding twenty-five dollars (\$25). Anyone who shall cut, break or deface any tree or shrub growing in such public grounds, without authority, shall be guilty of a misdemeanor and be punished by fine not exceeding one hundred dollars (\$100) or by imprisonment not exceeding thirty (30) days in jail. Any magistrate in the city shall have jurisdiction to try such offenses. [29 G. A., ch. 210, § 10.]

SEC. 879-k. Police protection—water supply—poles and wires. The mayor, on written request of the commission, shall furnish adequate police protection for such public grounds and the city shall furnish such water supply as may be necessary therefor, and properly light the same at

its expense. The commission shall be entitled to the services of the city engineer, when requested, without expense to it. It shall have the power to permit or forbid the erection of poles or the stretching of wires for electric light, street railway or other purposes by persons or corporations, in such public grounds or in or along streets, highways or over public places laid out or controlled by it. [29 G. A., ch. 210, § 11.]

SEC. 879-l. Wharves—landing places—bath and boat houses. That said commission shall have power, in and over the bed and banks of such river as specified, to construct and regulate the use of wharves, landing places, bath houses, boat houses and other suitable structures and shall have exclusive jurisdiction over the water of such stream, within the corporate limits of such city and may maintain said stream in a suitable condition for boating, skating and other public amusements and purposes. [29 G. A., ch. 210, § 12.]

SEC. 879-m. What prohibited. No member of the commission shall, during the time for which he has been appointed or elected, or for one year thereafter, be appointed to any office in the gift of the commission which shall be created, or the emolument of which shall be increased, during the term for which he was elected, nor shall he be interested directly or indirectly in any contract for work or service to be performed for the commission or in the purchase or sale of any property sold to or by the commission. [29 G. A., ch. 210, § 13.]

SEC. 879-n. Vacancies. In case vacancy arises in the commission, the governor of the state shall fill such vacancy by appointment for the unexpired portion of the term or until the next election as the case may be. [29 G. A., ch. 210, § 14.]

SEC. 879-o. Cities affected. The provisions of this act shall apply only to cities acting under special charter and cities of the first class acting under the general incorporation laws having a population of less than twenty-five thousand (25,000). [29 G. A., ch. 210, § 15.]

CHAPTER 9-B.

OF OFFICERS OF CITIES AND TOWNS.

SECTION 879-p. Executive powers and duties. All executive functions, powers and duties in cities and towns shall be exercised and performed by the mayor and other elective and appointive officers and boards as provided by law, and neither the council nor the members thereof shall exercise any executive function unless expressly conferred by law. [32 G. A., ch. 26, § 18.]

SEC. 879-q. Officers not to be interested in contracts—free passes or franks. No officer, including members of the city council shall be interested, directly or indirectly in any contract or job of work or material or the profits thereof or services to be furnished or performed for the city or town. No such officer shall accept or receive, directly or indirectly, from any person, firm or corporation operating within the said city or town, any railway, inter-urban railway, street railway, gas works, water works, electric light or power plants, telegraph line or telephone exchange or other business using a public franchise, any frank, free pass or ticket or other service upon terms more favorable than is granted to the public generally, except where, by franchise granted by the municipality to any such person or corporation, any officers of said municipality are granted such privileges as part of such franchise, and except that members of the police

and fire departments of any city or town shall be carried without charge. Any violation of the provision of this section shall be a misdemeanor. [32 G. A., ch. 26, § 19.]

CHAPTER 10.

OF CONDEMNATION AND PURCHASE OF LAND.

SECTION 880. For what purpose.

The power to condemn may be delegated to municipalities and when this is done they have the same power as the state acting through any regularly constituted authority. *Bennett v. Marion*, 106-628.

The city may be allowed to determine for itself whether a particular improvement shall be made, but the land owner may raise a question as to the amount of land necessary for the purpose contemplated. *Ibid.*

If the land sought to be taken will to some extent conduce to the public use to which it is to be devoted, a decision of the municipality that it is necessary therefor should not be interfered with; otherwise it should be set aside. *Ibid.*

The jury should be directed to include, as damages, incidental injuries to the balance of the land owner's property by reason of the proper use of the condemned

portion for the purpose contemplated. *Ibid.*

This section does not give the city any right to establish a pest house on property acquired by the city outside of its limits. *Warner v. Stebbins*, 111-86.

A city has authority to acquire land by condemnation for a public landing, and when so condemned it may give the right of way thereover to a railway company. *Diamond Jo Line Steamers v. Davenport*, 114-432.

The fact that the property is already owned by a private corporation as a steamboat landing does not prevent its condemnation for a public landing. *Ibid.*

The proceedings for condemnation may be abandoned by the city, but the city cannot abandon an award after it is made, and institute another proceeding for the purpose of condemning the same property. *Robertson v. Hartenbower*, 120-410.

SEC. 881. Repeal—sewer outlets—disposal plants. That section eight hundred and eighty-one (881) of the code be and the same is hereby repealed and the following be enacted in lieu thereof:

"Cities and towns shall have the power to acquire real estate within or without their territorial limits necessary for sewer outlets, garbage disposal plants, sewage disposal plants and dump grounds, by purchase or condemnation as in this chapter provided, and the expense of such acquisition of real estate for sewer outlets, garbage disposal plants, sewage disposal plants and dump grounds, shall, in the case of garbage disposal plants and dump grounds, be paid out of the general fund, and in the case of sewer outlets and sewage disposal plants, out of the general fund or out of the sewer fund of the sewer district for which the sewer outlet or sewage disposal plant is established." [30 G. A., ch. 37.]

The question whether the amount of land sought to be condemned is necessary for a sewer outlet may be raised by the land owner. *Bennett v. Marion*, 106-628.

In estimating damages, an improper use for sewer purposes such as would give rise to a nuisance is not to be considered, but the jury should be allowed to consider in what way the taking of land for these purposes would inconvenience the land owner in the use of the remainder of his land or lessen its value and if sewers properly constructed would have this effect, then the jury should be directed to take this into

consideration in making up their verdict. *Ibid.*

In such cases the city may be allowed to determine for itself whether the particular improvement shall be made, but the necessity for taking for that purpose the amount of land sought to be taken may be questioned by the land owner. *Ibid.*

The municipality may acquire real estate outside of its territorial limits for sewer outlets, and for garbage disposal plants and dump grounds. *Hanson v. Cresco*, 132-553.

SEC. 883. Disposal of lands acquired.

The city may grant the land covered by a street which is duly vacated to a railroad company for depot purposes. *Spitzer v. Runyan*, 113-619.

An abutting owner may have damages against the city for vacating a street fur-

nishing special access to such owner's property, but cannot recover damages against a railroad company for obstruction of such street after its vacation. *Harrington v. Iowa Cent. R. Co.*, 126-389.

SEC. 884. Proceedings for condemnation.

Costs made by the commissioners are to be paid by the corporation in any event. Only those involved in the appeal to the district court and attorneys' fees occasioned thereby depend in any way on the result of the trial. These are to be taxed against the corporation, except in the contingency of a trial at which the amount of damages is not increased. If that contingency does not arise the costs are to be paid by the corporation. *Mellichar v. Iowa City*, 116-390.

On the abandonment of the proceedings

it is but just and equitable that the party attempting to wrest the property from its owner should pay the expenses of litigation already incurred. *Ibid.*

The charge of the attorney in preparing an answer may properly be included in estimating the attorneys' fees, even though a formal answer is not required by the statute. *Ibid.*

Compensation for services rendered in other appeals, or in suits for the protection of the plaintiff's property, cannot be allowed. *Ibid.*

SEC. 885. Donation of sites for depots.

The city has no authority to issue negotiable bonds in payment for land condemned or otherwise taken in procuring a site for a railroad depot. The only indebted-

ness which the city can incur for that purpose is such indebtedness as may be satisfied out of its current revenues. *Swanson v. Ottumwa*, 131-540.

SEC. 886. Submission of question.

The provisions of this and the preceding section have no application to a case where the city vacates a street for use of a rail-

road company as depot grounds. *Spitzer v. Runyan*, 113-619.

CHAPTER 11.**OF TAXATION.**

SECTION 891. Labor on highways. Any city or town shall have power to provide that all able-bodied male residents of the corporation between the ages of twenty-one and forty-five years, between the first day of January and the first day of November of each year, either by themselves or satisfactory substitute, shall perform two days' labor of eight hours each upon the streets, avenues, alleys, highways or public grounds within such corporation, at such times and places as the proper officer may direct, upon three days' notice in writing given, or pay in lieu thereof in money a sum to be fixed by such council, not exceeding one and a half dollars for each of such day's labor. For each day's failure to attend and perform the labor, or pay said sum of money, as required, at the time and place specified, unless excused by the supervisor of highways or street commissioner, the delinquent shall forfeit and pay the sum of two dollars, not exceeding four dollars in all. Any person excused shall be again notified to perform such labor or pay said sum of money in lieu thereof, at any time prior to November first of said year. All persons claiming to be exempt from labor under this section shall, within three days after receiving notice to perform such labor, furnish the mayor or other proper officer with an affidavit showing

the extent and nature of the disabilities entitling him to such exemption. If he fails to do so he shall be liable to perform such labor or pay the penalty provided herein. [19 G. A., ch. 32; C., '73, § 487.] [27 G. A., ch. 27, § 1.]

SEC. 892. Enforcement of road tax. In case of failure to pay said sum of money in lieu of said labor, together with such forfeit, to the supervisor of highways, street commissioner, or other officer of said corporation authorized to receive the same within ten days from the expiration of the time fixed for the performance of such labor, said corporation may recover the same by action brought in the name of such city or town before the mayor of said corporation, or before any justice of the peace in the proper township. No property or wages belonging to said person shall be exempt to the defendant on an execution issued for said judgment and costs. The tax and forfeit money so collected shall be expended upon the streets, avenues, highways, alleys or public grounds of said corporation. All of such tax and forfeit money remaining unpaid on the first day of November in each year may be certified to the county auditor at any time before the following first day of December, and shall be entered by him upon the tax list of said county, and treated and collected as ordinary county taxes, and shall be a lien on all the real property of the delinquent. [19 G. A., ch. 32; C., '73, § 487.] [27 G. A., ch. 27, § 2.]

SEC. 894. Other taxes. Any city shall have power to levy annually the following special taxes:

1. *Grading fund.* A tax not exceeding, in any one year, three mills on the dollar, for a grading fund, to be used for the purpose of opening, widening, extending and grading any street, highway, avenue, alley, public ground or market place; [23 G. A., ch. 5, § 1; 21 G. A., ch. 160, §§ 2, 3; 20 G. A., ch. 20, § 5.]

2. *Improvement fund.* A tax not exceeding, in any one year, five mills on the dollar, for a city improvement fund, to be used for the purpose of paying the cost of the making, reconstruction or repair of any street improvements at the intersections of streets, highways, avenues or alleys, and at spaces opposite streets, highways, avenues and alleys intersecting but not crossing, and at spaces opposite property owned by the city or the United States, and for the purpose of paying the purchase price and subsequent taxes assessed against property purchased by the city at tax sale; [25 G. A., ch. 8, § 1; 22 G. A., ch. 12, § 1; 21 G. A., ch. 160, §§ 2, 3; 19 G. A., ch. 38, §§ 1, 2.]

3. *Sewer fund.* A tax not exceeding, in any one year, two mills on the dollar on the assessed valuation of all property therein, for a city sewer fund, when the entire city comprises one sewer district, to be used to pay the cost of the making, reconstruction or repair of any sewer at the intersection of streets, highways, avenues, alleys, and at spaces opposite streets, highways, avenues and alleys intersecting but not crossing, and at spaces opposite property owned by the city or the United States, and to pay the whole or any part of the cost of the making, reconstruction or repair of any sewer within the limits of said city; when a city has been divided into sewer districts, a tax not exceeding two mills on the dollar on the assessed valuation of all property in the sewer district, for a district sewer fund, to be used to pay, in whole or in part, the cost of the making, reconstruction or repair of any sewer located and laid in that particular district; [25 G. A., ch. 7, § 11; 22 G. A., ch. 7, § 1; 21 G. A., ch. 34; 17 G. A., ch. 162, § 1; 16 G. A., ch. 107, § 1.]

4. *Repeal—library tax.* That chapter thirty-eight (38) of the laws of the thirtieth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

"In cities and towns which have established, or may hereafter establish, a free public library when the trustees of such library have made the certificate provided for in section one hereof, a tax in the amount so certified, but not exceeding in any one year three mills on the dollar in all cities and incorporated towns having a population of not more than six thousand (6000), and not exceeding in any one year two mills on the dollar in all other cities, to be used for the maintenance of such library; and in such cities and towns an additional tax not exceeding in any one year three mills on the dollar, for the purchase of real estate and the erection of a building or buildings thereon for a public library, or for the payment of interest on any indebtedness incurred for that purpose, and for the creation of a sinking fund for the extinguishment of such indebtedness." [31 G. A., ch. 21, § 2.]

5. *Waterworks tax.* A tax not exceeding, in any one year, five mills on the dollar, which, with the water rates or rents authorized, shall be sufficient to pay the expenses of running, operating and repairing waterworks owned and operated by any city or town, and the interest on any bonds issued to pay all or any part of the cost of construction, renewal, repair or extension of such works; but such tax shall not be levied upon property which lies wholly without the limits of the benefit and protection of such works, which limits shall be fixed by the council each year before making the levy; [C., '73, § 475.] [29 G. A., ch. 48, § 1.]

6. *Tax for gas works or electric plant.* A tax not exceeding, in any one year, five mills on the dollar, which, with the rates or rentals authorized, shall be sufficient to pay the expenses of running, operating and repairing gas works and electric light or power plants owned by any city or town, and the interest on any bonds issued to pay all or any part of the cost of the construction of such works or plants; but such tax shall not be levied upon property which lies wholly without the limits of the benefit of the same, which limits shall be fixed by the council each year before making the levy; [22 G. A., ch. 11, § 2; C., '73, § 475.]

7. *Water tax.* A tax not exceeding, in any one year, five mills on the dollar, for the purpose of paying the amount due or to become due to any individual or company operating waterworks for water supplied under any contract, the levy to be limited to the property as in subdivision five hereof; and if in cities of the first class the maximum tax is insufficient to pay such amount under contracts now in force, the deficiency shall be paid out of the general fund; [C., '73, § 475.]

8. *Tax for gas or electric light or power.* A tax not exceeding, in any one year, five mills on the dollar, for the purpose of paying the amount due or to become due to any individual or company operating gas works or electric light or power plants for all gas, electric light or power supplied under any contract, the levy to be limited to the property as in subdivision six hereof; [22 G. A., ch. 11, § 2; C., '73, § 475.]

9. *Bond fund tax.* A tax for the purpose of creating a bond fund sufficient to pay the interest to accrue before the next annual levy on funding or refunding bonds outstanding, and such proportion of the principal that at the end of five years the sum raised shall equal at least twenty per cent. of the amount of the bonds issued, at the end of ten years at least forty per cent. of said amount, at the end of fifteen years at least sixty-five per cent. of said amount, and at or before the date of the maturity of said bonds a sum equal to the whole amount of the unpaid principal and interest, which tax shall be used to pay such principal and interest, and for no other purpose; [24 G. A., ch. 14, § 5; 23 G. A., ch. 4, §§ 6, 7; 22 G. A., ch. 17, § 5; 21 G. A., ch. 78, § 5.]

10. *Tax for water or gas works or electric plant bonds.* A tax as authorized in the preceding subdivision, to be levied in the proportions therein set forth, and to be used exclusively in payment of the principal of bonds issued for the construction of water and gas works and electric light and power plants, which tax shall not be levied upon property lying wholly without the limits of the benefit of such works or plants, which limits shall be fixed by the council each year before making the levy; [23 G. A., ch. 13, § 1; 22 G. A., ch. 10, § 1.]

11. *Cemetery tax.* A tax, not exceeding one-half of one mill on the dollar of the assessed valuation of the property within the corporate limits, for the care, preservation and adornment of any cemetery owned or controlled by the city.

12. *Subdivisions five, six, seven, eight, nine and ten, extended to incorporated towns, and proceedings legalized.* The provisions of subdivisions five (5), six (6), seven (7), eight (8), nine (9), and ten (10) of said section eight hundred and ninety-four (894) are extended to incorporated towns, and all proceedings of incorporated towns had under the assumption that the said provisions were applicable to said incorporated towns are hereby legalized and confirmed, and said proceedings shall be in law held to be valid to the same extent as if the said subdivisions of said section eight hundred and ninety-four (894) of the code included incorporated towns by the specific terms thereof. [28 G. A., ch. 32, § 1.]

Par. 2. *Improvement fund:* The improvement fund may be resorted to for payment of deficiencies in special assessments for street improvements. *Corey v. Ft. Dodge*, 133-666.

Par. 5. *Waterworks tax:* The proceeds of the five-mill special water tax au-

thorized by statute do not constitute the sole liability of the city under a contract to furnish water for public purposes. There may be a recovery of judgment under such contract payable out of the general funds. *Marion Water Co. v. Marion*, 121-306.

SEC. 898. Loans in anticipation of revenue.

The object of this provision is to place municipal corporations on a cash basis and prevent the accumulation of a floating indebtedness. *Phillips v. Reed*, 107-331, and see *Phillips v. Reed*, 109-188.

A city is not authorized, when borrowing money in anticipation of its revenues, to issue negotiable bonds therefor. *German Ins. Co. v. Manning*, 95 Fed. 597.

SEC. 902. *Assessments and taxes certified—collection.* All assessments and taxes of every kind and nature levied by the council, except as otherwise provided by law, shall be certified by the clerk on or before the first Monday in September, to the county auditor, and by him placed upon the tax list for the current year, and the county treasurer shall collect all assessments and taxes so levied in the same manner as other taxes, and when delinquent they shall draw the same interest and penalties. Sales for such assessments and taxes when delinquent shall be made at the same time and in the same manner as such sales are made for other taxes, and should there be other delinquent taxes or assessments due from the same person, and collectible by the county treasurer, the sale shall be for all such delinquent assessments and taxes, and all the provisions of law relating to the sale of property for delinquent taxes shall be applicable as far as may be to such sales. Before the third Monday of each month, the county treasurer shall give written notice to the mayor of each municipality in the county of the amount collected for each fund up to the first day of that month, and the mayor of each municipality shall draw an order therefor in favor of the city treasurer, countersigned by the clerk or auditor

of the municipality, upon the county treasurer who shall pay such taxes to the treasurers of the several municipalities only on such order. [25 G. A., ch. 1, § 2; 24 G. A., ch. 1, § 3; 21 G. A., ch. 13, § 2; 19 G. A., ch. 63, § 2; C., '73, §§ 495, 498; R., §§ 1123, 1126.] [31 G. A., ch. 29.]

Where the proper notice of expiration of the period of redemption has not been served, so that the deed can properly be issued, the limitation of this section is not applicable. *Hintrager v. McElhinny*, 112-325.

CHAPTER 12.

OF BONDS.

SECTION 905. Funding.

The statutory authority given to refund does not validate an unauthorized indebtedness. *Swanson v. Ottumwa*, 131-540.

SEC. 906. Form.

An erroneous recital as to the statute under which bonds are issued will not render them invalid. *Fernald v. Gilman*, 123 Fed. 797.

SEC. 912-a. Made applicable to towns. All provisions of section nine hundred twelve (912) of the code, granting to cities the power to issue certificates or bonds in anticipation of special taxes, shall be applicable, and is hereby made to apply to towns. [32 G. A., ch. 44.]

CHAPTER 13.

OF PLATS.

SECTION 914. For subdivisions or additions.

The owner of a lot platted as abutting on a navigable stream is not limited to the dimensions as determined by the platted meander line, but owns to high water mark. *Board of Park Commissioners v. Taylor*, 133-453.

SEC. 915. Acknowledgment and recording—abstract of title. Every such plat shall have a complete abstract of title attached thereto, and shall be accompanied by a statement to the effect that the subdivision of (here insert a correct description of the land or parcel subdivided), as appears on this plat, is with the free consent and in accordance with the desire of the proprietor, which shall be signed and acknowledged by him before some officer authorized to take the acknowledgment of deeds. Such proprietor shall also procure from the treasurer of the county in which the land lies, and file with the recorder, a certified statement that the land laid out into lots, streets and alleys is free from taxes, and a certified statement of the clerk of the district court that said land is free from all judgment, attachment, mechanics, or other liens, as appears by the records of his office, and a certified statement from the recorder that the title in fee is in such proprietor, and that it is free from incumbrance; but if the parcel of land so laid out shall be incumbered with a debt certain in amount, and which the creditor will not accept with accrued interest to the day of proffered payment if it draws interest, or with a rebate of interest at the rate of six per cent. per annum if it draws no interest, or if the creditor can-

not be found, then such proprietor, and, if a corporation, its proper officer or agent, may file with the recorder of such county an affidavit, stating either that such proprietor has offered to pay such creditor the full amount of his debt, with interest, or with a rebate of interest, as the case may be, and that he would not accept the same, or that he cannot be found, whereupon such proprietor may execute and file with the recorder a bond in double the amount of such incumbrance, with three sureties who shall be freeholders of the county, to be approved by the recorder and clerk of the district court, which bond shall run to the county, and shall be for the benefit of the purchasers of any lots, and shall be conditioned for the payment of such incumbrance and the cancellation thereof of record as soon as practicable after the same becomes due, and for the holding of all purchasers and those claiming under them forever harmless from such incumbrance. When such affidavit and bond shall have been filed with the recorder, together with the certificate of approval of the council of the city or town in which such land is situated or which is proposed to be made an addition thereto and a certificate of the recorder that said land is free from all incumbrance except as secured by said bond, and that the title in fee is in such proprietor, and that of the treasurer that the land is free from taxes, said plat shall be admitted to record, and be as valid as if such proprietor had filed with the recorder the certificate of such officer that said land was free from all incumbrance. [18 G. A., ch. 53, § 1.; C., '73, § 560.] [29 G. A., ch. 49, § 1.]

When a recorded plat is referred to in a deed as related to the matter of description, unless controlled by other facts or circumstances, such plat is to be considered as furnishing a true description of the property to be conveyed. *Quade v. Pillard*, 112 N. W. 646.

SEC. 916. Approval by council.

If the blocks are divided into lots the dedication of alleys may be insisted upon, but the division into parcels smaller than blocks is not required. *Giltner v. Albia*, 128-658.

The provisions of § 571 of the Code of

SEC. 917. Dedication to public.

Dedication: A deed which is inconsistent with the dedication of the streets and alleys of a plat to the public may amount to a revocation of the attempted dedication, unless it be shown that the public accepted the dedication before the deed was made. *Minneapolis & St. L. R. Co. v. Britt*, 105-198.

While a substantial compliance with statutory provisions is all that is required to effect a dedication of portions of a plat laid out for streets and alleys, yet where the plat did not show the width of such streets and the size of the lots and blocks except as determinable by scale from the plat itself, held that it was too indefinite to be effectual. *Ibid.*

The plat of the city of Keokuk did not operate to vest the fee of the land in the

The proprietor is entitled to have his plat approved if it complies with the provisions of the statute; that is the only question for determination by the city council. The matter of the acceptance of the streets and alleys by the city is not involved. *Giltner v. Albia*, 128-658.

1873, declaring that the plat of an addition to a city should be ineffectual until approved by an ordinance of the city, held inapplicable to cities and towns. *Burroughs v. Cherokee*, 109 N. W. 876.

streets in the city. *Chicago, B. & Q. R. Co. v. Kelley*, 105-106.

Payment of taxes on property is admissible as evidence against a claim of a dedication thereof to the public. *Brown v. Cedar Rapids*, 117-302.

To warrant the presumption of dedication, the use must be of a kind to convey to the owner knowledge of its extent and adverse nature. *Ibid.*

In a contest between grantor and grantee, where the plat differs from the survey, the latter will control. It may be that as to a purchaser buying in reliance on the plat as showing the dimensions of the lot, or as to a public officer charged with opening the streets, as shown by the plat, the rule would be otherwise. *Thrush v. Graybill*, 110-585.

Where the question was as to dedication in a plat made by county commissioners, held that the vital inquiry was as to the intent with which the commissioners acted in determining whether a square, which had been used for a court house, had been dedicated to the city, or retained by the county, and that, in order to determine this, the acknowledgment should be considered in connection with the plat, the certificate of survey, and such circumstances as might throw light on the transaction. *Youngerman v. Board of Supervisors*, 110-731.

And under the language of the instruments, and the circumstances surrounding their execution, held in a particular case that the title to such square did not pass to the city, but had been excepted from the dedication and retained by the county. *Ibid.*

The court is not authorized to add a line to the plat for the purpose of limiting the extent of the land dedicated to public use which does not appear on the plat as originally made, unless, perhaps, when there is a conflict in the boundaries, or in some cases when the plat is shown to be not in accordance with the original survey. *Boehler v. Des Moines*, 111-417.

Facts in a particular case held sufficient to show dedication of a street to the city and its acceptance. *Hull v. Cedar Rapids*, 111-466.

Evidence in a particular case held sufficient to show that an alley had been dedicated to public use. *Dodge v. Hart*, 113-685.

An alley marked on the plat may become public by a common law dedication and acceptance. *Keokuk v. Cosgrove*, 116-189.

The owner's intention as to dedication of a portion of the platted territory to public purposes is to be gathered from the plat itself. *Mt. Vernon v. Young*, 124-517.

The recording of the plat is a tender of the conveyance of the portion set apart as streets and alleys for such use to a municipality, which continues until shown to have been withdrawn. But where there has been non-user for not less than the statutory period, accompanied by actual and notorious possession of the land by an individual as private property under claim of right, an abandonment of the rights of the public in the street will be presumed. *Burroughs v. Cherokee*, 109 N. W. 876.

Dedication of land for a street may be shown by the verbal declarations of the owner, by his act in filing a plat, by his silence in the face of known adverse possession by the public, or by any other act or omission from which the intention to dedicate may fairly be inferred. Acceptance may be inferred from general use by the public, or by the improvement

and repair of the way by the authorities having care and control of the highways. The owners of abutting property may also divest themselves of all title in favor of the public by laying out a street and selling lots or parcels of land with reference thereto, and this rule is not subject to any acceptance by the public generally or by the authorities. *Snouffer v. Cedar Rapids & M. C. R. Co.*, 118-287.

Public use with the knowledge of the owner for the statutory period of limitation is admissible as tending to show a dedication. *Cedar Rapids v. Young*, 119-552.

In order that a dedication of land platted as a street shall be effectual, it is not essential that the statutory provisions as to platting be strictly complied with, but they must be substantially followed, that is, the portion of the platted land claimed as a street must have been pointed out with such precision and the boundaries so fixed that these may be certainly and definitely located from the data furnished. *Coe College v. Cedar Rapids*, 120-541.

Land may be dedicated to the public use in a plat without naming such use. But the intention to dedicate must appear, and this may sometimes be inferred from the shape of the land claimed to have been dedicated, its situation, dimensions, and the like. *Ibid.*

The lines in a plat may aid in ascertaining a common law dedication, but they will not be sufficient alone to establish such dedication. *Ibid.*

Acceptance: An acceptance of the dedication is essential to the validity of a conveyance to the city of ground designated for streets and alleys. *Blennerhasset v. Forest City*, 117-680.

The title to streets and alleys as laid out in the plat does not pass to the city until the dedication is accepted. *Brown v. Taber*, 103-1.

A reasonable time is allowed for acceptance by the public of a highway dedicated by a plat, and what is such reasonable time necessarily depends upon the situation and circumstances. *Sarvis v. Caster*, 116-707.

The plat constitutes a dedication of space left between the lots for public travel, but the title thereto does not vest in the city or town prior to its acceptance, and until then such spaces are not highways. After acceptance by the municipality and improvement so that the plat has become effective in passing the fee, the proprietor of the plats cannot divest the title of the municipality without the knowledge or consent of its officers. *Chrisman v. Omaha & Council Bluffs R. & B. Co.*, 125-133.

In the absence of proof of acceptance of a portion only of the platted street and of the recognition of the lot line con-

tended for by the abutting owner, the city will not be estopped from asserting title in the street as platted to the true line. *Vorhes v. Ackley*, 127-658.

The proprietors of a plat cannot divest the municipality of the title in streets which have been accepted and on which public money has been expended, unless with the knowledge and consent of its officers. *Chrisman v. Omaha & Council Bluffs R. & B. Co.*, 125-133.

The opening by the city of a portion of the streets in the plat indicates an intention to accept the others, to be opened when needed. *Parriott v. Hampton*, 111 N. W. 440.

Although the streets remain enclosed the acceptance by notice to the owner may be effectual. *Ibid.*

Estoppel: The public right to the use and occupancy of a street may be lost by estoppel. *Corey v. Ft. Dodge*, 118-742.

A town may estop itself from asserting title to ground indicated on a plat as a public alley. *Blennerhasset v. Forest City*, 117-680.

The proceedings by the city, even though irregular, to abandon an alley shown on the plat, held, in connection with other circumstances, to constitute an estoppel of the city from subsequently asserting a right to such alley as against one who had occupied adversely. *Ibid.*

With reference to portions of the premises covered by a plat which are set apart for streets, the city may so deal with another claiming title thereto, by subjecting it to the payment of public charges, as to estop itself from asserting title as against him. *Davenport v. Boyd*, 109-248.

Assessments of lots as the property of a taxpayer does not estop the city from claiming that a portion of such lots constitute a street. *Cedar Rapids v. Young*, 119-552.

The fact that the city exacts taxes on the dedicated property does not estop it from claiming that the same has become a public street. *Hull v. Cedar Rapids*, 111-466.

The levy and collection by the city of taxes on a strip of land which has been dedicated and accepted as a street will not estop the city, as the representative of the public, from asserting its rights in such street. *Hanger v. Des Moines*, 109-480.

The doctrine of estoppel is applied to municipal corporations to prevent the assertion of public right to a street where the exercise of such right would be inequitable, as, for instance, where the street has been for the statutory period of limitations enclosed by a private owner, and he has for that period asserted ownership thereof under a claim of right. *Weber v. Iowa City*, 119-633.

Further as to estoppel, see notes to Sec. 753.

Rights of abutting property owner: By accepting a street by dedication, a city or town enters into an implied obligation to keep it open and afford the dedicator or his grantee, near or remote, access to abutting lots, and though under the plenary powers of the legislature over all streets or highways such street may be vacated, the damages occasioned thereby cannot be said to be those shared by the public generally, and therefore compensation for such damages may be necessary. *Long v. Wilson*, 119-267.

The owner of property abutting on a street has a right to and an interest in the street distinct and different from that of the general public, and an adjudication between the city or town and another property owner as to the non-existence of such street is not binding on a property owner not made party to such proceeding. *Ibid.*

While the legislature may authorize a city or town to vacate streets, it does not follow that it may do so without compensation to abutting property owners, for damages to them as individuals, distinct from the general public, resulting from such vacation. *Ibid.*

Where land has been divided into lots, and a plat thereof is made, showing such lots and the streets on which they abut, and the owner sells the lots so designated on the plat, the purchaser has an easement in such streets as is necessary for the full enjoyment and use of his property, of which the grantor cannot deprive him. Nor can the fact that the plat was not made or authorized by the grantor, or that it was not a legal or recorded plat, make any difference with the rule. It is founded upon the doctrine of estoppel, and whether the plat be legal or illegal, authorized or unauthorized, if it be recognized and adopted by the grantor in making the sale, and is relied upon by the purchaser, the estoppel is as effectual as it would be were the conditions different. *Cleaver v. Mahanke*, 120-77.

The platting of ground as an alley, and designation thereof for that purpose, is equivalent to a deed in fee simple to the public, and the purchaser of lots abutting takes only to the lot line. *Blennerhasset v. Forest City*, 117-680.

Although in a city under special charter the title in the streets may be in the abutting property owner so that the city has no right to use such streets for any purpose whatever other than that for which they were originally designed, yet the erection of trolley poles in the street in front of the property of an abutting owner is not such an additional use of the street as may

be enjoined by a property owner in the absence of additional compensation. *Snyder v. Fort Madison St. R. Co.*, 105-284.

The owner of property, chargeable with such knowledge of the use and improvement of an abutting street as a reasonably prudent and observing person having care for his property would ordinarily acquire, is chargeable with notice of the dedication of an abutting street by the owner, and acceptance thereof by the public. *Hanger v. Des Moines*, 109-480.

One who takes possession of a dedicated street in connection with an adjoining lot under a conveyance of the lot cannot enjoin the city from subsequently opening and improving the street. *Backman v. Oskaloosa*, 130-600.

Vacation of street: Where an unrestricted dedication by designation in the plat has been made, it vests an absolute

title in the municipality, and on vacation of a street thus designated, the title does not revert to the original owner. *Lake City v. Fulkerson*, 122-569.

Non-user: While mere non-user for the statutory period will not constitute an abandonment by a city of a street duly laid out, yet, where there has been such non-user, accompanied by actual and notorious possession of the land by an individual as private property, under a claim of right, an abandonment will be presumed, and the public right in the street will be held to be extinguished. *Weber v. Iowa City*, 119-633.

A city may abandon a portion of a street, or by non-user forfeit its right thereto, and it may be foreclosed by agreement or acquiescence as to the true line. *Eldora v. Edgington*, 130-151.

SEC. 918. Vacation by proprietor.

Where none of the lots abutting on such streets or alleys have been conveyed the owner may vacate the plat and will thereafter be the unquestionable owner of the vacated streets and alleys. Subsequent

grantees of lots described in such plat will not be entitled to proportional shares of the streets and alleys so vacated. *Brown v. Taber*, 103-1.

SEC. 919. Part of plat vacated.

The plat cannot be vacated so as to extinguish the title of the municipality to streets which have been accepted and improved. Such streets have become highways. *Chrisman v. Omaha & Council Bluffs R. & B. Co.*, 125-133.

The provisions for vacation of a plat by the owner have no application to the vacation of streets in such plat by the city council or the board of supervisors.

Chrisman v. Brander, 112 N. W. 833.

While provisions are here made for vacation of part of a plat, yet if the rights and privileges of other proprietors in the plat are affected and they do not consent to the vacation, it is not effectual. So held as to streets in a plat which the owner attempted to vacate. *Uptagraff v. Smith*, 106-385.

SEC. 920. Vacation by lot owner.

A highway ought not to be vacated under the provisions of this section unless the immediate abutting owners so request. *Sarvis v. Caster*, 116-707.

A highway will not be vacated if it ap-

pears that in all reasonable probability it will soon be needed for public use, although it has not already been used by the public. *Ibid.*

SEC. 922. Plat by auditor. Whenever the original proprietor of any subdivision of land has sold or conveyed any part thereof, or invested the public with any rights therein, and has failed and neglected to execute and file for record a plat as provided in this chapter, the county auditor shall by mail or otherwise notify some or all of such owners, and demand its execution. If such owners, whether so notified or not, fail and neglect for thirty days after the issuance of such notice to execute and file said plat for record, the auditor shall cause one to be made, making any survey necessary therefor. Said plat shall be signed and acknowledged by the auditor, who shall certify that he executed it by reason of the failure of the owners named to do so, and file it for record in his office and in the office of the county recorder, and when so filed it shall have the same effect as if executed, acknowledged and recorded by the owners. A correct statement of

the costs and expenses of such plat, survey and record, verified by oath, shall be by the auditor laid before the first session of the board of supervisors, which shall allow the same and order them paid out of the county treasury, and he shall at the same time assess the amount *pro rata* upon the several subdivisions of said tract, lot or parcel so subdivided, and it shall be collected in the same manner as general taxes, and shall go to the general county fund; or said board may direct suit to be brought in the name of the county to recover from the original proprietor such cost and expense. [C., '73, § 568.] [31 G. A., ch. 30, § 1.]

SEC. 923. Repeal—platting for assessment and taxation. Section nine hundred twenty-three of the code is hereby repealed and the following substitute is enacted in lieu thereof:

“Whenever a congressional subdivision of land of one hundred and sixty acres or less, or any lot or subdivision, is owned by two or more persons in severalty, and the description of one or more of the different parts or parcels thereof cannot, in the judgment of the county auditor, be made sufficiently certain and accurate for the purposes of assessment and taxation without noting the metes and bounds of the same, he shall cause to be made and recorded in his office and the office of the county recorder a plat of such tract or lot with its several subdivisions including and replatting in such plat such other plats or parts thereof included within the same lot or congressional subdivision of land as may seem to him to be required in accordance with the provisions of this chapter, proceeding as directed in the preceding section, and all of its provisions shall govern.” [31 G. A., ch. 30, § 2.]

The plat referred to in this section is not a municipal plat. It does not fix the character of the land, but only its description, and extension of the corporate limits of the city so as to include such plat, held not to make it a city or town plat, within the provisions of § 1996, Code of '73, as to the extent of the homestead within town plats. *Parrott v. Thiel*, 117-392.

While the auditor has authority to plat a tract into subdivisions for convenience in taxation, although the same territory has previously been platted, he should not do so unless the new plat contains such reference to former plats as will make it possible to determine just what portions of any particular lots in the original plats

are included in each subdivision of the new plat. *Cranston v. McQuiston*, 127-104.

The plat contemplated is to be recorded in the auditor's office and not in the recorder's office and is not intended to furnish the basis of description for purposes of conveyance. *Ibid.*

Where the auditor's plat is improperly recorded in the recorder's office, it may be set aside in an action in equity for the purpose of removing a cloud from the title of one whose rights are determined by the original plat. *Ibid.*

The platting of territory within city limits by the auditor for purposes of taxation does not make it a part of the city or town plat. *Foster v. Rice*, 126-190.

SEC. 924. Insufficiency of description in deed. Every conveyance of land in this state shall be deemed to be a warranty that the description therein contained is sufficiently definite and accurate to enable the auditor to enter the same on the plat book required to be kept; and when there is presented for entry on the transfer book any conveyance in which the description is not sufficiently definite and accurate, the auditor shall note such fact on the deed, with that of the entry for transfer, and shall notify the person presenting it that the land therein is not sufficiently described, and must be platted within thirty days thereafter. Any person aggrieved by the opinion of the auditor may within said thirty days appeal therefrom to the board of supervisors, by giving notice thereof in writing, and thereupon no further proceeding shall be taken by the auditor. At its next session the board of supervisors shall determine said matter and direct whether the plat shall be executed and filed, and within what time. If the grantor in such conveyance shall neglect for thirty days thereafter to file

for record a plat thereof, and of the appropriate congressional subdivision in which the same is found, duly executed and acknowledged as required by the auditor, or, in case of appeal, as directed by the board of supervisors, then the auditor shall proceed as is provided in this chapter, and cause such plat to be made and recorded in his office and the office of the county recorder, and thereupon the same result shall follow as provided in the preceding section. Such plat shall describe said tract and any other subdivisions of the smallest congressional subdivision of which the same is part, numbering them by progressive numbers, setting forth the courses and distances, the number of acres, and such other memoranda as is necessary; and descriptions of such lots or subdivisions according to the number and designation thereon said plat shall be deemed sufficient for all purposes. [C., '73, § 570.] [31 G. A., ch. 30, § 3.]

SEC. 924-a. Acts of county auditors and recorders legalized. The acts of the county auditors of Iowa, in making and recording plats as authorized under sections nine hundred twenty-two (922), nine hundred twenty-three (923) and nine hundred twenty-four (924) of the code without first having properly signed or acknowledged the same and the acts of the county recorders of Iowa in recording such plats are hereby legalized and the same declared valid and binding the same as though they had in such respects been made and recorded in strict compliance with law. [32 G. A., ch. 247, § 1.]

SEC. 924-b. Descriptions of land legalized. The description of land in all instruments, conveyances and incumbrances describing lots in or referring to plats made by the county auditors of Iowa, or by the county surveyor for the owner, and placed of record by the county recorders of Iowa, are hereby legalized and the same declared valid and binding the same as though the said plats had been signed and acknowledged and filed and recorded in strict compliance with law. [32 G. A., ch. 247, § 2.]

SEC. 924-c. Pending litigation or decrees of court already rendered. This act shall not affect any rights now in litigation or which have been settled or adjudicated by the judgment or decree of any court. [32 G. A., ch. 247, § 3.]

SEC. 926. How made. The county surveyor of any county in which is situated any city, town, village or addition thereto, as contemplated in this chapter, may, and upon payment of his legal fees by any person desiring the same, must, make a resurvey of such city, town, village or addition, or any portion, and plat thereof, which plat shall conform as near as may be with the original lines of the parcel or tract so resurveyed, and be made in all respects in accordance with the provisions of this chapter. In making a resurvey and plat, the surveyor may summon witnesses, administer oaths, and take and hear evidence touching the original plat lines and subdivisions, whether the original proprietor is dead, and any other matter which may assist in arriving at and establishing the true lines and boundaries; but no resurvey shall be made except upon notice to be given by the surveyor by a publication of the contemplated resurvey, once each week, for four consecutive weeks in some newspaper printed in the county. [15 G. A., ch. 54, § 2.] [31 G. A., ch. 9, § 25.]

CHAPTER 14.

OF CITIES UNDER SPECIAL CHARTERS.

SECTION 933. General provisions not applicable.

The sections in this chapter are applicable only to cities under special charter. *Harvey v. Clarinda*, 111-528.

A statute applicable only to cities under special charter is not unconstitutional for want of uniformity of operation. The

adoption in the Code of 1857 of the provision prohibiting the granting of special charters to cities did not annual or render invalid the charters already granted. *Ulbrecht v. Keokuk*, 124-1.

SEC. 943. Compensation of aldermen—not to be interested.

The provision that no member of the city council shall be directly or indirectly interested in any contract for work or services does not affect the validity of the contract in such sense that a property owner can complain after the work is done of a violation of such provision. *Diver v. Keokuk*, 126-691.

The provision that a member of a city

council shall not become interested directly or indirectly in any contract for work or service to be performed for the corporation, has no application to the employment of a member of the city council as physician by the local board of health appointed by the mayor. *DeWitt v. Mills County*, 126-169.

SEC. 947. Ordinances—fines.

A city may not impose a fine in excess of \$100 for breach of an ordinance, and if the ordinance provides cumulative penalties for a continuing offense, so that the

aggregate fines for such offense may amount to more than \$100, the ordinance is in that respect void. *State v. Babcock*, 112-250.

SEC. 952. Ordinances signed and published—general powers. Sections six hundred and eighty-five, six hundred and eighty-six, six hundred and eighty-seven and six hundred and ninety-three of chapter three of this title, and sections six hundred and ninety-five to seven hundred and nineteen, seven hundred and twenty-two to seven hundred and thirty-two inclusive, of chapter four of this title, are hereby made applicable to cities acting under special charter. [27 G. A., ch. 28, § 1.]

SEC. 953-a. Repeal. That section nine hundred and fifty-three (953) of the code and section two (2) of chapter twenty-eight (28) of the acts of the twenty-seventh general assembly be and the same is hereby repealed. [29 G. A., ch. 50, § 1.]

SEC. 955. Water and gas works—electric light and power plants—street railway and telephone franchises. Such cities shall have power to establish, erect, purchase, lease, maintain or operate, within or without the corporate limits, heating plants, water works, gas works, electric light or electric power plants, with all the necessary reservoirs, mains, filters, streams, trenches, pipes, drains, poles, wires, burners, machinery, apparatus, and other requisites of said works or plants; but no such works or plants shall be thus established, erected, purchased or leased unless a majority of the electors voting on such proposition shall vote in favor of the same, at a general or special election. They may also grant individuals or private corporations the authority to erect, maintain or purchase such works or plants or railways, street railways or telephone systems, for the term of not more than twenty-five years, and may renew or extend the term of such grants for a period not exceeding twenty-five years; but no exclusive franchise shall be thus granted, extended or renewed, and no franchise shall be granted or authorized, until after notice of the application therefor has been published once each week for four consecutive weeks in some newspaper published in such city. [23 G. A., ch. 11, § 1.; 22 G. A., ch. 11, §§ 1,

2; 22 G. A., ch. 26; 14 G. A., ch. 78, §§ 2-5; C., '73, § 471.] [32 G. A., ch. 45.]

The notice contemplated by this section is intended to advise the property owners of the city not only that the franchise is desired, but also of the very terms of such franchise. *Hall v. Cedar Rapids*, 115-199.

The granting of permission to a street

railway having a franchise for the laying of its tracks in the streets, to lay such tracks on a street not already occupied by it, is not the granting of a new franchise requiring statutory notice. *Thurston v. Huston*, 123-157.

SEC. 955-a. Repeal. The law as it appears in section nine hundred and fifty-five-a (955-a) of the supplement to the code is hereby repealed. [32 G. A., ch. 46.]

SEC. 958. Other general powers. Sections seven hundred and thirty-four to seven hundred and forty-one, inclusive, of chapter four; chapter five; and sections seven hundred and fifty-one to seven hundred and seventy-four, and seven hundred and seventy-seven to seven hundred and ninety-one, inclusive, chapter six, of this title are made applicable to cities acting under special charter. And wherever the words "board of supervisors," "county auditor or recorder of deeds," and "county treasurer," are used in any section made applicable by chapter fourteen of title V of this code, to cities acting under special charters, the words "city council," "city clerk or recorder," and "city collector or treasurer," shall be respectively substituted. [27 G. A., ch. 28, § 4.]

SEC. 965. Street improvements and sewers.

The notice required by this section is jurisdictional. *Reed v. Cedar Rapids*, 111 N. W. 1013.

If the plat and schedule are filed as re-

quired in this section it is unnecessary to file a duplicate after the completion of the work. *Ibid.*

SEC. 971. Notice and levy of special assessments. After filing the plat and schedule referred to in section eight hundred and twenty-one, chapter seven, of this title, the council shall direct the clerk or recorder to give ten days' notice, by publishing same three times in a newspaper published in said city, that such plat and schedule are on file in the office of the clerk, fixing a time within which all objections thereto or to the prior proceedings must be made in writing; and the council, having heard the objections and made necessary corrections, shall levy the special assessment as shown in such plat and schedule. [25 G. A., ch. 7, §§ 11, 18; 22 G. A., ch. 5, § 6; 22 G. A., ch. 6, § 5; 21 G. A., ch. 168, §§ 11, 19.] [27 G. A., ch. 28, § 3.]

The provision of this section is not repealed by 28 G. A., Ch. 29, making the general provisions of Code § 823 applicable to cities under special charters. *Diver v. Keokuk*, 126-691.

This section is not unconstitutional for not requiring the notice to fix a time certain for hearing objections. *Reed v. Cedar Rapids*, 111 N. W. 1013.

SEC. 975. When delinquent—lien. Such assessment, and each installment with the interest thereon, shall be paid with accrued costs, at the office of the collector or treasurer, by the owner of the property upon which it is levied, at or before the time said property is sold for taxes or interest or both, and each installment and all interest due and unpaid shall become delinquent at the time fixed by ordinance or resolution, and shall bear such interest from the time of becoming delinquent, as ordinary taxes. All special assessments shall be a lien upon the property against which the same are assessed, from the date of the resolution of the council levying the same and shall be prior and superior to all other liens except ordinary

taxes, and shall not be divested by any judicial sale of the property. [25 G. A., ch. 7, § 11; 22 G. A., ch. 5, § 7; 21 G. A., ch. 168, § 12; 20 G. A., ch. 20, §§ 5, 6; 20 G. A., ch. 25; 17 G. A., ch. 162, § 3; 14 G. A., ch. 45, § 6; 13 G. A., ch. 14; 12 G. A., ch. 111; C., '73, §§ 478, 481; R., § 1068.] [31 G. A., ch. 31.]

SEC. 979. Other provisions as to special assessments. Sections eight hundred and twenty-eight, eight hundred and thirty-two, eight hundred and thirty-three, eight hundred and thirty-four, eight hundred and thirty-five, and eight hundred and forty, chapter seven, of this title, are made applicable to cities under special charter. [27 G. A., ch. 28, § 5.]

SEC. 984. Personal debt—action to enforce.

The provision of § 479 of the Code of '73 for recovery of ten per cent. interest and expenses of collection, where the assessment is collected by suit against the owner, held applicable only to a suit by the city. *Des Moines Brick Mfg. Co. v. Smith*, 108-307.

The statutory provisions relating to special charter cities that recovery against

an abutting owner for an improvement may be assessed on the basis of *quantum meruit*, notwithstanding infirmities or irregularities in the proceedings for the assessment, held not applicable where for want of a valid contract as required by law the city had no jurisdiction to make any assessment for such improvement. *Allen v. Davenport*, 132 Fed. 209.

SEC. 989. Limitation of action.

This section is not to be given a retrospective operation. *Waples v. Dubuque*, 116-167.

The provision is not applicable to certificates and bonds already issued at the

time the provision was adopted. *Citizens' State Bank*, 127-450.

Such limitation has no application to a re-assessment to pay such certificates or bonds. *Ibid.*

SEC. 999. Condemnation of land.

Under this section a city, acting under special charter, has power to acquire land by condemnation for a public landing.

Diamond Jo Line Steamers v. Davenport, 114,432.

SEC. 1004. Other provisions as to levying taxes. Sections eight hundred and eighty-eight, eight hundred and eighty-nine, eight hundred and ninety, eight hundred and ninety-one, eight hundred and ninety-two and eight hundred and ninety-three, of chapter eleven, of this title, section thirteen hundred and seventy (1370), section thirteen hundred and seventy-one (1371) as amended by chapter thirty-three of the acts of the twenty-seventh general assembly, section thirteen hundred and seventy-two (1372) as amended by chapter thirty of the acts of the twenty-seventh general assembly, and section thirteen hundred and seventy-three (1373), of chapter one of title seven, are made applicable to cities under special charter, except that the words "city treasurer" or "collector," and "city" shall be substituted for "county auditor" or "county," wherever the same appear in said sections. [29 G. A., ch. 52, § 1.]

SEC. 1005. Special taxes. They shall have power to levy annually the following taxes for special purposes:

1. *Grading fund.* A tax not exceeding three mills on the dollar for a grading fund, to be used for the purpose of opening, widening, extending or grading any street, public ground or market place; [23 G. A., ch. 5, § 1; 21 G. A., ch. 160, §§ 2, 3; 20 G. A., ch. 20, § 5.]

A statutory provision not retained in the Code, provided that property paying special assessments for street improvements might be exempted from road tax. Held that the repeal of such provision by

the adoption of the Code left the property subject to taxation under the provisions of this section. *Miller v. Hageman*, 114-195.

2. *Improvement fund.* A tax not exceeding three mills on the dollar for the city improvement fund, to be used for the purpose of paying the cost of the making, reconstruction and repair of any street improvement at the intersection of streets, and spaces opposite streets intersecting but not crossing, and the spaces opposite property owned by the city or state; [25 G. A., ch. 8, § 1; 22 G. A., ch. 12, § 1; 21 G. A., ch. 160, §§ 2, 3; 19 G. A., ch. 38, §§ 1, 2.]

3. *Sewer fund.* A tax not exceeding three mills on the dollar on the assessed valuation of all property therein, for the city sewer fund, to be used to pay the cost of making, reconstructing or repairing any sewer at the intersection of streets, and all spaces opposite streets intersecting but not crossing, and at spaces opposite property owned by the city or state, or to pay the whole or any part of the cost of making, reconstructing or repairing any sewer within the limits of such city. When the city has been divided into sewer districts, a tax not exceeding five mills on the taxable real property in the sewer district, for the district sewer fund, to be used to pay, in whole or in part, the cost of the making, reconstruction or repair of any sewer located or laid in that particular district; *provided* that, on petition of the owners of two-thirds in value of all the taxable real estate within such sewer district for the construction of a sewer in such district, then the maximum percentage of taxes that can be levied in any one year shall not be limited to five mills, but shall be such percentage of the valuation of such property as will produce at least one-tenth of the whole cost of such sewer assessable upon the real property in such district; [25 G. A., ch. 7, § 11; 22 G. A., ch. 7, § 1; 21 G. A., ch. 34, § 1; 17 G. A., ch. 162, § 1; 16 G. A., ch. 107, § 1.]

4. *Fire fund.* A tax not exceeding three mills on the dollar for the purpose of creating a city fire fund, to be used for paying the expenses of organizing, keeping and maintaining a fire department, including the expenses of constructing, purchasing, leasing and maintaining the proper and necessary buildings, grounds and apparatus therefor; [26 G. A., ch. 27; 23 G. A., ch. 8, §§ 1, 2.]

5. *Road fund.* When any city is divided into road districts, a tax not exceeding two mills on the dollar on all taxable property in such road district, to be known as the district road fund, and to be used only to pay the cost of cleaning, sprinkling and repairing the streets and public places in such district;

6. *Library tax.* In cities which have established, or may establish, a free public library, a tax as provided in section seven hundred and thirty-two (732) and amendments thereto; [25 G. A., ch. 43, § 1; 25 G. A., ch. 99, § 2; 22 G. A., ch. 18, § 1; 14 G. A., ch. 17; 13 G. A., ch. 45; C., '73, § 461.] [29 G. A., ch. 50, § 2.]

7. *Tax for water and gas works and electric plants.* A tax not exceeding five mills on the dollar, which, with the rates, rents or revenues derived therefrom, shall be sufficient to pay the expenses of running, operating and repairing, water and gas works, electric light and power plants, owned and operated by such city, and the interest on or principal of any bonds issued to pay the cost of the construction of such works; but such taxes shall not be levied upon the property which lies wholly without the limits of the benefits or protection of such works or plants, which limit shall be fixed by the council each year before making the levy. [22 G. A., ch. 11, § 2; C., '73, § 475.]

8. *Tax for water, gas and electric light or power.* A tax, not exceeding five mills on the dollar for the purpose of paying the amount due, or to become due, to any individual or company operating water or gas works

or electric light power plants, for water, light, gas or power supplied to the city, the levy to be limited to the property benefited thereby; [22 G. A., ch. 11, § 2; C., '73, § 475.]

9. *Bond fund.* A tax for the purpose of creating a bond fund sufficient to pay the interest, to accrue before the next annual levy, on funding or refunding bonds outstanding, and to pay the principal of such funding or refunding bonds. In case of such bonds, the levy shall be so made that, dividing the principal into as many parts as the bonds have years to run, not less than one such part shall be levied each year, and shall be made so that the fund derived therefrom shall be available and sufficient to pay the bonds at their maturity; [24 G. A., ch. 14, § 5; 23 G. A., ch. 4, §§ 6, 7; 22 G. A., ch. 17, § 5; 21 G. A., ch. 78.]

10. *Water and gas or electric light and power bonds.* A tax to be used exclusively in payment of the principal and interest of bonds issued for the construction of water and gas works, electric light and power plants, and which shall be levied in the manner provided in the preceding subdivision; [23 G. A., ch. 13, § 1; 22 G. A., ch. 10, § 1.]

11. *Park tax.* A tax not exceeding two mills on the dollar, as authorized by the vote of the electors, to purchase, improve and maintain public parks in such city; [24 G. A., ch. 1, § 7.]

12. *Special bridge tax.* A special tax to aid in the construction of bridges, when such tax has been voted by the electors of the city under the provisions of section seven hundred and sixty, of chapter six, of this title. [25 G. A., ch. 19, § 2; 21 G. A., ch. 13, § 2; 19 G. A., ch. 63, § 3.] [27 G. A., ch. 29, § 1.]

SEC. 1010. Levy and collection of taxes.

Where a city had provided by ordinance for notice to the tax payer before the city board of equalization could add to his taxes, held that in the absence of such

notice the increase of his assessment by such board was invalid. *Cedar Rapids & M. C. R. Co. v. Redmond*, 120-601

SEC. 1011. Assessment.

The provisions of Code § 1320 as to listing of property by an agent of a non-resident owner are applicable in special

charter cities. *German Trust Co. v. Board of Equalization*, 121-325.

SEC. 1020. *Questioning deed—refund.* Sections fourteen hundred and six, fourteen hundred and seven, fourteen hundred and eight, fourteen hundred and twenty-three, fourteen hundred and thirty-four, fourteen hundred and forty-six, fourteen hundred and forty-seven and fourteen hundred and forty-eight, chapter two, title seven, of this code are hereby made applicable to cities acting under special charters except that, where the word "treasurer" is used, there shall be used the words "city collector or treasurer or deputy treasurer or deputy or officer authorized to collect city taxes." And where the word auditor is used, there shall be substituted the words, "city clerk or recorder." [27 G. A., ch. 82, § 6.]

SEC. 1026. Officers appointed—quorum.

There is nothing in the statutes prohibiting a member of the city council from being employed by the local board of

health at an agreed compensation to treat cases of contagious diseases. *Dewitt v. Mills County*, 126-169.

SEC. 1050. Notice of unliquidated claim—limitation of action.

The limitations provided for by this section held not to be retroactive in effect. *Thoeni v. Dubuque*, 115-482.

A suit for injuries resulting from a defective sidewalk cannot be commenced within thirty days from the date of the

service of the notice of the claim for such injuries, under the provisions of this section. *Kenyon v. Cedar Rapids*, 124-159.

Under the statutory provision relating to notice of claims against a special charter city before bringing suit the action

must be commenced within three months after the cause thereof has accrued, and the filing of the claim must be at least thirty days before the suit is brought. *Foley v. Cedar Rapids*, 133-64.

SEC. 1051. Notice of claim for personal injury—limitation.

Reasonable certainty as to the place is all that is required in the notice. *Rusch v. Dubuque*, 116-402.

This section applies only to cities under special charters. *Harvey v. Clarinda*, 111-528.

For similar provisions as to other cities, see notes to Sec. 3447, Par. 1.

Recovery for the claim properly described in the notice is not defeated by the fact that the plaintiff asks in his petition to recover a larger sum than that named in the notice, and held that a verdict for the amount thus named would not be disturbed. *Van Camp v. Keokuk*, 130-716.

The notice required herein should advise the municipality of the nature and cause of the injury, the time and place when and where it occurred, and the particular defects or negligence which it is claimed

caused or contributed to it. The claimant is not bound however to rely upon a single defect nor to confine his statement of the defendant's negligence to such defect. *Bauer v. Dubuque*, 122-500.

Notice of the nature and cause of an injury alleged to be due to the negligence of the city and for which recovery is sought is sufficient if it states in a general way the nature and cause of the injury, and the defect or negligence complained of. It is not necessary that the facts constituting negligence be set out in detail. *Schnee v. Dubuque*, 122-459.

There cannot be recovery under an amendment to the petition filed more than three months after the injury for items of damage not included within the statement of the claim. *Ulbrecht v. Keokuk*, 124-1.

SEC. 1056-a1. Board of water-works trustees. That the water-works now owned by such special charter cities having a population of thirty-five thousand (35,000) or more shall be managed and operated by a board of water-works trustees, which shall be composed of three resident electors, appointed by the mayor of any such city. Upon the taking effect of this act, one of such trustees shall be appointed for a term of one year, another for a term of two years, and the remaining trustee for a term of three years, and thereafter each such trustee shall be appointed for a term of three years. Said trustees shall receive no compensation whatever for their duties as such. All vacancies occurring on said board occasioned by death, resignation, removal or otherwise, shall be filled by appointment to be made by the mayor of said city for the unexpired term. Each trustee upon qualifying shall execute and furnish the city an official bond, in the sum of five thousand dollars (\$5,000), for the faithful performance of his duties, which bond, if sufficient, shall be approved by the city council and filed with the city recorder and by him kept in his office and recorded in a book kept for that purpose, and the expense of such bonds shall be paid by the city treasurer, upon the order of the trustees, out of the water-works funds. Any of such trustees may be removed from office for cause under the provisions of chapter eight (8) of title six (VI) of the code, and in addition thereto, the mayor may, for like cause after hearing, remove any of such trustees. [32 G. A., ch. 47, § 1.]

SEC. 1056-a2. Superintendent—employes—duties of board. The said board of trustees shall employ an efficient superintendent, and such other employes as may be necessary and proper, for the operation and betterment of such works, for the collection of water rentals, and for the conduct of the business incident to the operation thereof. The said board of trustees shall require of the superintendent, and of the other employes as they may deem proper, good and sufficient bonds, the amount thereof to be fixed and approved by said board, for the faithful performance of their duties, which bonds shall run in the name of the city and be filed with the

city recorder and by him kept in his office and recorded in a book kept for that purpose. All money collected by the board of water-works trustees shall be deposited at least daily by them with the city treasurer; and all money so deposited and all tax money received by the city treasurer from any source, levied and collected for and on account of the water-works, shall be kept by the city treasurer as a separate and distinct fund, for which funds the city treasurer shall be liable upon his official bond the same as for other funds received by him as such treasurer. Such moneys shall be paid out by the city treasurer only on the written order of the board of water-works trustees, who shall have full and absolute control of the application and disbursement thereof for the purposes prescribed by law, including the payment of all indebtedness arising in the maintenance, operation, betterment, and extension of said water-works; and said board of water-works trustees shall make no payment of any kind whatsoever, except by written order on the city treasurer. For the operation, betterment, and improvement of such works, said board of trustees may incur obligations, and to pay therefor may anticipate the revenues of such works for a period not to exceed one year, unless the city council shall by tax levy make provision for the payment thereof. The board of trustees shall fix uniform water-rates and make and enforce proper rules and regulations for the collection of water-rentals and the supplying of good water service, and shall furnish the city council a schedule of such water rates and duplicate of such rules and regulations for publication as part of the proceedings of the city council. Such board of trustees shall each three months furnish the city council an itemized statement of all receipts and expenditures during such period, including all current liabilities and outstanding accounts, and, also complete annual statements, in the form of a balance sheet, which shall include all assets and liabilities; and, at least annually, and oftener if they see fit report the general condition and needs of the water-works plant; and such quarterly and annual statements and such reports shall when so furnished, be at once published as a part of the proceedings of the city council. Said board of trustees shall keep a book wherein a record shall be entered and kept of their proceedings, and which proceedings, duly attested, shall be at once published in two of the official newspapers of any such city. All books, vouchers, and records of said trustees in anywise relating to the water-works shall be open to the inspection and examination of any resident of said city. [32 G. A., ch. 47, § 2.]

SEC. 1056-a3. Cities affected—terms of office of acting trustees. All the provisions of this act shall be held and construed as applying to cities acting under special charters having a population of thirty-five thousand (35,000) or more as shown by the last state census; and all acts or parts of acts in conflict with this act shall not be applicable to any such cities in so far as they relate to the future management of water-works; and upon the taking effect of this act and the appointment of trustees hereunder, the terms of office of any and all water-works trustees now acting in any such city shall at once cease. [32 G. A., ch. 47, § 3.]

SEC. 1056-a4. Penalty or interest on unpaid taxes. That in cities acting under special charter no penalty or interest shall be collected upon taxes or assessments remaining unpaid four years or more, from the first day of January of the year in which the tax books containing the same, were first placed in the hands of the city collector or treasurer. [31 G. A., ch. 32.]

SEC. 1056-a5. Valuation—how provided. That the assessed or taxable value of all property, and the value at which it shall be listed, and upon which the levy shall be made, in special charter cities shall be provided by the city council of such city. [31 G. A., ch. 33, § 1.]

SEC. 1056-a6. Levy upon property valued and returned by executive council. That, where all property, except such as is listed and valued by the executive council is assessed upon its full or a certain percentage of its full valuation, the levy upon all such property valued and returned by the executive council shall be on a like percentage of the valuation so returned. [31 G. A., ch. 33, § 2.]

CHAPTER 14-A.

OF UNIFORM SYSTEM OF MUNICIPAL ACCOUNTS.

SECTION 1056-a7. Annual financial report. It shall be the duty of the chief accounting and warrant issuing officer of each city and town, namely auditor or clerk as the case may be, to prepare and to publish the annual report of the financial condition and transactions of the city or town now or hereafter required by law, and all accounting officers of all boards or commission departments and offices whatsoever within the corporate area receiving or disbursing public funds shall file with the auditor or clerk, within thirty days from the expiration of their fiscal year, a report in writing of official transactions in the form and manner required by law. In case of refusal or gross neglect to comply with the law and provisions herein governing the method of accounting for and reporting municipal transactions herein referred to, the official so delinquent shall be deemed guilty of a misdemeanor. The auditor or clerk aforesaid is hereby authorized to institute legal proceedings to enforce the provisions herein requiring report to him. [31 G. A., ch. 34, § 1.]

SEC. 1056-a8. How published. In cities having a population of five thousand or over, the annual report aforesaid shall be printed in pamphlet form. At least five hundred copies of said report shall be printed and the expense thereof shall be provided for annually by the city council. In cities and towns having less than five thousand population, the annual report may be published in pamphlet form if authorized by the city council. [31 G. A., ch. 34, § 2.]

SEC. 1056-a9. Certified to auditor of state—auditor to publish returns. On or before the first day of July the auditor or clerk of each city or town shall forward to the auditor of state a certified copy of the annual report in the form prescribed as hereinafter provided and said auditor of state shall publish in a separate volume such returns, showing under appropriate schedules the total receipts and expenditures, assets and indebtedness and related data of all cities and towns in the state together with his comment and recommendations respecting desirable changes in the laws governing financial administration in municipalities. Three thousand copies of such auditor's report shall be annually printed on or before December first for general distribution in accordance with law. [31 G. A., ch. 34, § 3.]

SEC. 1056-a 10. Uniform system of accounts—auditor to prescribe—advisory committee. That uniformity in the methods of accounting for and reporting the financial transactions of municipalities may be secured, the auditor of state is authorized and he is hereby directed to formulate and prescribe a system of municipal accounts and method of presenting departmental and general reports which shall be adopted and compiled within the administration of all cities or towns on and after April 1st, nineteen hundred and seven (1907). To insure careful consideration of the

merits and defects of existing methods in local accounting, the auditor of state shall appoint an advisory committee of not less than five nor more than seven persons familiar with municipal accounts, a majority of whom shall be city accounting officers; said committee shall serve without compensation except that their necessary traveling and hotel expenses for a period not to exceed thirty days shall be allowed them and for such expense the auditor of state is authorized to issue warrants upon the treasurer of state. In the system to be devised as herein contemplated, the officer and persons charged therewith shall adopt so far as practicable the latest and most approved methods in municipal accounting, especially the classifications and definitions of municipal finance in use in the national census office. [31 G. A., ch. 34, § 4.]

SEC. 1056-a11. Examiners of municipal accounts—compensation. The auditor of state shall appoint one or more examiners of municipal accounts whose duty it shall be at least once in two years to examine into, audit and report upon the financial condition and transactions of all cities having a population of five thousand or more. Said examiners shall have power to compel the attendance of witnesses and to administer oaths and shall have access to all books, papers or records essential in a thorough going examination. The examiner in charge of an investigation shall, on the conclusion thereof, file a written report of his findings with the mayor and council and with the auditor of state including his criticisms of any faults found and his recommendations respecting improvements desirable. Any and all reports thus made and filed shall be open to public inspection. The compensation of said examiners shall be five dollars (\$5.00) for each day actually employed together with their necessary traveling expenses; the sum so due in any case shall be paid by the auditor of state upon the presentation of proper bills therefor, by warrants on the treasury of state; thereupon the auditor of state shall file a claim for the full amount so allowed with the auditor or clerk of the city or town examined, and the council thereof shall provide for its payment. [31 G. A., ch. 34, § 5.]

SEC. 1056-a12. Application for examination. Any city or town with a population of less than five thousand may secure an examination of its financial transactions and the condition of its funds and a report thereon by a state examiner upon application by either the mayor or the council to the auditor of state. Further upon petition of fifty or more tax payers of any city or town setting forth facts that in the opinion of the state auditor justify action, the auditor of state shall send an examiner to inspect and report upon the financial administration and condition of the municipality in question. [31 G. A., ch. 34, § 6.]

SEC. 1056-a13. Applicable to special charter cities. The foregoing provisions shall apply to cities under special charters. [31 G. A., ch. 34, § 7.]

SEC. 1056-a14. Repeal—acts in conflict. All acts or parts of acts inconsistent with this act are hereby repealed. [31 G. A., ch. 34, § 8.]

CHAPTER 14-B.

OF APPOINTMENTS AND REMOVALS.

SECTION 1056-a15. Preference in appointments and promotions. That in every public department and upon all public works in the state of Iowa, and of the counties, cities and towns thereof, honorably discharged

soldiers, sailors, and marines from the army and navy of the United States in the late civil war, who are citizens and residents of this state, shall be entitled to preference in appointment, employment and promotion, over other persons of equal qualifications and the persons thus preferred shall not be disqualified from holding any position hereinbefore mentioned on account of his age or by reason of any physical disability, provided such age or disability does not render him incompetent to perform properly the duties of the position applied for and when such soldier, sailor or marine, shall apply for appointment or employment under this act, the officer, board or person whose duty it is or may be to appoint or employ some person to fill such position or place, shall before appointing or employing any one to fill such position or place, make an investigation as to the qualifications of said soldier, sailor or marine for such place or position, and if he is a man of good moral character and can perform the duties of said position so applied for by him, as hereinbefore provided, said officer, board or person shall appoint said soldier, sailor or marine to such position, place or employment. A refusal to allow the preference provided for in this and the next succeeding section to any honorably discharged soldier, sailor or marine, or a reduction of his compensation intended to bring about his resignation or discharge entitles such honorably discharged soldier, sailor or marine to a right of action therefor in any court of competent jurisdiction for damages, and also a remedy for mandamus for righting the wrong. [30 G. A., ch. 9, § 1.]

If the qualifications of a soldier of the civil war as applicant are not equal to those of the other persons under consideration for appointment he is not entitled to such appointment and the appointing board is authorized to determine that question. *McBride v. City Council*, 110 N. W. 157.

The statute providing for preference of honorably discharged soldiers and sailors

of the civil war who are residents of the state to appointment, employment and promotion in the public service over others of equal qualification, violates no constitutional provision. The right of appointment to a minor municipal office is not a privilege within the constitutional guaranties. *Shaw v. Marshalltown*, 131-128.

SEC. 1056-a16. Removals. Any person whose rights may be in any way prejudiced contrary to any of the provisions of this section shall be entitled to a writ of mandamus to remedy the wrong. No person holding a position by appointment or employment in the state of Iowa, or in the several counties, cities, or towns, thereof, who is an honorably discharged soldier, sailor or marine having served as such in the union army or navy during the late civil war shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, and with the right of such employe or appointee to a review by a writ of certiorari. The burden of proving incompetency or misconduct shall rest upon the party alleging the same. Nothing in this act shall be construed to apply to the position of private secretary or deputy of any official or department, or to any person holding a strictly confidential relation to the appointing officer. [30 G. A., ch. 9, § 2.]

CHAPTER 14-C.

OF GOVERNMENT OF CERTAIN CITIES.

SECTION 1056-a17. Cities affected. That any city of the first class, or with special charter, now or hereafter having a population of twenty-five thousand or over, as shown by the last preceding state census, may become

organized as a city under the provisions of this act by proceeding as herein-after provided. [32 G. A., ch. 48, § 1.]

SEC. 1056-a18. Petition — question submitted — result certified — election of officers. Upon petition of electors equal in number to twenty-five per centum of the votes cast for all candidates for mayor at the last preceding city election of any such city, the mayor shall by proclamation, submit the question of organizing as a city under this act at a special election to be held at a time specified therein, and within two months after said petition is filed. If said plan is not adopted at the special election called, the question of adopting said plan shall not be re-submitted to the voters of said city for adoption, within two years thereafter and then the question to adopt shall be re-submitted upon the presentation of a petition signed by electors equal in number to twenty-five per centum of the votes cast for all candidates for mayor at the last preceding general city election. At such election, the proposition to be submitted shall be, "Shall the proposition to organize the city of (name the city), under chapter (naming the chapter containing this act) of the acts of the thirty-second general assembly, be adopted?" and the election thereupon shall be conducted, the vote canvassed, and the result declared in the same manner as provided by law in respect to other city elections. If the majority of the votes cast shall be in favor thereof, the city shall thereupon proceed to the election of a mayor and four (4) councilmen, as hereinafter provided. Immediately after such proposition is adopted, the mayor shall transmit to the governor, to the secretary of state, and to the county auditor, each a certificate stating that such proposition was adopted. At the next regular city election after the adoption of such proposition, there shall be elected a mayor and four (4) councilmen. In the event however, that the next regular city election does not occur within one year after such special election, the mayor shall, within ten days after such special election, by proclamation, call a special election for the election of a mayor and four councilmen, sixty days' notice thereof being given in such call; such election in either case to be conducted as hereinafter provided. [32 G. A., ch. 48, § 2.]

SEC. 1056-a19. Statutes applicable—existing ordinances, resolutions, etc. All laws governing cities of the first class and not inconsistent with the provisions of this act, and sections 955, 956, 959, 964, 989, 1000, 1023, and 1053 of the code now applicable to special charter cities and not inconsistent with the provisions of this act, shall apply to and govern cities organized under this act. All by-laws, ordinances and resolutions lawfully passed and in force in any such city under its former organization shall remain in force until altered or repealed by the council elected under the provisions of this act. The territorial limits of such city shall remain the same as under its former organization and all rights and property of every description which were vested in any such city under its former organization, shall vest in the same under the organization herein contemplated, and no right or liability either in favor of or against it, existing at the time, and no suit or prosecution of any kind shall be affected by such change, unless otherwise provided for in this act. [32 G. A., ch. 48, § 3.]

SEC. 1056-a20. Elective officers — vacancies — terms of office. In every such city there shall be elected at the regular biennial municipal election, a mayor and four councilmen. If any vacancy occurs in any such office the remaining members of said council shall appoint a person to fill such vacancy during the balance of the unexpired term. Said officers shall be nominated and elected at large. Said officers shall qualify and their terms of office shall begin on the first Monday after their election. The terms of office of the mayor and councilmen or aldermen in such city in

office at the beginning of the terms of office of the mayor and councilmen first elected under the provisions of this act shall then cease and determine, and the terms of office of all other appointive officers in force in such city, except as hereinafter provided, shall cease and determine as soon as the council shall by resolution declare. [32 G. A., ch. 48, § 4.]

SEC. 1056-a21. Candidates—how nominated—primary election—ballot—canvass of vote—result published—municipal election. Candidates to be voted for at all general municipal elections at which a mayor and four councilmen are to be elected under the provisions of this act shall be nominated by a primary election, and no other names shall be placed upon the general ballot except those selected in the manner hereinafter prescribed. The primary election for such nomination shall be held on the second Monday preceding the general municipal election. The judges of election appointed for the general municipal election shall be the judges of the primary election, and it shall be held at the same place, so far as possible, and the polls shall be opened and closed at the same hours, with the same clerks as are required for said general municipal election. Any person desiring to become a candidate for mayor or councilman shall, at least ten days prior to said primary election, file with the said clerk a statement of such candidacy, in substantially the following form:

STATE OF IOWA, }
COUNTY. } SS.

I (—), being first duly sworn, say that I reside at street, city of county of state of Iowa; that I am a qualified voter therein; that I am a candidate for nomination to the office of (mayor or councilman) to be voted upon at the primary election to be held on the Monday of 19.... and I hereby request that my name be printed upon the official primary ballot for nomination by such primary election for such office.

(Signed)

Subscribed and sworn to (or affirmed) before me by on this day of 19....

(Signed)

and shall at the same time file therewith the petition of at least twenty-five qualified voters requesting such candidacy. Each petition shall be verified by one or more persons as to the qualifications and residence, with street number, of each of the persons so signing the said petition, and the said petition shall be in substantially the following form:

PETITION ACCOMPANYING NOMINATING STATEMENT.

The undersigned, duly qualified electors of the city of and residing at the places set opposite our respective names hereto, do hereby request that the name of (name of candidate) be placed on the ballot as a candidate for nomination for (name of office) at the primary election to be held in such city on the Monday of 19.... We further state that we know him to be a qualified elector of said city and a man of good moral character and qualified in our judgment for the duties of such office.

Names of Qualified Electors	Number	Street

Immediately upon the expiration of the time of filing the statements and petitions for candidacies, the said city clerk shall cause to be published for three successive days in all the daily newspapers published in the city, in proper form, the names of the persons as they are to appear upon the primary ballot, and if there be no daily newspaper, then in two issues of any other newspapers that may be published in said city; and the said clerk shall thereupon cause the primary ballots to be printed, authenticated with a facsimile of his signature. Upon the said ballot the names of the candidates for mayor, arranged alphabetically, shall first be placed, with a square at the left of each name, and immediately below the words, "Vote for one." Following these names, likewise arranged in alphabetical order, shall appear the names of the candidates for councilmen, with a square at the left of each name, and below the names of such candidates shall appear the words, "Vote for four." The ballots shall be printed upon plain, substantial white paper, and shall be headed:

CANDIDATES FOR NOMINATION FOR MAYOR AND COUNCILMEN OF
CITY AT THE PRIMARY ELECTION

but shall have no party designation or mark whatever. The ballots shall be in substantially the following form:

(Place a cross in the square preceding the names of the parties you favor as candidates for the respective positions.)

OFFICIAL PRIMARY BALLOT.

CANDIDATES FOR NOMINATION FOR MAYOR AND COUNCILMEN OF
CITY AT THE PRIMARY ELECTION.

- For Mayor
- (Name of candidate)
- (Vote for one)
- For Councilman
- (Name of candidate)
- (Vote for four)

Official ballot attest
(Signature)

.....
City Clerk.

Having caused said ballots to be printed, the said city clerk shall cause to be delivered at each polling-place a number of said ballots equal to twice the number of votes cast in such polling precinct at the last general municipal election for mayor. The persons who are qualified to vote at the general municipal election shall be qualified to vote at such primary election, and challenges can be made by not more than two persons, to be appointed at the time of opening the polls by the judges of election; and the law applicable to challenges at a general municipal election shall be applicable to challenges made at such primary election. Judges of election shall, immediately upon the closing of the polls, count the ballots and ascertain the number of votes cast in such precinct for each of the candidates, and make return thereof to the city clerk, upon proper blanks to be furnished by the said clerk, within six hours of the closing of the polls. On the day following the said primary election, the said city clerk shall canvass said returns so received from all the polling precincts, and shall make and

publish in all the newspapers of said city, at least once, the result thereof. Said canvass by the city clerk shall be publicly made. The two candidates receiving the highest number of votes for mayor shall be the candidates, and the only candidates, whose names shall be placed upon the ballot for mayor at the next succeeding general municipal election, and the eight candidates receiving the highest number of votes for councilman, or all such candidates if less than eight, shall be the candidates and the only candidates whose names shall be placed upon the ballot for councilman at such municipal election. All electors of cities under this act who by the laws governing cities of the first class and cities acting under special charter would be entitled to vote for the election of officers at any general municipal election in such cities, shall be qualified to vote at all elections under this act; and the ballot at such general municipal election shall be in the same general form as for such primary election, so far as applicable, and in all elections in such city the election precincts, voting places, method of conducting election, canvassing the votes and announcing the results, shall be the same as by law provided for election of officers in such cities, so far as the same are applicable and not inconsistent with the provisions of this act. [32 G. A., ch. 48, § 5.]

SEC. 1056-a22. Services for hire—penalty. Any person who shall agree to perform any services in the interest of any candidate for any office provided in this act, in consideration of any money or other valuable thing for such services performed in the interest of any candidate, shall be punished by a fine not exceeding three hundred dollars (\$300), or be imprisoned in the county jail not exceeding thirty (30) days. [32 G. A., ch. 48, § 5-a.]

SEC. 1056-a23. Bribery and illegal voting—penalty. Any person offering to give a bribe, either in money or other consideration, to any elector for the purpose of influencing his vote at any election provided in this act, or any elector entitled to vote at any such election receiving and accepting such bribe or other consideration; any person making false answer to any of the provisions of this act relative to his qualifications to vote at said election; any person wilfully voting or offering to vote at such election who has not been a resident of this state for six months next preceding said election, or who is not twenty-one years of age, or is not a citizen of the United States; or knowing himself not to be a qualified elector of such precinct where he offers to vote; any person knowingly procuring, aiding or abetting any violation hereof shall be deemed guilty of a misdemeanor and upon conviction shall be fined a sum not less than one hundred dollars (\$100), nor more than five hundred dollars (\$500), and be imprisoned in the county jail not less than ten (10) nor more than ninety (90) days. [32 G. A., ch. 48, § 5-b.]

SEC. 1056-a24. Council—quorum—mayor to preside. Every such city shall be governed by a council, consisting of the mayor and four councilmen, chosen as provided in this act, each of whom shall have the right to vote on all questions coming before the council. Three members of the council shall constitute a quorum, and the affirmative vote of three members shall be necessary to adopt any motion, resolution or ordinance, or pass any measure, unless a greater number is provided for in this act. Upon every vote the yeas and nays shall be called and recorded, and every motion, resolution or ordinance shall be reduced to writing and read before the vote is taken thereon. The mayor shall preside at all meetings of the council; he shall have no power to veto any measure, but every resolution or ordinance passed by the council must be signed by the mayor, or by two councilmen, and be recorded, before the same shall be in force. [32 G. A., ch. 48, § 6.]

SEC. 1056-a25. Council—powers and duties—departments. The council shall have and possess and the council and its members shall exercise all executive, legislative and judicial powers and duties now had, possessed and exercised by the mayor, city council, board of public works, park commissioners, board of police and fire commissioners, board of water-works trustees, board of library trustees, solicitor, assessor, treasurer, auditor, city engineer, and other executive and administrative officers in cities of the first class and cities acting under special charter. The executive and administrative powers, authority and duties in such cities shall be distributed into and among five departments, as follows:

1. Department of public affairs.
2. Department of accounts and finances.
3. Department of public safety.
4. Department of streets and public improvements.
5. Department of parks and public property.

The council shall determine the powers and duties to be performed by, and assign them to the appropriate department; shall prescribe the powers and duties of officers and employes; may assign particular officers and employes to one or more of the departments; may require an officer or employe to perform duties in two or more departments; and may make such other rules and regulations as may be necessary or proper for the efficient and economical conduct of the business of the city. [32 G. A., ch. 48, § 7.]

SEC. 1056-a26. Department superintendents—officers and assistants. The mayor shall be superintendent of the department of public affairs, and the council shall at the first regular meeting after election of its members designate by majority vote one councilman to be superintendent of the department of accounts and finances; one to be superintendent of the department of public safety; one to be superintendent of the department of streets and public improvements; and one to be superintendent of the department of parks and public property; but such designation shall be changed whenever it appears that the public service would be benefited thereby. The council shall, at said first meeting, or as soon as practicable thereafter, elect by majority vote the following officers: A city clerk, solicitor, assessor, treasurer, auditor, civil engineer, city physician, marshal, chief of fire department, market master, street commissioner, three library trustees, and such other officers and assistants as shall be provided for by ordinance and necessary to the proper and efficient conduct of the affairs of the city; and shall appoint a police judge in those cities not having a superior court. Any officer or assistant elected or appointed by the council may be removed from office at any time by vote of a majority of the members of the council, except as otherwise provided for in this act. [32 G. A., ch. 48, § 8.]

SEC. 1056-a27. Power to create and discontinue offices. The council shall have power from time to time to create, fill and discontinue offices and employments other than herein prescribed, according to their judgment of the needs of the city; and may by majority vote of all the members remove any such officer or employe, except as otherwise provided for in this act; and may by resolution or otherwise prescribe, limit or change the compensation of such officers or employes. [32 G. A., ch. 48, § 9.]

SEC. 1056-a28. Office in city hall—salaries. The mayor and council shall have an office at the city hall, and their total compensation shall be as follows: In cities having by the last preceding state or national census from 25,000 to 40,000 people, the annual salary of the mayor shall be \$2,500, and of each councilman \$1,800. In cities having by such census from 40,000 to 60,000 people, the mayor's annual salary shall be \$3,000,

and that of each councilman \$2,500; and in cities having by such census over 60,000 population, the mayor's annual salary shall be \$3,500, and that of each councilman \$3,000. Such salaries shall be payable in equal monthly installments. Any increase in salary occasioned under the provisions of this scale by increase in population in any city shall commence with the month next after the official publication of the census showing such increase therein. Every other officer or assistant shall receive such salary or compensation as the council shall by ordinance provide, payable in equal monthly installments. The salary or compensation of all other employes of such city shall be fixed by the council and shall be payable monthly or at such shorter periods as the council shall determine. [32 G. A., ch. 48, § 10.]

SEC. 1056-a29. Meetings—president of council—vice-president. Regular meetings of the council shall be held on the first Monday after the election of councilmen, and thereafter at least once each month. The council shall provide by ordinance for the time of holding regular meetings, and special meetings may be called from time to time by the mayor or two councilmen. All meetings of the council, whether regular or special, at which any person not a city officer is admitted, shall be open to the public. The mayor shall be president of the council and preside at its meetings, and shall supervise all departments and report to the council for its action all matters requiring attention in either [any]. The superintendent of the department of accounts and finances shall be vice-president of the council, and in case of vacancy in the office of mayor, or the absence or inability of the mayor, shall perform the duties of mayor. [32 G. A., ch. 48, § 11.]

SEC. 1056-a30. Ordinances and resolutions—franchises. Every ordinance or resolution appropriating money or ordering any street improvement or sewer, or making or authorizing the making of any contract, or granting any franchise or right to occupy or use the streets, highways, bridges or public places in the city for any purpose, shall be complete in the form in which it is finally passed, and remain on file with the city clerk for public inspection at least one week before the final passage or adoption thereof. No franchise or right to occupy or use the streets, highways, bridges or public places in any such city shall be granted, renewed or extended, except by ordinance, and every franchise or grant for interurban or street railways, gas or water-works, electric light or power plants, heating plants, telegraph or telephone systems, or other public service utilities within said city, must be authorized or approved by a majority of the electors voting thereon at a general or special election as provided in section 776 of the code. [32 G. A., ch. 48, § 12.]

SEC. 1056-a31. Officers and employes—what prohibited. No officer or employe elected or appointed in any such city shall be interested, directly or indirectly, in any contract or job for work or materials, or the profits thereof, or services to be furnished or performed for the city; and no such officer or employe shall be interested, directly or indirectly, in any contract or job for work or materials, or the profits thereof, or services to be furnished or performed for any person, firm or corporation operating interurban railway, street railway, gas works, water-works, electric light or power plant, heating plant, telegraph line, telephone exchange, or other public utility within the territorial limits of said city. No such officer or employe shall accept or receive, directly or indirectly, from any person, firm or corporation operating within the territorial limits of said city, any interurban railway, street railway, gas works, water-works, electric light or power plant, heating plant, telegraph line or telephone exchange, or other business using or operating under a public franchise, any frank,

free pass, free ticket or free service, or accept or receive, directly or indirectly, from any such person, firm or corporation, any other service upon terms more favorable than is granted to the public generally. Any violation of the provisions of this section shall be a misdemeanor, and every such contract or agreement shall be void. Such prohibition of free transportation shall not apply to policemen or firemen in uniform; nor shall any free service to city officials heretofore provided by any franchise or ordinance be affected by this section. Any officer or employe of such city who, by solicitation or otherwise, shall exert his influence directly or indirectly to influence other officers or employes of such city to adopt his political views or to favor any particular person or candidate for office, or who shall in any manner contribute money, labor, or other valuable thing to any person for election purposes, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding three hundred dollars (\$300) or by imprisonment in the county jail not exceeding thirty (30) days. [32 G. A., ch. 48, § 13.]

SEC. 1056-a32. Civil service commissioners—duties—powers of council. Immediately after organizing, the council shall by ordinance appoint three civil service commissioners, who shall hold office, one until the first Monday in April in the second year after his appointment, one until the first Monday in April of the fourth year after his appointment, and one until the first Monday in April of the sixth year after his appointment. Each succeeding council shall, as soon as practicable after organizing, appoint one commissioner for six years, who shall take the place of the commissioner whose term of office expires. The chairman of the commission for each biennial period shall be the member whose term first expires. No person while on the said commission shall hold or be a candidate for any office of public trust. Two of said members shall constitute a quorum to transact business. The commissioners must be citizens of Iowa, and residents of the city for more than three years next preceding their appointment. The council may remove any of said commissioners during their term of office for cause, four councilmen voting in favor of such removal, and shall fill any vacancy that may occur in said commission for the unexpired term. The city council shall provide suitable rooms in which the said civil service commission may hold its meetings. They shall have a clerk, who shall keep a record of all its meetings, such city to supply the said commission with all necessary equipment to properly attend to such business.

(a) *Oath of office.* Before entering upon the duties of their office, each of said commissioners shall take and subscribe an oath, which shall be filed and kept in the office of the city clerk, to support the constitution of the United States and of the state of Iowa, and to obey the laws, and to aim to secure and maintain an honest and efficient force, free from partisan distinction or control, and to perform the duties of his office to the best of his ability.

(b) *Examinations—results certified.* Said commission shall, on the first Monday of April and October of each year, or oftener if it shall be deemed necessary, under such rules and regulations as may be prescribed by the council, hold examinations for the purpose of determining the qualifications of applicants for positions, which examinations shall be practical and shall fairly test the fitness of the persons examined to discharge the duties of the position to which they seek to be appointed. Said commission shall, as soon as possible after such examination, certify to the council double the number of persons necessary to fill vacancies, who, according to its records, have the highest standing for the positions they seek to fill as a result of

such examination, and all vacancies which occur, that come under the civil service, prior to the date of the next regular examination, shall be filled from said list so certified; provided, however, that should the list for any cause be reduced to less than three for any division, then the council or the head of the proper department may temporarily fill a vacancy, but not to exceed thirty days.

(c) *Removals and discharges—appeal.* All persons subject to such civil service examination shall be subject to removal from office or employment by the council for misconduct or failure to perform their duties under such rules and regulations as it may adopt, and the chief of police, chief of the fire department, or any superintendent or foreman in charge of municipal work, may peremptorily suspend or discharge any subordinate then under his direction for neglect of duty or disobedience of orders, but shall, within twenty-four hours thereafter, report such suspension or discharge, and the reason therefor, to the superintendent of his department, who shall thereupon affirm or revoke such discharge or suspension according to the facts. Such employe (or the officer discharging or suspending him) may, within five days of such ruling, appeal therefrom to the council, which shall fully hear and determine the matter.

(d) *Witnesses—annual report—rules and regulations.* The council shall have the power to enforce the attendance of witnesses, the production of books and papers, and power to administer oaths in the same manner and with like effect, and under the same penalties, as in the case of magistrates exercising criminal or civil jurisdiction under the statutes of Iowa. Said commissioners shall make annual report to the council, and it may require a special report from said commission at any time; and said council may prescribe such rules and regulations for the proper conduct of the business of the said commission as shall be found expedient and advisable, including restrictions on appointment, promotions, removals for cause, roster of employes, certification of records to the auditor, and restrictions on payment to persons improperly employed.

(e) *Penalties.* The council of such city shall have power to pass ordinances imposing suitable penalties for the punishment of persons violating any of the provisions of this act relating to the civil service commission.

(f) *Officers and employes affected.* The provisions of this section shall apply to all appointive officers and employees of such city, except those especially named in section 8 of this act, commissioners of any kind (laborers whose occupation requires no special skill or fitness), election officials, and mayor's secretary and assistant solicitor, where such officers are appointed; provided, however, that existing employees heretofore appointed, or employed after competitive examination, or for long service under the provisions of chapter 31, acts of the 29th general assembly, and subsequent amendments thereto, shall retain their positions without further examination unless removed for cause. All officers and employees in any such city shall be elected or appointed with reference to their qualifications and fitness, and for the good of the public service, and without reference to their political faith or party affiliations. It shall be unlawful for any candidate for office, or any officer in any such city, directly or indirectly, to give or promise any person or persons any office, position, employment, benefit, or anything of value, for the purpose of influencing or obtaining the political support, aid or vote of any person or persons. Every elective officer in any such city shall, within thirty days after qualifying, file with the city clerk, and publish at least once in a daily newspaper of general circulation, his sworn statement of all his election and campaign expenses, and by whom such funds were contributed. Any violation of the provisions of this sec-

tion shall be a misdemeanor and be a ground for removal from office. [32 G. A., ch. 48, § 14.]

SEC. 1056-a33. Monthly itemized statement—annual examination. The council shall each month print in pamphlet form a detailed itemized statement of all receipts and expenses of the city and a summary of its proceedings during the preceding month, and furnish printed copies thereof to the state library, the city library, the daily newspapers of the city, and to persons who shall apply therefor at the office of the city clerk. At the end of each year the council shall cause a full and complete examination of all the books and accounts of the city to be made by competent accountants, and shall publish the result of such examination in the manner above provided for publication of statements of monthly expenditures. [32 G. A., ch. 48, § 15.]

SEC. 1056-a34. Appropriations. If, at the beginning of the term of office of the first council elected in such city under the provisions of this act, the appropriations for the expenditures of the city government for the current fiscal year have been made, said council shall have power, by ordinance, to revise, repeal or change said appropriations and to make additional appropriations. [32 G. A., ch. 48, § 16.]

SEC. 1056-a35. Terms defined. In the construction of this act the following rules shall be observed, unless such construction would be inconsistent with the manifest intent, or repugnant to the context of the statute.

1. The words "councilman" or "alderman" shall be construed to mean "councilman" when applied to cities under this act.

2. When an office or officer is named in any law referred to in this act, it shall, when applied to cities under this act, be construed to mean the office or officer having the same functions or duties under the provisions of this act, or under ordinances passed under authority thereof.

3. The word "franchise" shall include every special privilege in the streets, highways and public places of the city, whether granted by the state or the city, which does not belong to citizens generally by common right.

4. The word "electors" shall be construed to mean persons qualified to vote for elective offices at regular municipal elections. [32 G. A., ch. 48, § 17.]

SEC. 1056-a36. Removal of elective officers—procedure—election of successors. The holder of any elective office may be removed at any time by the electors qualified to vote for a successor of such incumbent. The procedure to effect the removal of an incumbent of an elective office shall be as follows: A petition signed by electors entitled to vote for a successor to the incumbent sought to be removed, equal in number to at least twenty-five per centum of the entire vote for all candidates for the office of mayor cast at the last preceding general municipal election, demanding an election of a successor of the person sought to be removed, shall be filed with the city clerk, which petition shall contain a general statement of the grounds for which the removal is sought. The signatures to the petition need not all be appended to one paper, but each signer shall add to his signature his place of residence, giving the street and number. One of the signers of each such paper shall make oath before an officer competent to administer oaths that the statements therein made are true as he believes, and that each signature to the paper appended is the genuine signature of the person whose name it purports to be. Within ten days from the date of filing such petition the city clerk shall examine and from the voters' register ascertain whether or not said petition is signed by the requisite number of qualified electors, and, if necessary, the council shall allow him extra help for

that purpose; and he shall attach to said petition his certificate, showing the result of said examination. If by the clerk's certificate the petition is shown to be insufficient, it may be amended within ten days from the date of said certificate. The clerk shall, within ten days after such amendment, make like examination of the amended petition, and if his certificate shall show the same to be insufficient, it shall be returned to the person filing the same; without prejudice, however, to the filing of a new petition to the same effect. If the petition shall be deemed to be sufficient, the clerk shall submit the same to the council without delay. If the petition shall be found to be sufficient, the council shall order and fix a date for holding the said election, not less than thirty days or more than forty days from the date of the clerk's certificate to the council that a sufficient petition is filed. The council shall make or cause to be made publication of notice and all arrangements for holding such election, and the same shall be conducted, returned and the result thereof declared, in all respects as are other city elections. The successor of any officer so removed shall hold office during the unexpired term of his predecessor. Any person sought to be removed may be a candidate to succeed himself, and unless he requests otherwise in writing, the clerk shall place his name on the official ballot without nomination. In any such removal election, the candidate receiving the highest number of votes shall be declared elected. At such election if some other person than the incumbent receives the highest number of votes, the incumbent shall thereupon be deemed removed from the office upon qualification of his successor. In case the party who receives the highest number of votes should fail to qualify within ten days after receiving notification of election, the office shall be deemed vacant. If the incumbent receives the highest number of votes, he shall continue in office. The said method of removal shall be cumulative and additional to the methods heretofore provided by law. [32 G. A., ch. 48, § 18.]

SEC. 1056-a37. Petitions for ordinances—adoption or submission—how repealed or amended. Any proposed ordinance may be submitted to the council by petition signed by electors of the city equal in number to the percentage hereinafter required. The signatures, verification, authentication, inspection, certification, amendment and submission of such petition shall be the same as provided for petitions under section 18 hereof. If the petition accompanying the proposed ordinance be signed by electors equal in number to twenty-five per centum of the votes cast for all candidates for mayor at the last preceding general election, and contains a request that the said ordinance be submitted to a vote of the people if not passed by the council, such council shall either (a) Pass said ordinance without alteration within twenty days after attachment of the clerk's certificate to the accompanying petition, or (b) Forthwith after the clerk shall attach to the petition accompanying such ordinance his certificate of sufficiency, the council shall call a special election, unless a general municipal election is fixed within ninety days thereafter, and at such special or general municipal election, if one is so fixed, such ordinance shall be submitted without alteration to the vote of the electors of said city. But if the petition is signed by not less than ten nor more than twenty-five per centum of the electors, as above defined, then the council shall, within twenty days, pass said ordinance without change, or submit the same at the next general city election occurring not more than thirty days after the clerk's certificate of sufficiency is attached to said petition. The ballots used when voting upon said ordinance shall contain these words: "For the ordinance" (stating the nature of the proposed ordinance), and "Against the ordinance" (stating the nature of the proposed ordinance). If a majority

of the qualified electors voting on the proposed ordinance shall vote in favor thereof, such ordinance shall thereupon become a valid and binding ordinance of the city; and any ordinance proposed by petition, or which shall be adopted by a vote of the people, cannot be repealed or amended except by a vote of the people. Any number of proposed ordinances may be voted upon at the same election, in accordance with the provisions of this section; but there shall not be more than one special election in any period of six months for such purpose. The council may submit a proposition for the repeal of any such ordinance, or for amendments thereto, to be voted upon at any succeeding general city election; and should such proposition so submitted receive a majority of the votes cast thereon at such election, such ordinance shall thereby be repealed or amended accordingly. Whenever any ordinance or proposition is required by this act to be submitted to the voters of the city at any election, the city clerk shall cause such ordinance or proposition to be published once in each of the daily newspapers published in said city; such publication to be not more than twenty or less than five days before the submission of such proposition or ordinance to be voted on. [32 G. A., ch. 48, § 19.]

SEC. 1056-a38. Ordinances—when effective—petitions of protest. No ordinance passed by the council, except when otherwise required by the general laws of the state or by the provisions of this act, except an ordinance for the immediate preservation of the public peace, health or safety, which contains a statement of its urgency and is passed by a two-thirds vote of the council, shall go into effect before ten days from the time of its final passage; and if during said ten days a petition signed by electors of the city equal in number to at least twenty-five per centum of the entire vote cast for all candidates for mayor at the last preceding general municipal election at which a mayor was elected, protesting against the passage of such ordinance, be presented to the council, the same shall thereupon be suspended from going into operation, and it shall be the duty of the council to reconsider such ordinance; and if the same is not entirely repealed, the council shall submit the ordinance, as is provided by sub-section b of section 19 of this act, to the vote of the electors of the city, either at the general election or at a special municipal election to be called for that purpose; and such ordinance shall not go into effect or become operative unless a majority of the qualified electors voting on the same shall vote in favor thereof. Said petition shall be in all respects in accordance with the provisions of said section 19 except as to the percentage of signers, and be examined and certified to by the clerk in all respects as is therein provided. [32 G. A., ch. 48, § 20.]

SEC. 1056-a39. Abandonment of commission plan of government—procedure. Any city which shall have operated for more than six years under the provisions of this act may abandon such organization hereunder, and accept the provisions of the general law of the state then applicable to cities of its population, or if now organized under special charter may resume said special charter by proceeding as follows: Upon the petition of not less than twenty-five per centum of the electors of such city a special election shall be called, at which the following proposition only shall be submitted:

“Shall the city of (name of city) abandon its organization under chapter of the acts of the thirty-second general assembly, and become a city under the general law governing cities of like population or if now organized under special charter shall resume said special charter?”

If the majority of the votes cast at such special election be in favor of such proposition, the officers elected at the next succeeding biennial election

shall be those then prescribed by the general law of the state for cities of like population, and upon the qualification of such officers such city shall become a city under such general law of the state; but such change shall not in any manner or degree affect the property, rights or liabilities of any nature of such city, but shall merely extend to such change in its form of government. The sufficiency of such petition shall be determined, the election ordered and conducted, and the results declared, generally as provided by section 18 of this act, in so far as the provisions thereof are applicable. [32 G. A., ch. 48, § 21.]

SEC. 1056-a40. Petitions. Petitions provided for in this act shall be signed by none but legal voters of the city. Each petition shall contain, in addition to the names of the petitioners, the street and house number in which the petitioner resides, his age and length of residence in the city. It shall also be accompanied by the affidavit of one or more legal voters of the city stating that the signers thereof were, at the time of signing, legal voters of said city and the number of signers at the time the affidavit was made. [32 G. A., ch. 48, § 22.]

TITLE VI.

OF ELECTIONS AND OFFICERS.

CHAPTER 1.

OF THE ELECTION OF OFFICERS AND THEIR TERMS.

SECTION 1057. Repeal. That sections one thousand and fifty-seven, one thousand and sixty-four, one thousand and sixty-five, one thousand and sixty-six, one thousand and seventy and one thousand and seventy-one, be and the same are hereby repealed and the following enacted in lieu thereof: [31 G. A., ch. 36, § 1.]

SEC. 1057-a. General election. The general election for state, district, county and township officers shall be held throughout the state on Tuesday, next after the first Monday in November in the year 1906 and each two years thereafter. [31 G. A., ch. 36, § 2.]

SEC. 1060. Term of office. The term of office of all officers chosen at a general election for a full term shall commence on the first Monday of January next thereafter, except when otherwise provided by the constitution or by statute; that of an officer chosen to fill a vacancy shall commence as soon as he has qualified therefor. [16 G. A., ch. 72; C., '73, § 576; R., § 462.] [31 G. A., ch. 37, § 1.]

See Const., art. IV, § 15.

SEC. 1064. Repeal—elections in odd-numbered years. [31 G. A., ch. 36, § 1.]

SEC. 1065. State officers. The governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, attorney general, and superintendent of public instruction shall be chosen at the general election in each even-numbered year and their terms of office shall be for two years. [31 G. A., ch. 36, § 3.]

As to secretary, auditor and treasurer, see Const., art IV, § 22. As to attorney-general, see Const., art V, § 12.

SEC. 1066. Judges of the supreme court. Two judges of the supreme court shall be chosen at the general election in the year 1906 and two shall be chosen at each general election thereafter, whose terms of office shall continue for six years and the judge whose term of office will soonest expire shall be chief justice and when it occurs that two judges shall be equally entitled, they shall each hold the place of chief justice for one year, and the one who is senior in age shall hold for the first of the two years to which they are each equally entitled; and at the session of the supreme court next preceding the commencement of the first of the said two years, the supreme court shall cause a record to be made as to who shall be the chief justice for the year next ensuing. [31 G. A., ch. 36, § 4.]

SEC. 1068. Repeal—railroad commissioners—election and term. Section one thousand sixty-eight (1068) of the code is hereby repealed, and the following enacted in lieu thereof:

“At the general election in the year 1906, and every four years thereafter, there shall be elected two railroad commissioners, whose term of office shall be for a period of four years; and at the general election in the year 1908, and every four years thereafter, there shall be elected one railroad commissioner, whose term of office shall be for a period of four years; and the present incumbents of the office of railroad commissioner shall continue in office until their successors are elected and qualified, as in this act provided.” [31 G. A., ch. 38.]

SEC. 1070. Representatives. Members of the house of representatives shall be elected in the respective representative districts in each even numbered year, and hold office for the term of two years. [31 G. A., ch. 36, § 5.]

See Const., art. III, § 3.

SEC. 1071. Senators. Senators in the general assembly, to succeed those whose terms are about to expire shall be elected in the respective senatorial districts in each even numbered year, and shall hold office for the term of four years. [31 G. A., ch. 36, § 6.]

See Const., art. III, § 5.

SEC. 1072. Repeal—county officers. That section one thousand and seventy-two of the code be and the same is hereby repealed, and the following enacted in lieu thereof:

“There shall be elected in each county, at the general election in 1906, and in each even numbered year thereafter an auditor, a treasurer, a clerk of the district court, a sheriff, a recorder of deeds, a county attorney, a county superintendent of schools, a surveyor, and a coroner, who shall hold office for the term of two years or until their successors are elected and qualified.” [31 G. A., ch. 39.]

[Women are by § 2748 made eligible to school offices, and by § 493 to the office of county recorder.]

SEC. 1074. Repeal—township trustees—election—term. That section ten hundred and seventy-four (1074) of the code be and the same is hereby repealed and the following enacted in lieu thereof:

“At the general election in the year 1906 there shall be elected in each township a successor to those trustees whose term of office will expire January 1st, 1907; and at the general election in the year 1908, and biennially thereafter, there shall be elected in each township three trustees, whose term of office shall be for a period of two years, and until their successors are elected and qualified, and those trustees whose term of office does not expire until the first day of January, 1908, shall continue in office until their successors are elected and qualified.” [31 G. A., ch. 37, § 2.]

SEC. 1074-a. At any time when a new township has been created in a year in which no general election is held by law, the county board of supervisors of the county affected, shall call a special election for the election of three trustees and other township officers of the new township, which officers shall continue in office until their successors are elected and qualified. [32 G. A., ch. 49.]

SEC. 1075. Township clerk, assessor. At the general election in each even-numbered year, there shall be elected in each civil township one township clerk, and, where not otherwise provided, one assessor, to be elected by the voters of such district, who shall hold their offices for the term of two years. [18 G. A., ch. 161, § 1; C., '73, § 591.] [29 G. A., ch. 53, § 1.]

CHAPTER 2.

OF THE REGISTRATION OF VOTERS.

SECTION 1076. Board of registers. In cities having a population of thirty-five hundred or more, not including the inmates of any state institution, the council, on or before the sixth Monday preceding each general election, and on or before the third Monday prior to any city election to be held during the year 1906, shall appoint one suitable person from each of the two political parties which cast the greatest number of votes at the last general election, from three names presented by each chairman of the city central political committee of such parties, to be registers in each election precinct in the city for the registration of voters therein, who shall be electors of the precinct in which they are to serve, of good clerical ability, speaking the English language understandingly, temperate, of good habits and reputation, who shall qualify by taking an oath or affirmation to the effect that they will well and truly discharge all of the duties required of them by law. They shall hold their office for two year[s], but registers appointed for city elections during the year 1906 shall hold such office only until such election is completed, and receive compensation at the rate of two dollars and fifty cents for each calendar day engaged in the discharge of their duties, to be paid by the county, except in case of city elections, when they shall be paid by the city. If for any cause such registers, or any of them, shall not be appointed at or before the time above mentioned, or, if appointed, shall be unable for any cause to discharge the duties of such office, the mayor of such city shall forthwith, on similar recommendation, make such appointments and fill all vacancies. Should the mayor, upon the request of five freehold electors, fail for a period of three days to perform the duties aforesaid, he shall forfeit and pay, at the action of any such elector, the sum of one hundred dollars per day, for the equal benefit of the city and plaintiff. The provisions of this title shall apply to cities acting under special charters, with like effect as though said cities were acting under the general incorporation laws of the state. [26 G. A., ch. 62; 22 G. A., ch. 48, §§ 5, 12; 21 G. A., ch. 167, § 3.] [31 G. A., ch. 40, § 1.] [31 G. A., ch. 41.]

SEC. 1076-a. Special charter cities. This act shall apply to cities under special charters with same effect as to cities under the general laws. [31 G. A., ch. 40, § 2.]

SEC. 1077. Registration. The registers shall meet on the second Thursday prior to any general, city, or special election, at the usual voting place in the precinct in which they have been appointed, and shall hold continuous sessions for two consecutive days, from eight o'clock in the forenoon until nine o'clock in the afternoon, and, in presidential years, such sessions shall be held for three days. Any person claiming to be a voter, or that he will be on election day, may appear before them in the election precinct where he claims he is or will be entitled to vote, and make and subscribe, under oath, a statement in a registry book, to be provided by the clerk and furnished the registers, at the equal expense of the city and county, and kept open for public inspection and examination during the time fixed for the registration, which statement shall be in the following form and contain the following matter :

ical parties or organizations and party county committeemen shall be elected at said primary election, at the times and in the manner hereinafter provided. The provisions of chapters three (3) and four (4), title six (6), and chapter eight (8), title twenty-four (24), of the code, shall apply so far as applicable to all such primary elections, the same as general elections, except as hereinafter provided. The vote upon candidates for the office of senator in the congress of the United States shall be for the sole purpose of ascertaining the sentiment of the voters in the respective parties. [32 G. A., ch. 51, § 1.]

SEC. 1087-a2. Primary election defined. The term "primary election" as used in this act shall be construed to apply to an election by the members of various political parties for the purpose of placing in nomination candidates for public office, for selecting delegates to conventions, and for the selection of party committeemen. [32 G. A., ch. 51, § 2.]

SEC. 1087-a3. Political party defined. The title "political party" shall mean a party which, at the last preceding general election, cast for its candidate for governor at least two per centum of the total vote cast at said election, provided that such other political organizations as may, under sections 1098 and 1099 of the code nominate and certify candidates and have their names placed upon the ballot for the November election, shall have the right so to do in the manner and under the conditions therein prescribed. [32 G. A., ch. 51, § 3.]

SEC. 1087-a4. When held. The primary election herein provided for shall consist of an election by all political parties and shall be held at the usual voting places of the several precincts on the first Tuesday after the first Monday in June, in the year nineteen hundred eight, and biennially thereafter, for the nomination of candidates for such offices as are to be filled at the general election in November next ensuing, (except candidates for the office of judge of the supreme, district and superior courts), for senator in the congress of the United States in the next year preceding the filling of that office by the general assembly, and for the electors of the president and vice-president of the United States, in the year in which a president and vice-president are to be elected. [32 G. A., ch. 51, § 4.]

SEC. 1087-a5. Judges and clerks—how selected—oath—expenses. The judges and clerks of all primary elections under this act shall be made up and selected and appointed in the same manner as for the general election held in November, and they shall take the same oath and the judges are hereby authorized to administer oaths as hereinafter provided. Vacancies shall be filled as provided for the judges and clerks of the general election, and their compensation shall be the same. The expenses of said primary election shall be paid one-half by the county in which the said primary election is held, and one-half by the state. The board of supervisors of each county shall audit the entire expense and certify the same to the executive council, which shall thereupon order a warrant for one-half the amount to be delivered to the county, which shall thereupon pay the entire amount. [32 G. A., ch. 51, § 5.]

SEC. 1087-a6. Australian ballot—polls open—ballots. The Australian ballot system as now used in this state, except as hereinafter provided, shall be used at said primary election in all precincts. The voter shall in all cases mark the ballot in the square before the name of each person for whom he desires to vote. In cities where registration is required by law, the polls shall be open from 7:00 a. m. to 8:00 p. m., and in all other precincts from 1:00 p. m. to 8:00 p. m. The elector voting at said primary election shall be allowed to vote for candidates for nomination on the

ticket of only one political party, and that shall be the party with which he is registered as affiliated. The endorsement of the judges of election and the fac-simile of the auditor's signature shall appear upon the ballots as provided by law for the ballots used for the November election. The voter shall return the ballot folded to one of the judges of election who shall deposit it in the ballot box. If any primary elector write upon his ticket the name of any person who is a candidate for the same office upon some other party ticket than that upon which his name shall be so written, such ballot shall be so counted for such person only as a candidate of the party upon whose ballot his name is written, and shall in no case be counted for such person as a candidate upon any other ticket. In case the person is nominated upon more than one ticket, he shall forthwith file with the proper officer a written declaration indicating the party designation under which his name is to be printed on the official ballot for the general election following such primary election. [32 G. A., ch. 51, § 6.]

SEC. 1087-a7. First declaration of party affiliation—record. At the primary election to be held in June in the year nineteen hundred eight any person shall be entitled to participate therein who is a qualified elector in such precinct at the time of said primary election, and when the voter seeks to pass the guard-rail he shall indicate the party ballot he desires and one of the judges of the primary election board shall give him such primary ballot, (unless challenged, and if so challenged, then only in the event that the challenge is determined in favor of the voter), and such person shall thereupon be allowed to vote. The voter's selection shall constitute his declaration of party affiliation, and it shall be the duty of the primary election board to record his name and check his declaration of party affiliation on the poll books used by the clerks of the primary election board, and said list properly certified to by said primary election board shall be returned to the county auditor for preservation. Copies of the names and party entries on such list together with the changes of party affiliation as hereinafter provided, arranged alphabetically by surnames, shall be used at subsequent primaries for determining with what party the voter has been enrolled, and no voter enrolled under the provisions of this act shall be allowed to receive the ballot of any political party except that with which he is enrolled, but he may change his enrollment as hereinafter provided. The county auditor shall prepare for each voting precinct two of the above mentioned lists duly certified by him, and taken from the poll books of the last preceding primary election, which he shall deliver to the succeeding primary election boards in the year nineteen hundred ten and biennially thereafter, at least one day prior to the day of the primary election, and which lists together with the poll books of the primary election shall be returned to the said auditor in good condition within twenty-four hours after the primary election, to be preserved by him. [32 G. A., ch. 51, § 7.]

SEC. 1087-a8. Change of affiliation—first voter—removal. Any person who has thus declared his party affiliation shall thereafter be listed on the poll books as a member of that political party, and such person while a resident of the same voting precinct need not declare his party affiliation at succeeding primary elections unless he desires to change his party affiliation. Any elector, who, having declared his party affiliation, desires to change the same, may, not less than ten days prior to the date of any primary election, file a written declaration with the county auditor stating his change of party affiliation, and the auditor shall enter a record of such change on the poll books of the last preceding primary election in the proper column opposite the voter's name and on the voting list. Any elector whose party affiliation has for any reason not been registered or any elector

who has changed his residence to another precinct, or a first voter or citizen of this state casting his first vote in this state shall be entitled to vote at any subsequent primary election in the same manner and upon the same terms as provided in section seven (7) of this act, and the clerks of the primary election shall record his party affiliation and the county auditor shall add his name to the alphabetical lists for use in subsequent primary elections as provided for in section seven (7) of this act. [32 G. A., ch. 51, § 8.]

SEC. 1087-a9. Challengers—affidavit. Each political party shall be entitled to have two party challengers present at each polling place, to be appointed by the respective party committeemen. Any judge or clerk of the primary election or any party challenger may challenge any voter upon the grounds mentioned in section eleven hundred fifteen (1115) of the code and such challenge shall be determined as there provided. Any elector whose party affiliation has been recorded as provided by this act and who desires to change his party affiliation on the primary election day, shall be subject to challenge. If the person challenged insists that he is entitled to vote the ticket of the political party to which he has transferred his political affiliation and the challenge is not withdrawn, one of the judges shall tender to him the following oath: "You do solemnly swear (or affirm) that you have in good faith changed your party affiliation to and desire to be a member of the party." And if he take such oath he shall thereupon be given a ticket of such political party and the clerks of the primary election shall change his enrollment of party affiliation accordingly. [32 G. A., ch. 51, § 9.]

SEC. 1087-a10. Nomination papers — candidates — affidavit. No candidate for an elective county office shall have his name printed upon the official primary ballot of his party unless at least thirty days prior to the day fixed for holding the primary election a nomination paper shall have been filed in his behalf in the office of the county auditor; and no candidate for nomination for an elective state office, or for representative in the congress of the United States, or member of the general assembly, shall have his name printed upon the official primary ballot of his party unless at least forty days prior to such primary election a nomination paper shall have been filed in his behalf in the office of the secretary of state; and no member of a political party desiring or intending to be a candidate for the office of senator in the congress of the United States, or a candidate for the office of elector of the president and vice-president of the United States, shall have his name printed upon the official primary ballot of his party in any election precinct unless at least forty days prior to such primary election a nomination paper shall have been filed in his behalf in the office of the secretary of state. A candidate for an office to be filled by the voters of any sub-division of a county shall not be required to file any nomination paper or papers. All nomination papers shall be in substantially the following form:

"I, the undersigned, a qualified elector of county, and state of Iowa, and a member of the party, hereby nominate of county, state of Iowa, who has affiliated with and is a member of the party, as a candidate for the office of to be voted for at the primary election to be held in June, 19. . .", and shall consist of sheets of uniform size about 8½ by 13 inches. No signatures shall be counted unless they are on sheets each having such form written or printed at the top thereof. Each signer of a nomination paper shall sign but one such nomination paper for the same office, except where more than one officer is to be elected to the same office, in which case he may sign as many

nomination papers as there are officers to be elected, and only one candidate shall be petitioned for or nominated in the same nomination paper. Each signer of a nomination paper shall add his residence with street and number, if any, and the date of signing. For all nominations, all signers of each separate part of a nomination paper shall reside in the same county. When more than one sheet is used for any nomination paper, the sheets shall be laid one upon the other and neatly, evenly, and securely fastened together before filing, and shall be considered as one nomination paper only. A nomination paper, when filed, shall not be withdrawn nor added to, nor any signature thereon revoked. The affidavit of a qualified elector shall be appended to each such nomination paper, or papers, if more than one for any candidate, stating that he is personally acquainted with all the persons who have signed the same; that he knows them to be electors of that county and believes them to be affiliated with the party named therein; that he knows that they signed the same with full knowledge of the contents thereof; that their respective residences are truly stated therein; and that each signer signed the same on the date stated opposite his name, but such affidavit shall not be made by the candidate. Each and every candidate shall make and file his affidavit stating that he is eligible to the office for the township, county, district or state in which he is and will be a *bona fide* candidate for nomination for said office, and shall file such affidavit with the said nomination paper or papers, when such paper or papers are required. If no such paper or papers are required, then he shall file such affidavit alone, with the county auditor, at least thirty days prior to such primary election, and the filing of such affidavit shall entitle such candidate to have his name printed on the official primary ballot of his party. Such affidavit shall be in form and substance as follows:

"I,.....being duly sworn, say that I reside at.....street, (city or town) of.....county of.....in the state of Iowa; that I am eligible to the office for which I am a candidate, and that the political party with which I affiliate is the.....party; that I am a.....and a candidate for nomination to the office of.....to be made at the primary election to be held in June, 19... , and hereby request that my name be printed upon the official primary ballot as provided by law, as a candidate of the.....party. I furthermore declare that if I am nominated and elected I will qualify as such officer.

(Signed)

Subscribed and sworn to (or affirmed) before me.....by.....on this.....day of....., 19...

.....
The nomination papers above required shall be signed as follows:

(1). If for a state office, United States senator, or elector at large, by at least one per centum of the voters of the party (as shown by the returns of the last general election) of such candidates, in each of at least ten counties of the state, and in the aggregate not less than one-half of one per centum of the total vote of his party in the state, as shown by the last general election.

(2). If for a representative in congress, district elector, or senator in the general assembly in districts composed of more than one county, by at least two per centum of the voters of his party, as shown by the last general election, in at least one-half of the counties of the district, and in the aggregate not less than one per centum of the total vote of his party in such district, as shown by the last general election.

(3). If for an office to be filled by the voters of the county, by at least two per centum of the party vote in the county, as shown by the last general election.

In each of the above cases, the vote to be taken for the purpose of computing the percentage shall be the vote cast for the head of the ticket. [32 G. A., ch. 51, § 10.]

SEC. 1087-a11. Blank nomination papers. The secretary of state shall cause to be printed and keep on hand a sufficient quantity of nomination paper blanks in form as provided for in this act and shall furnish the same on application to any qualified elector in the state desiring to petition for the nomination of any candidate, or to a person who intends to be a candidate, for any office whose nomination paper is required to be filed in his office; and the county auditor of each county shall likewise cause to be printed and keep on hand a sufficient quantity of such nomination paper blanks and furnish the same on application to any qualified elector in his county desiring to petition for the nomination of any candidate, or to a person who intends to be a candidate, for any office whose nomination paper is required to be filed in his office. [32 G. A., ch. 51, § 11.]

SEC. 1087-a12. Nominations certified to county auditor—notice published. At least thirty days before any such primary election, the secretary of state shall transmit to each county auditor a certified list containing the name and postoffice address of each person for whom a nomination paper has been filed in his office, in accordance with the provisions of section ten of this act and entitled to be voted for at such primary election by the voters of such county, together with a designation of the office for which he is a candidate, and the party from which he seeks a nomination. Such auditor shall forthwith upon receipt thereof, publish, under the proper party designation, the title of each office to be filled, the names and addresses of all persons for whom proper nomination papers have been duly filed, both in his own office and in the office of the secretary of state, giving the name and address of each, the date of the primary, the hours during which the polls will be open, and that the primary will be held in the regular polling place in each precinct. It shall be the duty of the said auditor to publish said notice once each week for two consecutive weeks prior to the said primary election. He shall also forthwith mail four copies of such notice to each city, town, and township clerk of the county, who shall immediately post three of said copies in three public places in each precinct of his township, town or city, designating therein the location of the polling booth in each election precinct. Every publication required in this act shall be made in at least two and not to exceed four newspapers of general circulation in such county. One of such newspapers shall represent the political party which cast the largest vote in such county at the last preceding general election, and one of such newspapers shall represent the political party which cast the next largest vote in such county at said general election. In any case where the publication of a notice cannot be made as hereinbefore required, it may be made in any newspaper having a general circulation in the county in which the notice is required to be published. [32 G. A., ch. 51, § 12.]

SEC. 1087-a13. Printing. The names of the candidates of each political party for nomination for the several offices and blank spaces for delegates to the county convention and for party committeemen shall be printed in black ink on separate sheets of paper uniform in color, quality, texture and size, with the name of the political party printed at the head of said ballots, which ballots shall be prepared by the county auditor in the same manner as for a general election. The names of candidates on all primary election ballots shall be arranged alphabetically according to surnames for each office. [32 G. A., ch. 51, § 13.]

SEC. 1087-a14. Ballot—form. The official primary election ballot shall be prepared, arranged and printed substantially in the following form:

.....PRIMARY ELECTION BALLOT

(Name of Party)

of

.....Township or Precinct,.....Ward, City or Town
of.....County of....., State of Iowa.

Primary election held on the.....day of June, 19...

FOR UNITED STATES SENATOR.

(Vote for one.)

- William K. Brown
- J. R. Wayne
-

FOR GOVERNOR.

(Vote for one.)

- Howard Collins
- William Longley
-

(Followed by other elective state and district officers in order.)

FOR COUNTY AUDITOR.

(Vote for one.)

- William Strong
- Robert Thompson
-

(Followed by other elective county officers in order.)

FOR DELEGATES TO COUNTY CONVENTION.

(Vote for.....)

-
-
-
-
-

FOR TOWNSHIP CLERK.

(Vote for one.)

- John H. Black
- Joseph Raymond
-

FOR TOWNSHIP TRUSTEES.

(Vote for two.)

- Clarence Foster
- William Jones
- H. S. Wilson
-

(Followed by other elective township officers in order.)

FOR PARTY COMMITTEEMAN.

(Vote for one.)

.....

[32 G. A., ch. 51, § 14.]

SEC. 1087-a15. Sample ballots. The county auditor of each county shall, at least fifteen days preceding the primary election, cause to be printed sample ballots of each political party and the words "SAMPLE BALLOT" shall be printed near the top of each of such ballots in large capital letters, and immediately thereafter shall mail one of such sample ballots to each candidate who is entitled to have his name printed on the official primary ballot of any party in any precinct in his county to the postoffice address of such candidate as given in his nomination paper, or affidavit, as the case may be, filed in the auditor's office, or as certified to him by the secretary of state, and one to the chairman of the county central committee, if any, of each political party in his county to his usual postoffice address as known to the auditor, or as ascertained by him; and such auditor shall correct any errors and omissions brought to his knowledge prior to the printing of the official ballots. [32 G. A., ch. 51, § 15.]

SEC. 1087-a16. Supplies—poll books. All necessary election supplies, including poll books as provided by law, for the general election, together with a sufficient number of official primary ballots of each party, shall be furnished for the primary election board for each precinct by the county auditor, and such poll books shall contain blank spaces for the names of the candidates of the several parties for the different offices to be written in, and blank spaces for entering by the clerks the names of the electors voting at said primary election; and upon the pages provided for entering the names of said voters there shall be ruled spaces for the listing of the names of said voters and for the designation of the party ticket voted by said elector in manner and form substantially as follows:

No.	Name	Rep- lican	Dem- ocrat	Prohibi- tionist	Socialist
1	James Smith.....	X			
2	Tom Jones.....		X		
3	Dan Brown.....			X	
4	George White.....				X

It shall be the duty of the clerks of the primary election when entering the name of a voter to place in the poll books a cross thus (X) in the column designating the party ticket which was given to said voter upon his application for a ticket. [32 G. A., ch. 51, § 16.]

SEC. 1087-a17. Ballots counted—returns. Upon the closing of the polls the clerks and judges shall immediately open the ballot box and proceed to take therefrom the ballots. Said officers shall count the number of ballots cast for each party, at the same time bunching the tickets cast for each party, in separate piles. As soon as the clerks and judges shall have sorted the ballots of each party, separately, they shall take the tally sheets provided in the poll books and shall count all the ballots for each party separately until the count is completed, and shall certify to the number of votes cast for each candidate for each office upon the ticket of each party. After all have been counted and certified to by the clerks and judges, they shall seal the ballots cast by each of the parties in separate envelopes, on

the outside of which shall be printed or written the names of that party's candidates for the different offices, and opposite each candidate's name shall be placed the number of votes cast for such candidate in said precinct, and then seal the envelopes containing the votes of the different political parties, in one large envelope, on the outside of which, or on a paper attached thereto, shall be printed or written, in perpendicular columns, the names of the several political parties with the names of the candidates for the different offices under their respective party headings, and opposite each candidate's name shall be placed the number of votes cast for such candidate in said precinct, and at the bottom the total vote cast by each political party in said precinct, and such envelopes shall be returned to the county auditor, who shall carefully preserve the same in said condition and deliver them to the county board of canvassers. But any elector of the county shall have the right, before the day fixed for canvassing the returns, to ascertain the vote cast for any candidate in any precinct in the county, as shown on the outside of the large envelope. Said judges of election shall deliver the returns so made, together with the poll books, including tally sheets and certificates of the judges and clerks written thereon, to the county auditor within twenty-four hours after the primary election has closed; and if the returns from any precinct be not so delivered within the said time, the county auditor shall forthwith send a messenger for any such missing returns, and said messenger shall be paid, as provided by law, for the general election. [32 G. A., ch. 51, § 17.]

SEC. 1087-a18. Recount of ballots. Any candidate, whose name appears upon the official primary ballot of any voting precinct, may require the board of supervisors of the county in which such precinct is situated to recount the ballots cast in any such precinct, at the time fixed for canvassing the returns of the judges of election, by filing with the county auditor not later than the day before such meeting, a showing, duly sworn to by any such candidate, that fraud was committed, or error or mistake was made, in counting or returning the votes cast in any such precinct. The showing must be specific and from it there must appear reasonable ground to believe that a recount of the ballots would produce a result different from the returns made by the judges. If such showing is made to the satisfaction of the board, thereupon the board shall recount the ballots cast in any such precinct, as to all candidates, including persons voted for for delegates and party committeemen, and make up a new return which in all subsequent proceedings shall be substituted for the returns of the judges of election for the precinct. The action of the board shall be final and no other contest of any kind shall be permitted. If a recount of the ballots of any precinct produces a result different from the returns of the judges with respect to delegates or party committeeman, the county auditor shall make or correct his certified list thereof to the chairmen of the respective party central committees for the county accordingly. The term "candidate" as used in this section shall include and apply to persons voted for for delegates and party committeeman. [32 G. A., ch. 51, § 18.]

SEC. 1087-a19. Canvass by board of supervisors—certificates. On Tuesday next following the primary election in June, the board of supervisors shall meet, open, and canvass the returns from each voting precinct in the county, and make abstracts thereof, stating in words written at length the number of ballots cast in the county by each political party, separately, for each office, the name of each person voted for and the number of votes given to each person for each different office and shall sign and certify thereto and file the same with the county auditor. Such canvass and certificate shall be final as to all candidates for nomination to any

elective county office or office of a subdivision of a county; and the candidate or candidates of each political party for each office to be filled by the voters of any subdivision of a county having received the highest number of votes shall be duly and legally nominated as the candidate of his party for such office; and the candidate or candidates of each political party for each office to be filled by the voters of a county having received the highest number of votes, and not less than thirty-five per centum of all the votes cast by the party for such office, shall be duly and legally nominated as the candidate of his party for such office; and each candidate so nominated shall be entitled to have his name printed on the official ballot to be voted for at the general election without other certificate, and the board shall prepare and certify a list of the candidates of each party so nominated, separately, and deliver to the chairman of each party central committee for the county a copy of the list of candidates nominated by the party he represents; and shall also prepare, certify and deliver to such chairman a list of the offices to be filled by the voters of a county for which no candidate of his party was nominated, together with the names of the candidates for each of such offices voted for at the primary election and the number of votes received by each of such candidates. [32 G. A., ch. 51, § 19.]

SEC. 1087-a20. Abstracts forwarded to secretary of state. The county board of canvassers shall also make a separate abstract of the canvass as to the following offices and certify to the same and forthwith forward it to the secretary of state, viz.:

United States senator,

Electors of the president and vice-president of the United States,

All state offices,

Representative in congress,

Senators and representatives in the general assembly. [32 G. A., ch. 51, § 20.]

SEC. 1087-a21. County returns filed. When the canvass is concluded, the board shall deliver the original returns to the auditor, who shall file the same and record each of the abstracts above mentioned in the election book. [32 G. A., ch. 51, § 21.]

SEC. 1087-a22. Canvass by state board—certificates. On the second Monday after the June primary election, the executive council shall meet as a canvassing board, and open and canvass the abstract returns received from each county in the state. If returns are not received from all the counties, the secretary of state shall immediately send a messenger after the abstract returns and the board may adjourn from day to day until they are received. The board shall make an abstract of its canvass, stating in words written at length, the number of ballots cast by each political party, separately, for each office designated in section twenty hereof, the names of all the persons voted for, and the number of votes received by each person for each office, and shall sign and certify thereto. Such canvass and certificates shall be final as to all candidates named therein; and the candidate of each political party for each office to be filled by vote of the people, having received the highest number of votes in the state or district of the state, as the case may be, provided he received not less than thirty-five per centum of all the votes cast by the party for such office, shall be duly and legally nominated as the candidate of his party for such office and entitled to have his name printed on the official ballot to be voted at the general election without other certificate; and the board shall prepare and certify a list of the candidates of each party so nominated, separately, and deliver to the chairman of each party central committee for the state a copy of the list of candidates nominated by the party he represents; and shall also

forthwith prepare a certificate as to each office, separately, for which no candidate was nominated, together with the names of the several candidates for each of such offices voted for at the primary election and the number of votes received by each of such candidates and send such certificate to the chairman of the party central committee for the state, in case of offices to be filled by the voters of the entire state, and to the chairman of the party central committee for a district of the state, if known, in case of offices to be filled by the voters of any such district of the state composed of more than one county, and to the county auditor of each county in any such district, and to the county auditor and the chairman of the party central committee for the county, in case any such district is composed of one county. [32 G. A., ch. 51, § 22.]

SEC. 1087-a23. State returns filed—nominations certified to county auditor. When the canvass is concluded, the board shall deliver the original abstract returns to the secretary of state, who shall file the same in his office and record the abstracts of the canvass of the state board and certificates attached thereto in the book kept by him known as the election book; and not less than fifteen days before the general election he shall certify to the auditor of each county, under separate party headings, the name of each person nominated as shown by the official canvass made by the executive council, or as certified to him by the proper persons when any person has been nominated by a convention, his place of residence, the office to which he is nominated, and the order in which the tickets of the several political parties shall appear on the official ballot. Should a vacancy in the nominations occur and be filled after such certificate has been forwarded, a like certificate shall at once be made and sent to the proper officer together with a statement showing the reason for its subsequent issue. [32 G. A., ch. 51, § 23.]

SEC. 1087-a24. Tie vote—vacancies. In case of a tie vote resulting in no nomination for any office, or election of delegates or party committeeman, the tie shall forthwith be determined by lot by the board of canvassers, or judges of election, as the case may be. Vacancies occurring after the holding of any primary election occasioned by death, withdrawal or change of residence of any candidate, or from any other cause, shall be filled by the party committee for the county, district, or state, as the case may be, representing the party in which the vacancy nomination occurs. [32 G. A., ch. 51, § 24.]

SEC. 1087-a25. County convention—delegates—committeemen. In each county there shall be held in each year in which a general election in November is to take place a county convention of each political party. Said county convention shall be composed of delegates elected at the last preceding primary election, and shall be held on the third Saturday following the primary election, convening at 11:00 o'clock a. m. The number of delegates from each voting precinct shall be determined by a ratio adopted by the respective party county central committees, and shall be thus determined and a statement designating the number from each voting precinct in the county filed in the office of the county auditor at least thirty days before the primary election; if not so done, the auditor shall fix the number. The requisite number of names of candidates of his choice for delegates to the county convention to which each precinct is entitled shall be written, or pasted with uniform white pasters, on the blank lines upon the ballot by the voter while in the booth, or by some one designated by a voter unable to write, after the ballots are received and before they are deposited, and the requisite number of persons from each precinct who receive the highest number of votes shall be the delegates from the precinct to the

county convention. One member of the county central committee for each political party from each precinct shall be elected in the same manner in which delegates are selected. His term of office shall begin on the day of the county convention and immediately following the adjournment thereof and shall continue for two years and until his successor is elected and qualified, unless such committeeman shall be removed by the county central committee for inattention to the duties of his position, incompetency or failure to support the ticket nominated by the party which elected him to such position. Returns shall be made by the judges of election respecting delegates and members of the county central committee in the same manner as for other offices, except that the judges of election shall canvass the returns as to delegates and members of the county central committee, and certify the result to the auditor with the returns. The auditor shall, immediately after such returns are filed, notify the delegates and members of the county central committee who have thus been elected, of their election, and of the time and place of holding the county convention, and shall on the second Thursday following the primary election, deliver a certified list thereof to the chairmen of the respective party central committees for the county. When the delegates, or a majority thereof, thus elected shall have assembled in the county convention at the time herein prescribed and at the county seat the convention shall be called to order by the chairman of the county central committee, who shall present the certified list of delegates and members of the county central committee, and a list of the offices for which no nomination was made at the primary election. If any precinct shall not be fully represented the delegates present from such precinct shall cast the full vote thereof, but there shall be no proxies. The said county convention shall make nominations of candidates for the party for any office to be filled by the voters of a county when no candidate for such office has been nominated at the preceding primary election, as shown by the canvass of the returns provided for in section 19 of this act, and shall nominate candidates for the office of judge of the district court in counties comprising one judicial district of the state, and shall select delegates to the next ensuing state and district conventions of that year upon such ratio of representation as may be determined by the party organization for the state, district or districts of the state, as the case may be, but no delegates shall be so selected to any of the district conventions referred to in section 26 of this act, except judicial conventions, unless a call therefor has been issued as therein provided. The said county convention shall also elect a member of the party central committee for the senatorial, judicial, and congressional districts composed of more than one county. [32 G. A., ch. 51, § 25.]

SEC. 1087-a26. District convention. In any senatorial, judicial, or congressional district composed of more than one county, in any year in which a senator in the general assembly, a judge of the district court, or a representative in the congress of the United States, is to be elected, a senatorial or congressional convention may be held, and a judicial convention shall be held by each political party participating in the primary election of that year. Not less than ten days and not more than sixty days before the day fixed for holding the county convention a call for such senatorial, judicial and congressional convention to be held shall be issued by the party central committee for any such district and published in at least one newspaper of general circulation of each county composing any such district and which call shall state among other things the number of delegates each county of the district shall be entitled to and the time and place of holding the convention. Any such call shall be signed by the chairman of the party central

committee for any such district, and be filed by him with the county auditor not less than five days before the county convention and the county auditor shall attach a true copy thereof to the certified list of delegates required to be delivered by him to the chairmen of the respective party county central committees. In case no nomination was made in the primary election for the office of senator in the general assembly in any district composed of more than one county, or for the office of representative in congress of the United States, as shown by the certificate issued by the state board of canvassers provided for in this act, then in any such district the chairman of the party central committee therefor shall forthwith issue such call for a convention in such district and deliver the same to the county auditor of each county in the district and in such case said call need not be published. No such district convention shall be held earlier than the first Thursday or later than the fifth Thursday following the county convention. The convention when organized shall make nominations of candidates for the party for any such district office when no candidate for such office has been nominated at the preceding primary election as shown by the canvass of the votes provided for in section twenty-two hereof. The organization of and procedure in any such district convention shall be the same as in the state convention. Such district conventions may adopt party platforms and transact such other business as may properly be brought before them. [32 G. A., ch. 51, § 26.]

SEC. 1087-a27. State convention—state central committee. A state convention of each political party, composed of delegates chosen in the manner herein provided, shall be held not earlier than the third Thursday and not later than the fifth Thursday following the primary election in the year nineteen hundred eight, and biennially thereafter, convening at such time and place as may be determined upon by the party organization. The convention shall be called to order by the chairman of the state central committee, who shall thereupon present a list of delegates, as certified by the various county conventions, and effect a temporary organization. If any county shall not be fully represented, the delegates present from such county shall cast the full vote thereof, but there shall be no proxies. Such convention when permanently organized shall formulate and adopt the state platform of the party it represents, and shall make nominations of candidates for the party for any state office to be filled by the voters of the entire state when no candidate for such office has been nominated at the preceding primary election as shown by the canvass of the returns provided for in section twenty-two hereof; and shall nominate candidates for the office of judge of the supreme court. It shall also elect a state central committee consisting of not less than one member from each congressional district and transact such other business as may properly be brought before it. The state central committee elected at said state convention may organize at pleasure for political work as is usual and customary with such committees and shall continue to act until succeeded by another committee duly elected. [32 G. A., ch. 51, § 27.]

SEC. 1087-a28. Existing party committees. The regularly organized political committees of each party as at present or hereafter constituted may continue to act until supplanted by the committees elected under the provisions of this act. [32 G. A., ch. 51, § 28.]

SEC. 1087-a29. Nomination by petition. Nothing contained in this act shall be construed so as to prohibit nomination of candidates for office by petition as now authorized by law; but no person so nominated shall be permitted to use the name of any political party authorized or entitled under this act to nominate a ticket by primary vote or that has nominated

a ticket by primary vote under the provisions of this act. [32 G. A., ch. 51, § 29.]

SEC. 1087-a30. Special elections. This act shall not apply to special elections to fill vacancies. [32 G. A., ch. 51, § 30.]

SEC. 1087-a31. Misconduct of election officials—penalty. Any party committeeman or any primary election or other public officer upon whom a duty is imposed by this act or by acts herein made applicable to primary elections, who shall wilfully neglect to perform any such duty, or who shall wilfully perform it in such a way as to hinder the objects thereof, or shall disclose to anyone, except as may be ordered by any court of justice, the contents of any ballot or any part thereof, as to the manner in which the same may have been voted, shall be punished by a fine of not less than one hundred dollars nor more than one thousand dollars, or by imprisonment in the penitentiary not to exceed five years, or by both such fine and imprisonment. [32 G. A., ch. 51, § 31.]

SEC. 1087-a32. Services for hire—penalty. Any person who shall agree to perform any services in the interest of any candidate in consideration of any money or other valuable thing, or who shall accept any money or other valuable thing for such services performed in the interest of any candidate, or any person paying or offering to pay or giving or offering to give money or other valuable things for such services, shall be punished by a fine of not more than three hundred dollars, or by imprisonment in the county jail not exceeding ninety days. But nothing herein shall be construed to prohibit any person from making contracts in good faith for the announcement of his candidacy in the newspapers and for securing the names of voters required to file preliminary nomination papers and the payment of any reasonable compensation for such services. [32 G. A., ch. 51, § 32.]

SEC. 1087-a33. Bribery—illegal voting—penalty. Any person offering or giving a bribe, either in money or other consideration, to any elector for the purpose of influencing his vote at a primary election, or any elector entitled to vote at such primary election receiving and accepting such bribe; any person making false answer to any of the provisions of this act relative to his qualifications and party affiliations; any person wilfully voting or offering to vote at a primary election who has not been a resident of this state for six months next preceding said primary election; or who, at the primary election is not twenty-one years of age, or is not a citizen of the United States; or knowing himself not to be a qualified elector of such precinct where he offers to vote; or any person violating any of the provisions of this act, or of any provisions of the code as may be hereto applied, and any person knowingly procuring, aiding or abetting such violation, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred dollars nor more than five hundred dollars, or be imprisoned in the county jail not less than thirty days nor more than six months. [32 G. A., ch. 51, § 33.]

SEC. 1087-a34. Primary elections in certain cities. The provisions of this act shall, so far as applicable, govern the nominations of candidates by political parties for all offices to be filled by a direct vote of the people in cities of the first class and cities acting under a special charter having a population of over fifteen thousand, except all such special charter cities and cities of the first class as have by vote of the people adopted a plan of municipal government which specifically provides for a non-partisan primary election. The duties devolving upon the county auditor, by the foregoing provisions of this act, shall, in municipal elections, devolve upon the city auditor and the duties devolving upon the board of supervisors by

the foregoing provisions of this act, devolve upon the city council which shall meet to perform said duties within two days next following the primary election. The date of the municipal primary election shall be the last Monday in February of each year in which a municipal election is held in said cities, after the year 1907, and the percentage of voters signing petitions required for printing the name of a candidate upon the official primary ballot shall be the same as is required of a candidate for a county office and shall be based upon the vote cast for mayor by the respective parties in the preceding city election. The names of candidates for ward aldermen, for city precinct committeemen and for delegates to the city convention, shall not be printed upon the official primary ballot but in each case a blank line or lines shall be provided therefor. A plurality shall nominate the party candidate for alderman and a plurality shall elect the precinct committeemen and delegates to the city convention. The entire expense of conducting a primary election provided for in this section shall be audited by the city council and paid by the city. This section shall not be held to repeal any law which provides for the adoption of a plan of municipal government by vote of the people and which embraces a non-partisan primary election. [32 G. A., ch. 51, § 34.]

SEC. 1087-a35. Repeal. Chapter forty (40) of the laws of the thirtieth general assembly, relating to primary elections; and chapters forty-five (45) and forty-six (46) of the laws of the thirty-first general assembly, relating to primary elections, are hereby repealed. [32 G. A., ch. 51, § 35.]

CHAPTER 3.

OF ELECTIONS.

SECTION 1089.

The Australian ballot law as originally adopted (24 G. A., chap. 33) did not apply to special elections held for the purpose

of voting taxes in aid of railroads or bridges. *Pritchard v. Magoun*, 109-364; *Bras v. McConnell*, 114-401.

SEC. 1090. Election precincts.

The vital inquiry in determining the residence of a person is as to where is his home. This is not purely a matter of intention. A person cannot live in one place and by force of imagination constitute some other his place of abode. The intent and the fact must concur. *State v. Savre*, 129-122.

The home of an unmarried man is

where he has his rooms, in which he keeps such personal effects as he has, where he rests when not at work, and spends his evenings and Sundays, and not the boarding house at which he takes his meals. *Ibid.*

Evidence in a particular case as to the actual residence of a voter considered. *Kelso v. Wright*, 110-560.

SEC. 1093. Election boards. Election boards shall consist of three judges and two clerks. Not more than two judges and not more than one clerk shall belong to the same political party or organization, if there be one or more electors qualified and willing to act as such judge or clerk, and a member or members of opposite parties. In cities and towns, the councilmen shall be judges of election; but in case more than two councilmen belonging to the same political party or organization are residents of the same election precinct, the county board of supervisors may designate which of them shall serve as judges. In township precincts, the clerk of the township shall be a clerk of election of the precinct in which he resides, and the trustees of the township shall be judges of election, except that, in townships not divided into election precincts, if all the trustees be of the

same political party, those two only whose terms shall next expire shall be judges of such precinct. The membership of such election board shall be made up or completed by the board of supervisors from the parties which cast the largest and next largest number of votes in said precinct at the last general election, or that one which is unrepresented; but, in city and town elections, the powers given in this chapter and duties herein made incumbent upon the board of supervisors shall be performed by the council. If, at the opening of the polls in any precinct, there shall be a vacancy in the office of clerk or judge of election, the same shall be filled by the members of the board present, and from the political party which is entitled to such vacant office under the provisions of this chapter. The election board at any special election shall be the same as at the last preceding general election. In case of vacancies happening therein, the county auditor may make the appointments to fill the same when the board of supervisors is not in session. [26 G. A., ch. 68, § 3; C., '73, §§ 606-8; R., §§ 481-3; C., '51, §§ 246-8.] [31 G. A., ch. 42.]

SEC. 1096. Polls open. At all elections the polls shall be opened at eight o'clock in the forenoon, except in cities where registration is required, when the polls shall be opened at seven o'clock in the forenoon, or in each case as soon thereafter as vacancies in the places of judges or clerks of election have been filled. In all cases the polls shall be closed at seven o'clock in the evening. [24 G. A., ch. 33, § 32; C., '73, § 611; R., § 486; C., '51, § 251.] [28 G. A., ch. 34, § 1.]

SEC. 1102. Vacancies filled.

When a certificate of nomination of candidates is held by the county auditor not to have been filed with him in time, the vacancies in nominations for such office may be filled in accordance with the provisions

of this section. The holding of the auditor that the filing is not as required by law is a holding that the nominating certificate is insufficient and inoperative. *Reese v. Hogan*, 117-603.

SEC. 1106. Ballot—form—candidates for district judge—separate ballot for constitutional amendments, etc. The names of all candidates to be voted for in each election precinct shall be printed on one ballot, all nominations of any political party or group of petitioners being placed under the party name or title of such party or group, as designated by them in their certificates of nomination or petitions, or, if none be designated, then under some suitable title, and the ballot shall contain no other names, except that, in case of electors for president and vice-president of the United States, the names of the candidates for president and vice-president may be added to the party or political designation. Each list of candidates for the several parties and groups of petitioners shall be placed in a separate column on the ballot, in such order as the authorities charged with the printing of the ballots shall decide, except as otherwise provided, and be called a ticket. But the name of no candidate shall appear upon the ballot in more than one place for the same office, whether nominated by convention, primary, caucus or petition, except as hereinafter provided. Where two or more conventions, primaries or caucuses, or any two of them, may nominate the same candidate for any office, the name of such candidate shall be printed under the name of the party first filing nomination papers bearing such name, unless the candidate himself shall, in writing duly verified, request the officer with whom the nomination papers are filed to cause the name to be printed upon some other ticket, provided, that in any judicial district of the state in which the bar association, or a convention of attorneys of the district nominates or recommends candidate or candidates for the office of district judge, and such candidates are also nomi-

nated or indorsed by any political party, in preparing the ballots for the general election, the names of such candidate or candidates shall be printed as candidate or candidates for each party by whom they are nominated, whether by primary, convention or petition. Each of the columns containing the list of candidates, including the party name, shall be separated by a distinct line. Said ballot shall be substantially in the following form:

REPUBLICAN. For Governor, <input type="checkbox"/> A.....B..... of.....County. For Lieutenant Gov- ernor, <input type="checkbox"/> C.....D..... of.....County. For Judge of Supreme Court, <input type="checkbox"/> E.....F..... of.....County.	DEMOCRATIC. For Governor, <input type="checkbox"/> G.....H..... of.....County. For Lieutenant Gov- ernor, <input type="checkbox"/> I.....J..... of.....County. For Judge of Supreme Court, <input type="checkbox"/> K.....L..... of.....County.	PROHIBITION. For Governor, <input type="checkbox"/> M.....N..... of.....County. For Lieutenant Gov- ernor, <input type="checkbox"/> O.....P..... of.....County. For Judge of Supreme Court, <input type="checkbox"/> Q.....R..... of.....County.	UNION LABOR. For Governor, <input type="checkbox"/> S.....T..... of.....County. For Lieutenant Gov- ernor, <input type="checkbox"/> U.....V..... of.....County. For Judge of Supreme Court, <input type="checkbox"/> W.....X..... of.....County.
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When a constitutional amendment or other public measure is to be voted upon by the electors, it shall be printed in full upon a separate ballot, preceded by the words, "Shall the following amendment to the constitution (or public measure) be adopted?" and upon the right hand margin, opposite these words, two spaces shall be left, one for votes favoring such amendment or public measure, and the other for votes opposing the same. In one of these spaces the word "yes" or other word required by law shall be printed; in the other, the word "no" or other word required, and to the right of each space a square shall be printed to receive the voting cross, all of which shall be substantially in the following form:

"Shall the following amendment to the constitution (or public measure) be adopted?"

(Here insert in full the proposed constitutional amendment or public measure.)

Yes.	
No.	

The elector shall designate his vote by a cross mark, thus X, placed in the proper square. At the top of such ballots shall be printed the following words, enclosed in brackets: [Notice to voters. For an affirmative vote upon any question submitted upon this ballot make a cross (x) mark in the square after the word "Yes." For a negative vote make a similar mark in the square following the word "No."] If more than one constitutional amendment or public measure is to be voted upon, they shall be printed upon the same ballot, one below the other, with one inch space between each constitutional amendment or public measure that is to be submitted. All of such ballots for the same polling-place shall be of the same size, similarly printed, upon yellow colored paper. On the back of each such ballot shall be printed appropriate words, showing that such ballot relates to a constitutional or other question to be submitted to the electors, so as to distinguish the said ballots from the official ballot for candidates for office, and a fac-simile of the signature of the auditor or other officer who has caused the ballot to be printed. Such ballots shall be endorsed and given to each voter by the judges of election, as provided in section eleven hundred and sixteen (1116), and shall be subject to all other laws governing ballots for candidates, so far as the same shall be applicable. [26 G. A., ch. 68, §§ 14, 16; 24 G. A., ch. 33, §§ 11-13.] [28 G. A., ch. 35, § 1.] [31 G. A., chs. 43-44.]

SEC. 1109. Method of printing. The ballot shall be on plain white paper, through which the printing or writing cannot be read. The party name or title shall be printed in capital letters, not less than one-fourth of an inch in height. The names of candidates shall be printed in capital letters not less than one-eighth nor more than one-fourth of an inch in height, and, at the beginning of each line in which the name of a candidate is printed, a square shall be printed, the sides of which shall not be less than one-fourth of an inch in length. On the back or outside of the ballot, so as to appear when folded, shall be printed the words "official ballot," followed by the designation of the polling place for which the ballot is prepared, the date of the election, and a *fac-simile* of the signature of the auditor or other officer who has caused the ballot to be printed. [26 G. A., ch. 68, § 14.] [31 G. A., ch. 44, § 2.]

SEC. 1117. Depositing ballots.

A ballot not bearing the endorsement of the judge should not be counted. *Kelso v. Wright*, 110-560.

SEC. 1119. Marking the ballot. Upon retiring to the voting booth, the voter shall prepare his ballot by placing a cross in the square opposite the name of each candidate for whom he desires to vote. The voter may also insert in writing, in the proper place, the name of any person for whom he desires to vote, making a cross opposite thereto. The writing of such name without making a cross opposite thereto, or the making a cross opposite such blank without writing a name therein shall not affect the validity of his vote. [24 G. A., ch. 33, § 22.] [28 G. A., ch. 36, § 1.] [31 G. A., ch. 44, § 3.]

The law does not recognize the writing proper place, with a cross in the square opposite the name as written. *Voorhees v. Arnold*, 108-77.

SEC. 1120. How counted. Ballots marked as provided in the preceding section shall be counted for the candidates designated by the marks in the squares. When only one candidate for any office is to be elected, if the voter marks in squares opposite the names of more than one candidate therefor, such vote shall not be counted for such office. When two or more officers of the same kind are to be elected, if more squares opposite the names of candidates for such office are marked than there are officers to be elected to such office, the ballot shall not be counted for any such candidates. If for any reason it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office. Any ballot marked by the voter in any other manner than as authorized in this chapter, and so that such mark may be used for the purpose of identifying such ballot, shall be rejected. [24 G. A., ch. 33, §§ 22, 27.] [31 G. A., ch. 44, § 4.]

The law by implication prohibits any person, including the voter, from so marking the ballot that the mark may be used for the purpose of identification, and a ballot so marked should be rejected. The unauthorized marks, to be objectionable as identification marks, must be deliberately made, and not merely accidentally, or as the result of inexperience. Whether the marks in particular cases are identification marks is for the jury. The ques-

tion is whether there has been a deliberate departure in the marking, and in a way that might enable the marks to be used to identify the ballot. *Voorhees v. Arnold*, 108-77.

What constitutes an identifying mark upon a ballot is generally a question of fact for the trial court, and its finding, or the finding of the jury, if the case is submitted to the jury, is conclusive upon appeal. The unnecessary marking of a

cross in the square below the marked circle does not affect the validity of the ballot. *Kelso v. Wright*, 110-560.

The amendment of this section, made by 28 G. A., chap. 36, held not applicable in a case tried and appealed before the amendment went into effect. *Morrison v. Pepperman*, 112-471.

Where a ballot had crosses in squares opposite all the names on the republican ticket, except that of the candidate for township trustee, and as to that office had a cross on another ticket in front of a blank space, held that it was properly rejected. *Ibid.*

This section makes the cross in the circle effective as a vote for all names printed upon the ticket below it, and if as in front of the name of the candidate to any office there is a blank in such

ticket, then a cross on another ticket for such office will authorize the counting of the ballot for the candidate thus designated. *Spurrier v. McLennan*, 115-461.

Whether unnecessary crosses in places where no provision for marking with a cross is made, as for instance in front of the names of the candidates for president and vice-president constitute identifying marks such as to vitiate the ballot is a question of fact for the trial court. *Ibid.*

Where there is a cross in the circle marked at the head of one ticket, the marking of a cross in the square before the name on another ticket has no effect other than to nullify the vote for the officer thus doubly voted for. This rule is in nowise altered by the marking of the squares below the marked circle. *Ibid.*

SEC. 1121. Voting mark—spoiled ballots. The voting mark shall be a cross in the square opposite to the name of the candidate for whom the voter desires to vote. Any voter who shall spoil his ballot may, on returning the same to the judges, receive another in place thereof, but no voter shall receive more than three ballots, including the one first delivered to him. None but ballots provided in accordance with the provisions of this chapter shall be counted. [24 G. A., ch. 33, §§ 22, 25.] [31 G. A., ch. 44, § 5.]

SEC. 1122. Defects in printed ballot.

The election law was enacted to aid the elector in expressing his free choice and not by technical obstructions to make the right of voting difficult and insecure. When the elector receives a ballot from the proper officials he may rely upon it as genuine and, when properly marked by

him, have it counted for all candidates for whom he had the right to vote and did vote. There is a distinction between errors of officers which would have the effect to deprive voters of the franchise and a disregard of the law by the electors themselves. *State v. Bernholtz*, 106-157.

SEC. 1125. Special policemen.

Special policemen, appointed by the city council on the nomination of political parties are not entitled to compensation either

from the city or the county as the statute makes no provision for such compensation. *Mousseau v. Sioux City*, 113-246.

SEC. 1129. Expenses—special policemen—compensation. The special policemen appointed under the provisions of this chapter shall be entitled to receive two dollars (\$2) a day as compensation for their services, which with the expense of providing booths, guard rails, and other things required in this chapter shall be paid in the same manner as other election expenses. The printing and distributing of ballots and cards of instruction to the voters, described in this chapter, for any general election, shall be at the expense of the county, and shall be provided for in the same manner as other county election expenses. The printing and distribution of ballots for use in city elections shall be at the expense of the city or town in which the election shall be held. [24 G. A., ch. 33, §§ 2, 20.] [30 G. A., ch. 39.]

The provisions of this section do not cover compensation to special policemen

appointed under Code § 1125. *Mousseau v. Sioux City*, 113-246.

SEC. 1130. Ballot boxes. The board of supervisors shall provide for each precinct in the county, for the purpose of elections, one box, with lock

and key. When any township precinct includes a town or part thereof, together with territory outside the limits of such town, the township trustees shall prepare a separate ballot box to receive the votes for township assessor, which shall be on separate ballots, and only the ballots of persons living outside of the limits of such town shall be placed in said ballot box. The judges of election shall place each ballot in its proper ballot box. The judges of election shall have the right to administer an oath to any voter, and to examine him under oath as to the assessor for whom such elector is entitled to vote. [17 G. A., ch. 71, §§ 2, 3; C., '73, § 614; R., § 489; C., '51, § 254.] [29 G. A., ch. 53, § 2.]

SEC. 1132. Registry and poll books.

It is not required that the poll lists resides. *Porter v. Butterfield*, 116-725. show in what town in the county the voter

SEC. 1137-a1. Candidates to make sworn statement of election expenses—where filed. Every candidate for any office to be voted for at any primary, municipal or general election shall, within ten days after the holding of such primary, municipal or general election, file a true, correct, detailed, sworn statement showing each and all sums of money or other things of value disbursed, expended or promised directly or indirectly by him, and to the best of his knowledge and belief by any other person or persons in his behalf for the purpose of aiding or securing his nomination or election. If the person be a candidate for a municipal or a county office, such statement shall be filed with the county auditor; if for a state office, or any other office to be voted for by the electors of more than one county, such statement shall be filed with the secretary of state. Such statement shall show the dates, amounts, and from whom such sums of money or other things of value were received; and the dates, amounts, purposes and to whom paid or disbursed, and shall include the assessment of any person, committee, or organization in charge of the campaign of such candidate. [32 G. A., ch. 50, § 2.]

SEC. 1137-a2. Testimony—immunity from prosecution. In prosecutions under this act, no witness shall be excused from giving testimony on the ground that his testimony would tend to render him criminally liable or expose him to public ignominy, but any matter so elicited shall not be used against him, and said witness shall not be prosecuted for any crime connected with or growing out of the act on which the prosecution is based in the cause in which his evidence is used for the state, under the provisions of this section. [32 G. A., ch. 50, § 3.]

SEC. 1137-a3. Statements by committee chairmen. The chairman of each party central committee for the state, district or county, shall file a statement of receipts and expenditures within ten days after the general election. The chairmen of state and district central committees shall file said statements with the secretary of state; and the chairmen of county central committees, with the county auditor. Such statements shall contain all the information required to be filed by candidates as set forth in section two (2) of this act, and in addition thereto shall state the amounts or balances remaining on hand. The person filing the same shall make oath that it is a full, true and correct statement. [32 G. A., ch. 50, § 4.]

SEC. 1137-a4. Statements open to public inspection. The statements provided for in this act shall be open at all times to the inspection of the public, and remain on file and become a part of the permanent records in the office where filed. [32 G. A., ch. 50, § 5.]

SEC. 1137-a5. Treating near the polls. It shall be the duty of the judges and clerks of all municipal, general and primary elections to prohibit

the placing, keeping, and giving to the voters, by any person of any cigars, food or other refreshments or treats, in or about the polling place. [32 G. A., ch. 50, § 6.]

SEC. 1137-a6. Penalty. Any person violating any of the provisions of the last five preceding sections shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars (\$50) nor more than three hundred dollars (\$300), or by imprisonment in the county jail not less than thirty (30) days nor more than six (6) months. [32 G. A., ch. 50, § 7.]

CHAPTER 3-A.

OF ELECTIONS—VOTING MACHINES.

SECTION 1137-a7. Use of voting machines authorized. That at all state, county, city, town, and township elections, hereafter held in the state of Iowa, ballots or votes may be cast, registered, recorded, and counted by means of voting machines, as hereinafter provided. [28 G. A., ch. 37, § 1.]

Voting by a machine is voting by ballot within the constitutional provisions, and a court of equity has no authority to enjoin the use of a voting machine at an election, the right to vote being only a political and not a civil right. *United States Standard Voting Mch. Co. v. Hobson*, 132-38.

A tax payer cannot invoke the jurisdiction of a court of equity to restrain the

performance of a contract by the board of supervisors for the purchase of voting machines on the ground that they are inefficient. *Shoemaker v. Des Moines*, 129-244.

A voter has no right which a court of equity will intervene to protect, with reference to the right to cast his ballot. *Ibid.*

SEC. 1137-a8. Board of supervisors to purchase, etc. Hereafter the board of county supervisors of any county, or the council of any incorporated city or town, in the state of Iowa may, by a two-thirds vote, authorize, purchase, and order the use of voting machines in any one or more voting precincts within said county, city, or town, until otherwise ordered by said board of county supervisors or city or town council. [28 G. A., ch. 37, § 2.]

SEC. 1137-a9. Commissioners—term—removal. Within thirty days after this act goes into effect, the governor shall appoint three commissioners and not more than two of whom shall be from the same political party. The said commissioners shall hold office for the term of five years, subject to removal at the pleasure of the governor. [28 G. A., ch. 37, § 3.]

SEC. 1137-a10. Examination of machine—report of commissioners—compensation. Any person or corporation owning or being interested in any voting machine may call upon the said commissioners to examine the said machine, and make report to the secretary of state upon the capacity of the said machine to register the will of voters, its accuracy and efficiency, and with respect to its mechanical perfections and imperfections. Their report shall be filed in the office of the secretary of state and shall state whether in their opinion the kind of machine so examined can be safely used by such voters at elections under the conditions prescribed in this act. If the report states that the machine can be so used, it shall be deemed approved by the commissioners, and machines of its kind may be adopted for use at elections as herein provided. Any form of voting machine not so approved cannot be used at any election. Each commissioner is entitled to one hundred and fifty dollars for his compensation and expenses in making

such examination and report, to be paid by the person or corporation applying for such examination. No commissioner shall have any interest whatever in any machine reported upon. Provided, that said commissioner shall not receive to exceed fifteen hundred dollars and reasonable expenses in any one year; and all sums collected for such examinations over and above said maximum salaries and expenses shall be turned into the state treasury. [28 G. A., ch. 37, § 4.]

SEC. 1137-a11. Provisions as to the construction of machine approved. A voting machine approved by the state board of voting machine commissioners must be so constructed as to provide facilities for voting for the candidates of at least seven different parties or organizations, must permit a voter to vote for any person for any office although not nominated as a candidate by any party or organization, and must permit voting in absolute secrecy. It must also be so constructed as to prevent voting for more than one person for the same office, except where the voter is lawfully entitled to vote for more than one person for that office; and it must afford him an opportunity to vote for any or all persons for that office as he is by law entitled to vote for and no more, at the same time preventing his voting for the same person twice. It may also be provided with one ballot in each party column or row containing only the words "presidential electors" preceded by the party name, and a vote for such ballot shall operate as a vote for all the candidates of such party for presidential electors. Such machine shall be so constructed as to accurately account for every vote cast upon it. [28 G. A., ch. 37, § 5.]

SEC. 1137-a12. Experimental use. The board of supervisors of any county, the council of any city or town, may provide for the experimental use at an election in one or more districts, of a machine which it might lawfully adopt, without a formal adoption thereof; and its use at such election shall be as valid for all purposes as if it had been lawfully adopted. [28 G. A., ch. 37, § 6.]

SEC. 1137-a13. Duties of local authorities. The local authorities adopting a voting machine shall, as soon as practical thereafter, provide for each polling place one or more voting machines in complete working order, and shall thereafter keep them in repair, and shall have the custody thereof and of the furniture and equipment of the polling place when not in use at an election. If it shall be impracticable to supply each and every election district with a voting machine or voting machines at any election following such adoption, as many may be supplied as it is practicable to procure, and the same may be used in such election district or districts within the county, city, or town as the officers adopting the same may direct. [28 G. A., ch. 37, § 7.]

SEC. 1137-a14. Bonds, certificates of indebtedness, etc. The local authorities, on the adoption and purchase of a voting machine, may provide for the payment therefor in such manner as they may deem for the best interest of the locality, and may for that purpose issue bonds, certificates of indebtedness, or other obligations which shall be a charge on the county, city, or town. Such bonds, certificates, or other obligations may be issued with or without interest, payable at such time or times as the authorities may determine, but shall not be issued or sold at less than par. [28 G. A., ch. 37, § 8.]

SEC. 1137-a15. Ballots—form. All ballots shall be printed in black ink on clear, white material, of such size as will fit the ballot frame, and in plain, clear type as the space will reasonably permit. The party name for each political party represented on the machine shall be prefixed to the list of candidates of such party. The order of the list of candidates of the

several parties or organizations shall be arranged as provided in section eleven hundred and six (1106) of the code, except that the lists may be arranged in horizontal rows or vertical columns. [28 G. A., ch. 37, § 9.]

SEC. 1137-a16. Sample ballots. The officers or board charged with the duty of providing ballots for any polling-place shall provide therefor two sample ballots, which shall be arranged in the form of a diagram showing the entire front of the voting machine as it will appear after the official ballots are arranged for voting on election day. Such sample ballots shall be open to public inspection at such polling-place during the day of election and the day next preceding election day. [28 G. A., ch. 37, § 10.]

SEC. 1137-a17. Two sets of ballots. Two sets of ballots shall be provided for each polling-place for each election for use in the voting machine. [28 G. A., ch. 37, § 11.]

SEC. 1137-a18. Delivery of ballots. The ballots and stationery shall be delivered to the election board of each election district before ten o'clock in the forenoon of the day next preceding the election. [28 G. A., ch. 37, § 12.]

SEC. 1137-a19. Duties of election officers — independent ballots. The judges of election and clerks of each district shall meet at the polling-place therein, at least three-quarters of an hour before the time set for the opening of the polls at each election, and shall proceed to arrange within the guard-rail the furniture, stationery, and voting machines for the conduct of the election. The judges of election shall then and there have the voting machine, ballots, and stationery required to be delivered to them for such election; and, if it be an election at which registered voters only can vote, the registry of such electors required to be made and kept therefor. The judges shall thereupon cause at least two instruction cards to be posted conspicuously within the polling-place. If not previously done, they shall arrange in their proper place on the voting machine, the ballots containing the names of the offices to be filled at such election, and the names of the candidates nominated therefor. If not previously done, the machine shall be so arranged as to show that no vote has been cast, and the same shall not be thereafter operated, except by electors in voting. Before the polls are open for election, each judge shall carefully examine every machine and see that no vote has been cast, and the same shall be subject to inspection of the election officers. Ballots voted for any person, whose name does not appear on the machine as a nominated candidate for office, are herein referred to as independent ballots. When two or more persons are to be elected to the same office, and the machine requires that all independent ballots voted for that office be deposited in a single receptacle or device, an elector may vote in or by such receptacle or device for one or more persons whose names do not appear upon the machine with or without the names of one or more persons whose names do so appear. With that exception, and except for presidential electors, no independent ballot shall be voted for any person for any office whose name appears on the machine as a nominated candidate for that office; any independent ballot so voted shall not be counted. An independent ballot must be cast in its appropriate place on the machine, or it shall be void and not counted. [28 G. A., ch. 37, § 13.]

SEC. 1137-a20. Voting machine in plain view—guard-rail. The exterior of the voting machine and every part of the polling-place shall be in plain view of the election officers. The voting machine shall be placed at least three feet from every wall and partition of the polling-place, and at least three feet from the guard-rail, and at least four feet from the clerk's table. A guard-rail shall be constructed at least three feet from the machine, with openings to admit electors to and from the machine. [28 G. A., ch. 37, § 14.]

SEC. 1137-a21. Method of voting. After the openings of the polls, the judges shall not allow any voter to pass within the guard-rail until they ascertain that he is duly entitled to vote. Only one voter at a time shall be permitted to pass within the guard-rail to vote. The operating of the voting machine by the elector while voting shall be secret and obscured from all other persons except as provided by this chapter in cases of voting by assisted electors. No voter shall remain within the voting machine booth longer than one minute, and if he shall refuse to leave it after the lapse of one minute, he shall be removed by the judges. [28 G. A., ch. 37, § 15.]

SEC. 1137-a22. Additional instructions. In case any elector after entering the voting machine booth shall ask for further instructions concerning the manner of voting, two judges of opposite political parties shall give such instructions to him; but no judge or other election officer or person assisting an elector shall in any manner request, suggest, or seek to persuade or induce any such elector to vote any particular ticket, or for any particular candidate, or for or against any particular amendment, question, or proposition. After receiving such instructions, such elector shall vote as in the case of an unassisted voter. [28 G. A., ch. 37, § 16.]

SEC. 1137-a23. Injury to the machine. No voter, or other person, shall deface or injure the voting machine or the ballot thereon. It shall be the duty of the judges to enforce the provisions of this section. During the entire period of an election, at least one of their number, designated by them from time to time, shall be stationed beside the entrance to the booth and shall see that it is properly closed after a voter has entered it to vote. He shall also, at such intervals as he may deem proper or necessary, examine the face of the machine to ascertain whether it has been defaced, or injured, to detect the wrong-doer and to repair any injury. [28 G. A., ch. 37, § 17.]

SEC. 1137-a24. Canvass of vote. As soon as the polls of the election are closed, the judges of the election thereat shall immediately lock the voting machine against voting and open the counting compartments in the presence of all persons who may be lawfully within the polling-place, and proceed to canvass the vote. [28 G. A., ch. 37, § 18.]

SEC. 1137-a25. Judges to lock machine. The judges of election shall, as soon as the count is completed and fully ascertained as in this act required, lock the machine against voting, and it shall so remain for the period of thirty days. Whenever independent ballots have been voted, the judges shall return all of such ballots properly secured in a sealed package as prescribed by section eleven hundred and forty-two (1142) of the code. [28 G. A., ch. 37, § 19.]

SEC. 1137-a26. Written statements of election. After the total vote for each candidate has been ascertained, and before leaving the room or voting place, the judges shall make and sign written statements of election, as required by the election laws now in force, except that such statements of the canvass need not contain any ballots except the independent ballots as herein provided. [28 G. A., ch. 37, § 20.]

SEC. 1137-a27. What statutes apply. All of the provisions of the election law now in force and not inconsistent with the provisions of this act shall apply with full force to all counties, cities, and towns adopting the use of voting machines. Nothing in this act shall be construed as prohibiting the use of a separate ballot for constitutional amendments and other public measures. [28 G. A., ch. 37, § 21.]

CHAPTER 4.

OF THE CANVASS OF VOTES.

SECTION 1142. Proclamation of result—preservation of votes.

The poll books and the registration lists prepared as provided by law furnish the best evidence as to who cast ballots at the election. So held where the question was as to the sufficiency of the petition of consent under the mulct tax law. *State v. Pressman*, 103-449.

The law provides for the strictest vigilance in the care and preservation of the ballots, and where it appears that these precautions have not been observed and there has been opportunity to tamper with them they will not be considered in an election contest for the purpose of overthrowing the result of the canvass by the proper officers. *Davenport v. Olerich*, 104-194.

The duty of preserving the ballots is not a negative one of non-interference, but a positive requirement to do whatever may be necessary in order to accomplish the purposes of the law in keeping them inviolate. *Ibid.*

The ballots when properly authenticated afford the very best evidence of who has been chosen by the electors to an office, but in order that the result of the canvass shall be overturned by the evidence of such ballots it must appear that they have been preserved with the care which precludes the suspicion of having been tampered with and the opportunity of alteration or change, and in a particular case, held, that it appeared that there had been such opportunity for tampering with the ballots that they should not be considered for the purpose of overturning the result as announced by the canvassing board. *Ibid.*

The ballots should be preserved in such

SEC. 1145. Poll books returned and preserved.

Previous to the time when the poll books are directed to be destroyed they may be used by the board of supervisors in determining whether the number of signers to a petition of consent for the sale of intoxicating liquors is sufficient. *Cameron v. Fellows*, 109-534.

Where the poll books have not been de-

SEC. 1149. Canvass by board of supervisors.

The judges of election who have made defective returns may correct such returns so as to authorize the board of supervisors

way as not to afford a reasonable possibility of their having been changed or tampered with by unauthorized persons. *Mentzer v. Davis*, 109-528.

As the manner and mode of preservation of ballots has been enjoined by statute, a substantial compliance therewith must be shown preliminary to the introduction of the ballots in evidence. This preliminary proof, unless waived, is essential to the competency of the ballots as evidence for any purpose as against the official count, and no averment in the pleading is required as a basis for an objection to their competency. *DeLong v. Brown*, 113-370.

The question of the competency of the ballots as evidence is one of fact to be determined by the trial court. *Ibid.*

Where it appeared that the ballots had been so kept that they might have been tampered with, held that they were not admissible. *Ibid.*

The fact that the ballots are in the custody of one acting as deputy auditor *de facto*, but not *de jure*, will not prevent their being received in evidence in an election contest. *Murphy v. Lentz*, 131-328.

The provisions as to the folding, wiring and sealing of the ballots by the election officers are directory in character, and mere irregularities will not prevent such ballots from being admissible in evidence in an election contest. *Ibid.*

The provisions of the statute with reference to the conduct of election officers upon whom duties are enjoined, are mandatory; but as to the particular methods of preserving the ballots they are directory only. *Ibid.*

stroyed, by reason of the commencement of some legal proceeding, involving their use in evidence, they are admissible in evidence after the expiration of the time when, in the usual course, they would have been destroyed. *Reed v. Jugenheimer*, 118-610.

to canvass the same. *Rummel v. Dealy*, 112-503.

SEC. 1164. Repeal—state election book. That section eleven hundred and sixty-four (1164) of the code is hereby repealed and the following enacted in lieu thereof:

“The secretary of state shall file the abstracts when received and shall have the same bound in book form to be kept by him as a record of the result of said state election, to be known as the state election book.” [32 G. A., ch. 52.]

CHAPTER 5.

OF PRESIDENTIAL ELECTORS.

SECTION 1173. Election of. At the general election in the years of the presidential election, or at such other times as the congress of the United States may direct, there shall be elected by the electors of the state, one person from each congressional district into which the state is divided, as elector of president and vice-president, and two from the state at large, no one of whom shall be a person holding the office of senator or representative in congress, or any office of trust or profit under the United States. Such election shall be conducted, and the canvass of the votes and the returns thereof made, in the same manner as for state officers and representatives in congress. [16 G. A., ch. 23; C., '73, §§ 659, 660; R., §§ 535-6; C., '51, §§ 301-2.] [28 G. A., ch. 38, § 1.]

See U. S. Const., Art II, § 1.

CHAPTER 6.

OF QUALIFICATION FOR OFFICE.

SECTION 1177. Oath and bond.

One who is elected to an office, but does *facto*. *Herkimer v. Keeler*, 109-680. not qualify nor act, is not an officer *de*

SEC. 1177-a. Bond. When a bond is required by law to be given by or for any public officer, deputy or employe of such public officer, or by any person holding a fiduciary office or trust, administrator, executor, guardian, trustee, officer or employe of any public or private corporation or association, when not otherwise specifically provided, shall be conditioned as provided in section eleven hundred eighty-three (1183) of the code. [29 G. A., ch. 54, § 1.]

SEC. 1177-b. Sureties relieved—how. If any surety on said bond shall so elect his liability thereon may be canceled at any time by giving thirty days' notice in writing to the person or persons authorized to approve said bond, and to the officer or person with whom the same is required to be filed or deposited by law, and refunding the premium paid, if any, less a pro rata part thereof for the time said bond shall have been in force. The liability and indemnity created by said bond shall extend to the date of cancellation as provided by chapter eleven (11), title six (VI) of the code. [29 G. A., ch. 54, § 2.]

SEC. 1177-c. Contract or stipulation. No contract, stipulation, or condition limiting the liability created by said bond shall be of any force or validity. [29 G. A., ch. 54, § 3.]

SEC. 1177-d. Other bonds. All other bonds, public or private, required to be given by law, when not otherwise specifically provided, shall be substantially conditioned as required in this act and subject to the limitations thereof. [29 G. A., ch. 54, § 4.]

SEC. 1183. Bond required.

The sureties of a county treasurer are liable for money in his hands at the expiration of his term which is subsequently converted by him before his successor comes into office, and not paid over to such successor. *Plymouth County v. Kerseboom*, 108-304.

Where the clerk of the courts in his

official capacity receives a fund to hold for a claimant thereof and deposits it at interest with a bank, the claimant having established his right to the fund may recover against the clerk and his bondsmen the interest accrued on the fund. *Rhea v. Brewster*, 130-729.

SEC. 1193. Accounting before approval.

Where an officer has accounted, as required by law, and produced the funds and property with which he is chargeable, the settlement with him, in the absence of fraud or mistake, is conclusive, not only as against him, but also as against his sureties, and the burden is cast on the sureties to show his failure to produce funds, and that such funds were misappro-

priated prior to the taking effect of the bond on which they are sureties. But the sureties are not estopped from showing that the defalcation for which they are sought to be charged in fact occurred prior to the making of such settlement, if at the time of settlement the funds were not in fact produced. *Independent School Dist. v. Hubbard*, 110-58.

CHAPTER 7.**OF CONTESTING ELECTIONS.****SECTION 1198. Grounds of contest.**

The provisions of this section are cumulative, and not exclusive of those authorized by Code § 4313 to test the right of an incumbent of a county office to hold the same. *Haverstock v. Aylesworth*, 113-378.

Voters at an election in a township for which defective returns are made may by action of mandamus compel the board of supervisors to canvass corrected returns. *Rummel v. Dealy*, 112-503.

SEC. 1203. Statement of contest.

The provisions of this section as to what the statement of contest must show have reference to the paper filed by the contestant as the basis for his proceedings,

and it is doubtful whether they apply to the answer filed by the incumbent. *Kelso v. Wright*, 110-560.

SEC. 1208. Procedure—powers of court.

The proceedings in contest cases should be assimilated to those in an action so far as practicable, and the defendant, that is, the incumbent in such a contest, is not required, as a general rule, to give bond. *Kelso v. Wright*, 110-560.

The incumbent may meet the case made by the contestant by showing that the illegal votes counted for him were without prejudice because of the illegal votes cast for the contestant. *Ibid.*

SEC. 1217. Costs.

The payment of costs in an election contest in which the contestant is unsuccessful is to be determined by the rules ap-

plicable in criminal cases where the prosecution has failed. See Code § 4318. *Hull v. Eby*, 123-257.

SEC. 1222. Appeal. The party against whom judgment is rendered may appeal within twenty days to the district court, but, if he be in possession of the office, such appeal will not supersede the execution of the judgment of the court as provided in the preceding section, unless he gives a bond, with security to be approved by the district judge, in a sum to be fixed by him, and which shall be at least double the probable compensation

of such officer for six months, which bond shall be conditioned that he will prosecute his appeal without delay, and that, if the judgment appealed from be affirmed, he will pay over to the successful party all compensation received by him while in possession of said office after the judgment appealed from was rendered. The court shall hear the appeal in equity and determine anew all questions arising in the case. [C., '73, § 716.] [28 G. A., ch. 39, § 1.]

After the judges of contest have in fact announced their decision, the notice of appeal may be served although the decision has not yet been formally reduced to writing and filed with the proper authorities. *Mentzer v. Davis*, 109-528.

The statute does not require the giving of bond where no stay of proceedings is sought. *Ibid.*

Ballots should not be received in evidence unless they have been so kept as not to be exposed to the reach of unauthorized persons in such a way as to afford a reasonable possibility of their having been changed or tampered with. *Ibid.* And see notes to § 1142.

The fact that contestant claims that the returns for a certain township or precinct were not such as to entitle the votes from that precinct to be counted will not prevent a determination of the contest by a recounting of votes of which proper re-

turns were made. *Brown v. Crosson*, 115-256.

The proceedings before the board are not binding on the court hearing the appeal. *Ibid.*

The supreme court does not on appeal in an election contest try the case *de novo*, but only upon errors assigned. *Spurrier v. McLennan*, 115-461.

The appeal in an election contest is triable in the court in equity, and is therefore triable *de novo*; and an appeal to the supreme court from the decision of the district court is also to be heard *de novo*. *Murphy v. Lentz*, 131-328.

The officer obtaining possession of an office by judgment of a court in a contest cannot recover from the county the salary or compensation of which he has been deprived by the incumbency of the *de facto* officer who is ousted by the contest. *Brown v. Tama County*, 122-745.

CHAPTER 8.

OF REMOVAL FROM OFFICE.

SECTION 1251. Causes.

Misconduct during a preceding term of office may be ground for the removal of a sheriff. *State v. Welsh*, 109-19.

The neglect of duty must be habitual or wilful to require removal. *Ibid.*

Voluntary intoxication while engaged in the performance of an official duty is such wilful misconduct as to be a ground for removal. *Ibid.*

SEC. 1258-a. Made applicable to special charter cities. The provisions of chapter eight (8) of title six (6) of the code are also made applicable to cities acting under special charters. [32 G. A., ch. 53.]

CHAPTER 10.

OF VACANCIES IN OFFICE.

SECTION 1205. Holding over.

Where the council of a city met at the time fixed by ordinance to elect a street commissioner and without doing so adjourned without date, held that the incumbent who thereafter gave bond as

a holdover officer was entitled to the office as against a person elected at a subsequent meeting of the council. *State v. Alexander*, 107-177.

SEC. 1266. What constitutes vacancy.

The office of justice of the peace becomes vacant if the incumbent becomes a resident of another state. *State v. Hemsworth*, 112-1.

But mere temporary residence for a short time in another township does not operate to create a vacancy. *Ibid.*

SEC. 1272. Filling vacancies. Vacancies in the offices of clerk and reporter of the supreme court shall be filled by the supreme court; in all other state offices, judges of courts of record, officers elected in districts larger than a county, except state senators and representatives, officers, trustees, inspectors, and members of all boards or commissions, officers chosen by the general assembly if the legislature is not in session, and all persons filling any position of trust or profit in the state, by the governor, except when some other method is specially provided, and he shall issue the proper commission to the appointee; in county offices, including those of justices of the peace and constables, by the board of supervisors; and in the membership of such board, by the clerk of the district court, auditor and recorder; and when by death, or otherwise, a vacancy occurs in the office of the clerk of the district court, said court, or judge thereof, may, by order entered of record in the court journal, appoint a suitable and proper person to act as clerk until the vacancy shall be filled in the manner provided by law; in all other township offices, including trustees, by the trustees, but where the offices of the three trustees are all vacant, the county auditor shall appoint; in the office of councilman or mayor of any city, and all other elective city offices, the council may appoint any qualified elector to fill such vacancy, who shall qualify in the same manner as persons regularly elected to fill such office, and shall hold such office until the qualification of the officer elected to fill such vacancy, who shall be elected at the next regular municipal election; in all city appointive offices, unless otherwise provided by law, in the same manner as the original appointment was made; in all town offices, by the council at its first regular meeting after such vacancy occurs, or as soon thereafter as practicable. [24 G. A., ch. 1, § 1; 23 G. A., ch. 3, § 2; 22 G. A., ch. 1, § 1; 19 G. A., ch. 124, § 1; C., '73, §§ 390, 530, 783, 794-5; R., §§ 664, 1101; C., '51, § 436.] [30 G. A., ch. 41.]

See Const., Art. IV, § 10.

SEC. 1275. Qualification.

Where there is an election of a person disqualified to hold the office, who therefore is unable to qualify, the vacancy is for failure to qualify and not for failure to elect, and the preceding officer is entitled to qualify within ten days after the

failure of the newly elected officer to qualify. *State v. Cahill*, 131-155.

The failure to elect within the statutory provision as to the vacancy refers to a failure to hold an election or a failure to make a choice as provided by law. *Ibid.*

CHAPTER 11.**OF ADDITIONAL SECURITY AND THE DISCHARGE OF SURETIES.****SECTIONS 1280-1288.**

[For provisions relating to the release of sureties from an obligation, and manner of procedure, as enacted by the 29 G. A., chapter 54, §§ 1, 2, 3 and 4, and made amendatory of this chapter, see sections 1177-a, 1177-b, 1177-c and 1177-d, *supra*.]

CHAPTER 12.

OF GENERAL PROVISIONS AS TO COMPENSATION.

SECTION 1290-a. Appraisers—compensation of generally. That the compensation of appraisers appointed to appraise property belonging to any estate as a basis for the assessment of the collateral inheritance tax and in other cases where the compensation of appraisers is not now fixed by statute, shall be two dollars (\$2.00) per day for each appraiser and five cents a mile for the distance traveled in going to and returning from the place of appraisement, to be paid out of the property appraised or by the owner or owners thereof. [29 G. A., ch. 55, § 1.]

SEC. 1293. Publication of legal notices. The compensation, when not otherwise fixed, for the publication in a newspaper of any notice, order, citation or other publication required or allowed by law, shall not exceed one dollar for one insertion, and fifty cents for each subsequent insertion, for each ten lines of brevier type, or its equivalent, in a column not less than two and one-sixth inches in width. For publication of the official ballot, forty cents for each ten lines of brevier or its equivalent may be charged, the space necessarily occupied thereby being measured as if it were in brevier type set solid. In no case shall the cost of publishing the official ballot exceed forty (40) dollars for each of the two papers in which it shall be published, except in presidential years, when it shall not exceed the sum of seventy (70) dollars for each of said papers. Weekly publications may be made in a daily or weekly newspaper. The plaintiff or executor, in all publications concerning actions, executions and estates, may designate the newspaper in which such publication shall be made. If any newspaper refuse to make publication thereof, when copy therefor, with the cost or security for payment of the cost, is tendered, such publication may be made in some other newspaper of general circulation at or nearest to the county seat, with the same effect as if made in the newspaper so refusing. [25 G. A., ch. 105; C., '73, § 3832.] [31 G. A., ch. 47.]

SEC. 1293-a. Succeeding publications. That in the publication of notices as provided for by this act, when the same shall be published in any paper published oftener than once each week, the succeeding publications of such notice shall be on the same day of the week as the first publication. [30 G. A., ch. 2, § 14.] [31 G. A., ch. 9, § 32.]

[The 31 G. A., chapter 9, section 32, enacted identically the same section as the one shown above, but it was not deemed best to insert both.]

SEC. 1297. Taking higher fees.

While the compensation of a public officer cannot be affected by contract, yet, if a city provides for a police matron without regard to the statutory provisions as

to such office, it may fix the compensation by contract. *Daniels v. Des Moines*, 108-484.

SEC. 1298. Fees paid in advance.

A witness for the defendant in a criminal prosecution is not bound to attend without prepayment of fees, unless the

subpoena is issued under the order of the judge, as provided in this section. *State v. Keenan*, 111-286.

SEC. 1299. Fee bill.

The unsuccessful party to a suit is primarily liable for the costs, and the successful party has no interest in and no

right to collect any portion of such costs, except such as have been advanced by him. *Hidy v. Hanson*, 116-8.

SEC. 1300. Fees payable by state or county.

Where, by providing a salary for police judge and marshal the city becomes entitled to their fees in criminal cases, it

may recover such fees in an action against the county. *Des Moines v. Polk County*, 107-525.

TITLE VII.

OF THE REVENUE.

CHAPTER 1.

OF THE ASSESSMENT OF TAXES.

SECTION 1303. Levy—amount of. The board of supervisors of each county shall, annually, at its September session, levy the following taxes upon the assessed value of the taxable property in the county:

1. For state revenue, such rate of tax as shall be fixed by the executive council as hereinafter provided;

2. For ordinary county revenue, not more than six mills on a dollar in counties having a population of less than twenty thousand, and in counties having a population of twenty thousand or more, four mills, with a poll tax in either case of fifty cents on each male resident over twenty-one years of age. But in any county in which the levy is limited to four mills the board of supervisors may, at any general election, submit the question of increasing such levy to six mills or less to a vote of the electors, and if such proposition is adopted the board of supervisors may make the next general levy at the proposed rate;

3. For support of schools, not less than one nor more than three mills on a dollar;

4. For making and repairing bridges, not more than four mills on a dollar; but such tax shall not be levied upon any property assessable within the limits of any city of the first class, and none of such bridge tax shall be used in the construction or repair of bridges within the limits of such city. [25 G. A., ch. 114; 22 G. A., ch. 43; 20 G. A., ch. 182; 18 G. A., ch. 13; 15 G. A., ch. 28; C., '73, § 796; R., § 710; C., '51, § 454.] [30 G. A., ch. 42.]

There can be no taxation except as authorized by statute or constitutional provision, and the taxing power can be exercised only in accordance with the forms of law. *Chicago, M. & St. P. R. Co. v. Phillips*, 111-377.

Provisions for levying a mullet tax on sellers of intoxicating liquor at the September session of the board of supervisors, held directory only and that a levy in December was valid. *Hubbell v. Polk County*, 106-618.

SEC. 1304. Exemptions. The following classes of property are not to be taxed:

1. The property of the United States and this state, including university, agricultural college and school lands, and all property leased to the state; the property of a county, township, city, town or school district or militia company, when devoted entirely to public use and not held for pecuniary profit; public grounds, including all places for the burial of the dead, crematoriums, the land on which they are built and appurtenant thereto not exceeding one acre, so long as no dividends or profits are derived therefrom; fire engines and all implements for extinguishing fires, with the grounds used exclusively for their buildings and meetings of the fire companies;

2. All grounds and buildings used for public libraries, including libraries owned and kept up by private individuals, associations or corporations

for public use and not for private profit, and for literary, scientific, charitable, benevolent, agricultural and religious institutions, and societies devoted solely to the appropriate objects of these institutions, not exceeding one hundred and sixty acres in extent, and not leased or otherwise used with a view to pecuniary profit, but all deeds or leases by which such property is held shall be filed for record before the property above described shall be omitted from the assessment; the books, papers and apparatus belonging to the above institutions, used solely for the purposes above contemplated, and the like property of students in any such institution used for their education; moneys and credits belonging exclusively to such institutions, and devoted solely to sustaining them, but not exceeding in amount or income the amount prescribed by their charters or articles of incorporation; provided, however, that real estate owned by an educational institution of this state, as part of its endowment fund, shall not be taxed;

3. The farm produce of the person assessed, harvested by him, and all wool shorn from his sheep, within one year previous to the listing; all poultry, ten stands of bees, all swine and sheep under six months of age; and all other domestic animals under one year of age not hereinbefore exempt; obligations for rent not yet due, in the hands of the original payees, private libraries, professional libraries to the actual value of three hundred dollars; family pictures; household furniture to the actual value of three hundred dollars and kitchen furniture; beds and bedding requisite for each family; all wearing apparel in actual use; and all food provided for the family; but the exemptions allowed in this subdivision shall not be held to apply to hotels and boarding houses except so far as said exempted classes of property shall be for the actual use of the family managing the same;

4. The polls or estates, or both, of persons who by reason of age or infirmity may in the opinion of the assessor be unable to contribute to the public revenue, such opinion and the fact on which it is based being in all cases entered on the assessment roll, and subject to reversal by the board of review;

5. The farming utensils of any person who makes his livelihood by farming, the team, wagon and harness of the teamster or drayman who makes his living by their use in hauling for others, and the tools of any mechanic, not in any case to exceed three hundred dollars in actual value;

6. Government lands entered and located, or lands purchased from this state, for the year in which the entry, location or purchase is made;

7. The property not to exceed eight hundred dollars in actual value, of any honorably discharged union soldier or sailor of the Mexican war or of the war of the Rebellion or of the widow remaining unmarried of such soldier or sailor. It shall be the duty of every assessor annually to make a list of all such soldiers, sailors and widows, and to return such list to the county auditor, upon forms to be furnished by such auditor for that purpose; but the failure on the part of any assessor so to do shall not affect the validity of any exemption. All soldiers, sailors or widows thereof referred to herein shall receive a reduction of eight hundred dollars at the time said assessment is made by the assessor unless waiver thereof is voluntarily made of said exemption at said time; but this exemption shall not apply in the case of any soldier or sailor or the widow of such soldier or sailor, owning property of the actual value of five thousand dollars (\$5,000.00) or where the wife of such soldier or sailor owns property to the actual value of five thousand dollars (\$5,000.00).

8. The accumulations and funds held or possessed by fraternal beneficiary associations for the purposes of paying the benefits contemplated by section eighteen hundred and twenty-two (1822) of the code, or for the

payment of the expenses of such association. [26 G. A., ch. 29; 21 G. A., ch. 97; C., '73, § 797; R., § 711; C., '51, § 455.] [29 G. A., ch. 56, § 1.] [31 G. A., ch. 48.] [32 G. A., ch. 54.]

[The amendments enacted by the 31 and 32 G. A. referred to the original code section and ignored the same as it appeared in the code supplement. The amendment by the 31 G. A. added the following to paragraph 2: "Provided, however, that real estate owned by educational institutions of this state as part of its endowment fund shall not be taxed," and the 32 G. A. added paragraph 8.]

In general: A general exemption from taxation, not embodied in a contract, is not irrevocable, even though property has been acquired or expenses incurred in reliance thereon. *Miller v. Hageman*, 114-195.

Pension money which has been paid to the guardian of an insane pensioner still remains subject to the jurisdiction and control of the federal government, and is therefore exempt from taxation under the provisions of § 4747 of the Revised Statutes of the United States. *Manning v. Spry*, 121-191.

Par. 1: The fact that the property of a county is exempt from general taxation does not exempt it from liability for a special assessment for street improvements in a city. *Edwards & Walsh Const. Co. v. Jasper County*, 117-365.

Land which has been acquired by condemnation by a school district for a school-house site cannot be sold at tax sale for taxes already due thereon at the time of condemnation. *Independent School Dist. v. Hewitt*, 105-663.

Par. 2: To be entitled to an exemption as a charitable, benevolent or religious institution it must appear that the body is such institution, and that the property is devoted solely to the appropriate objects of such institution. The presumption is in favor of taxation and against exemption. *Lacy v. Davis*, 112-106.

The exemption as to grounds and buildings used for literary and scientific institutions and societies devoted solely to the appropriate objects of these institutions, and not leased or otherwise used with a view to pecuniary profit, does not cover

the case of buildings and apparatus employed in conducting an educational institution for private profit. *In re Dille*, 119-575.

The exemption of the property of religious, charitable and educational institutions from taxation does not create an exemption from a business or license tax. *Iowa Mut. Tornado Assn. v. Gilbertson*, 129-658.

Par. 6: While it is true that when the full equitable title to public land has passed from the government, even prior to the issue of a patent conveying the legal title, the land is subject to taxation; yet until such equitable title has passed and while the land is still subject to the control of the government, it is beyond the reach of the state's power to tax. *Hussman v. Durham*, 165 U. S., 144.

Lands claimed under a railroad grant may by statute be made taxable from the time such lands are earned and selected. *Chicago, M. & St. P. R. Co. v. Hemenway*, 117-598.

Land which is part of the public domain at the time of assessment is not subject to taxation. *Davis v. Magoun*, 109-308.

But where a homestead entry was canceled only because in supposed conflict with a railway grant, and was subsequently established, held that such cancellation did not prevent the land from being taxable to the claimant. *Ibid.*

Par. 7: The provision of section 876 of the Code of 1873, that where the homestead is listed separately, it shall be liable only for the taxes thereon, is not retained in the present Code. *Bitzer v. Becke*, 120-66.

SEC. 1304-a. What property exempt. That the following named property is exempt from taxation until January 1st, 1917, viz.: All mills, buildings, machinery, tools, apparatus and appliances for the manufacture of sugar, the land upon which said mill is situated not to exceed ten acres, the capital invested in the business of the manufacture of sugar from beets raised in the state of Iowa, all personal property used in connection with said business, also the stock, shares, and certificates of any company or corporation actually engaged in said business. [28 G. A., ch. 40, § 1.] [32 G. A., ch. 55.]

SEC. 1305. Valuation. All property subject to taxation shall be valued at its actual value, which shall be entered opposite each item, and shall be assessed at twenty-five per cent. of such actual value. Such assessed value shall be taken and considered as the taxable value of such property,

upon which the levy shall be made. Actual value of property as used in this chapter shall mean its value in the market in the ordinary course of trade. This section shall not apply to special charter cities. [Code, '97.] [27 G. A., ch. 30, § 1.] [31 G. A., ch. 33, § 3.]

As to whether the provision that property shall be valued for purposes of taxation at its actual value and assessed at 25 per cent. of such value is applicable to railroad property in special charter cities, the court was equally divided. *Chicago & N. W. R. Co. v. Cedar Rapids*, 127-678; *Chicago, M. & St. P. R. Co. v. Davenport*, 127-677.

The constitutional limitation as to municipal indebtedness to five per cent. of the actual value of property subject to taxation is not affected by the provision

that property is to be assessed at twenty-five per cent. of the actual value at which it is listed. *Halsey v. Belle Plaine*, 128-467.

This provision held not applicable where the holder of bonds issued prior to the adoption of such provision sought by mandamus to compel the levy of a tax in the payment of such bonds in accordance with the provisions in force when the bonds were issued. *Ft. Madison v. Ft. Madison Water Co.*, 134 Fed. 214.

SEC. 1306-a. Repeal. That section thirteen hundred and six (1306) of the code be and is hereby repealed, and the following enacted in lieu thereof: [28 G. A., ch. 41, § 1.]

SEC. 1306-b. Repeal—amount of indebtedness limited. That section thirteen hundred and six-b (1306-b) of the supplement to the code and chapter forty-three (43) of the acts of the thirtieth general assembly be and the same are hereby repealed, and the following enacted in lieu thereof:

“No county or other political or municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount exceeding in the aggregate the amount of one and one-fourth per centum of the actual value of the taxable property within such county or corporation, except that cities and incorporated towns, may, for the purpose of purchasing, erecting or maintaining and operating waterworks, electric light and power plants, gas works and heating plants or of building and constructing sewers, incur an indebtedness, not exceeding in the aggregate, added to all other indebtedness, five per centum of the actual value of the taxable property within such city or incorporated town. The amount of such taxable property shall be ascertained by the last state and county tax list previous to the incurring of such indebtedness.” [31 G. A., ch. 49, § 1.]

The debt limit provision of the constitution has relation only to the actual value of property as the same may be found and returned by the assessor for taxation purposes, and an indebtedness which does not exceed five per cent. of the value of the property subject to taxation valued at its

actual value is not unconstitutional. The constitutional limitation refers to the actual value, and not to the taxable value as prescribed by Code § 1305, providing that property is to be assessed at twenty-five per cent. of the actual value at which it is listed. *Halsey v. Belle Plaine*, 128-467.

SEC. 1306-c. Procedure to exceed limitation in cities and towns. Provided; that before such indebtedness can be contracted in excess of one and one-quarter per centum of the actual value of the taxable property ascertained as above provided in this act, a petition signed by a majority of the qualified electors of such city or town shall be filed with the council of such city or town, asking that an election shall be called, stating the purposes for which the money is to be used and that the necessary water works, electric light and power plants, gas works, heating plants, or sewers, cannot be purchased, erected, built or furnished within the limit of one and one-quarter per centum of the valuation. And provided that in cities having a population of more than ten thousand, the petition need not be signed by more than two hundred qualified electors. [31 G. A., ch. 49, § 2.]

SEC. 1306-d. Election called—notice—ballot. The council of such city or town on the receipt of such petition shall at the next regular meeting call such election, fixing the time and place thereof, and give four weeks' notice thereof, by publication once each week, in some newspaper published in the said town or city, or if none be published there, then in the next nearest town or city in the county. At such election the ballots shall be prepared, and used in substantially the following form:

For the issuance of bonds in the sum of \$_____
for water works, electric light and power plants,
gas works, heating plants, or sewer purposes,

Against the issuance of bonds in the sum of \$_____
for water works, electric light and power plants,
gas works, heating plants, or sewer purposes,

[31 G. A., ch. 9, § 31.] [31 G. A., ch. 49, § 3.]

[Section 3, chapter 43, acts of the 30 G. A., was amended by section 31, chapter 9, 31 G. A., but chapter 43, acts of the 30 G. A., was repealed by chapter 49, 31 G. A., but as section 3 of chapter 43, 30 G. A., was the same as the above section the amendment is shown here. The amendment was by adding the words, "by publication once each week," after the word "thereof," in line 4.]

SEC. 1306-e. Issuance of bonds. If a majority, in cities having more than ten thousand population; or, if, in cities and towns having a population of ten thousand or less, two-thirds or more, of all the electors, voting at such election, vote in favor of the issuance of such bonds, the council of such city or town shall issue the same and make provision for the payment of the same and the interest thereon as provided in chapter eight (8) title five (V) of the code. [31 G. A., ch. 49, § 4.]

SEC. 1306-f. Construction. Nothing in this act contained shall be construed to repeal the provisions of chapter one hundred and fourteen (114) of the acts of the thirtieth general assembly nor shall anything in this act contained be construed as being applicable to bonds issued under section 745 of the supplement to the code. [31 G. A., ch. 49, § 5.]

SEC. 1308. What taxable—lands of other counties.

Animals held with a view of traffic therein, as in merchandise, are assessable under the provisions of Code § 1318, providing for the taxation of merchants; otherwise, although bought with the intention of owning them for a limited time only, they should be taxed to the owner as other personal property. *Jewell v. Board of Trustees*, 113-47.

Money in the hands of an executor or

administrator is not exempt from taxation simply for the reason it is not being loaned or invested, and even though the administration is ancillary, the money and property of the estate located in this state is subject to taxation, unless at least taxes thereon have been paid in the state of principal administration. *Dorris v. Miller*, 105-564.

SEC. 1310. Moneys—credits—annuities—banknotes—stock.

A contract for the conveyance of land creating an absolute indebtedness, gives rise to a credit in favor of the grantor which is subject to taxation. *Clark v. Horn*, 122-375.

Deferred payments due on a mutually obligatory contract for the sale of land are taxable as credits. *Cross v. Snakenberg*, 126-636.

The owner of land who has given to a tenant the option to purchase at a specified price, which option has not been ex-

ercised so as to bind the prospective purchaser for the payment of the balance of the price, cannot be taxed on such option as moneys and credits. *Schoonover v. Petcina*, 126-261.

One having a contract for the purchase of real property which gives him no more than the right to exercise an option does not have a taxable credit nor such interest in the land as subjects him to taxation on account thereof. *In re Shield*, 111 N. W. 963.

One who endorses and transfers negotiable paper to a bank does not remain the owner thereof in such sense that he is sub-

SEC. 1311. Deducting debts.

The fact that in returning moneys and credits for assessments the taxpayer specifies liabilities which he claims the right to have deducted does not estop him, in a subsequent proceeding by the treasurer, to enforce an assessment for moneys and credits omitted from taxation, from showing other debts than those previously returned. *Schoonover v. Petcina*, 126-261.

The taxpayer may waive the right to have his indebtedness offset against his moneys and credits for taxation, and although he does so for the purpose of concealing such indebtedness and to avoid a showing of insolvency, his assignee, for the benefit of creditors, cannot complain of the tax thus assessed. *Carpenter v. Jones County*, 130-494.

The valuation of corporate stock cannot be offset by indebtedness. *In re Kauffman's Est.*, 104-639.

If a bank pays the taxes for its stockholders on their shares in the bank it should as to those stockholders who are entitled to offset indebtedness as against the assessment of their shares as moneys and credits pay over by way of dividends

SEC. 1312. Listing—by whom.

The owner is required to list his personal property, including moneys and credits, although it may be in the hands of an agent in another taxing district of the state. *German Trust Co. v. Board of Equalization*, 121-325.

The administrator of a non-resident should list for taxation in this state funds which have been sent into the state and

SEC. 1313. Place of listing.

If the owner is a resident the listing of moneys and credits is to be made by him and not by his agent in whose possession such moneys and credits are, in another taxing district. *German Trust Co. v. Board of Equalization*, 121-325.

Property which has been wrongfully taxed in a county in which it is not subject to taxation may be taxed as omitted property in the county where it should have been taxed, but the county cannot recover taxes on property omitted from taxation in the property district if it has been in fact taxed in another district of the same county. *Snakenburg v. Stein*, 126-650.

SEC. 1314. Who deemed owners—commission merchants.

A transfer company to which property has been consigned by an owner out of the state and which is held by it for the purposes of delivery and shipment under the

subject to taxation for such paper as moneys and credits. *Schoonover v. Petcina*, 126-261.

the amount of such assessments. The bank has no right except by way of declaration of a dividend to appropriate its assets to the payment of the interest on the shares of the stock of its stockholders. *Redhead v. Iowa National Bank*, 127-572.

An endorser on promissory notes transferred by him with mortgage security is not entitled to deduct such contingent liability as a debt from his moneys and credits. *Schoonover v. Petcina*, 126-261.

The debts which may be deducted from moneys and credits due do not include delinquent taxes of a previous year. *In re Appeal of Bailies*, 127-124.

A note given on a valid consideration to a college for the benefit of its endowment fund, constitutes a debt which may properly be deducted from moneys and credits for the purposes of taxation. Such a note does not constitute a subscription "to any institution, society, corporation or company" under the exception in this section. Such exception relates to subscriptions with reference to the organization of such institution or association. *King v. Carroll*, 129-364.

placed in the hands of an agent for investment, as contemplated by Code § 1320. *In re Miller's Est.*, 116-446.

The fact that local or ancillary administration was delayed by the acts of the agent will not be taken into consideration in determining whether the funds remained subject to taxation. *Ibid.*

Choses in action are taxable to the owner at his domicile, and not elsewhere, unless the owner has himself given to the property a different situs. *Gilbertson v. Oliver*, 129-568.

It is doubtful whether by "assessment districts" in the section relating to the place of taxation of personal property is meant any subdivision less than one having an assessor and a local board of review. Within a school township personal property may well be assessed to the owner in the school district where he resides. *Independent School Dist. v. Board of Review*, 131-195.

owner's orders is subject to taxation for such property. *Merchants Transfer Co. v. Board of Review*, 128-732.

SEC. 1316. Listing property of another.

Property may be listed to one as agent without giving the name of the person for whom he holds it. *Security Savings Bank v. Carroll*, 131-605.

SEC. 1317. Business in different states—partners.

Notes taken by a branch bank in the ordinary course of business, and held as a part of its assets are taxable in the district where such bank is located. *Farmers' Loan & Trust Co. v. Fonda*, 114-728.

Transfer of such notes to another branch of the same parent institution, and

giving credit to the branch from which they are taken for the amount thereof, will not affect the question of taxation. *Ibid.*

Taxes levied against a firm become an individual debt of the partner, and must be paid from his estate in bankruptcy as a preferred claim. *In re Green*, 116 Fed. 118.

SEC. 1318. Merchants.

The assessable value of merchandise is not its value on January 1st, but its average value during the year. *Larson v. Hamilton County*, 123-485.

One who purchases stock with a view of fattening and reselling is not a merchant and should be assessed on the stock owned by him on the first of January. *Jewell v. Board of Trustees*, 113-47.

One to whom property has been assigned and transferred by a non-resident owner for the purpose of being held subject to disposal at the order of the owner, is taxable for such property. *Merchants' Transfer Co. v. Board of Review*, 128-732.

SEC. 1320. Agent personally liable.

Where funds are sent into this state and placed in the hands of an agent for investment so as to subject them to taxation, the death of the principal does not terminate the right to impose such tax. Such funds continue subject to taxation until removed from the state under the process of administration. *In re Miller's Bank v. Carroll*, 131-605. *Est.*, 116-446.

One in possession of money, notes and credits of a non-resident may be assessed as agent, although the name of his principal is not disclosed. *Security Savings*

To justify the assessor in requiring one person to list the property of another, it must appear first that there is an agency of the party required to list, and second that he has possession or control of the moneys, notes, or other credits of his principal, and third, that such possession or control is held by the agent with a view to investing or loaning or in some other manner holding or using the money for the pecuniary profit of himself or his principal. No agent is liable to taxation for

the property of another in his possession or under his control unless he holds that possession or is vested with that control for the particular purposes named in the statute. *German Trust Co. v. Board of Equalization*, 121-325; *Heinz v. Board of Equalization*, 121-445.

But where the principal puts his money into the purchase of securities through an agent who reserves the right to an interest in the proceeds, the agent is bound to list the securities for his principal. *Ibid.*

The statutory provision does not, however, contemplate the listing by an agent of money or securities of a principal who is a resident of the state, and subject to taxation where he resides. *Ibid.*

The fact that the non-resident owner of property which is required to be listed by his agent in this state having possession and control thereof may also be taxed therefor in the state of his residence does not render the statutory provisions requiring listing by the agent unconstitutional. *Heinz v. Board of Equalization*, 121-445.

SEC. 1321. Private bankers. Private banks or bankers, or any persons other than corporations hereinafter specified, a part of whose business is the receiving of deposits subject to check, on certificates, receipts, or otherwise, or the selling of exchange, shall prepare and furnish to the assessor a sworn statement, showing the assets, aside from real estate, and liabilities of such bank or banker on January first of the current year, as follows:

1. The amount of moneys, specifying separately the amount of moneys on hand or in transit, the funds in the hands of other banks, bankers,

brokers or other persons or corporations, and the amount of checks or other cash items not included in either of the preceding items;

2. The actual value of credits, consisting of bills receivable owned by them, and other credits due or to become due;

3. The amount of all deposits made with them by others, and also the amount of bills payable;

4. The actual value of bonds and stocks of every kind and shares of capital stock or joint stock of other corporations or companies held as an investment, or in any way representing assets, and the specific kinds and description thereof exempt from taxation;

5. All other property pertaining to said business, including real estate, which shall be specially listed and valued by the usual description thereof;

The aggregate actual value of moneys and credits, after deducting therefrom the amount of deposits and of debts owing by such bank as provided in this chapter, and the aggregate actual value of bonds and stocks, after deducting the portion thereof exempt, or otherwise taxed in this state, and also the other property pertaining to the business, shall be assessed as provided by section thirteen hundred and five (1305) of this chapter, not including real estate, which shall be listed and assessed as other real estate. [15 G. A., ch. 63; C., '73, § 812; R., §§ 719, 720; C., '51, §§ 460, 465.] [27 G. A., ch. 30, § 2.]

Where a branch bank had just prior to the first day of January as a part of its assets notes taken in the usual course of business, and the parent bank then transferred such notes to another branch, giving credit to the first branch therefor on the books of the parent institution, held that such transfer did not relieve the branch from which the notes had been

transferred of liability for assessment thereon. *Farmers' Loan & Trust Co. v. Fonda*, 114-728.

On the transfer of the assets of a private bank to a national bank the assets of the private bank cease to be taxable as moneys and credits. *Schoonover v. Petrina*, 126-261.

SEC. 1322. National, state and savings banks. Shares of stock of national banks shall be assessed to the individual stockholders at the place where the bank is located. Shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies and not to the individual stockholders. At the time the assessment is made, the officers of national banks shall furnish the assessor with a list of all the stockholders and the number of shares owned by each, and he shall list to each stockholder under the head of corporation stock the total value of such shares. To aid the assessor in fixing the value of such shares, the corporations shall furnish him a verified statement of all the matters provided in the preceding section, which shall also show, separately, the amount of capital stock, and the surplus and undivided earnings, and the assessor, from such statement and other information he can obtain, including any statement furnished to and information obtained by the auditor of state, which shall be furnished him on request, shall fix the value of such stock, taking into account the capital, surplus and undivided earnings. In arriving at the total value of the shares of stock of such corporations, the amount of their capital actually invested in real estate owned by them and in the shares of stock of corporations owning only the real estate (inclusive of leasehold interests, if any) on or in which the bank or trust company is located, shall be deducted from the real value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporations shall not be otherwise assessed. [23 G. A., ch. 39; 15 G. A., ch. 60, § 28; 15 G. A., ch. 63; C., '73, §§ 812, 818-20; R., §§ 719, 720; C., '51, §§ 460, 465.] [31 G. A., ch. 50, § 1.]

The assessor is not bound by the showing of the books of a national bank in arriving at the valuation of its stock for the purposes of assessment. In making such valuation the assessor is to determine the value of the stock on the market without regard to whether such value is based upon assets that are tangible or intangible. *First Nat. Bank v. City Council*, 112 N. W. 829.

Although stock of a national bank is assessed to the shareholders, the bank is itself a party in interest as representing the shareholders and may appear before the board of review and prosecute an appeal from its findings. *First Nat. Bank of Independence v. Independence*, 123-482.

Where by mutual agreement stockholders deposit a fund which becomes a part of the capital of the bank it should be taxed by taxing the shares of stock, and not as the individual deposit of the stockholders. *State Exchange Bank v. Parkersburg*, 112-104.

The bank has no right to pay out of its assets the taxes on the shares of stock held by the stockholders. And if it does so the actions amount practically to the declaration of a dividend. *Redhead v. Iowa National Bank*, 127-572.

United States Bonds: The tax on the shares of stock of a bank is not a tax on its capital, and as against a tax on the shares of stock held by individuals, the bank has no right to deduct the amount of its capital invested in United States bonds. *German-American Sav. Bank v. Council*, etc., 118-84.

In estimating the value of shares of stock in a national bank for the purpose of taxation, the value of United States bonds owned by the bank may be taken into account. *National State Bank v. Mayor*, 119-696.

The fact that private banks and bankers are assessed on a valuation determined by finding the aggregate amount of moneys

and credits of the bank, after deducting deposits and debts, and also the aggregate value of bonds and stocks, excluding United States bonds, while in the possession of corporate banks, including national, state and savings banks, the taxation is on the basis of the stock, in estimating which the property of the bank, including United States bonds, is taken into account, does not constitute a discrimination between national and state banks such as to render the statute void under the provisions of the federal law relating to the taxation of national banks. *Ibid.*

In determining the value of national bank stock for the purpose of taxation, the value of government bonds held by the bank should be considered. *First Nat. Bank of Independence v. Independence*, 123-482.

As United States bonds belonging to the bank are to be taken into account in fixing the valuation of the shares on which taxes are to be paid by the holders, the treasurer is not authorized to tax such bonds to the bank or the stockholders as omitted property where the stock has in fact been assessed for taxation to such stockholders. *Security Savings Bank v. Carroll*, 128-230.

The treasurer and auditor have no right to assess against the stockholders of a bank as an element in determining the value of their stock the amount of United States bonds held by the bank where the assessor to whom a full report of the facts has been made has excluded such element of value in determining the taxable value of the shares. *Judy v. National State Bank*, 133-252.

The statutory provision for taxation of bank stock does not authorize the assessment of such stock on a valuation which includes the United States bonds held by the bank. (In effect overruling *People's Savings Bank v. Layman*, 134 Fed. 635). *Home Savings Bank v. Des Moines*, 205 U. S., 503.

SEC. 1322-a. Applicable to 1906 tax. This act shall apply to the assessment for the tax of 1906. [31 G. A., ch. 50, § 2.]

SEC. 1323. Shares of corporation stock.

The fact that the statutory provisions as to methods of ascertaining the value of personal property and fixing the situs thereof are different as to corporate property than as to property of private individuals does not render the provisions as to assessment of the corporate property invalid. *Layman v. Iowa Telephone Co.*, 123-591.

As the statute provides a method for the assessment of the property of loan and

trust companies that method is exclusive. *Wahkonsa Inv. Co. v. Fort Dodge*, 125-148.

The shares of stock in a corporation organized under the laws of this state, except as otherwise provided, are to be assessed to the owners thereof at the place where the principal business is transacted. *Layman v. Iowa Telephone Co.*, 123-591.

SEC. 1324. Valuation of corporate stock.

Where the capital stock of a savings bank has been listed and an assessment made by the proper assessor, the county treasurer has no authority to enter an

assessment based on the difference between the assessed value and the real value of the stock as found by him. *German Sav. Bank v. Trowbridge*, 124-514.

SEC. 1325. Corporation liable.

The bank having paid the taxes on its capital stock for the holders thereof is entitled to retain the amount from any dividends becoming due to such stockholders, and such claims for repayment are assets of the bank, an individual stockholder

cannot maintain an action against the bank for his own benefit or against the other stockholders for whom such taxes have been paid, to recover his share of such payments. *Kennedy v. Citizens' Nat. Bank*, 128-561.

SEC. 1328. Telegraph and telephone companies. Every telegraph and telephone company operating a line in this state shall, on or before the first day of May in each year, furnish to the executive council of Iowa a statement verified by its president or secretary showing:

1. The total number of miles owned, operated or leased within the state, with a separate showing of the number leased;
2. The average number of poles per mile, and the whole number of poles on their lines in this state;
3. The total number of miles in each separate line or division thereof, also the average number of separate wires thereon;
4. The whole number of stations on each line, and the value of the same, including furniture;
5. The whole number of instruments on each separate line, and the gross rental charges per instrument, where the same are rented to patrons of the company making the return, together with the number of stations maintained, other than railroad stations;
6. The gross receipts and operating expenses of said company for the year ending December thirty-first next preceding on business originating and terminating in this state;
7. The gross receipts and operating expenses of said company for the year ending December thirty-first next preceding, and not included in the statement made under subsection six hereof;
8. The total capital stock of said company;
9. The number of shares of capital stock issued and outstanding, and the par or face value of each share;
10. The market value of such shares of stock on the first day of January next preceding, and if such shares have no market value, the actual value thereof;
11. All real estate and other property owned by such company and subject to local taxation within this state;
12. The specific real estate, together with the permanent improvements thereon, owned by such company and situated outside this state and taxed as other real estate in the state where located, with a specific description of each piece, where located and the purpose for which the same is used, and the actual value thereof in the locality where situated;
13. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof;
14. *a.* The total length of the lines of said company;
b. The total length of the lines of said company outside this state.

[17 G. A., ch. 59, §§ 1, 2.] [30 G. A., ch. 44, § 1.]

SEC. 1329. Failure to make statement. Upon the receipt of said statements from the several companies, the executive council shall examine

said statements and if it shall deem the same sufficient and that further information is requisite, it shall require the officer making same to make such other or further statement as it may desire. In case of failure or refusal of any company to make out or deliver to the auditor of state the statements required in this chapter, such company shall forfeit and pay to the state of Iowa one hundred dollars for each day such report is delayed beyond the first day of May, to be sued and recovered in any proper form of action in the name of the state, and on the relation of the executive council of Iowa, and such penalty, when collected, shall be paid into the general fund of the state. [17 G. A., ch. 59, § 3.] [30 G. A., ch. 44, § 2.]

SEC. 1330. Assessment by executive council. The executive council shall, at its meeting on the second Monday in July in each year, proceed to find the actual value of the property of such companies in this state, taking into consideration the information obtained from the statements above required, and any further information they can obtain, using the same as a means for determining the actual cash value of the property of such companies within this state; also taking into consideration the valuation of all property of such companies, including franchises and the use of the property in connection with lines outside the state, and making such deductions as may be necessary on account of extra value of property outside the state as compared with the value of property in the state, in order that the actual cash value of the property of the company within this state may be ascertained. Said assessment shall include all property of every kind and character whatsoever, real, personal, or mixed, used by said companies in the transaction of telegraph and telephone business; and the property so included in said assessment shall not be taxed in any other manner than as provided in this act. [C., '97.] [28 G. A., ch. 42, § 1.]

SEC. 1330-a. Actual value per mile—taxable value. The executive council shall ascertain the value per mile of the property of each of said companies within this state by dividing the total value, as above ascertained, by the number of miles of line of such company within the state, and the result shall be deemed and held to be the actual value per mile of line of the property of such company within this state. The taxable value shall be determined by taking the percentage of the actual value so ascertained, as provided by section one thousand three hundred and five (1305) of the code, and the ratio between the actual value and the assessed or taxable value of the property of each of said companies shall be the same as in the case of property of private individuals. At such meeting in July any company interested shall have the right to appear, by its officers or agents, before the executive council and be heard on the question of the valuation of its property for taxation. [28 G. A., ch. 42, § 2.]

SEC. 1330-b. Assessment in each county—how certified. The executive council shall, for the purpose of determining what amount shall be assessed to any one of said companies in each county of the state into which the line of the said company extends, multiply the assessed or taxable value per mile of line of said company, as above ascertained, by the number of miles in each of said counties, and the result thereof shall be by said council certified to the several county auditors of the respective counties into, over or through which said line extends. [28 G. A., ch. 42, § 3.] [30 G. A., ch. 45.]

SEC. 1330-c. Levy and collection of tax. At the first meeting of the board of supervisors held after such statement is received by the county auditor it shall cause such statement to be entered in its minute book, and make and enter therein an order stating the length of the lines and the assessed value of the property of each of said companies situated in each

city, town, township, or lesser taxing district in its county, as fixed by the executive council, which shall constitute the taxable value of said property for taxing purposes, and the taxes on said property when collected by the county treasurer shall be disposed of as other taxes on real estate. The county auditor shall transmit a copy of said order to the council or trustees of each city, town, or township in which the lines of said company extend. [28 G. A., ch. 42, § 4.]

SEC. 1330-d. Rates and purposes. All telegraph and telephone property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, towns, townships, or lesser taxing districts, and the county treasurer shall collect such taxes at the same time and in the same manner as other taxes, and the same penalties for the nonpayment shall be due and collectible as for the nonpayment of individual taxes. [28 G. A., ch. 42, § 5.]

Prior to the repeal of Code, § 1331, it was held that all the sections of the Code relating to the taxation of telegraph companies were void because the result was that corporations engaged in conducting the telegraph or telephone business were not thereby taxed on the same basis as individuals. *Layman v. Iowa Telephone Co.*, 123-591.

SEC. 1330-e. Other real and personal property. Land, lots, and other real estate and personal property belonging to any telegraph company or telephone company not used exclusively in its telegraph or telephone business shall be subject to assessment and taxation on the same basis as other property of individuals in the several counties where situated. [28 G. A., ch. 42, § 6.]

SEC. 1330-f. "Company" defined. The word "company" as used in this act shall be deemed and construed to mean and include any person, co-partnership, association, corporation, or syndicate that shall own or operate, or be engaged in operating, any telegraph or telephone line whether formed or organized under the laws of this state or elsewhere. [28 G. A., ch. 42, § 7.]

SEC. 1330-g. Owners of capital stock exempt. The owner of the capital stock in any telegraph or telephone company operating any line or lines in this state shall not be assessed for taxation upon said capital stock. [28 G. A., ch. 42, § 8.]

SEC. 1330-h. Power to reassess and relevy taxes. When by reason of non-conformity to any law, or by any omission, informality, or irregularity, or for any other cause, any tax heretofore or hereafter levied and assessed against any person, company, association, or corporation by the executive council is invalid or is adjudged illegal, the executive council may assess and levy a tax against such person, company, association, or corporation for the year or years for which such tax is invalid or illegal, or when necessary may assess and certify the same to the proper county officers, who shall levy such tax as by law in such cases made and provided, with the same force and effect as though done at the proper time and under any valid law, whether in force at the time of said levy and assessment or thereafter enacted. [28 G. A., ch. 49, § 1.]

SEC. 1330-i. Voluntary payments. When any person, company, association, or corporation, against whom any tax has been assessed and levied by the executive council and held invalid or illegal, shall have paid the same voluntarily or shall otherwise waive such invalidity and illegality, the executive council shall accept such tax in lieu of the tax to be raised by the reassessment and relevy provided for in section one hereof. [28 G. A., ch. 49, § 2.]

SEC. 1331-a. Repeal. Section one thousand three hundred and thirty-one (1331) of the code, and all laws and parts of laws in conflict herewith are hereby repealed. [28 G. A., ch. 42, § 9.]

SEC. 1332. Line operated by railroad.

A telegraph line owned by a railroad company and not used exclusively for the transaction of railroad business is taxable under Code, § 1328, notwithstanding the provisions of Code, § 1336, by which telegraph lines exclusively used in railroad business are to be taken into account in

the valuation of railroad property for taxation; and it is immaterial that the line has been in fact valued as a portion of the property of the railroad and that the taxes of the railroad have been paid in accordance with such valuation. *Chicago, B. & Q. R. Co. v. Rhein*, 112 N. W. 823.

SEC. 1333. Insurance companies. Every insurance company or association organized or incorporated under the laws of any state or nation other than the United States, and every other insurance company whose charter may be owned or a majority of whose stock may be controlled or whose business shall be carried on in the interest or for the benefit of any insurance company or association incorporated under the laws of any state or nation other than the United States, shall, at the time of making the annual statements as required by law, pay into the state treasury as taxes two and one-half per cent. of the gross amount of premiums received by it for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year. Every insurance company incorporated under the laws of any state of the United States other than the state of Iowa, not including associations operating under the provisions of chapter seven, title nine of this code, or fraternal beneficiary associations doing business in the United States, shall, at the time of making the annual statements as required by law, pay into the state treasury as taxes two and one-half per cent. of the gross amount of premiums received by it for business done in this state, including all insurance upon property situated in this state and upon the lives of persons resident in this state during the preceding year. At the time of paying said taxes, said companies and associations shall take duplicate receipts therefor, one of which shall be filed with the auditor of state, and upon filing of said receipt, and not till then, the auditor shall issue the annual certificate as provided by law. No deduction or exemption from the taxes herein provided shall be allowed for or on account of any indebtedness owing by any such insurance company or association. Provided, however, that companies doing a fire insurance business may deduct from the gross amount of premiums received, the amount of premiums returned upon cancelled policies issued upon property situated in this state. [C., '73, § 807; R., § 718; C., '51, § 464.] [28 G. A., ch. 43, § 1.] [29 G. A., ch. 57, § 1.] [32 G. A., ch. 56.]

This section which requires insurance companies to pay a tax on gross earnings within the state, and exempts them from payment of all other taxes, state or local, except taxes on real property and special assessments is unconstitutional under Constitution, Art. 8, § 2, which subjects property of all corporations for pecuniary profit to taxation the same as that of individuals. *Hawkeye Ins. Co. v. French*, 109-585.

The tax here provided for is not unconstitutional on account of lack of uniformity. There is no requirement that taxes

on business or on privileges shall be uniform. *Scottish U. & N. Ins. Co. v. Herriott*, 109-606.

The officers of the state are not authorized to collect this tax by suit or distraint of property. The only effect of the non-payment is that the auditor will not issue a certificate authorizing the delinquent company to do business in the state during the ensuing year. *Manchester Ins. Co. v. Herriott*, 91 Fed. 711.

This section is not unconstitutional on account of lack of uniformity. *Ibid.*

SEC. 1333-a. Domestic companies. The shares of stock of every insurance corporation or association having capital stock, organized under the laws of this state, shall be assessed for taxation in the manner provided for the assessment of the shares of corporate stock in sections thirteen hundred and twenty-three (1323), thirteen hundred and twenty-four (1324) and thirteen hundred and twenty-five (1325) of the code, and as in this act provided, and said shares of stock shall not be otherwise assessed. In addition to the statement required in section thirteen hundred and twenty-three (1323) of the code, the corporation shall furnish to the assessor a copy of its annual report made to the auditor of state. [28 G. A., ch. 43, § 2.]

SEC. 1333-b. Statement furnished local assessor—what to contain—duty of assessor. Every insurance corporation or association organized under the laws of this state, not including corporations with capital stock, county mutuals, and fraternal beneficiary associations, which county mutuals and fraternal beneficiary associations are not organized for pecuniary profit, shall on or before the 26th day of January in each year, for the purpose of assessment of its property, furnish to the assessor of the assessment district in which its principal place of business is located, a statement verified by its president, showing specifically with reference to the year next preceding the first day of January, then last past: (1), a duplicate of the statement required by law to be made to the auditor of state for the said year last past; (2), a detailed statement of all its property and assets of every kind and nature whatsoever, and the value of each item thereof, including surplus, guaranty and reserve fund, and the amount of each. It shall be the duty of the assessor, upon the receipt of said statements, and from other information acquired by him, to assess against every corporation or association referred to in this section, the value of all personal property owned by such corporation or association, together with the actual value of each parcel of real estate situated in the assessment district of such assessor, and all the said property shall be assessed at the same rate, and for the same purposes as the property of private individuals, as provided in section thirteen hundred and five (1305) of the code. [28 G. A., ch. 43, § 3.]

SEC. 1333-c. Assessment of moneys and credits. In assessing for taxation the moneys and credits of every insurance corporation, company or association, organized under the laws of this state, except county mutuals and fraternal beneficiary associations, which county mutuals and fraternal beneficiary associations are not organized for pecuniary profit, the assessor shall ascertain the debts or liabilities, if any, of such corporation, company or association to its shareholders or other persons, which debts and liabilities shall be deducted, as provided in section thirteen hundred and eleven (1311) of the code, but in ascertaining the indebtedness or liability of such corporation, company or association, a debt shall be deemed to exist on account of its liability on the policies, certificates or other contracts of insurance issued by it equal to the amount of the surplus or other funds accumulated by any such corporation, or association, pursuant to law, its contracts of insurance or its articles of incorporation for the purpose of fulfilling its policies, certificates or other contracts of insurance, and which can be used for no other purpose. [28 G. A., ch. 43, § 4.]

The purpose of the legislature as indicated by statutory provisions with reference to the taxation of insurance companies is to make the moneys and credits of such companies taxable, subject only to certain definite exceptions, and these exceptions are limited to funds which may be accumulated pursuant to law or the

contract of insurance or the articles of the company for the purpose of fulfilling its policies, certificates or other contracts of insurance. Therefore held that an unassigned or surplus fund was not within the exception. *Chicago Life Ins. Co. v. Board of Review*, 121-254.

SEC. 1333-d. State tax—date payable. Every insurance corporation or association of whatever kind or character, organized under the laws of the state of Iowa, not including county mutuals or fraternal beneficiary associations, which county mutuals and fraternal beneficiary associations are not organized for pecuniary profit, shall, on or before the first day of March of each year, pay to the treasurer of state a sum equivalent to one per centum of the gross receipts from premiums, assessments, fees and promissory obligations required by insurance contracts which are received during the next year preceding the first day of January last past, after deducting the amounts actually paid for losses, matured endowments, dividends to policy holders and the increase in the amount of the reserve as certified by the department actuary in his official statement to the auditor of state on the 31st day of December previous, based on the actuaries' table of mortality and four per cent., and the amounts returned to members upon cancelled policies, certificates and rejected applications, during said year, and not until such payment shall the auditor of state issue the annual certificate, as provided by law. Provided that fire insurance companies organized under the provisions of chapter four (4) of title nine (IX) of the code shall only be required to pay to the treasurer of state a sum equivalent to one per centum upon the gross receipts from premiums, assessments, fees and promissory obligations for business done within this state, including all insurance upon property situated in the state, after deducting the amount actually paid for losses on property located within the state and the amount returned upon cancelled policies and rejected applications covering property situated within this state. [28 G. A., ch. 43, § 5.] [32 G. A., ch. 57.]

The statute requiring every insurance corporation or association to pay to the state treasurer by way of tax one per cent of its gross receipts, and which is expressly declared not to be applicable to county mutual or fraternal beneficiary

associations, which are not organized for pecuniary profit, is not unconstitutional on account of this discrimination, the classification being one which the legislature has authority to make. *Iowa Mut. Tornado Ass'n v. Gilbertson*, 129-658.

SEC. 1333-e. Supervisors to correct assessments—when and how. In the event that any insurance corporation or association, affected by this act, shall pay to the treasurer of state prior to May first, 1900, a sum so that the amount of its payment to said treasurer of state for the year 1900 shall equal what said corporation or association would be compelled to pay to said treasurer of state had this act been in force prior to the granting of the annual certificate by the auditor of state for the year 1900, then such corporation or association shall, for the levy made in the year 1900, be subject to the provisions of this act, respecting the levy and assessment of taxes by local and municipal authorities, and upon presentation of the receipt from the said treasurer of state showing a compliance with this section by such insurance corporation or association, it is hereby made the duty of the board of supervisors of the proper county to alter and correct the assessment of such corporation, association or shareholder made in the year 1900, so that said assessment shall be the same in amount as though it had been made under the provisions of this act, and the tax levied by the local or municipal authorities against every such corporation or association or its shareholders entitled to the benefit of this section, is corrected accordingly. Any corporation or association entitled to, but failing to take advantage of, the provisions of this section, shall not be relieved from any local or municipal tax heretofore levied by any of the provisions of this act. [28 G. A., ch. 43, § 6.]

SEC. 1334. Railway companies—when made—verified statement—when furnished. On the second Monday in July in each year, the executive council shall assess all the property of each railway corporation in the state, excepting the lands, lots and other real estate belonging thereto not used in the operation of any railway, and excepting railway bridges across the Mississippi and Missouri rivers, and excepting grain elevators; and for the purpose of making such assessment its president, vice-president, general manager, general superintendent, receiver or such other officer as the council may designate, shall on or before the first day of April in each year, furnish it a verified statement, showing in detail, for the year ended December thirty-first next preceding:

1. The whole number of miles of railway owned, operated or leased by such corporation or company within and without the state;

2. The whole number of miles of railway owned, operated or leased within the state, including double tracks and side tracks, the mileage of the main line and branch lines to be stated separately, and showing the number of miles of track in each county;

3. A full and complete statement of the cost and actual present value of all buildings of every description owned by said railway company within the state not otherwise assessed;

4. The total number of ties per mile used on all its tracks within the state;

5. The weight of rails per yard in main line, double tracks and side tracks;

6. The number of miles of telegraph lines owned and used within the state;

7. The total number of engines, and passenger, chair, dining, official, express, mail, baggage, freight and other cars, including hand cars and boarding cars used in constructing and repairing such railway, in use on its whole line, and the sleeping cars owned by it, and the number of each class on its line within the state, each class to be valued separately;

8. Any and all other movable property owned by said railway within the state, classified and scheduled in such manner as may be required by said council;

9. The gross earnings of the entire road, and the gross earnings in this state;

10. The operating expenses of the entire road, and the operating expenses within this state;

11. The net earnings of the entire road, and the net earnings within this state. [C., '73, §§ 810, 1317, 1318.] [29 G. A., ch. 58, § 1.] [30 G. A., ch. 46, § 3.]

A street railway, although engaged to some extent in transporting goods and express matter for hire is not subject to assessment under the provisions of this section. So held as to a street railway which had been extended along the public highway beyond the city limits to a neighboring town. *Cedar Rapids & M. C. R. Co. v. Cedar Rapids*, 106-476.

Interurban railways are to be assessed

by the executive council of the state in the same manner in which steam railways are assessed. *Cedar Rapids & M. C. R. Co. v. Cummins*, 125-430.

Where an interurban railway system includes a street railway system in a city, it may be taxed by the executive council as a unit. *Waterloo & C. F. R. T. Co. v. Board of Supervisors*, 131-237.

SEC. 1334-a. Detailed statements—what to include. Each railway or other corporation required by law to report to the executive council under the provisions of the law as it appears in section thirteen hundred thirty-four (1334) of the supplement to the code shall, on or before the first day of April, 1905, make to the executive council a detailed statement

showing the amount of real estate owned or used by it on December 31, 1904, for railway purposes, in each county in the state in which said real estate is situated, including the right of way, roadbed, bridges, culverts, depot grounds, station buildings, yards, section and tool houses, round houses, machine and repair shops, water tanks, turn-tables, gravel beds and stone quarries, and for all other purposes, with the estimated actual value thereof, in such manner as may be required by the executive council. Only one such detailed statement by any corporation shall be necessary, and when received by the council it shall become the record of railway lands of such corporation, and be deemed as annually thereafter reported for valuation and assessment by the executive council. On or before the first day of April of each subsequent year such corporation shall in like manner report all real estate acquired for any of the railway purposes above named during the preceding calendar year; and also a list of any real estate, previously reported, disposed of during the same period, which disposition shall be noted by the council in an appropriate column opposite to the description of said tract in the original report of the same in the record of railway land. [30 G. A., ch. 46, § 1.]

SEC. 1334-b. Record of railway lands. The executive council shall, by some convenient method of binding, arrange the statements required to be made under the provision of the preceding section so as to form a consolidated list of all real estate reported to it as being owned or used for railway purposes within the state of Iowa, which list shall be known as the record of railway lands. [30 G. A., ch. 46, § 2.]

SEC. 1334-c. Repeal—acts in conflict. Sub-section three (3) of the law as it appears in section thirteen hundred thirty-four (1334) of the supplement to the code and all other statutes or parts of statutes in conflict herewith are hereby repealed. [30 G. A., ch. 46, § 3.]

SEC. 1336. Valuation.

The tax here provided for is on real and personal property without discrimination, and therefore a sewer district tax which can only be enforced against real property within the sewer district is not enforceable against the real property of a railroad company which is included in its general assessment for taxation. *Chicago, M. & St. P. R. Co. v. Phillips*, 111-377.

If a railroad company owns and operates a telegraph line which is not exclusively used in the operation of its road, such line is taxable under Code, § 1328, relating to the taxation of telegraph lines. *Chicago, B. & Q. R. Co. v. Rhein*, 112 N. W. 823.

SEC. 1337. Statement sent county auditors. On or before the first Monday in August of each year, the council shall transmit to the county auditor of each county, through and into which any railway may extend, a statement showing the length of the main track within the county, and the assessed value per mile of the same, as fixed by a ratable distribution per mile of the assessed valuation of the whole property. [16 G. A., ch. 153; C., '73, § 1320.] [29 G. A., ch. 58, § 2.]

SEC. 1337-a. Plats—when filed. That every railroad company owning or operating a line of railroad within this state, shall on or before the first day of August, A. D. 1902, place on file in the office of the county auditor of each county in the state, into which any part of the lines of any said company lies, a plat of the lines of said companies within said county, showing the length of their said lines and the area of the land owned or occupied, by said companies in each government sub-division of land, not included within the platted portion of any town or city, within each of said counties, and the length of the said lines within the platted portion of cities and towns. Companies having on file such plats of part or all of their

lines, in any of said counties, shall be required to file plats only of that part of their lines not fully shown as above required on the plats now on file. On the first day of January of each year hereafter, like plats shall be filed of all new lines or extensions of existing lines built or completed within the calendar year preceding. [29 G. A., ch. 60, § 1.]

SEC. 1337-b. Refusal to file. In the event of the failure or refusal of any railroad company to file the plats required under the provisions of section one of this act, at the time or according to the conditions named, then the county auditor may cause the same to be prepared by the county surveyor and the cost thereof shall, in the first place, be audited and paid by the board of supervisors out of the county fund, and the amount thereof shall be by said board levied as a special tax against said company and the property of said company which shall be collected as county taxes and when collected be paid into the county fund. [29 G. A., ch. 60, § 2.]

SEC. 1339. Rate.

As to whether in taxing railway property in special charter cities the provisions of Code, § 1305, as to assessment of property at twenty-five per cent. of its actual value are applicable, the court was equally divided. *Chicago, M. & St. P. R. Co. v. Davenport*, 127-677; *Chicago & N. W. R. Co. v. Cedar Rapids*, 127-678.

SEC. 1340. Number of sleeping and dining cars. In addition to the matters required to be contained in the statement made by the company for the purposes of taxation, such statement shall show the number of sleeping and dining cars not owned by such corporation, but used by it in operating its railway in this state during each month of the year for which the return is made, the value of each car so used, and also the number of miles each month said cars have been run or operated on such railway within the state, and the total number of miles said cars have been run or operated each month within and without the state. Such statement shall show the average daily sleeping car and dining car service or wheelage operated on each part or division of the line or system within the state, designating the points on the line where variations occur, with the mileage of that part having the same daily service or wheelage. [17 G. A., ch. 114, § 1.] [28 G. A., ch. 44, § 1.]

SEC. 1340-a. Gross earnings—proportion. That for the purpose of making reports to the executive council, the gross earnings of railway companies, owning or operating a line or lines of railway partly within this state, and partly within another state, or other states, or territory, or territories, upon their line or lines within this state, shall be ascertained and reported by said railway companies as follows, to wit: The aggregate of the earnings upon business originating and terminating within this state, upon business originating in this state and terminating elsewhere, upon business originating elsewhere and terminating in this state, and upon business neither originating or terminating in this state but carried on or done over the line or lines in this state or over some part thereof, shall be reported; and with respect to all such interstate business the earnings in this state for the purpose of report shall be actually computed upon the basis of the length of haul or carriage in this state as compared with the length of haul or carriage elsewhere. It being hereby declared that for the purpose of making reports looking to the assessment of railway property for taxation the gross earnings or business done or carried partly within this state and partly in another state, or other states, or territories, shall be that proportion of the entire earnings of such business that the haul or carriage in this state bears to the entire haul or carriage. [29 G. A., ch. 61, § 1.]

SEC. 1340-b. Rules and regulations—power of executive council. The executive council shall have the power to prescribe such rules and regulations with respect to the keeping of accounts by the railway companies doing business in this state as will insure the accurate division of earnings as aforesaid, and uniformity in reporting the same to the executive council. [29 G. A., ch. 61, § 2.]

SEC. 1340-c. Net earnings. The executive council shall have the power to prescribe a method for all railway companies doing business in this state, together with the rules and regulations for the ascertainment of the net earnings of the railway lines in this state, to the end that all such railway companies, in ascertaining and making report of net earnings, shall proceed upon the same basis and in a uniform manner. [29 G. A., ch. 61, § 3.]

SEC. 1340-d. Reports—when made. The reports herein provided for are not in lieu of, but in addition to, the reports provided for by law, and they shall be made at the time and as a part of the reports already required. [29 G. A., ch. 61, § 4.]

SEC. 1340-e. Additional rules and regulations. The rules, regulations, method, and requirements herein provided to be made by the executive council shall be made and communicated in writing or print to the said several railway companies within thirty days from and after the passage and taking effect of this act, and shall be and become binding upon said railway companies from the time they are so communicated; provided, however, that the said executive council shall have the power to prescribe supplemental or additional rules, regulations, and requirements at any time, and communicate them to the several railway companies in the manner aforesaid, and with respect to such additional or supplemental rules, regulations, and requirements, they shall be and become binding upon the said railway companies within thirty days after they are so communicated. [29 G. A., ch. 61, § 5.]

SEC. 1340-f. Refusal to conform to rules—penalty. If any railway company shall fail or refuse to obey or conform to the rules, regulations, method, and requirements so made or prescribed by the executive council under the provisions of this act, or to make the reports as herein provided for, the executive council shall proceed and assess the property of such railway company so failing or refusing, according to the best information obtainable, and shall then add to the taxable valuation of such railway company twenty-five per centum thereof, which valuation and penalty shall be separately shown, and together shall constitute the assessment for that year. [29 G. A., ch. 61, § 6.]

SEC. 1342. Real property of railways.

In determining whether real property claimed by a railroad company is included in its property as assessed by the executive council and is therefore exempt from taxation in any other form, the return of the railroad company to the executive council is not conclusive, and the council may reject property so returned as not coming within the statutory provisions as to such taxation; therefore to defeat the collection of taxes levied on lots claimed by the railroad company on assessments made by local authorities, not simply the return of the railroad company of such property to the executive council, but the

inclusion of such property in the assessment of the railroad by the executive council must be shown. *Chicago, B. & Q. R. Co. v. Kelley*, 105-106.

A railroad company is not taxable under this section for the value of elevators owned by it and situated on its right of way, though leased by tenants for a nominal rent, if exclusively used in storing or taking in grain for shipment over the road; otherwise if the elevators are used by the tenants for general purposes of storage for hire. *Herter v. Chicago, M. & St. P. R. Co.*, 114-330.

SEC. 1342-a. Freight line and equipment companies. Every company engaged in the business of operating cars, not otherwise listed for taxation or taxed in Iowa, for the transportation of freight, whether such freight be owned by such company, or any other person or company, over any railway line or lines, in whole or in part within this state, such line or lines, not being owned, leased or operated by such company, whether such cars be termed box, flat, coal, ore, tank, stock, gondola, furniture or refrigerator cars, or by some other name, shall be deemed to be a freight line company. Every company engaged in the business of furnishing or leasing cars of whatsoever kind or description, to be used in the operation of any railway line or lines, wholly or partially within this state, such line or lines not being owned, leased or operated by such company, and such cars not being otherwise listed for taxation in Iowa shall be deemed to be an equipment company. [29 G. A., ch. 62, § 1.]

SEC. 1342-b. Verified statement—what to include. Every freight line and every equipment company, as designated in the preceding section, doing business, or owning cars which are operated in this state, shall, annually, on or before the first Monday of June, in each year, commencing with the year 1903, make out and deliver to the executive council a statement, verified by oath of an officer or agent of such company making such statement, with reference to the first day of January, next preceding showing:

First.—The name of the company.

Second.—The nature of the company, whether a person or persons, an association, copartnership, corporation or syndicate, and under the laws of what state or county organized.

Third.—The location of its principal office or place of business.

Fourth.—The name and postoffice address of the president, secretary, auditor, treasurer and superintendent or general manager.

Fifth.—The name and postoffice address, of the chief officer or managing agent of the company in Iowa.

Sixth.—The aggregate number of miles traveled within the state of Iowa by its cars during the preceding calendar year.

Seventh.—The average number of miles traveled by the cars of each class of its cars during the preceding calendar year. The number of cars necessary for the mileage traveled within the state of Iowa, under the circumstances that ordinarily attend the use of such cars and where different classes of cars are used by said company, as to the matters embraced in this and the preceding paragraph, it shall furnish the required information as to each class of said cars, in the form prescribed by blanks to be furnished by the executive council.

Eighth.—The actual cash value on the first day of January next preceding of the said number of cars necessary to provide for the mileage, to be reported as required by paragraph six of this section.

Ninth.—The real estate, personal property, structure, machinery, fixtures and appliances, owned by said company, subject to local taxation within the state, and the location and the actual value thereof in the county, township or district where the same is assessed for local taxation. [29 G. A., ch. 62, § 2.] [30 G. A., ch. 47, §§ 1, 2.]

SEC. 1342-c. Additional statements—refusal to furnish—penalty. Upon the filing of such statements the executive council shall examine each of them, and if he [they] shall deem the same insufficient, or if they fail to fully set out the matters required to be reported, it shall require such officer or agent to make such other and further statements as to such matters as he

[they] may deem proper. In case of the failure or refusal of any company to make and deliver to the executive council any statement or statements required by this act, such company shall forfeit and pay to the state of Iowa, one hundred dollars each day such report is delayed beyond the first Monday of June, to be sued and recovered in any proper form of action, in the name of the state of Iowa, and such penalty when collected shall be paid into the general fund of the state. [29 G. A., ch. 62, § 3.]

SEC. 1342-d. Assessment by executive council. Upon the meeting of the executive council on the second Monday of July in each year, it shall value and assess as the property of said company within this state, the cars of the said company necessary, under the circumstances ordinarily attending the use of such cars, for the mileage to be reported under paragraphs six and seven of section two of this act, after examining such statements and after ascertaining the actual value of said property of such company therefrom, and from such other information as it may have or obtain. For that purpose the executive council may require such company by its agents or officers, to appear before said council with such books, papers, or additional statements as the council may require, and may compel the attendance of witnesses in case said council shall deem it necessary to enable it to ascertain the actual value of such property. From the entire actual value of the property within the state so ascertained, there shall be deducted by the said council the actual value of all cars locally assessed, and one-fourth of the residue of such actual value so ascertained, shall be by the executive council assessed to said company. [29 G. A., ch. 62, § 4.] [30 G. A., ch. 47, § 3.]

SEC. 1342-e. Tax—when due. The council shall also at said meeting determine the rate of tax to be levied and collected upon said assessments, which shall be equal, as nearly as may be, to the average rate of taxes, state, county, municipal and local, levied throughout the state during the previous year, which rate shall be ascertained from the records and files in the auditor's office, and said tax shall be in full of all taxes except on real estate, personal property locally assessed, and special assessments, and shall become due and payable at the state treasury on the first day of February following the levy thereof, and if not so paid, the state treasurer shall collect the same by distress and sale of any property belonging to such company in the state in the same manner as is required of county treasurers in like cases; and the order of the executive council in such cases shall be sufficient authority therefor. [29 G. A., ch. 62, § 6.]

SEC. 1342-f. "Company defined." The word "company" as used in this act, shall be deemed and construed to mean any person, copartnership, association, corporation or syndicate that may own or operate, or be engaged in operating, furnishing or leasing cars, as defined and described in section one of this act, whether formed or organized under the laws of this state, or any other state or territory, or any foreign country. [29 G. A., ch. 62, § 7.]

SEC. 1342-g. Stockholders. The individual stockholders or owners of interests of said companies shall not be required to list their shares or interests in such companies so long as the companies pay the taxes on their property as herein provided. [29 G. A., ch. 62, § 8.]

SEC. 1343. Water and gas works—electric plants—street railways.

The provisions of this section exclude the idea of making the franchise a distinct item of valuation in the assessment of such property for taxation. But on the other hand, the entire physical property of such

plant, as, for instance, an electric railway, or some specific portion thereof, located within a taxing district, is to be subject to taxation, and not merely the material of which it has been constructed. *City*

Council v. Cedar Rapids & M. C. R. Co., 120-259.

In the taxation of an electric light company, the franchise should not be valued as distinct from the plant; but in valuing the plant, the franchise may be taken into consideration. *Lake City Elec. Light Co. v. McCrary*, 132-624.

The portion of an interurban railway which is within the limits of a city is to be included with the other property of the interurban railway in the taxation of the system under the provisions of Code, § 1334. *Cedar Rapids & M. C. R. Co. v. Cummins*, 125-430.

SEC. 1344. Roadbeds and highways.

This section relates to the raising of general revenues, and not to assessment of railway property for street improve-

ments. *Chicago, R. I. & P. Co. v. Ottumwa*, 112-300.

SEC. 1346-a. Express companies—annual statement—what to contain. Every company engaged in conveying to, from, through, in, or across this state, or any part thereof, money, packages, gold, silver, plate, merchandise, or any other article, by express, under a contract, express or implied, with any railroad company, or the managers, lessees, agents, or receivers thereof, provided such company is not a railroad company, a freight line company, nor an equipment company, shall be deemed and held to be an express company within the meaning of this act, and every such express company shall on or before the first Monday in May, 1900, and annually thereafter between the first day of February and the first day of March, make out and deliver to the executive council a statement verified by the oath of an officer or agent of said company, making such statement, with reference to the first day of January next preceding, showing:

First.—The name of the company, and whether a corporation, partnership, or person, and under the laws of what state or country organized.

Second.—The principal place of business, and the location of its principal office and the name and postoffice address of its president, secretary, and superintendent or general manager and the name and postoffice address of its principal officers or managing agent in Iowa.

Third.—The total capital stock of said company; (a) authorized; (b) issued.

Fourth.—The number of shares of capital stock issued and outstanding, and the par face value of each share, and in case no shares of stock are issued in what manner the capital stock thereof is divided, and in what manner such holdings are evidenced.

Fifth.—The market value of said shares of stock on the first day of January next preceding, and if such shares have no market value then the actual value thereof; and in case no shares of stock have been issued state the market value, or the actual value, in case there is no market value of the capital thereof, and the manner in which the same is divided.

Sixth.—The real estate, buildings, machinery, fixtures, appliances, and personal property owned by said company and subject to local taxation within the state of Iowa, and the location and actual value thereof in the county, township, or district where the same is assessed for local taxation.

Seventh.—The specific real estate, together with the improvements thereon, and all bonds, mortgages, and other personal property owned by said company, situated outside of the state of Iowa, and used exclusively outside the conduct of the business, with a specific description of all bonds, mortgages, and other personal property, and the cash value thereof, the purposes for which the same are used, and where the same are kept or deposited, and each piece of real estate, where located, the purpose for which the same is used, and the actual value thereof, in the locality where situated.

Eighth.—All mortgages upon the whole or any part of its property, together with the dates and amounts thereof.

Ninth.—(a) The total length of lines or routes over which the company transports such merchandise, freight, or express.

(b) The total length of such lines or routes as are outside of the state of Iowa.

(c) The length of such lines or routes within each of the counties, townships, and assessment districts within the state of Iowa. [28 G. A., ch. 45, § 1.] [29 G. A., ch. 164, § 1.]

SEC. 1346-b. Additional statement—delay—penalty. That section two (2), chapter forty-five (45) acts of the twenty-eighth (28) general assembly be and the same is hereby repealed, and the following enacted in lieu thereof:

SEC. 2. “Upon the filing of such statements, the executive council shall examine each of them, and if it shall deem the same insufficient, or in case it shall deem that other information is requisite, it shall require such officer or agent to make such other and further statements as the executive council may call for. In the case of the failure or refusal of any company to make out and deliver to the executive council any statement or statements required by this act, such company shall forfeit and pay to the state of Iowa one hundred dollars for each day such report is delayed beyond the first Monday in March of that year, to be sued and recovered in any proper form of action in the name of the state of Iowa, on the relation of the executive council, and such penalty when collected shall be paid into the general fund of the state.” [29 G. A., ch. 164, § 2.]

SEC. 1346-c. Assessment by executive council. That section three (3), chapter forty-five (45), acts of the twenty-eighth (28) general assembly be and the same is hereby repealed, and the following enacted in lieu thereof:

SEC. 3. The executive council shall meet on the second Monday in July in each year, and it shall thereupon value and assess the property of such company, in the manner hereinafter set forth, after examining such statements, and after ascertaining the actual value of the property of such company therefrom, and from such other information as it may have or obtain. For that purpose the executive council may require such company, by its agents or officers, to appear before said council with such books, papers, or statements as the council may require, or it may require additional statements to be made by such company, and may compel the attendance of witnesses, in case said council shall deem it necessary, to enable it to ascertain the actual value of such property; any such company interested may, upon written application, appear before the executive council at such meeting, and be heard in the matter of the valuation of the property of such company for taxation. [29 G. A., ch. 164, § 3.]

SEC. 1346-d. Repeal—actual value—how ascertained. That section 1346-d of the supplement to the code be repealed and the following enacted in lieu thereof:

“The executive council shall first ascertain the actual value of the entire property owned by said company, from said statements or otherwise, for that purpose taking the aggregate market value of all shares of capital stock, in case said shares have a market value, and in case they have none taking the actual value thereof or of the capital of said company, in whatever manner the same is divided, in case no shares of capital stock have been issued; provided, however, that in case the whole or any portion of the property of said company shall be encumbered by a mortgage or mortgages, such council shall ascertain the actual value of such property by adding to

the market value or the aggregate shares of stock or to the value of the capital, in case there shall be no such shares, the aggregate amount of the market or cash value of such mortgage or mortgages, and the result shall be deemed and treated as the actual value of the property of such company. The executive council shall, for the purpose of ascertaining the actual value of the property within the state of Iowa, next ascertain from such statements or otherwise the actual value of the property, both real and personal, owned by the company, and which is used exclusively outside the general business of the company, and also the actual value of that part of its property, if any, without the state which cannot lawfully be considered in determining the mileage value of its routes; and the aggregate of such values shall be deducted from the entire actual value of the property as above ascertained. The executive council shall next ascertain and deduct the actual value of the sea or ocean routes of any such company, and in ascertaining the same may take into consideration the earnings, both gross and net per mile, of such sea or ocean routes, as compared with the earnings, gross and net, of the land routes of such company or may ascertain their value in any other practicable manner, and may require that the reports heretofore provided for shall show such earnings. Thereupon the executive council shall ascertain the actual value of the property of such company within the state of Iowa, and for that purpose may take into consideration the proportional value of the company's property without and within the state, and shall take as a basis of valuation of the company's property in this state the proportion of the whole aggregate value of the property of said company, as above ascertained, after making the deductions above provided for which the length of the routes within the state of Iowa bears to the whole length of the routes of such company other than sea or ocean routes, and such amount so ascertained shall be considered and taken to be the entire actual value of the property of such company within the state of Iowa. From the entire actual value of the property within the state so ascertained, there shall be deducted by the said council the actual value of all the real estate, buildings, machinery, appliances, and personal property not used exclusively in the conduct of the business within the state that are subject to local taxation within the counties, townships, and other assessment districts as hereinbefore described in the sixth item of section one of this act." [32 G. A., ch. 58.]

SEC. 1346-e. Actual value per mile—taxable value. The executive council shall thereupon ascertain the value per mile of the property within the state, by dividing the total value as above ascertained, after deducting the specific properties locally assessed within the state, by the number of miles within the state, and the result shall be deemed and held to be the actual value per mile of the property of such company within the state of Iowa. The assessed or taxable value shall be determined by taking that percentage of the actual value so ascertained, as is provided by section thirteen hundred and five of the code, and such valuation and assessment shall be in the same ratio as that of the property of individuals. [28 G. A., ch. 45, § 5.]

SEC. 1346-f. Repeal—assessment in each county—how certified. That section six (6), chapter forty-five (45), acts of the twenty-eighth (28) general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

“Said executive council shall thereupon, for the purpose of determining what amount shall be assessed by it to said company, in each county of the state, through, across, into, or over which the route of said company extends, multiply the value per mile, as above ascertained, by the number

of miles in each of said counties, as reported in said statements, or as otherwise ascertained, and the result thereof, with the mileage and the rate of assessment per mile, shall be by said council certified to the auditors respectively of the several counties through, into, over and across which the routes of said company extend." [29 G. A., ch. 164, § 4.]

SEC. 1346-g. Repeal—levy and collection of tax—rates. That section seven (7), chapter forty-five (45), acts of the twenty-eighth (28) general assembly be and the same is hereby repealed, and the following enacted in lieu thereof:

"At the first meeting of the board of supervisors held after such certificate is received by the county auditor, it shall cause the same to be entered in its minute book and make and enter therein an order stating the length of the routes and the assessed value of each in each city, town, township, or other taxing district in its county, through or into which said routes extend, which shall constitute the taxable value of said property for taxing purposes, and the taxes on said property, when collected by the county treasurer, shall be disposed of as other taxes. The county auditor shall immediately thereafter transmit a copy of said order to the councils of cities, or towns, and to the trustees of each township, in the county. The county auditor shall also add to the value so apportioned the assessed value of the real estate, buildings, machinery, fixtures, appliances, and personal property not used exclusively in the conduct of the business situated in any township or taxing district as returned by the assessor thereof, and extend the taxes thereon upon the tax list as in other cases. All such property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, townships, or taxing districts. The property so included in said assessment and the shares of stock in such companies so assessed shall not be taxed in this state, except as provided in this act." [29 G. A., ch. 164, § 5.]

SEC. 1346-h. Penalty. In case any such company shall fail or refuse to pay any taxes assessed against it in any county, township, or assessment district in the state, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the state of Iowa by the county attorneys of the different counties of the state, on the relation of the auditors of the different counties of the state, and judgment in such action shall include a penalty of fifty per cent. of the amount of the taxes so assessed and unpaid, together with reasonable attorney's fees for the prosecution of such action, which action may be prosecuted in any county into, through, over, or across which the routes of any such company shall extend, or in any county where such company shall have an officer or agent for the transaction of business. [28 G. A., ch. 45, § 8.]

SEC. 1346-i. "Company" defined. The word "company," as used in this act, shall be deemed and construed to mean and include any person, co-partnership, association, corporation, or syndicate that may own or operate, or be engaged in operating, any express route as herein defined, whether formed or organized under the laws of this state, any other state or territory, or of any foreign country. [28 G. A., ch. 45, § 9.]

SEC. 1346-j. Acts in conflict repealed. The provisions of this act are intended to take the place of sections thirteen hundred and forty-five, and thirteen hundred and forty-six of the code, and such sections and each of them, and all other laws and parts of laws in conflict with this act are hereby repealed; provided, that all moneys now due the state on account of any assessment or charge made against any of such persons, co-partnerships, associations, corporations, or syndicates, and all penalties and

charges therein growing out of any of said repealed section[s], shall be paid and collected under the provisions of said repealed sections, the same as if said sections were not repealed, and it is hereby expressly provided that all rights of the state now accrued under said sections are hereby saved from the operation of the aforesaid repealing clauses. [28 G. A., ch. 45, § 10.]

SEC. 1347. Peddlers—amount of tax.

This section, as amended by 27 G. A., chap. 32, and 30 G. A., chap. 48, does not apply to a traveling solicitor taking orders for goods from samples which are subject to the approval of his employer, and which on approval are to be filled by the delivery of the goods by the solicitor sent to him by his employer for that purpose. *State v. Bristow*, 131-664.

This section is unconstitutional on account of the exception as to persons who have served in the Union army or navy. The classification attempted is based on no apparent necessity or difference in conditions or circumstances. *State v. Garbroski*, 111-496.

SEC. 1347-a. Repeal—peddlers—amount of tax. That chapter forty-eight (48) acts of the thirtieth general assembly, be and the same is hereby repealed and the following is enacted in lieu thereof:

“Peddlers plying their vocation in any county in this state outside of a city or incorporated town, shall pay an annual county tax of twenty-five dollars for each pack peddler or hawkers on foot, fifty dollars for each one horse conveyance, and seventy-five dollars for each two-horse conveyance. Such tax shall be paid to the county treasurer, who shall issue to the person making such payment duplicate receipts therefor and upon presentation of one of same to the county auditor, he shall issue to the person presenting such receipt a license which shall not be transferable authorizing such person to ply the vocation of a peddler in such county for the term of one year from the date thereof. The word “peddlers” under the provisions of this act, and wherever found in the code, shall be held to include and apply to all transient merchants and itinerant vendors selling by sample or by taking orders, whether for immediate or future delivery. The provisions of this act shall not be construed to apply to persons selling at wholesale to merchants, nor to transient vendors of drugs, nor to persons running a huckster wagon, or selling and distributing fresh meats, fish, fruit, or vegetables, nor to persons selling their own work or production either by themselves or employes.” [32 G. A., ch. 59.]

SEC. 1348. License. Any person peddling outside the limits of a city or town without such license or after the expiration thereof, shall be guilty of a misdemeanor, whether he be the owner of the goods sold or carried by him or not, and, on conviction thereof, shall forfeit and pay into the county treasury, in addition to the penalty imposed therefor, double the amount of the tax for one year as fixed in the preceding section. The license shall be good only in the county in which issued, and shall not authorize peddling in cities and towns. [C., '73, § 907; R., § 792; C., '51, §§ 511, 512.] [28 G. A., ch. 46, § 1.]

SEC. 1350. Personal property—real estate—buildings.

Assessments of personal property relate back to the first of January previous. *Peters v. Davenport*, 104-625; *In re Kauffman's Estate*, 104-639.

Assessments may properly be made in

the name of the owner of the personal property on the first of January, although at the time of the assessment the owner is deceased. *Peters v. Davenport*, 104-625.

SEC. 1352. Listing property—valuation.

An assessment in the absence of evidence to the contrary will be presumed to have been properly made. *In re Kauffman's Estate*, 104-639.

The description is sufficiently definite

if it enables a competent person to identify the property. Abbreviations may be used if generally understood. *Watkins v. Couch*, 111 N. W. 315.

SEC. 1354. Duty of assessor—owner to assist.

Cattle brought into the state for feeding purposes, and kept in the state until after the first of January, are subject to taxation, although the owner is a non-resident. The case is different where the property is taken through the state merely in the course of transportation. *Fennell v. Pauley*, 112-94.

Where, through clerical mistake, the amount of the valuation fixed by the assessor is erroneously entered on the list, the taxpayer is not precluded from questioning the amount of the assessment by failure to go before the board of equalization for relief. *Smith v. McQuiston*, 108-363.

SEC. 1356. Notice of valuation.

The omission of the assessor to give written notice to the person assessed of the valuation placed upon his property

will not render the assessment invalid. *In re Kauffman's Estate*, 104-639.

SEC. 1357. Refusal to furnish statement.

The penalty for failure to make return as required cannot be avoided by subsequently making a return after the assess-

or's books have been placed before the board of review. *Farmers' Loan & Trust Co. v. Fonda*, 114-728.

SEC. 1360. Assessment rolls and books. The auditor shall procure and furnish to each assessor a supply of blank assessment rolls, on which to enter, separately, the names of all persons, partnerships, corporations or associations assessed, which rolls shall be made in duplicate, except that the oath form in the original may be omitted and the following inserted in lieu thereof: "If you are not satisfied that the foregoing assessment is correct, you can appear before the board of review, which meets at on the first Monday of April next. Dated day of 19 Assessor." Said duplicate shall be signed by the assessor, detached from the original, and delivered to the person assessed. He shall also furnish to each assessor a supply of blanks in this chapter described as "Assessment Roll, Form No. 2," which shall be in duplicate, and subject to the same conditions as the roll above provided for. The auditor shall also furnish to the assessor two assessment books, each page of which shall be headed "Assessor's book for township, county, Iowa, independent district of," and shall contain columns ruled and headed for the information required by this act, which rolls and books shall be substantially in the following form:

ASSESSMENT ROLL.

Name.....Age..... Address.....No. Dogs.....male.....female.....

No. road district. Name or number of school district.	PART OF SECT'N OR NAME OF TOWN.	Section or lot. Township or block. Range.	Value of new buildings.	No. of acres improved.	No. of acres unimproved.	TOTAL NUMBER OF ACRES TAXABLE		LANDS.		LTS.	Actual value of real estate.	EX-EMP'T'NS	No. of articles.	DESCRIPTION OF PERSONAL PROPERTY.	Actual value. Remarks.
						Acres	100	Actual value per acre.	Actual value.						
														Colts 1 year old.....	
														Colts 2 years old.....	
														Colts 3 years old.....	
														Horses over 3 years old.	
														Stallions.....	
														Mules and asses over 1 year old.....	
														Heifers 1 year old.....	
														Heifers 2 years old.....	
														Cows.....	
														Steers 1 year old.....	
														Steers 2 years old.....	
														Steers 3 years old or over.....	
														Bulls.....	
														Work oxen.....	
														Sheep over 6 months old	
														Swine over 6 months old	
														Vehicles.....	
														Household furniture of hotel and boarding-house.....	\$.....
														Moneys and credits fr'm form No. 2.....	\$.....
														Merchandise.....	\$.....
														Other personal property	\$.....
														Corporation stock.....	\$.....
														Total actual value personal.....	
														Total taxable value personal.....	
														Total actual value real estate.....	
														Total net taxable value real estate.....	
Total number of acres - - - - - Total actual value of real estate - - - - - \$ Total taxable value of real estate - - - - - \$ Total exemptions - - - - - \$ Net total value of lands and lots - - - - - \$															

Date of Inventory.....

Report name of soldier or sailor; or widow of soldier or sailor, and names of persons who by reason of age or infirmity claim to be unable to contribute to public revenue.

Notice of right to appear before board of review given..... A. D.....

Changes by board of review are as follows:

STATE OF IOWA, }
COUNTY. } ss.

I,, do solemnly swear (or affirm) that I am the person assessed above, that I have read the foregoing assessment roll of property listed or assessed to me, and that the same is a full, true and correct list of my taxable property, both real and personal property, subject to taxation within this district, and all property which should be listed on this assessment roll to me or by me.

Subscribed and sworn to (or affirmed) this day of..... A. D....., before me.

..... Assessor.

ASSESSOR'S BOOK.

..... Township, County, Iowa.
 Independent District of

Owner's name.	
Under 45.	Polls.
Over 45.	
Number of road district.	
Name or number of school district.	
Part of section or name of town.	
Section or lot.	
Township or block.	
Range.	
Number of acres improved.	
Number of acres unimproved.	
Acres.	Total No. of acres taxable.
100.	
Value of new buildings.	
Actual value per acre.	LANDS.
Actual value.	
Actual value.	Lots.
Total actual value of real estate.	
For Roads.	Exemption.
For Homesteads.	
Net actual value of lands and lots.	
Total taxable value of real estate.	
Number.	Colts 1 year old.
Actual value.	
Number.	Colts 2 years old.
Actual value.	
Number.	Horses 3 years old and over.
Actual value.	
Number.	Stallions.
Actual value.	
Number.	
Actual value.	

(CONTINUED)

CATTLE.	
Number.	Heifers 1 year old.
Actual value.	
Number.	Heifers 2 years old.
Actual value.	
Number.	Cows.
Actual value.	
Number.	Steers 1 year old.
Actual value.	
Number.	Steers 2 years old.
Actual value.	
Number.	Steers 3 years old or over.
Actual value.	
Number.	Bulls.
Actual value.	
SWINE.	
Number.	
Actual value.	
Number.	Sheep over 6 months.
Actual value.	
Number.	Vehicles.
Actual value.	
Number.	H'ld in 'tre, hotel and boarding house.
Actual value.	
Actual value.	Moneys and credits.
Corporation stocks.	
Merchandise.	
Other personal property.	
Actual value.	Total personal property.
Taxable value.	Actual value of all property.
Taxable value.	
Male.	
Female.	Dogs.

ASSESSMENT ROLL—FORM No 2
ASSESSMENT OF MONEYS AND CREDITS

Of _____ of _____ township of _____ state of Iowa, January 1,

NOTES, BONDS AND OTHER EVIDENCES OF CREDIT	ACTUAL VALUE
Aggregate amount of notes	
Aggregate amount of bonds	
Aggregate amount of other written evidences of credit	
Aggregate amount of money in bank	
Aggregate amount of other money	
Aggregate amount of book accounts—good	
Aggregate amount of book accounts—doubtful	
Aggregate amount of checks, drafts and other cash items	
Total moneys and credits	
LIABILITIES	
Total amount of notes	
Total amount of accounts	
Total amount of other debts	
Total amount of debts	
Net amount of moneys and credits	

The party assessed need list only such of his liabilities as he may desire to have subtracted from his moneys and credits

STATE OF IOWA, _____ County, ss.

I, _____ do solemnly swear (or affirm) that the above is a full, true and correct statement of all moneys and credits owned by me, and that the liabilities above given to be deducted therefrom are obligations in good faith actually owed by me

Signed _____
Subscribed and sworn to (or affirmed) before me by _____
this _____ day of _____

[C '73, § 821, R , §§ 732-3]
[27 G A ch 30, § 3]

Assessor

SEC. 1361. Schedules returned. The assessor shall furnish to each person, partnership, corporation or association, except those otherwise assessed as provided by law, a blank known as "Assessment Roll—Form No. 2," as provided in the preceding section, upon which such person, partnership, corporation or association shall enter and set out all moneys and credits of whatsoever kind or nature belonging to such person, partnership, corporation or association, and such liabilities as they claim should be deducted from the total of their moneys and credits. The assessor shall carry the aggregate moneys and credits of such persons, partnerships, corporation or associations to the regular schedule. The assessor shall return all schedules with the assessment books to the county auditor as is provided in this chapter, and the county auditor shall carefully keep all schedules known and described in this chapter as "Assessment Roll—Form No. 2," for the period of five years from the time of filing of the same in his office. [27 G. A., ch. 30, § 4.]

SEC. 1365. Completion of assessment.

Failure of the assessor to attach to the assessment rolls his oath, as required by statute, renders the taxes based on such assessment void. *Warfield-P.-H. Co. v. Averill Groc. Co*, 119-75.

SEC. 1370. Local board of review.

The statutory provisions as to the local board of review do not confer authority upon such tribunal to transfer property for assessment purposes from one school district to another. The determination of a question as to the locality within the township at which personal property shall be entered on the assessment rolls is left entirely to the assessor *Independent School District v. Board of Review*, 131-195.

SEC. 1371. Clerk—correction of assessments. The clerk or recorder of the township, city or town, as the case may be, shall be clerk of the board of review, and keep a record of its proceedings, and the assessor shall be present at its meeting and make upon the assessment rolls all corrections or additions directed by the board. At such meetings it shall be the duty of the assessor to read each and every taxpayer's name and assessment on the assessment rolls, and, if the assessment is approved, pass to the next name. After checking the same, the board shall then take up the unchecked names in alphabetical order, and raise or lower the same as in their opinion will be just; checking off each taxpayer as the same is adjusted. [18 G. A., ch. 109, § 1; C., '73, § 831; R., § 740.] [27 G. A., ch. 33, § 1.]

The board of review in fixing the value of bank stock has the right to avail itself of any information within reach for the purpose of determining the real or market value of such stock. *First Nat. Bank v. City Council*, 112 N. W. 829.

SEC. 1372. Notice of assessment raised. In case the value of any specific property or the entire assessment of any person, partnership, corporation or association is raised, or new property is added by the board, the clerk shall give immediate notice thereof by mail to each at the postoffice address shown on the assessment rolls, and at the conclusion of the action of the board therein the clerk shall post an alphabetical list of those whose assessments are thus raised and added, in a conspicuous place in the office or place of meeting of the board, and enter upon the records a statement that such posting has been made, which entry shall be conclusive evidence of the giving of the notice required. The board shall hold an adjourned meeting, with at least five days intervening after the posting of said notices, before final action with reference to the raising of assessments or the adding of property to the rolls is taken, and the posted notices shall state the time and place of holding such adjourned meeting, which time and place shall also be stated in the proceedings of the board. [18 G. A., ch. 109, § 3.] [27 G. A., ch. 30, § 5.]

Where the board of equalization increases the assessed value of a taxpayer's property without posting notice of its intention to do so, such increase will be invalid. *Cedar Rapids & M. C. R. Co. v. Redmond*, 120-601.

SEC. 1373. Complaint to board of review—appeal. Any person aggrieved by the action of the assessor in assessing his property may make oral or written complaint thereof to the board of review, which shall consist simply of a statement of the errors complained of, with such facts as may lead to their correction, and any person whose assessment has been raised or whose property has been added to the assessment rolls, as provided in the preceding section, shall make such complaint before the meeting of the board for final action with reference thereto, as provided in said section, and appeals may be taken from the action of the board with reference to such complaints to the district court of the county in which such board holds its sessions, within twenty days after its adjournment. Appeals shall be taken by a written notice to that effect to the chairman or presiding officer of the reviewing board, and served as an original notice. The court shall hear the appeal in equity and determine anew all questions arising before the board which relate to the liability of the property to assessment or the amount thereof, and its decision shall be certified by the clerk of the court to the county auditor, who shall correct the assessment books in his office accordingly. Any officer of a county, city, town, township or school district interested or a taxpayer thereof may in like manner make complaint before said board of review in respect to the assessment of any property in the township, city or town and an appeal from the action of the

board of review in fixing the amount of assessment on any property concerning which such complaint is made, may be taken by any of such aforementioned officers. Such appeal is in addition to the appeal allowed to the person whose property is assessed and shall be taken in the name of the county, city, town, township or school district interested and tried in the same manner, except that the notice of appeal shall also be served upon the owner of the property concerning which the complaint is made and affected thereby or person required to return said property for assessment. Upon trial of any appeal from the action of the board of review fixing the amount of assessment upon any property concerning which complaint is made, the court may increase, decrease or affirm the amount of the assessment appealed from. [18 G. A., ch. 109, § 1; C., '73, § 831; R., § 740.] [32 G. A., ch. 60, § 1.]

Appeal—what questions: No appeal can be taken from the action of the assessing tribunal refusing to make an assessment. *In re Assessment of Farmers' L. & T. Co.*, 129-588.

On all appeals from the action of the treasurer in assessing omitted property the matter stands before the district court in the same situation as before the treasurer and the court should determine whether or not the property owner was liable to assessment on the property with which the treasurer has assessed him. *Schoonover v. Petcina*, 126-261.

If the treasurer has attempted to assess the person complaining with moneys and credits as omitted from assessment, it is for the court to fix the amount of moneys and credits for which the complainant should have been assessed. *Ibid.*

If the court on appeal finds that no assessment should have been made the assessment by the treasurer should be set aside in toto, and if it appears that as to any items included in the treasurer's assessment the complainant was not liable to assessment then the court should reduce the assessment accordingly. *Ibid.*

The district court must have something before it to show what complaint was made to the board of review and what action was taken thereon, and the burden of proof is on the appellant to show that the decision of the board was erroneous. The taking of an appeal does not make an assessing tribunal out of the district court. *Frost v. Board of Review*, 114-103.

The court will presume that the board of review acted properly and upon sufficient evidence as to values, and the burden is upon the appealing taxpayer to overcome this presumption by evidence of injustice or inequity of the assessment as raised by the board of review. *First Nat. Bank v. City Council*, 112 N. W. 829.

It is the questions arising before the board which the district court is required to try on appeals from the board of equalization. Such objections may be raised in the most informal way, and may be quite

indefinite and general in statement, and need not be reduced to writing, yet they must be in some manner brought to the attention of the tax tribunal. *Gibson v. Cooley*, 129-529.

The court on appeal may correct the assessment of property in accordance with the application made in the first instance to the board of equalization, but it cannot include property for assessment as to which no assessment has been made, and no question raised before the board of equalization. *Cedar Rapids & M. C. R. Co. v. Cedar Rapids*, 106-476.

The district court on appeal is authorized to determine only the correctness of the assessment with reference to the complaints made, and cannot increase the assessment of appellant. *Farmers' Loan & Trust Co. v. Fonda*, 114-728.

Courts have no authority either to make or correct assessments. *Judy v. National State Bank*, 133-252.

Until by final adjournment the board has placed it beyond its power to further review the assessment complained of, no right of appeal exists. *Barz v. Board of Equalization*, 133-563.

Effect of judgment: An adjudication of the court on an appeal from an assessment of land contracts for one year, it was decided that they were not assessable, held binding as an adjudication with reference to the assessment of the same contracts to the same person for a subsequent year. *Defries v. McMeans*, 121-540.

Procedure: The notice here contemplated must be served on the mayor, who is by law the presiding officer of the city council, unless another presiding officer has been appointed of record. *Frost v. Board of Review*, 113-547.

While jurisdiction is conferred by the service and filing of a proper appeal, a transcript of the proceedings of the board of review should be required not only that the proceedings upon which the appeal is passed may be clearly and fairly brought to the attention of the court, but that the court record may furnish a proper basis

upon which to rest a decree. *City Council v. National Loan & Inv. Co.*, 122-629.

The notice need not recite the fact of the complaint by the appealing party to the board of review, but such facts should appear in the transcript. A mere allegation of that fact in a petition filed by the appellant and not denied by responsive pleading is not sufficient to show the jurisdiction of the court. *Ibid.*

While pleadings may properly be filed, the rules governing the making up of issues in equity actions in general, do not apply. *Ibid.*

Jurisdiction of an appeal to the district court is obtained by service of a notice. When a notice has been served, if the board of review neglects to send up the transcript, such neglect may result in a dismissal of the appeal if the appellant does not obtain the proper order or rule requiring the performance of that duty by the board. But the appellant may be allowed by the court to introduce a transcript during the progress of the trial. *City Council of Marion v. Cedar Rapids & M. C. R. Co.*, 120-259.

There is nowhere any direction or suggestion requiring a bond on such appeal, and the court has no power to impose any such condition. *Ibid.*

The notice of appeal gives the district court jurisdiction, and whether or not after acquiring jurisdiction it has sufficient evidence before it upon which to act intelligently, must be determined from the proceedings, and a judgment entered as the result of such proceedings will not be void. *German-American Sav. Bank v. Council, etc.*, 118-84.

If the appellant neglects to present a transcript of the proceedings and to docket the appeal, the appellee may cause the appeal to be docketed and dismissed under the provisions of Code § 3660. *Stephens v. City Council*, 132-490.

Other remedies—when allowable: After reversal in the supreme court of the finding of the district court relieving a taxpayer from taxes assessed against him, the reversal being on the ground that no sufficient complaint of the assessment was made before the board of review, the taxpayer cannot in the lower court interpose objections not thus made. *City Council v. National Loan & Inv. Co.*, 130-511.

A national bank representing its stockholders is a party in interest as to the taxation of its stock and may appear before the board of review and make complaint of the assessment of such stock and prosecute an appeal from adverse decision. *First National Bank of Independence v. Independence*, 123-482.

Where a loan and trust company objects before the board of review to an

assessment on its moneys and credits, it is not required to point out the manner in which its property should be assessed, and it may object on appeal from the action of the board of review to such assessment on moneys and credits although it might have been assessed on its corporate stock. *Wahkonsa Inv. Co. v. Ft. Dodge*, 125-148.

A prior contention with reference to assessments for other years that the company was assessable only as a savings bank did not estop it from objecting as to the year in question to an assessment on moneys and credits. *Ibid.*

Where the value fixed by the assessor is by mistake erroneously entered on the tax list, the property owner is not precluded from seeking other relief by failing to apply to the board of review for correction. *Smith v. McQuiston*, 108-363.

Irregularities and inequalities in assessment are to be complained of only by appeal to the board of review and from it to the district court. *Carpenter v. Jones County*, 130-494.

Where the board of review or the treasurer, in assessing property omitted from taxation, acts within the scope of the judicial or quasi-judicial power involved, such action is to be reviewed on appeal, and not in a proceeding for injunction, nor in an action to recover damages for an illegal act. *Stevens v. Carroll*, 130-463.

Injunction: The provision as to complaints to the board of review is broad enough to permit the correction of excessive assessments fraudulently made, and therefore one who complains that his property has been assessed too high on account of discriminations against him as a non-resident should ask relief by application to the board of review, and not by action in equity. The jurisdiction conferred upon the board is exclusive, unless otherwise expressed or clearly manifested. *Crawford v. Polk County*, 112-118.

If the tax is illegal, and not merely irregular, its enforcement may be restrained by injunction. *Montis v. McQuiston*, 107-651.

An excessive valuation can be corrected only on appeal, and not by an action to enjoin the collection of the tax. *Lake City Elec. Light Co. v. McCrary*, 132-624.

Equity will interfere by injunction to restrain the enforcement of a tax not supported by an assessment, but injunction will not lie to correct the error or wrong of an excessive assessment. *Collins v. Keokuk*, 118-30.

The fact that no appeal is authorized from an equalization board does not justify the interposition of the court by injunction to restrain the enforcement and

levy of a tax based upon an assessment. *Ibid.*

Certiorari: The board of review having properly acquired jurisdiction to determine the correctness of the assessment, its subsequent action in raising the assessment cannot be questioned by certiorari, on the ground that there was not sufficient evi-

dence before it on which to base such increase. The remedy in such case is by appeal. *Ferguson v. Board of Review*, 119-338.

The board acts with reference to the assessment returned by the assessor, and is authorized to act on the same sources of information. *Ibid.*

SEC. 1373-a. Pending litigation. The provisions of this act shall not apply to pending litigation. [32 G. A., ch. 60, § 2.]

SEC. 1374. Withholding property from assessment—penalty.

In general: Although the language of this section does not expressly make it retroactive, yet as it refers to an existing condition it may be applied to the collection of taxes on property omitted from taxation before the Code took effect. *Galusha v. Wendt*, 114-597; *Beresheim v. Arnd*, 117-83.

The act of the treasurer in determining that property has been omitted, and ascertaining the tax due on account thereof is a substitute for the assessment by the duly constituted authorities. *Ibid.*

The act of the assessor for previous years in assessing only a portion of the moneys and credits of a taxpayer does not constitute such an adjudication as to preclude assessments for moneys and credits omitted where such omission resulted from the fraud of the officer or the failure of the taxpayer to return the full amount of his moneys and credits for taxation. *Galusha v. Wendt*, 114-597.

But the mere fact that it appears that subsequently the taxpayer had a larger amount of moneys and credits than had been returned for assessment for previous years will not in itself show liability for taxes on omitted property. *Ibid.*

No penalty can be enforced with reference to taxes which should have been assessed prior to the taking effect of the Code, nor can interest on such taxes be collected from the time when they should have been assessed. *Ibid.*

The fact that the penalty provided cannot be imposed in such case does not defeat the effect of the entire provision as to property previously omitted from taxation. *Beresheim v. Arnd*, 117-83.

The fact that the treasurer is authorized to determine the amount for which suit shall be brought in such case and that by Code, § 490, a commission on the money collected is allowed to the treasurer does not render the section unconstitutional as making the treasurer a judge in a matter in which he is interested. Under the provision as to treasurer's compensation he is only collaterally and not directly interested in the result of the action. *Ibid.*

This section is not repealed by the en-

actment of chap. 50, acts of 28 G. A., (see Supp., §§ 1407-a.—e.). *Lambe v. McCormick*, 116-169.

Discovery of omitted property by agents: A county may contract with agents to discover property omitted or concealed from taxation. *Shinn v. Cunningham*, 120-383.

The provisions of 28 G. A., chap. 50, limiting the percentage which may be allowed to an agent under such contract, do not affect the compensation for services previously rendered under a valid contract. *Ibid.*

The board of supervisors has the authority to employ persons to discover property which has been omitted from taxation, for the purpose of enabling the treasurer to bring action for the taxes due thereon. *Disbrow v. Board of Supervisors*, 119-538.

The property owner cannot in a suit by the county for taxes on omitted property raise the question as to the validity of the contract between the county and attorneys employed for the purpose of discovering omitted property. *Galusha v. Wendt*, 114-597.

Demand: While the notice of the action in which the treasurer seeks to recover taxes on omitted property is not the demand contemplated by this section, nevertheless an original notice in another action, indicating that payment of such taxes is demanded, which action is dismissed or otherwise disposed of, may constitute the demand contemplated. *Beil v. Stevens*, 116-451.

If such original notice is signed by the treasurer with words indicating that he acts in his official capacity, the court will take judicial notice that he was the treasurer of the county at the date when such notice was served. *Ibid.*

Further as to notice, listing and appeal, see Supp. § 1407-a., and notes.

Action: Aside from the provisions of this section, an action cannot be maintained to recover taxes upon omitted property. *Judy v. National State Bank*, 133-252.

If the petition follows the language of the statute with reference to the treasurer's knowledge as to omitted taxes, it is not vulnerable to attack on the ground that the allegation is by way of information and belief. *Robinson v. Ferguson*, 119-325.

Limitation: The fact that a time limit is fixed within which corrections by the treasurer may be made, while under Code § 1385, with reference to entry on tax lists of omitted property by the auditor no limit is fixed, indicates that the authority of the auditor is limited to the current tax lists. *Mead's Estate v. Story County*, 119-69.

The treasurer alone has power to demand taxes on omitted property within five years from the date at which the assessment should have been made. The power of the auditor, under Code, § 1385, is limited to the current tax list. *Jewett v. Foote*, 119-359; *Mead's Estate v. Story County*, 119-69.

The five-year limitation begins to run from the date when the assessment should by law be completed, and not from the date when the tax lists are by law to be transmitted from the auditor to the treasurer. *Thornburg v. Cardell*, 123-313.

SEC. 1375. County board of review.

The power of county boards of equalization is plainly limited to equalizing by adding to, or taking from, the aggregate valuation of townships, cities and towns as a whole, and not as to parts thereof. Such board has no authority to equalize among

The provisions of 28 G. A., chap. 50, are to be construed with reference to the language of this section, and therefore the five-year limitation of this section is applicable. *Siberling v. Cropper*, 119-420.

The limitation of such an action is to be found in the language of that section, and not in the general statute of limitations. *Ibid.*

The action of the treasurer must be brought within five years after the expiration of the thirty days given by his notice within which to appear and make objection. But the treasurer cannot delay the running of the statute by failing to make demand and give notice. *Shearer v. Citizens' Bank*, 129-564.

The five year limitation against an assessment of property omitted from taxation commences to run from the time when the assessment of such property should have been made. *Schoonover v. Petcina*, 126-261.

The five year limitation on the treasurer's right to recover taxes on property omitted from assessment is to be computed from the completion of the work of the assessor. *Thornburg v. Cardell*, 123-313.

assessment districts which are embraced in the same city. The city board has ample power to remedy inequality as among assessment districts by raising or lowering the assessments throughout the city. *Montis v. McQuiston*, 107-651.

SEC. 1378. State board of review. The executive council shall constitute the state board of review, and shall meet at the seat of government on the second Monday of July in each year. The auditor of state shall lay before it the abstracts transmitted to him by the auditor, as required by the preceding section. [C., '73, § 834; R., § 742; C., '51, §§ 481-2.] [32 G. A., ch. 5, § 3.]

SEC. 1380-a. Repeal. Section thirteen hundred and eighty (1380) of the code is hereby repealed. [27 G. A., ch. 34, § 4.]

SEC. 1380-b. State levy. The executive council shall, in the year 1898, fix the rate per centum to be levied upon the valuation of the taxable property of the state necessary to yield for general state purposes approximately the sum of sixteen hundred thousand dollars (\$1,600,000) and in the year 1899 shall fix the rate necessary to yield approximately fifteen hundred thousand dollars (\$1,500,000). [27 G. A., ch. 34, § 1.]

SEC. 1380-c. Same. In the year 1900 and each subsequent year the executive council shall fix the rate per centum to be levied upon the valuation of the taxable property of the state necessary to raise such amount for general state purposes as shall be designated by the general assembly, either by statute or joint resolution. [27 G. A., ch. 34, § 2.]

SEC. 1380-d. Council to certify to county auditor. The executive council shall certify the rate so fixed to the auditor of each county. [27 G. A., ch. 34, § 3.]

SEC. 1382. Certifying results to county auditor. The board shall keep a record of its proceedings, and finish its review and adjustment on or before the first Monday of August. The county auditor shall thereupon add to or deduct from the valuation of each kind or class of property in his county the required percentage, rejecting all fractions of fifty cents or less in the result, and counting all over fifty cents as one dollar. [C., '73, § 836; R., § 743; C., '51, § 183.] [32 G. A., ch. 5, § 3.]

SEC. 1382-a. Repeal—acts in conflict. That all statutes in conflict with any of the provisions of this act be, and are, hereby amended so as not to be in conflict with the provisions of this act. [32 G. A., ch. 5, § 3.]

SEC. 1383. Tax list. All taxes, except road-tax, [taxes] which are uniform throughout any township or school district shall be formed into a single tax, and entered upon the tax list in a single column, to be known as a consolidated tax, and each receipt shall show the percentage levied for each separate fund. Before the first day of January in each year, the county auditor shall transcribe the assessments of the several townships, towns or cities into a book, to be provided at the expense of the county for that purpose, to be known as the tax list, properly ruled and headed, with distinct columns in which shall be entered the names of taxpayers, descriptions of lands, number of acres and value, number of town lots and value, value of personal property and each description of tax, with a column for polls and one for payments, and shall complete the same by carrying out the totals and footings of columns. At the end of the list for each township, town or city he shall make an abstract thereof, and apportion the consolidated tax among the respective funds to which it belongs, according to the number of mills levied for each. [C., '73, §§ 837-9; R., §§ 745-6; C., '51, §§ 485-6.] [30 G. A., ch. 50, & 1.]

SEC. 1385. Errors corrected.

The auditor has authority to determine when a mistake on the tax list, not due to error of judgment on the part of the assessor, has been made, but when the determination of whether there is a mistake depends upon facts outside of the record, it is wise for the auditor to decline to act. *Smith v. McQuiston*, 108-363.

The extension of the application of this section by 28 G. A., chap 47, (Supp. §§ 1385-a—c), and the enactment of 28 G. A., chap. 50, (Supp. §§ 1407-a—e), which may be construed as relating to Code § 1398, do not amount to an implied repeal of Code § 1374. *Lambe v. McCormick*, 116-169.

The auditor can act with reference to omitted property only for the purpose of

adding such property to the tax list for the current year. *Thornburg v. Cardell*, 123-313.

The county auditor has no duty or authority with respect to the collection of taxes on property withheld from assessment save of adding such omitted property to the tax list for the current year. *Heath v. Albrook*, 123-559.

The auditor's power to list omitted property under this section as amended by 28 G. A., chap. 47, (Supp. §§ 1385-a—c), is limited to the current tax list, and cannot be exercised without limitation as to the time. *Mead's Estate v. Story County*, 119-69; *Jewett v. Foot*, 119-359; *Thornburg v. Cardell*, 123-313.

SEC. 1385-a. Repeal. That section one thousand three hundred and eighty-five (1385) of the code be and the same is hereby repealed and the following enacted in lieu thereof. [28 G. A., ch. 47, § 1.]

SEC. 1385-b. Errors—omitted property—how corrected. The auditor may correct any error in the assessment or tax list, and may assess and list for taxation any omitted property; but before assessing and listing for taxation any omitted property he shall notify by registered letter the person, firm, corporation, or administrator, or other person in whose name the property is taxed, to appear before him at his office within ten days

from the time of said notice and show cause, if any there be, why such correction or assessment should not be made, and should such party feel aggrieved at the action of said auditor he shall have the right of appeal therefrom to the district court. And if such correction or assessment is made after the books have passed into the hands of the treasurer he shall be charged or credited therefor as the case may be. All expense incurred in the making of said correction or assessment shall be borne *pro rata* by the funds which are affected by said correction and the proceedings to be reported to the board of supervisors. [28 G. A., ch. 47, § 2.]

A mere notice by the auditor to the taxpayer with reference to omitted property is not such assessment as is contemplated by law. *Judy v. National State Bank*, 133-252.

The statutory provision authorizing the auditor to assess omitted property for taxation is not unconstitutional. *Clark v. Horn, Auditor*, 122-375.

SEC. 1385-c. Appeal. The appeal herein provided for shall be taken within ten days from the time of the final action of the auditor, by a written notice to that effect to the auditor, and served as an original notice. The court on appeal shall hear and determine the rights of the parties in the same manner as appeals from the board of review, as prescribed in section thirteen hundred and seventy-three (1373) of the code. [28 G. A., ch. 47, § 3.]

SEC. 1389. Treasurer to enter delinquent taxes.

Where the taxes have not been brought forward as required by statute a sale therefor is invalid and the owner should be permitted to redeem. *Smith v. Callanan*, 103-218.

tor by a city for collection if not brought forward on the treasurer's books as required with reference to general taxes, cease to be a lien upon the property. *Fitzgerald v. Sioux City*, 125-396.

Special assessments certified to the audi-

SEC. 1389-a. Repeal—treasurer to keep record. Section thirteen hundred and eighty-nine (1389) of the code is hereby repealed, and the following enacted in lieu thereof:

The treasurer shall, after October 1st, and before December 31st, of each year, enter in a book to be kept in his office as a part of the records thereof, to be known as the delinquent personal tax list, all delinquent personal taxes of any preceding year. [28 G. A., ch. 48, § 1.]

SEC. 1389-b. What to contain. Such entry of tax on delinquent personal tax list shall give the names of delinquents alphabetically arranged, with amounts of tax and for what year or years, and where property was located when assessed. [28 G. A., ch. 48, § 2.]

Abbreviations in describing the location of the property will not render the entry void. *Watkins v. Couch*, 111 N. W. 315.

SEC. 1389-c. Lien on real estate. Personal tax entered on delinquent personal tax list, as provided in sections one and two of this act, shall constitute a lien on any real estate owned or acquired by any such delinquent, and so remain until the same has been paid or legally cancelled, and taxes not so entered for each year shall cease to be a lien. [28 G. A., ch. 49, § 3.]

SEC. 1389-d. Entry of delinquent real estate taxes. The treasurer shall each year, upon receiving the tax list, enter upon the same in separate columns opposite each parcel of real estate on which the tax remains unpaid for any previous year, the amount of such unpaid tax, and unless such delinquent real estate tax is so brought forward and entered it shall cease to be a lien upon the real estate upon which the same was levied, and upon any other real estate of the owner. But to preserve such lien it shall only

be necessary to enter such tax, as aforesaid, opposite any tract upon which it was a lien. Any sale for the whole or any part of such delinquent tax not so entered shall be invalid. [28 G. A., ch. 48, § 4.]

SEC. 1391. Repeal—delinquent taxes. That section thirteen hundred and ninety-one (1391) of the code be and the same is hereby repealed and the following enacted in lieu thereof:

“No penalty or interest shall be collected upon taxes remaining unpaid four years or more from the thirty-first day of December of the year in which the tax books containing the same were first placed in the hands of the county treasurer, and the board of supervisors at the January meeting may declare such tax unavailable, and when so declared by the board, the amount shall be credited to the treasurer by the auditor as unavailable and he shall apportion such tax among the funds to which it belongs. Any portion of such tax belonging to the state shall be reported by him in his semi-annual settlement sheets to the auditor of state as unavailable, whereupon the auditor of state shall credit the county with the amount so reported, but nothing in this act shall be construed to in any way release the county treasurer from any duty required of him in the collection of delinquent taxes, nor to release the tax payer from his liability for the same. Should any of such tax afterward be collected, the county treasurer shall distribute the net amount collected among the several funds the same as though it had never been declared unavailable, and the portion belonging to the state shall be credited back to the state and included in the treasurer’s remittance of other state taxes to the treasurer of state and shall be reported by the county auditor in his semi-annual settlement sheets to the auditor of state, who shall recharge the same to the county.” [31 G. A., ch. 51.]

SEC. 1398. Assessment of omitted property.

Although the provisions of 28 G. A., chap. 50, (Supp. §§ 1407-a—e), may be construed as relating to this section, and those of 28 G. A., chap. 47, (Supp. §§ 1385-a—c), as amplifying the provisions of Code § 1385, nevertheless these acts are not to be regarded as repealing Code, § 1374. *Lambe v. McCormick*, 116-169.

SEC. 1400. Lien of taxes. Taxes upon real estate shall be a lien thereon against all persons except the state. Taxes due from any person upon personal property shall be a lien upon any and all real estate owned by such person or to which he may acquire title. As against a purchaser, such liens shall attach to real estate on and after the thirty-first day of December in each year. Taxes upon stocks of goods or merchandise shall be a lien thereon and shall continue a lien thereon when sold in bulk, and may be collected from the owner, purchaser or vendee. In all cases where buildings are assessed as personal property, the taxes shall be and remain a lien on said buildings from the date of levy until paid. [21 G. A., ch. 133; 20 G. A., ch. 194, § 1; C., '73, §§ 853, 865; R., § 759; C., '51, § 495.] [29 G. A., ch. 59, § 1.]

The lien provided for by this section attached, as to taxes already due on stocks of goods, on the day when the Code went into effect. *Plymouth County v. Moore*, 114-700.

The lien of a general tax has priority over a special tax not chargeable on the property at the time the lien for the general tax attaches and sale thereunder is made. *Harrington v. Valley Sav. Bank*, 119-312.

The particular time at which taxes attach as a lien against a stock of goods is not specifically designated by statute but inferentially it is when they become due. But a sale of the stock in bulk after assessment and before the levying of the tax will not pass the title free from the lien of such tax when duly levied. *Larson v. Hamilton County*, 123-485.

The purchaser of a stock of goods taken subject to the taxes assessed thereon, does

not become personally liable for the payment of such taxes. *Larson v. Hamilton County*, 123-485.

Sale of goods at retail divests the lien of the taxes upon the stock and a subsequent payment of the tax by the purchaser of the stock to save other property from distraint is a voluntary payment which cannot be recovered from the vendor. The tax on a stock of goods is not a charge against the purchaser of such stock. *Iowa Mercantile Co. v. Blair*, 123-290.

As between vendor and vendee, the liability for taxes depends on the intent of the parties as to passing of title. The mere use of language indicating the passing of title at the time of execution of the

contract is not controlling, but the usual test is the transfer of possession. *Nunn-gesser v. Hart*, 122-647.

The provision as to the date when the tax lien attaches between the seller and buyer does not affect the question as to which of the parties to a contract to convey shall pay the taxes accruing between the date of the contract and when the conveyance is to be made. In the absence of any controlling stipulation the vendor retaining possession, rents and profits, until the conveyance is due is under obligation to pay the accruing taxes until the conveyance is made. *Clinton v. Shugart*, 126-179.

SEC. 1400-a. Plats—when filed. That on or before the first day of August, A. D. 1904, each telephone or telegraph company owning or operating a telephone or telegraph line, any part of which lies within the state of Iowa, shall file with the several county auditors of the counties within which any part of its line is located, a map of all its lines within said county, except its line within any platted city or town, drawn to a scale of not less than one (1) inch to four (4) miles, on which the location of the line or lines of said company is correctly shown. The map of any line situated upon any highway or street which is the dividing line between taxing districts, shall show on which side of said street or highway said line is situated and shall locate all points at which said line may cross said street or highway. A statement showing the length of pole line in each taxing district, of each company shall be filed when no map of the pole lines of such company is required under the terms of this act. A telephone or telegraph company whose line is situated upon the right of way of a railway may file, in lieu of the map required to be filed by the provisions of this section, a certificate setting forth along what lines of railway said company's telephone or telegraph line extends. On or before the first day of March, A. D. 1905, and annually thereafter, like maps, statements or certificates shall be filed with the several county auditors of counties in which any part of said lines may have been extended, constructed, relocated or taken down entirely, during the preceding calendar year, showing the correct location of all such new or relocated lines, and the location of any part abandoned or taken down, as the same existed on the thirty-first day of December preceding. Provided, county auditors of the several counties shall, upon application of any company, owning or operating a telephone or telegraph line in their respective counties, furnish a map or maps accurately showing the boundaries of all taxing districts in said county, and the public highways located within such taxing districts. [30 G. A., ch. 49, § 1.]

SEC. 1400-b. Failure or refusal to file. In the event of the failure or refusal of any telephone or telegraph company, owning or operating any telephone or telegraph line not situated upon the right of way of a railway, to file the map required under the provisions of section one (1) of this act, at the time and according to the conditions named, then the county auditor may cause the same to be prepared by the county surveyor and the cost thereof shall, in the first place, be audited and paid by the board of supervisors of the county, out of the county fund, and the amount thereof shall be by said board levied as a special tax against said company and the property of said company, which shall be collected in the same manner as county taxes and become a part of the county fund. [30 G. A., ch. 49, § 2.]

SEC. 1400-c. Forest and fruit tree reservations. That on any tract of land in the state of Iowa the owner or owners may select a permanent forest reservation not less than two acres in continuous area, or a fruit tree reservation not less than one nor more than five acres in area, or both, and that upon compliance with the provisions of this act, such owner or owners shall be entitled to the benefits hereinafter set forth. [31 G. A., ch. 52, § 1.]

SEC. 1400-d. Forest reservation. A forest reservation shall contain not less than two hundred growing forest trees on each acre. If the area selected is an original forest containing the required number of growing forest trees, it shall be accepted as a forest reservation under the provisions of this act. If the area selected is an original forest containing less than two hundred forest trees to the acre, or if it is an artificial grove, the owner or owners thereof shall have planted, cultivated and otherwise properly cared for the number of forest trees necessary to bring the total number of growing trees to not less than two hundred on each acre, during a period of not less than two years, before it can be accepted as a forest reservation within the meaning of this act, provided that no ground upon which any farm buildings stand shall be recognized as part of any such reservation. [31 G. A., ch. 52, § 2.]

SEC. 1400-e. Annual removal of trees. Not more than one-fifth of the total number of trees in any forest reservation may be removed in any one year, excepting in cases where the trees die naturally. [31 G. A., ch. 52, § 3.]

SEC. 1400-f. What considered forest trees. The ash, black cherry, black walnut, butternut, catalpa, coffee tree, the elms, hackberry, the hickories, honey locust, mulberry, the oaks, sugar maple, European larch and other coniferous trees, and all other forest trees introduced into the state for experimental purposes, shall be considered forest trees within the meaning of this act. In forest reservations which are artificial groves, the willows, box-elder, soft maple, cotton-wood, and other poplars, shall be included among forest trees for the purposes of this act when they are used as protecting borders not exceeding two rows in width around a forest reservation, or when they are used as nurse-trees for forest trees in such forest reservation, the number of such nurse-trees not to exceed one hundred on each acre; provided that only box-elder and soft maple shall be used as nurse-trees. [31 G. A., ch. 52, § 4.]

SEC. 1400-g. Groves. The trees of a forest reservation shall be in groves not less than four rods wide. [31 G. A., ch. 52, § 5.]

SEC. 1400-h. Fruit-tree reservation. A fruit-tree reservation shall contain not less than seventy fruit trees on each acre, growing under proper care, and may be claimed as such for a period of eight years after planting. [31 G. A., ch. 52, § 6.]

SEC. 1400-i. What considered fruit-trees. The cultivated varieties of apples, crabs, plums, cherries, peaches and pears shall be considered fruit-trees within the meaning of this act. [31 G. A., ch. 52, § 7.]

SEC. 1400-j. Replacing dead or removed trees. Whenever any tree or trees on a fruit-tree or forest reservation shall be removed or die, the owner or owners of such reservation shall, within one year, plant and care for other fruit or forest trees, in order that the number of such trees may not fall below that required by this act. [31 G. A., ch. 52, & 8.]

SEC. 1400-k. Restraint of live stock. Cattle, horses, mules, sheep, goats and hogs shall not be permitted upon a fruit-tree or forest reservation. [31 G. A., ch. 52, § 9.]

SEC. 1400-l. Taxable valuation. Forest reservations fulfilling the conditions of this act shall be assessed on a taxable valuation of one dollar per acre. Fruit-tree reservations shall be assessed on a taxable valuation of one dollar per acre for a period of eight years from the time of planting. In all other cases where trees are planted upon any tract of land, without regard to area, for forest, fruit, shade or ornamental purposes, or for wind-breaks, the assessor shall not increase the valuation of such property because of such improvements. [31 G. A., ch. 52, § 10.]

SEC. 1400-m. Penalty for violations. If the owner or owners of a fruit or forest reservation violate any provision of this act within the two years preceding the making of an assessment, the assessor shall not list any tract belonging to such owner or owners, as a reservation within the meaning of this act, for the ensuing two years. [31 G. A., ch. 52, § 11.]

SEC. 1400-n. Duties of assessor. It shall be the duty of the assessor to secure the facts relative to fruit and forest reservations by taking the sworn statement, or affirmation, of the owner or owners making application under this act; and to make special report to the county auditor of all reservations made in the county under the provisions of this act. [31 G. A., ch. 52, § 12.]

SEC. 1400-o. Duties of county auditor. It shall be the duty of the county auditor in every county to keep a record of all forest and fruit-tree reservations within his county; and to make report of the same to the secretary of the state horticultural society on or before November 15th of each year. [31 G. A., ch. 52, § 13.]

SEC. 1400-p. State forestry commissioner. The secretary of the Iowa state horticultural society shall be state forestry commissioner, without salary. It shall be his duty to promote the objects of this act, and he shall have power to appoint deputies without salary for each county, or group of counties, who shall assist him, and who shall make an annual report to him of forestry matters and of the operations of this act, within their respective territories, for the use of the state horticultural society. [31 G. A., ch. 52, § 14.]

CHAPTER 2.

OF THE COLLECTION OF TAXES.

SECTION 1403. Payment—installments.

Where the land is taxed as one parcel, and the mortgage covers a portion only, the mortgagee cannot purchase the entire parcel at tax sale and acquire title so as to divest the owner of the balance of the tract of his title. *Cone v. Wood*, 108-260, and see notes to Sec. 1440.

The weight of authority is that the particular remedy provided by statute for the collection of taxes is exclusive, and held that an action in equity for the enforcement of the lien of the mulct tax against the premises on which a liquor nuisance was situated could not be maintained. *Crawford County v. Laub*, 110-355. So held also as to enforcement of personal property tax under § 1406. *Plymouth County v. Moore*, 114-700.

The payment and acceptance of a tax

as assessed by the assessor does not operate as an estoppel to enforce against such taxpayer an additional assessment made by the board of review. *City Council v. National Loan & Inv. Co.*, 130-511.

One who makes voluntary payment of taxes cannot recover them back on the ground that they were not legal. *Oden-dahl v. Rich*, 112-182.

One whose title rests on forged instruments and is therefore invalid may recover of the true owner taxes paid by him under the mistaken belief as to his ownership, if such belief is not the result of his own carelessness or want of knowledge of the law, and such property may be had in an action at law. *Govern v. Russ*, 125-188.

SEC. 1406. Sale of personal property.

The provisions of this section as to the collection of personal property tax are exclusive of any other remedy, except as provided by statute, and a personal action cannot be maintained for such tax. *Plymouth County v. Moore*, 114-700.

The method of enforcing the lien of a tax being provided by statute an action at law cannot be maintained against the owner of property to recover the amount thereof. *Carroll County v. Ley*, 127-230.

SEC. 1407. Collectors—sheriff. Immediately after the taxes become delinquent, each county treasurer shall proceed to collect the same by distress and sale of the personal property of the delinquent taxpayers, and for this purpose he may appoint one or more collectors to assist him in collecting the same. Each collector appointed shall receive for his services and expenses the sum of five per cent. on the amount of all taxes collected and paid over by him, which percentage he shall collect from the delinquent, together with the whole amount of delinquent taxes and interest; and pay the same to the treasurer at the end of each month, and in the discharge of his duties as collector, should it become necessary to make the delinquent taxes by distress and sale, or should no collector be appointed, or should the collector fail to institute proceedings to collect said delinquent taxes, the treasurer shall place the same in the hands of the sheriff, or a constable, who shall proceed to collect the same, and either shall be entitled to receive the same compensation, in addition to the five per cent., as constables are entitled to receive for the sale of property on execution. [C., '73, § 859.] [31 G. A., ch. 53.]

The county cannot contract with the collector that he is to receive a larger sum than that specified, nor can he recover his statutory compensation after receiving under contract a larger percentage than authorized by law. Any amount paid under such contract in excess of the statutory compensation may be recovered

back. *Massie v. Harrison County*, 129-277.

To support such a contract it is not competent to show that the collector agreed to compile a delinquent tax list, as the compilation of such list pertained to the duties of the treasurer's office. *Ibid.*

SEC. 1407-a. Discovery of property withheld from taxation—contract—notice—appeal. The board of supervisors of any county may contract in writing with any person to assist the proper officers in the discovery of property not listed and assessed as required by law. Before listing the property discovered, the treasurer shall give the person in whose name it is proposed to assess the same, or his agent, ten days' notice thereof by registered letter addressed to him at his usual place of residence, fixing the time and place where objection to such proposed listing and assessment may be made. An appeal may be taken to the district court from final action of the treasurer by serving written notice upon him and otherwise proceeding as provided in section thirteen hundred and seventy-three (1373) of the code. [28 G. A., ch. 50, § 1.]

In general: This act is not unconstitutional as embracing more than one subject-matter or subject-matter not embraced in the title. *Beresheim v. Arnd*, 117-83.

The provisions of this act are not to be construed as impliedly repealing Code § 1374. *Lambe v. McCormick*, 116-169.

What property: Before the county treasurer may act with reference to the enforcement of taxes for property wrongfully withheld from assessment, it must appear that the property withheld was subject to taxation in the county. *Layman v. Iowa Telephone Co.*, 123-591.

Where a savings bank has been in fact assessed, the treasurer has no authority to make an additional assessment for the difference between the value of the stock as assessed and its real value. The statutory provision for assessment of omitted property by the assessor has no application to those cases where property, the subject of taxation, has been in fact entered on the assessment books and has not been withheld, overlooked, or for any other cause, not listed. *German Sav. Bank v. Trowbridge*, 124-514.

It is no defense to a proceeding to col-

lect taxes on property omitted from taxation in the proper taxing district that it has been in fact taxed for the year in question in another county, but if it has been taxed in the same county, though in another district than that in which it should have been taxed, the county is estopped by receiving the tax actually imposed from insisting on further taxation. *Snakenberger v. Stein*, 126-650.

If the item of property charged to have been omitted has in fact been listed and the value fixed thereon by the proper officers, no recovery of taxes therefor can be had. *Security Savings Bank v. Carroll*, 128-230.

An assessment by the treasurer cannot be sustained except upon proof of the ownership of taxable property, and that it was withheld from taxation. *Gibson v. Clark*, 131-325.

Proof of ownership at a subsequent date is not proof of ownership as of the date when it is alleged the property was withheld from taxation. *Ibid.*

Where the assessor has made an assessment without fraud on his part, or concealment on the part of the property owner, and no steps have been taken to review such assessment in the manner provided by statute through the board of equalization, it becomes a finality, and the property thus assessed cannot be reassessed as omitted property for the same year, though the valuation by the assessor through mistake of law is inadequate. *People's Savings Bank v. Layman*, 134 Fed. 635.

Contracts: Prior to the enactment of this chapter the board of supervisors could make a valid agreement for services rendered or to be rendered in the discovery of omitted property, for a reasonable compensation. *Reed v. Cunningham*, 121-555.

Further as to contracts, see § 1374 and notes to that section in supplement.

While the board of supervisors may contract with an attorney to prosecute action against the owners of property omitted from assessment, it cannot contract with an attorney to render services in collecting such taxes for a percentage of the amount collected in addition to the amount which the county may pay under the provisions of this section. *Heath v. Albrook*, 123-559.

Any amount paid to an attorney under such illegal contract may be recovered back. *Ibid.*

Notice: The treasurer must give notice to the owner of the proceeding by him to enforce payment of taxes on property omitted from assessment. *Thornburg v. Cardell*, 123-313.

Notice by the treasurer to the taxpayer to appear and show cause why he should

not be assessed for omitted property is neither an assessment of such property nor a demand for payment of the taxes such as to render a subsequent voluntary payment of the taxes in pursuance of such notice and claim recoverable as having been illegally exacted. *Kehe v. Blackhawk County*, 125-549.

The agent of the county, sending out a notice as to the assessment by the treasurer of omitted property, is not liable in damages as for libel, although the property owner has not in fact been guilty of any fraud or perjury. *O'Connell v. Shontz*, 126-709.

Listing: A notice by the treasurer to the taxpayer is not an assessment of taxes against him on property claimed to have been omitted from taxation. *Kehe v. Blackhawk County*, 125-549.

Nor is the demand made by the treasurer for payment of taxes on omitted property such an assessment as is contemplated. *Judy v. National State Bank*, 133-252.

The county treasurer need not list omitted property for taxation on the day specified in the notice to the taxpayer, but may do so within a reasonable time thereafter. *Snakenberg v. Stein*, 126-650.

The listing of the property and assessment of the tax by the treasurer is not a judgment, nor does it in any way affect the bar of the statute as to actions for the collection of taxes upon omitted property. It is simply a condition precedent to the right of action. *Shearer v. Citizens' Bank*, 129-564.

Where the person in possession of the personal property of a non-resident is notified to appear and show cause why the property in his possession should not be assessed, and he appears and denies that he has in possession or under his control as agent the property in question, the treasurer may assess the property to him as agent without specifying the name of the principal. *Security Savings Bank v. Carroll*, 131-605.

Procedure in assessment: The determination by the county treasurer that property has been omitted, and ascertainment of the amount of tax due thereon, is a substitute for the assessment required by general provisions of the statute, and the treasurer should make the fact of such determination appear of record in his office. But the entry may be made by another under his direction. *In re Estate of Morgan*, 125-247.

Appeal: No formal pleadings are necessary before the treasurer on objection to the assessment of omitted property nor on the appeal to the district court from such assessment, and the general allegation that items of moneys and credits scheduled and proposed to be listed and

assessed are not items for which the complaining party is liable to assessment for the years specified is sufficient. Upon appeal the complaining party is entitled to have determined every question which the treasurer was called upon to determine with reference to liability of complainant to assessment on moneys and credits for years specified. *Schoonover v. Petcina*, 126-261.

The requirement for notice implies the right of the property owner to appear and make known his objections, and the duty of the treasurer to consider and pass upon the same. But it was not intended that the procedure be invested with all the formalities which pertain to an action in court. *Gibson v. Cooley*, 129-529.

On the appeal, however, the district court is called upon to determine only such objections as have been in some manner raised before the treasurer. *Ibid.*

The burden of proof is upon the person seeking to reverse or set aside the treasurer's assessment. *Ibid.*

The treasurer cannot appeal from his own action in refusing to make an assessment on omitted property on the application of persons acting under contract with the county to discover omitted property. *In re Assessment of Farmers' L. & T. Co.*, 129-588.

Other remedy: An attempt at assessment by the treasurer of property not subject to assessment in the county is void and the owner is not required to resort to an appeal from the assessment, but may attack it collaterally. *Layman v. Iowa Telephone Co.*, 123-591.

The threatened action of the treasurer in proceeding to assess omitted property is not to be enjoined before he has proceeded to act. The findings of the treasurer are not conclusive, but any error therein may be corrected on appeal. *Security Savings Bank v. Carroll*, 128-230.

Where the treasurer is acting within the scope of his statutory power in taxing property as omitted, the correctness of his action is to be determined on appeal and not by injunction, nor is he liable in an action for damages for an erroneous exercise of power within the scope of his judicial or quasi-judicial capacity. *Stevens v. Carroll*, 130-463.

An appeal being provided for an action in equity to restrain the treasurer from acting will not lie unless it be made clearly to appear that an assessment by him would be absolutely illegal and void. *Security Savings Bank v. Carroll*, 131-605.

The treasurer having authority to assess omitted personal property to an agent in possession and control thereof for a non-resident, his assessment thereon is not illegal and void, and the sufficiency of the evidence on which the assessment is made can be called in question only by an appeal. *Ibid.*

If the treasurer makes an assessment within his jurisdiction the taxpayer can only be heard to complain of error in his finding by an appeal. He cannot set up such error by way of defense in an action by the treasurer to recover the taxes so assessed. *Judy v. National State Bank*, 133-252.

If the taxpayer fraudulently conceals his property he cannot rely by way of adjudication upon the assessment made by the assessor. *Ibid.*

Voluntary payment: One who, being charged by the treasurer or his agents for the collection of taxes on omitted property, with taxes on account of such property, voluntarily pays the same, cannot afterwards recover back the taxes so paid on proof that he was not liable therefor. *Kehe v. Blackhawk County*, 125-549; *in re Estate of Morgan*, 125-247.

SEC. 1407-b. Compensation. The total charges, fees, and expenses authorized under section one (1) of this act shall not exceed fifteen per cent. of the taxes paid into the county treasury. [28 G. A., ch. 50, § 2.]

SEC. 1407-c. Bond—approval. The person employed under the provisions of section one hereof shall give a bond in the penal sum of not less than three thousand dollars, with sureties to be approved by the board of supervisors, conditioned for the faithful performance of the contract and observance of the provisions of law applicable to such employment. [28 G. A., ch. 50, § 3.]

SEC. 1407-d. Disposition of taxes recovered. After the deduction of the compensation hereinbefore provided for, the taxes recovered under this act shall be distributed among the several funds for that year in the same proportion as other taxes. [28 G. A., ch. 50, § 4.]

SEC. 1407-e. Existing contracts. All contracts heretofore made for the purpose specified in section one of this act are hereby declared to be valid and binding, in case the parties interested therein shall, within thirty

days from the taking effect of this act, consent in writing to accept the said fifteen per cent. in lieu of all compensation, expenses, and other charges whatsoever provided for in said contracts, and give the bond above required. Unless such consent and bond are given, said contracts are hereby declared null and void. [28 G. A., ch. 50, § 5.]

SEC. 1409. Taxes certified to another county.

It is only when a taxpayer has removed from the county, leaving no property therein out of which the taxes can be

made, that certification of his taxes to another county is authorized. *Union Cent. L. Ins. Co. v. Chapin*, 113-411.

SEC. 1417. Refunding erroneous tax.

This section has reference to the county officers, and not to the recovery against a city of taxes collected by a county officer on certification from the city. *Hawkeye L. & B. Co. v. Marion*, 110-468.

Taxes voluntarily paid under a mistake of law cannot be recovered back. *Ahlers v. Estherville*, 130-272.

The taxpayer who voluntarily appears and without protest pays taxes on property which he is charged with having omitted or concealed in returning his property for taxation, cannot recover back the taxes thus paid on proof that he was not properly chargeable with reference thereto. *Kehe v. Blackhawk County*, 125-549.

After payment of taxes a portion of which are due and collectible, the taxpayer cannot maintain an action to recover back another portion erroneously assessed. *Kehe v. Blackhawk County*, 125-549.

One who, being a purchaser of goods, in order to prevent their seizure for al-

leged taxes, pays such taxes assessed to the seller, which are invalid, cannot recover the same from the seller. *Warfield-P.-H. Co. v. Averill Groc. Co.*, 119-75.

The right of action for taxes subsequently paid by a tax purchaser on property as to which it is found that the sale is invalid is barred in five years from the time of payment of such taxes, and is not extended by the provisions of Code § 3448, with reference to an action based on fraud or mistake. *Lonsdale v. Carroll County*, 105-452.

The right to demand repayment of taxes illegally exacted arises at once, and the statute of limitations runs from the time of payment. The party making such payment cannot insist that the running of the statute be postponed until the legal character of the tax has been judicially determined. *Sioux City & St. P. R. Co. v. O'Brien County*, 118-582.

SEC. 1418. Tax sale—when and how made.

Irregularity, such as over assessment, will not render a tax void, nor authorize the interposition of a court of equity to restrain its enforcement. *Collins v. Keokuk*, 118-30.

Where there is an ambiguity on the face of the record as to whether taxes have been paid on the property sold, parol evidence is admissible with reference to the fact. *McCash v. Penrod*, 131-631.

SEC. 1419. Notice. Notice of the time and place of such sale shall be given by the treasurer, and shall contain a description of each separate tract to be sold as taken from the tax list, the amount of taxes for which it is liable delinquent for each year, and the amount of penalty, interest and costs thereon, the name of the owner, if known, or the person, if any, to whom it is taxed, by publication in some newspaper in the county, once each week, for three consecutive weeks, the last of which shall be at least one week before the day of sale, and by immediately posting a copy of the first publication thereof at the door of the court house, if there be one, if not, at the door of the place where the last term of district court was held. The compensation for such publication shall not exceed twenty cents for each description, and shall be paid by the county. The amount paid therefor shall be collected as a part of the costs of sale and paid into the county treasury. If the treasurer cannot procure the publication of the notice for the sum herein fixed, then the notice may be given by posting the same in four of the most public places in the county, to be selected by him, for four weeks, and filing a copy thereof with the auditor before the day of sale, with his verified statement thereon that it had been posted as and for the time herein

required, and that he could not obtain a publication thereof at the legal rate. [20 G. A., ch. 194, § 3; C., '73, §§ 872-4, 3833; R., § 764; C., '51, § 498.] [30 G. A., ch. 2, § 2.]

The provision for posting notices of a tax sale "on the door of the county court house" held to be satisfied by a posting thereof on a bulletin board provided for

such purposes at the courthouse door. *Hoskins v. Iowa Land Co.*, 121-299.

Publication of notice in a particular case held sufficient. *Davis v. Magoun*, 109-308.

SEC. 1421. Advertisement.

The term "advertisement" here used is meant to include both publication and posting, and irregularity in the posting will not affect the validity of the sale. *Davis v. Magoun*, 109-308.

The provision that no irregularity or in-

firmity in the advertisement shall affect the legality of the sale is applicable to any irregularity as to the place or manner of posting the notice at the courthouse door. *Hoskins v. Iowa Land Co.*, 121-299.

SEC. 1422. Offer for sale.

The sale of two lots in a lump is void.

Hintrager v. McElhinny, 112-325.

SEC. 1423. Bid—purchaser.

It is of the highest importance to the owners that the bidders know from the description what is being offered for sale. In a particular case held that a description was not sufficient which described the

property as eighteen acres "part of section," etc., with no specification as to the exact boundaries or designation by which the particular part of the section could be identified. *Armour v. Officer*, 116-675.

SEC. 1425. Sale of property remaining unsold.

Under the provisions of this section, land which is subject to a lien for taxes and remains unsold for want of bidders, the treasurer may sell such land for a portion of the tax, but redemption from such sale can only be made by the payment of the full amount of the tax which is a lien on such property. (See Code § 1437.) *Everson v. Woodbury County*, 118-99.

The purchaser at a tax sale for taxes including special assessment for street improvements certified to the county auditor by the officers of the city, acquires title free from the lien of any installments of special assessments not certified or which have not been brought forward so as to continue to be a lien on the property. *Fitzgerald v. Sioux City*, 125-396.

SEC. 1426. Resale.

The intention is that payment for each parcel or portion sold shall be made immediately upon the completion of the sale, and held that a third person paying the amount bid by the purchaser could not recover from the purchaser the amount of

his bid. *Sheldon v. Steele*, 114-616.

It will not render the sale illegal that the treasurer allows the bidder to postpone payment of the bid until after the conclusion of the sale. *Farmers' L. & T. Co. v. Wall*, 129-651.

SEC. 1432. Certificate of purchase. The treasurer shall prepare, sign, and deliver to the purchaser of any real estate sold for the non-payment of taxes a certificate of purchase, describing it as shown in the record of sales, giving the part of each tract or lot sold, the amount of each kind of tax, interest and costs for each tract or lot as described in such record, and that payment has been made therefor. If any person is the purchaser of more than one parcel, he may have the whole included in one certificate, but each parcel shall be separately described. And in case of loss of said certificate of purchase, the owner thereof, as appears on record, may, by filing an affidavit of such loss or destruction with the county treasurer, receive a duplicate thereof, which shall take the place of the original certificate and have the same force and effect in law and be subject to the same

rules and regulations. [C., '73, § 887; R., § 777; C., '51, § 503.] [32 G. A., ch. 61, § 1.]

The certificates are intended to be delivered when the sale is completed, and if the money bid is not then paid, a new sale

should be made, under the provisions of Code § 1426. *Sheldon v. Steele*, 114-616.

SEC. 1433. Repeal—assignment. Section one thousand four hundred thirty-three (1433) of the code is hereby repealed and the following is enacted in lieu thereof:

"The certificate of purchase shall be assignable by endorsement and entry in the register of tax sales in the office of county treasurer of the county from which said certificate issued, and when such assignment is so entered in the register of tax sales in the treasurer's office, it shall vest, in the assignee or his legal representatives, all the right and title of the assignor. The statement in the treasurer's deed of the fact of the assignment shall be presumptive evidence thereof." [32 G. A., ch. 61, § 2.]

No notation of the assignment of the certificate is necessary provided the person to whom the deed is made is in fact the holder of the certificate. *McCash v. Penrod*, 131-631.

The statutory presumption is that the grantee in the deed bought the land at the sale or succeeded to the rights of the bidder. *Farmers' L. & T. Co. v. Wall*, 129-651.

One who takes the certificate by assignment is subject to notice of all infirmities existing therein. *Young v. Iowa Toilers' Protective Association*, 106-447.

One who by reason of his interest in the property is bound to pay the taxes, cannot take an assignment of the certificate of sale of the property. Such assignment amounts to a redemption. *Blumenthal v. Culver*, 116-326.

SEC. 1436. Redemption—how effected. Real estate sold under the provisions of this chapter may be redeemed at any time before the right of redemption is cut off, by the payment to the auditor, to be held by him subject to the order of the purchaser, of the amount for which the same was sold and eight per cent. of such amount added as a penalty, with eight per cent. interest per annum on the whole amount thus made from the day of sale, and the amount of all taxes, interest and costs paid by the purchaser or his assignee for any subsequent year or years, with a similar penalty added as before on the amount of the payment for each subsequent year, and eight per cent. per annum on the whole of such amount or amounts from the day or days of payment; but the penalty for non-payment of taxes of any subsequent year or years shall not attach, unless the same shall have remained unpaid until the first day of April after they become due and have become delinquent, nor shall said penalties apply to taxes voted in aid of the construction of any railroad. In redeeming from a sale of a leasehold interest in agricultural college land, the amount to be paid shall include any amount paid by the holder of the certificate as interest or principal due by the terms of the lease or otherwise to prevent a forfeiture thereof, as provided by law, and for which proper voucher shall have been filed with the auditor, with interest thereon at eight per cent. per annum from date of payment, which amount shall be paid by the auditor to the holder of the certificate, and the certificate of redemption shall show the amount so paid by the party redeeming. [19 G. A., ch. 45; C., '73, § 890; R., § 779; C., '51, § 505.] [27 G. A., ch. 35, § 1.]

The term owner as used in determining who may redeem from a tax sale is construed to include mortgagees, judgment creditors, and holders of contingent interests; and a lien holder thus having a right to redeem cannot by a purchase or

taking an assignment of a certificate of purchase acquire title as against a senior lien holder. *Lane v. Wright*, 121-376.

A judgment creditor may redeem from tax sale the land on which his judgment is a lien. *Swan v. Harvey*, 117-58.

A mortgagee has the right to redeem the mortgaged property from tax sale. *Busch v. Hall*, 119-279.

Where one of several lien holders upon land sold at tax sale takes an assignment of the certificate of purchase, he is to be treated as having redeemed from such sale for the benefit of all the lien holders. Equity will not permit one lien holder to absorb the common security by purchase at a tax sale. *Lane v. Wright*, 121-376.

Where a person, entitled by decree to redeem from tax sale, deposited the money with the clerk, and moved to compel a conveyance, and was unsuccessful, and thereupon withdrew his money, and the tax title claimant by himself and grantee remained in possession for fifteen years, held that the right to redeem was thereby abandoned. *Cooper v. Cook*, 108-301.

The issuing of a deed before the expiration of the statutory period cannot affect the owner's rights, nor entitle him

to redeem in equity from the tax sale, where he had not attempted to make statutory redemption within the time allowed him for doing so. It is not the execution or non-execution of the deed which fixes the time within which redemption must be made, but the completed service according to law, and the filing of the notice of the expiration of the right to redeem. *Wood v. Coad*, 120-111.

One who has voluntarily paid a tax, although under protest, cannot recover the amount thereof from one who has redeemed the property from tax sale. *Anderson v. Cameron*, 122-183.

One who by reason of his interest in the property is under obligation to pay the taxes cannot acquire title thereto by tax deed, nor take an assignment of the certificate of sale. Such a transaction amounts to a redemption. *Blumenthal v. Culver*, 116-326.

SEC. 1437. Redemption from sale for part of tax.

Terms of redemption: When land has been sold as provided in Code § 1425, for a portion only of the tax which is a lien thereof, the owner in making redemption must pay the full amount of the taxes legally due. *Everson v. Woodbury County*, 118-99.

The board of supervisors has no authority to allow redemption in such case for less than the full amount of the taxes due. *Ibid.*

SEC. 1439. Minors and lunatics.

Under this section, providing that real property of any minor or lunatic sold at tax sale may be redeemed within one year after disability is removed in the manner provided by Code § 1440, that is, by equitable action, held that the action by the heirs of an insane person whose real estate had been sold for taxes before his death, and who continued insane from the time of such sale until his death, might be commenced within one year after the death of such insane person, but that the commencement of the action was to be determined by the actual service of notice, as provided by Code § 3514, and not by the placing of the notice in the hands of

the sheriff, with intent that it be immediately served, as provided by Code § 3450, relating to the sufficiency of the commencement of action for the purpose of avoiding the general bar of the statute of limitations. The one year provision in the section of the Code relating to redemption is not a limitation upon the action, but a condition of the exercise of the right. *Hawley v. Griffin*, 121-667.

Evidence in a particular case held sufficient to show that one whose lands had been sold for taxes was at the time insane, and that his heirs were therefore entitled to redeem the lands from such tax sale. *Ibid.*

SEC. 1440. Equitable action.

In general: Where proper notice of expiration of period for redemption has not been served, the property owner may have relief under this section, although the deed has in fact been issued. *Hintrager v. McWhinny*, 112-325; *Swan v. Harvey*, 117-58.

The action is deemed commenced when the notice is placed in the hands of the sheriff for service, the same rule being applicable as under the general statute of limitations. (See Code § 3450.) *Smith v. Callanan*, 103-218.

Ordinarily the owner whose land has been sold for taxes must make redemption within three years from the date of sale, and cannot insist on that right after the period has expired, even though no deed has been issued. *Bitzer v. Becke*, 120-66.

But where, by reason of mistake of law, the owner supposed that he was entitled to redeem his homestead from tax sale on payment of the taxes on the homestead alone, although it had been sold for the entire taxes due by him on his property,

and he had commenced an equitable action to secure such redemption, offering to pay the amount of taxes which should be found to be due on his homestead, held that he might be allowed, by order of court, to make redemption after the expiration of the statutory period, although the court found that such redemption could be made only on payment of the entire amount of taxes for which the property had been sold. *Ibid.*

One who seeks to make equitable redemption must show that he was the owner of or had an interest in the property. *Petersborough Sav. Bank v. Des Moines Sav. Bank*, 110-519.

Where right to redeem from a tax deed has been decreed the time within which redemption may be made is a mere incident to the enforcement of the decree, and though the district court loses jurisdiction on appeal from such decree, it still has authority to extend the period of redemption. *Swan v. Harvey*, 123-192.

One who seeks to redeem in an equitable action on the ground that no proper notice of the expiration of the period of redemption has been given is not required to show payment of taxes. *Iowa Loan & Trust Co. v. Pond*, 128-600.

Under the provision that when the real estate of a minor or lunatic is sold for taxes the same may be redeemed at any time within one year after removal of the disability in an action in equity brought for that purpose, the right to relief is a right granted to be exercised by bringing action within one year from the removal of the disability, and the action must be in fact commenced within the period prescribed. It is not enough that notice of such action be placed in the hands of the sheriff for service as provided by Code § 3450, which prescribes what shall be deemed the commencement of an action with reference to the general statute of limitations. *Hawley v. Griffin*, 121-667.

Amount to be paid: In an equitable action by a minor to redeem from a tax deed, if there is no showing as to the amount of taxes paid or of any other of the material items necessary to a computation of the sum to which the defendant is entitled, the case will be remanded to the trial court in order that these matters may be shown. *Bemis v. Plato*, 119-127.

In an action to redeem from the deed on the ground that the redemption notice was defective, the plaintiff should be required to pay the amount paid by the purchaser with penalty and interest on the total amount at 8 per cent. and may be allowed a reasonable time within which to make such payment. *Bancroft v. Mann*, 125-530.

Rents and profits: Where a property owner was found entitled to redeem in equity, held that the defendant should be charged with the rents received, and with interest on the amount received each year, and credited with the amount paid at the tax sale with interest and penalty, and with the amounts paid for subsequent taxes with interest, and also for amounts paid for repairs and care of the property with interest. *Hintrager v. McElhinny*, 112-325.

Where it appears that the rents and profits received by the person in possession are at least equal to the amount which should be paid in making redemption, a decree may be entered without compelling plaintiff to pay anything, and in a particular case held that as the case must be reversed it would be remanded with permission to the person in possession to present his claim for improvements to the lower court for allowance. *Hall v. Cardell*, 111-206.

Who may acquire title: Where the agent for the owner of land is not chargeable with the payment of taxes, he may, after his discharge as agent, acquire title to such land from one who has secured a tax title thereon. *Bemis v. Plato*, 119-127.

A person having such interest in land as entitles him to redeem from a tax sale cannot by taking a tax title eliminate the rights of others jointly interested with him in the property, as persons thus jointly interested may in equity redeem from a tax title thus acquired. *First Congregational Church v. Terry*, 130-513.

One who is under obligation to pay taxes upon the property or who has money of another in his possession for the purpose of paying such taxes cannot acquire a tax title as against other interested parties. *Young v. Iowa Toilers' Protective Association*, 106-447.

A mortgagee has the right to pay taxes and cannot by purchase at a tax sale defeat a senior mortgage nor acquire title against mortgagor. *Cone v. Wood*, 108-260.

A mortgagee alleging that a tax deed was fraudulently obtained through a transaction which amounted to a payment of the taxes by those under obligation to discharge the tax lien, may have the title acquired under such tax sale declared invalid as against him. *Busch v. Hall*, 119-279.

Concurrent owners: A tenant in common cannot acquire a valid tax title to property owned in common as against his co-tenant. *Funson v. Bradt*, 105-471.

A tenant in common cannot allow the property to go to tax sale and cut off his interest of his co-tenant by taking a tax

deed, as between him and his co-tenant such acquisition of title constitutes a redemption. *Crawford v. Meis*, 123-610.

But this rule has no application to the acquisition of such title by a remainderman. *Ibid.*

A life tenant is charged with the duty of paying taxes on the property, and can not by collusively permitting the same to

be sold and thereby acquiring a tax title either in his own name or in the name of another, cut off the rights of the remainder man. As against a tax title thus acquired the remainder-man is entitled to have a redemption in equity. *First Congregational Church v. Terry*, 130-513.

SEC. 1441. Notice of expiration of right of redemption. After two years and nine months from the date of sale, the holder of the certificate of purchase may cause to be served upon the person in possession of such real estate, and also upon the person in whose name the same is taxed, if such person resides in the county where the land is situated, in the manner provided for the service of original notices, a notice signed by him, his agent or attorney, stating the date of sale, the description of the property sold, the name of the purchaser, and that the right of redemption will expire and a deed for the land be made unless redemption is made within ninety days from the completed service thereof. Service may be made upon nonresidents of the county by publishing the same, once each week, for three consecutive weeks in some newspaper of said county, or by personal service thereof elsewhere in the same manner original notices may be served; but any such nonresident may in writing appoint a resident of the county in which said land is situated an agent, and file said appointment with the treasurer of said county, who shall forthwith record the same in a record kept in his office therefor, and index the same, after which personal service of said notice shall be made upon said agent. Service shall be complete only after an affidavit has been filed with the treasurer, showing the making of the service, the manner thereof, the time when and place where made, and under whose direction the same was made; such affidavit to be made by the holder of the certificate or by his agent or attorney, and in either of the latter cases stating that such affiant is the agent or attorney, as the case may be, of the holder of such certificate; which affidavit shall be filed by the treasurer and entered upon the sale book opposite the entry of the sale, and said record or affidavit shall be presumptive evidence of the completed service of said notice, and the right of redemption shall not expire until ninety days after service is complete. Any person knowingly and wilfully swearing falsely to any fact or statement contained in said affidavit shall be guilty of perjury. The cost of serving the notice and affidavit of publication shall be added to the amount necessary to redeem. The fee for serving the notice shall be the same as for service of an original notice, including copy fee and mileage. The treasurer shall, upon the filing of proof of service and statement of costs, forthwith report the same in writing to the auditor, who shall enter it in the sale book against the proper tract of real estate. The holder of the certificate of sale or his agent may report in writing to the county auditor the amount of costs incurred in giving such notice, and the auditor shall enter the same in the sale book as aforesaid, and no redemption shall be complete until such costs are paid. [25 G. A., ch. 81; C., '73, § 894; R., § 781.] [30 G. A., ch. 2, § 3.]

Notice necessary: The title holder is entitled to have a tax deed set aside which had been issued without notice of the expiration of the period for redemption. *Grimes v. Ellyson*, 130-286.

The provision as to notice to the owner is not applicable where the person owning the property at the time of the tax sale is

deceased. In such case service of notice is to be made as though the property had been assessed and taxed to an unknown owner. *Ibid.*

The requirement for notice is limited to the person in possession of the premises, in whose name the property is assessed,

or taxed, and proof of service upon the real owner is not sufficient. *Ibid.*

Unless the right of redemption be terminated by proper notice the issuance of a treasurer's deed is no obstacle to the exercise of the right, but it must be asserted by an action as provided in the preceding section. *Swan v. Harvey*, 117-58.

The authority of the treasurer to issue the deed is dependent on the service of redemption notice upon the person to whom the land is taxed and the person in possession, and in the absence of such notice the deed is void and the statutory limitation does not run in his favor. *Chicago, B. & Q. R. Co. v. Kelley*, 105-106.

A notice of expiration of the time for redemption directed to a railway by the initials of its name, such railway being in possession of the property, held, not to be sufficient in the absence of evidence showing that the railway was commonly known and customarily referred to by such abbreviation. *Ibid.*

By publication: Where the land was taxed to M. K. G., and there was no such person in the county at the time for serving notice of expiration of the period of redemption, service by publication was held sufficient, although the premises were in the possession of K. G., who was a resident of the county. *Hawkeye v. Loan & Brokerage Co. v. Gordon*, 115-561.

Notice by publication to an owner who is a non-resident is sufficient where no one is in actual possession of the land at the time notice is given. *McCash v. Penrod*, 131-631.

The fact that the person in whose name the notice was given was stated as "Karney," an affidavit as to publication was in the name of "Carney," held not to be a fatal defect, it appearing that the names referred to the same person. *Ibid.*

By whom given: Notice of the expiration of the redemption period may properly be given by the lawful holder of the certificate without regard to who is the beneficial owner. *Nugent v. Cook*, 129-381.

Where it appears that the person to whom the property is taxed is dead, the proceedings are to be the same as though the owner was "unknown" and no notice is necessary. It is not necessary that the notice be given to the heirs or legal representatives of such person. *Ibid.*

SEC. 1442. Deed executed.

Where the description does not furnish the means for determining the boundary line of the tract covered, the deed is not valid. *Tucker v. Carlson*, 113-449.

The description must contain in itself sufficient facts when applied to identify

the particular tract intended to be conveyed. *Armour v. Officer*, 116-675.

A deed issued to one who is in fact the owner of the certificate is valid, although such owner holds by assignment not recorded. *McCash v. Penrod*, 131-631.

Notice cannot be given by a purchaser who has assigned the certificate. *Sickles v. Union Investment Co.*, 109-450.

To whom given: The notice must be served upon the person in possession. *Hintrager v. McElhinney*, 112-325.

In a particular case held that the return of service of notice was not sufficient. *Ibid.*

The notice of the expiration of the period for redemption is to be given to the person in whose name the land is assessed and taxed at the time the notice is given rather than at the expiration of two years and nine months from the sale, where the giving of the notice is postponed to a later date than that at which it might first have been given. *Smith v. Callahan*, 103-218.

One who is not the owner is not entitled to notice of redemption in the absence of a showing that he is in the actual occupancy of the property. *Barcroft v. Mann*, 125-530.

In order for the owner of vacant lots to be in the possession thereof within the meaning of the statutory provision, he is not required to show any other acts of possession or control than such as are usually exercised by resident owners having title to property of that kind. *Foy v. Houstman*, 128-220.

Proof of notice: Reference in the affidavit of the purchaser to the printed notice, a copy of which is attached to the affidavit is sufficient. *Hoskins v. Iowa Land Co.*, 121-299.

The place of service of notice must be stated in the proof required by statute of the making of such service. *Barcroft v. Mann*, 125-530.

While an affidavit of a proprietor of a newspaper in which the notice was published is not competent to prove such publication, yet if such affidavit is made a part of the agent's affidavit of notice, the proof is sufficient. *Funson v. Bradt*, 105-471.

An affidavit of notice which does not show that the person making it was the agent or attorney of the holder of the tax certificate is not competent evidence of the facts recited. *Ibid.*

Where the description of the property in the redemption notice is such as to call the attention of the person upon whom it is served to the sale intended and the property sold, it is sufficient. *Ibid.*

SEC. 1444. Effect of deed—vests title.

What vests in purchaser: There is no privity between the holder of the fee and one who claims a tax title upon the land. The latter title is not derived from, but is antagonistic to the former. The holder of the tax title is not a privy in estate with the holder of the fee. Neither owes any duty to the other, nor is estopped from making any claim against the other. *Hussman v. Durham*, 165 U. S., 144.

A tax title is not derivative, but a new title in the nature of an independent grant from the sovereign, and the one who claims under a tax deed does not therefore claim title from the same source as the person attacking the deed whose title is derived from a foreclosure proceeding, and who does not show title in the person who executed the mortgage. *Petersborough Sav. Bank v. Des Moines Sav. Bank*, 110-519.

The effect of a tax deed is to be determined by the statute in force at the time it is executed. *Fitzgerald v. Sioux City*, 125-396.

Where the city certifies special assessments to the county auditor for collection, a purchaser at a sale for taxes including such special assessments by his deed acquires title free from the remaining installments of such special assessments which have not been brought forward so as to preserve the lien thereof on the property. *Fitzgerald v. Sioux City*, 125-396.

Deed as evidence: It is presumed in favor of the tax deed that service of notice

of redemption was not required to be made on a person in possession if the contrary does not appear. *Funson v. Bradt*, 105-471.

The fact that a deed is issued is *prima facie* evidence of the giving of notice of expiration of the period of redemption. *Young v. Iowa Toilers' Protective Association*, 106-447.

The holder of a tax deed regular upon its fact, makes out a *prima facie* case in an action to quiet title and the burden is upon the defendant to establish its invalidity. Even if the invalidity of the deed is shown, it may be sufficient basis for establishing title by adverse possession. *McCash v. Penrod*, 131-631.

A tax deed is at least *prima facie* evidence of the fact that the grantee named therein was the purchaser at the sale, or one who succeeded to his rights. *Farmers' L. & T. Co., v. Wall*, 129-651.

Where lands covered by a railroad grant were sold for taxes, not having been patented to the railroad at the time of the assessment of the tax, held that the presumption of regularity in favor of the tax sale would warrant the assumption that such lands had been earned and selected prior to the assessment of the tax. *Chicago, M. & St. P. R. Co. v. Hemenway*, 117-598.

Irregularity in posting of notice of tax sale will not affect the validity of the deed. *Davis v. Magoun*, 109-308.

SEC. 1445. Who may question.

One who attacks a tax deed does not make sufficient showing of title by the introduction of the record of foreclosure proceedings and the acquisition of title by him under such proceedings. The title required to be shown is such an one as that the party claiming thereunder might, if plaintiff, recover thereon. *Petersborough Sav. Bank v. Des Moines Sav. Bank*, 110-519.

Whether or not the plaintiff in an action attacking a tax deed must show that a subsequent sale of the land for taxes has been redeemed from, when the land was purchased at such sale by a stranger, *quaere*. *Ibid*.

Where the landowner seeks by equitable action to redeem under the provisions of

§ 1440, he is not required to show title or any payment of taxes as required by this section. A judgment creditor entitled to redeem may maintain such action. *Swan v. Harvey*, 117-58; *Roth v. Munzenmaier*, 118-326; *Busch v. Hall*, 119-279.

The plaintiff in such a case must show some title, but title by adverse possession is sufficient. *Roth v. Munzenmaier*, 118-326.

Any one having a right to redeem may maintain such equitable action. *Busch v. Hall*, 119-279.

One who attacks a tax deed on the ground that he has not had notice of the expiration of the right of redemption is not required to show payment of taxes. *Iowa Loan & Trust Co. v. Pond*, 128-600.

SEC. 1446. Sales wrongfully made—purchaser indemnified.

The provisions of this section entitle the purchaser to recover only where the mistake or error is that of the treasurer, and not where it is due to the auditor, although the land may by reason of such mistake of the auditor not be subject to sale. *Lonsdale v. Carroll County*, 105-452.

Such provisions do not entitle the tax purchaser to recover from the county, in case the sale is invalid by reason of mistake or error, the taxes subsequently paid by him on the property. *Ibid*.

Taxes voluntarily paid cannot, in the absence of statute, be recovered, and where

the county treasurer collects certified by a city, this section does not authorize recovery from the city of the taxes improperly claimed and paid. To warrant an action against the city to recover back money on the ground of illegality of taxes or assessments collected by it, it must appear that the city had no authority to collect the tax, that the money sued for has been actually received by the city, and that the payment by the plaintiff was upon compulsion to prevent the immediate enforcement of the tax against his property. *Hawkeye L. & B. Co. v. Marion*, 110-468.

The wrongful act or mistake of the treasurer which will subject the county to an action for the recovery of taxes under this section is one which the person seek-

ing recovery had no agency in bringing about. And where the bondsmen of one selling intoxicating liquor under the mulct law bought in the real property used for that purpose at a tax sale for the mulct tax, for which his bondsmen were liable, the sale being made at his request, held that he could not recover from the county the amount paid by him at such tax sale, which was afterwards set aside. *Guedert v. Emmet County*, 116-40.

Evidence in a particular case, showing but little competition at a tax sale, although quite a number of bidders were present, held not sufficient to prove fraud on the part of the purchaser. *Gallaher v. Head*, 108-588.

SEC. 1448. Limitation of actions.

The statute begins to run from the time the purchaser is entitled to a deed, but if the holder of the fee title makes a surrender to the holder of the tax title, by payment or rent before the five-year limit has expired, this will constitute such surrender of possession as to stop the running of the statute. *Gallaher v. Head*, 108-588.

The statute of limitations against the tax deed does not begin to run when the deed is issued without redemption notice being served on the person in whose name the land is taxed, and the same rule applies where the deed is invalid by reason of the failure to notify the person in possession. *Chicago, B. & Q. R. Co. v. Kelley*, 105-106.

The five-years' limitation is only available to one who was the owner of the title at the time of the sale, and if such owner, attacking the tax deed, introduces no evidence of title whatever, he cannot recover. *Gill v. Candler*, 114-332.

The statute begins to run at the time when the tax sale purchaser might have obtained his deed, that is, three years from the date of sale. If no action is brought by such purchaser within five years thereafter, the tax title is extinguished. *Roth v. Munzenmaier*, 118-326.

As against an action to defeat a tax title in the hands of the agent of the owner

of the property, the five year limitation is applicable. *Bemis v. Plato*, 119-127.

The provisions of this section limiting the action attacking a tax title to five years after the tax deed is executed and recorded, constitute a condition as to the right to maintain such action, and therefore the question whether the action is commenced in proper time is not to be determined by Code § 3450, which provides that with reference to the general statute of limitations an action is to be deemed commenced when the notice is placed in the hands of the sheriff for service, but by the provisions of Code § 3514, declaring that an action is commenced by service on the defendant. *Hawley v. Griffin*, 121-667.

Possession of land by the owner in order to bar an action under a tax title, need not be such as is required to make it adverse, hostile and exclusive, under the general statute of limitations. It is sufficient if it is such as would entitle the tax title owner to an action against the fee owner. *Clark v. Sexton*, 122-310.

If the tax deed is simply irregular, and not void, the tax title holder relying thereon in an action to quiet title is not subject to have his title attacked after five years. *McCash v. Penrod*, 131-631.

SEC. 1452-a. Actions authorized. In addition to all other remedies and proceedings now provided by law for the collection of taxes on personal property, the county treasurer is hereby authorized to bring or cause an ordinary suit at law to be commenced and prosecuted in his name for the use and benefit of the county for the collection of taxes from any person, persons, firm or corporation as shown by the tax list in his office, and the same shall be in all respects commenced, tried and prosecuted to final judgment the same as provided by the code for ordinary actions. [32 G. A., ch. 62, § 1.]

SEC. 1452-b. Statutes applicable—writ of attachment—damages. All the provisions of chapters one (1) and two (2) of title nineteen (19)

of the code and acts amendatory thereto, are hereby made applicable to any proceedings instituted by a county treasurer under the provisions of section one (1) hereof, and a writ of attachment shall be issued upon the county treasurer complying with the provisions of said chapter, for taxes, whether due or not due, except that no bond shall be required from the treasurer or county in such cases, but the county shall be liable for damages, only, as provided by section thirty-eight hundred eighty-seven (3887) of the code. [32 G. A., ch. 62, § 2.]

CHAPTER 3.

OF THE SECURITY OF THE REVENUE.

SECTION 1457. Loaning or depositing public funds. A county treasurer shall be liable to a like fine for loaning out, or in any manner using for private purposes, state, county or other funds in his hands, except that, when permitted by the board of supervisors by resolution entered of record, he may deposit such funds in any bank or banks in the state, to any amount fixed by such resolution; and the county may receive such rate of interest on the money so deposited as may be agreed upon by the treasurer, board of supervisors, and the bank; but before such deposit is made such bank shall file a bond with sureties, to be approved by the treasurer and the board of supervisors, in double the maximum amount permitted to be deposited, conditioned to hold the treasurer harmless from all loss by reason of such deposit or deposits. Said bond shall be filed with the county auditor, and action may be brought thereon either by the treasurer or the county, as the board of supervisors may elect. And the state treasurer shall be liable to a fine of not more than ten thousand dollars for a like misdemeanor. But nothing done under the provisions of this section shall alter or affect the liability of the treasurer or the sureties of his official bonds. [17 G. A., ch. 155; C., '73, § 912; R., § 797.] [27 G. A., ch. 36, § 1.]

The treasurer has no authority to collect taxes through a bank, and is primarily liable for loss of taxes thus collected by failure of the bank. Under such circum-

stances, the bank holds the taxes thus collected as a trust fund for the county. *Page County v. Rose*, 130-296.

SEC. 1460. Repeal—statement of account. That section fourteen hundred and sixty (1460) of the code, relating to the statement by the auditor of state of the county treasurer's account with the treasurer of state, be and the same is hereby repealed. [32 G. A., ch. 63.]

SEC. 1461. Settlement with county treasurer.

When a county treasurer is indicted upon the charge of receiving public money and failing to account therefor under the last provision found in Code § 4840, it must be alleged and proved that demand was made upon him by the person or officer entitled to receive the funds so demanded. *State v. McKinney*, 130-370.

Where the balance in the hands of an

outgoing county treasurer has been ascertained on the final settlement with the board of supervisors, his successor in office becomes the person entitled to receive the balance on hand, and is the only person who can make demand therefor, refusal of which will charge the outgoing officer with criminal liability for failure to account. *Ibid.*

CHAPTER 4.

OF ASSESSMENT AND COLLECTION OF COLLATERAL INHERITANCE TAX.

SECTION 1467. Rate. All property within the jurisdiction of this state, and any interest therein, whether belonging to the inhabitants of this state

or not, and whether tangible or intangible, which shall pass by will or by the statutes of inheritance of this or any other state, or by deed, grant, sale or gift made or intended to take effect in possession or in enjoyment after the death of the grantor or donor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, the lineal descendant of an adopted child of a decedent, step-child, or the lineal descendant of a step-child of a decedent, or to or for charitable, educational or religious societies or institutions, including hospitals, public libraries and public art galleries kept open to the free use of the public not less than three days of each week; within this state, shall be subject to a tax of five per centum of its value, above the sum of one thousand dollars, after the payment of all debts, for the use of the state; and all administrators, executors and trustees, and any such grantee under a conveyance, and any such donee under a gift, made during the grantor's or donor's life, shall be respectively liable for all such taxes to be paid by them, respectively, except as herein otherwise provided, with lawful interest as hereinafter set forth, until the same shall have been paid. The tax aforesaid shall be and remain a lien on such estate from the death of the decedent until paid. Whenever property, or any interest therein, shall pass to heirs, devisees, or other beneficiaries, as contemplated in the foregoing provisions, who are aliens, non-residents of the United States, the same shall be subject to a tax of twenty per centum (20%) of its true value, except where such foreign beneficiaries are brothers or sisters of the decedent owner, when the rate of tax to be assessed and collected therefrom shall be ten per centum (10%) of the value of the property or interest so passing. [26 G. A., ch. 28, § 1.] [30 G. A., ch. 51.] 31 G. A., chs. 54, 55.]

A tax upon succession with an exemption of one thousand dollars is not unconstitutional. *In re McGhee's Est.*, 105-9.

The statute exempts from taxation one thousand dollars of the entire estate and not one thousand dollars of the share coming to each distributee. *Ibid.*

The valuation of the property is to be made by appraisal and not determined by the regular assessment. Such value is the price which the property will command in the market. *Ibid.*

The expression, "within the sum of \$1,000," is descriptive of an estate which is to be exempt from taxation, and not of a portion of the estate which is to be exempt. *Herriott v. Bacon*, 110-342; *Gilbertson v. McAuley*, 117-522.

The situs of the property, and not the testator's domicile, determines the liability of the property for the inheritance tax, and where a resident of Iowa died possessed of cattle in an adjoining state which passed under his will to collateral heirs, held that such cattle, or the proceeds thereof, were not liable to the tax. *In re Weaver's Est.*, 110-328.

Where a son devised property to his mother, who died before the testator's death leaving as heirs a brother and sister of testator, held that the devised property passed directly from testator to his brother and sister as collateral heirs, and

thus became subject to the collateral inheritance tax. *In re Hulett's Est.*, 121-423.

Property which passed to collateral heirs on the death of a testator, prior to the passage of the collateral inheritance tax law, is not subject to such a tax. *Gilbertson v. Ballard*, 125-420.

Choses in action held by a non-resident against residents of the state are not subject to collateral inheritance tax on the death of the former. *Gilbertson v. Oliver*, 129-568.

An order made in a probate proceeding on application of the state treasurer that the executor file an inventory of real property for the purpose of having a collateral inheritance tax assessed against it, held to be such intermediate order substantially affecting the merits or determining a right that the executor might appeal therefrom. *In re Estate of Stone*, 132-136.

The devisee of an interest in real property taking collaterally, and therefore subject to an inheritance tax may renounce the devise in favor of the direct heirs, and thus prevent the attaching of the obligation to pay such tax. *Ibid.*

Property of an estate not distributed prior to the taking effect of 27 G. A., chap. 37, held to be subject to the collateral inheritance tax. *Montgomery v. Gilbertson*, 111 N. W. 964.

SEC. 1467-a. Debts deducted. The term "debts" in the eleventh line of section fourteen hundred and sixty-seven (1467) of the code shall in-

clude, in addition to debts owing by decedent at the time of his death, the local or state taxes due from the estate prior to his death, and a reasonable sum for funeral expenses, court costs, including the costs of appraisement made for the purpose of assessing the collateral inheritance tax, the statutory fees of executors, administrators, or trustees, and no other sum; but said debts shall not be deducted unless the same are approved and allowed, within fifteen months from the death of decedent, as established claims against the estate, unless otherwise ordered by the judge or court of the proper county. [28 G. A., ch. 51, § 1.]

SEC. 1467-b. Property subject to tax. Except as to property passing to the persons, corporations, and societies exempted by section fourteen hundred and sixty-seven (1467) of the code from the collateral inheritance tax, and real property located outside of the state passing in fee from the decedent owner, the tax imposed under chapter four (4) of title seven (7) of the code shall hereafter be assessed against, and be collected from, property of every kind, which, at the death of the decedent owner, is subject to, or thereafter, for the purpose of distribution, is brought into this state and becomes subject to the jurisdiction of the courts of this state for distribution purposes, or which was owned by any decedent domiciled within the state at the time of the death of such decedent, even though the property of said decedent so domiciled was situated outside of the state. [28 G. A., ch. 51, § 2.]

SEC. 1467-c. Construction. In the construction of this statute, the words "collateral heirs" shall be held to mean all persons who are not excepted from the provisions of the collateral inheritance tax by section fourteen hundred and sixty-seven (1467) of the code, and this act, except section two (2) thereof, shall apply to all pending estates which are not closed, and the property subjected by this act to the said tax is liable to the provisions incorporated in chapter four (4) of title seven (7) of the code, as to the amount and lien thereof, and the manner of enforcement and collection thereof, except as herein specifically provided otherwise. [28 G. A., ch. 51, § 12.]

SEC. 1467-d. Foreign estates and deduction of debts. Whenever any property belonging to a foreign estate, which estate, in whole or in part, is liable to pay a collateral inheritance tax in this state, the said tax shall be assessed upon the market value of said property remaining after the payment of such debts and expenses as are chargeable to the property under the laws of this state; in the event that the executor, administrator, or trustee of such foreign estate files with the clerk of the court having ancillary jurisdiction, and with the treasurer of state, duly certified statements exhibiting the true market value of the entire estate of the decedent owner, and the indebtedness for which the said estate has been adjudged liable, which statement shall be duly attested by the judge of the court having original jurisdiction, the beneficiaries of said estate shall then be entitled to have deducted such proportion of the said indebtedness of the decedent from the value of the property as the value of the property within this state bears to the value of the entire estate. [28 G. A., ch. 51, § 3.]

SEC. 1467-e. Foreign estates and direct and collateral beneficiaries. Whenever any property, real or personal, within this state belongs to a foreign estate, and said foreign estate passes in part exempt from the collateral inheritance tax, and in part subject to said collateral inheritance tax, and it is within the authority or discretion of the foreign executor, administrator, or trustee administering the estate to dispose of the property, not specifically devised to direct heirs or devisees in the payment of the debts owing by decedent at the time of his death, or in the satisfaction

of legacies, devise[e]s, or trusts given to direct and collateral legatees or devisees, or in payment of the distributive shares of any direct and collateral heirs, then the property within the jurisdiction of this state, belonging to such foreign estate, shall be subject to the collateral inheritance tax imposed by chapter four (4) of title seven (7) of the code, and the tax due thereon shall be assessed as provided in the next preceding section of this act, and with the same proviso respecting the deduction of the proportionate share of the indebtedness, as therein provided. [28 G. A., ch. 51, § 4.]

SEC. 1469. Appraisal.

The appraisal made of the personal property by the regularly appointed appraisers seems to be made the basis for the limitation of the tax on that kind of property. No notice to the heirs, legatees or devisees is provided for or required, and therefore this section as it originally stood was unconstitutional. The tax is a property tax, and not a tax on succession. But the provision for notice contained in 27 G. A., chap. 37, which is made retroactive, cures the defect as to estates not

settled at the time the act was passed and a tax previously levied is rendered valid by said act. *Ferry v. Campbell*, 110-290.

Where title to the real property belonging to deceased had vested absolutely in heirs prior to the enactment of 27 G. A., chap. 37, held that the legalizing act did not cure the defect in the law existing at the time inheritance was cast, and therefore did not render the tax valid as against the inheritance by the heirs. *Herriott v. Potter*, 115-648.

SEC. 1471-a. Valuation of life, term and deferred estates. The value of any estate and property described in sections fourteen hundred and seventy (1470) and fourteen hundred and seventy-one (1471) of the code subject to the collateral inheritance tax shall be determined for the purpose of computing said tax by the rule or standards of mortality and of value commonly used in actuaries' combined experience tables. The treasurer of state is directed to obtain and publish for the use of the courts and appraisers throughout the state tables showing the average expectancy of life, and the value of annuities or life and term estates, and the present worth or value of remainders and reversions. The taxable value of life or term, deferred or future, estates shall be computed at the rate of four per cent. interest. Whenever it is desired to remove the lien of the collateral inheritance tax on remainders, reversions, or deferred estates, parties owning the beneficial interest may pay at any time the said tax on the present worth of such interest determined according to the rules herein fixed. [28 G. A., ch. 51, § 7.]

In an action for permanent personal injury, mortality tables, published in pursuance of this section, are admissible in

evidence. *Clark v. Van Vleck*, 112 N. W. 648.

SEC. 1475-a. Surplus tax—how and when refunded. That when a court of competent jurisdiction has or may hereafter determine that property, upon which a collateral inheritance tax has been paid, is not subject to or liable for the payment of such tax, so much of such tax which has been overpaid to the treasurer of state, shall be returned or refunded to the executor or administrator of such estate, or to those entitled thereto, when a certified copy of the record of such court showing the fact of non-liability of such property to the payment of such tax has been filed with the executive council of the state, the executive council shall issue an order to the auditor of the state directing him to issue a warrant upon the treasurer of the state to refund such tax. [29 G. A., ch. 63, § 1.]

SEC. 1475-b. Notice of hearing. Such order of court shall not be given until fifteen days' notice of the application therefor shall be given to the treasurer of state of the time and place of the hearing of such applica-

tion, which notice shall be served in the same manner as provided for original notices. [29 G. A., ch. 63, § 2.]

SEC. 1476. Method of appraisal—notice—hearing—appeal. All appraisements of real estate subject to such tax shall be made and filed in the manner provided for appraisal of personal property. When such real estate is situated in another county, the same appraisers may serve, or others may be appointed. It shall be the duty of all appraisers appointed under the provisions of this chapter to forthwith give notice to the treasurer of state and other persons known to be interested in the property to be appraised, of the time and place at which they will appraise such property, which time shall not be less than ten days from the date of such notice. The notice shall be served in the same manner as is prescribed for the commencement of civil actions unless a different one is ordered by the court or judge, and the notice, with the proof of service thereof, shall be returned to the court with the appraisal. The treasurer of state, or any person interested in the estate appraised, may file exceptions to the appraisal, on the hearing of which, as an action in equity, either party may produce evidence competent or material to the matters therein involved. If, upon such hearing, the court finds the amount at which the property is appraised is its value on the market in the ordinary course of trade, and the appraisal was fairly and in good faith made, it shall approve such appraisal; but if it finds that the appraisal was made at a greater or less sum than the value of the property in the ordinary course of trade, or that the same was not fairly or in good faith made, it shall set aside the appraisal, appoint new appraisers and so proceed until a fair and good appraisal of the property is made at its value in the market in the ordinary course of trade. The treasurer of state, or any one interested in the property appraised may appeal to the supreme court from the order of the district court approving or setting aside any appraisal to which exceptions have been filed. Notice of appeal shall be served within thirty days from the date of the order appealed from, and the appeal shall be perfected in the time now provided for appeals in equitable actions. In case of appeal the appellant, if he is not the treasurer of state, shall give bond to be approved by the clerk of the court, to pay the tax, which bond shall provide that the said appellant and sureties shall pay the tax for which the property may be liable, with costs of the appeal. [26 G. A., ch. 28, § 10.] [27 G. A., ch. 37, § 1.]

SEC. 1476-a. Appraisements and relief therefrom. All estates, subject in whole or in part to the tax imposed upon collateral inheritances, shall be appraised for the purpose of computing said tax by the regular collateral inheritance tax appraisers, under the rules and regulations authorized to be made by section six (6) of chapter thirty-seven (37) of the laws of the twenty-seventh general assembly governing the district courts in the assessment of said tax; provided, that estates in some part liable for the payment of the inheritance tax need not be entirely appraised by the collateral inheritance appraisers where an appraisal of such part will be sufficient to determine the tax due the state, and estates liable for the collateral inheritance tax, which consist of money, book accounts, bank deposits, notes, mortgages, and bonds, need not be appraised by the collateral tax appraisers if the administrator, executor, or trustee, or the beneficiaries claiming such property, are willing to charge themselves and to pay the collateral inheritance tax upon the full face value of such properties, as may be shown in their inventories, together with the interest or earnings which may be due on said properties, but in all cases the relief of such personal property from appraisal for the collateral inheritance

tax is dependent upon the consent of the treasurer of state, and the subsequent approval thereof by the judge of the proper court. In the event that the estate has been duly appraised under the ordinary statutes of inheritance, and such appraisement is accepted by the treasurer of state as satisfactory for the collateral inheritance tax, the district court or judge of the proper court may, upon proper application relieve the estate from the appraisement by the collateral inheritance tax appraisers; but, in order to obtain such relief, the administrator, executor, trustee, or other party interested must file an application in the office of the clerk of the court for such relief before said clerk issues a commission to the collateral inheritance tax appraisers. The district court or judge of the proper court may, upon application of the representatives of the estate or parties interested, relieve the estate of the appraisement for collateral tax purposes if it be shown to said court that the market value of the entire estate subject to tax will not exceed one thousand dollars, provided, that, prior to the application to said court or judge, the written consent of the treasurer of state to such relief is procured. In all cases where an estate is relieved from an appraisement for collateral inheritance tax purposes, the fact of such relief and the reasons therefor shall be duly noted in the decree or order of final settlement made by the court. [28 G. A., ch. 51, § 5.]

SEC. 1476-b. Rules and regulations. The chief justice of the supreme court shall, prior to July first, 1898, appoint five of the district judges of the state to meet with him at Des Moines on a date to be by him fixed for the purpose of framing uniform rules and regulations, relative to the assessment and collection of the collateral inheritance tax, for the guidance of the district judges, officers of the court, executors and administrators. Said rules and regulations shall aim to give more publicity to the provisions of this chapter, and to secure the strict enforcement of the same, and when made shall form a part of and be published with the rules of the district courts of the state. [27 G. A., ch. 37, § 6.]

[See end of this chapter for rules and regulations adopted.]

SEC. 1477-a. Real estate. In all cases where real estate has been subject to or liable for the payment of the tax provided in this chapter, or where any real estate has heretofore been appraised and the tax not yet paid and the notice required in section one of this act was not given, it shall be the duty of the proper court, immediately upon the taking effect of this act, to enforce such tax, or to set aside any appraisement heretofore made, and order a re-appraisement of the same to be made as in this act provided, anything in the law to the contrary notwithstanding. [27 G. A., ch. 37, § 2.]

SEC. 1477-b. Corporate stock. If a foreign executor, administrator or trustee shall assign or transfer any corporate stock or obligations in this state standing in the name of a decedent, or in trust for a decedent, liable to such tax, the tax shall be paid to the treasurer of state on or before the transfer thereof; otherwise the corporation permitting its stock to be so transferred shall be liable to pay such tax and it is the duty of the treasurer of state to enforce the payment thereof. [27 G. A., ch. 37, § 3.]

SEC. 1477-c. Securities and assets. No safe deposit company, trust company, bank or other institution, person or persons holding securities or assets of the decedent shall deliver or transfer the same to the executor or administrator or legal representative of said decedent unless notice of the time and place of such intended transfer be served upon the state treasurer at least five days prior to the transfer thereof, or unless the tax for which such securities or assets are liable under chapter four (4), title seven (7)

of the code shall be first paid. It shall be lawful for, and the duty, of the treasurer of state to personally, or by any person by him duly authorized, to examine such securities or assets at the time of such delivery or transfer. Failure to serve such notice upon the treasurer of state or to allow such examination on the delivery of such securities or assets to such executor, administrator or legal representative before said tax is paid shall render such safe deposit company, trust company, bank or other institution, person or persons liable for the payment of the taxes due upon such securities or assets as provided in said chapter four (4). [27 G. A., ch. 37, § 4.]

SEC. 1477-d. County attorney—compensation. It shall be the duty of the county attorney of each county to report to the treasurer of state the death of all persons whose estates are liable to payment of the collateral inheritance tax, and the description of any property located in the county liable to such tax, and to perform such further legal services in the enforcement of said tax as he may be directed to do by the treasurer of state, but such attorney shall have no authority to receipt for or receive any of such tax. For reporting such estates or property the county attorney shall receive a compensation of ten (10) per cent. of the tax payable to the state, but not to exceed the sum of twenty (\$20) dollars in any one estate; and for additional legal services performed under the direction of the treasurer of state he shall be paid a compensation of three (3) per cent. on the amount of all taxes collected from estates so reported by him, but in no event shall the amount thereof exceed the sum of one hundred and fifty (\$150) dollars from any one estate. When the treasurer of state is satisfied that an estate reported by the county attorney is liable to the tax he shall so certify to the auditor of state, who shall issue his warrant on the treasurer of state in favor of said county attorney for the sum due for reporting said estate as herein provided, and all other compensation shall be paid said county attorney in like manner when the tax is collected and paid into the state treasury. [27 G. A., ch. 37, § 7.]

SEC. 1477-e. Regulations as to fees of county attorneys. In the event of uncertainty or of conflicting claims as to fees due county attorneys, under section seven (7) of chapter thirty-seven (37) of the laws of the twenty-seventh general assembly, the treasurer of state is empowered to determine the amount of fees, under the limitations of said section, to whom payable, and when the same are due, and as far as possible such determination shall be in accord with fixed rules made by the state treasurer. [28 G. A., ch. 51, § 11.]

SEC. 1478-a. Reports to be filed with treasurer of state. Administrators, executors, and trustees of the estates subject to the collateral inheritance tax shall, when demanded by the treasurer of state, send to such treasurer certified copies of such parts of their reports as may be deemed [demanded] by the treasurer of state, and upon the refusal of said parties to comply with the demand of the treasurer of state, it is the duty of the clerk of the court to comply with such demand, and the expenses of making such copies and transcripts shall be charged against the estate, as are other costs in probate. [28 G. A., ch. 51, § 9.]

SEC. 1478-b. Compromise settlements. Whenever an estate charged, or sought to be charged, with the collateral inheritance tax is of such a nature, or is so disposed, that the liability of the estate is doubtful, or the value thereof cannot, with reasonable certainty, be ascertained under the provisions of law, the treasurer of state may, with the written approval of the attorney-general, which approval shall set forth the reasons therefor, compromise with the beneficiaries or representatives of such estates, and compound the tax thereon; but said settlement must be approved by the

district court or judge of the proper court, and after such approval the payment of the amount of the taxes so agreed upon shall discharge the lien against the property of the estate. [28 G. A., ch. 51, § 8.]

SEC. 1478-c. Payment of costs. In any action where the state has been a party in enforcing the collection of the collateral inheritance tax, and a decision adverse to the state has been rendered, with an order that the state pay the costs it is the duty of the clerk of the court in which such action was pending to certify the amount of such costs to the treasurer of state, who shall, if said costs be correctly certified, and the case has been finally terminated, present the claim to the executive council to audit, and, said claim being allowed by said council, the auditor of state is directed to issue a warrant on the state treasurer in payment of such costs. [28 G. A., ch. 51, § 10.]

SEC. 1479-a. List of heirs. In all of the estates subject to the payment of the collateral inheritance tax it shall be the duty of the executor, administrator or trustee to furnish the clerk of the court a list of the heirs as required in section thirty-four hundred and twelve (3412) of the code and to state therein in a separate column the relationship which each heir, devisee or legatee bears to the decedent. The clerk of the court shall immediately forward a true copy of such list to the treasurer of state, and no final settlement of the account of any executor, administrator or trustee shall be accepted or allowed unless a strict compliance with the provisions of this section has been had by such person. [27 G. A., ch. 37, § 5.]

The duty imposed on the executor or administrator by the collateral inheritance tax law to file an inventory of real and personal property arises only when there is some property or interest passing under the will or by law which is subject to the payment of such tax. *In re Estate of Stone*, 132-136.

SEC. 1479-b. Date of filing inventories of personalty. Whenever, by reason of the complicated nature of an estate, or by reason of the confused condition of the decedent's affairs, it is impracticable for the executor, administrator, or trustee or beneficiary of said estate to file with the clerk of the court a full, complete, and itemized inventory of the personal assets belonging to the estate, within the time required by statute for filing inventories of the estates, the court may, upon the application of such representatives or parties in interest, extend the time for the filing of the collateral inheritance appraisalment for a period not to exceed three months beyond the time fixed by law. [28 G. A., ch. 51, § 6.]

TABLES FOR DETERMINING THE VALUATION OR PRESENT WORTH OF LIFE AND TERM ESTATES OR ANNUITIES AND REMAINDERS OR REVERSIONARY INTERESTS COMPUTED AT FOUR PER CENT. PER ANNUM FOR THE USE OF THE COURTS OF IOWA IN THE ASSESSMENT OF THE COLLATERAL INHERITANCE TAX.

STATE OF IOWA,
TREASURY DEPARTMENT,
DES MOINES, July 15, 1900.

Section seven (7) of chapter fifty-one (51) of the acts of the twenty-eighth (28) general assembly provides:

"The treasurer of state is directed to obtain and publish for the use of the courts and appraisers throughout the state tables showing the average expectancy of life and the values of annuities of life and term estates, and the present worth or value of remainders and reversions. The taxable value of life or term, deferred or future estates shall be computed at the rate of 4 per cent. interest."

Pursuant to the foregoing provisions, the following tables for determining the taxable value, namely, the present worth, of life estates or annuities and remainders or reversionary interests are hereby published and promulgated for the use of the courts and appraisers of the state.

Table I gives the basis for valuing "Life Estates" or annuities, the proceeds of which the beneficiary enjoys during his or her life.

Table II relates to "Term Estates" or annuities terminable at a certain period, definitely stated in the provisions of the instrument creating the estate.

The tables printed herein are those used by the United States government in the assessment of the inheritance tax under the war revenue act of June 13, 1898, prepared for the internal revenue service under the direction of the government actuary, Mr. J. S. McCoy. They are based upon the "Actuaries or Combined Experience Tables," money being considered worth four (4) per cent. per annum. Both the tables and notes are reproduced from circulars No. 527, March, 1899, and No. 21,231, December, 1899, issued by the commissioner of internal revenue.

The treasurer of state is indebted to Honorable G. W. Wilson, commissioner of internal revenue at Washington, D. C., for permission to reprint and use the tables employed by the national government, and he desires here to acknowledge the courtesy and the very valuable favor rendered by him.

JOHN HERRIOTT,
Treasurer of State of Iowa.

Table No. I. Single-life, 4 per cent., showing the present worth of an annuity, or life interest, and a reversionary interest.

Age.	Mean redemption period.	Annuity or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.	Age.	Mean redemption period.	Annuity or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
0	23.179	\$14.72829	\$0.39507	50	18.113	\$12.47032	\$0.48191
1	30.552	17.30771	0.29586	51	17.527	12.17919	0.49311
2	35.626	18.69578	0.24247	52	16.947	11.88408	0.50446
3	37.572	19.15901	0.22465	53	16.372	11.58531	0.51595
4	38.702	19.41226	0.21491	54	15.804	11.28325	0.52757
5	39.352	19.55301	0.20950	55	15.243	10.99789	0.53931
6	39.654	19.61731	0.20703	56	14.689	10.66982	0.55116
7	39.691	19.62502	0.20673	57	14.143	10.35931	0.56310
8	39.625	19.61097	0.20727	58	13.603	10.04630	0.57514
9	39.264	19.53413	0.21022	59	13.072	9.73131	0.58726
10	38.891	19.45359	0.21332	60	12.549	9.41474	0.59943
11	38.507	19.36943	0.21656	61	12.029	9.09765	0.61163
12	38.113	19.28184	0.21993	62	11.532	8.78052	0.62382
13	37.710	19.19065	0.22344	63	11.039	8.46412	0.63600
14	37.298	19.09590	0.22708	64	10.557	8.14888	0.64812
15	36.877	18.99764	0.23086	65	10.088	7.83552	0.66017
16	36.447	18.89569	0.23478	66	9.630	7.52476	0.67212
17	36.010	18.79010	0.23884	67	9.185	7.21699	0.68396
18	35.565	18.68070	0.24305	68	8.753	6.91298	0.69565
19	35.113	18.56751	0.24740	69	8.333	6.61301	0.70719
20	34.652	18.45038	0.25191	70	7.926	6.31716	0.71857
21	34.186	18.32932	0.25656	71	7.532	6.02612	0.72976
22	33.711	18.20416	0.26138	72	7.151	5.74003	0.74077
23	33.230	18.07471	0.26636	73	6.782	5.45928	0.75157
24	32.742	17.94097	0.27150	74	6.425	5.18402	0.76215
25	32.248	17.80274	0.27682	75	6.081	4.91463	0.77251
26	31.747	17.65984	0.28231	76	5.749	4.65125	0.78264
27	31.239	17.51224	0.28799	77	5.428	4.39383	0.79254
28	30.725	17.35968	0.29386	78	5.119	4.14286	0.80220
29	30.205	17.20225	0.29991	79	4.823	3.89858	0.81159
30	29.678	17.03961	0.30617	80	4.537	3.66071	0.82074
31	29.147	16.87176	0.31262	81	4.262	3.42900	0.82965
32	28.608	16.69846	0.31929	82	3.995	3.20258	0.83836
33	28.067	16.51964	0.32617	83	3.737	2.98024	0.84691
34	27.516	16.33503	0.33327	84	3.484	2.76106	0.85534
35	26.961	16.14437	0.34060	85	3.236	2.54366	0.86371
36	26.401	15.94755	0.34817	86	2.992	2.32795	0.87200
37	25.834	15.74427	0.35599	87	2.752	2.11384	0.88024
38	25.263	15.53421	0.36407	88	2.517	1.90115	0.88842
39	24.685	15.31722	0.37241	89	2.286	1.69107	0.89650
40	24.101	15.09295	0.38104	90	2.062	1.48540	0.90441
41	23.511	14.86102	0.38996	91	1.845	1.28432	0.91214
42	22.915	14.62122	0.39918	92	1.637	1.09024	0.91961
43	22.313	14.37356	0.40871	93	1.442	0.90647	0.92667
44	21.708	14.11860	0.41852	94	1.263	0.73687	0.93320
45	21.103	13.85713	0.42857	95	1.103	0.58435	0.93906
46	20.499	13.58958	0.43886	96	0.975	0.46182	0.94378
47	19.896	13.31698	0.44935	97	0.877	0.36698	0.94742
48	19.298	13.03942	0.46002	98	0.746	0.24038	0.95229
49	18.703	12.75716	0.47088	99	0.500	0.00000	0.96154

EXPLANATORY NOTES AND EXAMPLES.

The first column shows the age of the person under consideration.

The second column shows the corresponding "mean redemption period" and represents the time in years in which the present values of annuities and reversions certain will become equal, respectively, to the present value of annuities and reversions contingent on the duration of life. The "mean redemption period" is a mean between the last payment of the annuity and the payment of the reversion, averaging six months later than the former payment and six months earlier than the latter payment. (This period is ordinarily designated the expectancy of life during which a beneficiary will enjoy the life estate.)

The third column shows the present value of an annuity for life of one dollar per annum, the last payment being made at the end of the year prior to the one in which death occurs. The fourth column shows the present worth of one dollar payable at the end of the year in which death occurs.

EXAMPLE 1.

A person dying bequeaths to his nephew, aged forty years, an annuity of one thousand dollars during life. What is the present value of the annuity?

Reference to the foregoing table shows that the present value of one dollar a year, payable at the end of each year during the life of a person aged forty years, is fifteen dollars nine cents two mills and ninety-five one-hundredths of a mill (\$15.09295); therefore, the present value of one thousand dollars is one thousand times as much, or fifteen thousand and ninety-two dollars and ninety-five cents, the amount upon which tax accrues.

EXAMPLE 2.

A person dying bequeaths to his sister, aged thirty-five years, a life interest in personal property amounting to fifty thousand dollars (\$50,000.00), the estate to revert absolutely at her death to other collateral parties. Required the present value, at the date of death of the testator, of the life interest of the sister in the estate; also, required at the same date, the present value of the reversionary interest of said other parties in the estate.

At a net interest of four per cent. per annum, the assumed rate, the estate of \$50,000.00 will realize an income or annuity of \$2,000.00 per annum. The present value of the sum of \$1.00, payable at the end of each year during the life of a person aged thirty-five years, is found by the table to be \$16, 14437, and the present value of an annuity of \$2,000.00 for the same time would be two thousand times as much, or \$32,288.74, the amount upon which tax accrues.

The reversion or present value of \$1.00, due at the end of the year of death of a person aged thirty-five years, is found by the table to be \$0.34060, and such value of \$50,000.00 would be fifty thousand times as much, or \$17,030.00, the amount upon which tax accrues.

Table No. II. Present value of annuities and reversions certain upon a 4 per cent. basis.

Number of years.	Present worth of an annuity of one dollar, payable at the end of each year, for a certain number of years.	Present worth of one dollar, payable at the end of a certain number of years.	Number of years.	Present worth of an annuity of one dollar, payable at the end of each year, for a certain number of years.	Present worth of one dollar, payable at the end of a certain number of years.
	<i>Annuity.</i>	<i>Reversion.</i>		<i>Annuity.</i>	<i>Reversion.</i>
1	\$ 0.96154	\$0.961538	16	\$11.65229	\$0.533908
2	1.88609	0.924556	17	12.16567	0.513373
3	2.77509	0.888996	18	12.65929	0.493628
4	3.62989	0.854804	19	13.13394	0.474642
5	4.45182	0.821927	20	13.59032	0.456387
6	5.24214	0.790314	21	14.02916	0.438834
7	6.00205	0.759918	22	14.45111	0.421955
8	6.73274	0.730690	23	14.85684	0.405726
9	7.43533	0.702587	24	15.24696	0.390121
10	8.11089	0.675564	25	15.62208	0.375117
11	8.76047	0.649581	26	15.98277	0.360689
12	9.38507	0.624597	27	16.32958	0.346816
13	9.98565	0.600574	28	16.66306	0.333477
14	10.56312	0.577475	29	16.98371	0.320651
15	11.11839	0.555262	30	17.29203	0.308319

EXAMPLE.

A man dies leaving personal property to the amount of \$50,000.00. His niece is to have the income from it for 20 years, it then to revert to his youngest brother. What is the present worth of these legacies?

The income of \$50,000.00 would be \$2,000.00 per annum, assuming money at 4 per cent.

The present worth of an annuity of \$2,000.00 for 20 years will be 2,000 times an annuity of \$1.00 for 20 years. In the table opposite 20 we find the value of an annuity of \$1.00 to be \$13.59032, therefore the present worth of an annuity of \$2,000.00 will be \$27,180.64.

A reversion of \$1.00 at the end of 20 years is shown by the table to be \$0.456387, and a reversion of \$50,000.00 will be 50,000 times as much, or \$22,819.35.

STATE OF IOWA,
TREASURY DEPARTMENT,
DES MOINES.

The following rules and regulations for the assessment and collection of the tax on collateral inheritances in Iowa were drafted and adopted in accordance with the provisions of section six, chapter thirty-seven, of the acts of the twenty-seventh general assembly, which follow:

The chief justice of the supreme court shall, prior to July 1, 1898, appoint five of the district judges of the state to meet with him at Des Moines on a date to be by him fixed, for the purpose of framing uniform rules and regulations relative to the assessment and collection of the collateral inheritance tax, for the guidance of the district judges, officers of the court, executors and administrators. Said rules and regulations shall aim to give more publicity to the provisions of this chapter, and to secure the strict enforcement of the same, and when made shall form a part of and be published with the rules of the district courts of the state.

Pursuant to the authority conferred in the above section, Judge H. E. Deemer, chief justice of the supreme court, directed Judges S. M. Weaver, of the Eleventh judicial district; L. E. Fellows, of the Thirteenth; H. M.

Towner, of the Third; Z. A. Church, of the Sixteenth, and M. J. Wade, of the Eighth judicial district of Iowa, to meet with him in Des Moines. The rules and regulations for the assessment and collection of the collateral inheritance tax herewith published were adopted June 11, 1898.

JOHN HERRIOTT,
Treasurer of State.

RULES AND REGULATIONS RELATING TO THE ASSESSMENT AND COLLECTION OF THE COLLATERAL INHERITANCE TAX.

RULE 1.

Lien book. The clerk of the district court in and for each county shall provide and keep a suitable book, substantially bound and suitably ruled, to be known as the Collateral Inheritance Tax and Lien Book, in which shall be kept a full and accurate record of all proceedings in cases where property is charged or sought to be charged with the payment of a collateral inheritance tax under the laws of this state, to be printed and ruled so as to show, upon one page:

1. The name, place of residence, and date of death of the decedent.
2. Whether the decedent died testate or intestate, and if testate, the record and page where the will was probated and recorded.
3. The name and postoffice address of the executor, administrator, trustee or grantee, with date of appointment or transfer.
4. The names, postoffice addresses and relationship, if known, of all the heirs, devisees and grantees.
5. The appraised valuation of the personal property.
6. The amount of inheritance tax due upon said personal property.
7. A record of payment with amount and date.
8. Date of filing objections and names of objectors.
9. Blank for index and reference to all proceedings, and for memorandum entries of the court or judge in relation thereto.

Upon the opposite page of such record shall be printed:

1. "Real estate derived from..... (naming decedent) which is subject to the lien prescribed by the statute for collateral inheritance tax."
2. A full and accurate description of such real estate, by forty acre or fractional tracts, or by lots, or other complete individual description.
3. The appraised valuation as reported by the appraisers,—with a reference to the record of their report,—as to each piece of such real estate.
4. The amount of the inheritance tax due upon each such piece.
5. A record of payments, with dates and amounts.
6. Date of filing objections, and names of objectors.
7. Blank for index and reference to all proceedings, and for memorandum entries of court or judge in relation thereto.

RULE 2.

Report by administrators, etc. Upon the appointment and qualifications of each executor, administrator and testamentary trustee, the clerk issuing the letters shall at the same time deliver to him a blank form upon which he shall be required to make detailed report of the following facts:

1. Name and last residence of decedent.
2. Date of death.
3. Whether or not he left a will.
4. Name and postoffice of executor, administrator or trustee.

5. Name and postoffice of surviving wife or husband, if any.
6. If testate, name and postoffice of each beneficiary under will.
7. Relationship of each beneficiary to the testator.
8. If intestate, name and postoffice of each heir at law.
9. Relationship of each heir at law to the decedent.
10. Inventory of all the real estate of the decedent, giving amount and description of each tract.

Within ten days after his qualification each executor, administrator and testamentary trustee shall make and return to the clerk, under oath, a full and detailed report as indicated in the preceding paragraph, and upon his failure so to do, the clerk shall forthwith report his delinquency to the district court if in session, or to a judge of said court if in vacation, for such order as may be necessary to enforce an observance of these rules.

If it appears from the inventory or report so filed, that the real estate, or any part of it, is subject to an inheritance tax it shall be the duty of the executor or administrator to cause the lien of the same to be entered upon the lien book in the office of the clerk of the court in each county where each particular tract of said real estate is situated.

RULE 3.

Duties of the clerk. The clerk shall from time to time enter upon the collateral inheritance tax and lien book, the title of all estates subject to the inheritance tax, as shown by the inventories or lists of heirs filed in his office, or as reported to him by the county attorney or the treasurer of state, and shall enter in said book as against each estate or title at the appropriate place, all such information relating to the situation and condition of the estate as he may be able to obtain from the papers filed in his office, or from the county attorney or the treasurer of state, as may be necessary to the collection and enforcement of the tax. He shall also immediately index all liens entered upon the collateral inheritance tax and lien book in the book kept in his office for that purpose.

Should any estate, or the name of any grantee or grantees, be placed upon the book at the suggestion of the county attorney or the treasurer of state, in which the papers already on file in the clerk's office do not disclose that an inheritance tax is due or payable, the county attorney shall forthwith give to all parties in interest, such notice as the court or judge may prescribe, requiring them to appear on a day to be fixed by the said court or judge, and show cause why the property should not be appraised and subjected to said tax. If upon hearing at the time so fixed, the court is satisfied that any property of the decedent, or any property devised, granted or donated by him, is subject to the tax, the same proceedings shall be had as in other cases, so far as applicable.

RULE 4.

Appointment of appraisers. At the first term of court in each county, after the publication of these rules, and annually thereafter, the court shall appoint three competent residents and freeholders of said county, to act as appraisers of all property within its jurisdiction, which is charged or sought to be charged with a collateral inheritance tax. Said appraisers shall serve for one year, and until their successors are appointed and qualified. They shall each take an oath to faithfully and impartially perform the duties of the office, but shall not be required to give bond. They shall be subject to removal at any time at the discretion of the court, and the court, or a judge thereof in vacation, may also, in its discretion, either before or after the appointment of the regular appraisers, appoint other appraisers.

to act in any given case. Vacancies occurring otherwise than by expiration of term, shall be filled by the appointment of the court, or by a judge in vacation.

RULE 5.

Duties of appraisers. When an estate is opened in which there is property which may be subject to the inheritance tax, the clerk shall forthwith issue a commission to the appraisers, who shall fix a time and place for appraisal, and if not practicable to serve the notice provided for by statute, they shall apply to the court or judge for an order as to notice, and upon service of such notice and the making of such appraisal, the said notice, return thereon and appraisal shall be filed with the clerk, and a copy of such appraisal shall be filed by the clerk with the treasurer of state.

Any person interested may, within twenty days thereafter, file objections to said appraisal or taxation, and the same shall then stand for trial and further proceedings as provided by statute. If upon such hearing the court finds that the property is not subject to the tax, the court shall upon expiration of time for appeal, when no appeal has been taken, order the clerk to enter upon the lien book a cancellation of any claim or lien for taxes.

RULE 6.

Duty of county attorney. It shall be the duty of each county attorney to make examination from time to time of all reports filed with the clerk by administrators, executors, and trustees, pursuant to law or the provisions of these rules; also to make examination of all foreign wills offered for probate or recorded within his county, as well as of the records of deeds and conveyances in the recorder's office of said county, and if from such examination, or from information or knowledge coming to him from any other source, he finds or believes that any property within his county, or within the jurisdiction of the district court of said county, has since July 4, 1896, passed by will or by the intestate laws of this or any other state, or by deed, grant, sale, or gift made or intended to take effect, in possession or enjoyment after the death of the testator, donor or grantor, to any person other than to or for the use of the father, mother, husband, wife, lineal descendant, adopted child, the lineal descendant of an adopted child of a decedent, or to or for charitable, educational or religious societies, or institutions within this state, he shall make report thereof in writing to the clerk of the district court, embodying in such report, so far as he is able, all the facts mentioned in rule 2 of these rules, and cause the notice required by rule 3 hereof to be properly given and returned.

Any citizen of the state having knowledge of property liable to such tax, against which no proceeding for enforcing collection thereof is pending, may report the same to the county attorney, and it shall be the duty of such officer to investigate the case, and if he has reason to believe the information to be true, he shall forthwith institute such proceedings substantially as above indicated. He shall also advise and assist the clerk and appraisers in the discharge of their duties in cases of this nature, and see that notices required by law and these rules are properly made, served and returned.

RULE 7.

Duty of court. On the first or second day of each regular term, the court shall require the clerk to present for its inspection, the inheritance tax and lien book hereinbefore provided for, together with all reports of

administrators, executors and trustees which have been filed pursuant to these rules, since the last preceding term. The county attorney shall also attend and make report to the court concerning the progress of all cases pending for the collection of such taxes, together with any other facts, which, in his judgment, may aid the court in enforcing the general observance of the collateral inheritance tax law. If from information obtained from the records or reports, or from any other source, the court has reason to believe that there is property within its jurisdiction liable to the payment of an inheritance tax, against which proceedings for collection are not already pending, it shall enter an order of record, directing the county attorney to institute such proceedings forthwith.

RULE 8.

Record. In all cases entered upon the inheritance tax and lien book, the clerk shall make a complete record in the proper probate record, of all the proceedings, orders, reports, inventory, appraisements and all other matters and proceedings therein.

RULE 9.

Costs. In all cases where property is found to be liable to taxation under the inheritance tax law, all costs of the proceedings had for the assessment of such tax shall be chargeable to such property, and to discharge the lien upon such property all costs, as well as the taxes, must be paid. In all other cases the costs are to be paid as ordered by the court.

RULE 10.

Books and blanks. The book herein provided for, and all blanks to be used in carrying out the provisions of the law and of these rules, shall be in form to be approved by the chief justice of the supreme court, which form shall be furnished to the clerk of each county by the treasurer of state.

It shall be the duty of the state treasurer to give such publicity to these rules, and the provision of the statute regarding the collection of such tax, as may by him be deemed advisable and practicable.

RULE 11.

Construction. These rules are not to be construed as in any manner superseding any of the requirements of the statute governing the levy and collection of collateral inheritance taxes, or as relieving executors, administrators, trustees or officers of court, or any of them, from a strict observance of all the duties which such statute imposes upon them.

These rules shall be in full force and effect from and after the 4th day of July, 1898.

BE IT REMEMBERED, that the above and foregoing rules were adopted this 11th day of June, 1898, by the following: H. E. Deemer, chief justice of the supreme court of Iowa; S. M. Weaver, judge of the eleventh judicial district of Iowa; L. E. Fellows, judge of the thirteenth judicial district of Iowa; H. M. Towner, judge of the third judicial district of Iowa; Z. A. Church, judge of the sixteenth judicial district of Iowa; M. J. Wade, judge of the eighth judicial district of Iowa. Said district judges having been appointed by the said chief justice of the supreme court, pursuant to section six, chapter thirty-seven of the acts of the twenty-seventh general assembly of the state of Iowa.

Witness my hand the 11th day of June, 1898.

H. E. DEEMER,

Chief Justice of the Supreme Court of Iowa.

Attest: M. J. WADE, *Secretary.*

TITLE VIII.

OF ROADS, BRIDGES AND FERRIES, AND THE DESTRUCTION OF THISTLES.

CHAPTER 1.

OF THE ESTABLISHMENT, ALTERATION AND VACATION OF ROADS.

SECTION 1482. Jurisdiction over.

Jurisdiction: The board of supervisors is without jurisdiction to establish a highway within the limits of an incorporated town. *Philbrick v. University Place*, 106-352.

The action of the board of supervisors in vacating a portion of a highway cannot be questioned by mandamus against a road supervisor to compel him to remove obstructions from the portion of the highway vacated. *Sullivan v. Robbins*, 109-235.

The fact that the board vacates a portion of the highway, so as to leave the remainder less than forty feet in width is not such an irregularity as can be taken advantage of in a collateral proceeding. *Ibid.*

The right to the highway vests in the public generally, and but for statutory provisions, giving the board of supervisors power to establish, maintain and discontinue highways, such power would be in the state, which is the representative of the general public. *Dickinson County v. Fouse*, 112-21.

Dedication: The execution and filing with the county judge of an instrument giving or offering to give a right of way for a highway which was thereafter abandoned, held sufficient to show a dedication. *Agne v. Seitsinger*, 104-482.

No particular form is necessary for the dedication of land for a highway, the vital question as against the owner being whether the *animus dedicandi* may be inferred from the facts proven; and held that the signature of the owner to a petition to the board of supervisors to lay out a highway was admissible as tending to show an intent to dedicate, although the

board of supervisors were without jurisdiction in the matter. *Philbrick v. University Place*, 106-352.

While it is well settled that the dedication of a highway or street must be accepted to be effectual, nevertheless the public or a city or town may be estopped by its conduct to open a street or highway which has been closed or occupied for many years by a private person under a claim of right. *Uptagraff v. Smith*, 106-385.

To establish a highway by prescription there must be a general uninterrupted public use under a claim of right, continued for the statutory period. The mere fact that neighbors and those owning adjoining lands were permitted to use the way for hauling wood and otherwise, is not sufficient to show a dedication to public use. *Fairchild v. Stewart*, 117-734.

Evidence in a particular case held not sufficient to show dedication of a highway. *Fountain v. Keen*, 116-406.

Adverse possession: Mere non-user will not operate to discontinue a legally established highway unless there has been such long-continued adverse possession or transfer of the land by purchase and sale as that justice demands the public should be estopped from asserting the right to open it up. *Bradley v. Appanoose County*, 106-105.

Where an adjacent owner fenced up the highway, claiming that it had been discontinued by reason of proceedings to relocate, and had exclusive possession by virtue of such acts, continued for ten years, held that the public was barred from asserting any rights thereto. *Rector v. Christy*, 114-471.

SEC. 1483. Repeal—width of roads. That section fourteen hundred and eighty-three (1483) of the code, be and the same is hereby repealed, and the following enacted in lieu thereof:

“Roads hereafter established, unless otherwise fixed by the board, shall be at least sixty-six feet wide, and in no case less than forty; within these limits they may be increased or diminished in width, altered in direction, or vacated, by pursuing the course prescribed in this chapter; provided, however, that said board may locate and establish consent roads, at its discretion, at a minimum width of not less than thirty feet. [32 G. A., ch. 64.]

Where there is no record as to the width of the highway established, it will be presumed that it is sixty-six feet in width. *Biglow v. Ritter*, 131-213.

less width than sixty-six feet, if the evidence shows the use to have been restricted to a less width. *Haan v. Meester*, 132-709.

A highway by prescription may be of

SEC. 1487. Expediency.

Where the opening of a road will require the removal of buildings, the property owner having due notice may waive objection to the opening of the highway

on that ground and claim compensation by way of damages. *Stronsky v. Hickman*, 116-651.

SEC. 1489. Survey made—commissioner sworn.

It is only when the precise location cannot be given otherwise in his report that the commissioner is bound to cause the

line thereof to be surveyed and plainly marked. *Palmer v. Clark*, 114-558.

SEC. 1495. Notice served. Within twenty days after the day is fixed by the auditor as above provided, a notice shall be served on each owner of land lying in the proposed road, or abutting thereon, as shown by the transfer books in the auditor's office, who resides in the county, in the manner provided for the service of original notices. If the owner of the land as thus shown does not reside in the county, similar notice shall be served upon any person who is in the actual occupancy of such land. In any case, notice shall be published, once each week, for four weeks in some newspaper printed in the county. The notice may be in the following form:

To all whom it may concern: The commissioner appointed to locate, vacate, or alter (as the case may be) a road commencing at.....in..... county, running thence (describe in general terms all the points as in the commissioner's report, giving the names of the owners of the land through which the proposed road passes as they appear upon the transfer books of the auditor's office) and terminating at....., has reported in favor of the establishment, vacation, or alteration thereof, and all objections thereto, or claims for damages, must be filed in the auditor's office on or before noon of the.....day of....., A. D....., or such road will be established, vacated, or altered without reference thereto.

.....
County Auditor.

[19 G. A., ch. 109; C., '73, § 936.]

[30 G. A., ch. 2, § 4.]

The notice required by this section is for the purpose of giving the owners of land living or abutting on the road an opportunity to object to the establishment or vacation thereof, or to present their claims for damages. One who has signed a petition asking that action be taken cannot object for want of notice to him. *Sullivan v. Robbins*, 109-235.

Where the property owner has due notice he may interpose the objection that the opening of the highway will necessitate the removal of buildings, or he may waive that objection and demand compen-

sation by way of damages. *Stronsky v. Hickman*, 116-651.

A notice to non-residents of the establishment of a highway which is such as might have been authorized by the legislature may be made sufficient by a legalizing act, although not sufficient under the statute in force when it was given. *Fair v. Buss*, 117-164.

A general order of the board of supervisors for the opening of highways along all section lines in the county with notice simply, "to whom it may concern" is insufficient and the subsequent abandonment

of one of the highways claimed to have been thus established may be shown. *Hatch v. Barnes*, 124-251.

SEC. 1501. Final action.

The board of supervisors has discretion in determining whether a highway shall be established, even where its establishment is asked by consent. *Perry v. Board of Supervisors*, 133-281.

The board having acquired jurisdiction to establish a highway, every presumption thereafter is in favor of the legality of its proceedings. *Biglow v. Ritter*, 131-213.

Where the establishment of a highway is ordered by the board of supervisors on condition that the costs and damages be paid by the petitioner, it does not become a legal highway until such conditions are complied with. *Kirkhart v. Roberts*, 123-137.

A highway established by an unauthorized general order for the establishment of highways along all county section lines

The defect in the proceeding is not cured by a subsequent legalizing act. *Ibid.*

and without proper notice may be subsequently abandoned so that a legalizing act will not render the original establishment valid. *Hatch v. Barnes*, 124-251.

While an alteration of the road may involve the discontinuance of that part which is altered, it will not result in discontinuance of a portion of the old road which is not rendered unnecessary by reason of the change. *Rector v. Christy*, 114-471.

The right to vacate a public highway is different from that of a city to vacate a street which it has accepted by dedication. *Long v. Wilson*, 119-267.

A highway outside of the limits of a city or town can only be vacated by the order of the county board of supervisors. *Chrisman v. Omaha & Council Bluffs R. & B. Co.*, 125-133.

SEC. 1508. In cities or towns.

The statutory provisions as to highways relate to the streets of cities and towns so far as they are applicable. *Newton v. Board of Supervisors*, 112 N. W. 167.

The streets of a city or town plat are

county highways and on the termination of the corporate capacity of the city or town pass completely under the control of the board of supervisors. *Chrisman v. Brandes*, 112 N. W. 833.

SEC. 1510. County line roads.

A highway cannot be considered as established by joint action of two boards of supervisors where the action of each board is independent in character and in fact separated from that of the other board by a considerable interval of time. *Lamansky v. Williams*, 125-578.

While the statute does not expressly mention bridges in connection with the

provisions for county line roads to be established by the joint action of the boards of supervisors of two adjoining counties, the provisions of such statute are equally applicable to the proceedings under Code § 424, to construct a bridge across an unnavigable stream which is the boundary line of the counties. *Bremer County v. Walstead*, 130-164.

SEC. 1511. General control—concurrent action.

The fact that the boards of supervisors of adjoining counties have each, by independent action, established highways in their respective counties which are continuous with each other, does not necessitate joint action of the two boards in the vacation of that portion of the continuous highway located in one county. *Lamansky v. Williams*, 125-578.

The fact that the same petition for vacation was presented to the two boards does not preclude final action being taken by one board with reference to the portion of the highway located in its county, in case the independent action of such board would in itself be proper. *Ibid.*

SEC. 1513. Appeals—from what taken.

The appeal in a proceeding for the establishment of a highway is from the final decision of the board. While the damages are assessed in the first instance by the appraisers, the finding may be reviewed by the board, and the damages be increased or diminished. *Henderson v. Calhoun County*, 129-119.

Appeal does not lie from the order

establishing a highway, but only from the award of damages. *In re Application of Dugan*, 129-241.

A notice of appeal will be liberally construed, and if it is sufficiently definite for a reasonably certain identification of the judgment, order or decision appealed from, it is good. *Ibid.*

SEC. 1516. Proceedings in court.

It is only upon a matter of damages in road cases. *In re Bradley*, 108-476. that a claimant is entitled to a jury trial

SEC. 1520. Proceedings—record.

The record of a second survey is not sufficient to establish a relocation of the highway where the surveyor does not make use of the field notes of the highway as originally established and the field notes attached to his survey do not purport to be those of a resurvey. *Caulkins v. Ward*, 127-609.

SEC. 1527-a. Purchase or condemnation of land. The board of supervisors at any regular meeting shall have the power to purchase or provide for the condemnation of, pay for out of the county bridge fund, enter upon and take any land necessary for the purpose of preventing the encroachment of a navigable or non-navigable stream on a public highway, and for the purpose of straightening or altering a public highway when any such stream has encroached thereon, or some other condition in the highway exists that would, in the judgment of the board, render it necessary or advisable to straighten or alter the same, and the proceedings for condemnation of land as contemplated in this act shall be in accordance with the provisions relating to taking private property for works of internal improvement. [32 G. A., ch. 65.]

SEC. 1527-b. Supervisors may grant use of highway—damages. Upon application to the board of supervisors of any county by any municipality for permission to construct its water mains and lay its pipes in the public highway from such municipality to its reservoir, the said board may grant the same upon condition that it shall not in any manner interfere with the public travel. The applicant shall be responsible for all damages that may arise from such construction, or from the same not being kept in repair. [32 G. A., ch. 66.]

CHAPTER 2.
OF WORKING ROADS.

SECTION 1528. Powers and duties of trustees. The township trustees of each township shall meet on the first Monday in April, or as soon thereafter as the assessment book is received by the township clerk, and on the first Monday in November, in each year. At the April meeting, said trustees shall determine:

1. The rate of property tax to be levied for the succeeding year for roads, bridges, guideboards, plows, scrapers, tools, and machinery adapted to the construction and repair of roads, and for the payment of any indebtedness previously incurred for road purposes, and levy the same, which shall not be less than one nor more than four mills on the dollar on the amount of the township assessment for that year, which, when collected, shall be expended under the direction and order of the township trustees;

2. The amount that will be allowed for a day's labor done by a man, and by a man and team, on the road. To certify to the board of supervisors the desire for an additional road tax, of not to exceed one mill, to be levied in whole or in part by the board of supervisors as hereinafter provided. At the November meeting, they shall settle with the township clerk and supervisors of roads. [26 G. A., ch. 43; 25 G. A., ch. 22; C., '73, §§ 969, 971; R., §§ 880, 891, 895; C., '51, § 568.] [29 G. A., ch. 53, § 3.] [29 G. A., ch. 64, § 1.]

There is no obligation on the part of the county to keep the highways in repair. *Wilson v. Wapello County*, 129-77.

The board of supervisors has no authority to purchase machinery out of the road tax with which to work the roads. *Harrison County v. Ogden*, 133-9.

The board cannot incur obligations pay-

able in the future out of the road fund. *Ibid.*

The county is not estopped by the unauthorized acts of its officers incurring indebtedness payable out of such fund, nor in attempting to ratify unlawful obligations already entered into. *Ibid.*

SEC. 1530. County road fund—how levied and paid out. The board of supervisors of each county shall, at the time of levying taxes for other purposes, levy a tax of not more than one mill on the dollar of the assessed value of the taxable property in its county, including all taxable property in cities and incorporated towns, which shall be collected at the same time and in the same manner as other taxes, and be known as the county road fund, and paid out only on the order of the board for the purchase of road tools or machinery or for work done on the roads of the county in such places as it shall determine. Provided that on written petition of a majority of the electors who are freeholders of any township in any county, the board of supervisors may levy an additional mill in said township, to be expended by said board of supervisors on roads in township where same is levied; but so much of the county road fund as arises from property within any city or incorporated town, except such pro rata share as may have been expended by the board for the purchase or road tools or machinery, shall be expended on the roads or streets within such city or town, or on the roads adjacent thereto, under the direction of the city or town council; and the county treasurer shall receive the same compensation for collecting this tax as he does for collecting corporation taxes. Moneys so collected shall not be transferable to any other fund nor used for any other purpose. The board of supervisors shall levy such an additional sum for the benefit of such townships as shall have certified a desire for such additional levy, as provided for in section fifteen hundred and twenty-eight of this chapter; but the amount for the general township fund and the county road fund shall not exceed in any year five mills on the dollar. [25 G. A., ch. 22; 20 G. A., ch. 200, § 1.] [29 G. A., ch. 65, § 1.] [31 G. A., ch. 56.] [32 G. A., ch. 67.]

This section contemplates the levying of such tax upon the property within city limits, as well as upon other property in the county, although the tax is not to be expended within the city limits. *Chicago, R. I. & P. Co. v. Murphy*, 106-43.

The part of the road fund collected within a city must be expended on the roads in and about the city as directed by the city council. *Newton v. Board of Supervisors*, 112 N. W. 167.

SEC. 1532-a. Repeal—consolidation of township into one road district. That section one thousand five hundred and thirty-two (1532) of the code be, and the same is, hereby repealed, and the following enacted as a substitute therefor: The board of township trustees of each civil township in this state, at its regular meeting in April, 1903, shall consolidate said township into one road district, and all road funds belonging to the road districts of said township shall at once become a general township road fund, out of which all claims for work done or material furnished for road purposes prior to the change, and unsettled, shall be paid. [20 G. A., ch. 200 §§ 4, 11.] [29 G. A., ch. 53, § 4.]

SEC. 1533. Duty of trustees—road superintendents. Where the one road district plan is adopted, the board of township trustees shall order and direct the expenditure of the road funds and labor belonging or owing to the township; may let, by contract, to the lowest responsible, competent bidder, any part or all of the work on the roads for the current year, or

may appoint not to exceed four superintendents of roads, to oversee, subject to the direction of the board, all or any part of the work, but it shall not incur an indebtedness for such purposes unless the same has been or shall at the time be provided for by an authorized levy; and shall order the township road tax for the succeeding year paid in money and collected by the county treasurer. It shall cause both the property and poll road tax to be equitably and judiciously expended for road purposes in the entire road district; shall cause at least seventy-five per cent. of the township road tax locally assessed to be thus expended by the fifteenth day of July in each year; shall cause the noxious weeds growing in the roads to be cut twice a year, when necessary, and at such times as to prevent their seeding, and it may allow any land owner a reasonable compensation for the destruction thereof, when growing in the roads abutting upon his land. If a superintendent, or superintendents of roads be employed, it shall fix the term of office, which shall not exceed one year, and compensation, which shall not exceed three dollars a day; and no contract shall be made without reserving the right of the board to dispense with his services at its pleasure. [20 G. A., ch. 200, §§ 5-10, 17.] [29 G. A., ch. 53, § 5.] [29 G. A., ch. 64, § 2.] [30 G. A., ch. 50, § 2.] [31 G. A., ch. 57.] [31 G. A., ch. 50, § 1.]

[The amendment by the 30 G. A., chapter 50, and the amendment by 31 G. A., chapter 58, struck out the words "as other taxes" in line 10, except the amendment by 30 G. A. ignored code supplement where the section appeared.]

The trustees are vested with authority to appoint the road superintendent and fix his compensation, and are prohibited by Code Supp., § 468-a from making contracts with him as individuals to furnish labor or material for the township. *State v. York*, 131-635.

Where the township trustees had exe-

cuted a note for road machinery intended only to bind the township, but so executed as to make them individually liable, held that they might by way of equitable defense ask a reformation of that instrument so as to make it correspond to the intention of the parties. *Western Wheel-er & Scraper Co. v. Stickleman*, 122-396.

SEC. 1538. Compensation of trustees, treasurer and clerk. The trustees shall receive the same compensation per day for time necessarily spent in looking after the roads as they do for other township business; the county treasurer shall receive the same per cent. for collecting the road taxes here contemplated that he does for collecting corporation taxes. [20 G. A., ch. 200, § 13.] [31 G. A., ch. 59.]

SEC. 1540-a. Repeal—tax list. That section one thousand five hundred and forty (1540) of the code, is hereby repealed, and the following enacted as a substitute therefor:

"He shall, within four weeks after the trustees have levied the property road tax for the succeeding year, certify said levy to the county auditor, who shall enter it upon the tax books for collection by the county treasurer who shall collect in one installment and pay the same over to the clerk of the township entitled thereto. And he shall, not later than the fifteenth day of April, make out and deliver to the superintendent of roads a list of all persons required to pay road poll tax under the provisions of this act. To enable him to make out such list, the assessor shall furnish the clerk of said township, before the first day of April of each year, a complete copy of the assessment lists of said township for that year, which shall be the basis of such poll tax list. Provided, that the property road tax for the year 1903, shall be levied as heretofore, that it shall be paid in cash and shall be collected by the superintendent of roads appointed by the trustees or the township clerk, as the board of trustees shall determine and direct. Provided, further, that all delinquent road tax for the year 1903, shall be certified to the county auditor by the clerk of each township, for collection as provided by section one thousand five hundred and forty-two (1542) of the code, as

amended by this act." [C., '73, § 973; R., § 892.] [29 G. A., ch. 53, § 6.] [31 G. A., ch. 58, § 2.]

SEC. 1541-a. Repeal. That section one thousand five hundred and forty-one (1541) of the code be, and the same is hereby repealed. [29 G. A., ch. 53, § 7.]

SEC. 1542-a. Repeal—delinquent tax certified. That section fifteen hundred and forty-two (1542) of the code be repealed and the following enacted in lieu of the same:

Section 1542. He shall, on or before the second Monday of November of each year, make out a certified list of all property, including lands, town lots, personal property and property otherwise assessed, including assessments by the executive council on which the road tax has not been paid in full, and the amount of the tax charged on each separate assessment or parcel of said property, designating the district in which the same is situated and transmit the same to the county auditor, who shall enter the amount of tax on the lists the same as other taxes, and deliver the same to the county treasurer, charging him therewith which shall be collected in the same manner as county taxes are collected. In case the township clerk shall fail or neglect to make such return, he shall forfeit and pay to the township for road purposes a sum equal to the amount of tax on said property, which may be collected by an action on his bond. [29 G. A., ch. 64, § 3.]

[Section 1542 was first repealed by 29 G. A., chapter 64, section 3, which act was approved March 25, 1902, and took effect by publication March 27, 1902, while section 8 of chapter 53, acts of the 29 G. A., which took effect July 4, 1902, attempts to amend the original section 1542.]

SEC. 1545. Superintendent—qualification. Each road superintendent or contractor shall give bond in such sum and with such security as the township clerk may require (but in no case shall a township trustee sign such bond as surety), conditioned that he will faithfully and impartially perform all the duties required of him, and devote all moneys that may come into his hands by virtue of his office, according to law. [16 G. A., ch. 167; C., '73, §§ 977-8; R., §§ 881, 884.] [29 G. A., ch. 53, § 9.]

SEC. 1546-a. Repeal. That section one thousand five hundred and forty-six (1546) of the code, is hereby repealed. [29 G. A., ch. 53, § 10.]

SEC. 1550. Who to perform labor. The road supervisor shall require all able-bodied male residents of his district, between the ages of twenty-one and forty-five, to perform two days' labor upon the roads, between the first days of April and October of each year. [C., '73, § 983.] [31 G. A., ch. 60.]

One who works on the highway, under the direction of the road supervisors, is not liable, in the absence of trespass, for any injury to adjoining land occasioned by surface water improperly deflected from its natural channel by the improvement of the highway. *Mulvihill v. Thompson*, 114-734.

SEC. 1551. Notice of time and place—receipts. The road supervisor shall give at least three days' notice of the day or days and place to work the roads to all persons subject to work thereon, or who are charged with a road tax within his district, and all persons so notified must meet him at such time and place, with such tools, implements and teams as he may direct, and labor diligently under his direction for eight hours each day; and for such two days' labor the supervisor shall give to him a certificate, which shall be evidence that he has performed such labor on the public roads, and exempt him from performing labor in payment of road poll tax in that or any other road district for the same year. [C., '73, § 984; R., §§ 886, 896; C., '51, § 588.] [29 G. A., ch. 53, § 11.]

SEC. 1553-a. Repeal. That section one thousand five hundred and fifty-three (1553) of the code be, and the same is, hereby repealed. [29 G. A., ch. 53, § 12.]

SEC. 1554. Report. The superintendent of the township shall report to the township clerk on the first Monday of April and November of each year, which report shall embrace the following items:

1. The names of all persons in his district required to perform labor on the public road, and the amount performed by each;
2. The names of all persons against whom actions have been brought, and the amount collected of each;
3. The names of all persons who have paid their property road tax in labor, and the amount paid by each;
4. The amount of all moneys coming into his hands by virtue of his office, and from what sources;
5. The manner in which moneys coming into his hands have been expended, and the amount, if any, in his possession;
6. The number of days he has been employed in the discharge of his duty;
7. The condition of the roads in his district, and such other items and suggestions as he may wish to make, which report shall be signed and sworn to by him, and filed by the township clerk in his office. [26 G. A., ch. 43; C., '73, § 987; R., § 897; C., '51, § 580.] [29 G. A., ch. 53, § 13.] [29 G. A., ch. 64, § 4.]

[Section 4 of chapter 64 of the 29 G. A. attempts to amend said section by the insertion of the words "property including" between the words "all" and "lands" in subdivisions five and six, as formerly numbered, but which paragraphs had been stricken out by section 13, chapter 53, of the 29 G. A.]

SEC. 1556. Shade trees—timber—drainage.

The mere fact of the planting and raising of trees in the highway does not constitute adverse possession of such portion

of the highway as against the public. *Biglow v. Ritter*, 121-213.

SEC. 1557. Liability for unsafe bridge or highway.

A road supervisor is liable for all damages resulting from a defect in the highway allowed to remain after a reasonable time for making repair only where he has had written notice, as required by this section. *Sells v. Dermody*, 114-344.

quired by mandamus, at the suit of a private property owner, to restore or repair a county bridge, that being a matter of discretion with the board, to be exercised in the public interest. *Leonard v. Wakeman*, 120-140.

A board of supervisors cannot be re-

SEC. 1560. Obstructions removed. The road supervisor shall remove all obstructions in the roads, but must not throw down or remove fences which do not directly obstruct travel, until notice in writing, not exceeding six months, has been given to the owner or agent of the land inclosed in part by such fence. [C., '73, § 993; R., § 905; C., '51, § 594.] [28 G. A., ch. 52, § 1.]

SEC. 1561. Condition—guide board.

The road supervisor is individually liable in damages for neglect in the performance of the ministerial duty of making repairs, but such liability only attaches

after he has had the written notice required by Code § 1557. *Sells v. Dermody*, 114-344.

SEC. 1562. Canada thistle—written notice. The road supervisor, when notified in writing that any Canada thistles or any other variety of thistles are growing upon any lands or lots within his district, shall cause a

written notice to be served on the owner, agent, or lessee of such lands or lots, if found within the county, notifying him to destroy said thistles within ten days from the service of said notice, and in case the same are not destroyed within such time, or if such owner, agent, or lessee is not found within the county, then the road supervisor shall cause the same to be destroyed, and make return in writing to the board of supervisors of his county, with a bill for his expenses or charges therefor, which in no case shall exceed two dollars per day for such services, which shall be audited and allowed by said board and paid from the county fund, and the amount so paid shall be entered up and levied against the lands or lots on which said thistles have been destroyed, and collected by the county treasurer the same as other taxes, and returned to the county fund. [24 G. A., ch. 45; C., '73, § 995.] [27 G. A., ch. 39, § 1.]

SEC. 1562-a. Repeal—weeds—duty of road superintendent—when.

That chapter thirty-eight (38) of the laws of the twenty-seventh general assembly be and the same is hereby repealed, and the following enacted in lieu thereof:

It shall be the duty of road supervisors to cause to be cut, near the surface, all weeds on the public roads in their respective districts between the fifteenth day of July and the fifteenth day of August of each year. But nothing herein shall prevent the land owner from harvesting the grass grown upon the roads along his land in proper season. [28 G. A., ch. 139, § 1.]

SEC. 1563. Russian thistle—notice. No owner or occupant of any land or lots, or corporation or association of persons owning, occupying or controlling land as right of way, depot grounds or other purposes, or public officer in charge of any street or road, shall allow to grow to maturity thereon the Russian thistle or salt wort (*salsoli kali*, variety *tragus*). It shall be the duty of every person or corporation so owning, occupying or controlling lands, lots or other real property, or any road supervisor or other public officer having charge of any street or road, to cut, burn or otherwise entirely destroy such thistle growing on said premises, right of way, road or street, before the same shall bloom or come to maturity; and any person, corporation or public officer neglecting to destroy all such thistles as aforesaid, after receiving notice in writing of their presence, shall be deemed guilty of a misdemeanor and be punished accordingly. It shall be the duty of any person knowing of the presence of Russian thistles upon any premises, lands, lots, street, roads or elsewhere, at any time after the first day of July, to give notice immediately to any member of the board of trustees of the township in which thistles are growing; or, if within a city or town, then to give notice to the mayor, recorder, or clerk thereof; who shall immediately give notice in writing to the owner, occupant, or person or corporation in possession or control thereof; and if not destroyed by such owner or occupant or person in possession in proper time to prevent maturity, cause their total destruction, the costs thereof, together with the costs of serving notice, to be paid out of the county fund upon the certificate of the township trustees or the council, as the case may be, to the board of supervisors; which board shall cause the sum so paid to be levied as a special tax against the premises upon which the thistles are growing, and against the person or corporation owning or occupying the same; which amount shall be collected by the county treasurer as other taxes, and paid into the county fund. Where township trustees have received notice, as aforesaid, of the presence of such thistles upon lands owned by the United States or this state, it shall be their duty to cause their destruction, and the costs thereof, upon proper certificate of the amount, shall be paid out

of the county fund. [26 G. A., ch. 78; 25 G. A., ch. 91, §§ 1-3.] [28 G. A., ch. 53, § 1.]

SEC. 1566-a. Itemized account—duty of trustees. That the trustees of each township shall take and file with the board of supervisors on or before the first Monday in each year a full and itemized account verified by the township clerk showing each item of expenditures and receipt of all moneys received and disbursed during the preceding year for road purposes in said township, which report shall remain on file with the county auditor, and, omitting certifications and verifications of township officers, a synopsis thereof showing the names of all persons to whom money has been paid and the amount paid to each shall be published in the published report of the proceedings of the January session of the board of supervisors. [29 G. A., ch. 53, § 15.] [31 G. A., ch. 61.]

SEC. 1566-b. Meaning of “road supervisors.” That wherever the term “road supervisors” appears in the code and amendments thereto it shall be held so far as applicable to mean the superintendent or contractor. [29 G. A., ch. 53, § 17.]

SEC. 1567-a. Repeal. That section one thousand five hundred and sixty-seven (1567) of the code be, and the same is, hereby repealed. [29 G. A., ch. 53, § 14.]

SEC. 1567-b. Repeal—acts in conflict. That all acts and parts of acts in conflict with the provisions of this act, are hereby repealed. [29 G. A., ch. 53, § 18.]

SEC. 1569. Turning to right.

This provision is applicable where a person on a bicycle meets a person driving a horse and vehicle. *Cook v. Fogarty*, 103-500.

One driving along a highway is not bound to yield any portion thereof to al-

low another proceeding in the same direction to pass him. It is only to avoid a collision reasonably to be apprehended that he is required to turn aside. *Elenz v. Conrad*, 123-522.

SEC. 1570. Trimming hedges. Owners of osage orange, willow, or any other hedge fence along the public road, unless the same shall be used as a wind-break for orchards or feed lots, shall keep the same trimmed, by cutting back within five feet of the ground at least once in every two years, when so ordered by the trustees of their respective townships, and burn or remove the trimmings so cut from the road.

Upon a failure to comply with the foregoing provision, the road supervisor shall immediately serve notice in writing upon the owner of the hedge to trim the same, and if he fails to do so for sixty days thereafter, such supervisor shall cause the same to be done at a cost not exceeding forty cents per rod, which shall be paid for out of the road fund, and make return thereof to the township clerk, who shall, in certifying the lands upon which the road tax has not been paid, include the lands along which the hedge has been trimmed, together with the amount paid therefor, which shall be collected by the county treasurer in the manner other county taxes are collected.

Where the one district system is adopted as provided in this chapter, it shall be the duty of the township trustees to enforce the foregoing provisions. [26 G. A., ch. 48; 25 G. A., ch. 88, §§ 1, 2; 24 G. A., ch. 40.] [28 G. A., ch. 54, § 1.]

SEC. 1570-a. Supervisors to apportion work. The boards of supervisors of the various counties of the state of Iowa bordering upon the state line are hereby authorized to meet the authorities in control and charge of the public highways in the adjoining counties of other states and agree upon and assign the portion or part of each public highway upon the state

line between such states to be kept in repair by the authorities in the state of Iowa and such other states. [32 G. A., ch. 69.]

SEC. 1570-b. Road drag—approval. On and after the passage of this act, the township trustees are hereby authorized to have work done upon the public highways by use of a road drag to be approved by said trustees. [31 G. A., ch. 62, § 1.]

SEC. 1570-c. How used—compensation. The trustees shall have the road drag used upon the public highway under the direction of the road superintendent when in their judgment the road would be improved thereby. In choice of persons to do the work, preference shall be given other things being equal to the occupants of the land abutting upon the road at the point where the work is to be done. Provided that when there is more than one occupant the superintendent may decide to which the preference shall be given. Reasonable compensation shall be allowed for such work, but in no case shall it exceed fifty cents per mile for each time same is dragged; and there shall not be expended therefor more than five dollars (\$5) per mile for any mile on which said work is done during any one year. [31 G. A., ch. 62, § 2.]

SEC. 1570-d. Use of wagons with wide tires—rebate. That all persons who shall in good faith use wagons on the public highways of this state with tires not less than three inches in width, for hauling loads exceeding eight hundred pounds in weight, for the year ending the first day of July nineteen hundred and seven (1907) and each succeeding year thereafter, shall receive a rebate of one-fourth ($\frac{1}{4}$) of their assessed highway tax for that year, and in like manner each succeeding year thereafter; provided, that such rebate shall not exceed the sum of five dollars (\$5.00) in any one year to any person. [31 G. A., ch. 63, § 1.]

SEC. 1570-e. Affidavit—rebate, how paid. Any person complying with the provision of section one (1) of this act, who shall make and subscribe to an affidavit that he has for the last preceding year of July first, nineteen hundred and seven or any succeeding year thereafter, used only such wagons with tires not less than three inches in width, for hauling loads exceeding eight hundred pounds in weight, on the public highways of this state, shall receive payment by the township trustees of the township in which such person resides, of one-fourth ($\frac{1}{4}$) of the road tax assessed and levied on the property of said person. Such payment shall not exceed in any one year the sum of five dollars (\$5.00) and all township trustees and township clerks are hereby authorized to administer such oath. [31 G. A., ch. 63, § 2.]

SEC. 1571. Steam engines on roads—penalty. Whenever any engine driven in whole or in part by steam power is being propelled upon a public road, or is upon the same, the whistle thereof shall not be blown, and those having it in charge shall stop it one hundred yards distant from any person or persons with horses or other stock in or upon the same, and at a greater distance away if they exhibit fear on account thereof, until they shall have passed it, and a competent person shall be kept one hundred yards in advance of such engine to assist in any emergency arising from frightened animals, and to prevent accidents. In crossing any bridge or culvert in the public road, or plank street-crossing in any city or town, four sound strong planks not less than twelve feet long, each one foot wide and two inches thick, shall be used, by placing and keeping continuously two of them under the wheels. A failure to comply with either of the provisions of this section shall be a misdemeanor, punishable by imprisonment in the county jail not more than thirty days, or by a fine of not more than \$100, and, in addition, all damages sustained may be recovered in a civil action against

the violator, and in no such case shall the county be liable for personal injuries or for damages occurring to any engine or separator. [25 G. A., ch. 21, §§ 1, 2; 24 G. A., ch. 68, §§ 1-4.] [28 G. A., ch. 55, § 1.] [30 G. A., ch. 52.]

The violation of the statutory provision requiring that planks be placed under a steam engine crossing a bridge will not defeat recovery by the owner for injuries resulting from defects in the bridge for

which the county is liable, if the failure to comply with the statute has not directly constituted to the injury. *Tackett v. Taylor County*, 123-149.

CHAPTER 2-A.

OF MOTOR VEHICLES.

SECTION 1571-a. Terms defined. The words and phrases used in this act shall, for the purposes of this act only, be construed as follows: 1, "Motor Vehicle" shall include all vehicles propelled by any power other than muscular power, excepting such motor vehicles as run only upon rails or tracks, provided that nothing herein contained shall apply to traction engines or road rollers; 2, "Closely built up portions," shall mean the territory of a city town or village contiguous to a public highway devoted to business or where for not less than one-fourth ($\frac{1}{4}$) of a mile the dwelling houses on such highway average not more than one hundred (100) feet apart. [30 G. A., ch. 53, § 1.]

SEC. 1571-b. Statement—fees. Every owner of a motor vehicle shall, for every such vehicle owned by him, file in the office of the secretary of state a statement of his name and address, with a brief description of the vehicle to be registered, on a blank to be prepared and furnished by such secretary for that purpose. The filing and registration fee shall be five (5) dollars, payable to the secretary of state. [30 G. A., ch. 53, § 2.] [32 G. A., ch. 68, § 1.]

SEC. 1571-c. Statement filed—registration number. The secretary of state shall thereupon file such statement in his office, register such motor vehicle in a book to be kept for that purpose, and assign it a number, beginning with the number one (1); and so on in the order of filing. [30 G. A., ch. 53, § 3.]

SEC. 1571-d. Change of owner—re-registration. Every person acquiring a motor vehicle shall file a like statement with the secretary of state, accompanied by the fee required in section two (2) of this act, and such secretary of state shall, in like manner, file such statement, register such vehicle and assign it a number. If the vehicle has previously been registered, such fact and number assigned it shall be set forth in the statement, and the previous registration shall be canceled; but the number of such previous registration may be assigned under the new registration. [30 G. A., ch. 53, § 4.] [32 G. A., ch. 68, § 2.]

SEC. 1571-e. Seal. The secretary of state shall forthwith on such registration, and without other fee, issue and deliver to the owner of such motor vehicle a seal of aluminum or other suitable metal, which shall be circular in form, not over two (2) inches in diameter, and have stamped therein the words "registered in the office of the secretary of state for the state of Iowa, under the motor vehicle law, No. _____" with the registration number inserted therein; which seal shall thereafter at all times be conspicuously displayed on the motor vehicle to which such number has been assigned. Every dealer in motor vehicles may have issued to him by the

secretary of state, a dealer's number, to be registered as such, which number, and also the number displayed on the back of the motor vehicle as provided in section six of this chapter, shall be preceded by the capital letter "D", which number may, be temporarily used upon any motor vehicle owned by said dealer, or kept and exhibited for sale by him, when demonstrating its use on the public streets or highways, and not in use for hire. Every motor vehicle kept for hire shall have a separate, individual, registered number the same as if kept by the owner for private use. Every dealer in motor vehicles is hereby required to apply to the secretary of state on or before the first day of July of each year for a dealer's number and a dealer's permit to use the same, the annual fee for which shall be ten (10) dollars, payable to the secretary of state when the number and permit are applied for; provided, however, that a dealer may if he chooses register each motor vehicle in his possession separately and individually, in which event he shall not be required to take out a dealer's number. The same number may be re-assigned to the same dealer, but shall not be transferable to any other person, firm or company. [30 G. A., ch. 53, § 5.] [32 G. A., ch. 68, § 3.]

SEC. 1571-f. Number displayed. Every motor vehicle shall also at all times have the number assigned to it by the secretary of state displayed on the back of such motor vehicle in such a manner as to be plainly visible, the number to be in Arabic numerals, each not less than three (3) inches in height, and each stroke to be of a width not less than one-half (1/2) inch, and also as a part of such number the initial and terminal letters of the state's name, such letters to be not less than two (2) inches in height. [30 G. A., ch. 53, § 6.]

SEC. 1571-g. Non-resident owner. The provisions of sections two (2) to five (5) inclusive shall not apply to motor vehicles owned and operated by non-residents of this state, provided the owners thereof have complied with any law requiring the registration of owners of motor vehicles in force in the state, territory or federal district of their residence, and the registration number showing the initial of such state, territory or federal district shall be displayed on such vehicle substantially as provided by section six (6) of this act. [30 G. A., ch. 53, § 7.]

SEC. 1571-h. Regulations. No person shall operate a motor vehicle on a public highway at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or so as to endanger the life or limb of any person, or in any event in the closely built up portions of a city, town or village, at a greater rate than one (1) mile in six (6) minutes, or elsewhere in a city, town or village at a greater rate than one (1) mile in four (4) minutes, or elsewhere outside of a city town or village at a greater average rate than twenty (20) miles per hour; subject, however, to the other provisions of this section. Upon approaching a crossing of intersecting public highways, or a bridge, or a sharp curve, or a steep descent, and also in traversing such crossing, bridge, curve or descent, a person operating a motor vehicle shall have it under control and operate it at a rate of speed less than hereinbefore specified, and in no event greater than is reasonable and proper, having regard to the traffic then on such highway and the safety of the public. [30 G. A., ch. 53, § 8.]

The statute expressly authorizes the use of automobiles on the highways, and confers on the operators of such vehicles the same rights in the roads and streets as are accorded to the drivers of other

vehicles. *House v. Cramer*, 112 N. W. 3.

But the operator of an automobile is liable for damages resulting from his negligence in not exercising care to avoid frightening horses. *Ibid.*

SEC. 1571-i. Caution—signals. Any person operating a motor vehicle shall, at request or on signal by putting up the hand, from a person riding

or driving a restive horse or other draft or domestic animals, bring such motor vehicle immediately to a stop, and, if traveling in the opposite direction, remain stationery so long as may be reasonable to allow such horse or animals to pass, and, if traveling in the same direction, use reasonable caution in passing such horse or animal, and the operator and occupants of any motor vehicle shall render necessary assistance to the party having in charge said horse or other draft animal in so passing. [30 G. A., ch. 53, § 9.]

SEC. 1571-j. Brakes—signal bell or horn—lamps. Every motor vehicle while in use on a public highway shall be provided with good and efficient brakes, and also with a suitable bell, horn or other signal, and be so constructed as to exhibit, during the period from one (1) hour after sunset to one (1) hour before sunrise, one or more lamps showing white light visible within a reasonable distance in the direction toward which such vehicle is proceeding, and also a red light visible in the reverse direction. [30 G. A., ch. 53, § 10.]

SEC. 1571-k. Powers of cities and towns. Cities and towns shall have no power to pass, enforce or maintain any ordinance, rule or regulation requiring of any owner or operator of a motor vehicle any license or permit to use the public highways or excluding or prohibiting any motor vehicle whose owner has complied with section two (2) or section four (4) of this act from the free use of such highway, and all such ordinances, rules or regulations now in force are hereby declared to be of no validity or effect; provided that nothing in this act shall be construed as limiting the power of local authorities to make, enforce and maintain ordinances, rules or regulations, in addition to the provisions of this act, affecting motor vehicles which are offered to the public for hire. [30 G. A., ch. 53, § 11.]

SEC. 1571-l. Penalties. The violation of any of the provisions of this act, shall be deemed a misdemeanor, punishable by a fine not exceeding twenty-five dollars (\$25) for the first offense, and punishable by a fine of not less than twenty-five dollars (\$25) nor more than fifty dollars (\$50), or imprisonment not exceeding thirty (30) days in the county jail for a second or subsequent offense. [30 G. A., ch. 53, § 12.]

TITLE IX.

OF CORPORATIONS.

CHAPTER 1.

OF CORPORATIONS FOR PECUNIARY PROFIT.

SECTION 1609. Powers.

Par. 2. Name: To make notice to a corporation which is named only by the initials of its corporate name sufficient it must appear that at the time such notice was given the corporation was commonly known and customarily referred to by such abbreviations. *Chicago, B. & Q. R. Co. v. Kelley*, 105-106.

Par. 5. Exemption of property: The provisions of the articles in a particular case held sufficient to exempt private property of the stockholders in a mutual insurance company from liability for debts of the corporation, although there was a provision by which such property should be liable for money advanced to creating a guaranty fund. *Smith v. Sherman*, 113-601.

Corporations may be legally organized whose articles do not exempt private property of its stockholders from liability for corporate debts. *Berkson v. Anderson*, 115-674.

Par. 6. Powers: The powers given by statute to corporations are not required to be enumerated in its articles, and an omission to claim any such powers in the articles would not leave the corporation without such powers. *Sioux City Terminal R. & W. Co. v. Trust Co.*, 82 Fed. 124.

When the state courts have determined the extent of the powers and liabilities of corporations created under the state law, their decision is conclusive in the federal courts in cases involving no question of general or commercial law and no federal question. *Ibid.*

A corporation is itself a franchise, and the different powers which may be exercised by the corporation are also franchises. Thus, the right given to a corporation to supply a city with water and of occupying the streets for that purpose, may be spoken of as a franchise. But such a privilege is not in the strict sense of the word a corporate franchise. *Cedar Rapids Water Co. v. Cedar Rapids*, 118-234.

One who becomes shareholder in a corporation thereby assents to the transaction of business expressly or impliedly authorized by its charter. *Traer v. Lucas Prospecting Co.*, 124-107.

The corporation does not necessarily have all the powers which by statute are within the scope of corporate powers, but only such powers within the statutory scope as are given by the articles of incorporation. *Ibid.*

While as a general rule a corporation may not sell any part or all of its property for other than a cash consideration unless authorized by charter, yet where the company was authorized by its articles to purchase, sell and deal in corporate stocks of corporations authorized to conduct mining operations, but had not power to carry on business of mining, the power to exchange its property or sell it for stock in a corporation which should engage in the business of mining was clearly implied. *Ibid.*

A trading corporation unless prohibited by its charter may buy and sell the stock of another corporation. *Ibid.*

The articles contain the terms of agreement between the company and its stockholders and are to be construed in accordance with the general laws relating to charter grants and legislative power. By accepting stock in the corporation, the stockholder assents to the terms and conditions found in the articles. *Dempster Mfg. Co. v. Downs*, 126-80.

A corporation may hold real or personal property in trust for any purpose that is not foreign to the business for which it was created, and a court of equity will enforce such trust. *State v. Higby Co.*, 130-69.

Par. 7. By-laws: By-laws may be binding on a corporation, although informally adopted, if recognized and acted upon by it. *Smith v. Sherman*, 113-601.

SEC. 1610. Articles adopted and recorded—fees to state. Before commencing any business except their own organization, they must adopt articles of incorporation, which must be signed and acknowledged by the incorporators, recorded in the office of the recorder of deeds of the county where the principal place of business is to be, in a book kept therefor, and the recorder must, within five days thereafter, indorse thereon the time when the same were filed, and the book and page where the record will be found. Said articles thus indorsed shall then be forwarded to the secretary of state, and be by him recorded in a book kept for that purpose. Such corporation shall pay to the secretary of state, before a certificate of incorporation is issued, a fee of twenty-five dollars, and, for all authorized stock in excess of ten thousand dollars, an additional fee of one dollar per thousand. Should any corporation increase its capital stock, it shall pay a fee to the secretary of state of one dollar for each one thousand dollars of such increase. The recording fee shall be paid in all cases. Farmers' mutual co-operative creamery associations and corporations organized for the manufacture of sugar from beets grown in the state of Iowa, shall be exempt from the payment of the incorporation fee provided herein. When articles of incorporation are presented to the secretary of state for the purpose of being filed, if he is satisfied that they are in proper form to meet the requirements of law, that their object is a lawful one and not against public policy, that their plan for doing business, if any be provided for, is honest and lawful, he shall file them; but if he is of the opinion that they are not in proper form to meet the requirements of law, or that their object is an unlawful one, or against public policy, or that their plan for doing business is dishonest or unlawful, he shall refuse to file them. Should a question of doubt arise as to the legality of the articles, he shall submit them to the attorney general whose duty it shall be to forthwith examine and return them with an opinion in writing touching the point or points concerning which inquiry has been made of him. If such opinion is in favor of the legality of the articles, and no other objections are apparent, they shall then, upon payment of the proper fee, be filed and otherwise dealt with as the law provides. If, however, such opinion be against their legality they shall not be filed. Upon the rejection of any articles of incorporation by the secretary of state, except for the reason that they have been held by the attorney general to be illegal they shall, if the person or persons presenting them so requested, be submitted to the executive council, which shall, as soon as practicable, consider the said articles and if the council determines that the articles are in proper form, of honest purpose, not against public policy, nor otherwise objectionable, it shall so advise the secretary of state in writing, whereupon he shall, upon the payment of the proper fees, file the same and proceed otherwise as the law directs; but if the council sustains the previous action of the secretary of state in rejecting said articles, such decision by the council shall be reported to the secretary of state in writing, and he shall then return said articles to the person or persons presenting them with such explanation as shall be proper in the case. Nothing in this act shall be construed as repealing or modifying any statute now in force in respect to the approval of articles of incorporation relating to insurance companies, building and loan associations or investment companies. [26 G. A., ch. 98; 17 G. A., ch. 23; C., '73, § 1060; R., 1152; C., '51, § 675.] 27 G. A., ch. 40, §§ 1, 2.] [27 G. A., ch. 41, § 1.] [29 G. A., ch. 66, § 1.] [32 G. A., ch. 70.]

It is not specifically required that the acknowledgment shall be in the same form as that required for conveyances of real

property, and therefore, if the venue is given at the beginning of the certificate, and the officer taking the acknowledgment

subscribes as "notary public," without reciting that he is a notary public in and for the county named, the acknowledgment is sufficient, it being presumed that the officer acts only within the scope of his authority. *Smith v. Sherman*, 113-601.

The object of requiring the filing and

recording of articles of incorporation is to give them the same publicity as nearly as may be as statutory charters, and their provisions are binding on all who deal with the stock of the corporation. *Dempster Mfg. Co. v. Downs*, 126-80.

SEC. 1611. Limit of indebtedness.

It is doubtful whether an insurance company is required to recite the limit of indebtedness which it may incur by its policies of insurance. At any rate, if the amount of indebtedness is reasonably ascertainable the requirements of the statute have been complied with. *Smith v. Sherman*, 113-601.

A debt contracted in excess of the maximum limitation stated in the charter is not void, but is enforceable against it, corporation and parties holding under it, and gives rise only to a right of action on the part of the state because of the violation of statute, and perhaps also a liability on the officers of the corporation for the excessive debt so contracted. *Sioux City Terminal R. & W. Co. v. Trust Co.*, 173 U. S., 109; S. C. 82 Fed. 124.

A mortgage given by a debtor corpora-

tion on its own property is not intended to be governed by the last sentence of this section (embodying a proviso added to § 1061 of the Code of '73 by chap. 22 of 20 G. A.). This sentence applies to the class and not the condition. It singles out this particular kind of corporation, and it is not meant to point out such a state of affairs which it was thought might exist with any corporation. *Beach v. Wakefield*, 107-567.

The corporation having received the full benefit of the consideration for indebtedness contracted in excess of the limitation of its indebtedness, it cannot question the validity of indebtedness thus incurred. And it is immaterial that money borrowed in excess of the limitation of indebtedness is used for an *ultra vires* purpose. *Traer v. Lucas Prospecting Co.*, 124-107.

SEC. 1612. Place of business—list of officers—notice or process—upon whom and how served. If the corporation transacts business in this state, the articles shall fix its principal place of business, which must be in this state, and in charge of an agent of the corporation, at which place it shall keep its stock and transfer books and hold its meetings. The corporation shall annually, in January, file with the secretary of state a list of its officers and directors, and any change in the location of its place of business made by a vote of the stockholders. Provided that any corporation organized under the laws of this state that does not maintain an office in the county of its organization, or transact business in this state, shall file with the secretary of state a written instrument duly signed and sealed, authorizing the secretary of state to acknowledge service or [of] notice or process for and in behalf of such corporation in this state, and consenting that service of notice or process may be made upon the secretary of state, and when so made shall be taken and held as valid as if served according to the laws of this state, and waiving all claim or right or error by reason of such acknowledgment of service. Such notice or process, with a copy thereof, may be mailed to the secretary of state at Des Moines, Iowa, in a registered letter addressed to him by his official title, and he shall immediately upon its receipt acknowledge service thereon in behalf of the defendant corporation by writing thereon, giving the date thereof, and shall immediately return such notice or process in a registered letter to the clerk of the court in which the suit is pending, addressed by his official title, and shall also forthwith mail such copy, with a copy of his acknowledgment of service written thereon, in a registered letter addressed to the corporation or person who shall be named or designated by the corporation in such written instrument. If any such corporation shall fail to file with the secretary of state the power and authority to acknowledge service as herein provided on or before July 1st, 1906, it shall be the duty of the secretary of state to notify such corporation to file such power and authority within

thirty days thereafter, and in case of failure to comply with such notice it shall be the duty of the attorney general of the state to proceed against such corporation to forfeit its charter and wind up its affairs. [31 G. A., ch. 64.]

SEC. 1613. Notice published—how—what to contain. A notice must be published once each week for four weeks in succession in some newspaper as convenient as practicable to the principal place of business, which must contain:

1. The name of the corporation and its principal place of business;
2. The general nature of the business to be transacted;
3. The amount of capital stock authorized, and the times and conditions on which it is to be paid in;
4. The time of the commencement and termination of the corporation;
5. By what officers or persons its affairs are to be conducted, and the times when and manner in which they will be elected;
6. The highest amount of indebtedness to which it is at any time to subject itself;
7. Whether private property is to be exempt from corporate debts.

Proof of such publication, by affidavit of the publisher of the newspaper in which it is made, shall be filed with the secretary of state, and shall be evidence of the fact. [C., '73, §§ 1062-3; R., §§ 1154-5; C., '51, §§ 677-8.] [29 G. A., ch. 67, § 1.]

As corporations may be legally organized in whose articles there is no limitation which exempts the individual property of its stockholders, the requirements that the notice make disclosure on this question is important, and where the publication is in an obscure newspaper, published at a place remote from that of the principal

place remote from that of the principal *son v. Anderson*, 115-674.

The publication of notice in a newspaper published at a place remote from the principal place of business is not sufficient compliance with the statute. *Clinton Novelty Iron Works v. Neiting*, 111 N. W. 974.

SEC. 1613-a. Legalizing—defective publication. That each corporation heretofore incorporated under the laws of the state of Iowa which have [has] caused notice of their [its] incorporation to be published once each week for four consecutive weeks in some daily, semi-weekly or tri-weekly newspaper, instead of causing the same to be published in each issue of such newspaper for four consecutive weeks are hereby legalized and are declared legal incorporations the same as though the law had been complied with in all respects in regard to the publication of notice. [29 G. A., ch. 226, § 1.]

SEC. 1615. Change of articles.

Where a renewal of the corporate franchise is authorized it may be effected

by amendment of the articles as provided in this section. *Lamb v. Dobson*, 117-124

SEC. 1616. Individual property liable.

Aside from statute, stockholders of a *de facto* corporation cannot be held liable as partners on account of irregularities, omissions or mistakes in incorporating or organizing the corporation. The statute does not create a contract liability. Therefore, those dealing with a corporation having actual notice of the articles, and after publication of the notice required by statute, cannot hold the stockholders individually liable because of irregularity in the organization and publication. *Seaton v. Grimm*, 110-145.

Stockholders who participated in the organization of the company and became

responsible to the same extent as other stockholders for failure to have notice published, cannot hold such other stockholders liable individually on the ground that there was not a proper publication of notice. *Ibid.*

"Organization and publicity" should be construed "organization or publicity." *Ibid.*

A subscriber to stock may disaffirm his contract on account of defects in the organization of the company, where it has been represented to him that the organization was legal and complete, and is not bound to go to the records or other sources of information before relying upon such

representation. *Maine v. Midland Inv. Co.*, 132-272.

Whether one who buys stock in a defectively organized corporation incurs liability, in virtue of the statutory provision, for debts of the corporation incurred prior to the date of the purchase, is an open question in this state. *Houts v. Sioux City Brass Works*, 110 N. W. 166.

One who becomes a stockholder within the three months allowed for the publica-

tion of notice is liable for the debts incurred after he became a stockholder, if he has had knowledge of the facts connected with the organization of the corporation at the time he became a member or when the indebtedness was contracted. It is immaterial that he was not in any way responsible for the failure of the corporation to give proper notice of its organization. *Clinton Novelty Iron Works v. Neiting*, 111 N. W. 974.

SEC. 1618. Duration—renewal—certificate and articles to be recorded—fees—notice—proof filed. Corporations for the construction of any work of internal improvement, or for the transaction of the business of life insurance, may be formed to endure fifty years; those for other purposes, not to exceed twenty years; but in either case they may be renewed from time to time for the same or shorter periods, within three months before or after the time for the termination thereof, if a majority of the votes cast at any regular election, or special election called for that purpose, be in favor of such renewal, and if those wishing such renewal will purchase the stock of those opposed thereto at its real value. Within five days after the said action of the stockholders for the renewal of any corporation, a certificate, showing the proceedings resulting in such renewal, sworn to by the president and secretary of the corporation, or by such other officers as may be designated by the stockholders, together with the articles of incorporation, shall be filed for record in the office of the recorder of the county in which the principal place of business of said corporation is situated, and the same shall be recorded. Upon filing with the secretary of state the said certificate and articles of incorporation, within ten days after they are filed with the recorder, and upon the payment to the secretary of state of a fee of twenty-five (\$25) dollars, and an additional fee of one (\$1) dollar per thousand for all authorized stock in excess of ten thousand (\$10,000) dollars, the secretary of state shall record the said certificate and the said articles of incorporation in a book to be kept by him for that purpose, and shall issue a proper certificate for the renewal of the corporation. Within three months after the filing of the certificate and articles of incorporation with the secretary of state, the corporation so renewed shall publish a notice of renewal. Said notice shall be published, once each week, for four weeks in succession in a newspaper as convenient as practicable to the principal place of business of the corporation, and proof of publication filed in the office of the secretary of state, and shall contain the matters and things required to be published by section sixteen hundred and thirteen (1613) of the code, relating to original incorporations. [C., '73, § 1069; R., § 1158; C., '51, § 681.] [28 G. A., ch. 56, § 1.] [29 G. A., ch. 66, § 2.] [30 G. A., ch. 2, § 13.]

Where a corporation has re-incorporated with the same membership and for the purpose of carrying on the same business, and assuming the obligations of the old company, the new company is liable on the contracts of the old. *Benesh v. Mill Owners' Mut. F. Ins. Co.*, 103-465.

A corporation which took proper steps for renewal and tendered to the secretary

of state the fees required at the time, held not subject to the provisions of the amending statute requiring higher fees in cases of renewal. *Lamb v. Dobson*, 117-124.

The renewal of a corporation may be made by an amendment of its articles as provided in Code § 1615. *Ibid.*

SEC. 1618-a. Renewal of corporate existence. The corporate existence of any state or savings bank may be renewed or extended, from time to time, for a period not longer than the time for which such banks may

organize, by an affirmative vote of two-thirds (2-3) of the shareholders thereof, at a stockholders' meeting held for that purpose, within three months before or after the time of the expiration of its charter as shown by its certificate of incorporation issued by the secretary of state. Such meeting shall be called upon a notice signed by at least two (2) of the officers of the bank and by a majority of its directors, specifying the object of the meeting, and the time and place thereof, published once a week for four (4) consecutive weeks before the time at which the same is to be held, in some newspaper in the county wherein the bank is located. If at such meeting the required vote is given, a certificate of the proceedings showing compliance with the foregoing provisions and the time to which the corporate period is to be continued, shall be signed and verified by the affidavit of the chairman and secretary of the meeting, certified to by a majority of the board of directors, and together with the articles of incorporation, as they exist at the date of the meeting, shall be recorded in the office of the recorder of deeds of the proper county and filed, recorded and fees paid, as provided in section sixteen hundred eighteen (1618) of the code and shall be by the secretary of state certified to the auditor of state. When the meeting is held previous to the expiration of the charter of the bank, such amendments may be made to the articles of incorporation, subject to the provisions thereof, as may be deemed necessary and whether held before or after the extension of the corporate period, such changes may be made in the articles as are necessary to show the time to which the corporate period is extended and the names of the officers and directors at the time of the renewal or extension. When the above has been complied with, the auditor of state shall issue to such bank a certificate as provided in section eighteen hundred forty-three (1843) of the code, notice of which shall be published as required by the provisions of said section. [31 G. A., ch. 65.]

SEC. 1618-b. Fees—since when due. The fees herein provided shall be due from all corporations applying for a renewal since the first day of January, 1898. [28 G. A., ch. 56, § 2.]

SEC. 1619. Legislative control.

By express provision of the statute, building and loan associations are subject to legislative control. *Wood v. Iowa Bldg. & Loan Assn.*, 126-464.

A franchise granted to a street railway company is subject to subsequent modification. *Marshalltown Light, P. & R. Co. v. Marshalltown*, 127-637.

SEC. 1621. Diversion of funds.

It is only persons injured by the diversion of funds who are deemed to be defrauded thereby. One who is not a creditor at the time of the diversion is not injured thereby. *Benge v. Eppard*, 110-86.

As to one who is a creditor at the time of the diversion there is no liability if, notwithstanding the diversion, the corporation had sufficient property remaining to pay all debts. *Ibid.*

SEC. 1624. By-laws posted.

The statutory requirements that the corporation shall keep posted a copy of its by-laws and a statement of the amount of capital stock subscribed and the amount of indebtedness, is primarily for the benefit of the public, to be enforced by mandamus at the suit of a party injured. *Board-*

man v. Marshalltown Grocery Co., 105-445.

By-laws not posted as required by statute are not binding on a stranger without actual notice, but failure to post as required does not constitute a failure to adopt such by-laws. *Fee v. National Masonic Acc. Assn.*, 110-271.

SEC. 1626. Transfer of shares.

A transfer of stock not made upon the books of the company as required by statute will not be effectual as against an

attachment of such stock for debts of the person who appears from the books to be the owner. Knowledge on the part of the

attaching creditor or the officer of the transfer of the stock will not defeat the lien of the attachment. *Ottumwa Screen Co. v. Stodghill*, 103-437; *Perkins v. Lyons*, 111-192.

A stipulation for an assignment of shares of stock, actually in the custody of the transferee, implies an obligation to have a formal and effectual transfer thereof made on the books of the corporation. *First Nat. Bank v. Park*, 117-552.

The holder of stock as collateral has authority to have proper entry of transfer of such stock made upon the company's books. *Ibid.*

A person who is entitled to have shares of stock issued to him, or to have stock owned by him transferred on the books of the company, may maintain an action of mandamus to compel the proper issuance or transfer. *Hair v. Burnell*, 160 Fed. 280.

So long as the stock stands on the books in the name of the judgment debtor it can be levied on and sold, although the creditor has actual notice of a transfer thereof by the debtor. *Ibid.*

One who has purchased stock which is subject to assessment to the corporation, is not liable for the payment of such assessment until the stock has been transferred to him, and any person who has without right paid for such stock and had

it transferred to himself on the books of the company, and has made payment of such assessment, has no claim on the stock except for the repayment of the assessment. *Loetscher v. Dillon*, 119-202.

The transferee of shares of stock takes subject to any lien thereon created by the articles in favor of the corporation as against a prior holder and such lien attaches also to dividends declared during its existence. *Dempster Mfg. Co.*, 126-80.

These provisions relate to corporations organized under the laws of the state and doing business in the state, and the books referred to are required to be kept within the state where they can be inspected. *Perkins v. Lyons*, 111-192.

In a particular case held that a pencil notation on the stub of the stock book, made long prior to a levy on the stock, although not dated, was sufficient to constitute a transfer. *Ibid.*

The provisions of this section relating to transfer of stock as collateral security held not to be retroactive. *Ibid.*

A private individual cannot require that the books of the company be at all times kept open for public inspection. His right to inspect, if any, is personal. Neither can he have an order with reference to future inspection. *Boardman v. Marshalltown Grocery Co.*, 105-445.

SEC. 1627. Amount paid in. No certificate or shares of stock shall be issued, delivered or transferred by any corporation, officer or agent thereof, or by the owner of such certificate or shares, without having indorsed on the face thereof what amount or portion of the par value has been paid to the corporation issuing the same, and whether such payment has been in money or property. Any person violating the provisions of this section, or knowingly making a false statement on such certificate, shall be fined not less than one hundred dollars nor more than five hundred dollars, and shall stand committed to the county jail until such fine and costs are paid. This section shall not apply to railway or quasi public corporations organized before the first day of October, 1897. [28 G. A., ch. 57, § 1.]

Failure to endorse on a certificate of stock the amount and manner of payment therefor will not render a contract in relation to such stock void, especially where it appears that full value in property was

paid for the stock, and that such endorsement would not have altered the situation of the parties. *French v. Northwestern Laundry*, 132-81.

SEC. 1629. Expiration.

The fact that the charter of the corporation has expired will not show that it cannot be the owner of property. After the expiration of the term of the charter the corporation continues to live for the purpose of discharging its obligations and disposing of its property. *State v. Fогerty*, 105-32.

The corporate existence may continue after the period limited in the charter for the purpose of winding up the corporate

affairs. *Rogers v. Western Mut. Life Assn.*, 123-722.

The statute contemplates the continuance of the liability of stockholders until the business of the corporation is wound up at least so far as valid indebtedness has been contracted while the corporation has a legal existence. The liability of stockholders does not become that of partners after the expiration of the period

fixed by the charter. *Elson v. Wright*, 112 N. W. 105.

It is only corporations whose charters expire by limitation, or the voluntary act of the stockholders, which continue for the purpose of winding up their affairs. Corporations dissolved by action of court have no further legal existence, and cannot be represented by officers or agents. *State v. Fidelity L. & T. Co.*, 113-439.

A court of equity may wind up the

affairs of a corporation whose charter has expired, if internal dissensions in the corporation make it necessary. This section only authorizes continuance of the business by the corporation managers for the amicable settlement of its affairs. But a corporation whose charter has not expired will not be dissolved at the suit of a stockholder, and it is error to direct a sale of its property in such suit. *Stewart v. Pierce*, 116-733.

SEC. 1631. Liability of stockholders.

Although a certificate of stock recites that it is fully paid, yet if it expressly declares that it is subject to assessment for purposes named such an assessment will be valid and can be enforced against the holder of the stock. *Western Imp. Co. v. Des Moines Nat. Bank*, 103-455.

Such stock is not fully paid up stock and the holder thereof is individually liable under statutory provisions, even if the articles of incorporation provide otherwise. *Ibid.*

The corporation may maintain an action against the stockholder for an assessment lawfully made and it is not necessary that it shall appear that the corporation is insolvent. *Ibid.*

Where a call for an assessment on stock does not specify the time, place or person to whom payment is to be made it will be presumed that the assessment is payable on demand at the place of business of the corporation and to the officer authorized to receive money due to it. *Ibid.*

When property is received by the corporation in payment of stock at an excessive valuation it is to be considered as constituting payment only to the extent of its real value and the owners of such stock are liable to creditors for the difference between the actual value of the property and the face value of the stock. *Stout v. Hubbell*, 104-499.

It is immaterial that the articles of incorporation show that certain shares of stock have been issued as fully paid up in exchange for property. Creditors have a right to presume in such case that the property received is of the actual value of the face of the stock, and if it is of less value the holder of such stock is liable to the creditors for the difference. *Ibid.*

The stockholder after the transfer of his stock remains liable for indebtedness of the corporation existing at the time of such transfer. *White v. Green*, 105-176; *White v. Marquardt*, 105-145.

One who in fact becomes a holder of stock incurs the liability of a stockholder for unpaid installments, although the

transfer of the stock to him is not recorded in the books of the company; and upon a subsequent transfer of the stock by him effected by means of a transfer at his instance directly from the original holder to the last purchaser, he nevertheless remains liable in the same way that other holders of stock remain liable after transfer for liabilities of the corporation existing at the time of such transfer. *White v. Marquardt*, 105-145.

Indebtedness of the corporation not matured at the time of the transfer of stock is nevertheless a liability for which the stockholder remains liable to the extent of the unpaid installments of his stock. *White v. Greene*, 105-176.

Property may be accepted in exchange for stock, providing it is taken at its true value. The parties have the right in good faith to agree on the value of the property taken, but this should not be speculative or fictitious. *State Trust Co. v. Turner et al.*, 111-664.

But a creditor of the corporation, who has become such with knowledge that stock, although issued as fully paid, has not in fact been paid for, cannot enforce his claim against the holders of such stock, nor can his assignee do so. *Ibid.*

In an action against a stockholder for an unpaid subscription, the burden is on the creditor seeking to enforce payment by the stockholder to prove that payment by the stockholder has not been made. *Merrill v. Timbrell*, 123-375.

In a proceeding by the auditor of state to wind up a bank and distribute its assets among the creditors, the receiver may have an order for the assessment of stockholders based on an estimate of the amount for which they will be liable under the statutory provision for double liability, and the stockholders may be compelled to pay such assessment before the assets of the bank are distributed, subject to the right to a return of any assets left undisposed of after the debts are all paid. *State ex rel. v. Union Stock Yards State Bank*, 103-549; and see *Elson v. Wright*, 112 N. W. 105.

SEC. 1633. Indemnity—contribution.

A stockholder who has been compelled to pay more than his just proportion of unpaid subscriptions to the capital stock may enforce contribution from the other stockholders who have not paid their just proportion, and this rule is applicable to a case where a stockholder has voluntarily paid more than his just proportion, but

liability in this respect may be determined by the contract between the parties, and if the stockholders pays creditors, knowing that the other stockholders have an agreement by which their stock is to be treated as fully paid up, he cannot recover against them for contribution. *Esgen v. Smith*, 113-25.

SEC. 1636. Estoppel.

In an action brought by a corporation to protect its property from wrongful acts the defendant cannot set up want of legal

organization as a defense. *State Security Bank v. Hoskins*, 130-339.

SEC. 1637. Foreign corporation—filing articles—process.

It is within the power of the state to prescribe the method by which corporations doing business within its jurisdiction may be brought into court and to designate the officer or agent of such corporation upon whom the process necessary to commence an action may be served. *Green v. Equitable Mut. L. & End. Assn.*, 105-628.

The permit here required is not necessary to enable a foreign corporation to purchase property in this state and transport the same through the state. *Ware Cattle Co. v. Anderson*, 107-231.

The fact that statutory requirements as to foreign corporations have not been complied with by the corporation cannot be taken advantage of by one who has received the benefits of a contract with such corporation. *Spinney v. Miller*, 114-210.

The exception as to the doing business in the state by foreign corporations covers the transaction of receiving and accepting a note and mortgage for a valid consideration when such transaction is independent of and not connected with any form of business which the company is

prohibited from transacting without a permit. *Prudential Ins. Co. v. Cushman*, 130-378.

A mortgagor who has received and retained the benefits of the transaction in which the mortgage is given cannot be heard to assert its invalidity on the ground that the mortgagee is a foreign corporation which has failed to comply with the statutes prescribing the terms upon which such corporations may do business in the state, the state alone being entitled to take advantage of the failure of the corporation to comply with the statute. *Ibid.*

It is no defense to a contract entered into by a foreign corporation that when the contract was made it did not have a permit to do business in the state. *Iowa Lilloet Gold Mining Co. v. United States F. & G. Co.*, 146 Fed. 437.

In a direct action by the state to oust a foreign corporation from doing business therein without a permit, a judgment of ouster will not be awarded if the corporation complies with the law within a reasonable time. *Ibid.*

SEC. 1640. Dissolution—receiver.

From the time of entry of dissolution by the court in a proper case the corporation is dead, and cannot be represented by officers or agents. Therefore held that where the decree contained an order or dissolu-

tion, the corporation, without appealing from that portion of the decree, could not ask relief with reference to other orders in the same decree. *State v. Fidelity L. & T. Co.*, 113-439.

SEC. 1641. Repeal—ownership of property. That section sixteen hundred and forty-one (1641) of the code be repealed and the following enacted in lieu thereof:

“Corporations organized in any foreign country or corporations organized in this country, the stock of which is owned in whole or in part by non-resident aliens, shall have the same rights, powers and privileges with regard to the purchase and ownership of real estate in this state as are granted to non-resident aliens in section twenty-eight hundred and ninety (2890) of the code.” [30 G. A., ch. 54.]

SEC. 1641-a. Right to vote stock. Every executor, administrator, guardian or trustee, shall represent the stock in his hands at all corporate

meetings, and may vote the same as a stockholder; and every person who shall pledge his stock, in the absence of a written agreement to the contrary, may represent the same at all such meetings and vote accordingly. The owner of corporate stock levied upon by attachment or other proceeding, shall have the right to vote the same at all corporate meetings, until such time as that he shall have been divested of his title thereto by execution sale. But nothing contained in this section shall in any manner conflict with any provision in the articles of incorporation, or the by-laws of the corporation issuing the stock. [30 G. A., ch. 55.]

SEC. 1641-b. Capital stock—how issued—executive council to fix value. That from and after the passage of this act no corporation organized under the laws of the state of Iowa, except building and loan associations as defined and provided for in chapter thirteen (13), title (9) of the code, shall issue any capital stock or any certificate or certificates of shares of capital stock, or any substitute therefor, until the corporation has received the par value thereof. If it is proposed to pay for said capital stock in property or in any other thing than money, the corporation proposing the same must, before issuing capital stock in any form, apply to the executive council of the state of Iowa for leave so to do. Such application shall state the amount of capital stock proposed to be issued for a consideration other than money, and set forth specifically the property or other thing to be received in payment for such stock. Thereupon, it shall be the duty of the executive council to make investigation, under such rules as it may prescribe, and to ascertain the real value of the property or other thing which the corporation is to receive for the stock; and shall enter its finding, fixing the value at which the corporation may receive the same in payment for capital stock; and no corporation shall issue capital stock for the said property or thing in a greater amount than the value so fixed and determined by the executive council. [32 G. A., ch. 71, § 1.]

SEC. 1641-c. Certificate filed with secretary of state. It shall be the duty of every corporation to file a certificate under oath with the secretary of state, within ten (10) days after the issuance of any capital stock, stating the date of issue, the amount issued, the sum received therefor, if payment be made in money, or the property or thing taken, if such be the method of payment. [32 G. A., ch. 71, § 2.]

SEC. 1641-d. Cancellation of stock. The capital stock of any corporation issued in violation of the terms and provisions hereof shall be void, and in a suit brought by the attorney general on behalf of the state of Iowa, in any court having jurisdiction, a decree of cancellation shall be entered; and if the corporation has received any money or thing of value for the said stock, it shall remain the property of the corporation for the benefit of the remaining stockholders. [32 G. A., ch. 71, § 3.]

SEC. 1641-e. Dissolution of corporation. Any corporation violating the provisions hereof shall, upon the application of the attorney general, in behalf of the state, made to any court of competent jurisdiction, be dissolved, its affairs wound up, and its assets distributed among the stockholders other than those who have received the stock so unlawfully issued. [32 G. A., ch. 71, § 4.]

SEC. 1641-f. Penalty. Any officer, agent or representative of a corporation who violates any of the provisions hereof shall, upon conviction, be fined not less than two hundred (200) dollars nor more than one thousand (1,000) dollars, and be imprisoned in the county jail for not less than thirty (30) days nor more than six (6) months. [32 G. A., ch. 71, § 5.]

SEC. 1641-g. False statements—penalty. Every director, officer or agent of any corporation or joint-stock association, who knowingly concurs

in making, publishing or posting, either generally or privately to the stockholders or other persons, any written report, exhibit, or statement of its affairs or pecuniary condition, or book or notice containing any material statement which is false, or any untrue or willfully or fraudulently exaggerated report, prospectus, account, statement of operations, values, business, profits, expenditures, or prospects, or any other paper or document intended to produce or give, or having a tendency to produce or give, the shares of stock in such corporation a greater value or a less apparent or market value than they really possess, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the penitentiary not to exceed one year, or by imprisonment in the county jail not to exceed six months or a fine not exceeding five hundred dollars. [32 G. A., ch. 72.]

SEC. 1641-h. Political contributions by corporations prohibited. It shall be unlawful for any corporation doing business within the state, or any officer, agent or representative thereof acting for such corporation, to give or contribute any money, property, labor or thing of value, directly or indirectly, to any member of any political committee, political party, or employe or representative thereof, or to any candidate for any public office or candidate for nomination to any public office or to the representative of such candidate, for campaign expenses or for any political purpose whatsoever, or to any person partnership or corporation for the purpose of influencing or causing such person, partnership or corporation to influence any elector of the state to vote for or against any candidate for public office or for nomination for public office or to any public officer for the purpose of influencing his official action, but nothing in this act shall be construed to restrain or abridge the liberty of the press or prohibit the consideration and discussion therein of candidacies, nominations, public officers or political questions. [32 G. A., ch. 73, § 1.]

SEC. 1641-i. Solicitation from corporations prohibited. It shall be unlawful for any member of any political committee, political party, or employe or representative thereof, or candidate for any office or the representative of such candidate, to solicit, request or knowingly receive from any corporation or any officer, agent or representative thereof, any money, property or thing of value belonging to such corporation, for campaign expenses or for any political purpose whatsoever. [32 G. A., ch. 73, § 2.]

SEC. 1641-j. Testimony—immunity from prosecution. No person, and no agent or officer of any corporation within the purview of this act shall be privileged from testifying in relation to any thing herein prohibited; and no person having so testified shall be liable to any prosecution or punishment for any offense concerning which he is required to give his testimony, provided that he shall not be exempted from prosecution and punishment for perjury committed in so testifying. [32 G. A., ch. 73, § 3.]

SEC. 1641-k. Penalty. Any person convicted of a violation of any of the provisions of this act shall be punished by imprisonment in the county jail not less than six months or more than one year and in the discretion of the court, by fine not exceeding one thousand dollars (\$1000.00). [32 G. A., ch. 73, § 4.]

CHAPTER 2.

OF CORPORATIONS NOT FOR PECUNIARY PROFIT.

SECTION 1642. Organization—purpose—name.

The secular acts of religious corporations are to be governed by the same principles of law as those applied to civil cor-

porations. *Moore v. First etc. Methodist Church*, 117-33.

The law presumes that meetings of trus-

tees of a religious corporation are regular and upon proper notice and that contracts made by them and under which they have accepted benefits are binding. *Ibid.*

Corporations for religious purposes have no stock, and being without authority to levy assessments upon or enforce contributions from their members, the membership of an insolvent religious corporation may organize as a new corporation without becoming liable for the debts of the old in the absence of fraud and if no property of the old corporation is taken by the new. *Allen v. North Des Moines M. E. Church*, 127-96.

A religious society seeking to effectuate its ideals of religious life through the common ownership and management of the property of its members may acquire and hold real property and establish and conduct industrial enterprises so long as its property is owned and managed and its enterprises are conducted and extended, simply to meet the needs of its members, and maintain them in a manner consistent

with their religious faith, to which its total income and accumulation of property is devoted; and such a corporation will not be dissolved and its privileges forfeited on the ground that it has exceeded its corporate powers. *State v. Amana Society*, 132-304.

The management of the property of such a corporation so that it shall yield a profit to be used in promoting its business is not prohibited, the power to acquire and make use of property being incidental to and in aid of the power conferred to accomplish the business appropriate to the execution of the purposes of the organization. *Ibid.*

A mutual insurance company or association is a corporation for pecuniary profit, but under the provisions of Code Supplement § 1333-d it seems that there may be county mutual associations which are not corporations for pecuniary profit; the tax thus imposed is not a property tax, but a business or license tax. *Iowa Mut. Tornado Assn. v. Gilbertson*, 129-658.

SEC. 1642-a. Change of name or amendments—how effected by corporations heretofore organized. Any corporation heretofore organized under chapter 2 of title IX of the code, for the maintenance of a hospital or home for destitute or unfortunate women or orphaned or abandoned children, and whose membership is made to depend on the payment of dues and is indefinite or uncertain for any reason, and which has not issued certificates of membership, may at any time change the name of such corporation or amend its articles of incorporation by a vote of at least three-fourths of its governing board of directors or trustees at a meeting called and held for that purpose, after giving four weeks' notice thereof by publication, made in the same manner as original notices, of the time, place and purpose of such meeting. [32 G. A., ch. 250, § 1.]

SEC. 1642-b. Change of name and amendments legalized. Any corporation so organized under chapter 2 of title IX of the code which shall have heretofore adopted articles of incorporation, or changed its name or amended its articles and some question has arisen as to whether such articles, change in name or amendment was adopted by a majority of the members of such corporation as required by section 1651 of the code, and such corporation shall have been engaged in the exercise of its corporate functions for the period of at least three years, such articles, change in name or amendment, shall be held and considered to have been duly adopted by a majority of all the members of such corporation, and are hereby legalized and made valid. [32 G. A., ch. 250, § 2.]

SEC. 1642-c. Saving clause. Nothing in this act contained shall affect any pending litigation. [32 G. A., ch. 250, § 3.]

CHAPTER 3.

OF DEPARTMENT OF AGRICULTURE, AGRICULTURAL AND HORTICULTURAL SOCIETIES AND STOCKBREEDERS' ASSOCIATIONS AND STATE DAIRY ASSOCIATIONS.

SECTION 1657-a. Repeal. That section sixteen hundred and fifty-three (1653), sixteen hundred and fifty-four (1654), sixteen hundred and fifty-

five (1655), sixteen hundred and fifty-six (1656), sixteen hundred and fifty-seven (1657), sixteen hundred and seventy-four (1674), sixteen hundred and eighty-two (1682) and sixteen hundred and eighty-three (1683) of the code, and chapter forty-two (42) of the acts of the twenty-seventh general assembly, be and the same are hereby repealed. [28 G. A., ch. 58, § 18.]

SEC. 1657-b. Department of agriculture. For the promotion of agriculture, horticulture, forestry, animal industry, manufactures, and the domestic arts, there is hereby established a department to be known as the "department of agriculture," which shall embrace the district and county agricultural societies organized or to be organized under existing statutes and entitled to receive aid from the state, the state weather and crop service, and the offices of the dairy commissioner and state veterinarian. [28 G. A., ch. 58, § 1.]

SEC. 1657-c. State board of agriculture. The department shall be managed by a board, to be styled "the state board of agriculture," of which the governor of the state, the president of the state college of agriculture and mechanic arts, the state dairy commissioner, and the state veterinarian shall be members *ex officio*. The other members of the board shall consist of a president, vice-president, secretary, treasurer and one director from each congressional district, to be chosen as hereinafter provided. [28 G. A., ch. 58, § 2.]

SEC. 1657-d. Agricultural convention. There shall be held at the capitol on the second Wednesday of December, 1900, and annually thereafter, a state agricultural convention, composed of the state board of agriculture, together with the president or secretary of each county or district society entitled to receive aid from the state, or a regularly elected delegate therefrom accredited in writing, who shall be a resident of the county; and in counties where there are no agricultural societies the board of supervisors may appoint a delegate who shall be a resident of the county. The president or an accredited representative of the following named associations shall be entitled to membership in the said convention, to-wit: the state horticultural society, the state dairy association, the improved stock breeders' association, the swine breeders' association, and each farmers' institute organized under the provisions of section sixteen hundred and seventy-five (1675) of the code. Provided, said farmers' institute has been organized at least one (1) year, and has reported to the state secretary of agriculture, not later than November first, through its president and secretary or executive committee, that an institute was held according to law, the date thereof, the names and postoffice address of its officers. They shall also furnish the state secretary of agriculture with a copy of program of each institute hereafter held and one or more papers read before such institute, if papers are read. On all questions arising for determination by the convention including the election of members of the board, each member present shall be entitled to but one vote, and no proxies shall be recognized by the convention. [28 G. A., ch. 58, § 3.] [29 G. A., ch. 165, § 1.] [31 G. A., ch. 66.]

SEC. 1657-e. Officers—directors—vacancies. At the convention held on the second Wednesday in December, 1900, there shall be elected a president and vice-president for the term of one year; also one director of the board of agriculture from each congressional district; those from even-numbered districts to serve two years and those from odd-numbered districts one year. At subsequent annual conventions, vacancies in the list of district directors shall be filled for two years. But vacancies occurring from death or other causes, shall be filled for the unexpired term; and the

board may fill any vacancy in office until the next annual convention. [28 G. A., ch. 58, § 4.]

SEC. 1657-f. State farmers' institute. In connection with the annual convention, either preceding or following the day on which the officers are elected, the board may hold a state farmers' institute, for the discussion of practical and scientific topics relating to the various branches of agriculture, the substance of which shall be published in the annual report of the board. [28 G. A., ch. 58, § 5.]

SEC. 1657-g. Duties of board. The board shall have general supervision of the several branches, bureaus and offices embraced in the department of agriculture; and it shall be the duty of the board to look after and promote the interests of agriculture, of agricultural education and animal and other industries throughout the state; to investigate all subjects relating to the improvement of methods, appliances and machinery, and the diversification of crops and products; also to investigate reports of the prevalence of contagious diseases among domestic animals, or destructive insects and fungus diseases in grains, and grasses, and other plants, the adulteration of foods, seeds and other products, and to report the result of investigation, together with recommendations of remedial measures for prevention of damage resulting therefrom. It shall be the duty of the Iowa agricultural experiment station to co-operate with the department of agriculture in carrying on these investigations. [28 G. A., ch. 58, § 6.]

SEC. 1657-h. Executive committee. The president, vice-president, and secretary shall constitute an executive committee, which shall transact such business as may be delegated to it by the board of agriculture. The president may call meetings of the board when the interests of the department require it. [28 G. A., ch. 58, § 7.]

SEC. 1657-i. State fair. The board shall have full control of the state fair grounds and improvements thereon belonging to the state, with requisite powers to hold annual fairs and exhibits of the productive resources and industries of the state. They may prescribe all necessary rules and regulations thereon. The board may delegate the management of the state fair to the executive committee and two or more additional members of the board; and for special work pertaining to the fair they may employ an assistant secretary and such clerical assistance as may be deemed necessary. All expenditures connected with the fair including the per diem and expenses of the managers thereof, shall be recorded separately and paid from the state fair receipts. The said board of agriculture shall have the power to authorize or forbid the construction of street railways within the state fair grounds and may define the motive power by which the cars thereon shall be propelled and to authorize or forbid the location and laying down of tracks for street railways in said grounds. [28 G. A., ch. 58, § 8.] [29 G. A., ch. 166, § 1.]

SEC. 1657-j. Duties of officers as to bequests. The department of agriculture is hereby authorized to take and hold property, real and personal, derived by gifts and bequests, and the president, secretary and treasurer shall have charge and control of the same, subject to the action of the board, and shall give bonds as required in case of executors, to be approved by the board of agriculture and filed with the secretary of state. [28 G. A., ch. 58, § 9.]

SEC. 1657-k. Secretary—duties—Iowa Year Book of Agriculture. The board shall elect a secretary for a term of one year, whose duties shall be such as usually pertain to the office of a secretary, under the direction of the board. He shall keep a complete record of the proceedings of the annual state agricultural convention and all meetings of the board; he shall

draw all warrants on the treasurer and keep a correct account thereof; he shall compile and superintend the printing of the annual report of the state department of agriculture, which shall be entitled "The Iowa Year Book of Agriculture," and shall include the annual report of the dairy commissioner, the state dairy association, and the Iowa agricultural experiment station, the annual report of the state veterinarian, the Iowa weather and crop service, the Iowa improved stock breeders' association, or such part thereof as the executive committee may approve, and such other reports and statistics as the board may direct, which shall be published by the state; he shall perform such other duties as the board may direct. [28 G. A., ch. 58, § 10.]

SEC. 1657-l. Distribution of year book—competitive bids. The Iowa Year Book of Agriculture shall be printed and bound in cloth and such number as the executive council shall direct, to be distributed as follows: One copy to each state officer and member of the general assembly; ten copies to the state library and ten copies to the libraries of the state university and the state college of agriculture and mechanic arts; one copy to each library in the state open to the general public; one copy to the president and secretary of each county and district agricultural society, and one copy to the board of supervisors of each county in which there is no such agricultural society, and the balance as may be directed by the board of agriculture. The executive council shall receive competitive bids for the printing and binding of the year book and let the contract to the lowest responsible bidder. Such bidding, however, shall be confined to concerns in Iowa and to persons or corporations paying the union scale of wages. [28 G. A., ch. 58, § 11.]

SEC. 1657-m. Present officers and directors. The present officers and directors of the state agricultural society, upon taking effect of this act, shall be, and they are hereby made and constituted officers and directors of the department of agriculture, who, with the *ex officio* members named in section two (2) hereof, shall have full control and management of the department of agriculture until the members of the state board of agriculture are elected as provided in section three (3) of this act. [28 G. A., ch. 58, § 12.]

SEC. 1657-n. Office — supplies — salary of secretary and assistant. The office of the department of agriculture shall be in rooms numbers eleven (11) and twelve (12), in the capitol building; the said office shall be entitled to such supplies, stationery, postage and express as may be required, which shall be furnished by the executive council in the same manner as other officers are supplied. The salary of the secretary shall not exceed eighteen hundred dollars (\$1500) per annum; and when the board deem it necessary it may employ an assistant at an expense of not more than seventy-five dollars (\$75) per month. [28 G. A., ch. 58, § 13.] [31 G. A., ch. 67.]

[The amendment by the 31 G. A. was by striking out the word "fifteen" in line 6 and inserting in lieu thereof the word "eighteen," but the figures "\$1500" were unchanged.]

SEC. 1657-o. Treasurer—duties—bond—compensation. The board shall elect a treasurer for a term of one year, whose duties shall be to keep a correct account of the receipts and disbursements of all moneys belonging to the department of agriculture, and shall make payments only on warrants signed by the president and secretary thereof, except in payment of premiums. He shall execute a bond for the faithful performance of his duty, to be approved by the board and filed with the secretary, and shall receive such compensation for his services as shall be fixed by the board, not exceeding one hundred dollars per annum. [28 G. A., ch. 58, § 14.]

SEC. 1657-p. Compensation of elective members. The elective members of the state board of agriculture, for attending the meetings of the board, and for the special work pertaining to the holding of the state fair shall be allowed four dollars (\$4) per day and five cents per mile in going and returning from the place where the business is transacted, the claim for which shall in all cases be verified and paid as provided in section eight (8). [28 G. A., ch. 58, § 15.]

SEC. 1657-q. Finance committee—report—compensation. A finance committee consisting of three members shall be appointed by the executive council, whose duty it shall be to examine and report upon all financial business of the department of agriculture prior to the annual convention thereof, and make their report to the governor. No member of such committee shall be a member of the board. A reasonable compensation, not exceeding four dollars to each member for each day actually and necessarily engaged in the performance of their duties and necessary expenses incurred, shall be allowed said finance committee, to be audited by the executive council and paid out of any funds in the state treasury not otherwise appropriated. Such report shall be edited under the direction of the executive council and be published in accordance with the provisions of section one hundred and sixty-three (163) of the code and acts amendatory thereof. [28 G. A., ch. 58, § 16.]

SEC. 1657-r. Premium list and rules. The premium list and rules of exhibition shall be determined and published by the board prior to the first day of April in each year. [28 G. A., ch. 58, § 17.]

SEC. 1657-s. Corrective. That where the words "board of directors of the state agricultural society" occur in the code or the acts amendatory thereto, the same shall be construed to mean and to refer to the state board of agriculture; and the words "state society" and "state agricultural society" shall be construed to mean and refer to the department of agriculture. [28 G. A., ch. 58, § 20.]

SEC. 1657-t. Amounts appropriated. There is hereby appropriated annually from and after the first day of January nineteen hundred and one (1901) for the support of the office of the department of agriculture, twenty-four hundred dollars (\$2400) and for insurance and improvements of buildings on the state fair grounds the sum of one thousand dollars (\$1,000) or so much thereof as shall be necessary, and the auditor of state shall draw a warrant therefor upon the order of the department of agriculture signed by the president and secretary thereof, in such sums and at such times as the board shall deem necessary. The state shall not be liable for the payment of any premiums offered by the state board of agriculture, nor for any expenses or liabilities incurred by said board, except, as expressly provided for in this act. [28 G. A., ch. 58, § 21.]

SEC. 1658. County societies—premiums. County and district agricultural societies may annually offer and award premiums for the improvement of stock, tillage, crops, implements, mechanical fabrics, articles of domestic industry, and such other articles and improvements as they may think proper, and so regulate the amount thereof and the different grades as to induce general competition. [C., '73, § 1109; R., § 1697.] [28 G. A., ch. 59, § 2.]

Under the statutory provision authorizing agricultural societies to award premiums, etc., such society has power to authorize trials of speed on its grounds and such lawful games or amusements as its officers and directors may in their discretion see fit to arrange for in furnishing amusement and entertainment as well

as instruction to those attending. Therefore the directors of such society are not liable in their individual capacity for neglect to provide protection to spectators against dangers incident to the playing of such games as are authorized. *Williams v. Dean*, 111 N. W. 931.

SEC. 1659. List of awards. Each county and district society shall annually publish a list of the awards, and an abstract of the treasurer's account, in one or more newspapers of the county, with a report of its proceedings during the year, and a synopsis of the awards. It shall also make a report of the condition of agriculture in the county to the board of directors of the state agricultural society, which shall be forwarded on or before the first day of November in each year to the secretary of said society. The auditor of state, before issuing a warrant in favor of such societies for any amount, shall demand the certificate of the secretary of the state society that such report has been made. Any society failing to report on or before the first day of November shall not receive state aid for that year. [C., '73, § 1110; R., § 1698.] [28 G. A., ch. 59, § 2.]

SEC. 1660. Appropriation from county—question submitted—notice—title in county—control. When a county agricultural society shall have produced in fee simple, free from incumbrance, land for fair grounds, not less than ten acres in extent, or hold and occupy such amount of land by virtue of a lease, and own and have thereon buildings and improvements worth at least two thousand dollars, the board of supervisors of the county may appropriate and pay to it a sum not exceeding one hundred dollars for every thousand inhabitants in the county, to be expended by it in fitting up or purchasing such fair grounds, but for no other purpose; but the aggregate amount so appropriated shall not exceed one thousand dollars to any one society. The board of supervisors are further authorized to purchase real estate for county fair purposes, in sums not exceeding one thousand dollars (\$1,000.00), providing however, that the board of supervisors shall first have submitted to the legal voters of the county a proposition therefor, and voted for by a majority of all persons voting for and against such proposition at a general or special election; notice to be given as provided in section four hundred twenty-three (423) of the supplement to the code. And the board of supervisors shall not exceed in the purchase of such real estate, the amount so voted for. The title of such real estate when purchased to be taken in the name of the county, and the board of supervisors shall place such real estate under the control and management of an incorporated county fair society, as long as an annual county fair is maintained by such corporation on said real estate. And said corporation is authorized to erect and maintain buildings and make such other improvements on said real estate as is necessary, but the county shall not be liable for such improvements, or the expenditures therefor. The right of such county fair society to the control and management of said real estate may be terminated by the board of supervisors whenever well conducted agricultural fairs are not annually held thereon. [C., '73, § 111.] [32 G. A., ch. 17, § 2.]

SEC. 1661-a. Repeal—state aid to district or county society—failure to report. That section sixteen hundred sixty-one (1661) of the code be and is hereby repealed and the following enacted in lieu thereof:

Any county or district agricultural society, upon filing with the auditor of state affidavits of its president, secretary, and treasurer showing what sum has actually been paid out during the current year for premiums, not including races, or money paid to secure games or other amusements, and that no gambling devices or other violations of law were permitted, together with a certificate from the secretary of the state society showing that it has reported according to law, shall be entitled to receive from the state treasury a sum equal to forty per cent. of the amount so paid in premiums, but in no case shall the amount paid to any society exceed the sum of two hundred dollars. When any society fails to report, according to law, on or before the first day of November, that society shall not receive a

warrant from the state auditor for that year, but the secretary of the state board of agriculture shall notify the county auditor of the county in which the society is located of such failure, and the board of supervisors may appoint a delegate to the annual meeting or state agriculture [agricultural] convention, said delegate to be a resident of said county. [27 G. A., ch. 43, § 1.] [28 G. A., ch. 59, § 1.]

SEC. 1672. Printing and distribution. There shall be printed four thousand copies of the report, which shall be bound in muslin covers, uniform in style with the reports heretofore made, which shall be distributed by the secretary of state, as follows: Six copies each to the governor, lieutenant-governor, secretary of state, auditor, treasurer, attorney-general, judges of the supreme court, and each member of the general assembly; one hundred to the agricultural college, five copies to the university, two to each incorporated college in the state, one to each auditor, and clerk of the district court, to be kept in his office, and one to each newspaper published in the state; the remainder to be distributed by direction of the society. [18 G. A., ch. 6; C., '73, § 1120.] [29 G. A., ch. 68, § 1.]

SEC. 1673. Appropriation for. The sum of four thousand dollars is hereby appropriated annually for the use and benefit of said society, which shall be paid upon the warrant of the auditor of state, upon the order of the president of said society, in such sums and at such times as may be for the interests of said society. [20 G. A., ch. 128; C., '73, § 1121.] [29 G. A., ch. 68, § 2.]

SEC. 1675. Farmers' institutes—state aid—appropriation. When forty or more farmers of a county organize a farmers' county institute, with a president, secretary, treasurer, and an executive committee of not less than three outside of such officers, and hold an institute, remaining in session not less than two days in each year, which institute may be adjourned from time to time and place to place in said county, the county auditor, upon proof of such organization and such institute having been held, together with an itemized statement, showing the manner in which the money herein appropriated has been expended, shall certify the same to the auditor of state, who shall remit to the treasurer of such county his warrant for not to exceed seventy-five dollars, and there is hereby appropriated, out of the moneys in the state treasury not otherwise appropriated, a sum not to exceed seventy-five dollars annually for such institute work in each county. No officer of any such farmers' institute shall receive, directly or indirectly, any compensation from said state fund for services as such officer. [24 G. A., ch. 58, § 1.] [29 G. A., ch. 69, § 1.]

SEC. 1679. Stations—bulletins. The director shall co-operate with the board of directors of the state agricultural society to establish volunteer stations at one or more places in each county in the state, and in appointing observers thereat; to supervise such stations, receive reports of meteorological events and crop conditions therefrom, and tabulate the same for permanent record; to issue weekly weather and crop bulletins during the season from April first to October first, and to edit and cause to be published at the office of the state printer a monthly weather and crop review, containing meteorological and agricultural matter of public interest and educational value. The state printer shall print three thousand copies thereof, which shall be distributed from the office of department of agriculture. The directors may require a larger issue for such subscribers as will pay the expense thereof. The director shall have advisory power to co-operate with the farmers' institute organizations of the several counties of the state, for the purpose of arranging dates and providing speakers or lecturers, with a view to economy of time and travel in attending institutes; such insti-

tutes to be held as nearly as practicable in circuits, and at such dates as will enable speakers to attend two or more such institutes each week. [24 G. A., ch. 63, § 2; 23 G. A., ch. 29, § 4.] [28 G. A., ch. 58, § 19.]

SEC. 1681. Appropriation. There is hereby appropriated, out of any money in the state treasury not otherwise appropriated, the sum of two thousand seven hundred dollars annually, to be drawn and expended upon the order of the president and secretary of the department of agriculture, for such service, including the salary of the director, which shall not exceed fifteen hundred dollars per annum. [24 G. A., ch. 63, § 1.] [28 G. A., ch. 58, § 19.]

CHAPTER 4.

OF INSURANCE OTHER THAN LIFE.

SECTION 1687. Name.

An insurance company, although authorized to do business by the auditor of state may be enjoined from using a name which is so similar to the name of a foreign in-

surance company authorized to do business in the state that it is calculated to deceive the public. *Atlas Assurance Co. v. Atlas Insurance Co.*, 112 N. W. 232.

SEC. 1689. Kind of company. Every insurance company organized as provided in this chapter shall, if it be a mutual company, embody the word "mutual" in its title, which must appear upon the first page of every policy and renewal receipt; and every company doing business as a stock company shall, upon the face of its policies, express in some suitable manner that such policies are issued by a stock company. Provided that from and after July 4, 1906, no company shall be organized upon the mutual plan, under the provisions of this chapter, for the purpose of transacting the business specified in subdivisions one (1) and four (4) of section seventeen hundred and nine (1709) of the supplement to the code. [C., '73, § 1140.] [31 G. A., ch. 68.]

The provisions as to mutual benefit associations are distinct from those for the incorporation of mutual companies, and the statutory requirement that the word "mutual" shall be included in the

name of the company organized under the later provisions has no application to such a society. *Moore v. Union Fraternal Acc. Assn.*, 103-424.

SEC. 1690. Stock or mutual.

A mutual company cannot issue policies upon the stock plan, and such policies, if issued, are illegal and void. *Smith v. Sherman*, 113-601.

A company issuing a policy on the stock plan will be presumed to have authority to issue such a policy until the

contrary appears. One contracting with the company is not bound to know at his peril whether the company has complied with the condition authorizing it to do a stock insurance business. *Harris-Emery Co. v. Pitcairn*, 122-595.

SEC. 1698. Secretary and other officers—by-laws—records.

By-laws duly adopted, but not posted as required by law, are valid and controlling as to all persons informed of their existence, the posting being required for the sole purpose of imparting constructive notice, and if the existence of the by-laws is expressly recognized, the person who receives such certificate is bound thereby. *Fee v. National Masonic Acc. Assn.*, 110-271.

While members of a mutual company may be bound by by-laws adopted after they become members, nevertheless the terms of a policy of insurance will be presumed to be governed by the by-laws in force when it is issued, and not to be affected by those subsequently adopted. *Farmers' Mut. Hail Ins. Assn. v. Slattery*, 115-410.

SEC. 1699. Funds invested.

While as between the state and the company the investment of its surplus in bank stock may be unauthorized, such a transaction entered into by the officers for the purpose of avoiding loss to the company

may be so ratified by the directors in taking advantage of the benefits thereof as to estop the corporation from treating the transaction as *ultra vires*. *Fidelity Ins. Co. v. German Sav. Bank*, 127-591.

SEC. 1706. Settlement of losses.

The authority of making assessments conferred on the directors is exclusive and cannot be exercised by other officers un-

der the direction of such directors. *Farmers' Milling Co. v. Mill Owners' Mut. Fire Ins. Co.*, 127-314.

SEC. 1709. Kinds of insurance—limitation of risk. Any company organized under this chapter or authorized to do business in this state may:

1. Insure houses, buildings, and all other kinds of property against loss or damage by fire or other casualty, and make all kinds of insurance on goods, merchandise, moneys and securities or other property in the course of transportation, whether on land or water, or any vessel or boat wherever the same may be; [31 G. A., ch. 72, § 2.]

A policy of insurance against loss by burglary, although issued prior to 28 G. A., ch. 60, is valid. *Bankers' Mut. Cas. Co. v. First National Bank*, 131-456.

The statutory provision authorizing insurance against "loss or damage by fire or other casualty" is sufficiently broad to cover such casualty as burglary. *Ibid.*

In ordinary usage, "casualty" is commonly applied to losses and injuries which happen suddenly and unexpectedly, not in the usual course of events, and without any design on the part of the person suffering the injury, although the result is brought about by the conscious or intended act of another. *Ibid.*

2. Insure the fidelity of persons holding places of private or public trust, or execute as surety any bond or other obligation required or permitted by law to be made, given or filed, except bonds required in criminal causes. None but stock companies shall engage in fidelity and surety business;

3. Insure the safe keeping of books, papers, moneys, stocks, bonds and all kinds of personal property, and receive them on deposit;

4. Insure horses, cattle and other live stock against loss or damage by accident, theft or any unknown or contingent event which may be the subject of legal insurance, and stock companies may insure horses and registered cattle against loss by death from disease or accident; [31 G. A., ch. 69.]

5. Insure the health of persons and against personal injuries, disablement or death resulting from traveling or general accidents by land or water, insure against loss or damage to property caused by the accidental discharge or leakage of water from automatic sprinkling systems, and insure employers against loss in consequence of accidents or casualties of any kind to employes or other persons, or to property resulting from any act of an employe, or any accident or casualty to persons or property, or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith; [31 G. A., ch. 70, § 1.] [31 G. A., ch. 71, § 1.]

6. Insure against loss or injury to person or property, or both, growing out of explosion or rupture of steam boilers;

7. Any insurance company organized and incorporated on the stock or mutual plan may insure against loss or damage resulting from burglary or robbery, or attempt thereat. A mutual company organized under this subdivision shall not issue any policy to any person, firm, or corporation other than banks, bankers, loan companies, trust companies, and county treas-

urers. Provided, also, that companies organized to transact business as provided by this subdivision seven (7) may hold their annual meetings in the month of July, instead of January; [31 G. A., ch. 72, § 1.]

8. Insure or guarantee and indemnify merchants, traders and those engaged in business and giving credit from loss and damage by reason of giving and extending credit to their customers and those dealing with them, which business shall be known as credit insurance. [25 G. A., ch. 32; 24 G. A., ch. 29; C., '73, § 1132.] [28 G. A., ch. 60, § 1.] [29 G. A., ch. 70, § 1.] [29 G. A., ch. 71, § 1.] [31 G. A., chs. 69-70-71-72.]

SEC. 1710. Repeal — kinds of risks — limitations. That the law which appears as section seventeen hundred and ten (1710) of the supplement to the code be and the same is hereby repealed and the following enacted in lieu thereof:

No company organized by either of the methods provided in this chapter, or authorized to do business in this state, shall issue policies of insurance for more than one (1) of the eight (8) purposes mentioned in the preceding section, or expose itself to loss on any one risk, or hazard, to an amount exceeding ten per cent. of its paid up capital, unless the excess shall be re-insured in some other good and reliable company except as in this section provided as follows: Any stock company organized under the laws of this state for the purpose of transacting the business specified in subdivision five (5) of the preceding section with one hundred and fifty thousand (\$150,000) dollars capital stock, seventy-five thousand (\$75,000) dollars of which is paid up in cash, may in addition to insuring against the casualties specified in subdivision five (5), also insure against injury or loss to persons, or property, or both, growing out of explosion, or rupture, of steam boilers and insure plate glass against breakage from accident; and any stock company organized under the laws of any other state, or nation, and authorized under the laws of this state to transact the business specified in subdivision five (5) of the preceding section, may if it has a paid up capital of two hundred and fifty thousand (\$250,000) dollars, in addition to insuring against the casualties specified in subdivision five (5) of the preceding section, also insure against the casualties specified in subdivision six (6), or insure plate glass against breakage from accident, or if such company is possessed of a paid up capital of three hundred thousand (\$300,000) dollars, it may, in addition to insuring against the casualties specified in subdivision five (5), insure against the casualties specified in subdivision six (6) and also insure plate glass against breakage from accident, provided further, however, that any stock company now or hereafter authorized under the laws of this state to transact the business described in division two (2) or subdivision five (5) of the preceding section shall, in addition to such insurance, also be authorized to insure against loss, or damage, resulting from theft, larceny, burglary, robbery, or attempt thereat. The restrictions as to the amount of risk a company may assume, shall not apply to companies organized to guarantee the fidelity of persons in places of public or private trust, nor to companies that receive on deposit and guarantee the safe keeping of books, papers, moneys and other personal property. [31 G. A., ch. 70, § 2.] [31 G. A., ch. 71, § 2.]

SEC. 1714. Annual statement.

The statement required as to the financial condition of an insurance company is intended not alone for the information of the auditor, to enable him to determine whether he should issue a certificate, but also by way of information to the public. The fact that such statement is required

to be published indicates such legislative intention. Therefore not only one who contracts for insurance, but also one who becomes a purchaser of stock of the company, is entitled to rely upon such statements, and a purchaser of stock may recover damages against an officer of a

company for an intentional false statement which has operated to his prejudice. *Warfield v. Clark*, 118-69.

The provision that the statement shall show expenditures for the preceding year, and also the amount of losses paid during that time, how much subsequent to the date

of the preceding statement, and the amount at which such losses were estimated in such statement, implies that some of the matters to be included in the statement are to be given by way of estimate. *Ibid.*

SEC. 1720-a. Repeal—auditor's report. That section seventeen hundred twenty (1720) of the code be repealed, and the following enacted in lieu thereof:

"He shall cause the information contained in the statements required of the companies organized or doing business in the state to be arranged in detail, and prepare the same for printing, which report shall be made to the governor on or before the first day of May of each year." [28 G. A., ch. 62, § 1.]

SEC. 1722. Service of process.

It is the written consent of the corporation, and not the statute itself, which con-

fers on the auditor power to acknowledge service. *Greaves v. Posner*, 111-651.

SEC. 1724. Certificate.

The power to exclude foreign corporations includes the right to preclude such corporations from continuing in business without complying with the provisions imposed by statute. *Manchester Ins. Co. v. Herriott*, 91 Fed. 711.

It is only upon compliance with statutory requirements that foreign companies become entitled to do business within the state. *Hartman v. Hollowell*, 126-643.

SEC. 1725. Agent to have certificate of authority.

An agent procuring insurance for his principal in a company not authorized to do business in the state becomes li-

able to the principal for any loss resulting from the failure to procure valid insurance. *Hartman v. Hollowell*, 126-643.

SEC. 1727. Forfeiture of policies.

This section was designed to give to the assured at least thirty days from the mailing of the notice in which to make the payment to which the notice refers, and the time cannot be shortened by a direction on the envelope containing the notice that it shall be returned if not delivered within fifteen days. *Smith v. Continental Ins. Co.*, 108-382.

Where such notice treats two policies as one, although they are separate and distinct, it should specify the amount required to cancel each policy, and also the amount of the premium about to become due on account thereof. *Ibid. Born v. Home Ins. Co.*, 110-379.

Forfeitures are not favored and the provisions of this section are mandatory and must be strictly followed. *McDonald v. Anchor Mut. Ins. Co.*, 116-371.

Error in stating the amount of the short rate, as fixed by the auditor under the provisions of Code § 1729, will defeat the forfeiture. *Ibid.*

The provisions of 18 G. A., chap. 210, as to notice of forfeiture for non-payment of premium note, had no application to a forfeiture of membership in a mutual association for failure to pay assessments. *Beeman v. Farmers' Pioneer Mut. Ins. Assn.*, 104-83.

SEC. 1728. Cancellation of policy.

An association purporting to be organized under the provisions of § 1160 of the Code of 1873, but in fact exacting premium notes instead of assessments from its members, thereby subjected itself to

the requirements of 18 G. A., chap. 210 (Code § 1727), as to giving notice of forfeiture on account of non-payment of such notes. *Bradford v. Mut. Ins. Co.*, 112-495.

SEC. 1731. Examination—dissolution.

An insurance company may enforce assessments for the purpose of making good a depletion of its capital, without a requi-

sition from the auditor of state directing such assessment. *Iowa National Bank v. Cooper*, 131-556.

SEC. 1737. Repeal—certificates of compliance—how published. That section seventeen hundred and thirty-seven (1737) of the code, be and the same is hereby repealed and the following enacted in lieu thereof:

"The auditor of state shall annually, as soon as practicable after the first of March, publish in two newspapers of general circulation, a statement made up from the annual report of every insurance company of the character provided for in this chapter and doing business in this state whether organized under the laws of this or any other state, which statements shall contain a synopsis of the company's annual report and shall show that the company has in all respects complied with the laws of the state relating to insurance and is authorized to transact business in the state. One publication as above contemplated, shall be made at the seat of government, and in case of companies organized in this state and located elsewhere than in the city of Des Moines, the other shall be made in the county in which the home office of the company is located. The fee for each publication shall be six (\$6.00) dollars, which shall be paid to the auditor of state at the time and in the manner provided for in section seventeen hundred and fifty-two (1752) supplement to the code and shall be by him paid to the papers making the publication upon receipt of a bill for same, together with an affidavit by the publisher or foreman showing that such publication has been properly made, the same to be filed within thirty days from the date of such publication." [31 G. A., ch. 73.]

SEC. 1741. Copy of application.

The fact that the application is not embodied in or attached to the policy does not preclude proof of the terms of the application in a suit by the insured against members and officers of a mutual benefit association to compel the payment of the assessment, where such evidence is sought to be introduced for the purpose of showing that the assured knew that the company was conducted on the assessment plan. *Moore v. Union Fraternal Acc. Assn.* 103-424.

The purpose of the statutory provisions under which it is necessary to set the application out in or attach it to the policy is, that when the application is made a part of the contract a true copy must be attached to the policy, so that the writings composing the contract may all appear together and that the insured may be in possession of the evidence of what his contract is. Therefore, held, that the statute contemplates more than a mere substantial copy of the application and yet not a true likeness or *fac-simile*. The copy must be so exact and accurate as that upon comparison it can be said to be a true copy without resorting to construction. *Johnson v. Des Moines L. Assn.*, 105-273.

Where a copy of an application attached to or incorporated in the policy is defective and incomplete, the company is precluded from proving the falsity of the representations in the application as a defense to an action on the policy. *Corson v. Anchor Mut. F. Ins. Co.*, 113-841.

Where the copy of an application

attached to the policy is totally defective and insufficient, the company cannot show misrepresentations or breach of conditions contained in such application. *Corson v. Iowa Mut. Fire Ins. Assn.*, 115-485.

The provisions of this section are applicable to mutual companies, notwithstanding the provisions of Code § 1759. *Ibid.*

A premium note, non-payment of which will by the terms of the application render the policy void, must be set out as a part of the application under the provisions of this section. (Following *Lewis v. Burlington Ins. Co.*, 71-97; s. c. 80-259.) *Summers v. Des Moines Ins. Co.*, 116-593.

The examiners' report on an application for life insurance is not a part of the application or representation of the assured, and is not required to be included in the copy of the application. The same is true as to notes of instructions given for making the application and answers and notes and indorsements upon the back of the application made for mere convenience. *Johnson v. Des Moines L. Assn.*, 105-273.

Where the copy of the application attached to the policy indicated that it had been signed, but did not show a copy of the signature, held, that it was not such copy as required by the statute, and the terms of the application could not be considered in an action on the policy. *Seiler v. Economic L. Assn.*, 105-87.

It is the application or representations of the assured only that is required to be attached to or indorsed upon the policy. It is not necessary to indorse thereon provisions found in the by-laws of a mutual

company by which the policy is issued. *Fitzgerald v. Metropolitan Acc. Assn.*, 106-457.

Endorsement of a copy of the application upon the policy, or its attachment thereto, is a necessary foundation for pleading the falsity of statements made therein. *Parker v. Des Moines L. Assn.*, 108-117.

The provisions of chap. 211, acts of 18 G. A., embodied in this section, held appli-

cable to fraternal societies issuing certificates on lives of members. *Stork v. Supreme Lodge K. of P.*, 113-724.

The statutory provision requiring insurance companies to attach a copy of the application to each policy of insurance is applicable to fidelity insurance companies. *United States F. & G. Co. v. Egg Shippers' Strawboard & F. Co.*, 148 Fed. 353.

SEC. 1742. Evidence of value—proofs—action.

Evidence of value: The statute does not attempt to fix, as the measure of recovery in case of the destruction of buildings, any other than the actual value of the building at the time of loss. If, after the *prima facie* showing made by proof of the amount of insurance, the company shall offer evidence to show the actual value to be less, then the amount of recovery becomes a question for the jury, and the actual value is as the jury shall find it. The parties may, by contract, stipulate for the ascertainment of this actual value by appraisers as a condition precedent to the right of action. *Zalesky v. Home Ins. Co.*, 108-341.

Whether the latter part of this section is applicable in case of loss of personal property covered by the policy, *quaere*, *Westenhaver v. German-American Ins. Co.*, 113-726.

Where a policy for \$4000 was issued under an arrangement with the soliciting

agent that total insurance to the extent of \$7000 should be procured on the property, held that in an action on the \$4000 policy the total amount of insurance contemplated was *prima facie* the value of the property insured. *Wensel v. Property Mutual Ins. Assn.*, 129-295.

Proofs of loss furnished to the company are only admissible in evidence in the first instance to establish the fact that they were so furnished. If a schedule attached to such proofs is referred to by a witness as furnishing a correct statement of the items of property destroyed and the value thereof, it may be introduced in evidence in connection with such testimony, but the two purposes should be kept distinct. *Names v. Union Ins. Co.*, 104-612.

Under previous statutory provisions held that proofs of death in a particular case were not sufficient. *Stephenson v. Bankers' Life Assn.*, 108-637.

SEC. 1742-a. Proofs of loss. In furnishing proofs of loss under any contract of insurance for damages or loss of personal property it shall only be necessary for the assured, within sixty days from the time the loss occurs, to give notice in writing to the company issuing such contract of insurance accompanied by an affidavit, stating the facts as to how the loss occurred, so far as same are within his knowledge, and the extent of the loss, any agreement or contract to the contrary notwithstanding. [29 G. A., ch. 73, § 1.]

The provisions of the policy relating to proofs of loss are superseded by the statutory provisions so far as they are in-

consistent. *American Cereal Co. v. Western Assur. Co.*, 148 Fed. 77.

SEC. 1743. Conditions. Any condition or stipulation in an application policy or contract of insurance, making the policy void before the loss occurs, shall not prevent recovery thereon by the insured, if it shall be shown by the plaintiff that the failure to observe such provision or the violation thereof did not contribute to the loss: *provided*, however, that any condition or stipulation referring to any other insurance, valid or invalid, or to vacancy of the insured premises or the title or ownership of the property insured, or to lien, or incumbrances thereon created by voluntary act of the insured and within his control, or to the suspension or forfeiture of the policy during default or failure to pay any written obligation given to the insurance company for the premium, or to the assignment or transfer of such policy of insurance before loss without the consent of the insurance company, or to the removal of the property in-

sured, or to a change in the occupancy or use of the property insured, if such change or use makes the risk more hazardous, or to the fraud of the insured in the procurement of the contract of insurance, shall not be changed or affected by this provision. No recovery on a policy or contract of insurance shall be defeated for failure of the insured to comply, after a loss occurs, with any arbitration or appraisal stipulation as to fixing value of property. No arbitration shall take place except where the property was situated at the time of loss. Any agreement, stipulation or condition in any policy or contract of insurance by which any insurance company reserves or has the right to rebuild shall be void and of no effect in case of total loss, or where the amount of loss, upon the request of the insurance company, has been submitted to arbitration. Nothing herein shall be construed to change the limitations or restrictions respecting the pleading or proving of any defense by any insurance company to which it is subject by law. The provisions of this section shall apply to all contracts of insurance on real and personal property. [28 G. A., ch. 63, § 1.] [28 G. A., ch. 64, § 1.] [32 G. A., ch. 75.]

This provision has no application to the failure of the insured to comply with a condition precedent to the taking effect of the policy. *Banco De Sonora v. Bankers' Mut. Casualty Co.*, 124-576.

A breach of warranty or condition constitutes, generally speaking, no defense, if it appears that such breach did not occasion or contribute to the loss; but the defense based on change in use or occupancy is good if such change makes the risk in fact more hazardous. *Krell v. Chickasaw Farmers' Mut. Fire Ins. Co.*, 127-748.

The burden is on the insured suing on the policy to show that change in use or occupancy in violation of the provisions of the policy did not contribute to the loss. *Ibid.*

The question whether a change in occupancy without consent increases the risk is for the jury. *Nicholas v. Iowa Merch. Mut. Ins. Co.*, 125-262.

The fact that the furniture in a dwelling house is insured after taking a policy on the house itself, does not in the absence of fraud or over-insurance con-

stitute an increase of hazard as to the building. *Ibid.*

Breach of an agreement to keep a set of books in an iron safe will not defeat recovery for a loss under the policy unless it is pleaded and proven that such breach contributed to the loss. *Johnson v. Farmers' Ins. Co.*, 126-565.

A provision in the policy that the removal of the property shall be deemed an increase of the risk as a matter of law is void in view of the statutory provision that the breach of the condition as to removal shall not affect the validity of the policy unless it increases the risk. The burden is on the insured to show that the removal, in violation of the terms of the policy, did not cause or contribute to the loss, but the burden is on the company to show, as a matter of defense, that it increased the risk. *Adams v. Atlas Mut. Ins. Co.*, 112 N. W. 651.

This section does not apply to forfeitures accrued under policies previously issued. *Elliott v. Farmers' Ins. Co.*, 114-153.

SEC. 1744. Notice and proof of loss—time of bringing action—provisions not affected by contract. The notice of loss and proof thereof required in section seventeen hundred and forty-two hereof, and the notice and proof of loss under oath in case of insurance on personal property, shall be given within sixty days from the time loss occurred, and no action for such loss shall be begun within forty days after such notice and proofs have been given to the company, nor shall the time within which action shall be brought be limited to less than one year from the time when a cause of action for the loss accrues. No provisions of any policy or contract to the contrary shall affect the provisions of this and the three preceding sections. [18 G. A., ch. 211, § 3.] [27 G. A., ch. 44, § 1.]

Proofs of loss: The statutory requirement as to notice and proofs of loss is all that can be made essential by the contract. A notice and affidavit are sufficient to constitute the proof required. The sufficiency

of the document is not dependent on the intent, but on the contents. *Parks v. Anchor Mut. F. Ins. Co.*, 106-402.

This statute concerning proofs of loss supersedes the provisions of a policy of

insurance with relation to the same matter. *Washburn-Halligan Coffee Co. v. Merchants' Fire Ins. Co.*, 110-423.

Stipulations in a policy that no officer or agent shall have power to waive any provision or condition of the policy, except such as by the terms of the policy may be subject of agreement endorsed thereon or added thereto, do not prevent waiver of proofs of loss by an officer or agent having general authority to do so. Such a stipulation relates to the conditions and provisions of the policy and not to their performance. *Ibid.*, and *Lake v. Farmers' Ins. Co.*, 110-473.

The provisions of 18 G. A., Chap. 211, Sec. 3, relating to proofs of loss, as originally enacted, held applicable to mutual benefit associations as well as fire insurance companies. *Parsons v. A. O. U. W.*, 108-6.

Waiver: Good faith requires that upon receipt of proofs of loss, if the company is not satisfied therewith, it should specify its objections thereto, to the end that the proofs may be perfected if possible, and if the company fails to specify the objections at a time when they might be remedied it should not afterwards be heard to urge them. *Dyer v. Des Moines Ins. Co.*, 103-524.

The action of the company in asking for an arbitration to determine the amount to be paid is a waiver of defects in the proofs or notice of loss known to the company before the arbitration took place. *Dee & Sons Co. v. Key City F. Ins. Co.*, 104-167.

Notwithstanding a provision in the policy that none of its terms or conditions can be waived by any person except in writing by the secretary of the company, and that no agent has any authority to waive or modify any printed conditions of the policy, an adjusting agent having power to determine what proofs are satisfactory may waive those proofs which are regarded unimportant, although certain specified proofs are required by the policy. *Bröck v. Des Moines Ins. Co.*, 106-30.

Failure to object to the proofs of loss because not accompanied with affidavit, as required, amounts to a waiver of objection on this ground. *Pringle v. Des Moines Ins. Co.*, 107-742.

Where the company refuses payment on the ground that the policy has been suspended in consequence of failure to pay an installment of premium, waiver of proofs of loss may be inferred. *Pray v. Life Indemnity & Security Co.*, 104-114; *Smith v. Continental Ins. Co.*, 108-382.

Unqualified refusal to pay constitutes a waiver on the part of the insurance company of proofs of death, where something purporting to be proofs of death has been received by the company and not objected

to. *Stephenson v. Bankers' Life Assn.*, 108-637.

The promise to the company to pay is as effective as the waiver of proofs, as a denial of liability and the promise of settlement is inconsistent with insistence on strict compliance with the conditions of the contract. *Lake v. Farmers' Ins. Co.*, 110-473.

Telegrams from insured advising the company of the loss and giving it all information which the insured could be supposed to have may constitute sufficient proof of the loss and by failing to object for want of an affidavit to such proofs, the company waives the requirement. *Nicholas v. Iowa Merch. Mut. Ins. Co.*, 125-262.

An agent having power to adjust a loss has authority to waive formal proofs of loss. *Lake v. Farmers' Ins. Co.*, 110-473.

Where the adjuster requires the procurement of duplicate invoices, which are prepared at considerable expense, the company cannot afterwards object that the proofs of loss are not sufficient. If the conduct of the company is such as to induce the insured to rest, in good faith, under the well founded belief of strict compliance, and that the conditions will not be insisted on, it cannot afterwards set up non-performance of such conditions as a bar to recovery. *Ibid.* *Corson v. Anchor Mut. F. Ins. Co.*, 113-641.

Time for bringing action: Where action is prematurely brought because of failure of insured to demand an appraisal he cannot cure the defect in his proceeding by subsequently demanding such appraisal and setting out the fact in the supplemental petition. *Zalesky v. Home Ins. Co.*, 102-613.

The statutory provision cannot be waived and an action brought in less than ninety days after notice of loss or a waiver of notice and proof is premature. *Blood v. Hawkeye Ins. Co.*, 103-728.

Although in the second action it is claimed that the first action was not prematurely brought, this will not sustain the second action brought after the period of limitation under the policy has expired. *Wilhelmi v. Des Moines Ins. Co.*, 103-532.

Where the first action for a loss under a policy was prematurely brought and subsequently another action was brought after the time limited in the policy for bringing action, held, that the second action was not to be deemed a continuation of the first action under the provisions of Code § 3455. *Harrison v. Hartford F. Ins. Co.*, 67 Fed. 298.

The provisions of 18 G. A., chap. 211, as to time of bringing action, were not applicable to associations organized under § 1160 of the Code of '73, but associations collecting premiums instead of assess-

ments from members were not properly organized under that section, and therefore were subject to the provisions of said act of 18 G. A. *Bradford v. Mutual Ins. Co.*, 112-495.

Where the policy limited the time of bringing action to six months next after the fire, held, that the six months commenced to run not from the time of the fire, but from the time when the loss became payable, that is, sixty days after the notice and proof of loss were furnished. *Read v. State Ins. Co.*, 103-307.

The provision of this section as to time of bringing suit held applicable to a loss occurring prior to the taking effect of the Code, when the statute provided that suit should not be brought within ninety days. Such a statutory provision relates to the remedy, and is no part of the contract.

SEC. 1745. Forms of policies.

The provision of a policy for cancellation by the insured should not be construed as requiring repayment of pre-

SEC. 1746. Other insurance—pro-rating.

A stipulation to include a void policy in determining the *pro rata* liability of the company cannot be enforced, and the fact that the company issuing the void

SEC. 1749. Advertisements—soliciting agents.

An agent instructed to procure insurance is liable to his principal for any loss resulting from procuring insurance in a

SEC. 1750. Who deemed agent.

A soliciting agent with power to take and forward applications and receive money to be paid when the insurance is effected, does not have authority to bind the company by declarations as to the validity of the contract of insurance or as to the rights and liabilities of the company, when such declarations are not made while discharging his duties as agent in the transaction in question. *Schoep v. Bankers' Alliance Ins. Co.*, 104-354.

An adjusting agent with authority to ascertain and settle losses has of necessity power to determine what proofs are satis-

Jones v. German Ins. Co., 110-75.

The defense that action on a policy is not brought within the statutory period specified in the contract is one which must be affirmatively introduced, otherwise it will be deemed waived. *Miller Brewing Co. v. Capital Ins. Co.*, 111-590.

Prior to the adoption of this section it was lawful for the parties to create a contract limitation which would be binding on the courts, and under this section the parties may contract as before, provided the limitation fixed by them is not less than one year. *Farmers' Co-Op. Creamery Co. v. Iowa State Ins. Co.*, 112-608.

The change in the statute is not applicable to contract limitations under a policy executed before the change in the statute, and which were valid when made. *Ibid.*

miums by the company before such cancellation can become effective. *Parsons v. Northwestern Nat. Ins. Co.*, 133-532.

policy may have treated it as valid, cannot affect the liability of the company issuing a subsequent policy. *Gurnett v. Atlas Mut. Ins. Co.*, 124-547.

company not authorized to do business in the state. *Hartman v. Hollowell*, 126-643.

factory and to waive those which are regarded as unimportant. *Brock v. Des Moines Ins. Co.*, 106-30.

An agent having the power to transact all the business within the apparent scope or usual extent of his employment in issuing policies may waive the conditions of a policy as to incumbrances, notwithstanding a provision in the policy denying such authority to the agent. *Liquid Carbonic Acid Mfg. Co. v. Phoenix Ins. Co.*, 126-225.

Section applied. *McMaster v. New York L. Ins. Co.*, 78 Fed. 33; s. c. 90 Fed. 40; s. c. 99 Fed. 856.

SEC. 1752. Fees. There shall be paid to the auditor of state for services required under the provisions of this chapter the following fees, which shall be accounted for by him in the same manner as other fees received in the discharge of the duties of his office:

1. For filing and examination of the first application of any company and accompanying articles of incorporation for organization in this state, and the issuing of the permission to do business, ten dollars;

2. For filing application of any foreign company for certificate to do business in this state, and the accompanying certified copy of charter or article of incorporation, twenty-five dollars;

3. For permission to foreign company to do business in this state, or certified copy thereof, two dollars;
4. For filing annual statement of a domestic company, and issuing the renewal of the permission required by law to authorize continuance in business, three dollars;
5. For filing annual statement of a foreign company, twenty dollars, and issuing renewal of permission, two dollars;
6. For certificate of authority to agent of foreign company, two dollars;
7. For each certificate of authority to agent of domestic company, fifty cents;
8. For every copy of any paper filed, the sum of twenty cents per folio, and for affixing the official seal to such copy and certifying the same, one dollar;
9. For each certificate for publication of foreign companies, two dollars, and for each certificate for publication of Iowa companies, fifty cents. [C., '73, § 1153.] [27 G. A., ch. 45, §§ 1, 2, 3.]

SEC. 1754. Combinations.

The statutory prohibition of combinations between fire insurance companies in relation to the rates of commissions or the manner of transacting business are not in violation of the state constitution prohibiting the granting of special privileges and immunities, and requiring general laws to be uniform in operation. But so far as such provisions make it unlawful for

two or more companies to enter into any agreement as to the amount of commissions to be allowed agents, they are invalid as depriving the companies of the liberty of contract, secured by the federal constitution. *Greenwich Ins. Co. v. Carroll*, 125 Fed. 121. (As to the second point this case is reversed. *Carroll v. Greenwich Ins. Co.*, 199 U. S., 401.)

SEC. 1758-a. Additions, riders and clauses permitted. It shall be unlawful for any insurance company to issue any policy of fire insurance upon any property in this state other or different from the standard form of fire insurance policy herein set forth, except,

I. It may print in its policy its name, location, date of incorporation, amount of its paid up capital stock, (if a stock company), names of its officers and agents, the number and date of the policy, the amount (under dollar mark) for which it issued, and if issued through an agent the words: "This policy shall not be valid until countersigned by the duly authorized agent of this company at"

II. It may use in or upon its policy forms or slips of the description, location and specifications of the property insured, together with permits upon such conditions not in conflict with the provisions of law, as may be agreed upon, for the use or storage of electricity, gasoline, explosives, or other extra hazardous products or materials; for repairs or improvements; for the operation or ceasing to operate; and for the vacancy of the premises; and permits for hazards other than those specifically mentioned above; also a mortgagee's or loss payable clause, and other permits or riders, not in conflict with law.

III. It may also by written or printed clause upon such conditions not in conflict with the provisions of law as may be agreed upon, provide that a policy shall cover any loss or damage caused by lightning, tornadoes, cyclones, hail or windstorms not exceeding the sum insured or the interest of the insured in the property; provided, if there shall be other valid insurance on such property, whereby the same is insured against loss by lightning, tornadoes, cyclones, hail or windstorms, said company shall be liable only pro rate with such other valid and collectible insurance for any such loss by lightning, tornadoes, cyclones, hail or windstorms.

IV. Any company incorporated in this state, or authorized to do business herein, shall print in its policy or attach thereto any provision which such company is required by law to insert in its policies or attach thereto, not included in the provisions of this policy, but such provisions shall be printed apart from the other conditions and agreements of this policy and under a separate title as follows: "Provisions required by law to be stated in the policy of insurance."

V. It shall print upon its policy issued in compliance with the preceding provisions of this act, the words: IOWA STANDARD FIRE INSURANCE POLICY. [32 G. A., ch. 76, § 1.]

SEC. 1758-b. Standard fire insurance policy—form. The policy shall be plainly printed, and no part thereof shall be in type smaller than brevier; the conditions thereof shall be printed in double column form with numbered lines, and such policy shall be in terms and conditions as follows:

I. In consideration of the stipulations herein named and of dollars, does insure.....for the term of.....from the day of 19.... at noon, (standard time), to the day of 19.... at noon, (standard time), against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding dollars, to the following described property, while located and contained as described herein, and not elsewhere, to wit:

.....

It is hereby agreed that the insured may obtain \$...... additional insurance in companies authorized to do business in the state of Iowa.

II. This company shall not be liable beyond the actual cash value of the property covered by this policy at the time any loss or damage occurs, and said liability shall in no event exceed what it would cost the insured to repair or replace the property lost or damaged with material of like kind and quality. The sum for which this company is liable pursuant to this policy, shall be payable forty days after due notice and proofs of loss have been received by this company in accordance with law.

III. This policy shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof.

IV. Unless otherwise provided by agreement of this company this policy shall be void:

- (a) If the insured now has or shall hereafter procure any other contract of insurance valid or invalid on the property covered in whole or in part by this policy; or
- (b) If the subject of insurance be a manufacturing establishment, and it cease to be operated for more than ten consecutive days; or
- (c) If the building herein described, whether intended for occupancy by the owner or tenant be or become vacant or unoccupied and so remain for ten consecutive days; or
- (d) If the interest of the insured be other than unconditional and sole ownership; or
- (e) If the subject of insurance be a building on ground not owned by the insured; or
- (f) If any change other than by death of the insured whether by legal proceedings, judgment, voluntary act of the insured or otherwise, take place in the interest, title, possession or use of the subject of insurance, if such change in the possession or use makes the risk more hazardous; or

(g) If the subject of insurance or a part thereof (as to the part so encumbered) be or become encumbered by lien, mortgage or otherwise created by voluntary act of the insured or within his control; or

(h) If the property insured or any part thereof (as to the part so removed) be removed to any other building or location than that specified in the policy; or

(i) If this policy be assigned before loss.

V. Unless otherwise provided by agreement of this company, this policy shall be void:

(a) If the subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than 10 o'clock; or

(b) If the hazard be increased by any means within the knowledge of the insured; or

(c) If mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time; or

(d) If illuminating gas or vapor be generated in any building covered hereby, or on any premises adjacent thereto for use upon the insured premises; or

(e) If there be kept, used, or allowed on the within described premises benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, exceeding twenty-five pounds in quantity, naphtha, nitroglycerine, or other explosives, phosphorous, calcium carbide, petroleum or any of its products of greater inflammability than kerosene of lawful standard, which last named article may be used for lights and kept for sale according to law, in quantities not exceeding five barrels; or

(f) If the insured permits the property which is the subject of insurance, or any part thereof, to be used for any unlawful purpose.

Provided that nothing contained in paragraph five herein shall operate to avoid this policy in any case, if the insured shall establish that the failure to observe and comply with such provisions and conditions did not contribute to the loss.

VI. This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or military or usurped power, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property during and after a fire, or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for damage by fire only) by explosion of any kind or by lightning; but liability for direct damage by lightning may be assumed by specific agreement.

VII. This company shall not be liable for loss or damage to any property covered by this policy if the insured shall fail to pay any written obligation given to the company for the premium or any assessment or installment of premium when due; provided the company shall have given the insured notice as required by law. Upon payment and acceptance by the company of the delinquent premium, assessment or installment of premium before loss occurs, or after loss, if the company shall have had notice thereof and accepts such payment, this policy shall be revived and in full force according to its terms.

VIII. If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building, or its contents, shall immediately cease.

IX. This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes or securities; nor, unless liability is specifically assumed thereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office fur-

niture or fixtures, sculpture, plate glass, frescoes or decorations; or property held in storage or for repairs; nor, beyond the actual value destroyed by fire for loss occasioned by ordinance or law regulating construction or repairs of buildings, or by interruption of business, manufacturing processes or otherwise.

X. Any application, survey, plan, or description of property signed by the insured and referred to in this policy shall, when a copy is attached hereto, be a part of this contract, and shall be held to be a representation and not a warranty.

XI. This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation either by registered letter directed to the insured at his last known address, or by personal written notice. If this policy shall be cancelled as hereinbefore provided, or becomes void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rates; except that when this policy is cancelled by this company by giving notice it shall retain only the pro rate premium.

XII. If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the provisions and conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest, as shall be agreed upon by the company.

XIII. If property covered by this insurance is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location, shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one new location bears to the value in all such new locations; but this company shall not in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total valid and collectible insurance on the whole property at the time of fire, whether the same cover in new location or not.

XIV. If loss occur the insured shall as soon as practicable after he ascertains the fact of such loss, give notice in writing thereof to the company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, and put it in the best possible order, and shall, within sixty days from date of loss, furnish this company with notice thereof in writing accompanied by affidavit stating the facts as to how the loss occurred and the extent thereof, so far as such facts are within his knowledge.

XV. The insured, as often as reasonably required, shall exhibit to any person designated by this company, all that remains of any property herein described as to which a claim for loss or damage is made, and submit to examination under oath by any person named by this company, and subscribe the same, and, as often as reasonably required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made; provided, however, that this company shall not be held to have waived any of the provisions or conditions of this

policy or any forfeiture thereof by any examination or investigation herein provided for.

XVI. This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole amount of valid and collectible insurance covering such property.

XVII. No suit or action on this policy, for the recovery of any claim thereon, shall be sustainable in any court of law or equity, unless commenced within twelve months next after the right of action for the loss accrues.

XVIII. Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss", occurs, it shall be deemed the equivalent of "loss or damage."

XIX. This policy is issued and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions now or hereafter specifically authorized by law as may be endorsed hereon or added hereto.

In witness whereof, this company has executed and attested these presents.

.....
Secretary.

.....
President.

Countersigned at this day of 19....

.....
Agent.

[32 G. A., ch. 76, § 2.]

SEC. 1758-c. **Violations—penalty.** Any insurance company, its officers or agents, or either of them, violating any of the provisions of this act, by issuing, delivering or offering to issue or deliver any policy of fire insurance on property in this state other or different from the standard form, herein provided for, shall be guilty of a misdemeanor, and upon complaint made by the auditor of state, or by any citizen of this state, shall, upon conviction thereof, be punished by a fine of not less than fifty dollars nor more than one hundred dollars for the first offense, and not less than one hundred dollars nor more than two hundred dollars for each subsequent offense, but any policy so issued or delivered shall, nevertheless, be binding upon the company issuing or delivering the same, and such company shall, until the payment of such fine, be disqualified from doing any insurance business in this state; but any policy so issued or delivered shall, nevertheless, be binding upon the company issuing or delivering the same. [32 G. A., ch. 76, § 3.]

SEC. 1758-d. **Existing statutes—waiver in interest of insured.** Nothing contained in this act nor any provisions or conditions in the standard form of policy provided for herein, shall be deemed to repeal or in any way modify any existing statutes nor to prevent any insurance company issuing such policy, from waiving any of the provisions or conditions contained therein, if the waiver of such provisions or conditions shall be in the interest of the insured. [32 G. A., ch. 76, § 4.]

CHAPTER 5.

OF MUTUAL FIRE, TORNADO AND HAILSTORM ASSESSMENT INSURANCE ASSOCIATIONS.

SECTION 1759-a. Repeal—organization — purposes. That chapter five (5) of title IX (9) of the code be repealed and the following enacted in lieu thereof:

Any number of persons may, without regard to the provisions of the preceding chapter, enter into contracts with each other for the insurance from loss or damage by fire, tornadoes, lightning, hailstorms, cyclones or windstorms and to insure plate glass against breakage from accident, but such associations of persons shall in no case insure any property not owned by one of their own number, except such school and church property as may be situated within the territory in which they do business and the reinsurance of the risks of similar associations. Associations organizing for the purpose of transacting business under the provisions of this chapter shall incorporate under the provisions of chapter one (1) of title IX (9) of the code.

Risks or hazards above mentioned shall be classified as follows:

1. Fire and lightning.
2. Tornadoes, cyclones and windstorms.
3. Hailstorms.
4. Plate glass. [32 G. A., ch. 80, § 1.]

A mutual fire insurance company cannot issue a policy to one not a member nor for a stated and definite amount of insurance nor for a stipulated premium. One who insures his property in a mutual company in a stated amount for a specific premium does not become a member. *In re Assignment Mutual Guaranty F. Ins. Co.*, 107-143.

One who has accepted such a policy which by statute the company is not allowed to issue cannot recover therein. *Ibid.*

Members of the company are not individually liable under such a policy. *Ibid.*

An association organized under the provision of § 1160 of the Code of '73 could not collect money from a member by way of premium. *Bradford v. Mutual F. Ins. Co.*, 112-495.

An association collecting premiums from its members, instead of assessments, was not under that section exempt from the operation of chap. 211, acts of 18 G. A., relating to time of bringing action. *Ibid.*

The creation of a guaranty fund held not to deprive the corporation of the character of a mutual company. *Smith v. Sherman*, 113-601.

The requirements of Code, § 1741, as to setting out copy of application in connection with the policy are applicable to mutual companies. *Corson v. Iowa Mut. Fire Ins. Ass'n*, 115-485.

Although in general a money judgment cannot be rendered against an assessment company, yet if the company has issued a policy in which it agrees to pay a fixed sum in case of loss, such action may be maintained. *Byrnes v. American Mut. F. Ins. Co.*, 114-738.

SEC. 1759-b. County and state associations. Any association incorporated under the laws of this state for the purpose of furnishing insurance as provided for in this chapter, doing business only within the county in which is situated the town or city in its articles of incorporation as its principal place of business, or the counties contiguous thereto, shall, for the purposes of this chapter, be deemed a county mutual assessment association; all other associations operating hereunder shall, for the purposes of this chapter, be deemed state mutual assessment associations. [32 G. A., ch. 80, § 2.]

The distinction between state mutual and county mutual associations or companies may be the basis of distinction in

the matter of taxation. *Iowa Mut. Tornado Ass'n v. Gilbertson*, 129-658.

SEC. 1759-c. Conditions of authorization. No state mutual assessment association shall issue any policies until at least one hundred and twenty-five (125) applications have been received in any class as shown by section one (1) hereof, representing the following amount of insurance: Classes 1, 2 and 3, two hundred and fifty thousand dollars (\$250,000.00). Class 4, one hundred thousand dollars (\$100,000.00), and no county mutual assessment association shall issue any policies until applications for insurance to the amount of fifty thousand dollars (\$50,000.00), representing at least fifty (50) applicants, have been received. Neither shall any association issue any policies of insurance until its articles of incorporation and form of policy shall have been submitted to, and approved by, the auditor of state, nor until he has satisfied himself that the association has, in good faith, applications representing the number of applicants and the amount of insurance above required and has issued to the association a certificate authorizing it to transact an insurance business. [32 G. A., ch. 80, § 3.]

SEC. 1759-d. Annual report. Each association doing business under the provisions of this chapter shall, annually, in the month of January, report to the auditor of state, upon blanks furnished by him the following facts:

- 1st. The name, place of doing business, date of commencement and objects of the association.
- 2d. Names and postoffice addresses of president, secretary and treasurer.
- 3d. Amount of risks in force at beginning of year.
- 4th. Amount of risks written during the year.
- 5th. Amount of risks expired and cancelled during the year.
- 6th. Amount of risks in force at the end of the year.
- 7th. The amount of receipts from assessments during the year.
- 8th. The receipts from other sources.
- 9th. Amount paid for losses during the year.
- 10th. Amount paid to agents for services during the year.
- 11th. Amount paid to officers during the year, specifying amount paid each.
- 12th. Amount paid to employes during the year.
- 13th. Amount of other expenses.
- 14th. Amount of losses adjusted and due.
- 15th. Amount of losses adjusted and not due.
- 16th. Amount and number of claims reported but not adjusted.
- 17th. Number and amount of claims resisted and in litigation.
- 18th. Cost per thousand during the year.
- 19th. Average cost per thousand during the past five years. Provided that state mutual assessment insurance associations shall, in addition to the foregoing, report the following facts.
- 20th. The value of real estate owned by the association.
- 21st. The amount of cash on hand and deposited in bank to the credit of the association, and in what bank deposited.
- 22d. The amount of cash in hands of agents and in course of transmission.
- 23d. The amount of loans secured by first mortgage on real estate, with the rate of interest thereon.
- 24th. The amount of all other loans and bonds, and how secured, with the rate of interest thereon.
- 25th. The amount of interest on investments actually due and unpaid.
- 26th. The amount of all other securities and their value.
- 27th. The amount which the association is required by law to hold as a reinsurance reserve.

28th. The amount due officers and employes.

29th. The amount due agents.

30th. The amount due banks or other creditors and the security given therefor.

31st. All other claims against the association.

32d. The largest amount insured in any one risk.

33d. The amount reinsured and names of companies and associations carrying such reinsurance, and such other information as the auditor of state may deem necessary for the purpose of ascertaining the true condition of the association. The report herein contemplated shall be made as of December 31st of each year, and verified by the oath of the president or vice-president and secretary of the association. [32 G. A., ch. 80, § 4.]

SEC. 1759-e. Publication of report. The report referred to in the preceding section shall be tabulated by the auditor of state and published by him in the annual report on insurance, one copy of which shall be sent to each association. The county associations, the state associations and those doing an exclusive tornado and an exclusive hailstorm insurance business shall be separately classified. [32 G. A., ch. 80, § 5.]

SEC. 1759-f. Fees—certificates. Such associations shall pay the same fees for annual reports and annual certificates of authority as are required to be paid by domestic companies organized and doing business under the preceding chapter, which certificate shall expire March 1st of the year following the date of its issue. [32 G. A., ch. 80, § 6.]

SEC. 1759-g. Inquiries by auditor. The auditor of state may address inquiries to any association in relation to its doings and condition and any association so addressed shall promptly reply thereto in writing. [32 G. A., ch. 80, § 7.]

SEC. 1759-h. Fees and assessments. Such associations may collect a policy and survey fees and such assessments, provided for in their articles of incorporation and by-laws, as are required to pay losses and necessary expenses incurred in the conduct of their business. State mutual fire insurance associations shall provide for and maintain a reinsurance reserve as hereinafter designated. No state mutual association shall collect assessments for more than one year in advance where such assessments exceed three (3) mills on each dollar of insurance in force. [32 G. A., ch. 80, § 8.]

SEC. 1759-i. Reinsurance reserve. From and after the taking effect of this act, all state mutual fire insurance associations operating under the provisions of this chapter, except such associations as confine their business exclusively to farm and dwelling property, churches and schoolhouses, shall, annually, set aside and maintain as a reinsurance reserve an amount equal to ten (10) per cent. of the receipts from assessments during the year until the total amount thus accumulated shall equal forty (40) per cent., but not to exceed fifty (50) per cent. of the amount of one annual assessment at the basis rate charged for such insurance on all policies in force. The reserve thus accumulated may be used for the payment of losses and expenses and when so used shall be restored and maintained by the collection of assessments as hereinafter provided. [32 G. A., ch. 80, § 9.]

SEC. 1759-j. Maximum liability of members. Every association contemplated by the preceding section shall provide in its by-laws and specify in its policies the maximum liability of its members to the association. Such liability shall not be less than a sum equal to the basis rate charged by the association for insurance nor greater than a sum equal three times such basis rate. The maximum liability of the member shall be plainly and legibly stated in each policy. Whenever reductions shall be

made in the liability of members such reduction shall apply proportionately to all policies in force. [32 G. A., ch. 80, § 10.]

SEC. 1759-k. Assessments when assets are insufficient. Whenever the assets of any association required to maintain a reinsurance reserve are insufficient for the payment of losses and expenses, it shall make an assessment for the required amount ratably upon its members liable therefor, and whenever by reason of depreciation, loss or otherwise, the net assets of any association required to maintain a reinsurance reserve, after providing for other debts, are less than the required reserve, the deficiency shall be restored by assessment as above provided. [32 G. A., ch. 80, § 11.]

SEC. 1759-l. Assessments when association is insolvent. Whenever the board of directors or the auditor of state shall ascertain that any association is insolvent, such board, or upon its failure so to do, the auditor of state may direct an assessment ratably upon all members liable therefor in such amount as may be necessary as follows:

1st. It shall be determined what amount each policy-holder should pay or receive in case he desires to withdraw from the association.

2d. What further sum each policy-holder should pay to reinsure his policy with some other solvent association.

The board of directors shall forthwith cause written notice and demand of payment to be served personally or by mail upon each policy-holder liable therefor. The notice of assessment shall show separately the amount required to be paid in case of withdrawal and the amount required to be paid where withdrawal or cancellation is not desired. The amount due under the assessment shall be payable at the home office of the association within thirty (30) days after date of the notice, but the insured may elect whether to pay the amount called for in case of withdrawal is desired or the amount called for where it is desired that the insurance shall be continued and his policy shall be cancelled or continued according to such payment. In case of state mutual assessment associations if, within sixty (60) days after the assessment is made, it shall appear that the amount of insurance remaining in force is less than the amounts required by section three (3) hereof the reinsurance reserve of such policies as are in force shall be used to reinsure such policies in some solvent association or at the option of the policy-holder contributing the same shall be returned to him and the association shall continue only for the purpose of adjusting its affairs and closing up its business. [32 G. A., ch. 80, § 12.]

SEC. 1759-m. Cancellation of policies. Any policy of insurance issued by any association operating under the provisions of this chapter may be cancelled by the association giving five (5) days written notice thereof to the insured, or if the insured shall demand in writing or in person, of the association, the cancellation of his policy, the association shall immediately advise him, by letter to address named, the amount, if any, due, as his pro rata share of losses and expenses incurred since date of his policy. Upon surrender of his policy and payment of all sums due, his membership shall cease, provided, that during the months of June, July and August, hail insurance policies may be cancelled only at the option of the officers of the association carrying the risk. Upon the expiration or cancellation of any policy of insurance issued under the provisions of this act, all obligations to the association having been paid, the members shall be entitled to and shall be paid by the association a sum equal to at least seventy-five per cent. (75%) of the unexpended portion of the amount contributed by him to the reinsurance reserve. [32 G. A., ch. 80, § 13.]

SEC. 1759-n. State associations — bonds of officers. Any state mutual assessment association contemplated by this chapter, before being

authorized to do business in this state, shall require its secretary and treasurer to give bond to the association in such sum as the directors shall deem sufficient, not less, however, than ten thousand dollars (\$10,000.00) for each office, which bond after being approved by the president of the association and by the auditor of state, shall be deposited with the auditor of state as security for the faithful performance of the duties of the secretary and treasurer in handling the funds of the association. Should the auditor of state consider the surety on said bonds, or the amount thereof, insufficient he may require additional security, or an increase in the amount of the bond. If such additional security or increase be not furnished within thirty (30) days after notice thereof, the auditor of state may revoke the certificate of authority of the association. [32 G. A., ch. 80, § 14.]

SEC. 1759-o. Annual meetings. The annual meetings of the members of associations transacting business under the provisions of this chapter shall be held at the home office of the association, except as hereinafter provided. Such associations as confine their membership to persons of one occupation, which persons maintain a state organization and hold annual meetings thereof, may for the purpose of electing directors and changing or amending their articles of incorporation and by-laws, hold their annual meetings at the same time and place as the annual meeting of the members of the occupation to which the association confines its membership, provided, that until such time as the articles of incorporation of the association provide for the holding of meetings as above contemplated other than at the home office of the association twenty (20) days' notice of the time and place of the holding of said meetings shall be given to all members of the association. [32 G. A., ch. 80, § 15.]

SEC. 1759. Repeal. Section seventeen hundred fifty-nine (1759) of the code as amended and sections seventeen hundred sixty (1760) to seventeen hundred and sixty-seven (1767) inclusive, are hereby repealed. [32 G. A., ch. 80, § 16.]

SEC. 1765. Fees and assessments.

The fact that mutual insurance associations are authorized to make assessments to meet expenses indicates that they are associations for pecuniary profit under the incorporation laws. *Iowa Mut. Tornado Ass'n v. Gilbertson*, 129-658.

CHAPTER 6.

OF LIFE INSURANCE COMPANIES.

SECTION 1768. On level premium plan. Every life insurance company upon the level premium or the natural premium plan, created under the laws of this or any other state or country, shall, before issuing policies in the state, comply with the provisions of this chapter applicable to such companies.

Before any such company shall be permitted to incorporate under the laws of this state, it shall present its articles of incorporation to the auditor of state and the attorney general and have the same by them approved. Such articles shall show the name, location of principal place of business, object, amount of capital, if a stock company, and shall contain such other provisions as may be necessary to a full understanding of the nature of the business to be transacted and the plan upon which the same is to be conducted. All amendments to such articles and amendments hereafter made to the articles of incorporation of companies already or-

ganized under the laws of this state shall be approved in like manner. [C., '73, § 1161.] [32 G. A., ch. 81.] ·

It is not unlawful for an insurance company to discriminate between policy holders and those who are not policy holders in the loaning of money, nor for it to agree that one who takes insurance shall have a loan thereon. *Key v. National Life Ins. Co.*, 107-446.

The provisions of this section as to "any contract of insurance agreement other than as plainly expressed in the policy issued" is to be limited in its application by the title of the act in which it was first enacted, and by the general provisions of the section, and is therefore

applicable only to cases of discrimination. *Kelley v. Mutual L. Ins. Co.*, 109 Fed. 56.

The provision as to contracts "plainly expressed in the policy issued" includes in the term "policy" the provision of the application endorsed thereon, in accordance with Code § 1819. *Mutual L. Ins. Co. v. Kelly*, 114 Fed. 268.

The amendment of this section made by 27 G. A., chap. 46, held not applicable where the policy had been issued and the death had occurred prior to the taking effect of the amendment. *Beverly v. Northern L. Assn.*, 112-730.

SEC. 1771. Stock or premium notes. No note shall be accepted as part of the capital of a stock company, nor as a premium note for the purpose of organizing a mutual company, unless accompanied by a certificate of the clerk of the district court or other court of record, of the county in which the person executing it resides, to the effect that the person making it is in his opinion pecuniarily good and responsible therefor in property not exempt from execution. All notes heretofore or hereafter given as a part of the capital stock of a stock company, shall be deposited with the auditor of state, and in the event any stockholder shall dispose of his or her stock in such company, he or she may withdraw the note or notes so given, upon depositing with the auditor of state the note of the purchaser of such stock, accompanied by a certificate as provided for in this section. [29 G. A., ch. 75, § 1.]

SEC. 1782. Discriminations. No life insurance company or association[s] shall make or permit any distinction or discrimination between persons insured of the same class and equal expectancy of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms or conditions of the contract it makes; nor shall any such company or association[s] or agent thereof make any contract of insurance agreement, other than as plainly expressed in the policy issued; nor shall any such company or association[s] or agent pay or allow, directly or indirectly, as an inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy or contract of insurance. [23 G. A., ch. 33, § 1.] [27 G. A., ch. 46, § 1.]

SEC. 1783-a. Policy forms filed with auditor of state. It shall be unlawful for any insurance company transacting business within this state, under the provisions of chapter six (6) of title nine (9) of the code, to write or use any form of policy or contract of insurance, on the life of any individual in this state, until a copy of such form of policy or contract has been filed with the auditor of state subject to approval or disapproval by the governor, auditor of state and attorney-general, or by any two of them. Any form of policy or contract which has been disapproved by said officials shall not be written or used in this state. [30 G. A., ch. 59, § 1.]

SEC. 1783-b. Medical examination. Said officials shall decline to approve any such policy or contract of insurance unless the same shall, in all respects, conform to the laws of this state applicable thereto, and unless the issuance of the same is based upon a satisfactory medical examination of the applicant by a physician duly authorized to practice

medicine in the state of Iowa, or the state where examined and no policy or contract of insurance shall be issued by any insurance company to any individual in this state until such examination shall have been passed and duly approved by the medical examiner or medical board of such company. [30 G. A., ch. 59, § 2.]

SEC. 1783-c. Penalty. Any company violating any of the provisions of this act shall, upon conviction thereof, be fined in a sum not less than one hundred nor more than one thousand dollars for each such offense, and the court may also revoke its authority to do business within this state. Should any company decline to file a copy of its form of policies or contracts, as provided in this act, the auditor of state shall suspend its authority to transact business within the state until such form of policies or contracts have been so filed and approved. [30 G. A., ch. 59, § 3.]

SEC. 1783-d. Life insurance companies may write other insurance. Any life insurance company organized on the stock or mutual plan and authorized by its charter or articles of incorporation so to do, may in addition to such life insurance, insure the health of persons and against personal injuries, disablement or death, resulting from traveling or general accidents by land or water, and insure employers against loss in consequence of accidents or casualties of any kind to employes or other persons, or to property resulting from any act of the employe or any accident or casualty to persons or property, or both, occurring in or connected with the transaction of their business, or from the operation of any machinery connected therewith, but nothing herein contained shall be construed to authorize any life insurance company to insure against loss or injury to person, or property, or both, growing out of explosion or rupture of steam boilers. [31 G. A., ch. 74.]

SEC. 1783-e. Capital stock—minimum amount. From and after the taking effect of this act, no insurance company shall be incorporated to transact business upon the stock plan, whether life insurance or insurance other than life, with less than one hundred thousand dollars (\$100,000) capital, the entire amount of which shall be fully paid up in cash and invested as provided by law. No part of the capital referred to, shall be loaned to any officer or stockholder of the company. [32 G. A., ch. 79, § 1.]

SEC. 1783-f. Companies heretofore organized. The certificate of authority of any company heretofore organized and transacting business on the stock plan shall not be renewed after January 1st, 1910, unless said company shall have, at said time, at least one hundred thousand dollars (\$100,000) of capital stock; at least fifty thousand dollars (\$50,000) of which shall be paid up in cash and invested according to law. The remainder of said capital may be represented by stock notes payable to the company on demand of its board of directors and said notes shall be deposited with the auditor of state subject to his approval. But no increase of the capital stock of any company shall hereafter be made unless the amount of said increase is paid up in cash. [32 G. A., ch. 79, § 2.]

SEC. 1783-g. May not advertise authorized capital. No insurance company shall, after the taking effect of this act, be permitted to advertise or publish an authorized capital, or to represent in any manner itself as possessed of any greater capital than that actually paid up and invested as above provided. [32 G. A., ch. 79, § 3.]

SEC. 1783-h. Penalty. Any person, firm or corporation violating any of the provisions of this act, or failing to comply with any of its provisions, shall be subjected to the penalties provided in section four of chapter fifty-six, acts of the thirtieth general assembly. [32 G. A., ch. 79, § 4.]

CHAPTER 7.

OF STIPULATED PREMIUM AND ASSESSMENT LIFE INSURANCE ASSOCIATIONS.

SECTION 1784. Repeal—defined. That the law as it appears in section seventeen hundred and eighty-four (1784) of the supplement to the code be and the same is hereby repealed, and the following enacted in lieu thereof:

“Every corporation organized upon the assessment plan, for the purpose of insuring the lives of individuals or furnishing benefits to the widows, heirs, orphans or legatees of deceased members, or insuring the health of persons or furnishing accident indemnity, shall be styled an association, and any corporation doing business under this chapter which provides for the payment of policy claims, accumulation of a reserve or emergency fund, the expense of management and prosecution of the business, by payment of assessments as provided in its contracts, and wherein the liability of the insured to contribute to the payment of policy claims is not limited to a fixed amount, shall be deemed to be engaged in the business of life insurance upon the assessment plan, and shall be subject to the provisions of this chapter, and chapter eight, of title nine of the code.” [31 G. A., ch. 75.]

The statutory provisions with reference to mutual benefit associations, held to be applicable to an association organized under such provisions, although it had not fully complied therewith. *Crocker v. Hogin*, 103-243.

Life insurance companies, except as otherwise specially provided, are incorpo-

rated under the general provision as to the formation of corporations. *Krause v. Modern Woodmen*, 133-199.

Members of a mutual benefit association are bound to take notice of and be governed by its by-laws. *Fitzgerald v. Metropolitan Acc. Assn.*, 106-457.

SEC. 1784-a. Repeal. That the law as it appears in sections seventeen hundred eighty-four-a (1784-a) to seventeen hundred eighty-four-o (1784-o) inclusive, supplement to the code be and the same are hereby repealed. [31 G. A., ch. 76.]

SEC. 1786. Name.

The provisions of Code § 1689 as to including the word “mutual” in the name of a mutual company has no application to

associations organized under this chapter. *Moore v. Union Frat. Acc. Assn.*, 103-424.

SEC. 1787. Conditions for commencing business.

Under the bond given by the president of an assessment life insurance company, the sureties are not liable to a receiver of the company for moneys wrongfully paid by him to one member which were collected for the benefit of another who has in turn been satisfied from funds subsequently collected or for money misappropriated after the expiration of the bond. *Sherman v. Harbin*, 124-643.

Any act of the president of the association contrary to his duty under its articles of incorporation, even though directed or acquiesced in by the board of directors, constitutes a breach of duty involving liability of the surety on his offi-

cial bond if it results in loss to the association. *Sherman v. Harbin*, 125-174.

A new bond executed on re-election for another year is a new and independent undertaking and not a continuance of the bond for the previous year. *Ibid.*

Auditing the books of the company being no part of the duty of the president, he is not liable under his official bond for not discovering errors overlooked by the auditing committee. *Ibid.*

The act of the president in diverting the beneficiary fund to the payment of expenses in resisting claims renders him liable on his bond. *Ibid.*

SEC. 1788. Assessments. The articles and by-laws of each such association and its notices of assessment shall state the objects to which the

money to be collected is to be devoted, and no part of the proceeds thereof shall be applied to any other purpose than as stated, and the excess, if any, beyond payment of the benefit, shall be set aside and applied only to like purposes, except that all sums collected for expenses and not used for that purpose may be transferred to the benefit, emergency or reserve fund. [21 G. A., ch. 65, § 6.] [30 G. A., ch. 60.]

While in the enforcement of a claim for a death loss against a mutual benefit association resort must be had in the first place to an action in mandamus to compel a levy of an assessment, yet, where the corporation fails to make the levy at a time when it would be effectual in furnishing the fund for the payment of the claim, and postpones it until long after, when by reason of decrease in the membership in the association it becomes ineffectual, the association may be held liable in damages. *Christie v. Iowa L. Ins. Co.*, 111-177.

In such case interest from the time the

money should have been collected and paid over under the terms of the contract may be added. *Ibid.*

The beneficiaries being entitled to the amount realized on particular assessments under their certificates, the misappropriation of an assessment made for a loss under one certificate to the payment of a loss under a different certificate, does not give rise to an action on the bond of the officer making such appropriation at the suit of the receiver of the company. *Sherman v. Harbin*, 124-643.

SEC. 1789. Insurable age—beneficiary—assignment of policy.

Age: An association is not precluded by the provisions of this section from assuming by consolidation the liability of another association to a member, although at the time of such consolidation the member is over the age when a valid certificate could have been issued. *Cathcart v. Equitable Mut. L. Assn.*, 111-471.

A company whose articles do not prohibit the insurance of persons over the age specified by Code § 1789 cannot by its by-laws render a contract of insurance with a person within the statutory age *ultra vires* and void. *Krause v. Modern Woodmen*, 133-199.

Change of beneficiary: The provision as to change of beneficiaries relates to the certificate and not to the fund, and the word "assignment" as here used is equivalent to the word "endorsement." A beneficiary who is substituted by the act of the person on whose life the certificate is issued is not an assignee of the certificate. *Shuman v. Supreme K. of H.*, 110-480.

Where the right to change the beneficiary is specifically provided for in the certificate, and the manner of doing so is pointed out, the method indicated must be adopted and if that method involves the issuance of a new certificate, the endorsement of a certificate without the observance of the formalities required will not give the endorsee a right to the proceeds as against the beneficiaries designated by the certificate itself. *Shuman v. A. O. U. W.*, 110-642.

Where the benefit was made payable to the wife of the deceased, who was disqualified to collect it on account of having feloniously caused the death of her husband, held that her heirs had no interest in the benefit fund, but that the amount payable was held in trust by the

association for the estate of the deceased. *Schmidt v. Northern Life Assn.*, 112-41.

The beneficiary named in such a certificate has no property right therein, but only an expectancy. If a beneficiary is designated who does not belong to the class of persons enumerated by statute, the insurance becomes payable to those who would have been entitled to it in the absence of any designation. *Ibid.*

Where the parties have agreed upon a mode by which a change of beneficiary may be effected, the change can be made in that mode only, unless by subsequent agreement, assented to by the association, a different mode is substituted. *Modern Woodmen v. Little*, 114-109.

The beneficiary in a fraternal or mutual benefit association has no vested interest, but is subject to provisions as to changing beneficiaries and when the member has done all in his power to effect the change and entitle him to a new certificate in favor of the proposed beneficiary equity will carry out his purpose, although the actual issuance and acceptance of the new certificate were prevented by the death of the member. *Wandell v. Mystic Toilers*, 130-639.

And it seems that if by action of the local officer the member is misled as to the steps necessary to be taken, the association will be estopped to question the sufficiency of the change. *Ibid.*

This section applies to foreign as well as domestic companies. *Belknap v. Johnston*, 114-265.

Where the certificate is a contract of insurance, made in another state, and change of beneficiary is made and completed in that state, according to its laws, it will be valid. *Ibid.*

The right to change beneficiary existing in such other state at the time the contract was made cannot be affected by subsequent legislation of such state. *Ibid.*

Assignment: Where it was provided that the certificate should not be assignable in payment of or security for any debt, held, that the assignment thereof as a security was invalid and the creditor acquired no rights thereunder. *Crocker v. Hogin*, 103-243.

Rights of beneficiary: Until the beneficiary is changed by law, he has an actual, subsisting interest in the policy

which will pass to his administrator in case of his death, and as against such beneficiary, or his administrator, suicide on the part of the insured is not a defense in the absence of a provision to that effect in the policy. But fraud, in procuring a policy with the intent to commit suicide, will vitiate the entire contract, and defeat recovery. *Parker v. Des Moines Life Assn.*, 108-117.

Under an ordinary life policy the beneficiary has a vested right which cannot be impaired without his consent. *Haerter v. Mohr*, 114-636.

SEC. 1794. Foreign companies. Any association organized under the laws of any other state to carry on the business of insuring the lives of persons, or of furnishing benefits to the widows, orphans, heirs or legatees of deceased members, or of paying accident indemnity, or surrender value of certificates of insurance, upon the stipulated premium plan or assessment plan, may be permitted to do business in the state by complying with the requirements hereinafter made, but not otherwise. It shall file with the auditor of state a copy of its charter or articles of incorporation, duly certified by the proper officers of the state wherein it was organized, together with a copy of its by-laws, application and policy or certificate of membership. It shall also file with the auditor a statement, signed and verified by its president and secretary, which shall show the name and location of the association, its principal place of business, the names of its president, secretary and other principal officers, the number of certificates or policies in force, the aggregate amount insured thereby, the amount paid to beneficiaries in the event of death or accident, the amount paid on the last death loss and the date thereof, the amount of cash or other assets owned by the association and how invested, and any other information which the auditor may require. The statement, papers and proofs thus filed shall show that the death loss or surrender value of the certificate of insurance or accident indemnity is in the main provided for by assessments upon or contributions by surviving members of such association, and that it is legally organized, honestly managed, and that an ordinary assessment upon its members or other regular contributions to its mortuary fund are sufficient to pay its maximum certificate to the full limit named therein. Upon its complying with the provisions of this section, and of section eighteen hundred and eight, chapter eight, of this title, and the payment of twenty-five dollars, the auditor shall issue to it a certificate of authority to do business in this state, provided the same right is extended by the state in which said association is organized to associations of the same class in this state. When the auditor doubts the solvency of any foreign association, and the failure to pay the full limit named in its certificate or policy shall be such evidence of its insolvency as to require the auditor to investigate it, he shall for this or other good cause, at the expense of such association, cause an examination of its books, papers and business to be made, and if upon such examination he finds that the association is not financially sound, or is not paying its policies or certificates in full, or is conducting its business fraudulently, or if it shall fail to make the statement required by law, he may revoke its authority and prohibit it from doing business until it shall again comply with the provisions of this chapter. If the auditor appoints some one not receiving a regular salary in his office to make this examination, such examiner shall receive five dollars per day for his services in addition to his actual traveling and hotel expenses, to be paid by the associa-

tion examined, or by the state on the approval of the executive council, if the association fails to pay the same.

The provisions of this section shall apply to fraternal beneficiary associations doing exclusively an accident insurance business, and upon compliance with the provisions of this chapter, and the provisions of chapter eight of title nine of the code, so far as the same are applicable, such associations may be authorized to transact business within this state. [21 G. A., ch. 65, § 13.] [32 G. A., ch. 82.]

SEC. 1798-a. Future organization or authorization prohibited—valuation of policies of existing associations. No life insurance company or association, other than fraternal beneficiary associations, which issues contracts, the performance of which is contingent upon the payment of assessments of call made upon its members, shall do business within this state except such companies or associations as are now authorized to do business within this state and which shall value their assessment policies or certificates of membership as yearly renewable term policies according to the standard of valuation of life insurance policies prescribed by the laws of this state. [32 G. A., ch. 83, § 1.]

SEC. 1798-b. Reincorporation as legal reserve company. Any existing domestic assessment company or association may, with the written consent of the auditor of state, upon a majority vote of its trustees or directors, amend its articles of incorporation and by-laws in such manner as to transform itself into a legal reserve or level premium company, and upon so doing and upon procuring from the auditor of state a certificate of authority, as prescribed by law, to transact business in this state as a legal reserve or level premium company, shall incur the obligations and enjoy the benefits thereof, the same as though originally thus incorporated, and such corporation, under its charter as thus amended, shall be a continuation of such original corporation, and the officers thereof shall serve through their respective terms as provided in the original charter, but their successors shall be elected and serve as in such amended articles provided; but such amendment or re-incorporation shall not affect existing suits, rights or contracts. Any assessment company re-incorporated to transact life insurance business, shall value its assessment policies or certificates as yearly renewable term policies according to the standard of valuation of life insurance policies prescribed by the laws of this state. [32 G. A., ch. 83, § 2.]

CHAPTER 8.

OF PROVISIONS APPLYING TO LIFE INSURANCE COMPANIES AND ASSOCIATIONS.

SECTION 1805. Policy exempt from execution.

The execution of an ordinary life policy confers immediately a vested right upon and raises an irrevocable trust in favor of the party named as beneficiary, a right which cannot be impaired without the beneficiary's consent. *Haerther v. Mohr*, 114-636.

The purpose of this section being to provide that the money derived from life or accident insurance shall enure to the benefit of the widow, exempt from her antecedent debts, it follows that she may invest a part or the whole thereof in property

which shall be necessary for the comfort and support of her family, without impairing this right of exemption. The exemption is not limited to the money itself. *Cook v. Allee*, 119-226.

In the absence of any contract or arrangement, the proceeds of life insurance are not exempt in the hands of the heir from the debts of such heir. *O'Melia v. Hoffmeyer*, 119-444.

Where a bankrupt holds a policy payable to himself, his heirs or legal representatives, the surrender value thereof will

be a part of the assets of his estate in bankruptcy, under the provisions of the federal bankrupt law. *In re Lange*, 91 Fed. 361; *in re Steele*, 98 Fed. 78.

The provisions of the bankrupt law as to exemption of policies of life insurance

are only applicable to cases where there is no exemption by the state law, but so far as such policies are exempt by the state law such exemption is recognized under the general provisions as to exempt property. *Steele v. Buel*, 104 Fed. 968.

SEC. 1806. Repeal—investment of funds. That the law which appears as section eighteen hundred and six (1806), supplement to the code, be and the same is hereby repealed and the following enacted in lieu thereof:

“The funds required by law to be deposited with the auditor of state by any company or association contemplated in the two chapters preceding, and the funds or accumulations of any such company or association organized under the laws of this state held in trust for the purpose of fulfilling any contract in its policies or certificates, shall be invested in the following described securities and no other:

1. The bonds of the United States;
2. The bonds of this state or of any other state when such bonds are at or above par;
3. Bonds or other evidences of indebtedness of any county, city, town or school district within the state or any other state, drainage district bonds of this state, improvement certificates issued by any municipal corporation of this state such certificates being a first lien upon real estate within the corporate limits of the municipality issuing the same, where such bonds or other evidences of indebtedness are issued by authority of and according to law and bearing interest, and are approved by the executive council;
4. Bonds and mortgages and other interest bearing securities being first liens upon real estate within this state or any other state worth at least double the amount loaned thereon and secured thereby exclusive of improvements, or two and one-half times such amount including the improvements thereon, if such improvements are constructed of brick or stone; but no such improvements shall be considered in estimating the value unless the owner shall contract to keep the same insured in some reliable fire insurance company or companies authorized to do business in the state, during the life of the loan, in a sum at least double the excess of the loan above one-half the value of the ground exclusive of the improvements, the insurance to be made payable in case of loss to the company or association investing its funds, as its interests may appear at the time of loss; provided that before a company or association may invest any of its funds in such securities as are specified in this subdivision of this section in any state other than the state of Iowa it shall first obtain consent of the executive council so to do;
5. Loans upon its own policies, where the same have been in force at least two full years, in an amount not exceeding the net terminal reserve. If such loan is made, the company must describe in the note or contract taken, the amount of the loan, the name of the borrower, the number of the policy, and the terms of such note or contract shall make the amount loaned a lien against such policy and such note or contract shall be numbered, dated and signed, giving the postoffice address of the insured.
6. Any such real estate in this state as is necessary for its accommodation as a home office and in the erection of any building for such purposes, it may add thereto rooms for rent; provided that before any company or association shall invest any of its funds, in accordance with the provisions of this subdivision it shall first obtain the consent of the executive council, and provide[d] further that not to exceed ten per cent.

of the lawful reserve of such company or association shall be so invested. Any company or association so investing its funds may use the value of any such home office as a part of the deposit of legal reserve in which case it shall convey the same to the auditor of state by deed, such property to be held by him in trust for the benefit of the policy-holders or members of the company or association. The value thereof to be determined from time to time by the auditor of state.

All such securities shall be deposited with the auditor of state, subject to his approval, and shall remain with him until withdrawn in accordance with law. Any company or association receiving payments or partial payments on any securities deposited with the auditor of state shall notify him of such fact, giving the amount and date of payment, within thirty (30) days after such payment shall have been made. The officers of any company or association which fails to report the receipt of payments or partial payments as above provided, shall be liable to a fine in double the amount collected and not reported within the time and in the manner above specified. It shall be the duty of the company or association and of the officers thereof to withdraw from deposit any loans made in accordance with the provisions of subdivision five (5) of this section within fifteen (15) days after the date of the lapsing or termination of any policy of insurance upon which any such loan is made. Any association making deposit with the auditor of state as herein contemplated, shall at the time of making request for the withdrawal of any securities designate for what purpose the same are desired to be withdrawn. The auditor of state shall have authority to suspend or revoke the certificate of authority of any company or association failing to comply with any of the provisions of this section or for violating the same." [31 G. A., ch. 77.]

SEC. 1811. Defenses to actions on policies—intoxication.

This provision has no application to mutual benefit associations. *Knapp v. Brotherhood*, 128-566.

SEC. 1812. Physician's certificate.

To defeat recovery on account of false statements as to the health of the applicant, the defendant must show, not only that the statements of the applicant were false and fraudulent, but that the examiner was deceived thereby. But the defendant is not estopped by the certificate of the medical examiner from setting up fraud on the part of the applicant in procuring such certificate on which the policy was issued. *Welch v. Union Central L. Ins. Co.*, 108-224.

The purpose of this statutory provision, estopping the company from setting up misrepresentations as to the health of deceased where a medical examiner has passed on the fitness of the applicant, is to prevent recovery being defeated on any policy where the company has, by its agent, examined and passed upon the fitness of the applicant for insurance, and it is quite immaterial what representations have been made, or warranties given. The fraud or deceit referred to in the statute is that of procuring the report or certificate of the physician and not the policy. *Weimer v. Economic L. Assn.*, 108-451.

Unless the examiner is deceived by answers in the application, or in some other way, the company is not entitled to have the condition of health of the insured at the time of the issuance of the policy investigated. In the absence of fraud or deceit practiced on the medical examiner the company is estopped from questioning the truthfulness of the answers made by the insured in the application. *Stewart v. Equitable Mut. L. Ins. Assn.*, 110-528.

Under this section the company is estopped from inquiring into the correctness of answers in the application, in the absence of an allegation that the medical examiner's report was procured through fraud or deceit. The fact that the statements in such application amount to warranties is immaterial. *Nelson v. Netherland L. Ins. Co.*, 110-600.

The provisions of this section evidently relate to procedure, and not to the validity of the contract, and therefore control in an action on a policy issued in another state by a foreign insurance company. *Ibid.*

Where a physician reports in favor of the application, and it is not proven that such report was secured by fraud practiced upon the physician, the defendant is estopped from denying the truthfulness of the applicant's representations. *Brown v. Modern Woodmen*, 115-450.

The medical examiner or physician referred to in this section is the person who examines the applicant and determines his condition of health and reports whether he is a proper risk. *Peterson v. Des Moines L. Assn.*, 115-668.

The provisions of this section apply to the person who represents the company in making an examination of applicants as to their physical condition, and not to the action of the medical director of the company in determining whether the risk shall

be accepted. *Wood v. Farmers' Life Assn.*, 121-44.

Proof of the falsity of the representations made in an application for life insurance is not alone sufficient to establish that such representations were fraudulently made. *Ley v. Metropolitan L. Ins. Co.*, 120-208.

The provisions with reference to the conclusiveness of a health certificate given by a medical examiner have no application to mutual benefit associations. *Smith v. Supreme Lodge*, 123-676.

In an action on a fraternal benefit certificate evidence of fraud in the application consisting in false answers as to the conditions of the applicant's health is admissible to defeat recovery. *Ibid.*

Section applied. *Metzradt v. Modern Brotherhood of America*, 112-522.

SEC. 1813. Misrepresentation of age.

This provision held applicable to a contract of insurance in the Modern Woodmen, it not appearing that such organization was a fraternal beneficiary society as defined in Code § 1822, and therefore

specially exempted from the general statutory provisions relating to life insurance. *Krause v. Modern Woodmen*, 133-199.

SEC. 1819. Copy of application.

Whether the provision that a copy of the application must be attached to or endorsed upon the policy pertains solely to matters of remedy and procedure, and is therefore applicable in an action in this state upon a policy regardless of the place of contract, *quaere*; but held that the statute of Minnesota under which the policy was executed, though different in terms from the statutory provision in this state, should receive the same construction, and that evidence of fraudulent

statements in the application not thus attached or endorsed was inadmissible. *Rauen v. Prudential Ins. Co.*, 129-725.

The provisions of 18 G. A., chap. 211, G. A., as to attaching copy of application to policy (now embodied in Code § 1741) held applicable to fraternal societies. *Stork v. Supreme Lodge K. of P.*, 113-724.

Section applied. *Mutual L. Ins. Co. v. Kelly*, 114 Fed. 268.

As applicable to this section, see notes to Code § 1741.

SEC. 1820. Limitation of action.

The provisions of 18 G. A., chap. 211, § 3, relating to proofs of loss, held applicable to mutual benefit associations, as

well as fire insurance companies. *Parsons v. A. O. U. W.*, 108-6.

SEC. 1820-a. Disbursements—vouchers—affidavit. No domestic life insurance company shall make any disbursement of one hundred dollars or more unless the same be evidenced by a voucher signed by or on behalf of the person, firm, or corporation receiving the money and correctly describing the consideration for the payment. If the expenditure be for both services and disbursements the voucher shall set forth the services rendered and an itemized statement of the disbursements made. When such voucher cannot be obtained the expenditure shall be evidenced by an affidavit of some officer or agent of said company describing the character and object of the expenditure and stating the reason for not obtaining such voucher. [32 G. A., ch. 84.]

SEC. 1820-b. Misrepresentations prohibited. No life insurance corporation doing business in this state and no officer, director or agent thereof shall issue, circulate, or use, or cause or permit to be issued, circulated, or used, any estimate, illustration, circular or statement of any sort

misrepresenting the terms of any policy issued by it or the benefits or advantages promised thereby, or the dividends or share of surplus to be received thereon, or shall use any title of any policy or class of policies misrepresenting the true nature thereof. [32 G. A., ch. 85, § 1.]

SEC. 1820-c.—Penalty. Any person violating the provisions of this act, shall be deemed guilty of a misdemeanor and shall be punished accordingly. [32 G. A., ch. 85, § 2.]

CHAPTER 8-A.

OF EXAMINATION OF INSURANCE COMPANIES.

SECTION 1821-a. Examination authorized—at least biennially. The auditor of state may, at any time he may deem it advisable, make an examination of or inquire into the affairs of any insurance company authorized or seeking to be authorized to transact business within this state, provided that such examination shall not be less frequent than once during each biennial period. [30 G. A., ch. 56, § 1.]

SEC. 1821-b. Companies to assist—administer oaths. When any company is being examined, the officers, employes or agents thereof shall produce for inspection all books, documents, papers or other information concerning the affairs of such company, and shall otherwise assist in such examination so far as they can do. The auditor of state, or his legally authorized representative in charge of the examination, shall have authority to administer oaths and take testimony bearing upon the affairs of any company under examination. [30 G. A., ch. 56, § 2.]

SEC. 1821-c. Examiner—assistants—compensation — expenses—how paid. For the purpose of carrying into effect the provisions of this act, the auditor of state is hereby authorized to appoint an insurance examiner, who shall also be a competent actuary, who shall receive for his services a salary of three thousand dollars per year, and who, while conducting examinations, shall possess all the powers conferred upon the auditor of state for such purposes. Said examiner shall give bond to the state conditioned upon the faithful performance of his duties, in the sum of five thousand dollars, which bond shall be filed with and approved by the auditor of state. The entire time of the examiner shall be under the control of the auditor of state, and shall be employed as he may direct. The auditor of state may, when in his judgment it is advisable, appoint assistants to aid in making examinations. Such assistants shall receive as compensation for their services not to exceed five dollars per day each. Said examiner and assistants shall receive no other or further compensation than as above provided, except that they and the auditor of state shall receive actual and necessary traveling, hotel and other expenses while engaged in conducting examinations away from their respective places of residence. Such expenses, together with the compensation of the assistants, shall be paid by the treasurer of state, upon warrants drawn by the auditor of state, bills for the same having first been approved by the executive council. Such bills shall be filed under oath of the party incurring the expense and shall be approved by the person in charge of the examination. The salary of the examiner shall be paid as are the salaries of other employes of the auditor's office. All bills for expenses of any examination, together with the compensation of the assistants, shall be charged to and paid by the companies examined, and upon failure or refusal of any company examined to pay such bill or bills, the same may be recovered in an action brought in the

name of the state under the direction of the executive council, and the auditor may also revoke the certificate of authority of such company to transact business within this state. All fees collected under the provisions of this chapter shall be paid to the auditor of state and shall be by him turned into the state treasury as are other fees of his office. [30 G. A., ch. 56, § 3.] [32 G. A., ch. 78.]

SEC. 1821-d. Revocation of certificate—publication of results of examination. If upon investigation or examination, it shall appear that any company is insolvent or in an unsound condition, or is doing an illegal or unauthorized business, or that it has refused or neglected for more than thirty days to pay final judgment rendered against it in the courts of this state, the auditor of state may suspend its authority to transact business within this state until it shall have complied in all respects with the laws applicable to such company or has paid such judgment, or he may revoke its certificate of authority to transact business within this state and having revoked the certificate of any company organized under the laws of this state, he shall at once report the same to the attorney-general, who shall apply to the district court or any judge thereof for the appointment of a receiver to close up the affairs of said company; provided that in the case of companies organized on the stock plan under the provisions of chapter four, title IX of the code, the above named officers shall proceed as provided in sections seventeen hundred thirty-one (1731) and seventeen hundred thirty-two (1732) of the code; and in case of companies organized under the provisions of chapter six, title IX of the code, said officers shall proceed as provided in sections seventeen hundred seventy-seven (1777) and seventeen hundred seventy-eight (1778) of the code, and no receiver shall be appointed for any company contemplated by this chapter except upon application of the attorney-general, unless five days' notice shall have been served upon the auditor of state and attorney-general, stating the time and place of the hearing of such application, at which time and place said officers shall have the right to appear and be heard as to such application and appointment. The results of any examination shall be published in one or more newspapers of the state or in pamphlet form, when in the opinion of the auditor of state the interests of the public require it. [30 G. A., ch. 56, § 4.]

SEC. 1821-e. Transfer of stock pending examination. Any transfer of stock of any company, pending an investigation, shall not release the party making the transfer from any liability for losses that may have occurred previous to such transfer. [30 G. A., ch. 56, § 5.]

SEC. 1821-f. Soliciting business after revocation of authority—penalty. Any officer, manager, agent or representative of any insurance company contemplated by this act, who, with knowledge that its certificate of authority has been suspended or revoked, or that it is insolvent, or is doing an unlawful or unauthorized business, solicits insurance for said company, or receives applications therefor, or does any other act or thing toward receiving or procuring any new business for said company, shall be deemed guilty of a misdemeanor and shall be subject to the penalties provided in section eighteen hundred fourteen (1814) of the code, and the provisions of said section are hereby extended to all companies contemplated by this act. [30 G. A., ch. 56, § 6.]

SEC. 1821-g. Refusing to be examined—penalty. Should any company decline or refuse to submit to an examination as in this act provided, the auditor of state shall at once revoke its certificate of authority, and if such company is organized under the laws of this state, he shall report his action to the attorney-general, who shall at once apply to the district court or a judge thereof for the appointment of a receiver to wind up the affairs of the company. [30 G. A., ch. 56, § 7.]

SEC. 1821-h. Non-resident companies. Examination of insurance companies not located within this state shall only be made by order of the executive council, and at such time as it may direct. [30 G. A., ch. 56, § 8.]

SEC. 1821-i. "Company" defined. The word "company" as used in this act shall mean all companies or associations organized under the provisions of chapters four, five, six, seven or eight of title nine of the code, except county mutuals, and all companies or associations admitted or seeking to be admitted to this state under the provisions of any of the chapters herein referred to. [30 G. A., ch. 56, § 9.]

SEC. 1821-j. Repeal—acts in conflict. All acts or parts of acts in conflict with the provisions of this act are hereby repealed. [30 G. A., ch. 56, § 10.]

CHAPTER 8-B.

OF CONSOLIDATION, RE-INSURANCE, PROPORTIONATE REPRESENTATION, LICENSING AGENTS AND USE OF PROXIES.

SECTION 1821-k. Agent must be licensed—auditor may revoke license. No person shall directly or indirectly, act within this state as agent or otherwise, in receiving or procuring applications for insurance, or in doing or transacting any kind of insurance business for any company or association, other than county mutuals or fraternal beneficiary associations, until he has procured from the auditor of state a license authorizing him to act for such company or association as agent which license shall terminate at the end of the insurance year for which such company or association is authorized to transact business. The auditor of state may, for good cause, decline to issue such license or may, for like cause, revoke the same. The fee charged for such agent's license shall be, for domestic companies, fifty cents, and for companies located outside the state, two dollars. [30 G. A., ch. 57, § 1.]

SEC. 1821-l. Acting without license—penalty. Any person acting as agent or otherwise representing any insurance company or association, in violation of the provisions of this act, shall be liable to a fine of twenty-five dollars for each day he shall so act. [30 G. A., ch. 57, § 2.]

SEC. 1821-m. "Company defined." The word "company" or "companies" when used in this act shall mean any company or association organized under the provisions of chapters four, five, six, seven or eight of title nine of the code, except county mutuals. [30 G. A., ch. 58, § 1.]

SEC. 1821-n. Life companies. No company organized under the laws of this state to do the business of life insurance, either on the stock, mutual, stipulated premium or assessment plan, shall consolidate with any other company or re-insure its risks, or any part thereof, with any other company, or assume or re-insure the whole or any part of the risks of any other company, except as hereinafter provided. Provided that nothing contained in this chapter shall prevent any company as defined in section one (1) of this act from re-insuring a fractional part of any single risk. [30 G. A., ch. 58, § 2.]

SEC. 1821-o. Submit plan to auditor of state—statement as to condition. When any such company shall propose to consolidate or enter into any re-insurance contract with any other company, it shall present its plan to the auditor of state, setting forth the terms of its proposed contract of consolidation or re-insurance, asking for the approval or any modification thereof, which the commission hereinafter provided for may approve. The

company must also file a statement of its assets and if a legal reserve company, of the reserve value of its policies or contracts. [30 G. A., ch. 58, § 3.]

SEC. 1821-p. Commission to proceed without notice—may require notice. The commission shall proceed to hear and determine such petition, without notice. But if the commission shall deem it necessary in order to conserve the interests of the policy-holders that notice shall be given, it shall require the company or companies to notify, by mail, all of the members or policy-holders of the said company or companies of the pendency of such petition, and the time and place at which the same will be heard, the length of time of such notice to be determined by the commission. [30 G. A., ch. 58, § 4.]

SEC. 1821-q. Commission—how composed—unanimous approval. For the purpose of hearing and determining such petition, a commission consisting of the governor, auditor of state and attorney-general is hereby created. In the inability of the governor to act, the secretary of state may act in his stead. The commission may make such examination into the affairs and condition of any company or companies as it may deem proper, and shall have power to summon and compel the attendance and testimony of witnesses, and the production of books and papers before said commission and may administer oaths. When notice shall have been given as above provided, any policy-holder or stockholder of said company or companies shall have the right to appear before said commission and be heard with reference to said petition. Said commission, if satisfied that the interests of the policy-holders of said company or companies are properly protected and no reasonable objection of said petition exists, may authorize the proposed consolidation or re-insurance or may direct such modification thereof as may seem to it best for the interests of the policy-holders; and said commission may make such order and disposition of the assets of any such company thereafter remaining as shall be just and equitable. Such consolidation or re-insurance shall only be approved by the consent of all of the members of said commission, and it shall be the duty of said commission to guard the interests of the policy-holders of any such company or companies proposing consolidation or re-insurance. In case of companies organized on the assessment plan, the commission may require the plan of consolidation or re-insurance to be submitted to the membership of such company or companies to be voted upon. When submitted, it shall be at a meeting called for that purpose, thirty days' notice being given, and a two-thirds vote of all the members present and voting shall be necessary to an approval of any plan of consolidation or re-insurance, and no proxies shall, in any case, be voted. Any plan of consolidation or re-insurance submitted as herein contemplated, must first have been approved by the commission, and the result of said vote must be filed with the auditor of state and be by him determined before any consolidation or re-insurance shall be effected. [30 G. A., ch. 58, § 5.]

SEC. 1821-r. Companies other than life—approval of plan. When any company or companies not named in section two of this act desire to consolidate or re-insure, it shall only be necessary for such company or companies to submit the plan of consolidation or re-insurance with any other information that may be required, to the auditor of state and the attorney-general and have the same by them approved. [30 G. A., ch. 58, § 6.]

SEC. 1821-s. Consolidation with unauthorized companies prohibited. No company or companies as defined by section one of this act shall consolidate or re-insure with any other company or companies not authorized to transact business in this state. [30 G. A., ch. 58, § 7.]

SEC. 1821-t. Expenses, how paid. All expenses and costs incident to proceedings under the provisions of this chapter, shall be paid by the company or companies bringing the petition. [30 G. A., ch. 58, § 8.]

SEC. 1821-u. Penalty. Any officer, director or stockholder of any company or companies, as defined in this act, violating or consenting to the violation of any of the provisions hereof, shall be punished by a fine of not less than one thousand dollars, or by imprisonment in the county jail for not less than one year, or by both such fine and imprisonment in the discretion of the court. [30 G. A., ch. 58, § 9.]

SEC. 1821-v. Proportionate representation. From and after the taking effect of this act, the holder or holders, jointly or severally, of not less than one-fifth but less than a majority of the shares of the capital stock of corporations organized on the stock plan under the laws of this state for transacting the business of life or fire insurance, shall be entitled to nominate to be elected or appointed, as the case may be, directors or other persons performing the functions of directors by whom, according to the articles of incorporation of such corporations its affairs are to be conducted. In the event such nomination shall be made, there shall be elected or appointed to the extent that the total number to be elected or appointed is divisible, such proportionate number from the persons so nominated as the shares of stock held by persons making such nominations bear to the whole number of shares issued; provided the holder or holders of the minority shares of stock shall only be entitled to one-fifth (1-5) (disregarding fractions) of the total number of directors to be elected for each one-fifth (1-5) of the entire capital stock of such corporation so held by them; and provided further that this act shall not be construed to prevent the holders of a majority of the stock of any such corporation from electing the majority of its directors. Vacancies occurring from time to time shall be filled so as to preserve and secure to such minority and majority stockholders proportionate representation as above provided. [32 G. A., ch. 74, § 1.]

SEC. 1821-w. Articles of incorporation. All such existing corporations shall by amendment to their articles of incorporation, approved by the auditor of state, provide for the nomination, election or appointment, of the directors or other persons by whom its affairs are to be conducted, in conformity with the provisions of this act, and the articles of incorporation of all such incorporations hereafter organized shall contain like provisions. [32 G. A., ch. 74, § 2.]

SEC. 1821-x. Voting by proxies—conditions. Any insurance company or association organized under the laws of this state, may provide in its articles of incorporation, that its members or stockholders may vote by proxies, voluntarily given, upon all matters of business coming before the stated or called meetings of the stockholders or members, including the election of directors. No proxy shall be valid unless signed and executed within two months prior to such meeting or election for which said proxy was given, and such proxy shall be limited to thirty days subsequent to the date of such meeting or election, and may be revoked at any time by the policyholder or stockholder who executed the said proxy. All proxies shall be filed with the company at least one day prior to an election at which they are to be used. [32 G. A., ch. 77, § 1.]

SEC. 1821-y. Solicitation by agents—expenditure of funds. Soliciting of proxies by an agent of the company either for personal use or for the use of officers of the company or association, or for any other persons, is forbidden. Nor shall any of the funds of a company or association be expended in procuring proxies. [32 G. A., ch. 77, § 2.]

SEC. 1821-z. Penalty. Any violation of this act shall be deemed a misdemeanor and punishable accordingly. [32 G. A., ch. 77, § 3.]

CHAPTER 9.

OF FRATERNAL BENEFICIARY SOCIETIES, ORDERS OR ASSOCIATIONS.

SECTION 1822. Defined.

Unless it appears that an association engaged in the business of insurance is within the definition of fraternal beneficiary societies, it will be presumed to be

within the general provisions relating to life insurance companies and associations. *Krause v. Modern Woodmen*, 133-199.

SEC. 1824. Insurable age—beneficiary.

The designation of a beneficiary in a certificate of fraternal insurance is not affected by the fact that such beneficiary has subsequently ceased to bear the relationship to the member required by the articles of the association with reference to the designation of such beneficiary. *White v. Brotherhood of Am. Yeomen*, 124-293; *Schmidt v. Hauer*, 111 N. W. 966.

Relationship by affinity is not created between the blood relatives on either side of the parties to the marriage relation, and a beneficiary is not a relative of the member within the statutory language as to who may be beneficiaries where their relationship is only by affinity through one who is deceased. *Smith v. Supreme Tent*, 127-115.

Where a beneficiary named is not capable of taking the proceeds under the limitations of the statute as to who may be made beneficiaries, the administrator of the deceased member can recover such proceeds as though no beneficiary had been named. *Smith v. Supreme Tent*, 127-115.

In an action against a mutual benefit company by one claiming under a certificate as wife of the insured, the company defending on the ground that insured had a prior wife living, and that plaintiff was not, therefore, entitled to the benefit, has the burden of showing that a prior marriage existed, and had not been dissolved. *Parsons v. A. O. U. W.*, 108-6.

As to changing beneficiary see notes to § 1789.

SEC. 1825. Statutes applicable.

The statutes relating to life insurance companies are not applicable to mutual benefit associations except as specifically provided, and therefore held that the provisions of Code, § 1812, making the certificate of a medical examiner conclusive on the company as against all statements in the application, are not applicable to such

associations. *Smith v. Supreme Lodge*, 123-676.

The provisions of the general chapter relating to life insurance are not applicable to mutual benefit associations unless incorporated into the chapter relating to such associations. *Knapp v. Brotherhood*, 128-566.

SEC. 1832. Repeal — annual certificate — amount of insurance required. That the law which appears as section eighteen hundred and thirty-two (1832) of the supplement to the code be and the same is hereby repealed and the following enacted in lieu thereof:

“Before any beneficiary society, order or association shall be authorized to commence business within this state, it shall submit to the auditor of state its by-laws or rules by which it is to be governed, and also its articles of incorporation which shall include its plan of business. The auditor of state shall thereupon submit its articles of incorporation to the attorney-general for examination, and if found by him to be in harmony with this title, chapter and with law, he shall so certify upon said articles and return them to the auditor of state. If the auditor of state shall approve the articles and also the by-laws or rules, he shall issue to the society, order or association a permit in writing, authorizing it to transact business within this state for a period of one year from the first day of April of the year of its issue, for which certificate and all proceedings in connection therewith, there shall be paid to the auditor of state a fee of twenty-five dollars, and for each annual renewal thereof a like fee shall be paid; provided, however, that before such certificate shall be issued, the fraternal society, order or association shall have actual *bona fide* applications upon the lives of at least

five hundred (500) persons, residents of this state, for at least one thousand dollars of insurance each, and the auditor of state may require the presentation of such applications, signed by the applicants themselves. No renewal of certificate of authority shall be made to any society, order, or association whose membership, in good standing, or the amount of whose insurance in force shall be reduced below the above requirements. Societies, orders or associations not organized under the laws of this state, in addition to the requirements of the provisions of section eighteen hundred twenty-nine (1829) of the code, must also comply with all of the provisions of this chapter, except as to the residence of membership; provided, that no such society, order or association shall be authorized to transact business within this state unless it shall be shown to have actual members, in good standing, of at least one thousand, and at least one million dollars of insurance in force." [30 G. A., ch. 62.]

SEC. 1833. Agents.

Mutual benefit associations are prohibited from employing paid agents, and therefore such an organization cannot after it is formed, ratify the act of a promoter in agreeing that an agent shall have a commission for procuring members for the organization. *First National Bank v. Church Federation*, 129-268.

Such a contract being expressly forbidden, the association is not estopped by taking advantage of the services of such

agent from defending against his claim for compensation. *Ibid.*

The statute does not, however, prohibit others than the association from employing and paying an agent to procure members, and held that the promoter pretending to act as general superintendent of the organization was liable to the agent employed by him in the name of the association for compensation under the contract. *Ibid.*

SEC. 1839-a. "Association" defined. The term "association" when used in this act shall mean any society, order or association organized or authorized under the provisions of chapter nine of title nine of the code. [30 G. A., ch. 61, § 1.]

SEC. 1839-b. Examination—assistants—compensation. The auditor of state may, at any time he may deem it advisable, either in person or by his legally appointed representative, make an examination of or inquire into the affairs of any fraternal beneficiary association authorized or seeking to be authorized to transact business within this state, provided the examination of associations organized under the laws of this state shall not be less frequent than once during each biennial period. To aid in making such examination, the auditor of state may appoint such assistants as may be necessary, each of whom shall receive as compensation for his services not to exceed five dollars per day. [30 G. A., ch. 61, § 2.]

SEC. 1839-c. Officers to assist—examiner may administer oaths. When an association is being examined, the officers, agents or employes thereof shall produce for inspection all books, papers, documents or other information concerning the affairs of the association and shall otherwise assist in the examination. The auditor of state or examiner shall have authority to administer oaths, and may summon and may examine under oath any officer, employe, representative or agent of any association concerning its affairs or condition. [30 G. A., ch. 61, § 3.]

SEC. 1839-d. Revocation or suspension of authority. If upon investigation or examination, it shall appear to the satisfaction of the auditor of state that any association is doing an illegal or unauthorized business, or is failing to fulfill its contracts with its members, or is conducting its business fraudulently, or if its membership or the amount of its insurance in force has been reduced below the legal requirement, or should any association decline or refuse to submit to an examination, the auditor of state may

suspend or revoke its certificate of authority to transact business within this state, and having revoked the certificate of authority of any association organized under the laws of this state, he shall at once report the same to the attorney-general who shall apply to the district court or any judge thereof for the appointment of a receiver to wind up the affairs of such association. [30 G. A., ch. 61, § 4.]

SEC. 1839-e. Expenses—how paid. In addition to the compensation of the assistants provided for in section two of this act, the auditor or examiner and assistants shall be entitled to actual and necessary traveling, hotel and other expenses while conducting examinations away from their respective places of residence, the same to be paid by the treasurer of state upon warrants drawn by the auditor of state, bills therefor having been filed under oath and approved by the executive council. Such expense and compensation shall, by the auditor of state, be charged to and collected from the associations examined and should any association neglect or refuse to pay the same, the auditor of state shall at once revoke its certificate of authority to transact business within this state. [30 G. A., ch. 61, § 5.]

SEC. 1839-f. Soliciting new business—penalty. Any officer, manager, agent or representative of any association who with knowledge that its certificates [certificate] of authority has been suspended or revoked or that it is doing an illegal, unauthorized or fraudulent business solicits insurance for said association or receives applications therefor, or does any other act or thing toward receiving or procuring any new business for said association, shall be deemed guilty of a misdemeanor and for every such act, on conviction thereof, shall pay a fine of not less than one hundred nor more than one thousand dollars, or be imprisoned in the county jail not more than one year, or be punished by both such fine and imprisonment. [30 G. A., ch. 61, § 6.]

SEC. 1839-g. Plan of consolidation or re-insurance — approval. When any fraternal beneficiary association shall propose to consolidate or enter into any re-insurance contract with any other association or organization, it shall present its proposed plan of consolidation or re-insurance, together with a statement of the condition of its affairs to the auditor of state for his approval. Should he approve the plan, the same shall be submitted by any association proposing to re-insure its risks or transfer its business, to its local lodges or organizations or to a regular or special meeting of its supreme lodge or governing body to be voted upon, such notice being given as the auditor of state may direct. If, in the judgment of the auditor of state, it is deemed advisable he may also require the plan to be in like manner submitted to the association proposing to accept or re-insure the risks of any other association. In case two or more associations propose to consolidate, the proposed plan of consolidation shall be submitted, as above provided, to all of the associations interested in such consolidation. In any of the above cases, a two-thirds vote of all of the members of each association present and voting shall be necessary to an approval of any plan of consolidation or re-insurance, and in no case shall proxies be voted. On presenting to the auditor of state satisfactory proof that the foregoing provisions have been complied with and that the required number of votes have been cast in favor of the proposed plan, he shall issue to the associations an order to the effect that the plan has been approved, and the same shall be in force and effect from and after the date of such order, and the auditor of state shall direct such distribution of the assets of any such association or associations as shall be just and equitable. [30 G. A., ch. 63, § 1.]

SEC. 1839-h. Expenses, how paid. All expenses or costs incident to proceedings under the provisions of this act shall be paid by the associations interested. [30 G. A., ch. 63, § 2.]

SEC. 1839-i. Penalty. Any officer, director or manager of any association violating or consenting to the violation of any of the provisions of this act, shall be punished by a fine of not less than one thousand dollars, or by imprisonment in the county jail not less than one year, or by both such fine and imprisonment in the discretion of the court. [30 G. A., ch. 63, § 3.]

SEC. 1839-j. Mortuary assessment rates. No fraternal beneficiary society not admitted to transact business within this state prior to the passage of this act, shall be incorporated or given a permit or certificate of authority to transact business within this state, unless it shall first show that the mortuary assessment rates provided for in whatever plan of business it has adopted, are not lower than is indicated as necessary by the following mortality table:

NATIONAL FRATERNAL CONGRESS MORTALITY TABLE.

Age.	Number Living	Number Dying	Probability of Dying	Age.	Number Living	Number Dying	Probability of Dying
20.....	100,000	500	.0050000	60.....	69,801	1,588	.0227504
21.....	99,500	501	.0050352	61.....	68,213	1,681	.0246434
22.....	98,999	502	.0050708	62.....	66,532	1,778	.0267240
23.....	98,497	503	.0051068	63.....	64,754	1,880	.0290330
24.....	97,994	505	.0051535	64.....	62,874	1,985	.0315701
25.....	97,489	507	.0052006	65.....	60,889	2,094	.0343904
26.....	96,982	510	.0052587	66.....	58,795	2,206	.0375202
27.....	96,472	513	.0053176	67.....	56,589	2,308	.0409620
28.....	95,957	517	.0053877	68.....	54,271	2,430	.0447753
29.....	95,442	522	.0054693	69.....	51,841	2,539	.0489767
30.....	94,920	527	.0055520	70.....	49,302	2,645	.0536489
31.....	94,393	533	.0056466	71.....	46,657	2,744	.0588122
32.....	93,860	540	.0057532	72.....	43,913	2,832	.0644912
33.....	93,320	548	.0058723	73.....	41,081	2,909	.0708113
34.....	92,772	557	.0060040	74.....	38,172	2,969	.0777795
35.....	92,215	567	.0061487	75.....	35,203	3,009	.0854957
36.....	91,648	578	.0063067	76.....	32,194	3,026	.0939927
37.....	91,070	591	.0064895	77.....	29,168	3,016	.1031010
38.....	90,479	606	.0066977	78.....	26,152	2,977	.1138345
39.....	89,873	622	.0069209	79.....	23,175	2,905	.1253506
40.....	89,251	640	.0071708	80.....	20,270	2,799	.1380858
41.....	88,611	660	.0074483	81.....	17,471	2,659	.1521951
42.....	87,951	683	.0077657	82.....	14,812	2,485	.1677694
43.....	87,268	708	.0081129	83.....	12,327	2,280	.1849599
44.....	86,568	734	.0084797	84.....	10,047	2,050	.2040410
45.....	85,826	761	.0088668	85.....	7,997	1,800	.2250844
46.....	85,065	790	.0092870	86.....	6,197	1,539	.2483460
47.....	84,275	822	.0097538	87.....	4,658	1,277	.2741520
48.....	83,453	857	.0102693	88.....	3,381	1,023	.3025732
49.....	82,596	894	.0108238	89.....	2,358	788	.3341815
50.....	81,702	935	.0114440	90.....	1,570	579	.3687898
51.....	80,767	981	.0121460	91.....	991	404	.4076690
52.....	79,786	1,029	.0128970	92.....	587	264	.4497445
53.....	78,757	1,083	.0137512	93.....	323	161	.4984520
54.....	77,674	1,140	.0146767	94.....	162	89	.5493827
55.....	76,534	1,202	.0157054	95.....	73	44	.6027397
56.....	75,332	1,270	.0168587	96.....	29	19	.6551724
57.....	74,062	1,342	.0181200	97.....	10	7	.7000000
58.....	72,720	1,418	.0194994	98.....	3	3	1.0000000
59.....	71,302	1,501	.0210513				

Provided, however, that nothing in this act shall be construed to apply to any association organized solely for benevolent purposes and composed wholly of members of any one occupation or guild. [32 G. A., ch. 86.]

SEC. 1839-k. Acquisition of real estate—erection of building—conditions. Any fraternal beneficiary society, order or association organized under the laws of this state, accumulating money to be held in trust for the purpose of the fulfillment of its certificates or contracts, shall be permitted to invest not to exceed ten per cent. (10%) of the aggregate amount of such accumulation in such real estate in this state as is necessary for its accommodation as a home office, and in the purchase or erection of any building for such purpose it may add thereto rooms for rent; provided that before any association shall invest any of its funds in accordance with the provisions of this sub-division it shall first obtain the consent of the executive council. Any company or association so investing its funds shall convey the real estate thus acquired to the auditor of state by deed, such property to be held by him in trust for the benefit of the members of such association, the value thereof to be determined from time to time by the auditor of state. Provided, that nothing in this act shall be construed to permit the officials or board of directors of such society, order or association to make such investment without authority specifically granted by the said society, order or association through its grand or supreme lodge or convention. [32 G. A., ch. 87.]

SEC. 1839-l. Investment of funds—securities deposited. Any fraternal beneficiary society, order or association organized under the laws of this state, accumulating money to be held in trust for the purpose of the fulfillment of its certificates or contracts, shall invest such accumulations in the following securities and no other:

1. Bonds of the United States.
2. Bonds of this or of any other state, when such bonds are at or above par.
3. Bonds or other evidences of indebtedness of any county, city, town or school district within the state or any other state, or drainage bonds of any drainage district in the state of Iowa where such bonds or other evidences of indebtedness are issued by authority of and according to law and bearing interest, and are approved by the executive council.
4. Bonds, mortgages and other interest bearing securities being first liens upon real estate within this state or any other state, worth at least double the amount loaned thereon and secured thereby exclusive of improvements, or two and one-half times such amount including the improvements thereon, if such improvements are constructed of brick or stone; but no such improvements shall be considered in estimating the value unless the owner shall contract to keep the same insured in some reliable fire insurance company or companies authorized to do business in the state, during the life of the loan, in a sum at least double the excess of the loan above one-half the value of the ground exclusive of the improvements, the insurance to be made payable in case of loss to the company or association investing its funds, as its interest may appear at the time of loss.

All such securities shall be deposited with the auditor of state subject to his approval, and shall remain with him until withdrawn in accordance with the provisions of this act. Any fraternal beneficiary society, order or association receiving payments, or partial payments on any securities deposited with the auditor of state, shall notify him of such fact giving the amount and date of payment within fifteen (15) days after such payment shall have been made. The officers of any society, order or association which fails to report the receipt of payments or partial payments as above provided shall be liable to a fine in double the amount collected and not reported within the time and in the manner above specified. Any society, order or association required to make a deposit with the auditor of

state as herein contemplated, shall at the time of making such deposit, designate by what provisions of its articles of incorporation or laws such fund is accumulated and upon making request for withdrawal of any funds shall designate for what purpose such withdrawal is desired. Any society, order or association, may at any time change its securities on deposit by depositing a like amount in other securities of the same character and the auditor of state shall permit a withdrawal of the same upon satisfactory proof in writing filed with him that they are to be used for the purpose for which they were originally deposited. The auditor of state shall have authority to suspend or revoke the certificate of authority of any society, order or association failing to comply with any of the provisions of this act or for violating the same.

Nothing in this act shall be construed to apply to any association organized solely for benevolent purposes and composed wholly of members of any one occupation, guild, profession or religious denomination. [32 G. A., chs. 88-89.]

CHAPTER 10.

OF SAVINGS BANKS.

SECTION 1841. Business.

A savings bank has authority to receive securities of its depositors for safe keep- ing. *Sherwood v. Home Savings Bank*, 131-528.

SEC. 1842. Articles of incorporation. The articles of incorporation of a savings bank shall be signed and acknowledged by the incorporators before some officer authorized to take acknowledgment of deeds, and give the corporate name, the object for which it is formed, the amount of capital, the time of its existence, which shall not exceed fifty years, the number of its directors, the name and postoffice address of each person or officer who shall manage its affairs until the first election, and the name of the city, town or village, and the county, in which the principal place of business is to be located. Such articles shall be filed and recorded in the office of the recorder of deeds of the county of the principal place of business, and in the office of the secretary of state. Notice of its incorporation shall be given by publication in some newspaper published in the county wherein the bank is located, once each week, for four consecutive weeks, which notice shall state, in substance, the matters required to be given in the articles of incorporation. [15 G. A., ch. 60, § 3.] [30 G. A., ch. 2, § 5.]

SEC. 1843. Capital. The paid up capital of any savings bank shall not be less than ten thousand dollars in cities, towns or villages having a population of ten thousand or less, nor less than fifty thousand dollars in cities having a greater population. The corporation may commence business when its first directors or officers named in its recorded articles of incorporation shall have furnished the auditor of state proof, under oath, that the required capital has been paid in and is held in good faith by said bank, and he has satisfied himself of such fact, for which purpose he may make a personal examination, or cause it to be made, at the expense of such bank, and he is also satisfied that the preceding sections of this chapter have been complied with, and has issued a certificate to that effect, naming therein its first board of directors, notice of which certificate shall be given by the publication thereof once each week for four consecutive weeks in some newspaper printed in the county where its articles are recorded, at the expense of such bank, and proof of such publication by the oath of the publisher or

his foreman filed with such auditor. [15 G. A., ch. 60, §§ 2, 3.] [30 G. A., ch. 2, § 6.]

SEC. 1844. Powers.

Under a previous statutory provision that a savings bank should not make a loan of money to any person in excess of a certain per cent. of its capital, held that such provision did not render loans in excess void, the prohibition being intended as a rule for the government of the bank. *Benton County Sav. Bank v. Boddicker*, 105-548.

A savings bank is not liable for the negligence of a clerk furnished by it to keep account of the sales at a public auction and take notes with good security for such sales. *Willett v. Farmers' Sav. Bank*, 107-69.

SEC. 1845. Management—officers—meetings.

While the board of directors of a savings bank may elect a cashier to hold office during the pleasure of the board, it may also adopt the plan of electing or appointing the cashier annually, and if it does so, the surety on the cashier's bond is not liable for defalcation after the annual period for which the bond was given. *Ida County Sav. Bank v. Seidensticker*, 128-54.

The provision that the cashier may be dismissed at the pleasure of the board does not negative his appointment for a fixed term. *Ibid.*

Although the board has appointed a cashier to hold office at pleasure, it may

make a new appointment of the same person as cashier for a definite period, which appointment will limit the liability of the sureties on his original bond, although as a matter of fact he continues without interruption to occupy the position under the new arrangement and subsequent arrangements of the same character. *Wapello State Bank v. Colton*, 133-147.

The existence of a vacancy is not essential to the authority of the governing board to change the terms and conditions of the service of an officer already holding office which the board has authority to fill at pleasure. *Ibid.*

SEC. 1848. Deposits. Any savings bank organized under this chapter may receive on deposit money equal to twenty times the aggregate amount of its paid up capital and surplus, and no greater amount of deposits shall be received without a corresponding increase of the aggregate paid up capital and surplus, which capital and surplus shall be a guaranty fund for the better security of depositors, and invested in safe and available securities. The deposits so received shall be paid to such depositor or his representative, when requested, with such interest and under such regulations as the board of directors shall, from time to time, prescribe, not inconsistent with the provisions of this chapter, which shall be printed and conspicuously exposed in the business office of the bank, in some place accessible and visible to all; and no alteration which may at any time be made in such rules and regulations shall affect the rights of depositors acquired previously thereto in respect to deposits or interest thereon. Savings banks may require sixty days' written notice of the withdrawal of savings deposits, but when there are sufficient funds on hand the officers thereof may, in their discretion, waive this requirement. They may close any account, upon such written notice as may be provided for in the by-laws, directing a depositor to withdraw his deposits, after which it shall cease to draw interest. But nothing in this chapter shall prevent such banks, in their discretion, issuing certificates of deposit payable upon demand. [15 G. A., ch. 60, § 7.] [28 G. A., ch. 67, §§ 2, 4.] [29 G. A., ch. 167, § 1.]

SEC. 1850. Investment of funds. Each savings bank shall invest its funds or capital, all moneys deposited therein and all its gains and profits, only as follows:

1. In bonds or interest bearing notes or certificates of the United States;
2. In bonds or evidences of debt of this state, bearing interest;

3. In bonds or warrants of any city, town, county, school district, or drainage district of this state, issued pursuant to the authority of law; but not exceeding twenty-five per cent. of the assets of the bank shall consist of such bonds or warrants;

4. In notes or bonds secured by mortgage or deed of trust upon unincumbered real estate in this state, worth at least twice the amount loaned thereon;

5. It may discount, purchase, sell and make loans upon commercial paper, notes, bills of exchange, drafts, or any other personal or public security, but shall not purchase, hold or make loans upon the shares of its capital stock;

6. In all cases of loans upon real estate, all the expenses of searches, examination and certificates of title, or the inspection of property, appraisals of value, and of drawing, perfecting and recording papers, shall be paid by such borrowers; if buildings are included in the valuation of real estate upon which a loan shall be made, they shall be insured by the mortgagor for at least two-thirds of their value, in some solvent company, and the loss, if any, under the policy of insurance shall be made payable to the bank or its assigns, as its interests may appear. When the mortgagor neglects to procure the insurance as above provided, the mortgagee may procure the same in the mortgagor's name for its benefit, and the premium so paid therefor shall be added to the mortgage debt. [15 G. A., ch. 60, § 9.] [31 G. A., ch. 78.]

The authority to sell, discount, purchase, and make loans on commercial paper, notes, etc., authorizes a savings bank to make a contract for the purchase of notes, notwithstanding the inhibition on contracting debt. *Ubbinga v. Farmers' Sav. Bank*, 108-221.

SEC. 1850-a. Surplus fund—how invested. The directors of any savings bank may set apart from its earnings, over and above expenses, any desired sum as a surplus fund, to be maintained as such, separate and apart from earnings usually carried and designated as undivided profits, and which surplus fund shall not be drawn upon for the payment of expenses or dividends, except that it may be made use of as a stock dividend for increasing the capital of the bank. Such surplus shall be invested in the same manner as the capital of the bank, as provided in section eighteen hundred and forty-eight (1848) of this chapter. The directors may transfer said surplus fund, or any part of the same, back to the undivided profits account, and make use of the same, when so transferred, for the payment of expenses and dividends when the deposits of the bank shall be less than ten times the capital, or capital and remaining surplus, and not otherwise. [28 G. A., ch. 67, § 1.]

SEC. 1852. Interest—dividends. No dividend shall be declared or paid to stockholders, save out of the undivided profits on hand after paying or setting apart sums sufficient for the payment of all expenses in operating the bank, and of interest to depositors according to the rate fixed therefor by the board of directors from time to time. The bank shall pay interest to the depositors, when due, upon presentation of deposit book or certificate. [15 G. A., ch. 60, § 11.] [28 G. A., ch. 67, § 3.]

SEC. 1855. Repeal—indebtedness. Section eighteen hundred and fifty-five (1855) of the code, be, and the same is hereby repealed. [32 G. A., ch. 90, § 1.]

SEC. 1855-a. Indebtedness. State and savings banks may contract indebtedness or liability for the following purposes only; for necessary expenses in managing and transacting their business, for deposits, and to pay depositors; provided, that in pursuance to an order of the board of

directors previously adopted, other liabilities not in excess of amount equal to the capital stock may be incurred. [32 G. A., ch. 90, § 2.]

SEC. 1855-b. Repeal—acts in conflict. All acts or parts of acts in conflict with this act, are hereby repealed. [32 G. A., ch. 90, § 3.]

CHAPTER 11.

OF STATE BANKS.

SECTION 1864. Capital—certificate. No state bank shall be organized under the provisions of this chapter with a less amount of paid up capital than fifty thousand dollars, except in cities or towns having a population not exceeding three thousand, where such association may be organized with a paid up capital of not less than twenty-five thousand dollars. But no such association shall have the right to commence business until its officers or its stockholders shall have furnished to the auditor of state a sworn statement of the paid up capital, and, when the auditor of state is satisfied as to that fact, he shall issue to such association a certificate authorizing it to commence business, and it shall cause said certificate to be published in some newspaper printed in the city or town where the association is located, once each week, for at least four weeks, or, if no newspaper is published in such city or town, then in a newspaper published nearest thereto in the county. [31 G. A., ch. 9, § 6.]

SEC. 1866. Directors.

Acquiescence by a bank in a course of action by its president who is its managing officer, or any facts constituting a holding out of the president by the bank as having a right to act for it, lay a foundation for authority actual or inferred. *Griffin v. Erskine*, 131-444.

A remittance to the president of a bank in his name with an abbreviation of his official title, is a payment to the bank. *Ibid.*

CHAPTER 12.

OF BANKS.

SECTION 1869. Repeal—pay of and loan to officers. That section eighteen hundred sixty-nine of the code be, and the same is, hereby repealed, and the following enacted in lieu thereof:

“Officers of savings and state banks may receive for their services a reasonable compensation, to be fixed from time to time in the by-laws, or by vote of the board of directors, but no director, as such, shall be paid for his services. No officer or employe of the bank shall in any manner, directly or indirectly, use its funds or deposits, or any part thereof, except for the regular business transactions of the bank, and no loan shall be made by it to any of them except upon the express order of the board of directors, made in the absence of the applicant, duly entered in the records of the board proceedings, and only upon the same security as required of others. But the board of directors may, by resolution, duly entered in the records of the board proceedings, authorize loans to directors not holding any other office nor being an employe, not exceeding a maximum sum at any one time, which resolution shall be voted upon in the absence of such director and any such loan shall be upon the same security as required of others. Any such

officer or employe of the bank violating any of the provisions of this section shall be guilty of embezzlement and shall be imprisoned in the penitentiary not exceeding ten years, or fined in a sum not less than the amount embezzled, or by both fine and imprisonment, but nothing in this act shall prevent or defeat the right to recover upon any note or notes given in violation of its provisions." [32 G. A., ch. 91.]

[The 31 G. A., by chapter 79, amended the above section by adding thereto the following, "and shall be imprisoned in the penitentiary not exceeding ten years, or fined in a sum not less than the amount embezzled, or by both fine and imprisonment." The 32 G. A., by chapter 91, repealed the above section of the code and enacted a substitute without referring to the amendment by the 31 G. A., but incorporated the same in the above.]

This provision is intended to prohibit any loan to an officer unless that particular loan has been passed upon by the board of directors as provided. A blanket resolution of the directors will not render valid such subsequent loans. *German Sav. Bank v. Des Moines National Bank*, 122-737.

But the bank may be bound by the subsequent ratification of approval of such loans and estopped from afterwards questioning the validity of the notes given therefor by the officers and transferred to a purchaser without notice. *Ibid.*

SEC. 1870. Limit of liabilities. The total liabilities to any savings or state bank of any person, corporation, company or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed twenty per cent. of the actually paid up capital of such bank; provided that they may loan not to exceed one-half of their capital stock to any person, corporation, company or firm on notes or bonds secured by mortgage or deed of trust upon unencumbered farm land in this state, worth at least twice the amount loaned thereon; but the discount of *bona fide* bills of exchange drawn against actually existing value, and the discount of commercial or business paper actually owned by the person or persons, corporation, company or firm negotiating the same, shall not be considered money so borrowed. [25 G. A., ch. 30, § 2; 15 G. A., ch. 60, § 18.] [29 G. A., ch. 76, § 1.]

SEC. 1871. Examinations. The board of directors of each savings and state bank shall, at its annual meeting, appoint from its members an examining committee of not less than two, which shall examine the condition of the bank, at least every quarter, and report the same in writing duly signed to the board, who shall cause said report to be recorded in the directors' minute book of the bank. One of these examinations shall be made during the month of June, and another one during the month of December, in each year, and these two examinations, besides being recorded in the minute book of the bank, shall be reported to the state auditor on blanks to be supplied by him. And in case any bank refuses or neglects to so forward such report, the auditor shall be authorized to have such examination made by one of his regular examiners, and the bank shall be charged with and required to pay the reasonable expense of such examination. Members of such examining committee shall receive for their services a reasonable compensation, to be fixed by the board at its annual meeting, but in no case shall such compensation exceed five dollars per day for each day's actual service to each member. [25 G. A., ch. 30, § 4.] [31 G. A., ch. 80.]

SEC. 1872. Quarterly statements.

What is said in this section relating to deposits and exchange does not indicate that the section applies to corporations

like investment companies not engaged in a general banking business. *Williams v. Lewis Investment Co.*, 110-635.

SEC. 1873. Examination by auditor. The auditor of state may, at any time he may see proper, make or cause to be made an examination of any savings or state bank, or he shall call upon it for a report of its condition upon any given day which has passed, as often as four times each year, which report shall contain the information under the preceding section, and the auditor shall cause it to be published in one regular issue in some daily, semi-weekly, tri-weekly or weekly newspaper in the city or town where such bank is located, or, if there be none in such city or town, then, in one regular issue of some daily, semi-weekly, tri-weekly or weekly newspaper printed in said county, and the expense of such publication shall be paid by the bank. [15 G. A., ch. 60, § 23; C., '73, § 1571.] [32 G. A., ch. 92.]

SEC. 1875. Repeal—examiners—fees. That the law as it appears in sections eighteen hundred and seventy-five (1875) and eighteen hundred and seventy-six (1876) of the code, be and the same is hereby repealed and the following enacted in lieu thereof:

"The auditor of state may appoint not to exceed five bank examiners, to hold office at his pleasure, who shall give bond to the state, conditioned for the faithful discharge of their duties, in the sum of four thousand dollars (\$4,000), which shall be filed with and the sureties therein approved by said auditor. Said examiners shall receive as compensation for their services, a salary of eighteen hundred dollars each, per annum. The auditor of state and examiners shall be entitled to actual and necessary expenses incurred in the examination of banks, and loan and trust companies, which shall be audited by the executive council and paid by the treasurer of state upon warrants drawn by the auditor of state, but the total amount of such expenses and the salaries of examiners shall not in any one year, exceed the amount of fees collected from such banks and loan and trust companies. Each of such banks and loan and trust companies shall pay to the auditor of state annually before the first day of March, the following fees: which shall be by him turned into the state treasury as other fees of his office: those having a paid up capital of fifty thousand dollars or under, the sum of fifteen dollars; those possessing a paid up capital of more than fifty thousand and under one hundred thousand dollars, twenty dollars; those possessing a paid up capital of one hundred thousand and under two hundred thousand dollars, twenty-five dollars; and those possessing a paid up capital of two hundred thousand dollars or over, thirty dollars: provided, that, banks which have been examined between the first day of January, 1904, and the taking effect of this act, shall not be required to pay such fee for the year 1904, and banks which have not been so examined, shall pay such fee on or before the first day of September, nineteen hundred and four, provided that no bank examiner shall be assigned by the auditor of state to examine a bank or loan and trust company in a county in which he is interested in the business of banking or of a loan and trust company." [30 G. A., ch. 64.] [31 G. A., ch. 81.]

SEC. 1876. Repealed. [30 G. A., ch. 64.]

SEC. 1877. Proceedings against by state—receivers.

The receiver of an insolvent bank appointed under a proceeding brought by the auditor of state under statutory provisions may have an order on the stockholders for the payment of an assessment in such amount as appears to be necessary to meet the liabilities of the bank (under provisions as to double liability of stockholders) and the stockholder is bound to pay the amount of such assessment without waiting for the final distribution of the assets of the bank. In such case the time for collection of such assessment and the amount to be collected can best be left to the sound discretion of the court, the proceeding being one where the estate of the bank is in process of liquidation by direction of the auditor of state. *State ex rel. v. Union Stock Yards State Bank*, 103-549.

SEC. 1878. Assessments.

The proceeds of an assessment on stockholders should be applied ratably to the payment of the general creditors and of the depositors were not satisfied out of the assets of the bank as to which they are given preference. *State v. Corning State Sav. Bank*, 127-198.

On the appointment of a receiver for an insolvent bank depositors are preferred

creditors and entitled to be paid in full as after deducting costs and expenses from the general assets of the bank. And they are also entitled to share ratably with all creditors in the distribution of the proceeds of a statutory assessment of the stockholders. *State v. Corning State Sav. Bank*, 127-198.

SEC. 1882. Liability of shareholders.

The statutory provision rendering stockholders liable to the extent of double the value of their stock for the debts of the bank is not an act authorizing the creation of corporations with banking powers, etc., without submission to the people within the constitutional prohibition. *State ex rel. v. Union Stock Yards State Bank*, 103-549.

Under the provisions of 18 G. A., chap. 208, incorporated into this section, but which as originally passed related to corporations in general, held that the liability provided for in case of buying and selling

exchange, etc., applied to the banking business only, and not to an investment business, although the corporation carrying on the business had authority to receive deposits of money. *Williams v. Lewis Investment Co.*, 110-635.

An assessment in a receivership proceeding is the proper method of enforcing the stockholder's liability, and to render such assessment valid and binding he must be made a party to the proceedings before the assessment. *Elson v. Wright*, 112 N. W. 105.

SEC. 1885. Penalty.

This section contemplates time deposits as well as deposits subject to check and therefore the issuance of a certificate of deposit for money paid in when the bank is insolvent is a criminal act. *State v. Boomer*, 103-106.

The insolvency of the bank may be proven by the testimony of experts familiar with the banking business. *Ibid.*

To authorize a conviction for receiving deposits for an insolvent bank, actual knowledge of the insolvency of the bank

on the part of the officer receiving such deposits must be proven, and it is error to instruct that the defendant will be criminally liable if as a reasonable prudent man he ought to have known of the insolvency of the bank. *State v. Dunning*, 130-678.

These provisions are not applicable to an officer of a national bank. *Easton v. Iowa*, 188 U. S., 220, (reversing *State v. Easton*, 113-516).

SEC. 1889. Statement—doing business—loan and trust companies.

The president and cashier of every savings and state bank shall cause to be kept at all times a full and correct list of the names and residences of the officers, directors, examining committee, and of all the stockholders in the bank, and the number of shares held by each, in the office where its business is transacted. Said list shall be subject to the inspection of all the stockholders and creditors of the bank during business hours of each day in which business may be legally transacted. A copy of such list, verified by the oath of the president or cashier, shall be transmitted to the auditor of state within ten days after each annual meeting. No corporation shall engage in the banking business, receive deposits, and transact the business generally done by banks, unless it is subject to and organized under the provisions of this title, or of the banking laws of the state heretofore existing, except that loan and trust companies may receive time deposits subject to the same limitations as are now or may hereafter be prescribed for the receiving of deposits by state banks and issue drafts on their depositaries.

All such companies and all corporations now existing or hereafter organized under the provisions of chapter 1, title 9 of the code whose articles of incorporation authorize the acceptance and execution of trusts, and all corporations in whose name the word "trust" is incorporated and forms a part, shall have a full paid capital of not less than the amount of capital

of saving [savings] banks, as provided in section 1843 of chapter 10 and shall be subject to examination, regulation and control by the auditor of state, like savings and state banks, and their stockholders shall be liable to the creditors of such companies as provided in section eighteen hundred and eighty-two of this chapter for stockholders in savings and state banks. Any corporation violating this section shall forfeit its charter at the suit of the attorney-general, and said corporation, its officers, directors and agents, shall be punished by a fine of not less than five hundred dollars, or imprisonment of not less than two years in the penitentiary, or by both such fine and imprisonment, at the discretion of the court; provided that loan and trust companies organized under the general incorporation laws of the state, which were engaged in the banking business prior to the first day of January, 1886, and have continued therein since said date, may, by the proper additions to their articles of incorporation, become state banks within the provisions of this title, without incorporating the word "state" in the names of such corporations. [28 G. A., ch. 68, § 1.] [30 G. A., ch. 65.]

[The amendment by 30 G. A. refers to the code section, while the same section appeared in the supplement to the code. The words stricken, and for which other matter was inserted, appear in line 14 of the code, and line 17 of the supplement to the code.]

CHAPTER 13.

OF BUILDING AND LOAN ASSOCIATIONS.

SECTION 1890. Defined.

The fundamental purpose of these associations is to assist members by small periodical payments to acquire homes. *Home Sav. & Trust Co. v. Fidelity & Dep. Co.*, 115-394.

Comity between states does not require the courts of this state to enforce a contract or apply a remedy with reference to a foreign building and loan association which contravenes or nullifies the settled policy of this state with reference to such associations. *Field v. Eastern Bldg. & L. Assn.*, 117-185.

Where the contract issued by a building and loan association was evidently intended to be construed by the stockholder to whom it was issued as providing for full payment of the par value of the stock after the payment of specific sums by way of dues for a fixed time, held that the contract would be so construed as against the association. *Ibid.*

Such a contract is not affected by subsequent amendments to the by-laws, which

are made parts of the contract, in the absence of any provision authorizing a change of the terms of the contract by such amendments. *Ibid.*

Such an association although mutual in name may in the absence of statutory restrictions bind itself to make payment of the par value of its stock after fixed payment of dues have continued for a specified time. *Ibid.*

Under the articles of plaintiff association, held that a limitation in the number of payments which could be exacted was not a guarantee that such payments would mature the stock, and the member whose stock had then matured was held bound to pay interest and premiums thereafter on his loan. *Le Mars Bldg. & Loan Assn. v. Burgess*, 129-422.

The retroactive provisions of 26 G. A., chap. 85, and 27 G. A., chap 48, were not unconstitutional. *Iowa Sav. & Loan Assn. v. Selby*, 111-402.

SEC. 1893-a. Articles amended—maximum rate—appointment of receiver. The provisions of this act shall apply to all building and loan and savings and loan associations hereafter incorporated as well as those now incorporated under the laws of this state or doing business herein, and all such associations shall amend their articles of incorporation so as to conform to the provisions of this act. No such associations shall be authorized or empowered to collect or receive premiums and interest from a borrower

at a greater rate than eight per cent. and in case of an amendment to the articles of incorporation so that a lower rate of interest or charge for the use of money loaned to the borrowing member is authorized than the rate of interest charged upon loans, to members who have theretofore borrowed, shall in like manner be reduced to the same rate as that permitted to borrowers after such amendments to the articles of incorporation, so that the interest charged under whatever name, whether charged as premium or interest to all members of the same association, shall be the same, all reductions of the rate of interest or premium charged to new borrowers shall be made and apply equally to those who have theretofore borrowed. In case any such association doing business in the state shall fail to amend its articles of incorporation in conformity herewith prior to July 15th, 1900, its authority to do business in this state shall be revoked by the executive council, and under the direction of the executive council application by the attorney-general shall be made to the proper court for the appointment of a receiver to wind up the affairs of the association, and in such proceedings the amount due from the borrowing member on mortgages shall be ascertained in the manner provided in section 7 of this act, and the balance due on such mortgages shall be treated and considered as due within a reasonable time to be fixed by the court after the appointment of a receiver. [28 G. A., ch. 69, § 10.]

SEC. 1894-a. Revocation of certificates. The executive council shall have the power, and it shall be its duty, to revoke any certificate of authority given to any building and loan or savings and loan association whenever it appears to said council that said association is transacting business illegally, or is unjust and oppressive to its members or the public. [28 G. A., ch. 69, § 11.]

SEC. 1898. Nature of business—statement. All building and loan or savings and loan associations, upon receiving the certificate from the auditor, shall have power, subject to the terms and conditions contained in their articles of incorporation and by-laws, to issue stock to members to be paid for in single, stated, or monthly payments, but not more than ten thousand dollars of stock, computed at par value, of any kind shall be issued to one person; to assess and collect from members such dues, membership fees, fines, premiums, and interest on loans as may in the articles of incorporation and by-laws have been provided, and the same shall not be held to be usurious; to permit members, other than holders of guarantee stock, to withdraw all or a part of their stock deposits upon such terms and at such times as the articles of incorporation and by-laws may provide; to acquire, hold, encumber and convey such real estate and personal property as may be necessary for the transaction of their business; to make loans to members on such terms, conditions and securities as the articles of incorporation and by-laws provide; said loans to be made only on real estate security, or on the security of their own shares of stock, not to exceed ninety per cent. of the withdrawal value thereof. It shall be the duty of the secretary of every such association doing business in this state to prepare, on or before February fifteenth of each year, a duly verified statement, showing the book value and withdrawal value of a share of each class of stock in said association, for each monthly period up to January first preceding, and file the same with the auditor of state, which shall be preserved in his office. And the said association shall, on or before February fifteenth of each year, mail to each shareholder a written or printed copy of the same. In case of foreclosure, the borrower shall be charged with the full amount of the loan made to him, together with the dues, interest, premium and fines for which he is delinquent, and he shall be cred-

ited with the same value of his pledged shares as if he had voluntarily withdrawn the same. In event that judgment is obtained against a borrower from a building and loan association, no greater recovery shall be had than the net amount of principal actually received, with interest thereon at a rate not greater than twelve per centum per annum on the net amount of loan actually received by and paid to borrower, with statutory attorney fees; no evasion of this provision shall be had by means of any dues, membership fees, premiums, fines, forfeitures or other charges, any agreement to the contrary notwithstanding. [The provisions of said section shall apply to and govern all contracts between building and loan and savings and loan associations and their members, made and entered into prior to the taking effect of the code, and every such contract shall in all actions and proceedings be construed and enforced as in said section provided, and with the same force and effect as if made and entered into after the code took effect, anything in the statutes in force when such contracts were made to the contrary notwithstanding.] [26 G. A., ch. 85, § 9; C., '73, §§ 1185, 1186.] [27 G. A., ch. 48, § 1.]

[The above section was amended by the 27 G. A., chapter 48, section 1, by adding thereto the portion enclosed in brackets. By section 12, chapter 69, of the 28 G. A., said chapter 48 of the 27th G. A. is repealed; and section 16 of chapter 69 of the 28 G. A. legalizes all loans affected by the repeal of said chapter 48. The supreme court of Iowa, however, in the case of *Edworthy et al. v. Iowa Savings and Loan Association*, 86 N. W. 315, has held the repealing act unconstitutional so far as it affects contracts legalized by chapter 48 of the 27 G. A., hence it is inserted herein, as being still in force as to certain loans.]

Powers: While a building and loan association can only loan money on the security prescribed by statute, yet, as incident to the transaction of its business, it may make a loan on real property on the basis of a valuation fixed with reference to improvements to be made, and accept a bond as security that such improvements will be made in order that the value of the property shall be sufficient to sustain the loan. *Home Sav. & Trust Co. v. Fidelity & Dep. Co.*, 115-394.

In the absence of express prohibition a building and loan association has the power to borrow money, such power being implied from the general nature of its business. *Bohn v. Boone Bldg. & Loan Assn.*, 112 N. W. 199.

Therefore held that in accordance with its usual course of business the president and secretary of such association had authority to execute a note to the holder of matured stock for the amount he was entitled to thereon. *Ibid.*

Where a contract between a building and loan association and a borrowing member is void on the ground that it gives to the member a preference over other members, the association is only entitled to recover the amount actually loaned, with interest. *Winegardner v. Equitable Loan Co.*, 120-485.

A contract between a building and loan association and a borrowing member, by which it is agreed that the stock of the member shall mature and constitute a full satisfaction of the loan, after a specified number of payments of dues, premium,

and interest, regardless of whether the profits of the association have been in fact such as to mature the stock, is invalid. Such a contract involves the appropriation to the benefit of the borrowing member of assets of the association contributed by other members, thus giving the borrowing member a preference to which he is not entitled. *Winegardner v. Equitable Loan Co.*, 120-485.

The legalizing act of 27 G. A., chap. 48, with reference to building and loan associations, does not validate a previous contract of such association with borrowing members which gives them a preference over other members in the distribution of the assets of the association. *Winegardner v. Equitable Loan Co.*, 120-485.

Settlement: Where the by-laws contained provisions for withdrawal of members and paying back contributions out of the loan fund, only a percentage of which could be used for such purpose, held, that the withdrawal member was not a preferred creditor as to the funds of the association after it had become insolvent, the percentage of the fund applicable to the payment of withdrawals having been exhausted. *Rabbit v. Wilcoxon*, 103-35.

Where the association is insolvent and unable to pay each stockholder the book value of his shares, the borrowing shareholder is entitled only to credit for the withdrawal value of his shares, and not for the book value consisting of the amount of installments paid on the stock and the earnings thereof at the last dividend period. If a borrowing member is allowed

for all the payments he has made and the earnings thereof, the loss of the association will fall upon the members who have not borrowed, and inequality between the two classes of members will result. An equitable distribution of the assets, if any, in excess of the liabilities, should be effected, and the borrowing member should only be entitled to credit for the actual value of his shares. *Wilcoxon v. Smith*, 107-555.

There is nothing in the statute authorizing a building and loan association to raise money on certificates in any other way than by issuing shares of stock, and the stockholders constitute its members. *Teller v. Wilcoxon*, 110-565.

Therefore the holder of a certificate of stock is not a creditor of the association entitled to preference over other members in the winding up of its affairs. *Ibid.*

In the settlement of the affairs of an insolvent building and loan association a borrowing member whose stock has not matured is to be held for the amount of money actually received by him, with interest thereon, less the premium actually paid by him for the loan, and less the interest on the monthly payments of interest made by him. This rule applies to cases where the affairs of the association are not so far settled as to ascertain the value of the stock. When the value of the stock can be determined, the borrower should then be entitled to credit for its value, in addition to the items mentioned. *Hale v. Kline*, 113-523.

Premiums form a part of the profit fund when paid, and go to the increase of value of shares. If the association is insolvent the borrower should be allowed his share of the profit fund, made up in part of the premiums, but no further credit on account of premiums paid. *Briggs v. Iowa Sav. & L. Assn.*, 114-232.

The fact that interest is exacted monthly instead of at longer intervals will not make the contract usurious. *Ibid.*

The borrower cannot be required to pay more than twelve per cent. per annum, payable monthly, on the loan. *Iowa Cent. Bldg. & L. Assn. v. Vogt*, 115-59.

Where the association is solvent and seeking foreclosure, a withdrawing shareholder is entitled to have credited on his stock the dues, but not the premiums paid, for the latter go into the profit fund, and are to be shared equally by all members. But where the association is insolvent, a borrowing member is entitled to credit on his debt for premiums paid, but not for interest nor dues. *Spinney v. Miller*, 114-210; *Tootle v. Singer*, 118-533.

In an action by the receiver of a building and loan association after it has become insolvent and ceased to be a going concern, to recover the amount of a loan made to a borrowing member, the mem-

ber is entitled to have credited upon his loan the interest as paid, and the amount of the premiums paid as of the time of payment, and upon the balance, computing from the time of the appointment of the receiver of the association, the member is chargeable with interest at six per cent., and entitled to credit for the actual value of the shares of stock held by him. *Spinney v. Chapman*, 121-38.

In determining the net amount of the loan, monthly payments exacted in advance are not to be included. *Oskaloosa Nat. B. L. & L. Assn. v. Bailey*, 129-287.

When the borrower announces his desire to cease further payment of monthly payments, and to take up his mortgage, and negotiations are begun to ascertain the amount paid, the amount of the indebtedness becomes fixed and from that time interest should be allowed on such amount at the ordinary rate. *Ibid.*

The net amount of the loan on which interest may be computed does not include an amount credited by way of advance payment on stock; the association can only recover the amount actually paid to or advanced for the mortgagor. *Butson v. Home Sav. & Trust Co.*, 129-370.

This rule is not affected by the fact that the company has become insolvent and gone into the hands of a receiver. *Ibid.*

Every payment which goes to advance or accelerate the process of maturing the stock is a payment in some degree or measure on the debt, irrespective of whether by the contract such payment is to be directly applied in discharge thereof. *Ibid.*

A provision fixing a withdrawal value on stock held not to entitle the borrower to credit on foreclosure to the full amount of such withdrawal value. *Le Mars Bldg. & L. Assn. v. Burgess*, 129-422.

A borrower cannot recover back money voluntarily paid to a building and loan association in excess of the amount due on his loan. *Carter v. Iowa State Business Mens' B. & L. Assn.*, 112 N. W. 828.

Premiums, interest, usury: Where the borrower has authorized the secretary of the association to make a certain bid for priority of loan, it will be presumed, in the absence of evidence to the contrary, that the bid was made by the secretary and the money obtained thereby. In such a transaction the contract is not usurious, no interest being charged on the premium bid. *Hawkeye State Sav. & Loan Assn. v. Johnston*, 106-218.

It is not unconstitutional to authorize building and loan associations to charge by way of interest or premium more than the lawful rate of interest. The profits inure to the benefit of the borrower with other stockholders. *Iowa Sav. & Loan Assn. v. Heidt*, 107-297.

In the absence of express statutory provision it is not lawful for the association to exact from the borrower a sum by way of premium which in addition to the interest contracted for renders the amount to be paid for the loan greater than lawful interest. But payment by the borrower of necessary expenses in making the loan in addition to legal interest will not constitute usury. *Ibid.*

The association may deduct from the amount of the loan charges for making abstract, examination of the same and appraisal. If these charges are actually for amounts paid out it is immaterial that they are entered as expenses for making the loan. *Ibid.*

The association may deduct a portion of the dues to cover the expense of management. *Ibid.*

The statute authorizes penalties for the non-payment of dues and unless exorbitant they will not be unlawful. *Ibid.*

It is not required that the premium be paid in advance. It may be made payable in monthly installments. But the premium provided for must be fixed and paid in good faith to secure the loan, and not as a mere device to evade the law against usury. If the sums nominally paid as premium and interest together exceed the loaned, and the monthly payments of premium and interest together exceed the highest rate of interest allowed by law, the loan is usurious. *Wilcozen v. Smith*, 107-555.

Under the provisions of § 1185 of the Code of '73, authorizing building and loan associations to levy, assess and collect from the members dues, fines, interest and premiums, which shall not be construed to make the loan usurious, held that even though it were necessary to avoid the usury law in such case that the association adopt a by-law authorizing the collection of such dues, interest and premiums, the existence of such by-law was sufficiently shown by the instrument evidencing the loan. *Building Sav. & Loan Assn. v. Froelich*, 110-244.

The burden is upon the borrower to show that there was in fact no bidding for the right of precedence in making the loan, which would serve as a basis for a premium. *Ibid.*

To take a loan out of the general law as to usury on the ground that it is authorized as a contract with a building and loan association, it must appear that the lender is in fact such an association, and the mere form of the contract of loan will not evidence that fact. *Hyland v. Phoenix Loan Assn.*, 118-401.

The curative act, removing the objection of usury to loans of building associations is valid as to contracts previously made, if the borrower continues to recognize the contract as valid after the change

in the law. *Iowa Sav. & L. Assn. v. Heidt*, 107-297; *Iowa Sav. & Loan Assn. v. Curtis*, 107-504.

Building and loan contracts are exempted from the operation of the general law relating to usury. *Le Mars Bldg. & Loan Assn. v. Burgess*, 129-422.

Where a loan had been purged of usury by the provisions of 27 G. A., chap. 48, held that the repeal of that act by 28 G. A., chap. 69, did not restore the defense of usury as against such loan. *Edworthy v. Iowa S. & L. Assn.*, 114-220; *Le Mars Bldg. & Loan Assn. v. Burgess*, 129-422.

Loans made by a building and loan association to a member, which would otherwise be usurious, but which are legalized by 27 G. A., chap. 48, are valid, not only as to the member, but as to a third party who has become surety of the member for such loan. There is no illegality involved in accepting personal security for a loan to a member. *Le Mars B. & L. Assn. v. McLain*, 120-527.

Under this section and the legalizing act of 27 G. A., chap. 48, the computation of interest which is to be made in determining whether the contract with the building and loan association is usurious is to be on the principal sum without rests occasioned by the payment of interest, dues and premiums, and if the total amount of interest and premium paid and delinquent is larger than the principal sum with twelve per cent. interest thereon, then the statutory limit has been exceeded and the borrower is entitled to credit for the excess in addition to the withdrawal value of his stock. *Bacon v. Iowa Sav. & Loan Assn.*, 121-449.

The borrower may be charged with such interest, dues and penalties as are provided for by his contract unless the total amount of the charge exceeds the net loan received by him with twelve per cent. per annum thereon. In such event he is not to be required to pay more than such net amount with twelve per cent. interest. In computing the amount paid by way of interest, dues and premiums, the borrower is not to be allowed interest on such sums paid as on partial payments. *Iowa Dep. & Loan Co. v. Matthews*, 126-743.

Usurious interest provided for in a building and loan contract made before the enactment of chapter 48, acts of 27 G. A., held to be legalized by that statute. *Co-operative Bank v. Meldrum*, 128-694.

As to the legalizing act, 27 G. A., chap. 48, see *Guaranty S. & L. Assn. v. Ascherman*, 108-150.

The act of 27 G. A., chap. 48, legalizing loans previously made by such associations, is applicable to foreign as well as domestic companies. *Tootle v. Singer*, 118-533; *Spinney v. Chapman*, 121-38.

The mere establishment of the right to the withdrawal value of stock does not

give the stockholder a preference, but if the corporation although insolvent, but before being put into the hands of a receiver, pays a portion of the withdrawal value the transferee of the stock is entitled to dividends on the balance in the

same proportion as other stockholders, and the previous payment cannot be accounted as a dividend by the receiver. *McKee v. Home Savings & Trust Co.*, 133-548.

SEC. 1898-a. Repeal. Chapter forty-eight (48) of the acts of the twenty-seventh general assembly, and all acts and parts of acts in conflict with this act, are hereby repealed. [28 G. A., ch. 69, § 12.]

The repeal of the act of 27 G. A., does not render unlawful loans which, though unlawful when made, were rendered valid

by such act of 27 G. A. *Edworthy v. Iowa Sav. & Loan Assn.*, 114-220.

[The above section repeals the portion of the preceding section inclosed in brackets, which is section 1, chapter 48, of the 27th G. A.]

SEC. 1898-b. Loans, contracts and mortgages legalized. All loans, contracts, and mortgages which are affected by the repeal of said chapter forty-eight (48), acts of the twenty-seventh general assembly, are hereby legalized so far as to permit recovery to be had thereon for interest at the rate of eight (8) per cent. per annum, but at no greater rate, and nothing contained in such contracts shall be construed to be usurious so as to work a forfeiture of any penalty to the school fund. [28 G. A., ch. 69, § 16.]

SEC. 1898-c. Forbidden stocks—rate of dividend. That no building and loan or savings and loan associations shall issue guaranty stock, fully paid stock, or single payment stock, or any stock of any other kind or name which shall receive fixed dividends, or is not subject to all the liabilities of all other classes of stock of said associations, except that it shall be lawful for such associations to issue fully paid stock upon the payment by the holder thereof of the par value of such stock upon which the dividends to be declared shall not exceed the sum named in said certificate of stock, but in no event shall the dividend exceed eight per cent. per annum nor the rate of dividend declared upon the other stock of said association, which said stock shall be subject to be called in and redeemed by the said association by giving the holder thirty days' notice thereof. But such stock shall not be entitled to vote at any stockholders meeting. Any association having heretofore issued stocks forbidden by this section must retire the same on or before January 1st, 1901, and the same may be retired either by paying the amount due thereon in cash or by the issuing of stock permitted to be issued by the provisions of this section. [28 G. A., ch. 69, § 1.]

The holder of stock bearing a fixed dividend issued prior to the statute prohibiting the issuance of such stock, upon giving notice of its withdrawal for the purpose of retiring it, in conformity with

the statute, is entitled to legal interest on the amount due from the time of such notice. *Kellenberger v. Oskaloosa Nat. B. L. & I. Assn.*, 129-582.

SEC. 1898-d. Foreclosure of mortgage—costs. In case of foreclosure of any mortgage given by a shareholder of any such association, the mortgagor shall be charged with the rate of interest agreed upon, not however to exceed eight per cent. per annum, and shall be entitled to be credited, as of any anniversary of said mortgage, with the total amount of all payments made on the stock to the said association during the preceding year, and such payment on the stock shall be treated as a payment upon the mortgage, anything in the articles of incorporation or the by-laws of such association to the contrary notwithstanding. If such association shows affirmatively that losses have occurred during the period of the membership of such shareholder in excess of the amount of any fund accumulated from which to pay such losses, to such an extent that the value of the shares

of stock have been impaired, then such associations shall be entitled to have entered as a part of the judgment of foreclosure the equitable contribution of said shareholder toward such losses. If, by the articles of incorporation, the withdrawal value of the stock of such mortgagor is greater than the amount paid thereon, together with eight per cent. interest then such withdrawal value shall be credited on the mortgages of the date to which such value is computed, in lieu of the credits of payment on stock as aforesaid, and judgment and decree shall be rendered for only the balance found due, provided, however, that on any mortgage executed between October 1, 1897, and the date of the taking effect of this act, the rate of interest may be computed at the rate therein named, but in no case at a greater rate than twelve per centum per annum on the net amount of the loan actually received by and paid to the borrower, and no evasion of this provision shall be had by means of any dues, premiums, membership fees, fines, forfeitures, or other charges, any agreement to the contrary notwithstanding. In any suit in which the recovery upon the mortgage shall be for a less amount than the amount demanded in the plaintiff's petition, all costs of suit, including attorney's fees, may in the discretion of the court be taxed to the plaintiff. Provided, further, that in case of foreclosure judgment and decree shall be entered for as much as would be due the association under the provisions of this act if suit had not been brought. [28 G. A., ch. 69, § 6.]

The fact that on foreclosure of a mortgage the association claims a larger judgment than it is entitled to does not deprive it of the right to attorneys' fees as contemplated in the statute. *Le Mars Bldg. & Loan Assn. v. Burgess*, 129-422.

SEC. 1899-a. Loans—premium and interest. Such associations shall have power to loan money to their members at such rate as may be agreed upon, and may collect premiums and interest thereon, but in no case shall the amount of premium and interest paid exceed eight per cent. per annum, but nothing herein shall be construed as prohibiting the payment of such interest and premium monthly, or at such time as may be provided for in the articles of incorporation. [28 G. A., ch. 69, § 4.]

SEC. 1900. Voting shares of stock.

The provision that no person shall vote more than ten per cent. of the outstanding shares of the association is applicable to the action of stockholders in adopting a proposition for voluntary liquidation under Code Supplement, § 1907-a. *McKee v. Home Sav. & Trust Co.*, 122-731.

A proxy given before the adoption of the provision for voting on voluntary liquidation does not authorize the holder to use such proxy in voting on the question. *Ibid.*

SEC. 1902-a. Expenditures and expenses—compensation of officers and agents. All expenditures and expenses for management and conducting the affairs of said associations, not including membership fees and charges for closing loans, shall be paid from the receipts of interest, premiums, and other sources of profit. Said associations may thus use for expenses in any one year a sum not in excess of the following percentages on their assets, as shown by the last annual report, to-wit: Associations with assets not in excess of \$100,000, three per centum per annum; associations with assets in excess of \$100,000, but less than \$300,000, two and one-half per cent.; associations in excess of \$300,000, and less than \$500,000, two and a quarter per cent.; and associations with assets in excess of \$500,000, two per cent.; but in no event shall the expenses of any association exceed \$12,000 in any one year. No officer, employe, or agent of any association shall receive directly or indirectly any salary or other compensation, except for services actually rendered; and any compensation hereafter paid in violation of this section may be recovered by any shareholder or borrower

within three years from the receipt of such illegal compensation from the person accepting the same, or from any officer knowingly consenting to the allowance thereof, in a suit which may be brought in the name of the association, or in the name of such shareholder or borrower. [28 G. A., ch. 69, § 2.]

After the enactment of 28 G. A., chap. 69, it was not competent for a building and loan association to carry out a contract previously made by which an agent was entitled to a percentage of the gross ex-

pense fund received in the business of the association, inasmuch as no such expense fund could be provided by the association. *Wood v. Iowa Bldg. & Loan Assn.*, 126-464.

SEC. 1903-a. Fines—terms of withdrawal. Any stockholder in arrears in payments may be fined in a sum not in excess of three cents per share of one hundred dollars each for the first month's delinquency and five cents per share of one hundred dollars each for each succeeding month's delinquency; but said penalty shall only be due and payable from the profits belonging to said delinquent. The terms of withdrawal of a member from such association shall be such that any withdrawing member shall receive a sum not less than he has paid into said association, unless losses have occurred to said association, during the time that said withdrawing member was a member, which exceed the amount of the profits, or any fund created with which to pay such losses, and in that case such withdrawing member shall be charged with his proportionate share of the excess of the losses over the profits, and no more. [28 G. A., ch. 69, § 3.]

SEC. 1903-b. Withdrawal of non-borrowing members. The articles of incorporation of any building and loan or building and savings association may, by a three-fourths vote of the board of directors, provide that non-borrowing members shall withdraw their stock at book value in the order of its issue, beginning with the stock first issued, by giving the stockholders thereof thirty days notice. [28 G. A., ch. 69, § 5.]

SEC. 1906-a. Detailed statement published. The auditor of state shall publish, in his report of building and loan and savings and loan associations, a detailed statement of the salaries and compensation paid, and to whom, giving the names of the officers and agents respectively receiving such salaries. [28 G. A., ch. 69, § 13.]

SEC. 1907-a. Voluntary liquidation. Building and loan or saving and loan associations, by a vote of three-fourths of the shareholders of such associations, represented in person or by proxy, may go into voluntary liquidation upon such plan as shall be determined upon by the shareholders at their meeting. In case any such association resolves to go into voluntary liquidation, it shall have power, after crediting the mortgages given by the borrowing member with the full book value of the stock, to sell and assign such mortgage to a similar building and loan association, or to any other parties who will hold the same upon the terms under which such mortgage was given to the association. In that event the said mortgage shall be held to become due, if no other time can be agreed upon between the mortgagor and the association, within three years after the assignment thereof. In case the shareholders are unable to agree upon other plan and terms upon which the said association may wind up its affairs, the following plan shall be adopted. Interest shall be computed on the respective amounts paid in by the several shareholders from the date of such payments until the date that said association resolves to go into liquidation, and amount so found shall be the basis for distribution of the assets of the association. In the case of a borrowing member the amount thus found due him on stock, if there have been no losses so as to impair the capital, shall be credited on his mortgage and the balance of such mortgage shall be paid within one year

together with interest at the rate therein agreed upon not to exceed 8 per cent., and upon the payments of the outstanding mortgages and the conversion of the assets into money the same shall be distributed *pro rata* among the stockholders according to the amount found due each as aforesaid. And any balance due the borrowing member, over and above the amount actually received as a credit on the mortgage, shall be paid to such members. In case, however, of an impairment of the capital by loss, the amount of such loss shall be estimated and apportioned to each member *pro rata* according to the amount found due such members in the manner aforesaid, and the borrowing members shall be entitled to receive a credit on their mortgages for the balance after the stock is charged with its *pro rata* share of the loss, and the balance due on such mortgages shall be paid within twelve months, and upon the final distribution any balance due such borrowing member shall be paid to him. But in the final distribution, before the final dividend is made, interest shall be allowed on the amount found due the non-borrowing member not to exceed six per cent. so as to equalize between the borrowing member who has received a credit on his mortgage and the non-borrowing member. Any plan other than that herein specified shall be submitted to the executive council for approval before the same is adopted. [28 G. A., ch. 69, § 7.]

Where the proceedings for voluntary liquidation are not valid under the statutory provision on that subject a receiver may be appointed without regard to such proceedings. *McKee v. Home Sav. & T. Co.*, 122-731.

The holder of a proxy given before the adoption of the provision with reference to voluntary liquidation does not have authority to vote under such proxy on that question. *Ibid.*

SEC. 1907-b. Consolidation with other companies. Any building and loan or savings and loan association organized under the laws of this state shall have authority to consolidate its business and membership with one or more building and loan or savings and loan associations of the same class organized under the laws of this state and to transfer to such association or associations its entire assets subject to its existing liabilities, and upon the consolidation of such associations, if any one or more of said companies shall have heretofore issued guaranty stock, they may provide for the withdrawal and retirement of said guaranty stock, and the same may be withdrawn in accordance with the plan therein adopted. The plan of such consolidation, when approved by the board of directors of each of the associations, shall be reduced to writing and submitted to the executive council, and if they find that the plan is in conformity with the law, and equitable in all respects to the members of both associations, they shall attach thereto their certificate of approval. Such plan shall then be submitted to the members of both associations, either at the regular meetings or at special meetings called for that purpose, and, if approved by a vote of three-fourths of the shares of stock of each association, the same shall then be filed in the office of the auditor of state, who shall issue a certificate authorizing the consolidation. At such meetings the members may vote in person or by proxy or by written ballot mailed or otherwise delivered to the secretary at or before the time of meeting. [28 G. A., ch. 69, § 8.]

SEC. 1907-c. Consolidation when in hands of receiver. In any case where a receiver has been appointed for any such association, its membership and business may in like manner be consolidated with, and its assets transferred to, another such association of the same class, but in such case the receiver shall act in place of the board of directors, and the plan must also be approved by the court by which the receiver was appointed. [28 G. A., ch. 69, § 9.]

SEC. 1908. Foreign companies.

Prior to any specific provisions as to foreign associations, such an association might do business in the state upon complying with the law relating to foreign corporations generally. *Tootle v. Singer*, 118-533.

This section implies that foreign corporations are to be put upon an equality with domestic associations of the same character, upon condition only that they comply with the requirements peculiar to them, and held that the act of 27 G. A., chap. 48, legalizing usurious loans by building and loan associations, was applicable to foreign as well as domestic companies. *Ibid.*

SEC. 1908-a. Foreign companies. No building and loan or savings and loan association, incorporated under the laws of any other state or country, shall be authorized to do business in this state, whose articles of incorporation are not found by the executive council to be in substantial compliance with the laws of this state, and affording equal security and protection to the members thereof. [28 G. A., ch. 69, § 14.]

SEC. 1915-a. Penalty. It shall be unlawful for any agent, solicitor, or other person to sell stock or solicit persons to subscribe for stock in any such association named in section 14 hereof, which has not been authorized to do business in this state, and any person convicted of so doing shall be punished by a fine of not less than fifty nor more than two hundred dollars, and shall be committed to the county jail until the fine and costs are paid. [28 G. A., ch. 69, § 15.]

SEC. 1918. False statements.

An officer of a building and loan association may be prosecuted for embezzlement, under Code § 4842, relating to embezzlement in general, although he

is guilty of a crime under the statutory provisions relating to such associations. *State v. Ames*, 119-680.

SEC. 1920-a. Unincorporated building and loan associations—extending provisions of other sections to include what. All unincorporated organizations, associations, societies, partnerships or individuals conducting and carrying on a business, the purpose of which is to create a fund derived from periodical payments by members of such organizations, associations, societies, or other persons, upon contracts or otherwise, as well as from fines, forfeitures, incidental fees and payment of premiums and interest, which fund is to be loaned or advanced to members of the organization, association, society or to the persons making such periodical payments, for the purpose of enabling them to acquire the ownership or free possession of real estate, or personal property or to construct buildings, or any or all of such purposes, shall be deemed building and loan associations; and the provisions of chapter thirteen (13) of title nine (9) of the code, and chapter sixty-nine (69) of the acts of the twenty-eighth general assembly of the state of Iowa, shall apply to all such building and loan associations so far as the same can be made applicable to unincorporated organizations, associations, societies, partnerships or individuals. [29 G. A., ch. 77, § 1.]

The statute imposing different conditions on the building and loan business when conducted by an unincorporated association from those imposed upon the

business when conducted by a corporation is not unconstitutional. *Brady v. Matern*, 125-158.

SEC. 1920-b. Sworn statements—deposit of securities. Every such unincorporated organization, association, society, partnership or individual, conducting and carrying on the business defined in section one (1) hereof, shall, before transacting any business in this state, submit to the executive council a full and complete sworn statement of the resources and liabilities of such organization, association, society, partnership or individual, and of the proposed plan or method of doing business; and no such unincorporated building and loan association shall be permitted to carry on its business within this state unless it shall first deposit with the auditor of state at least fifty thousand dollars (\$50,000) of first mortgages and negotiable notes in the same amount secured thereby upon real estate in the state of Iowa, bearing interest at a rate not less than five per cent. per annum, which said mortgages shall in no case exceed one-half the actual value of the real estate upon which they are taken; and the auditor of state shall have power and authority to require that such further amount of such securities shall be deposited with him as in his judgment may thereafter be necessary to protect the members of such building and loan association, or the persons making periodical payments thereto. The notes, mortgages and securities so deposited with the auditor of state shall, with all interest and accumulations thereon, be held in trust by him for the purpose of fulfilling and carrying out all contracts made by such building and loan association with the members thereof, and with the persons making periodical payments thereto. [29 G. A., ch. 77, § 2.]

SEC. 1920-c. Approval—certificate. If the executive council approves the plan or method of business of any such building and loan association, it shall endorse its approval upon the statement of the resources and liabilities and plan of business presented to it, and such statement shall thereupon be filed in the office of the auditor of state, who shall issue a certificate to such building and loan association to transact business within the state of Iowa, if such association has deposited with him the mortgages and securities required by the provisions of section two (2) hereof. [29 G. A., ch. 77, § 3.]

SEC. 1920-d. Officers to give bonds—approval. Every officer of such building and loan association who signs or endorses checks or handles any of the funds or securities thereof, shall give such bond or fidelity insurance for the faithful performance of his duty in such sum as the auditor of state may require, and no such officer shall be deemed qualified to enter upon the duties of his office until his bond is approved by, and deposited with, the auditor of state. And any such bond may be increased or additional sureties required by the auditor of state whenever in his judgment it becomes necessary to protect the interest of the association or its members, or persons making periodical payments of money thereto. [29 G. A., ch. 77, § 4.]

SEC. 1920-e. Examination. The auditor of state may at any time he may see proper make, or cause to be made, an examination of any such building and loan association, or he may call upon it for a report of its condition upon any given day which has passed, as often as four times each year, which report shall contain the information hereinafter required. [29 G. A., ch. 77, § 5.]

SEC. 1920-f. Expense of examination. The expense of making such examination shall be paid by the building and loan association, and if made by the auditor in person he shall be paid his necessary expenses only; if made by an examiner designated by the auditor, he shall receive ten dollars (\$10) a day for the time employed by him and his necessary expenses. [29 G. A., ch. 77, § 6.]

SEC. 1920-g. Annual reports. On or before the first day of February of each year every such building and loan association shall file with the auditor of state its annual report in writing for the year ending on the thirty-first day of December preceding, giving a complete statement in detail of all of its receipts from all sources, and all disbursements made, during such year, arranged and itemized as may be required by the auditor of state. Such report shall also show the number of members or persons making periodical payments to such association, the number and amount of loans made to such persons, the interest received therefrom, the number and amounts of mortgages, contracts or other securities held by the association, the actual cash value of the real estate securing such mortgages or contracts, the salary paid to each of its officers during the preceding year, the assets and liabilities of the association at the end of the year, and any other matters which in the judgment of the auditor of state may be required to give him full information as to the business transacted by such building and loan association. [29 G. A., ch. 77, § 7.]

SEC. 1920-h. Failure or refusal to furnish reports. If any such building and loan association shall fail or refuse to furnish to the auditor of state the report required in the preceding section, the officers or persons conducting the business of such building and loan association shall forfeit the sum of twenty-five dollars (\$25) for each day that such report is withheld, and the auditor of state may maintain an action, jointly or severally, against them in the name of the state to recover such penalty, and the same shall be paid in to the state treasury when recovered by him. [29 G. A., ch. 77, § 8.]

SEC. 1920-i. Penalties. If any officer or agent of any such building and loan association, or any person conducting the business thereof, shall knowingly and wilfully swear falsely to any statement in regard to any matter in this act required to be made under oath, he shall be guilty of perjury and punished accordingly. And if any officer, agent or employe of any such association, or any person transacting the business thereof, shall issue, utter or offer to utter, any warrant, check, order, or promise to pay of such association, or shall sign, transfer, cancel or surrender any note, bond, draft, mortgage, or other evidence of indebtedness belonging to such association, or shall demand, collect or receive any money from any member or other person in the name of such association without being authorized so to do; or if any such officer, agent or employe of such association, or any person transacting the business thereof, shall embezzle, convert to his own use, or shall use or pledge for his own benefit or purpose, any moneys, securities, credits or other property belonging to the association, or shall knowingly solicit, transact, or attempt to transact any business for any such association which has not procured and does not hold the certificate of authority from the auditor of state to transact business in this state as provided herein; or shall knowingly make, or cause to be made, any false entries in the books of the association, or shall, with intent to deceive any person making an examination of such association, as herein provided, exhibit to the person making the examination any false entry, paper or statement, he shall be fined in a sum not exceeding ten thousand dollars (\$10,000.00), or imprisoned in the penitentiary not exceeding ten (10) years, or punished by both such fine and imprisonment. [29 G. A., ch. 77, § 9.]

SEC. 1920-j. Revocation of certificate—receiver. If any such building and loan association, holding a certificate of authority to transact business within this state issued by the auditor as herein provided, shall violate any of the provisions of this act, or shall fail to deposit with the auditor of

state such further amount of mortgages or securities as he may require under section two (2) hereof, the auditor of state shall at once revoke such certificate and notify the executive council of the revocation thereof; and under the direction of the executive council, application shall be made by the attorney-general to the proper court for the appointment of a receiver to wind up the affairs of the association; and in such proceedings the amount due from the borrowing members or persons making periodical payments upon contracts or mortgages given by them, shall be ascertained in the manner provided in section seven (7) of chapter sixty-nine (69) of the acts of the twenty-eighth general assembly; and the amounts owing upon such mortgages or contracts from members of the association or persons making periodical payments thereto, shall be treated and considered as due and payable within a reasonable time, to be fixed by the court after the appointment of a receiver. [29 G. A., ch. 77, § 10.]

CHAPTER 13-A.

OF THE REGULATION OF CERTAIN PERSONS, FIRMS, COMPANIES, PARTNERSHIPS, ASSOCIATIONS OR CORPORATIONS.

SECTION 1920-k. Terms defined. The term "association" when used in this act shall mean any person, firm, company, partnership, association or corporation, other than building and loan associations and insurance companies and associations, which issue stocks on the partial payment or installment plan. The term "issue" shall mean issue, sell, place, engage in or otherwise dispose of or handle. The term "stock" shall mean certificates, memberships, shares, bonds, contracts, debentures, stocks, tontine contracts, or other investment securities or agreements of any kind or character issued upon the partial payment or installment plan. [30 G. A., ch. 66, § 1.]

SEC. 1920-l. Certificate—how obtained. No association contemplated by this act shall issue any stock until it shall have procured from the auditor of state a certificate of authority authorizing it to engage in such business. To procure such certificate of authority it shall be necessary for such association to file with the auditor of state a statement, under oath, showing the name and location of such association, the name and postoffice address of its officers, the date of organization, and if incorporated a copy of its articles of incorporation, also, a copy of its by-laws or rules by which it is to be governed, the form of its certificates, stocks or contracts, all printed matter issued by it, together with a detailed statement of its financial condition and such other information concerning its affairs or plan of business as the auditor of state may require. The same shall be, by the auditor of state laid before the executive council for consideration. [30 G. A., ch. 66, § 2.]

SEC. 1920-m. Executive council to approve plan. If the executive council is satisfied that the business is not in violation of law or of public policy, and is safe, reliable and entitled to public confidence, and if it shall approve the form of certificate of stock or contract, it shall direct the auditor of state to issue to such association a certificate of authority authorizing it to transact business within this state until the first day of March next succeeding the date of such authorization. [30 G. A., ch. 66, § 3.]

SEC. 1920-n. Existing companies. Every such association at present transacting, within this state, the business contemplated by this act, shall

be subject to all the provisions hereof, and shall within sixty days from the taking effect of the same, comply with all of its requirements. [30 G. A., ch. 66, § 4.]

SEC. 1920-o. To report annually. During the month of January of each year, every association transacting the business contemplated by this act, shall file with the auditor of state a statement showing its condition on the 31st day of December preceding. Said statement shall be in such form as shall be prescribed by the auditor of state. If it appears from such statement that such association is doing a safe business and is solvent, the auditor of state may renew its certificate of authority authorizing it to transact business within the state until the first day of March of the following year. If at any time it shall appear that such association is doing an unsafe business or is insolvent the auditor of state may revoke its certificate of authority to authorizing [authorize] it to transact business within the state until the first day of March of the following year. If at any time it shall appear that such association is doing an unsafe business or is insolvent the auditor of state may revoke its certificate of authority to transact business and having revoked the certificate of authority of an association organized under the laws of this state, he shall report his action to the attorney-general who shall at once apply to the district court or a judge thereof for the appointment of a receiver to close up the affairs of such association, and an injunction may issue in the same proceeding enjoining and restraining the association from transacting business in this state. [30 G. A., ch. 66, § 5.]

SEC. 1920-p. Deposit of bonds or securities. Before any association shall be authorized to transact business contemplated by this chapter, it shall deposit with the auditor of state a bond approved by the executive council, guaranteeing the faithful performance of all contracts entered into by such association or securities of the kind designated in subdivisions one, two, three, four and five of section eighteen hundred and six of the code, as amended by chapter sixty-six (66), acts of the twenty-eighth general assembly, or such other securities as shall be approved by the executive council in the amount of twenty-five thousand dollars, which amount shall remain in possession of the auditor of state until the end of the calendar year in which the association shall first be authorized to transact business. At the end of such calendar year, such association shall deposit with the auditor of state securities of the kind above provided in an amount equal to all its liabilities to persons residing within this state and shall keep such deposit at all times equal to such liability; provided that at no time shall such deposit be reduced below twenty-five thousand dollars except at such time as such association shall be by law closing out its business and its liabilities shall have been reduced below twenty-five thousand dollars. [30 G. A., ch. 66, § 6.]

SEC. 1920-q. Unauthorized companies—penalty. Any member or representative of any association who shall attempt to issue or sell any stock as contemplated by this act or to transact any business whatsoever in the name of or on behalf of such association, not authorized to do business within this state, or which has failed or refused to comply with the provisions of this act, or has violated any of its provisions shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by imprisonment in the county jail not to exceed one year, or by a fine of not less than one hundred nor more than one thousand dollars or by both such fine and imprisonment in the discretion of the court. [30 G. A., ch. 66, § 7.]

SEC. 1920-r. Fee for annual certificate. Such association shall pay to the auditor of state for its certificate of authority to transact business, a

fee of twenty-five dollars, and for each annual renewal thereof at the time of filing the annual statement ten dollars, which fee shall be by the auditor of state turned into the state treasury as are other fees of his office. [30 G. A., ch. 66, § 8.]

SEC. 1920-s. Examination. Every such association doing business within this state, shall be subject to examination in the same manner as is provided for the examination of insurance companies and shall pay the same fees and costs therefor, and shall so far as is consistent with the plan of business, be subject to the same restrictions and regulations. Such examinations shall be full and complete and in making the same the auditor of state or examiner shall have full access to and may demand the production of all books, securities, papers, moneys, etc., of the association under examination, and may administer oaths, summon and compel the attendance and testimony of any persons connected with such association. If upon such examination, it shall appear that such association does not conduct its business in accordance with law, or if it permits forfeiture of payments by persons holding its stock, after three years from the issuance of said stock or provides for the payment of its expenses other than from earnings, or that any profits, advantage or compensation of any form or description is given to any member or investor over any other member or investor of the same class, or if beneficiaries are selected or determined or advantages given one over another by any form of chance, lottery or hazard, or if certificates of stock are by their terms or by any other provision to be redeemed in numerical order or by any arbitrary order or precedence, without reference the amount previously paid thereon by the holder thereof, or that the affairs are in an unsound condition, or if such association refuses such examination to be made, the auditor of state may revoke its certificate or [of] authority to do business in this state, and having revoked the certificate of authority of an association organized under the laws of this state, he shall report the same to the attorney-general, who shall proceed as provided in section five (5) hereof. [30 G. A., ch. 66, § 9.]

TITLE X.

OF INTERNAL IMPROVEMENTS.

CHAPTER 2.

OF LEVEES, DRAINS, DITCHES AND WATERCOURSES.

SECTION 1939. Supervisors to Locate.

The power of a board of supervisors to construct ditches and drains under these provisions is not restricted in terms or by necessary inference to territory outside of towns and cities. The presumption must be exercised that the board will have due consideration for the interests of the public within as well as without the limits of such municipal corporation. *Aldrich v. Paine*, 106-461.

SEC. 1940. Proceedings—bond—survey—notice. A petition signed by a majority of the persons resident in the county, owning land abutting upon such proposed improvement, shall be first filed in the office of the county auditor, setting forth the necessity for the same, the starting point, route and terminus, together with a bond, with sufficient sureties to be approved by him, conditioned to pay all costs and expenses incurred in case the supervisors refuse to grant the prayer of the petition. The auditor shall thereupon place a copy of the petition in the hands of the county surveyor or a competent engineer, who shall make a survey of the proposed improvement, and return a plat and profile thereof to the auditor; which return shall set forth a full and detailed description thereof, its availability, necessity and probable cost, with a description of each tract of land owned by different persons, through or abutting upon which the improvement is proposed to be located, how it will be affected thereby, and its situation and elevation as compared with that of adjoining lands, with such other facts as he may deem material. The auditor shall immediately thereafter cause notice in writing to be served on the owner of each tract of land, through or abutting upon which the proposed improvement is to be located, who is a resident of the county, of the pendency and prayer of said petition, and the session of the board of supervisors at which the same will be heard, which notice shall be served ten days prior to said session in the same manner that original notices are required to be served. In case any such owner is a non-resident of the county, such notice as to him shall be published, once each week, for two consecutive weeks in some newspaper published in the county, proof thereof being made by affidavits as in case of legal notices published in newspapers, which proof shall be filed with the board. [19 G. A., ch. 44, § 2; C., '73, § 1208.] [31 G. A., ch. 9, § 15.]

Under § 1208 of the Code of '73 which used the word "adjacent" in describing the owners who are required to petition for a ditch, held, the term applied to owners of land abutting on the improvement, and not the owners of all the land within the congressional subdivi-

sion through which it runs. *Wormley v. Board of Supervisors*, 108-232.

In a proceeding to enjoin the issuance of bonds for the construction of a ditch, the contractor is a necessary party. *Tod v. Crisman*, 123-693.

Constitutionality: The unconstitution-

ality of the provision for taxing lands in the vicinity of the ditch without notice to the owner thereof, renders the entire provision for assessment for such ditches invalid. *Smith v. Peterson*, 123-672.

The provisions of these sections do not contemplate notice to a landowner whose land does not abut upon the ditch that he may be assessed therefor, and as he is not afforded an opportunity for a hearing the statute is unconstitutional as to such owner. *Beebe v. Magoun*, 122-94.

A statute which provides for notice to the property owner at some stage of the proceedings, before the assessment is

made, is not open to constitutional objection simply because it does not provide for a new or additional notice of each successive step leading up to the assessment. *Ross v. Board of Supervisors*, 128-427.

The amendatory statute, 30 G. A., ch. 67, providing for notice in proceedings already instituted, is constitutional. *Ibid.*

No one is entitled to raise the objection of want of notice of the proceedings except the party entitled to notice. *Ibid.*

The landowner is not entitled to notice of the hearing as to the extent of the drainage district, and as to whether his land shall be included therein. *Ibid.*

SEC. 1941. Location—damage.

Even though the notice is not in the language of the statute, if it is not so defective that it can be said there is no notice, the action of the board in holding it to be sufficient cannot be collaterally assailed. *Oliver v. Monona County*, 117-43.

No express finding that the ditch is necessary or would conduce to the public health, convenience or welfare is required. A finding by the board that all the requirements of the law have been fully complied with is sufficient, there being no require-

ment that a finding as to the necessity for the ditch shall be made of record. *Ibid.*

The validity of the establishment of a ditch is not affected by the fact that claims for damages are not made and allowed before such location. The objection is not jurisdictional. *Ibid.*

A landowner who has made claim for damages which has been passed on by the board of supervisors cannot afterwards enjoin the prosecution of the work because the damages allowed are not sufficient. *Ibid.*

SEC. 1942. Claim for damages.

If in the construction of a county drain or ditch through the limits of a city or town injury will result to the streets or an additional burden of expense be cast upon the corporation, there would seem

to be no reason why damages might not be claimed by such corporation as well as by the individual owners through whose land the ditch extends. *Aldrich v. Paine*, 106-461.

SEC. 1944. Letting work—payment. The auditor shall cause notice to be given of the time and place of letting, the kind and approximate amount of work to be done on each section, and the time fixed for its completion, by publication, once each week, for four (4) consecutive weeks in some newspaper printed in said county, and shall let it upon each separate section to the lowest bidder therefor, who shall be required to execute a bond, with sufficient sureties, in an amount equal to ten per cent. of the estimated cost of the work so let, or deposit such amount in cash with the auditor, as security for the performance of his contract. The engineer in charge of the construction shall furnish the contractor monthly estimates of the amount of work done on each section, and upon the filing of the same with the auditor, he shall draw a warrant in favor of the contractor for eighty per cent. of the value of the work done, according to the estimate; and when said improvement is completed to the satisfaction of the engineer in charge, and so certified by him to the auditor, he shall draw a warrant in favor of said contractor upon the levee or drainage fund for the balance due, as provided in the following section. If any person to whom any portion of said work has been let shall fail to perform the same as, and in the time, specified in his contract, the cash deposited by him shall be forfeited to, or the penalty named in the bond may be recovered in an action thereon by, the county auditor, for the benefit of the levee or drainage district, on said contract, as liquidated damages, and it shall be relet by the auditor in the manner hereinbefore provided. [19 G. A., ch. 44, § 6; 18 G. A., ch. 85, § 8; 16 G. A., ch. 140, § 1; C., '73, § 1212.] [31 G. A., ch. 9, § 16.]

One who claims to be the lowest bidder cannot maintain an action of mandamus to compel the board to award the contract to him. *Vincent v. Ellis*, 116-609.

The statutory provision as to forfeiture of cash deposit and recovery of a penalty does not deprive the board of supervisors of their right to treat the whole contract

as forfeited on default of the contractor to perform, and institute new proceedings for the construction of a different ditch. The board is not bound under such circumstances to allow the county auditor to re-let the work under the former proceedings. *Brown v. Board of Supervisors*, 129-533.

SEC. 1946. Assessment of costs and damages. When any levee, ditch, drain, or change of direction of any water course shall have been located and established, as provided in this chapter, or when it shall be necessary to cause the same to be repaired or reopened, the auditor shall appoint three persons, one of whom shall be a competent civil engineer, and two who shall be resident freeholders of the county, not living within the township or townships where the improvement is or is to be located, and not interested therein or in a like question, nor related to any party whose land is affected thereby, who shall within twenty days after such appointment personally inspect and classify as "dry," "low," "wet," or "swamp" all the land benefited by the location and construction of the improvement, or the repairing or reopening of the same, and shall make an equitable apportionment of the cost, expenses, cost of construction, fees, and damages assessed for the construction of any such improvement, or of repairing or reopening the same, and make report thereof in writing to the board of supervisors and file the same with the county auditor who shall immediately thereafter fix a time for hearing objections thereto before the board of supervisors, and cause to be served upon the owner of each tract of land or lot described in said report as shown by the transfer books in the auditor's office notice in writing of the filing and pendency of said report, the amount of special assessment apportioned to such owner, the day set for hearing the same, and that all objections thereto must be made in writing and filed with the county auditor on or before noon of the day set for such hearing, which notice as to residents of the county shall be served not less than ten days prior to the day set for such hearing in the same manner that original notices are required to be served and as to non-residents of the county such notice shall be served by publishing the same one [once] each week for two consecutive weeks the last publication not less than ten days prior to the day set for hearing in some newspaper published in the county and by serving the same upon the person or persons in the actual occupancy of the property not less than ten days prior to the day set for such hearing. When the day set for hearing has arrived the board of supervisors shall proceed to hear and determine all objections made and filed to said report, and may increase, diminish, annul or affirm the apportionment made in said report or any part thereof as may appear to the board to be just and equitable which apportionment shall be assessed among the owners of the land along or in the vicinity of such improvement and to be benefited thereby, in proportion to the benefit to each of them, and levied upon the lands of the owners so benefited in said proportions, and collected in the same manner as other taxes are levied and collected for county purposes; which fund so collected shall be kept separate from other county funds, and shall be paid out only for purposes properly connected with the improvement, on the order of the county auditor, on claims properly certified by the engineer in charge of the improvement as in this chapter provided, or on the order of the board of supervisors. The engineer shall receive for each day's service, while so engaged, five dollars, and the other commissioners shall receive each two dollars per day, to be paid out of the funds so collected. In order to prevent or repair a break in any levee in time of high

water, any member of the board of supervisors may at once employ the necessary labor to repair the levee or prevent a break thereof, and the necessary and reasonable expense therefor shall be audited by the board of supervisors and paid from the levee fund. [21 G. A., ch. 139; 19 G. A., ch. 44, § 7; 16 G. A., ch. 140, § 4; C., '73, § 1214.] [29 G. A., ch. 78, § 1.] [30 G. A., ch. 67, § 1.]

[The amendment by the 30 G. A. ignored section 1946 as it appeared in the code supplement, but amended 1946 of the code. Section 1946 of the code was amended by the 29 G. A. by adding matter to the end of the section, and the amendment by the 30 G. A. has been shown as amending the section as it appears in the code supplement.]

These statutory provisions practically authorize the creation of a drainage district and the assessment of the expenses for the improvement upon all the property coming within the general benefit involved in the promotion of the public health, convenience and welfare. It is not the proximity of the parcels of land in question to the ditch or the benefit to the parcels from the construction thereof which is the basis of the assessment, but all the parcels within the drainage district are to be assessed uniformly with the expense in accordance with their general character. The owner is entitled to notice with reference to whether his land is included within the drainage district and this is sufficient to charge him with notice of the subsequent proceedings. *Oliver v. Monona County*, 117-43.

The funds derived from a special assessment for the construction of a ditch do not belong to the county. *Yockey v. Woodbury County*, 130-412.

Under this section, held that the entire assessment on the lands of an owner, some of which abutted upon the ditch, while others were in the vicinity thereof, was invalid for want of the provision for notice to the owner with reference to the proposed assessment on land in the vicinity. *Smith v. Peterson*, 123-672.

The act of 30 G. A., chap. 67, relating to special assessments for ditches, provides that when the report is made by the commissioners appointed to classify the benefited lands and apportion the expenses notice shall be served personally upon residents and upon non-residents by publication, and that upon such hearing the board shall determine all objections to the assessment, and may affirm or modify the apportionments, and this provision is made applicable to proceedings already instituted. It was competent for the legislature to thus provide for notice in existing proceedings. *Ross v. Board of Supervisors*, 128-427.

SEC. 1946-a. Proceedings now pending. That said section one thousand nine hundred and forty-six (1946) of the code as amended by section one (1) hereof shall be construed to apply to all proceedings now pending before boards of supervisors for the location and construction of levees, drains, ditches or water courses under the provisions of chapter two (2) title ten (X) of the code where the apportionment, assessment or levy of the cost of the improvement has not yet been made as well as to proceedings instituted hereafter. [30 G. A., ch. 67, § 2.]

SEC. 1946-b. Re-assessment and relevy. Where the assessment and levy on account of any ditch, drain or water course has been made by the board of supervisors of any county under the provisions of said section one thousand nine hundred and forty-six (1946) of the code without notice or legal notice to the owner of the land affected thereby and the whole or any part thereof remains unpaid, the board of supervisors shall have the authority to recall the assessment or levy thus made without notice and proceed anew as provided in section one (1) hereof to apportion and levy the cost of such improvement among the owners and upon the land benefited thereby, taking as a basis the original apportionment, and report of the commissioners upon which the board had theretofore acted, and the new assessment and levy made upon notice and hearing in such cases shall be certified by the county auditor to the county treasurer, re-entered upon the tax list and collected as other taxes for county purposes, and all payments made under the prior assessment, and levy shall be credited upon the new assessment and levy. [30 G. A., ch. 67, § 3.]

A taxpayer who may be subjected to the payment of a tax by reassessment cannot object to the tax on account of defects

which might thus be cured. *Thompson v. Mitchell*, 133-527.

SEC. 1946-c. Completion and payment of work already begun. When any levee, ditch, drain, water course or change of water course shall have been heretofore established by any of the boards of supervisors of this state and contract or contracts let therefor, and the improvement wholly or partly constructed or drainage bonds issued on account thereof and the proceedings or tax therefor have been or shall be for any cause found invalid and the board of supervisors has found or shall find that such improvement will be conducive to the public health, convenience or welfare, such board is authorized to provide for the completion of the work and the payment therefor, and for the payment of the work already done and of the drainage bonds issued and to that end shall recall the tax theretofore levied and shall reascertain the cost and expense of such improvement, and after notice and hearing as provided in this act shall assess and levy the same upon the lands benefited thereby, and the said board and the other county officers shall proceed as provided by section three (3) and the other provisions of this act. Such re-assessment and relevy of taxes shall be in proportion to and not in excess of benefits, and all taxes theretofore paid upon such improvement shall be credited as provided in section three (3) of this act. [30 G. A., ch. 67, § 4.]

SEC. 1946-d. Drainage bonds. Section one thousand nine hundred and fifty-three (1953) of the code shall be construed to apply to and authorize the issuance of drainage bonds in proceedings heretofore or hereafter instituted under section one thousand nine hundred and forty (1940) of the code. [30 G. A., ch. 67, § 5.]

SEC. 1946-e. Future levies. Such assessment shall fix the proportion for all future levies on account of such improvement or the repair or re-opening thereof, and may be levied in one year or apportioned among a series of years, and drainage bonds issued therefor as provided by section one thousand nine hundred and fifty-three (1953) of the code, and appeals may be taken as provided by section one thousand nine hundred and forty-seven (1947) of the code. [30 G. A., ch. 67, § 6.]

SEC. 1947. Appeals.

The provision of this section that it shall not be competent to show that the lands assessed were not benefited by the improvements pertains exclusively to the remedy, and is applicable, although the statutory provision in force when the tax was levied authorized the property owner to show that his property was not benefited by the improvements. *Allerton v. Monona County*, 111-560; *Oliver v. Monona County*, 117-43.

The landowner being given opportunity to appear before the board of supervisors and make objection that his land as reported by the commissioner is not in fact benefited by the improvement, is concluded by the finding of the board, and such provision is not unconstitutional. *Ross v. Board of Supervisors*, 128-427.

On an appeal to the district court from an order of the board of supervisors refusing to order the construction of a ditch on an application therefor there is no right to a jury trial. *In re Bradley*, 108-476.

The petitioners for the establishment of

a public ditch being required to contribute to the expense of establishing it, are entitled to notice of appeal from the award of damages taken by a claimant for such damages. *Henderson v. Calhoun County*, 129-119.

The board of supervisors has no authority to direct the dismissal of an appeal from its action in fixing the assessment upon lands. The county or board of supervisors if properly a party to the appeal in any sense is such party only in a nominal or representative capacity and the real parties in interest have the right to control the proceedings. *Temple v. Hamilton*, 112 N. W. 174.

The board is given the authority to pass upon the necessity of the improvement and determine its public character and fix the boundaries of the district, which power is legislative rather than judicial; the court should on appeal be reluctant to interfere with the exercise of discretion on the part of the board. *Temple v. Hamilton*, 112 N. W. 174.

SEC. 1948. Nuisance. Any ditch, drain or water course which is now or may hereafter be constructed so as to prevent the surplus and overflow waters from the adjacent land from entering the same, is hereby declared a nuisance, and the same may be abated as such; and the diverting, obstructing, impeding, or filling up of such ditches, drains, or water courses, or breaking down of such levees in any manner by any person, without legal authority, or obstructing or in any manner diverting any part of the site thereof to private use, is hereby declared a nuisance, criminally punishable as such. [21 G. A., ch. 139; 19 G. A., ch. 44, § 7; 16 G. A., ch. 140, § 4; C., '73, §§ 1214, 1216.] [29 G. A., ch. 78, § 2.]

SEC. 1951. Levees, ditches or drains in public highway—highway along levee. Levees, ditches, drains and embankments may be located and constructed within the limits of public highways, on either or both sides of and along the same, to be so built as not materially to interfere with the public travel thereon, by taxation and assessment under the provisions of this chapter, and, when constructed, shall be under the control of the board of supervisors of the county in which they are situated; and it shall have power to grant a right of way thereon to any railway that will maintain them while used by it, subject to any claim for damages against the company in any condemnation proceedings which shall be instituted, and the damages awarded, paid, or secured to be paid before possession shall be given, but the county shall not be required on account thereof or otherwise to keep up such improvements at its expense. The board of supervisors shall have power to establish public highways along and upon any levee built under the provisions of this chapter, provided that when so used the same shall be worked as other highways and so as to at all times maintain its condition as a levee. [20 G. A., ch. 186, § 1.] [29 G. A., ch. 78, § 3.]

SEC. 1952. Petition for drain—proceedings.

Where a petition is apparently sufficient as to the number of signers the action of the board of supervisors in entertaining jurisdiction of the proceeding cannot be collaterally assailed. *Oliver v. Monona County*, 117-43.

The essential facts which must be alleged and established before the improvement can be ordered, are, that the body or district of land is subject to overflow, or is too wet for cultivation, and that the public health, convenience or welfare will be promoted by the proposed work. The duty of hearing and determining this question is committed in the first instance to the board of supervisors, and until the truth of both of these propositions has been established to the satisfaction of such board, the order for the location and construction of the improvement cannot right-

fully be made. If the supervisors fail to find facts without which the order for the drain or ditch could not be made, they have no jurisdiction to proceed. *In re Bradley*, 117-472.

While it is required by Code § 1940 that the petitioners in an application for a ditch, to be constructed at the public expense, shall give a bond to pay all costs and expenses incurred in case the board of supervisors refuse to grant the prayer of the petition, nevertheless, in an appeal in such a proceeding the court may tax the costs against the successful party. *Ibid.*

A property owner who has knowledge of the proceedings and allows the public improvement to proceed without objection cannot afterwards question the validity of the tax on account of irregularity. *Thompson v. Mitchell*, 133-527.

SEC. 1968. Compensation. Any person or corporation who by machinery, such as engines or pumps, or by making drains or adit levels, or in any other way, shall rid any lead or zinc bearing mineral lands or lead or zinc mines of water, thereby enabling the miners and the owners of mineral interest in said lands to make them productive and available for mining purposes, shall receive one-tenth of all the lead and zinc mineral taken from said lands as compensation for said drainage. [C., '73, § 1229.] [31 G. A., ch. 82, § 1.]

SEC. 1969. Setting apart. The owners of the mineral interest in said lands, and persons mining upon and taking lead or zinc mineral from said

lands, shall jointly and severally set apart and deliver from time to time, when demanded, the said one-tenth part of the mineral taken from said lands to the person or corporation entitled thereto, and the owners of the mineral interest therein shall allow the party entitled to such compensation and his agents at all times to descend into and examine said mines, and to enter any building occupied for mining purposes upon any of said lands, and examine and weigh the mineral taken therefrom. [C., '73, § 1230.] [31 G. A., ch. 82, § 2.]

SEC. 1971. Notice to smelters. The person or corporation entitled to said drainage compensation may at any time leave with any smelter of lead or zinc mineral in this state a written notice, stating that said person or corporation claims of the persons named in said notice the amount to which said person or corporation may be entitled, which notice shall have the effect of notices in garnishment, and also authorize the said smelter to retain, for the use of the person entitled thereto, the one-tenth part of the mineral taken from said land and received from the person named in said notice. The payment or delivery of the one-tenth part of the mineral taken from any of said lands by any one of the persons whose duty it is hereby made to pay or deliver the same, shall discharge the parties liable jointly with him, except liability to contribute among themselves. [C., '73, § 1232.] [31 G. A., ch. 82, § 3.]

SEC. 1972. Right of way. Any person or corporation engaged as aforesaid in draining such mines and lead or zinc bearing mineral lands, when he or they shall find it necessary for the prosecution of their work, shall have the right of way upon, over or under the surface of such mineral lands, and the contiguous and neighboring lands, for the purpose of conveying the water from said mineral lands by troughs, pipes, ditches, water races or tunnels, and the right to construct and use shafts and airholes in and upon the same, doing as little injury as possible in making said improvements. [C., '73, § 1233.] [31 G. A., ch. 82, § 4.]

SEC. 1976. Repeal — proceedings. That section nineteen hundred seventy-six (1976) of the code be and the same is hereby repealed and the following enacted in lieu thereof:

“Proceedings as contemplated by the preceding section may be begun by filing with the county auditor a petition asking the board of supervisors to form a levee or a drainage district, for any one or all of the purposes specified in section nineteen hundred and seventy-five (1975) hereof. Said petition shall be signed by one or more owners of lands lying within the limits of such proposed district; the general limits of said district shall be given therein, and a plat of the proposed district shall be filed with said petition. There shall be filed with said petition a bond, with sureties approved by the county auditor, conditioned for the payment of all costs and expenses incurred, in case the board of supervisors shall refuse to grant the prayer or the petition. [31 G. A., ch. 83, § 1.]

SEC. 1977. Commission. At their next regular session held after the filing of such petition, or at a special session called for the purpose, the board of supervisors shall, if the foregoing provisions have been complied with, appoint a commission of three disinterested freeholders of the county, one of whom shall be, if practicable, a competent civil engineer or surveyor. This commission shall, after being duly sworn, proceed to examine the lands within such proposed district, lay out the work required, and make an estimate of the probable cost of the same. They shall make a full report to the board of supervisors, and may recommend that such district be formed as prayed, or that it be enlarged or diminished, as in their judgment will best subserve the general good and promote the general welfare. [26 G. A., ch. 46, § 3.] [31 G. A., ch. 83, § 2.]

SEC. 1979. Repeal—hearing. That section nineteen hundred and seventy-nine (1979) of the code be repealed and the following enacted in lieu thereof:

“At the time named, or at such other time to which the board of supervisors may adjourn the matter, they shall proceed with the hearing, at which any interested parties may appear, either in person or by counsel, and be heard, and may file written pleadings. The board shall hear and determine the matter, and if they determine against the formation of such district, they shall dismiss the proceedings at the cost of the petitioners. If they shall decide to form such levee or drainage district, they shall proceed to fix the boundaries of the same, and their finding shall be entered upon their records. The finding and the report of the commissioners shall be competent evidence at the hearing above provided for, but shall not be conclusive.” [31 G. A., ch. 83, § 3.]

SEC. 1981. Work carried on—land condemned. After entering the order as provided in section nineteen hundred and seventy-nine hereof, unless further proceedings are suspended as provided in section nineteen hundred and eighty hereof, the board of supervisors shall proceed and adopt such plan or system as in their judgment is proper and best under all the circumstances, and cause the work to be done, causing such ditches to be dug, channels opened, embankments erected, fills made, and such other work done as in their judgment will most efficiently promote the general good and the public welfare. They shall have power, in the manner now provided by law, chapter four of title ten, of this code, to condemn any land which they deem it necessary to take or use in the prosecution of such work, including any that may be required to aid the United States in completing such levee, the costs and expenses of which shall be paid out of the drainage fund pertaining to such district as hereinafter provided. In the doing of this work the board of supervisors shall have power to employ such help and assistance as they deem necessary, and to fix compensation for the same. All the work to be done which shall involve an estimated expenditure of five hundred dollars or over shall be let by contract, after advertising the same, once each week, for three weeks in some newspaper of general circulation published in the county, to the lowest bidder who shall furnish satisfactory security for the performance of the contract: *provided*, however, that the board of supervisors may reject all bids, and do the work themselves whenever in their judgment, the work can be so done at a substantial saving. [26 G. A., ch. 46, § 7.] [31 G. A., ch. 9, § 17.]

SEC. 1982. Repeal—costs assessed. That section nineteen hundred and eighty-two (1982) of the code be repealed and the following enacted in lieu thereof:

“If said district is established, the entire costs and expenses incurred under this chapter shall be assessed against and collected from the lands lying within such district, by the levy of a rate upon the assessable value of the land within such district, sufficient to raise the required sum, provided that where the proposed improvement is for drainage only the board may, in their discretion, classify the land within such district and graduate the tax thereon, as provided in chapter sixty-eight (68) of the laws of the thirtieth general assembly. When the board decides to make such classification, they shall proceed in the manner set forth in section twelve (12) of said chapter sixty-eight (68), and the commissioners shall each be allowed three dollars per day.” [31 G. A., ch. 83, § 4.]

SEC. 1984. Repeal—annual installments. That section nineteen hundred and eighty-four (1984) of the code be repealed and the following enacted in lieu thereof:

"If the proposed improvement is the maintenance of a levy, the amount collected in any one year shall not exceed [shall not exceed] fifty mills on the dollar of the assessment valuation, which said assessment shall be levied at a level rate on the assessable value of the said lands, easements and railroads within the district. If the amount necessary to pay for the improvement, under section nineteen hundred and eighty-two (1982) hereof, exceed said sum, it shall be levied and collected in annual installments. For all other improvements, the board shall levy a rate sufficient to pay for the same, and may, at their discretion, make the same payable in annual installments of ten or less." [31 G. A., ch. 83, § 5.] [32 G. A., ch. 93, § 1.]

SEC. 1985. Bonds. If the entire amount required under this chapter cannot be collected in one year, the board of supervisors of such county shall have the power to issue drainage bonds for all which cannot thus be provided for in one year, in substantially the manner and form as provided in section nineteen hundred and fifty-three, chapter two, title ten, of this code, such issue to be determined upon by them before the levy, and an amount sufficient to pay the interest on such bonds shall be estimated and included in the assessment. If the amount of money required for the improvement under the provisions of this chapter cannot be collected in one year, or if the board of supervisors in their discretion deem it advisable that the taxes shall be paid in installments, or in case it becomes necessary to expend an extraordinary sum for the preservation of the levee in case of an emergency, the board of supervisors of the county shall have the power to issue bonds for all which cannot thus be provided for in one year substantially [in] the manner and form as provided in section twenty-eight (28) of chapter sixty-eight (68) of the laws of the thirtieth general assembly and acts amendatory thereto, and all acts and proceedings in relation thereto shall conform therewith, except that bonds issued in anticipation of taxes for the maintenance of a levee shall not exceed five years' taxes and shall be due in six years from the date of issue. [26 G. A., ch. 46, § 11.] [32 G. A., ch. 93, § 3.]

SEC. 1985-a. Claim for repairs. Whenever a levee or drainage district is organized, the board or boards of supervisors, as the case may be, shall have power and authority to audit and allow claims for money and labor expended in the preservation of said levee prior to and since the organization of the said district; all sums so allowed to be payable from the levee or drainage fund. The said board or boards shall also have full power and authority to make an equitable adjustment of and credit for any taxes paid for repairing the levee where the same has been heretofore levied and collected in any manner by said board or boards of supervisors under any prior proceedings. [32 G. A., ch. 93, § 4.]

SEC. 1986. Cost of maintaining. The board of supervisors shall have the right and power to keep up and maintain any such levee, ditches, drains, or system of drainage, either in whole or in part, as may in their judgment be required, and to levy the expense thereof upon the real estate within such drainage district as herein provided for, and collect and expend the same: *provided*, however, that no such work which shall impose a tax exceeding fifty mills on the dollar on the assessable value of the lands within the district shall be authorized by them, unless the same is first petitioned for and authorized in substantially the manner required by this chapter for the inauguration of new work. [26 G. A., ch. 46, § 12.] [31 G. A., ch. 83, § 6.] [32 G. A., ch. 93, § 2.]

CHAPTER 2-A.

OF LEVEES, DITCHES, DRAINS AND WATER COURSES.

SECTION 1989-a1. Board of supervisors to establish drainage district. The board of supervisors of any county shall have jurisdiction, power and authority at any regular, special or adjourned session, to establish a drainage district or districts, and to locate and establish levees, and cause to be constructed as hereinafter provided any levee, ditch, drain or water course, or to straighten, widen, deepen or change any natural water course, in such county, whenever the same will be of public utility or conducive to the public health, convenience or welfare, and the drainage of surface waters from agricultural lands shall be considered a public benefit and conducive to the public health, convenience, utility and welfare. [30 G. A., ch. 68, § 1.]

By the term, agricultural lands, which is used in the provision for special assessments for public ditches, the legislature meant to designate generally those various and well-known bodies of land lying within the state which, owing to location and

surface conditions, habitually collect and retain surface waters to such an extent as to presently unfit them for agricultural purposes. *Sisson v. Board of Supervisors*, 128-442.

SEC. 1989-a2. Proceedings—bond—survey. Whenever a petition signed by one or more of the landowners whose lands will be affected by, or assessed for the expenses of, the proposed improvement, shall be filed in the office of the county auditor setting forth that any body or district of land in the county, described by metes and bounds, or otherwise, so as to convey any [an] intelligible description of such lands, is subject to overflow or too wet for cultivation, and that the public benefit or utility, or the public health, convenience of [or] welfare will be promoted by draining, ditching, tiling or leveeing the same, or by changing a natural water course, and setting forth therein the starting point, route and terminus and lateral branches, if necessary, of the proposed improvement, and there is filed therewith a bond, in amount and with sureties to be approved by the county auditor and conditioned for the payment of all costs and expenses incurred in the proceedings in case the supervisors do not grant the prayer of said petition, the board shall at its first session thereafter, regular, special or adjourned, appoint a disinterested and competent engineer and place a copy of the petition in his hands and he shall proceed to examine the lands described in said petition and any other lands which would be benefited by said improvement or necessary in the carrying out of said improvement, and survey and locate such drain or drains, ditch or ditches, improvement or improvements, as may be practicable and feasible to carry out the purposes of the petition and which will be of public benefit or utility or conducive to public health, convenience or welfare. He shall make return of his proceedings to the county auditor, which returns shall set forth the starting point, the route, the terminus or termini of the said ditch or ditches, drain or drains, or other improvements, together with a plat and profile showing the ditches, drains or other improvements, and the course and length of the drain or drains through each tract of land and the elevation of all lakes, ponds and deep depressions in said district, and the boundary of the proposed district, and the description of each tract of land therein and names of the owners thereof as shown by the transfer books in the auditor's office, together with the probable cost, and such other facts and recommendations as he may deem material. The board of supervisors may at any time recall the appointment of any engineer made under the provisions of this act, if deemed advisable to do so, and select another to act in his

place. That the ditches or drains herein provided for shall be surveyed and located along the general course of the natural streams and water courses or in the general course of natural drainage of the lands of said district, having due regard for straightening and shortening of such natural streams, water courses and course of natural drainage. Whenever any such ditch or drain crosses any railroad right of way it shall be located at the place of the natural water way across such right of way unless said railroad company shall have provided another place in the construction of the road bed for the flow of the water; and if located at the place provided by the railroad company, such company shall be estopped from afterwards objecting to such location on the ground that it is not at the place of the natural water way. [30 G. A., ch. 68, § 2.] [31 G. A., ch. 84, § 1.] [31 G. A., ch. 85, § 1.] [32 G. A., ch. 94, § 1.] [32 G. A., ch. 95, § 1.]

SEC. 1989-a3. Notice of hearing—approval of plan—fees and mileage for serving notice. Upon the filing of the return of the engineer, if the same recommends the establishment of the levee or drainage district, the board of supervisors shall then examine the return of the engineer, and if the plan seems to be expedient and meets the approval of the board of supervisors, they shall direct the auditor to cause a notice to be given, as hereinafter provided. But if it does not appear to be expedient and is not approved, the board of supervisors are hereby authorized to direct said engineer, or another engineer selected by them, to report another plan. When the plan, if any, shall have been finally adopted by the board of supervisors, they shall order the auditor immediately thereafter to cause notice in writing to be served upon the owner of each tract of land or lot within the proposed levee or drainage district, as shown by the transfer books of the auditor's office, and also upon the person in actual occupancy of any lands or lots, and upon each lien holder or incumbrancer of any land through which or abutting upon which the proposed improvement extends as shown by the county records, of the pendency and prayer of said petition, the favorable report thereon by the engineer, the day set for hearing the same before the board of supervisors and all claims for damages must be filed in the auditor's office not less than five days before the day set for hearing upon the petition, which notice, as to residence as to the county, shall be served not less than twenty days prior to the time set for such hearing, in the manner that original notices are required to be served. Provided, however, no notice shall be served by the auditor upon any of the persons hereinbefore described who shall file with said auditor a statement in writing signed by said party entering his appearance at said hearing and waiving any additional notice. The officer or person serving said notice shall receive five cents per mile for the distance actually traveled and not exceeding five dollars per day of eight hours for making said services. In case any such owner, lien holder or incumbrancer is a non-resident of the county, such notice as to him shall be published once each week for two consecutive weeks in some newspaper of general circulation published in the county, the last of which publications shall be not less than twenty days prior to the day set for hearing upon the petition proof of such service to be made by affidavit of the publisher and filed with the county auditor. If at the date set for hearing before the board of supervisors, it should appear that any person entitled to notice, as provided in this section, should not have been served with notice for the time, or in the manner, as provided herein, the board may postpone said hearing and set another time for the same, and notice of such day of hearing may be served on such omitted parties in the manner and for the same length of time, as provided for in this section, and by fixing said new day for hearing and by adjourning said proceedings to said time, the said board of supervisors shall not be held to

have lost jurisdiction of the subject matter of said proceeding, nor of any parties so previously served with notice. [30 G. A., ch. 68, § 3.] [31 G. A., ch. 85, § 2.] [32 G. A., ch. 94, § 2.]

[Section 2, chapter 94, 32 G. A., amends section 3, chapter 68, 30 G. A., by inserting matter after the word "served" in line 15. This section was amended by section 2, chapter 85, 31 G. A., and after such amendment the word "served" appeared in line 22, where change has been made.]

SEC. 1989-a4. Claims for damages. Any person claiming damages as compensation for or on account of the construction of such improvement shall file such claim in the office of the county auditor at least five days prior to the day on which the petition has been set for hearing, and on failure to file such claim at the time specified, shall be held to have waived his rights thereto. [30 G. A., ch. 68, § 4.]

SEC. 1989-a5. Location—damages. The board of supervisors at the session set for the hearing on said petition, which session may be regular, special or adjourned, shall thereupon proceed to hear and determine the sufficiency of the petition in form and manner [matter], which petition may be amended as to form and substance at any time before final action thereon, and, if deemed necessary, the board may view the premises and if they shall find that such levee or drainage districts would not be for the public benefit or utility nor conducive to the public health, convenience or welfare, they shall dismiss the proceedings; but, if they shall find such improvement conducive to the public health, convenience or welfare or to the public benefit or utility and no claim shall have been filed for damages as provided in section four hereof, they may if deemed advisable locate and establish the same in accordance with the recommendations of the engineer, or they may refuse to establish the same as they may deem best; and at said hearing, the board may order the said engineer or a new engineer appointed by them if deemed advisable, to make further examination and report to said board as to said proposed improvement, and if they determine that further examination and report shall be made, or if any claims have been filed for damages, as provided in section four hereof, then the board of supervisors shall proceed no further than to determine the necessity of the levee or drainage districts and further proceedings shall be continued to an adjourned, regular or special session, the date of which shall be fixed at the time of the adjournment; and the county auditor shall appoint three appraisers to assess such damages who shall be disinterested freeholders of the county and not related to any party interested in the proposed improvement nor themselves interested in a like improvement; and the engineer appointed by the board of supervisors shall accompany said appraisers and furnish such information as may be called for by the appraisers concerning the survey of said improvement. [30 G. A., ch. 68, § 5.] [31 G. A., ch. 84, § 2.] [31 G. A., ch. 85, § 3.]

The authority to pass upon the necessity of the improvement, determine its public character and fix the boundaries of the district, is legislative rather than judicial in its nature and is intrusted, primarily at least, to the board of supervisors. The court should on appeal be very reluctant to interfere with the action of the board

and should set aside its order on the ground that the ditch is not a work of public character or its cost a greater burden than the land benefited should bear only where the evidence is so clear as to render that conclusion unavoidable. *Temple v. Hamilton*, 112 N. W. 174.

SEC. 1989-a6. Assessment of damages—appeal. The appraisers appointed to assess damages shall proceed to view the premises and determine and fix the amount of damages to which each claimant is entitled and shall, at least five days before the date fixed by the board to hear and determine the same, file with the county auditor reports in writing showing the

amount of damages sustained by each claimant. Should the report not be filed in time or should any good cause for delay exist the board may postpone the time of final action on the subject and, if necessary, the auditor may appoint other appraisers. When the time for final action shall have arrived, and after the filing of the report of the appraisers, said board shall consider the amount of damages awarded in their final determination in regard to establishing such levee or drainage district, and if in their opinion the cost of construction and the amount of damages awarded is not excessive and a greater burden than should be properly borne by the land benefited by the improvement, they shall locate and establish the same, and they shall thereupon appoint said engineer, or if deemed advisable, may appoint a new engineer as a commissioner, who shall make a permanent survey of said ditch as so located, showing the levels and elevations of each forty acre tract of land and shall file a report of the same with the county auditor together with a plat and profile thereof and shall thereupon proceed to determine the amount of damages sustained by each claimant, and may hear evidence in respect thereto and may increase or diminish the amount awarded in respect thereto, and any party aggrieved may appeal from the finding of the board in establishing or refusing to establish the improvement district or from its finding in the allowance of damages to the district court by filing notice with the county auditor at any time within ten days after such finding, at the same time filing a bond with the county auditor, approved by him, and conditioned to pay all costs and expenses of the appeal unless the finding of the district court shall be more favorable to the appellant or appellants than the finding of the board, which appeal shall be tried in the district court as an ordinary proceeding, except that when the appeal is from the order of the board in establishing or refusing to establish the levee or drainage district, it shall be tried in equity and the appearance term shall be the trial term.

If the appeal is from the amount of damages allowed, the amount ascertained in the district court shall be entered of record, but no judgment shall be rendered therefor. The amount thus ascertained shall be certified by the clerk of said court to the board of supervisors, who shall thereafter proceed as if such amount had been by it allowed the claimant as damages. If the appeal is from the action of the board in establishing or refusing to establish said drainage district, the court shall enter such order as may be proper in the premises, and the clerk of said court shall certify the same to the board of supervisors, who shall proceed thereafter in said matter in accordance with the order of the court. How the costs shall be distributed among the litigants and against whom the same shall be taxed shall rest in the discretion of the trial court. [30 G. A., ch. 68, § 6.] [31 G. A., ch. 85, § 4.] [32 G. A., ch. 94, § 3.]

The county cannot appeal from the action of the district court in setting aside an order of the board of supervisors for the reassessment of the expenses of constructing the ditch. *Yockey v. Woodbury County*, 130-412.

The contractor who is entitled to be paid out of the funds collected by the assessment may appeal, as he has an interest in such fund. *Ibid.*

SEC. 1989-a7. Damages, by whom paid—engineer. The amount of damages finally determined by the board in favor of any claimant or claimants shall be required to be paid in the first instance by the parties benefited by the said levee or drainage district, or secured to be paid upon such terms and conditions as the county auditor may deem just and proper, and after such damages shall have been paid or secured as aforesaid, the board shall divide said improvement into suitable sections, numbering the same con-

secutively from the source or beginning of the improvement downward towards its outlet and prescribe the time within which the improvement shall be completed and appoint a competent engineer to have charge of the work of construction thereof, who shall be required before entering upon the work to give a bond to the county for the use and benefit of the levee or drainage district to be approved by the auditor in such sum as the board may fix, conditioned for the faithful discharge of his duties. [30 G. A., ch. 68, § 7.]

The provision that the damages are to be secured to be paid upon such terms and conditions as the county auditor may deem just and proper does not render the statute unconstitutional. *Sisson v. Board of Supervisors*, 128-442.

SEC. 1989-a8. Letting work. The board shall cause notice to be given by publication, once each week, for four consecutive weeks in some newspaper published in the county wherein such improvement is located and such additional publication elsewhere as they may direct, of the time and place of letting the work of construction of said improvement, and in such notice they shall specify the approximate amount of work to be done in each section and the time fixed for the commencement and completion thereof and they shall award contract or contracts for each section of the work to the lowest responsible bidder or bidders therefor, or to the lowest responsible bidder considering the same as a whole, exercising their own discretion as to letting said work as a whole or in sections and reserving the right to reject any and all bids and re-advertise the letting of the work. Each person bidding for such work shall deposit in cash or certified check a sum equal to ten per centum of the amount of the bid, not in any event however to exceed ten thousand dollars, said deposit to be returned to him if his bid is not successful, and if successful to be retained as a guarantee only of his good faith in entering on said contract. The successful bidder shall be required to execute a bond with sufficient sureties in favor of the county for the use and benefit of the levee or drainage district in an amount equal to twenty-five per centum of the estimated cost of the work so let, or he may deposit such amount in cash with the auditor as security for the performance of his contract and upon the execution of such bond, or the making of such deposit, the deposit originally made with his bid shall be returned to him. [30 G. A., ch. 68, § 8.] [31 G. A., ch. 9, § 30.] [31 G. A., ch. 85, § 5.]

SEC. 1989-a9. Payment. The engineer in charge of the construction shall furnish the contractor monthly estimates of the amount of work done on each section and upon filing the same with the auditor, he shall draw a warrant in favor of such contractor, or deliver to him improvement certificates, as the case may be, for eighty per centum of the value of the work done according to the estimate, and when said improvement is completed to the satisfaction of the engineer in charge thereof and so certified by him to the board and approved by it, the auditor shall draw a warrant in favor of said contractor upon the levee or drainage fund, or deliver to him improvement certificates, as the case may be, for the balance due. [30 G. A., ch. 68, § 9.]

SEC. 1989-a10. Failure to perform work—penalty. If any person to whom any portion of said work shall have been let shall fail to perform the same according to the terms specified in his contract, then the cash deposited by him shall be forfeited to the county, or recovery may be had in an action on the bond by the county, for the benefit of the levee or drainage district, for the damages sustained and the work shall be relet by the board in the manner hereinbefore provided. [30 G. A., ch. 68, § 10.]

SEC. 1989-a11. Changes in dimensions. If, after said contract shall have been let and the work begun, it shall become apparent to the engineer in charge that the dimensions of the levee, ditch or drain should be enlarged, deepened or otherwise changed for the better service thereof of the lands benefited, then the engineer shall report such fact to the supervisors, explaining to them the necessity for such change, and the board may by resolution authorize such change in the dimensions of said improvement as the engineer shall recommend, provided that all persons whose lands shall be taken or who may be damaged by the said change, shall first have been given like notices and like proceedings had as hereinbefore provided for the establishment of the levee or drainage district. [30 G. A., ch. 68, § 11.] [32 G. A., ch. 94, § 4.]

SEC. 1989-a12. Assessment of costs and damages. When the levee or drainage district or other improvement herein provided for shall have been located and established as provided for in this act, or when it shall be necessary to cause the same to be repaired, enlarged, reopened or cleared from any obstruction therein, unless such repairs, reopening or clearing of obstructions can be paid for as hereinafter provided, the board shall appoint three commissioners, one of whom shall be a competent civil engineer and two of whom shall be resident freeholders of the county, not living within the levee or drainage district and not interested therein or in a like question, nor related to any party whose land is affected thereby; and they shall within twenty days after such appointment personally inspect and classify all the lands benefited by the location and construction of such levee or drainage district, or the repairing or reopening of the same, in tracts of forty acres or less according to the legal or recognized subdivisions in a graduated scale of benefits, to be numbered according to the benefit to be received by the proposed improvement; and they shall make an equitable apportionment of the costs, expenses, costs of construction, fees and damages assessed for the construction of any such improvement, or the repairing or reopening of the same, and make report thereof in writing to the board of supervisors. In making the said estimate the lands receiving the greatest benefit shall be marked on a scale of one hundred and those benefited in a less degree shall be marked with such percentage of one hundred as the benefit received bears in proportion thereto. This classification when finally established shall remain as a basis for all future assessments connected with the objects of said levee or drainage district, unless the board, for good cause, shall authorize a revision thereof. In the report of the appraisers so appointed, they shall specify each tract of land by proper description and the ownership thereof as the same appears on the transfer books in the auditor's office, and the auditor shall cause notice to be served upon each person whose name appears as owner and also upon the person or persons in actual occupancy of any such land in the time and manner provided for the establishment of a levee or drainage district, which notice shall state the amount of special assessments apportioned to such owner, upon each tract or lot, the day set for hearing the same before the board of supervisors and that all objections thereto must be made in writing and filed with the county auditor on or before noon of the day set for such hearing. When the day set for hearing shall have arrived, the board of supervisors shall proceed to hear and determine all objections made and filed to said report and may increase, diminish, annul or affirm the apportionment made in said report or in any part thereof as may appear to the board to be just and equitable; but in no case shall it be competent to show that the lands assessed would not be benefited by the improvement, and when such hearing shall have been had the board shall assess such appor-

tionment so fixed by it upon the lands within such levee or drainage district. If the first assessment made by the board of supervisors for the original cost or for repairs of any improvement as provided in this act is insufficient, the board may make an additional assessment and levy in the same ratio as the first for either purpose. [30 G. A., ch. 68, § 12.]

The statutory provision for notice in proceedings for the assessment of property on account of the benefits derived from the construction of public ditches is not open to the constitutional objection that it authorizes the levying of special

assessments upon property in an amount greater than the benefit received, as provision is made therein for the determination of such benefits as a limitation upon the assessment. *Sisson v. Board of Supervisors*, 128-442.

SEC. 1989-a13. Levy and collection of tax. In estimating the benefits as to the lands not traversed by said improvement they shall not consider what benefits such lands will receive after some other improvements shall have been constructed, but only the benefits which will be received by reason of the construction of the improvement in question as it affords an outlet for the drainage of such lands. Said tax shall be levied upon the lands of the owners so benefited in the ratio aforesaid and collected in the same manner as other taxes for county purposes, and the funds so collected shall be kept as a separate fund and shall be paid out only for purposes properly connected with such improvement on the order of the board of supervisors. [30 G. A., ch. 68, § 13.]

SEC. 1989-a14. Appeal — "Drainage Record" — employment of counsel. An appeal may be taken to the district court from the order of the board fixing the assessment of benefits upon the lands in the same manner and time as herein provided for appeals from the assessment of damages. The appeal herein provided for shall be tried in the district court as an action in equity and the appearance term shall be the trial term; and when several appeals are taken and pending in the district court by land owners of the same drainage district whose lands have been assessed by the board, the court may, in its discretion, order the consolidation of such cases, and try the same as one cause of action. When any appeal is taken from any order of the board made in any drainage proceeding coming before it for action, it shall be the duty of the board to employ counsel to represent the interests of the drainage district affected by said appeal on the trial thereof in the appellate courts and the expense thereof shall be paid out of the drainage fund of such district. The board shall provide a book to be known as the "Drainage Record" and the county auditor shall keep a full and complete record therein of all proceedings in each case and upon an appeal being taken shall make a full and complete transcript thereof and transmit the same to the clerk of the district court on or before the first day of the term to which the appeal shall be taken. [30 G. A., ch. 68, § 14.] [32 G. A., ch. 95, § 2.]

SEC. 1989-a15. Nuisance. Any ditch, drain or water course which is now or may hereafter be constructed so as to prevent the surface and overflow waters from the adjacent lands from entering the same is hereby declared a nuisance and may be abated as such; and any person or corporation diverting, obstructing, impeding or filling up any such ditch, drain or water course or breaking down any levee established under the provisions of this act without legal authority, shall be deemed guilty of a nuisance and criminally punished as such. [30 G. A., ch. 68, § 15.]

SEC. 1989-a16. Subsequent proceedings. In any proceedings heretofore or hereafter had for the establishment of a ditch, drain, levee or the changing of a natural water course, or the establishment of a levee or drainage district where an engineer has been appointed and has made a complete

survey, return and plat thereof and for any reason the improvement has been abandoned and the proceedings dismissed and afterwards proceedings are instituted for the establishment of a levee or drainage district, or the changing [of] a natural water course, for the benefit or reclamation of the same territory surveyed in said former proceedings a part thereof, or the same with territory additional thereto, the engineer shall use the return, plat and profile made in said former proceedings, or so much thereof, as may be applicable. [30 G. A., ch. 68, § 16.]

Where proceedings with reference to a public ditch were abandoned at the instance of the contractor, on account of doubt as to the constitutionality of the statute under which they were instituted,

held that he was not entitled to do the work under new proceedings involving the construction of a ditch of a different character. *Brown v. Board of Supervisors*, 129-533.

SEC. 1989-a17. Relevy. Where proceedings have been had for the establishment of a ditch, drain, levee, change of natural water course or the establishment of a drainage district under the law as heretofore existing and such improvement has been established and constructed and taxes levied upon the land benefited thereby, or upon any portion thereof for the cost of such improvement, and where the levy so made cannot for any reason be enforced, the board shall proceed as to all lands benefited by said improvement in the same manner as if the appraisalment and apportionment of benefits had never been made; and they shall proceed in the manner hereinbefore provided, using as a basis the entire cost of such improvement, and in taxing up said benefits account shall be taken of the amount of tax, if any, that has been paid by those benefited and credit therefor shall be given accordingly. [30 G. A., ch. 68, § 17.]

SEC. 1989-a18. Establishment and construction across railroad right of way. That sections eighteen (18) and nineteen (19) of said chapter be amended to read as follows:

"Whenever the board of supervisors shall have established any levee, or drainage district, or change of any natural water course and the levee, ditch, drain or water course as surveyed and located crosses the right of way of any railroad company, the county auditor shall immediately cause to be served upon such railroad company, in the manner provided for the service of original notices, a notice in writing stating the nature of the improvement to be constructed, the place where it will cross the right of way of such company, and the full requirements for its complete construction across such right of way as shown by the plans, specifications, plat and profile of the engineer appointed by the board, and directing such company to construct such improvement according to said plans and specifications at the place designated, across its right of way, and to build and construct or re-build and re-construct the necessary culvert or bridge where any ditch, drain or water course crosses its right of way, so as not to obstruct, impede or interfere with the free flow of the water therein, within thirty days from the time of the service of such notice upon it; and upon receiving said notice it shall be the duty of such railroad company to construct the improvement across its right of way according to the plans and specifications furnished in said notice and to build and construct or re-build and re-construct the necessary culvert or bridge above mentioned and complete the same within the time specified in said notice; if such railroad company shall fail, neglect or refuse to do so within the time fixed in said notice the auditor shall cause the same to be done under the supervision of the engineer in charge of the improvement and such railroad company shall be liable for the cost thereof to be collected by the county in any court having jurisdiction; and the cost of constructing the improvement across the right

of way of such company, not including the cost of building and constructing or re-building and re-constructing any necessary culvert or bridge, shall be considered as an element of such company's damages by the appraisers thereof; and the cost of building and constructing or re-building and re-constructing any necessary culvert or bridge shall be borne by such railroad company without reimbursement therefor. The commissioners to assess benefits shall fix and determine the benefits to the property of the railroad company within the levee or drainage district and make return thereof with their regular return. Such special assessment shall be a debt due personally from the railroad company, and unless the same is paid by the railroad company as special assessment, it may be collected in the name of the county in any court having jurisdiction." [30 G. A., ch. 68, §§ 18, 19.] [32 G. A., ch. 95, § 3.]

SEC. 1989-a19. Construction across highway. Where the board of supervisors shall have established any levee, drainage district or change of any natural water course, and when such levee, ditch, drain or change of any natural water course crosses any public highway, the actual cost of constructing the same across such highway shall be paid by the township trustees from the road fund of such township; and whenever the making of such improvement across any highway necessitates the building of a bridge over the same, the board of supervisors shall build and construct the same and pay all costs and expenses thereof out of the county bridge fund. Whenever any highway within the levee or drainage district will be beneficially affected by the construction of any improvement or improvements in such district, it shall be the duty of the commissioners appointed to classify and assess benefits to determine and return in their report the amount of the benefit to such highway, and notice shall be served upon the clerk of the township in which said highway is located as provided in case of an individual property owner. At the time fixed for hearing upon such report the board of supervisors shall fix and determine the amount to be apportioned to the road district on account of such benefit; and the amount so fixed shall be paid to the county for the use and benefit of the levee or drainage district, from the road fund of such township or from the county road fund, or partly from each of said funds as the board may determine. [30 G. A., ch. 68, § 20.]

SEC. 1989-a20. Construction on or along highway. Whenever a levee or drainage district shall have been established by the board and it shall become necessary or desirable that the levee, ditch, drain or improvement should be located and constructed within the limits of any public highway, on either or both sides and along the same, it shall be so built as not materially to interfere with the public travel thereon; and the board of supervisors shall have power and authority to lay out and establish public highways along and upon any levee or embankment along any ditch or drain built under the provisions of this act, provided that when so established the same shall be worked as other highways and so as not to impair the levee, ditch or drain. [30 G. A., ch. 68, § 21.]

SEC. 1989-a21. Control—repairs. Whenever any levee or drainage district shall have been established and the improvement constructed as in this act provided, the same shall at all times be under the control and supervision of the board of supervisors and it shall be the duty of the board to keep the same in repair and for that purpose they may cause the same to be enlarged, reopened, deepened, widened, straightened or lengthened for a better outlet, and they may change or enlarge the same or cause all or any part thereof to be converted into a closed drain when considered for the best interests of the public rights affected thereby. The cost of such re-

pairs or change shall be paid by the board from the drainage fund of said levee or drainage district, or by assessing and levying the cost of such change or repair upon the lands in the same proportion that the original expenses and cost of construction were levied and assessed, except where additional right of way is required or additional lands affected thereby, in either of which cases the board shall proceed as hereinbefore provided; provided, however, that if the repair is made necessary by the act or negligence of the owner of any land through which such improvement is constructed or by the act, or the negligence of his agent or employe, or if the same is filled and obstructed by the cattle, hogs or other stock of such owner, employe or agent, then the cost thereof shall be assessed and levied against the lands of such owner alone. [30 G. A., ch. 68, § 22.]

SEC. 1989-a22. Outlet for lateral drains. The owner of any land, lot or premises that have been assessed for the payment of the cost of the location and construction of any ditch, drain or water course as hereinbefore provided, shall have the right to use the ditch, drain or water course as an outlet for lateral drains from said land, lot or premises. [30 G. A., ch. 68, § 23.]

SEC. 1989-a23. Sub-drainage districts. If any person who owns land within the drainage district which has been assessed for benefits and which is separated from the ditch, drain or water course for which it has been assessed, by the land of another or others, shall desire to ditch or drain his said land across the land of such other or others into such ditch, drain or water course and shall be unable to agree with such other or others on the terms and conditions on which he may enter upon their lands and construct such drain or ditch, he may proceed in the manner in this section provided, and the ditch or drain which he shall construct or cause to be constructed shall be considered to be conducive to the public health, welfare, convenience and utility to promote which said drainage district was established. He may file his petition with the county auditor asking the board to establish a sub-district within the limits of the original district for the purpose of securing more complete drainage, describing the lands to be affected thereby by metes and bounds or otherwise so as to convey an intelligible description of such lands; and the bond and all other proceedings shall be the same as herein provided for the establishment, formation and construction of original districts and improvement thereof, including the assessment of damages and the assessment of benefits and when established and constructed, it shall be and become a part of the drainage system of such drainage district and be under the control and supervision of the board of supervisors. [30 G. A., ch. 68, § 24.]

SEC. 1989-a24. Enlargement of water course or stream. When two or more districts shall have their outlet or discharge into the same natural water course or stream and it shall become necessary to deepen or enlarge said natural water course or stream, each district shall be assessed for the cost of such work in the same ratio to such total cost as the discharge of waters of such district bears to the combined discharge of waters of the several districts emptying into said natural water course or stream; but no district shall be liable to contribute for any improvement or costs and expenses incurred in improving said natural water course or stream above the point of discharge of the waters of such district into the same. [30 G. A., ch. 68, § 25.]

SEC. 1989-a25. New levee or drainage districts. If any levee, drainage district or improvement heretofore established, either by legal proceedings or by private parties, or which may hereafter be established, shall prove insufficient to protect or drain all of the lands necessarily tributary

thereto, the board of supervisors, upon petition therefor as for the establishment of an original levee or drainage district, shall have the power and authority to establish a new levee or drainage district covering and including such old district or improvement, together with any additional lands deemed necessary; and whenever a new district shall be established as contemplated in this section and the new improvement shall extend into or along the former improvement, the commissioners of classification and benefits shall take into consideration the value of such old improvement in the construction of the new improvement and credit the same to the parties owning the old improvement as their interests may appear. [30 G. A., ch. 68, § 26.] [31 G. A., ch. 85, § 6.]

SEC. 1989-a26. How paid—improvement certificates. The special assessment for benefits made by the commissioners appointed for that purpose, as corrected and approved by the board of supervisors, shall be levied at one time by the board against the property so benefited, and when levied and certified shall be payable at the office of the county treasurer. If the owner of any parcel of land, lot or premises against which any such levy shall have been made and certified, which is embraced in any certificate provided for in this section, shall within thirty days from the date of such assessment promise and agree in writing endorsed upon such certificate, or in a separate agreement, that in consideration of having the right to pay his assessment in installments, he will not make any objection of illegality or irregularity as to the assessment of benefits, or levy of such tax upon and against his property, but will pay said assessment with interest thereon at such rate not exceeding six per centum per annum as shall be prescribed by resolution of the board, such tax so levied against the land, lot or premises of such owner shall be payable in ten equal installments, the first of which with interest on the whole assessment shall mature and be payable on the date of such assessment, and the others with interest on the whole amount unpaid annually thereafter at the same time and in the same manner as the March semi-annual payment of ordinary taxes; but where no such terms and agreement in writing shall be made by the owner of any land, lot or premises then the whole of said special assessment, so levied upon and against the property of such owner, shall mature at one time and be due and payable with interest from the date of such assessment, and shall be collected at the next succeeding March semi-annual payment of ordinary taxes. All of such tax with interest shall become delinquent on the first day of March next after its maturity and shall bear the same interest with the same penalties as ordinary taxes. And the board may provide by resolution for the issuance of improvement certificates, payable to bearer or to the contractors who have constructed the said improvement or completed part thereof within the meaning of this act in payment or part payment therefor, each of which certificates shall state the amount of one or more assessments or part thereof made against the property designating it and the owners thereof liable to assessments for the cost of same, and said certificate may be negotiated. Such certificates shall transfer to the bearer, contractor or assigns all right and interest in and to the tax in every such assessment, or part thereof, described therein and shall authorize such bearer, contractor or assignee to collect and receive every assessment embraced in said certificate, by or through any of the methods provided by law for their collection, as the same mature. Such certificates shall bear interest not to exceed six per centum per annum, payable annually, and shall be paid by the taxpayer to the county treasurer who shall receipt for the same and cause the amount paid to be applied to the payment of the certificate issued therefor. Provided, that any person shall have the right to pay the full amount of the tax so levied against his property, together with in-

terest thereon to date of payment at any time he desires so to do, even before the maturity of any certificates issued therefor. No certificate shall be issued or negotiated for the use of the drainage district for less than par value with accrued interest up to the delivery or transfer thereof. Should the costs of such work exceed the amount of benefits assessed and certificates issued, a new apportionment and levy of tax may be made and other certificates issued in like manner. [30 G. A., ch. 68, § 27.]

The provision for the privilege of payment in installments upon waiver of objections does not impose a penalty for refusal to waive objections, and it does not con-

stitute a denial of the equal protection of the law. *Sisson v. Board of Supervisors*, 128-442.

SEC. 1989-a27. Drainage bonds. If the board of supervisors shall determine that the estimated cost of reclamation and improvement of such district of land is greater than should be levied in a single year upon the lands benefited, instead of issuing improvement certificates as provided in the preceding section, it may fix the amount that shall be levied and collected each year and may issue drainage bonds of the county, bearing not more than six per centum annual interest and payable semi-annually in the proportions and at the times when such taxes shall have been collected, and may devote the same at par, with accrued interest, to the payment of the work as it progresses or may sell the same at not less than par, with accrued interest, and devote the proceeds to such payment; and if in the sale of said bonds a premium is received, such premium shall be credited to the drainage fund, and should the cost of such work exceed the estimate, a new apportionment of the tax may be made and other bonds issued and sold in like manner, but in no case shall the bonds run longer than fifteen years. Any property owner may pay the full amount of the benefit assessed against his property before such bonds are issued and receive a receipt in full therefor. Such payment shall be made to the county treasurer, and it shall be the duty of the county auditor to certify to the treasurer the amount of any such assessment when requested to do so, and the treasurer shall enter the same upon the tax lists in his hands in a separate place provided therefor, and shall furnish the auditor with duplicate receipts given for all assessments so paid in full. The terms and times of payment of the bonds so issued shall be fixed by the board. Said bonds shall be issued for the benefit of the district numbered thereon and each district shall be numbered by the board of supervisors and recorded by the auditor, said record showing specifically the lands embraced in said district and upon which the tax has not been previously paid in full. In no case shall the amount of bonds exceed the benefits assessed. Each bond issued shall show expressly upon its face that it is to be paid only by a tax assessed, levied and collected on the lands within the district so designated and numbered, and for the benefit of which district such bond is issued; nor shall any tax be levied or collected for the payment of said bond or bonds, or the interest thereon, on any property outside the district so numbered, designated and benefited. [30 G. A., ch. 68, § 28.] [31 G. A., ch. 84, § 3.]

SEC. 1989-a28. Establishment when owners mutually agree. Owners of land which requires combined drainage may provide for the establishment of a drainage district or location and construction of drains, ditches and water courses upon their own lands by mutual agreement in writing duly signed, acknowledged and filed with the county auditor; such agreement may include the location, the character of the work to be done, the adjustment of the damages, the classification of the lands to be benefited thereby, the amount of taxes or special assessments to be levied, when the

same shall be levied, or so many of these or other provisions as may be agreed upon, and to such extent shall be as valid and binding as though performed in the mode and manner provided for in this act. Upon the filing of the agreement with the county auditor, the board of supervisors shall at the next session thereafter establish such drainage district, and locate the ditch, drain or water course provided for in said mutual agreement according to the terms thereof, and shall thereafter have full and complete jurisdiction of the parties and subject-matter, and order such procedure under the provisions of this act as may be required or necessary to carry out the object, purpose and intent of such agreement and to complete and construct the desired improvement and shall retain jurisdiction of the same as fully as in other cases made and provided for in this act. [30 G. A., ch. 68, § 29.]

SEC. 1989-a29. Establishment through two or more counties. When the desired levy [levee] or drainage district extends into or through two or more counties and embraces land in two or more counties, the petition of one or more owners of land to be affected or benefited by such improvement shall be presented to the county auditor of each county into or through which said levy [levee] or drainage district will extend, accompanied by a bond to be filed with the county auditor of each of the said counties at the time of filing such petition, conditioned as provided when the district is wholly within one county, in an amount and with sureties satisfactory to, and approved by, the board of supervisors. Upon the presentation of such petition and the approval of such bond, the board of supervisors of each of said counties shall appoint a commissioner, and the commissioners of the several counties thus appointed shall meet within ten days thereafter and appoint a competent engineer, and such commissioners and engineer shall together make a survey of the entire lands embraced in the district, and shall determine what improvement or improvements in the way of levees, drains, ditches or changing of natural water courses are necessary for the reclamation of the lands described in the said petition; the engineer shall make a plat of all of the lands of said district, showing thereon the proposed improvements, the elevations and levels of said lands, so far as he may deem necessary, and a profile of said levee, drains, ditches or changes in any natural water course and shall file a copy in the auditor's office of each of said counties together with a full return of said commissioners and engineer, explaining the situation, describing the lands, the improvements, what effect said improvements will have upon the lands of said district, the course and length of any levee, drain, ditch or change of any natural water course through each tract of land, the estimated cost of the same, the dimensions of said improvement together with the names of the owners of all lands included within said district, as shown by the transfer books in the auditor's office, and which in their opinion will be affected or benefited thereby, together with such other facts and recommendations as to them shall seem advisable, and especially whether or not in their judgment such levee or drainage district should be established. Immediately upon the filing of such return, plat and profile, if such recommends the establishment of the levee or drainage district, each county auditor of said counties shall cause the owners of the lands, as shown by the transfer books in the auditor's office, and also the person in actual occupancy of any lots or lands in the district and also each lien holder or incumbrancer, as shown by the county records, of any land through or abutting upon which the proposed improvement extends, to be notified of the time and place where the boards of the several counties will meet in joint session for the consideration of said petition and return. Such notice

shall be the same and served in the same time and manner as provided in this act when the levee or drainage district is wholly within one county. [30 G. A., ch. 68, § 30.]

SEC. 1989-a30. Claims for damages—where filed. Any person claiming damages as compensation for, or on account of, the construction of such improvement shall file his claim in writing therefor in the office of the county auditor of the county in which his land is situated, at least five days prior to the time at which the petition has been set for hearing, and on failure to file such claims at the time specified shall be held to have waived his right thereto. [30 G. A., ch. 68, § 31.]

SEC. 1989-a31. Hearing—appraisers. At the time set for hearing such petition the boards of the several counties shall meet at the place designated in said notice and sit jointly in considering the petition and proceed in the same manner as provided in section five of this act, except that if it becomes necessary to appoint appraisers, the boards of supervisors acting jointly shall appoint one appraiser from each county, and if said levee or drainage district extends into or through only two counties then the two appraisers shall choose a third, each of whom shall have like qualifications as provided where the improvement is wholly within one county and they shall then proceed in the same manner and make the same return as provided in section six of this act, except that a copy thereof shall be filed in the auditor's office of each of the several counties. After the filing of the report of such appraisers the further proceedings of the board[s] of supervisors acting jointly shall be the same, as in this act provided where the levee or drainage district is wholly within one county so far as applicable except as herein otherwise provided. [30 G. A., ch. 68, § 32.]

SEC. 1989-a32. Assessment of costs and damages—improvement certificates—bonds. If the boards of supervisors, acting jointly, shall establish the levee or drainage district, they shall appoint a commission, one of whom shall be selected from each county and in addition thereto a competent engineer, each of whom shall have the same qualifications as provided where the district is wholly within one county; and said commission shall within twenty days go upon and view the premises and classify the same as hereinbefore provided where the district is wholly within one county, and in addition thereto shall make and [an] equitable apportionment of the costs, expenses, costs of construction, fees and damages assessed for the construction of such improvement or of the repairing or reopening the same, and make report thereof as provided where the improvement is wholly within one county, except a copy of said report shall be filed with each of the several county auditors. Immediately upon the filing of such report the several county auditors, acting jointly, shall cause notice to be served of the time when and the place where the boards of supervisors will meet and consider such report, which notice shall be the same and served in the same time and manner and all proceedings thereon shall be the same as provided where the district is wholly within one county, except after the amount to be assessed and levied against the several parcels or tracts of land shall have been apportioned and finally determined, the several boards of supervisors acting separately, and within their own counties, shall proceed to levy and collect the taxes thus apportioned in the same manner as provided where the district is wholly within one county, and they may issue improvement certificates or may sell bonds for the full amount of the benefits apportioned to such county. [30 G. A., ch. 68, § 33.]

SEC. 1989-a33. Letting work. If the boards of supervisors, acting jointly, shall establish such levee or drainage district, the auditors of the

several counties shall immediately thereafter, acting jointly, cause notice to be given of the time and place of the meeting of the boards for letting the contract or contracts for the construction of the improvement. The notices, bond and all other proceedings in relation to letting the contract or contracts shall be the same as in this act provided where the district is wholly within one county, except that the several boards shall act jointly. [30 G. A., ch. 68, § 34.]

SEC. 1989-a34. Supervising engineer—contractor, how paid. At the time of establishing the levee or drainage district the boards of supervisors shall appoint a competent engineer to have charge of the construction of the work, and they shall fix his compensation therefor, and he shall before entering upon and taking charge of said work give bond to the counties for the use and benefit of the levee or drainage district, approved by the boards of supervisors in such sum as they may direct, conditioned for the faithful discharge of his duties. The engineer in charge of the work shall furnish the contractor monthly estimates of the amount of work done on each section and the amount due from each county, a duplicate of which shall be filed with the auditor of each of the several counties. Upon the filing of such statement each auditor shall draw a warrant or deliver to him improvement certificates, as the case may be, in favor of the contractor for eighty per centum of the amount due from his respective county. When said improvement is completed to the satisfaction of the engineer in charge and accepted by the boards of supervisors, the engineer shall certify such fact to the several county auditors and each county auditor shall draw a warrant in favor of the contractor, or deliver to him improvement certificates, for the balance due from his respective county. [30 G. A., ch. 68, § 35.]

SEC. 1989-a35. Appeals. Any person or persons aggrieved shall have the right to appeal in the same time and in the same manner as provided when the district is wholly in one county, except that if the appeal is taken from the action of the boards in establishing the levee or drainage district, such appeal may be taken to the district court of either county in which the district or some part thereof is located. If said appeal is from the award of damages or assessment of benefits the appeal shall be taken to the district court of the county in which the land affected is located. [30 G. A., ch. 68, § 36.]

SEC. 1989-a36. District court to establish—when. Whenever the establishment of a levee or drainage district, extending into or through two or more counties, is petitioned for as hereinbefore provided and one or more of such boards of supervisors neglect, fail or refuse to take action thereon, the petitioner or petitioners may cause notice in writing to be served upon the chairman of such board or boards, demanding that action be taken upon the prayer of the petition within twenty days from and after the service of such notice; and if such board or boards shall neglect, fail or refuse to take action thereon within the time named, or if such action is taken and the boards of supervisors cannot agree as to the proper determination thereof, the petitioner or petitioners may cause such proceedings to be transferred to the district court of either of the counties into or through which such proposed district, or some part thereof, extends by serving notice upon the auditors of the several counties within ten days after the expiration of the time fixed by the notice, served upon the chairman of the board or boards, or within ten days after the failure of such boards to agree. Upon such notice being given the auditors shall, acting jointly, prepare and certify to the clerk of the district court a full and complete transcript of all proceedings had in such case, on or before the

first day of the next succeeding term of said court. The clerk of the district court shall thereupon docket the case and the same shall be tried as in equity and the appearance term shall be the trial term, and the court shall enter judgment and decree dismissing the case or establishing such levee or drainage district and may by proper orders and writs enforce its judgment and decree. [30 G. A., ch. 68, § 37.]

SEC. 1989-a37. Special sessions of boards of supervisors. Whenever the district is located in two or more counties, the boards of supervisors shall have power and authority to adjourn from time to time and meet in special session and in all cases shall have the same jurisdiction, power and authority as provided where the improvement is wholly within one county, and all proceedings shall be the same so far as applicable and not herein otherwise provided. [30 G. A., ch. 68, § 38.]

SEC. 1989-a38. Cities and towns included. The board of supervisors shall have the same power, right and authority to establish a levee or drainage district that includes the whole or any part of any incorporated town or city, including cities acting under special charter, as they have to establish districts as hereinbefore provided, and they shall have the same power, right and authority with respect to the assessment of damages and benefits within such towns or cities as they have in other cases provided for in this act, and like notice to such city or town with respect to the establishment of such district and the apportionment and assessment of damages and benefits shall be given as is required by this act to be given to owners of property damaged or benefited by the establishment or construction of such improvement. [30 G. A., ch. 68, § 39.]

SEC. 1989-a39. Outlet in another state. Whenever a drainage district is established in any county in this state and no practicable or feasible outlet can be obtained except through the lands of an adjoining state, the board of supervisors of such county shall have power and authority to purchase a right of way for such outlet in such adjoining state and pay for the same out of the funds of such district. [30 G. A., ch. 68, § 40.]

SEC. 1989-a40. Watchmen. Whenever a levee has been established, or shall hereafter be established, and constructed in any county, the board of supervisors shall be empowered and authorized to employ one or more persons whose duty it shall be to watch such levee and make repairs thereon in case of emergency or cause the same to be made. And such employe shall file with the county auditor an itemized bill for services rendered, and cost and expense incurred in watching or repairing such levee, and the same shall be audited and allowed by the board as other claims and demands and the amount or amounts so allowed shall be paid by the county from the funds belonging to such levee district. If there are no funds on hand belonging to such district, the same shall be paid in the first instance by the county from the general fund and the board shall proceed to assess and levy a tax upon the lands in such district, which assessment and levy shall be apportioned to each tract of land in the same ratio that the original cost thereof was apportioned, and when collected the auditor shall draw a warrant thereon in favor of the county for the sum or sums so paid from the county funds. [30 G. A., ch. 68, § 41.]

SEC. 1989-a41. Fees and expenses. Any engineer employed under the provisions of this act shall receive such compensation per diem as shall be fixed and determined by the board of supervisors. Appraisers of damages and commissioners to assess benefits, other than the engineer, shall receive three dollars per day each, and all other fees and costs required under the provisions of this act shall be the same as provided by law for like services in other cases. Such costs and expenses shall be paid by the

order of the board of supervisors out of the county treasury from the levee or drainage funds collected for that purpose upon warrants drawn by the county auditor. And the amount of fees for publication of all notices required to be published by the provisions of this act shall be fixed by the board of supervisors not exceeding thirty-three and one-third cents for each ten lines of brevier type, or its equivalent. [30 G. A., ch. 68, § 42.] [31 G. A., ch. 84, § 4.]

SEC. 1989-a42. County auditor—compensation—Drainage record. Whenever a levy or drainage district or districts shall be petitioned for or established in any county, the board of supervisors shall allow the county auditor such compensation or furnish such additional help, as shall be just and reasonable, to be paid by the county; and the county auditor shall be the custodian of all papers and records pertaining to the levee or drainage matter in his county and shall keep the book known as the "Drainage Record" and shall record therein all of the proceedings of the board of supervisors pertaining to the subject of levees or drainage, as well as the papers required to be issued or filed by the county auditor in such proceedings. [30 G. A., ch. 68, § 43.]

SEC. 1989-a43. Draining of highways. Whenever the township trustees of any township or townships shall desire to drain any highway within or under the jurisdiction of such trustees, and it becomes necessary to cross the lands of a private owner or owners to obtain a proper outlet and the trustees cannot agree with the owner or owners of such land as to how, where and upon what terms such drain may be constructed, such trustees may file in the office of the county auditor a petition describing the highway to be drained and the lands necessary to be crossed to obtain a proper outlet, the starting point, route and terminus of the desired drain, as near as may be, and asking the establishment of such drain. Upon the filing of such petition the county auditor shall appoint a commissioner, who shall be a competent engineer, and place a copy of the petition in his hands and he shall proceed to survey the proposed ditch or drain along the route described in the petition, or other route if found more practicable or feasible, and shall return a plat and profile thereof to the county auditor, and his return shall set forth a full and detailed description thereof, its size, dimensions, whether it will require a covered or open drain, its availability, necessity and probable cost, with a description of each tract of land or lot owned by different persons through which or abutting upon which the drain is proposed to be located and such other facts and recommendations as he may deem material; and he shall also apportion among the several townships, if more than one, the ratio of the cost of construction and expenses that shall be borne by each township. After the filing of such report the further proceedings shall be the same as provided in title eight (VIII), chapter one (1) of the code in relation to the establishment of highways, except that the costs, expenses and damages shall be paid by the township trustees from the road fund of such township or townships, or from the county road fund, or partly from each of said funds, as the board of supervisors may determine. If the board of supervisors shall establish such drain, the same shall be constructed by the board of supervisors in the same manner that other county work is done, and the cost thereof shall be paid from the road fund of such township or townships, or from the county road fund, or partly from each of said funds, as the board of supervisors may direct, or the township trustees having jurisdiction over said highway shall have the right, if they deem advisable, to petition for the establishment of a drainage district including therein said highway, and said petition shall be considered and acted upon and proceedings had

thereunder in all respects the same as provided where petition is signed by one or more of the land owners whose lands would be affected by or assessed for the expenses of the proposed improvements. [30 G. A., ch. 68, § 44.] [31 G. A., ch. 84, § 5.]

SEC. 1989-a44. Inspection. The board of supervisors of any county in or through which an improvement of the character provided for in this act extends, or shall extend, shall cause a competent engineer to inspect such improvement whenever they may deem it necessary, and he shall make report to such board of the condition of the improvement together with such recommendation as he deems necessary. [30 G. A., ch. 68, § 45.]

SEC. 1989-a45. Tax, a lien upon premises. The tax provided for in this act, when levied, shall be a lien upon all premises upon which the same is assessed to the same extent and in the same manner as taxes levied for county and state purposes. [30 G. A., ch. 68, § 46.]

SEC. 1989-a46. Defects in proceedings. The provisions of this act shall be liberally construed to promote the leveeing, ditching, draining and reclamation of wet, overflow or agricultural lands; the collection of the assessments shall not be defeated, where the proper notices have been given, by reason of any defect in the proceedings occurring prior to the order of the board of supervisors locating and establishing the levee, ditch, drain or change of natural water course provided for in this act, but such order or orders shall be conclusive and final that all prior proceedings were regular and according to law unless they were appealed from. But if upon appeal the court shall deem it just and proper to release any person or modify his assessment or liability, it shall in no manner affect the rights or liability of any person other than the appellant; and the failure to appeal from the order of the board of supervisors of which complaint is made shall be a waiver of any illegality in the proceedings and the remedies provided for in this act shall exclude all other remedies. [30 G. A., ch. 68, § 47.]

SEC. 1989-a47. Additional to statutes. The provisions of this act shall be construed as and independent procedure additional to chapter two (2) title ten (X) of the code and supplement, relating to the location, establishment and construction of levees, drains, ditches and water courses and shall not be held to repeal any of such provisions. [30 G. A., ch. 68, § 48.] [31 G. A., ch. 84, § 6.]

SEC. 1989-a48. Preliminary drainage expenses—how paid. Whenever a petition is filed with the county auditor of any county within the state, as contemplated in chapter sixty-eight (68) acts of the thirtieth (30th) general assembly of Iowa for the establishment of a drainage district in any county or counties within the state, the board of supervisors of said county (or counties if there be more than one) are hereby authorized to pay all necessary preliminary expenses in connection with said drainage district, out of the general county fund of said county, or if there be more than one county from the general county fund of each of the counties included in said district in such proportion as the work done or expense created in each county bears to the whole amount of work done or expense created, said amounts to be determined by the engineer in charge of the work, and they shall replace the same to the credit of the county fund of said county or counties as their interests may appear as soon as possible after the drainage district is established, or if said district be not established, then said amounts shall be paid from the proceeds of the bond deposited with the county auditor for that purpose, as provided for in chapter sixty-eight (68) acts of the thirtieth general assembly of Iowa. [31 G. A., ch. 86.]

SEC. 1989-a49. Pumping stations. The board of supervisors of any county or counties in the state in which a drainage or levee district has been or may hereafter be organized as provided in this act may provide as a part of said drainage system for the establishment and maintenance of a pumping station or stations, when and where the same may be necessary to secure a proper outlet for the drainage of the land comprising the said district and the cost of construction and maintenance of said pumping station or stations shall be levied upon and collected from the lands in the drainage or levee district in the same manner as provided for in the construction and maintenance of ditches or drains or levees in this act. [32 G. A., ch. 94, § 5.]

SEC. 1989-a50. Proceedings under petitions heretofore filed. Whenever any petition has heretofore been filed and any action thereon has been taken by the board of supervisors that is not final, it shall not be necessary that a new petition shall be filed in order to obtain the benefits of this act, but the board of supervisors are hereby empowered to proceed with the improvement from the point at which legal proceedings thereon were stopped. [32 G. A., ch. 94, § 6.]

SEC. 1989-a51. Statute applicable. That the measure of damages for locating, establishing and constructing a levee, ditch, drain or water course across the right of way of any railroad company provided for in section three (3) of this act shall be construed to apply to all cases and proceedings now pending involving such question; and the provisions of this act shall also be applicable to chapter two (2) title ten (10) of the code. [32 G. A., ch. 95, § 4.]

SEC. 1989-a52. Pumping stations. The board of supervisors of any county or counties in the state in which a drainage district has been or may hereafter be organized in the manner provided in chapter two (2) of title ten (10) of the code may provide for the establishment and maintenance of a pumping station when and where the same shall be necessary to secure a proper outlet for the lands comprising the district, and the costs of construction and maintenance of such pumping station or plant shall be levied upon and collected from the lands in the drainage district in the same manner as provided for the construction and maintenance of ditches as provided in title ten (10) chapter two (2) of the code, and code supplement—except the petition referred to shall require the signature[s] of fifty (50) per cent. of the land owners of such district. [30 G. A., ch. 69.]

SEC. 1989-a53. Owners may drain. Owners of land may drain the same in the general course of natural drainage, by constructing open or covered drains; discharging the same into any natural water course, or into any natural depression, whereby the water will be carried into some natural water course, and when such drainage is wholly upon the owner's land he shall not be liable in damages therefor to any person or persons or corporation. Nothing in this act shall, in any manner, be construed to affect the rights or liabilities of proprietors in respect to running waters or streams. [30 G. A., ch. 70.]

The owner may conduct surface water by means of tile drains upon his own land into the natural and usual channel which nature has provided for its discharge upon his neighbor's land without being liable in damages. This was the rule before the adoption of this statute. *Dorr v. Simmerson*, 127-551.

In an injunction case to restrain the establishment by a land owner of a system

of tile drainage on his own land at the complaint of an adjoining owner, it must appear that the defendant is about to materially and unduly increase the flow of water to plaintiff's imminent damage. *Wirde v. Vierkandt*, 131-125.

Where a ditch is by agreement of adjoining owners constructed along a natural water course, connecting with an outlet, the upper owner's rights are not limited

to the drainage of the particular area from which the ditch of itself conducts surface water, but he may construct lateral tile drains so as to drain lands not otherwise affected. *Neuhring v. Schmidt*, 130-401.

One may lawfully tile a natural water course which passes over his land onto that of another where the effect is not to cast a greater quantity of water or to carry the water in a different manner upon the land of his neighbor. *Hull v. Harker*, 130-190.

A natural water course is not necessarily a channel with banks, but if the surface water uniformly flows in a given course within reasonable limits, the line of its flow is a water course. *Ibid.*

The statute as to private drainage and tiling is merely declaratory of the rule at common law, that the owner of land may tile drain it in the general course of natural drainage, discharging the water collected into one natural water course or natural depression by which the water will be carried into some natural water course. *Pohlman v. Chicago, M. & St. P. R. Co.*, 131-89.

Where a land owner constructs a ditch through his land for drainage purposes, in conjunction with another owner, and acquiesces in its use, it becomes a water course to which the owner of the adjoining land may conduct his surface water. *Sheker v. Machovec*, 110 N. W. 1055.

CHAPTER 4.

OF TAKING PRIVATE PROPERTY FOR WORKS OF INTERNAL IMPROVEMENT.

SECTION 1995. By railway—limit of.

When property has been devoted to public use it cannot be taken and applied to another conflicting public use by the exercise of the power of eminent domain, unless by authority of the legislature expressly given or necessarily implied. But held that land owned by a steamboat company and used for a landing was not so devoted to a public use, the steamboat company having no power to condemn land for public use for such purposes and therefore not being authorized to hold for such purposes exempt from the right of condemnation for purposes authorized by statute. *Diamond Jo Line Steamers v. Davenport*, 114-432.

Held further that the fact that the steamboat company had only an undivided interest in the property would indicate that it was not held absolutely and as of right to a public use. *Ibid.*

A railroad company undertaking to exercise the privilege of eminent domain is precluded from questioning the constitutionality of the conditions provided by statute for the exercise of such privilege. *Gano v. Minneapolis & St. L. R. Co.*, 114-713.

A railway company is not bound to acquire a right of way of any particular width, nor to lay its main track in the center of that which is acquired. While ordinarily it is to be presumed to have obtained a right of way of the maximum

width, and to have intended to have its track in the center, this is a mere naked presumption, casting the burden of proof on any one asserting the contrary, but subject to be overcome by evidence rebutting the inference. Hence, exclusive possession exercised by an abutting property owner to within less than 50 feet of the center of the railway track may be shown as against the claim of the railroad company to the full width of the right of way. *Cedar Rapids Canning Co. v. Burlington, C. R. & N. R. Co.*, 120-724.

A railroad cannot acquire by condemnation a strip to exceed one hundred feet in width. *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co.*, 116-681.

As the statute does not provide for nor require a preliminary survey or location until the condemnation proceedings are commenced, the company is a trespasser in entering upon land for the purpose of making such preliminary survey, and acquires no rights thereby. *Ibid.*

While the statute contemplates the condemnation only of a right of way one hundred feet in width, yet an additional strip acquired by purchase for use in connection with the right of way constitutes a portion thereof, and the duty of providing a private crossing to the land owner whose property is intersected by the right of way is not changed. *Mattice v. Chicago G. W. R. Co.*, 130-749.

SEC. 1998. Additional depot grounds. Any railway corporation owning or operating or constructing a railway shall have power to condemn lands for necessary additional depot grounds or yards, for additional or new right of way for constructing double track, reducing or straightening curves, changing grades, shortening or re-locating portions of the line,

for excavations, embankments, or places for depositing waste earth in the same manner as is provided by law for the condemnation of the right of way. Before any proceedings shall be instituted therefor, the company shall apply to the railway commissioners, who shall give notice to the land owner, and examine into the matter, and report by certificate, to the clerk of the district court in the county in which the land is situated, the amount and description of the additional lands necessary for such purposes, present and prospective, of such company; whereupon the company shall have the power to condemn the lands so certified by the commissioners. [20 G. A., ch. 190, § 1.] [28 G. A., ch. 70, § 1.] [29 G. A., ch. 79, § 1.]

The right of way which may be taken for railroad purposes is limited to one hundred feet, whether acquired by condemnation or by purchase. Additional right of way for depot grounds can be acquired only by application to the railroad

commissioners who shall, after a hearing, certify to the district court the amount and description of additional land necessary for that purpose. *Crandall v. Des Moines N. W. R. Co.*, 103-684.

SEC. 1999. Manner of condemnation.

Measure of damages: In condemnation proceedings the damages are to be assessed once for all, and when once assessed they include all the injuries which may result for all time to come from the construction and operation of the road in a reasonable and proper manner. *Hileman v. Chicago G. W. R. Co.*, 113-591.

Additional tracks and sidetracks, as they may become necessary, may be constructed without the payment of additional damages for right of way. *Ibid.*

Many of the considerations that tend to affect the value of town property are prospective only, but they may nevertheless be taken into account. Therefore, where land was condemned for depot purposes, held, that its prospective increased value on account of the location of the depot in that locality might be considered. *Snouffer v. Chicago & N. W. R. Co.*, 105-681.

Where a lessee seeks compensation he should be allowed the difference between the value of the annual use of the premises before the taking of the right of way and what it was worth afterward. *Werthman v. Mason City & Ft. D. R. Co.*, 128-135.

The damages to be assessed in condemnation proceedings do not include injuries which may result from the negligence or improper construction of the railroad. *Guinn v. Iowa & St. L. R. Co.*, 125-301.

In such a proceeding damages resulting from causing water to flow upon the premises of the owner from lands of another owner by the improper construction of ditches are not to be taken into account. *Ibid.*

It is not to be assumed that where the right of way is maintained through the premises of an owner the private way to which he will be entitled, will be a grade crossing. It must be assumed that it will be an adequate crossing. *Ibid.*

It is not competent to show in evidence the amount which the company has paid to other owners per acre for rights of way over their land. *Simons v. Mason City & Ft. D. R. Co.*, 128-139.

Damages are not to be predicated on any particular form of crossing, the requirement of the statute being that the company shall furnish an adequate crossing. *Ibid.*

Nor should the jury be told that they may take into account every element of annoyance and disadvantage resulting from the construction of the railroad which would influence an intending purchaser in making an estimate of the market value of the property. *Ibid.*

Interest is to be awarded from the time the railway takes possession of the right of way. *Guinn v. Iowa & St. L. R. Co.*, 131-680.

The allowance of interest from the time of the construction of the road, antedating the institution of condemnation proceedings, is erroneous. *Clark v. Wabash R. Co.*, 132-11.

Entire premises: The damages allowed on condemnation of a portion of the owner's premises should include damage to the entire premises resulting from the construction of the improvement which involves the taking of his land. *Haggard v. Independent School Dist.*, 113-486.

Two tracts connected by a right of way may constitute one farm, damage to the whole of which is to be considered in proceedings to condemn a right of way across one portion. *Westbrook v. Muscatine, N. & S. R. Co.*, 115-106.

In the assessment of damages it is error to limit the witnesses to a consideration of any special use for the land. The owner is entitled to have his farm valued as a whole, and his damages assessed on that basis. *Lough v. Minneapolis & St. L. R. Co.*, 116-31.

When separate tracts, one only of which is crossed by a right of way, is adapted to one use, and both are especially valuable because of adaptability to that use and are both injuriously affected by the appropriation, they should be treated as constituting one property in assessing the damages. *Hoyt v. Chicago, M. & St. P. R. Co.*, 117-296.

Whether the owner of separate parcels is entitled to have them treated as one tract is usually a question for the jury. But where the tracts are entirely independent, not contiguous, and there is no evidence that damage to the part actually taken affects the part not touched the court should direct the jury to consider only that tract over which the right of way is taken. *Ibid.*

The fact that the railroad company in condemnation proceedings described only one of two tracts which are occupied together as a farm does not deprive the owner of the right to have the damages to the entire farm estimated in the proceeding. *Cook v. Boone Suburban Elec. R. Co.*, 122-437.

Although a tract belonging to one owner may have been platted, it does not follow that there should be a separate assessment as to each subdivision, where there is no physical evidence of the plat, and no improvements made with reference thereto. *Gray v. Iowa Cent. R. Co.*, 129-68.

Trespass by company: Where the railroad company entering without right upon land continues to occupy the same after title has been conveyed to another owner, such occupancy may be treated as a continuing trespass, for which the grantee may recover damages from the time of acquiring title. But the grantee is not entitled to recover for the damages suffered by his grantor. *Clark v. Wabash R. Co.*, 132-11.

Obstructing water course: A railroad company constructing its road across a stream is not liable for negligence in failing to provide for a flood which is not only extraordinary, but unprecedented, and could not reasonably have been foreseen, but it should anticipate and make provision for such floods as may occur in the ordinary course of nature, and will be liable in damages to a property owner whose property is injured by its failing to do so. *Houghtaling v. Chicago G. W. R. Co.*, 117-540.

It is immaterial that in the construction of an adequate culvert the company acted upon the advice of its engineers, who were shown to have been competent and skillful. *Ibid.*

The company is liable for damages resulting from the clogging of a culvert by debris carried down by a stream during a freshet, so far as such damage is

the result of a flood not extraordinary and unprecedented, and which could not reasonably have been anticipated. *Ibid.*

An exception in a conveyance of a right of way does not cover an additional right granted to the railroad company to discharge surface water upon the land. *Earhart v. Cowles*, 122-194.

A railroad company procuring a right of way by condemnation does not have the right to divert the surface water or a stream to the damage of the land owner from whose land the right of way has been taken, and such unlawful obstruction may be enjoined. *Albright v. Cedar Rapids & I. C. R. & L. Co.*, 133-644.

Proceedings: The proceedings before the commissioners appointed by law to appraise the land are not a suit at law, but in the nature of an inquest to ascertain its value. No hearing is had and no evidence introduced. The commissioners merely inspect the land, determine upon the amount of damages which will be occasioned by the appropriation, and make a written report to the sheriff. To this extent the proceeding is in no respect a suit, but when an appeal from the finding is taken to the district court, the proceeding is adversary and is in the nature of a suit, which may be removed to the federal court under the removal acts. *Myers v. Chicago & N. W. R. Co.*, 118-312.

While no formal pleadings are required in condemnation proceedings, yet if the defendant undertakes to plead formally, and files a written answer, the ordinary rules of pleading should prevail and no affirmative defense not pleaded can be relied on. *Mason v. Iowa Cent. R. Co.*, 131-468.

Where the company is in possession of the right of way sought to be condemned, and the description given in the notice is sufficient to direct the sheriff and jury to the premises, and the award contains a correct description, there can be no objection that the notice of the proceedings was insufficient as to the description of the property to be condemned. *Gray v. Iowa Central R. Co.*, 129-68.

Abandonment of proceedings: While a company may abandon the condemnation proceedings after the award of damages is made, and thereby escape the payment of the award, it cannot simply abandon the award and continue the proceedings, or institute other proceedings for another award as to the same property. *Robertson v. Hartenbower*, 120-410.

Abandonment of road: When a railroad company enters upon the land of another, builds a roadbed, places ties and rails thereon, these as a general rule, in the absence of abandonment to the owner, belong to the company constructing the same or to its grantees or assignees, and

the land owner cannot in condemnation proceedings, although instituted subsequently to the construction of the road, have the value thereof included in his award. *Van Husen v. Omaha B. & T. R. Co.*, 118-366.

Payment to sheriff: Nothing short of actual payment, or its equivalent, to the owner of the damages assessed constitutes compensation for property wrested from him under the power of eminent domain. Payment of the damages to the sheriff is

not effectual where the sheriff becomes insolvent and the property owner is unable to secure the money paid. *Burns v. Chicago, Ft. M. & D. M. R. Co.*, 110-385.

The deposit with the sheriff of the amount of the award is intended as security for the land owner where the company takes immediate possession of the land and the land owner has such an interest in the deposit when made that he may hold the officer liable for its safe keeping. *Bannister v. McIntire*, 112-600.

SEC. 2000. Assessment of damages—notice.

It is not necessary that all the condemnations of the same right of way be before the same jury. *Gray v. Iowa Central R. Co.*, 129-68.

Where a particular tract included among those as to which damages are to

be assessed is overlooked or lost sight of by the sheriff and jury in making up the awards, a subsequent proceeding to assess the damages for such tract is not barred. *Mason v. Iowa Central R. Co.*, 131-468.

SEC. 2003. Notice published. Said notice shall be published in some newspaper in the county, if there is one, if not, then in a newspaper published in the nearest county through which the proposed railway is to be run, once each week, for at least eight successive weeks prior to the day fixed for the appraisal at the instance of the corporation. [C., '73, § 1248.] [31 G. A., ch. 9, § 26.]

SEC. 2007. Costs.

The provisions of this section allowing attorney's fees in such proceedings is not unconstitutional. *Gano v. Minneapolis & St. L. R. Co.*, 114-713; *Lough v. Minneapolis & St. L. R. Co.*, 116-31; *Clark v. Wabash R. Co.*, 132-11.

The provision as to attorney's fees does not apply unless on the trial the award is at least equal to that allowed by the commissioners. *Wormley v. Mason City & Ft. D. R. Co.*, 120-684.

By the provisions of Code § 884 the proceedings provided for under this section are to be followed in condemning land by a city. *Mellichar v. Iowa City*, 116-390.

In the taxation of attorney's fees, the court in its discretion may receive testimony, but is not bound to do so, and may limit the testimony to proof of the services rendered. *Hall v. Wabash R. Co.*, 133-714.

SEC. 2009. Appeals—how taken.

The right of appeal furnishes an adequate remedy for any errors or irregularities in the proceeding. *Gray v. Iowa Central R. Co.*, 129-68.

It is not error to strike from the files an answer of the appellee questioning the jurisdiction of the court over the appellee, where the facts alleged do not show want of jurisdiction. *Simons v. Mason City & Ft. D. R. Co.*, 128-139.

Where the land owner alone appeals from the award, the company is the defendant in such sense as to be entitled to remove the case to the federal court without regard to which party made the application for the appointment of commissioners. *Kirby v. Chicago & N. W. R. Co.*, 106 Fed. 551.

An appeal by the land owner from the assessment of damages by the commissioners in a condemnation proceeding is in effect an action by the land owner against

the corporation for the value of the property taken, and may be removed to the federal court on account of diversity of citizenship of the parties. *Myers v. Chicago & N. W. R. Co.*, 118-312.

An appeal from the finding of the sheriff's jury is such an action as may be removed to the federal court, on account of diversity of citizenship, although the land owner is the appellant and as a non-resident asks the removal. *Mason City & Ft. D. R. Co. v. Boynton*, 204 U. S. 570.

Where in a single proceeding the jury pass on the question as to the damage to be allowed to the owner and his tenant separately, either may appeal without joining the other or serving notice upon the other. An award to one would in no manner affect or prejudice the right of the other. *Simons v. Mason City & Ft. D. R. Co.*, 128-139.

While it may not be proper in examining the jurors on *voir dire* to disclose the amount of the award by the sheriff's jury, there will not be a reversal on that ground where it does not appear that any of the jurors to whom such suggestion was made acted on the final trial of the case. *Simons v. Mason City & Ft. D. R. Co.*, 128-139.

Where the company served notice of appeal and afterwards the land owner also served notice and filed a transcript without paying the filing fee and the company thereupon caused the land owner's appeal to be docketed and asked an affirmance

for failure of the land owner to prosecute his appeal, held that it was not error for the trial court to consolidate the land owner's appeal with that taken by the company, and subsequent dismissal of its appeal by the company left no question for determination by the court. *McKinnon v. Cedar Rapids & I. C. R. & L. Co.*, 126-426.

Where land is condemned and taken possession of before the damages are paid interest should be allowed on the amount of the award. *Lough v. Minneapolis & St. L. R. Co.*, 116-31.

SEC. 2011. Trial—judgment—costs.

Payment to the sheriff does not limit the property owner to his remedy against the sheriff for the recovery of money thus paid. *Burns v. Chicago, Ft. M. & D. M. R. Co.*, 110-385.

The court should not on appeal render judgment against the company for the damages found where the property has not been appropriated. *Haggard v. Independent Sch. Dist.*, 113-486.

SEC. 2015. Non-user of right of way.

Where the right of the company to land taken for right of way is lost by non-user the land does not revert to the original owner from whom it was taken, but to the present owner of the tracts of land from which it was taken. *Smith v. Hall*, 103-95.

Where a right of way is acquired by a fee simple deed and subsequently the separated tracks of the parcel of land through which the right-of-way is thus conveyed by description, excluding the right of way, such subsequent conveyance does not cover any right of reversion of the right of way. *Watkins v. Ia. Cent. R. Co.*, 123-390.

Where the owner of land conveys a right of way passing through his premises and afterwards conveys the two parcels expressly excluding the right of way by description from the conveyance, the grantees of the respective parcels are not entitled to damages on the taking of such right of way by another railroad, after abandonment by non-user for eight years. *Spencer v. Wabash R. Co.*, 132-129.

In a conveyance of land, a portion of which has been taken for railroad right of way, the portion thus taken may be excepted from the grant so that upon

abandonment of the right of way the title thereto does not revert to the grantee of the balance of the tract, but to the original grantor. *Hall v. Wabash R. Co.*, 133-714.

It is to be questioned whether this section is meant to apply to a grant of the use of a public highway, but at any rate it does not apply to restrict a railroad company from using a right of way acquired over a public highway alongside a right of way acquired over private property whenever it shall see fit to avail itself of such right. *Morgan v. Des Moines U. R. Co.*, 113-561.

By agreement a land owner may be entitled to enforce a forfeiture of the railroad right of way in case of abandonment although the length of time of non-user contemplated by the statute has not expired. *Gill v. Chicago & N. W. R. Co.*, 117-278.

Use of the right of way over the owner's land which is merely colorable and not for ordinary railroad purposes will not prevent such forfeiture. *Ibid.*

It is not necessary to constitute such abandonment that the entire line of which the right of way in question forms a part shall have been abandoned. *Ibid.*

SEC. 2016. Condemning abandoned right of way.

After the lapse of eight years of non-user, the right of way ceases to exist as such, and is to be again acquired by exercise of the power of eminent domain in the same manner as rights of way are obtained in the first instance. And in such case the provision that parties who have previously received compensation, which has not been refunded, shall not be permitted to recover the second time, has no

application. *Remey v. Iowa Cent. R. Co.*, 116-133; *Gray v. Iowa Central R. Co.*, 129-68.

As to the question involved in the case of *Remey v. Iowa Central R. Co.*, 116-133, the judges of the court on a subsequent consideration in another case were equally divided in opinion. *Clark v. Wabash R. Co.*, 132-11.

SEC. 2017. Raising or lowering highways.

A railroad company may cross streets in the occupation of a right of way acquired over private property without the consent of abutting property owners, if in crossing such streets its track is not laid in front of the property of such abutting owners. *Morgan v. Des Moines U. R. Co.*, 113-561.

Land devoted to the use of a railroad is devoted to public use and a common highway may be used by a railroad company without further compensation to adjoining owners. *Burlington Gas Light Co. v.*

Burlington, C. R. & N. R. Co., 165 U. S. 370.

Under the evidence in a particular case held that the railroad took its grant of right of way subject to existing easements in favor of the public. *Chicago, R. I. & P. R. Co. v. Council Bluffs*, 109-425.

And held that, having recognized and adopted a dedication of highways to the public by the original proprietor, a mere non-use by the public of such highways would not defeat the same. *Ibid.*

SEC. 2020. Crossing railways, canals, etc.

Where the right of one road to cross another has been acquired under existing statutes, the legislature cannot, by a subsequent statute, impose as a condition to the continued use of such crossing the burden of paying the entire cost of putting in and operating an interlocking system.

Manhattan Trust Co. v. Sioux City & N. R. Co., 81 Fed. 50.

But by Code § 2063 a railway proposing to cross one already constructed must bear the expense of interlocking. *Minneapolis & St. L. R. Co. v. Cedar Rapids, G. & N. W. R. Co.*, 114-502.

SEC. 2022. Private crossings. When any person owns land on both sides of any railway, the corporations owning the same shall, when requested so to do, make and keep in good repair a sufficient causeway or other adequate means of crossing the same and one cattle-guard on each side thereof connected by cross fences to the right of way fence on each side of the right of way, at such reasonable place as may be designated by the owner. [C., '73, § 1268; R., § 1329.] [32 G. A., ch. 96.]

The fact that an under passageway is contracted in width after it has been occupied and used for a long period does not entitle the property owner to damages if such passageway is left of sufficient width to fulfill the objects for which it was originally provided. *Olver v. Burlington, C. R. & N. R. Co.*, 111-221.

A land owner cannot acquire a right to a crossing by adverse possession so as to preclude change thereof by the company. *Schrimper v. Chicago, M. & St. P. R. Co.*, 115-35.

An undercrossing, constructed in pursuance of the statute, and not by contract with the owner, may be changed by the company to a grade crossing when no peculiar damage results to the owner by the change and the expense of maintaining the undercrossing would be unreasonable. *Ibid.*

In condemnation proceedings it is proper for the jury to take into account the fact that an adequate crossing over the track is required by statute to be constructed, and that if only an underground crossing would be adequate, such a crossing will be given. *Lough v. Minneapolis & St. L. R. Co.*, 116-31.

The duty of determining the kind of crossings is imposed on the company with the limitation that they be adequate, and in determining the damages in a condemnation proceeding it is not to be assumed that the crossing will be a grade crossing.

Gunn v. Iowa & St. L. R. Co., 125-301.

Mandamus will lie: To compel railroad companies to construct suitable crossings for one owning land on both sides of the railroad track without the prior submission of the matter to a board of railroad commissioners. *Swinney v. Chicago, R. I. & P. R. Co.*, 123-219.

The statute clearly contemplates such a crossing as shall connect the several parts of the owner's land without requiring him to go into the public highway, and consent to the construction of a way by which he may reach the public highway is not a waiver of his right to a private crossing. *Herrstrom v. Newton & N. W. R. Co.*, 129-507.

Where a grade crossing is impracticable, the fact that an overhead crossing would involve considerable expense will not constitute a sufficient reason for not requiring the company to construct such overhead crossing. *Ibid.*

The railroad company is not excused from providing a private crossing by the fact that the land owner may pass from one tract of his land to another separated by the railway by means of an adjoining public highway. The statute evidently contemplates more convenient access than is usually afforded by a public highway, even though one side of the land may abut thereon. *Mattice v. Chicago G. W. R. Co.*, 130-749.

The fact that the railway has acquired

a strip of land for its use adjoining its right of way of full width does not excuse it from furnishing a private crossing. *Ibid.*

The railroad company is required to build and maintain cattle guards within a reasonable time after having been properly requested. The request must be of some officer or agent of the company, acting within the scope of his duties, such duties including the management or control of the putting in of cattle guards, or of ordering them to be put in. *McGill v. Minneapolis & St. L. R. Co.*, 113-358.

Where a private crossing was constructed over three adjacent parallel lines

of railroad which was protected by gates at each end of the passageway, held that failure of one of the companies to maintain an inside gate between its own right of way and that of another company would not render it liable for an injury to an animal coming upon its right of way. *Fowbel v. Wabash R. Co.*, 125-215.

The obstruction of a private crossing is prohibited by the provisions of Code § 5078, relating to obstructions of either public or private ways, and a tenant in possession may recover damages to his use of the premises by reason of such obstruction. *Morrison v. Chicago & N. W. R. Co.*, 117-587.

SEC. 2024-a. State to condemn. Whenever in the opinion of the governor of the state, the public interest requires the laying or construction of any drain, sewer or aqueduct, and the acquisition of an easement therefor, upon or across private property, or the taking of any real estate for the making or construction of any drain, sewer or aqueduct, or for rifle ranges, exercise, drill or parade grounds, yards, walls, buildings or other improvements or conveniences for the use or benefit of any fort, arsenal, military post or other institution of the United States, upon or across private property, the same proceedings may be had in the name of the state as are provided for the taking of private property for works of internal improvement by chapter 4, title X, of the code; and the proceedings shall be conducted by the county attorney of the county in which the land is situated, whenever directed by the governor, or he may appoint some other person for that purpose. [29 G. A., ch. 83, § 1.]

SEC. 2024-b. Damages certified—how paid—conveyance of title. When the amount of the damages is finally determined, the sheriff or clerk, as the case may be, shall certify the amount thereof to the governor who shall, by an order endorsed thereon, direct the payment of the same, including all costs and expenses incurred, and the auditor of state shall issue a warrant on the treasury for the amount, which shall be paid out of such money as may have been deposited in the treasury by the United States, or by any person or persons for and on its behalf, and when paid to the sheriff or person entitled thereto, the governor and auditor of state are hereby authorized and instructed to convey the easement or real estate so taken and all of the rights of the state so acquired therein, to the United States, by good and sufficient deed of conveyance executed for, on behalf of and in the name of the state of Iowa, and thereupon the United States, through its proper officer or agent, may enter upon the premises and construct the desired work. [29 G. A., ch. 83, § 2.]

SEC. 2024-c. United States may purchase or condemn. That where the United States of America has undertaken or may hereafter undertake to improve any river, stream, or water-course, forming a part of the boundary line of this state, or within this state, or to utilize any river, stream, or water-course, for any purpose, deemed advisable, the said United States may purchase, or condemn land and private property, in accordance with the provisions of chapter four (4) title ten (10) of the code, for taking private property. [29 G. A., ch. 80, § 1.]

SEC. 2024-d. Additional grounds for buildings. Whenever, in the opinion of the executive council of the state, public interest requires the taking of real estate as a site for any state building, or as additional grounds for any existing state building, or for any other state purpose,

the state may take and hold, under its right of eminent domain, so much real estate as is necessary for the purpose for which the same is taken; and proceedings may be instituted in the name of the state of Iowa for the condemnation of such real estate under the provisions of chapter four (4) of title ten (X) of the code, which proceedings shall be conducted by some person appointed by the governor of the state. [30 G. A., ch. 71, § 1.]

SEC. 2024-e. Damages—how paid. When the amount of damages is determined, the sheriff or clerk, as the case may be, shall certify the amount thereof to the executive council which shall, by an order endorsed upon the certificate, direct the payment of the same, and the auditor of state shall, upon receipt of such order, issue a warrant on the treasury for the amount, which warrant shall be paid out of any money appropriated by the general assembly for that purpose, or out of any money received from the sale of other property, the proceeds of which may have been authorized by law to be used for the purpose of the purchase of real estate for state use; and when the amount of such damages is paid to the sheriff, the clerk, or the person entitled thereto, the state, through its proper officer or agent, may enter upon the possession of the real estate taken, and use and occupy the same for state purposes. [30 G. A., ch. 71, § 2.]

SEC. 2024-f. Court houses—jails—condemnation proceedings authorized. Whenever the interest of any county requires real estate for the erection of court houses or jails by a county, such county may take and hold such real estate for the purpose for which same is taken, by condemnation proceedings. Such proceedings shall be instituted pursuant to a resolution of the board of supervisors of a county, and shall be instituted and prosecuted in the name of the county seeking such condemnation by the county attorney for such county under the provisions of chapter four (4) of title ten (X) of the code. [30 G. A., ch. 72, § 1.]

SEC. 2024-g. Damages—how paid. In cases where such condemnation is sought by a county, the sheriff or clerk, as the case may be, shall, when the amount of the damages is determined, certify the amount thereof to the board of supervisors and such board may direct payment thereof by resolution, and the county auditor shall thereupon issue his warrant therefor upon the proper fund of such county. In any case when the amount of the damages is paid to the sheriff or clerk, or the person entitled thereto, and the time for appeal has expired or final judgment entered upon appeal, the county may enter into possession of the real estate taken, through its proper officers or agents, and use and occupy the same for the purpose taken. [30 G. A., ch. 72, § 2.]

SEC. 2024-h. Appeals. No county condemning or seeking to condemn land under the provisions of this act, shall be entitled to the possession of the lands condemned or sought to be condemned until the time for appeal to the district or supreme court from such condemnation has expired, or final judgment rendered on appeal, and in all appeals from the award of the sheriff's jury in such proceedings, the court shall have jurisdiction to pass upon the public necessity for the condemnation of such real estate, and shall determine the same without the intervention of a jury, and may make such order with reference thereto as it may deem proper within its discretion, and may modify, enlarge or diminish the area of grounds sought to be condemned, but all questions as to amount of damages shall be determined by ordinary proceedings as in other cases of condemnation. [30 G. A., ch. 72, § 3.]

SEC. 2024-i. Counties and townships. The board of supervisors of any county and the township trustees of any township are hereby authorized and empowered within their respective limits, and without the limits

of any city or town to procure, purchase or condemn, enter upon and take any lands for the purpose of obtaining gravel or other suitable material with which to improve the roads and highways of such county or township, including a sufficient roadway to such land by the most reasonable route, and pay for the same out of the county or township road funds. [30 G. A., ch. 73, § 1.]

SEC. 2024-j. Cities and towns. Cities and towns including cities under special charter are hereby authorized and empowered within or without their limits to procure, purchase or condemn, enter upon and take any lands for the purpose of obtaining gravel, stone or other suitable material with which to improve the streets and alleys of such city or town, including a suitable roadway thereto by the most reasonable route, and pay for the same from the general fund, grading fund, or from the highway or poll taxes of such city or town, or partly from each of said funds. [30 G. A., ch. 73, § 2.]

SEC. 2024-k. Condemnation proceedings. Proceedings for condemnation of land as contemplated in this act shall be, in accordance with the provisions relating to taking private property for works of internal improvements. [30 G. A., ch. 73, § 3.]

SEC. 2024-l. Reversion of lands. When lands that have been condemned and taken under this act, and not used for the purpose herein specified for the period of five consecutive years, such lands shall then revert to the owner or owners of the tract from which it was taken. [30 G. A., ch. 73, § 4.]

SEC. 2026. Repeal—interurban or street railway over highways. That section two thousand and twenty-six (2026) of the supplement to the code, and chapter eighty-seven (87) of the acts of the thirty-first general assembly be and the same are hereby repealed, and the following enacted in lieu thereof:

“Any interurban or street railway, may for the purpose of constructing or extending its line locate, build and operate its road by any power other than steam, over and along any portion of the public road, beyond the limits of any city or town, which is one hundred feet or more wide. It shall as soon as practicable put the road in as good repair as it was before its use for such railway. Boards of supervisors are authorized to accept for road purposes conveyances of land adjoining any such road or part thereof sufficient to increase the same to the width of one hundred feet; but in any county in which such company desires to operate its line of railway over a road not less than sixty feet in width, for a distance not over two miles, beyond the limits of a city or town, the board of supervisors may grant the right to it to operate its line over said road, not exceeding two miles, under such rules and regulations as said board may prescribe, and may also from time to time make such further reasonable regulations as may be necessary. Where an interurban railway desires to operate its lines along or upon a public highway beyond the limits of any city or town, and in the opinion of the board of supervisors of the county in which such highway is located, it is impracticable or inexpedient to increase the width thereof to one hundred feet, such board of supervisors may permit such interurban railway company to construct and operate its railway along and upon such highway, under such restrictions and regulations as the board may deem advisable; but no such railway shall construct or operate its line along or upon such highway until a written statement of consent of two-thirds of the residents owning property abutting upon such highway shall have been obtained and filed with the auditor of the county in which the highway is located; but no such written consent signed by any abutting

land owner shall be construed to waive any claim for damages he may have on account of the location and construction of such railway upon and along the highway in front of the premises unless expressly so stated therein, and no such written consent shall have the effect to deprive any other abutting land owner of his right to recover damages therefor. And in all cases the location, construction and operation of such interurban railway shall be subject to the provisions of section two thousand twenty-seven (2027) of the code. [32 G. A., ch. 97.]

The provisions of the act from which this section is derived related entirely to street railways and a street railway which is thus extended beyond the city limits along the public highway to a neighboring city or town does not become subject to taxation under the provisions relating to taxation of railroads. *Cedar Rapids & M. C. R. Co. v. Cedar Rapids*, 106-476.

Under the provisions of Code § 1334, which now control the taxation of interurban railways, an electric railway constructed and operated along the highway outside of the city limits is to be taxed as an interurban railway, being now so defined by Code Supplement § 2033-a. *Cedar Rapids & M. C. R. Co. v. Cummins*, 125-430.

SEC. 2028. Ways to lands which have none. Any person, corporation or copartnership owning or leasing any land not having a public or private way thereto, may have a public way to any railway station, street or highway established over the land of another, not exceeding forty feet in width, to be located on a division line or immediately adjacent thereto; but if a railway is to be constructed thereon, as provided in section two thousand and thirty-one (2031) the same may be located wherever necessary and practicable, but not exceeding one hundred feet in width, and not interfering with buildings, orchards, gardens or cemeteries; and when the same shall be constructed it shall, when passing through inclosed land, be fenced on both sides by the person or corporation causing it to be established. [25 G. A., ch. 18; 15 G. A., ch. 34, § 1.] [29 G. A., ch. 82, § 1.]

One whose property is not reached by a public highway may have an outlet to the highway established at his expense. *Perry v. Board of Supervisors*, 133-281.

One who petitions for the establishment of a public way cannot be defeated by a showing that proceedings to establish a public highway along the same line have been defeated, where it does not appear that the party asking the establishment of the way was a party to the proceeding for establishing the highway. *Kirkhart v. Roberts*, 123-137.

The provisions relating to the establishment of rights of way to mines are to be construed together and it is only on a public way, such as is authorized to be located under this section, that a railway

may be established under § 2031. *Morrison v. Thistle Coal Co.*, 119-705.

The right of way for a railway thus established is a public way, even though it is not maintained so as to be available for use by the traveler otherwise than by use of railway cars. *Ibid.*

The requirement of this section, before its amendment by 29 G. A., chapter 82, that such right of way, not exceeding forty feet in width, may be located on a division line or immediately adjacent thereto, did not render it improper where, by reason of making a reasonably convenient curve, it was necessary to construct a portion of the track more than forty feet from a division line. *Ibid.*

CHAPTER 4-A.

OF INTERURBAN RAILWAYS.

SECTION 2033-a. Interurban railway defined. Any railway operated upon the streets of a city or town by electric or other power than steam, which extends beyond the corporate limits of such city or town to another city, town or village, or any railway operated by electric or other power than steam, extending from one city, town or village to another city,

town or village, shall be known as an interurban railway, and shall be a work of internal improvement. [29 G. A., ch. 81, § 1.]

The provision that the portion of an interurban railway system within the corporate limits of a city shall be subject to municipality regulation does not destroy its character as a part of the system for the purposes of taxation. *Cedar Rapids & M. C. R. Co. v. Cummins*, 125-430.

SEC. 2033-b. What statutes apply. The words railway, railway company, railway corporation, railroad, railroad company, and railroad corporation, as used in the code and acts of the general assembly, now in force or hereafter enacted, are hereby declared to apply to and include all interurban railways, and all companies or corporations constructing, owning or operating such interurban street railways, and all provisions of the code and acts of the general assembly, now in force or hereafter enacted, affecting railways, railway companies, railway corporations, railroads, railroad companies and railroad corporations, are hereby declared to affect and apply in full force and effect to all interurban railways, and to all interurban railway companies or railway corporations constructing, owning or operating such interurban railways. [29 G. A., ch. 81, § 2.]

SEC. 2033-c. When a street railway. Any interurban railway shall within the corporate limits of any city or town, or of any city acting under a special charter, upon such streets as it shall use for transporting passengers, mail, baggage, and such parcels, packages, and freight as it may carry in its passenger or combination baggage cars only, be deemed a street railway, and be subject to the laws governing street railways. [29 G. A., ch. 81, § 3.]

An interurban line which includes a city street car system may be taxed by the executive council as a unit. *Waterloo & C. F. R. T. Co. v. Board of Supervisors*, 131-237; *Cedar Rapids & M. C. R. Co. v. Cummins*, 125-430.

An interurban railway, so far as it is

operated within the limits of a city, does not come within the terms of Code § 2071, declaring that a railway company is liable to an employe for injuries resulting from the negligence of a co-employe. *McLeod v. Chicago & N. W. R. Co.*, 125-270.

SEC. 2033-d. Powers of cities and towns. Cities and towns and cities acting under special charters, shall have power to authorize or forbid the construction of such railways upon, or over, or along the streets, alleys and public grounds within their limits and to prescribe the conditions and regulations under which said railways shall be constructed and operated within said limits. But the right to operate as a street railway under section three (3) of this act shall not be granted for a period exceeding twenty-five (25) years. Nothing herein shall impair the obligation of contracts of such city or town heretofore made. This act shall not in any manner affect sections seven hundred and seventy-five (775) and seven hundred and seventy-six (776) of the code, which shall be applicable to interurban railways. [29 G. A., ch. 81, § 4.]

SEC. 2033-e. Grade-crossings — duties of employes — penalty. Wherever the tracks of an interurban railway cross the tracks of any steam railway at grade the steam railway shall have the right of way and not be compelled to stop its trains and the interurban railway company operating said line shall cause its cars to come to a full stop not nearer than ten (10) feet nor further than fifty (50) feet from such crossing, and before proceeding to cross said steam railway tracks shall cause some person in its employ first to cross said track ahead of said car or cars and ascertain if the way is clear and free from danger for the passage of said interurban cars, and said interurban cars shall not proceed to cross until signalled to do so by such person employed as aforesaid, or said way is clear

for such passage over said tracks. Every person in charge of any interurban car or cars, who wilfully fails to comply with the provisions hereof and fails to bring the car or cars which he has in charge to stop, or causes the same to cross said steam railway tracks before the way is clear or he is signalled to do so, shall be subject to a fine of not less than one hundred dollars (\$100.00) nor more than two hundred dollars (\$200.00) or imprisonment in the county jail not to exceed twelve (12) months in the discretion of the court. No steam railway shall obstruct the free passage of the cars of an intersecting interurban railway at such crossing. [29 G. A., ch. 81, § 6.]

SEC. 2033-f. Automobile railway—statutes applicable. Any system of railway operating cars within the state of Iowa over or upon any track other than steel or iron shall be known as an automobile railway, and shall be a work of internal improvement. The words “railway”, “railway company”, “railway corporation”, “railroad”, “railroad company” or “railroad corporation”, as used in the code and acts of the general assembly now in force or hereafter enacted, are hereby declared to apply to, and include, automobile railways, and all companies or corporations owning or operating such automobile railways, and all provisions of the code and acts of the general assembly now in force or hereafter enacted affecting railways, railway companies, railway corporations, railroads, railroad companies or railroad corporations, are hereby declared to affect and apply in full force and effect to all automobile railways and to all automobile railway companies owning or operating such automobile railways. [32 G. A., ch. 98.]

CHAPTER 5.

OF THE CONSTRUCTION AND OPERATION OF RAILWAYS.

SECTION 2036. May join or consolidate.

A lease of railroad property for a long period of time is not void under the statutory provision against the creation of perpetuities. *Sioux City Terminal R. & W. Co. v. Trust Co.*, 82 Fed. 124; *First Nat. Bank v. Sioux City Terminal R. & W. Co.*, 69 Fed. 441.

OF THE PURCHASE OR CONTROL OF RAILROADS IN OTHER STATES.

SEC. 2038-a. Powers in other states. That any railroad corporation organized under and by virtue of the laws of this state and owning and operating a railroad therein shall be authorized and empowered to exercise in any other state or territory of the United States in which it may control or operate a connecting line or lines of railway the powers and privileges conferred upon it by its articles of incorporation and all powers, privileges and franchises conferred upon railroad corporations under and by virtue of the laws of Iowa or of such other state or territory, for the purposes set forth in section two hereof. [29 G. A., ch. 84, § 1.]

SEC. 2038-b. May purchase, lease, control or operate. That any railroad corporation so organized under the laws of Iowa and owning and operating a railroad therein may lease, purchase, or otherwise acquire and own, control or operate any connecting extension of its said railroad not parallel or competing therewith, in any other state or territory of the United States, and to that end may purchase and control the stock, bonds or securities of any such extension if not contrary to the laws of such other state or territory. [29 G. A., ch. 84, § 2.]

SEC. 2039. Duties and liabilities of lessees.

A special assessment on railway property for improvement of abutting streets cannot be collected directly from the lessee where the lessee has not undertaken to pay such assessment. *Chicago, R. I. & P. R. Co. v. Ottumwa*, 112-300.

A construction company operating engines and cars over a temporary track in

the construction of a railroad is engaged in the operation of a railroad within the provisions of Code § 2071, providing that every corporation operating a railway shall be liable to its employes for all damages sustained in consequence of the negligence of co-employes. *Mace v. Boeker*, 127-721.

SEC. 2041. Bonds—mortgages.

By statute the company has express authority to mortgage after-acquired property, and by that statutory provision, when the power to mortgage exists, the

right to incumber after-acquired property is necessarily included. *Beach v. Wakefield*, 107-567.

SEC. 2042. After-acquired property.

The statute expressly authorizes any corporation organized under the state law for the purpose of constructing and operating a railway, to mortgage its fran-

chise and all its property, whether acquired before or after the execution of the mortgage. *Sioux City Terminal R. & W. Co. v. Trust Co.*, 82 Fed. 124.

SEC. 2043. Execution of mortgages.

A railroad company is in many respects purely a private corporation, and it may bind itself by an *ultra vires* mortgage,

which is not against public policy, by accepting and retaining the benefits thereof. *Beach v. Wakefield*, 107-567.

SEC. 2051. Conditional sale or lease of equipment or rolling stock.

In any contract for the sale of railroad or street railway equipment or rolling stock or power house, electric or other equipment of street or inter-urban railways or of electric light and power companies or of steam heating companies, such equipment including engines, boilers, generators, switch boards, transformers, motors and other machinery and appliances, it may be agreed that the title thereto, although possession thereof be delivered immediately or at any time or times subsequently, shall not vest in the purchaser until the purchase price shall be fully paid, or that the seller shall have and retain a lien thereon for the unpaid purchase money. In any contract for the leasing or hiring of such property, it may be stipulated for a conditional sale thereof at the termination of such contract, and that the rentals or amounts to be received under such contract may, as paid, be applied and treated as purchase money, and that the title to the property shall not vest in the lessee or bailee until the purchase price shall have been paid in full, and until the terms of the contract shall have been fully performed, notwithstanding delivery to and possession by such lessee or bailee; but no such contract shall be valid as against any subsequent judgment creditor, or subsequent *bona fide* purchaser for value without notice, unless:

1. The same shall be evidenced by an instrument executed by the parties and acknowledged by the vendee, or lessee, or bailee, as the case may be, in the same manner as deeds are acknowledged or proved;

2. Such instrument shall be filed for record in the office of the secretary of state;

3. Each locomotive engine, stationary engine, boiler, switch board, transformer, motor, other piece of machinery or appliance or car sold, leased or hired as aforesaid shall have the name of the vendor, lessor or bailor plainly marked on each side thereof, followed by the word "owner," "lessor" or "bailor," as the case may be. [25 G. A., ch. 28, § 1.] [32 G. A., ch. 99.]

SEC. 2052. Recording. The contracts herein authorized shall be recorded by the secretary of state in a book of records to be kept for that purpose, and, on payment in full of the purchase money and the performance of the terms and conditions stipulated in any such contract, a declaration in writing to that effect may be made by the vendor, lessor or bailor, or his or its assignee, which declaration may be made on the margin of the record of the contract, duly attested, or it may be made by a separate instrument, to be acknowledged by the vendor, lessor or bailor, or his or its assignee, and recorded as aforesaid. For such services the secretary of state shall be entitled to a fee of ten cents per hundred words for recording each of the contracts and each of said declarations but in no case shall the fee be less than one dollar and a fee of one dollar for noting such declaration on the margin of the record. [25 G. A., ch. 28, § 2.] [31 G. A., ch. 88.]

SEC. 2054. Cattle-guards—crossings—signs.

The statute absolutely requires railroad companies to construct specified crossings wherever their road crosses public streets or highways and makes them absolutely liable for failure to do so. The provision for notice when there has been such failure and for the construction thereof by the municipal or other authorities is for the protection and accommodation of the public only and does not affect or lessen the duties or liability of the delinquent company. *See v. Wabash R. Co.*, 123-443.

An approach to a crossing situated on the company's right of way is a part of the crossing which the company is bound to construct. *Ibid.*

The duty to erect a crossing necessarily implies a duty to maintain it. *Ibid.*

In an action for personal injuries resulting from a defect in such crossing or approach the burden of proof is on the defendant to show contributory negligence upon the part of the plaintiff. *Ibid.*

The company may be held liable for not taking precautions at highway crossings for the protection of those in the rightful use of the highway. *Oliver v. Iowa Central R. Co.*, 123-217.

But a person *sui juris* voluntarily and unnecessarily placing himself in a position of known danger cannot recover from the

railroad company for injuries received, although the company has been negligent in not taking steps to protect him from danger. *Ibid.*

In the absence of some controlling reason to the contrary, highways are to be improved so that the travel shall pass along the middle line of the land appropriated therefor and a railroad company cannot complain of the assumption that it constructed its crossing at the place thus fixed by legal presumption. The statute requires cattle guards and fences to be placed along the line of the highway. *Craig v. Wabash R. Co.*, 121-471.

In an action to recover damages resulting to an employe by reason of a defective cattle-guard, a plea of contributory negligence may be quite different from an allegation in the petition that plaintiff was free from contributory negligence. *Ford v. Chicago, R. I. & P. R. Co.*, 106-85.

Where an animal had gone upon the right of way over a defective cattle-guard and had afterwards escaped across such guard to the highway and was there killed, held, that it did not necessarily appear that it was not killed by reason of the defective cattle-guard and the the company might be liable. *Riley v. Chicago, M. & St. P. R. Co.*, 104-235.

SEC. 2055. Failure to fence—liability for stock killed—speed at depots.

Failure to provide fences and cattle-guards: The fact that the railroad company allows a portion of its right of way to remain open for use of the public as a highway does not relieve it from liability for stock killed on such portion of its right of way where it does not appear that the dedication of such portion of the right of way to the public has been accepted by it. *Sarver v. Chicago, B. & Q. R. Co.*, 104-59.

The fact that fencing would involve a cattle-guard at the place where a spur track leaves the main track does not constitute an excuse for not maintaining a

fence at such place. *Kingsbury v. Chicago, M. & St. P. R. Co.*, 104-63.

The issue under a general denial in an action to recover for injuries to stock on a right of way raises simply the question whether the company has the right to fence its right of way at the point involved, and not the question whether it has a legal excuse for not so doing. *Ibid.*

There is no liability for a failure to fence unless the injury is caused thereby. *Norman v. Chicago & N. W. R. Co.*, 110-283.

Upon proof of the failure of the railroad company to fence its track at the point

where an animal comes upon the right of way from adjoining premises and is killed a *prima facie* case is made out for the recovery of damages for the killing of the animal, and to escape such liability the company attempting to relieve itself from the duty of maintaining a fence on account of an arrangement with the adjoining property owner by which such fence is to be maintained by him, has the burden of proof. The voluntary construction of some kind of a fence by the adjoining land owner will not excuse the company from erecting such fence as is required by law. *Craig v. Wabash R. Co.*, 121-471.

It is the track, and not the right of way, which is required to be fenced, and where the track was laid on a bridge, and the right of way under the bridge was left unfenced, and cattle passed through from an adjoining field under the bridge onto the highway, and were killed at the highway crossing, held that the railroad company was not liable by reason of the want of a fence. *Cagwin v. Chicago & N. W. R. Co.*, 113-175.

Defective fence or cattle-guard: The finding in a particular case that stock got on the right of way through a defective gate held sufficiently supported by evidence indicating that the gate was liable to come open by reason of the action of the wind. *Huss v. Chicago G. W. R. Co.*, 113-343.

Failure to repair upon notice or within a reasonable time is a failure to fence within the statutory provision. *Daily v. Chicago, M. & St. P. R. Co.*, 121-254.

Although a proper fence is maintained at the boundary of the right of way, yet if there is another fence nearer the track, leaving a lane between the two fences to which stock have access from the highway or adjoining premises the fence next to the track is such fence as that the stock getting upon the track by reason of defects in such fence. *Ibid.*

Animals coming into this open way from adjoining premises are running at large within the meaning of the statute, and the company is liable in damages if such animals get upon the track by reason of defect in the fence adjoining the track and are killed. *Ibid.*

The company being charged with the duty of maintaining proper and sufficient gates at private crossings is bound to use ordinary care and prudence in the construction of such gates, but is not charged with an absolute liability for the results of defects therein. It will not be liable for the results of the defective condition arising from use or decay unless it has actual notice of the defects or in the exercise of reasonable care should have had notice and a sufficient time has elapsed within which to make repairs. Notice may be inferred from lapse of time and

the question of notice and the reasonable time for repair or reconstruction are for the jury. *Wirstlin v. Chicago, M. & St. P. R. Co.*, 124-170.

The owner of stock can recover for injury thereto on the right of way only upon proof of want of repair in the fence, where that is complained of, and that the condition was known to the defendant or had existed for such length of time that knowledge should be imputed to it. *Klay v. Chicago, M. & St. P. R. Co.*, 126-671.

Under a notice claiming damages on account of the killing of an animal going upon the track because of a defective fence, plaintiff may recover on proof that the accident occurred by reason of a defective cattle-guard. *Boyer v. Chicago, R. I. & P. R. Co.*, 123-248.

To relieve the company from liability for the killing of an animal coming upon the right of way across a cattle-guard, it must appear that the guard was reasonably sufficient for the purpose intended. *Campbell v. Iowa Cent. R. Co.*, 124-248.

Where a cattle-guard is defective by reason of being filled up with sand and gravel so that animals may readily pass over the same from the highway to the portion of the right of way which is fenced, the company is liable for killing such animals on the fenced portion of the right of way after they have passed thereon from the highway. *Pothast v. Chicago G. W. R. Co.*, 110-458.

Where an animal gets upon a right of way over a cattle-guard which is defective by reason of being filled up with snow, an action for the death of the animal falls within the provisions of this section. *Paul v. Chicago, M. & St. P. R. Co.*, 120-224.

Evidence in a particular case held sufficient to sustain a verdict against a railroad company for killing of stock by reason of a defective fence. *Kling v. Chicago, M. & St. P. R. Co.*, 115-133.

Negligence: Where the track is enclosed for a long distance each way from the place of accident and train men have no reason to expect that stock will be on the right of way at such place, there is no duty owed to the owner of the stock until their presence is discovered, and then the company owes only the duty of using ordinary care to avoid injury to such stock. *Mears v. Chicago & N. W. R. Co.*, 103-203.

Where a gate at a crossing is such as is commonly in use and is in good order, and the railroad company is not negligent in keeping it closed, it will not be liable for stock killed on the right of way going thereon through such gate, unless it is negligent in the operation of its trains with reference to such stock. *Ibid.*

The liability of the railroad company for stock coming upon the right of way on account of a failure to fence does not de-

pend on the negligence of the employes operating the train. *Mikesell v. Wabash R. Co.*, 112 N. W. 201.

If an animal comes upon the right of way through a defective fence and becoming frightened by the operation of a hand car from which it attempts to escape is injured at a cattle-guard, the company is liable. *Ibid.*

In an action based on negligent killing of cattle at a crossing, it is sufficient to allege the failure to give the warning signals and to stop the train after the cattle were or should have been discovered in the exercise of reasonable care. It is not necessary to state the causes of the failure of duty and charge the same as independent matters of negligence. *Barnard v. Chicago, M. & St. P. R. Co.*, 133-185.

Negligence of owner: The mere fact that the owner knows that a gate separating his premises from the right of way is broken down will not as a matter of law preclude his recovery for killing of his animals which go upon the right of way through such gate. Contributory negligence alone will not defeat the owner's recovery. *Enix v. Iowa Central R. Co.*, 114-508.

Contributory negligence of the owner of the stock does not defeat recovery if the animals are killed through the negligence of the company. *Barnard v. Chicago, M. & St. P. R. Co.*, 133-185.

Evidence, burden of proof: In an action for killing a horse which had passed through a right of way gate upon the track, held that the evidence was sufficient to justify the submission to the jury of the question as to how the gate became open. *Titus v. Chicago, M. & St. P. R. Co.*, 128-194.

If it appears that a right of way gate has been opened by stock so that an animal gets upon the right of way and is injured, it is then for the jury to determine whether the gate was sufficient in its construction and fastening. *Ibid.*

Proof of changes in such gate made by the railway company after the accident is inadmissible. *Ibid.*

If the fence through which stock go upon the right of way is not such as is required by the statute, the company is liable in double damages for the injury. *Ibid.*

In an action for the killing of an animal coming on the right of way through a gate, evidence is admissible tending to show the general construction of the gate, manner of use, the material of which it was constructed, and the kind of fastening used, in order that the jury may determine whether or not the company was negligent in its construction. But the company is not to be charged with any other negligence in that respect than that related in the petition. *Wirstlin v. Chicago, M. &*

St. P. R. Co., 124-170.

In an action to recover damages for killing of stock, which it is claimed came upon the enclosed portion of the right of way over a cattle-guard from a highway crossing, it is competent to show that the cattle-guard was out of order and ineffective. *Black v. Minneapolis & St. L. R. Co.*, 122-32.

It appearing that an animal has got upon the track through a defective fence and been killed, throws upon the company the burden of proving freedom from negligence. *Daily v. Chicago, M. & St. P. R. Co.*, 121-254.

Where the question was as to whether a gate in the right of way fence was sufficient, it was held error to permit a witness to testify that he did not think such gate was sufficient. *Collins v. Chicago, M. & St. P. R. Co.*, 122-231.

Under the evidence in a particular case held that the jury was justified in finding that the animal killed was struck upon the right of way and not upon the highway. *Klay v. Chicago, M. & St. P. R. Co.*, 126-671.

Speed at depot grounds: Liability for injury to stock on account of operating trains on the depot grounds at a greater rate of speed than eight miles per hour where no fence is built, is limited to stock running at large and is not applicable to stock driven by and under the control of the owner or his servant. *Strever v. Chicago & N. W. R. Co.*, 106-137.

Measure of damages: One who has stock killed on the right of way as the result of a defective cattle-guard over which the animals have come upon the right of way, may recover the value of the animals, and is not limited to the average value of such stock in general. Therefore, where the action was for the killing of a brood mare it was held competent to show the number of her foals as tending to show a special value for breeding qualities. *Campbell v. Iowa Cent. R. Co.*, 124-248.

In proving the value of a mare killed on the right of way evidence is competent to show that she was with foal. *Boyer v. Chicago, R. I. & P. R. Co.*, 123-248.

Notice: The mis-naming of the defendant in a notice with reference to the killing of stock by designating it as a "railway" instead of a "railroad" company is immaterial, actual notice having been served on the defendant. *Black v. Minneapolis & St. L. R. Co.*, 122-32.

It is not essential that the jurat to the affidavit shall state that it was sworn to in the presence of or before the notary who verifies the fact by his certificate. That fact is presumed from the official statement that the affidavit was sworn to which statement is made over the notary's official seal, and is signed by him as a notary public. *Ibid.*

Double damages: Where the notice and affidavit were sufficient to put the railroad company upon inquiry, which, if diligently pursued, would have led to a discovery of the facts concerning plaintiff's claim, held that that was sufficient, although there was a discrepancy between them. *Brammer v. Wabash R. Co.*, 112-375.

The liability for double damages is provided for only if the stock is running at large when killed, and not if at that time it is in the charge of or under the control of the owner. *Morris v. Chicago, G. W. R. Co.*, 133-28.

The company having failed to pay in accordance with a notice and affidavit of loss and it appearing that the action is properly maintainable for double damages, the court may give judgment for twice the value of the animal as found by the jury; or if the jury renders a verdict, which upon inquiry the court finds to have been

for the value of the animal only, the jury may be allowed to correct their verdict accordingly. *Campbell v. Iowa Cent. R. Co.*, 124-248.

A concession by counsel for plaintiff during the progress of the trial that there is no right to recover double damages is not binding on the court in rendering judgment, the facts necessary to entitle the plaintiff to recover double damages having been established. *Black v. Minneapolis & St. L. R. Co.*, 122-32.

[The last reference in the notes to this section in the original Code is erroneous. It should be *Schurr v. Omaha & St. L. R. Co.*, 91-418.]

It is only the willful act of the owner which will defeat his recovery for animals passing through a defective gate or fence and killed on the right of way by the operation of trains. *Claus v. Chicago, G. W. R. Co.*, 111 N. W. 15.

SEC. 2056. Damages by fire.

Ordinary care: The statute does not make a railroad company absolutely liable for fires set out by it. Ordinary and reasonable care on the part of the company is all that is required. But ordinary care demands the use of the best known and most appropriate appliances for preventing the escape of fire. *German Ins. Co. v. Chicago & N. W. R. Co.*, 128-386.

Presumption; burden of proof: The fact that fire is set out by sparks from an engine creates a presumption of negligence on the part of the railroad company which may be overcome by proof that it was not guilty of negligence. *Swanson v. Keokuk & W. R. Co.*, 116-304; *Krejci v. Chicago & N. W. R. Co.*, 117-344.

The provision of this section throwing the burden of proof on the company to escape liability from loss due to fires is not applicable to fires set out by section men on the right of way. *Connors v. Chicago & N. W. R. Co.*, 111-384.

Aside from the provisions of this section the escape of sparks from a locomotive is not in itself proof of negligence in its operation, and where an employe claimed to be injured by reasons of sparks and cinders striking him in the eye, held that proof of the accident was not in itself evidence of negligence on the part of the company. *Duree v. Chicago, M. & St. P. R. Co.*, 118-640.

Before the enactment of the fire statute it had uniformly been held in this state that negligence of the company would not be presumed from proof of the setting out of fire alone. But it was also held that the setting out of two or more fires by the same engine would constitute some evidence of negligence. And where the evidence indicated that the fires might have been set out by reason of the negligent use

of slack coal in the engine, held that there was enough evidence on the subject of negligence to take the case to the jury. *Glanz v. Chicago, M. & St. P. R. Co.*, 119-611.

The fact of a fire caused by the operation of a railroad company having been shown, a presumption of negligence on the part of the company follows without further proof. *Kennedy v. Iowa State Ins. Co.*, 119-29.

But the company may contract for exemptions from liability for its negligence in causing fires to property, permitted by it to be located upon its right of way. *Ibid.*

Measure of damages: Where one's meadow has been destroyed he is entitled to recover its value, which may be ascertained by finding what it would cost to reproduce or restore it. The rule is different as to the destruction of trees. *Bradley v. Iowa Central R. Co.*, 111-562.

Where land has been appropriated to a particular purpose as by converting it into an orchard or a meadow, or planting it to a crop which is already growing, the loss occasioned by a fire destroying the meadow or orchard or crop is to be determined with reference to such existing condition. *Black v. Minneapolis & St. L. R. Co.*, 122-32.

When trees, shrubs or meadow are destroyed the measure of damages is at least the difference in value between the land as it was before the injury and its value afterward and the loss of rental value on account of the loss. *Krejci v. Chicago & N. W. R. Co.*, 117-344.

The rule of damages for the destruction of a hedge is the difference in value of the entire farm of plaintiff before and after its destruction, and the value of the hedge may be taken into account in determining

the amount of the injury. *Swanson v. Keokuk & W. R. Co.*, 116-304; *Thompson v. Keokuk & W. R. Co.*, 116-215.

In such case plaintiff is entitled to recover the value of the grass destroyed, as well as the expense of restoring the meadow. *Ibid.*

Evidence: In case of the destruction of a meadow, the value of the meadow burned may be determined by comparison with the condition of the remainder of the meadow at the time of the trial. *Ibid.*

In an action to recover damages for injury to a meadow by fire, evidence as to the effect of fire on another meadow under substantially similar circumstances is admissible. Proximity of the two meadows is not important, the competency of the evidence depending on similarity of the conditions. *Castner v. Chicago, B. & Q. R. Co.*, 126-581.

In an action to recover damages for loss of property by fire set out by a railroad engine, evidence of witnesses that they had seen engines of the defendant throw sparks to a greater distance from the track than the place where the fire in question

started is competent as bearing on the question whether the fire could have been occasioned by sparks from an engine. *Black v. Minneapolis & St. L. R. Co.*, 122-32.

On the question whether the fire was set by sparks from defendant's locomotive, witnesses may testify that within a few minutes after the passing of a locomotive the fire was discovered. *Ibid.*

Liability for personal injuries from fire: Where it appeared that the wife of the owner of farm buildings had been injured by being burned while attempting to protect the premises against fire, and had been made ill by overexertion in so doing, held that the railroad company being chargeable with negligence in setting out such fire, was liable, regardless of statutory provisions. *Glanz v. Chicago, M. & St. P. R. Co.*, 119-611.

The provisions of this section as to liability for damages resulting from fires set out apply only to injuries to property, and not to injuries to the person. *Duree v. Chicago, M. & St. P. R. Co.*, 118-640.

SEC. 2057. Repeal—fences required. That section two thousand and fifty-seven (2057) of the code be and the same is hereby repealed, and the following enacted in lieu thereof:

"All railway corporations owning or operating a line of railway within the state shall construct, maintain, and keep in repair a suitable fence of posts and barb wire, or woven wire, or both combined, or posts and boards, or any other fence which the fence viewers shall determine to be equivalent thereto, on each side of the track thereof, so connected with cattle guards at all public road crossings as to prevent cattle, horses, sheep, swine, and other live stock from getting on the railroad tracks. Such tracks shall be fenced within six months after the completion of the same or any part thereof. Such fence, when of barb wire, shall be of five wires; when of barb wire and woven wire, it shall consist of three barb wires above and woven wire not less than twenty-four inches wide at the bottom, or it may consist entirely of woven wire, in which event the woven wire shall be not less than fifty inches wide; all of the above to be securely fastened to posts not more than twenty feet apart, the top of such fences to be not less than fifty-four inches high; or such fences may consist of five boards, securely nailed to posts set not more than eight feet apart, and to be not less than fifty-four inches high, provided, however, that, where such fences are constructed entirely of barb wire, in addition to the above, on the written request of any person owning land abutting such right of way who has constructed, and is maintaining around his said land, or any part thereof, a hog tight fence on all sides thereof except along such right of way, such railroad corporations shall reinforce such right of way fence with such additional barb or woven wire as is necessary to make it hog tight. Fences repaired or rebuilt shall conform to the foregoing provisions. Nothing in this or the following sections shall be construed to compel a railway company operating a third class line to fence its roads through the land of any farmer or other person who by written agreement with such company waives the fencing thereof." [32 G. A., ch. 100.]

The purpose of specifying what shall be a sufficient fence is to fix absolutely the

liability of the company for injury to animals going upon the right of way through

a fence, unless it complies with the requirements of statute. *Titus v. Chicago, M. & St. P. R. Co.*, 128-194.

The railroad company erecting and maintaining gates at private crossings must construct them with an efficiency corresponding to the requirements as to a fence. *Claus v. Chicago G. W. R. Co.*, 111 N. W. 15.

If, the railroad company having con-

SEC. 2063. Proposed crossing.

Where a railroad about to be constructed is to cross one already constructed, the former must bear the expense of interlocking. *Minneapolis & St. L. R. Co. v. Cedar Rapids, G. & N. W. R. Co.*, 114-502.

The right to use a crossing already established cannot be made to depend upon payment of the entire cost of an inter-

locking system. *Manhattan Trust Co. v. Sioux City & N. R. Co.*, 81 Fed. 50.

Where one railroad company is bound to pay the expense of an interlocking system, the other company is bound to contribute to the expense of the maintenance thereof. *Minneapolis & St. L. R. Co. v. Gowrie & N. W. R. Co.*, 123-543.

locking system. *Manhattan Trust Co. v. Sioux City & N. R. Co.*, 81 Fed. 50.

Where one railroad company is bound to pay the expense of an interlocking system, the other company is bound to contribute to the expense of the maintenance thereof. *Minneapolis & St. L. R. Co. v. Gowrie & N. W. R. Co.*, 123-543.

SEC. 2064. Apportionment of costs.

The provisions of this section as to apportionment relate only to the costs of the proceedings, and not to the expense of the

interlocking device. *Minneapolis & St. L. R. Co. v. Cedar Rapids, G. & N. W. R. Co.*, 114-502.

SEC. 2066. Sale or lease of railroad property—joint arrangement.

A railway may contract with connecting lines to carry beyond its line, subject only to the qualification that under such agree-

ment arbitrary rates cannot be fixed which are discriminatory in their nature. *Bras v. McConnell*, 114-401.

SEC. 2071. Liability for negligence or wrongs of employes. Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers or other employes thereof, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers or other employes, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding. Nor shall any contract of insurance, relief, benefit, or indemnity in case of injury or death, entered into prior to the injury, between the person so injured and such corporation, or any other person or association acting for such corporation, nor shall the acceptance of any such insurance, relief, benefit, or indemnity by the person injured, his widow, heirs, or legal representatives after the injury, from such corporation, person, or association, constitute any bar or defense to any cause of action brought under the provisions of this section, but nothing contained herein shall be construed to prevent or invalidate any settlement for damages between the parties subsequent to injuries received. [C., '73, § 1307.] [27 G. A., ch. 49, § 1.]

In general: The company is not liable to an employe for an injury done by a co-employe when it would not have been liable to a third person injured by a like act. *Kincade v. Chicago, M. & St. P. Ry.*, 107-682.

This section makes no pretense of fixing the degree of negligence which will entitle an injured person to recover. It does not render the company liable to a trespasser for injuries received, unless due to wilful

wrong or gross negligence. *Earl v. Chicago, R. I. & P. Co.*, 109-14.

This provision applies only to companies operating commercial railroads and not to street railway companies. *McLeod v. Chicago & N. W. R. Co.*, 125-270.

This statutory provision does not render the company liable to the surviving husband or wife for such negligence causing the instant death of the other. *Major v. Burlington, C. R. & N. R. Co.*, 115-309;

Seney v. Chicago, M. & St. P. R. Co., 125-290.

Negligence: The provisions of this section do not alter the character of the relation between the railroad company and a person injured, nor the rule of evidence appropriate to such relation upon an issue as to negligence. In such an action the fact of the happening of the accident through which an employe is injured is not evidence of negligence on the part of the defendant, or its employes, to sustain the burden of proof resting on the plaintiff. *Chicago & N. W. R. Co. v. O'Brien*, 132 Fed. 593.

Operation of the railroad: One employed in the construction of a bridge is engaged in the operation of the road in such sense as that the company will be liable for injuries to him caused by negligence of the foreman in allowing a train to go upon the incomplete bridge, the foreman having been provided with a flag for the purpose of enabling him to control the operation of trains over such bridge. *Keatley v. Illinois Cent. R. Co.*, 103-282.

The peculiarity of the railroad business which distinguishes it from any other is the movement of vehicles or machinery of great weight on the track by steam or other power, and the dangers incident to such movement are those the statute was intended to guard against. If, then, the injury is received by an employe whose work exposes him to the hazards of moving trains, cars, engines, or machinery on the track, and is caused by the negligence of a co-employe in the actual movement thereof, or in any manner directly connected therewith, the statute applies and recovery may be had. Beyond this the statute affords no protection. *Akeson v. Chicago, B. & Q. R. Co.*, 106-54.

Therefore, held, that an employe in a railroad coal house, who was injured by the negligence of a co-employe in shoving back a plank over which coal had been carried to fill a tender of a live locomotive, was so engaged in the operation of the railroad as to be entitled to recovery for negligence of the co-employe. *Ibid.*

An employe engaged in an occupation in connection with the business of the road, having nothing to do with the movement of trains, yet involving the performance of duties which bring him into a situation where he is exposed to the perils and hazards arising from such operation or movement, is within the provisions of this section. *Williams v. Iowa Central R. Co.*, 121-270.

In determining whether an employe is engaged in such employment as to bring him within these provisions the test is, does the duty of the employe, no matter what his designation, require him to perform services which expose him to the hazards peculiar to the business of operat-

ing a railway? And held that a car repairer injured by a moving engine when actually employed at his work in the railroad yards was within the statutory provision. *Hughes v. Iowa Cent. R. Co.*, 128-207.

An employe operating a hand car is engaged in the operation of the road. *Larson v. Illinois Cent. R. Co.*, 91-81.

The statute contemplates such injuries only as are caused by the negligent acts of employes engaged in the movement of the engines, cars and machinery on the track, or directly connected therewith. Therefore, held, that the handling of a derrick in coaling an engine was not within the contemplation of the statute. *Reddington v. Chicago, M. & St. P. R. Co.*, 108-96.

A railroad is only operated, within the meaning of the law, by moving trains, cars, engines, or machinery on the track. *Connors v. Chicago & N. W. R. Co.*, 111-384.

This section held applicable to injuries sustained by a car cleaner working in a standing car on a side track, which was run into by an engine by reason of the negligence of a hostler in charge of such engine. *Jensen v. Omaha & St. L. R. Co.*, 115-404.

Where an employe was assisting in transferring railroad rails from one car to another by means of power furnished by the operation of a locomotive engine, held that he was so engaged in the hazardous business of operating railways as to be entitled to recover for injuries received through the negligence of a co-employe. *Stebbins v. Crooked Creek R. & C. Co.*, 116-513.

The operation of an engine and cars over a temporary track in the construction of a railroad is the operating of a railway within the statutory provisions, rendering every corporation operating a railway liable to its employes for damages sustained in consequence of the negligence of other employes. *Mace v. Boedker*, 127-721.

The ordinary work of a section hand which is wholly disconnected with the operation and control of cars or trains operated on the track is not an employment connected with the use and operation of the road within the statutory provision. *Dunn v. Chicago, R. I. & P. R. Co.*, 130-580.

Assumption of risk: The provisions of this section do not affect the rule as to assumption of risk. *Chicago, G. W. R. Co. v. Grotty*, 141 Fed., 913.

One engaging in the hazardous business of operating trains on a railroad does not assume the risk of the negligence of the train dispatcher. *Phinney v. Illinois Cent. R. Co.*, 122-488.

Contractual limitation of liability: The so-called Temple Amendment (added to

this section by 27 G. A., chap. 49 and constituting the last sentence of this section as printed above) prohibiting any defense on account of a contract between a railroad company and its employes in the nature of a contract for insurance or relief in case of accident, made prior to the injury, is constitutional. Such a contract constitutes a limitation of liability such as is prohibited by the statute. *McGuire v. Chicago, B. & Q. R. Co.*, 131-340.

SEC. 2072. Signals at road crossings.

In general: A railroad company cannot be excused for failure to comply with the provisions of this section on the ground that compliance would amount to an interference with interstate commerce. *Willfong v. Omaha & St. L. R. Co.*, 116-548.

The statutory requirement that the whistle be blown on approaching a highway crossing does not apply to the street crossings within the city limits in the absence of some ordinance or resolution on the part of the city; but the requirement that the bell shall be rung is applicable to street crossings, and if they are less than sixty rods apart, the bell should be rung continuously from the time the duty begins until all such crossings are passed. *Golinvaux v. Burlington, C. R. & N. R. Co.*, 125-652.

Where there is no ordinance requiring the blowing of the whistle within city or town limits it may be omitted. *Pratt v. Chicago, R. I. & P. R. Co.*, 107-287.

The signals required of the railroad company on approaching a highway crossing are not only intended for the benefit of those who are on or about to cross the track, but also for the benefit of those who may be near the track in such position as to be placed in peril. *Mitchell v. Union Terminal R. Co.*, 122-237.

Negligence: The requirements of state statutes and city ordinances are not the sole standards for determining whether due care has been observed by the railroad company to guard against accidents at a crossing. *Kowalski v. Chicago G. W. R. Co.*, 84 Fed. 586.

Failure to give signals as required by law will be presumed, in the absence of a showing to the contrary, to have been the proximate cause of injury at a highway crossing. *Kuehl v. Chicago, M. & St. P. R. Co.*, 126-638.

Even though there is no duty to keep a flagman at a crossing, the fact of the failure to do so may be taken into consideration on the question of alleged negligence in running the train at a high and dangerous rate of speed at such crossings. *Golinvaux v. Burlington, C. R. & N. R. Co.*, 125-652.

The railroad company does not necessarily discharge its whole legal duty with

An agreement entered into at the time of the employment between the company and an employe that if he sustains any personal injury for which he makes a claim against the company for damages he will give notice thereof in writing within thirty days is a limitation on the company's liability, and therefore invalid. *Mumford v. Chicago, R. I. & P. Co.*, 128-685.

reference to the safety of persons about to cross a track at a public crossing, or as to the safety of the property under their control, by sounding the whistle and ringing the bell. If by reason of a curve in the track, high banks, or other obstructions, there is peculiar danger to such persons or their property, the common law obligation to exercise care may require the taking of further precautions. *Kinyon v. Chicago & N. W. R. Co.*, 118-349.

The mere fact of great speed will not in itself constitute negligence, but if, by reason of natural or artificial obstructions, or a curve in the track, the crossing is of peculiar or extraordinary danger, the operation of the railway must be conducted with reference to that fact. *Ibid.*

Contributory negligence: The mere fact that the person approaching the crossing may have heard the train at the distance from the crossing at which the signal should have been given, will not of itself justify the court in saying as a matter of law that there was no negligence on the part of the company, or that there was contributory negligence on plaintiff's part in connection with the accident happening at such crossing. *Ibid.*

One about to cross a railroad track at a highway crossing has the right to place some degree of reliance upon the presumption that the trainmen will do their duty and sound the usual signal of warning in approaching the crossing. The question of contributory negligence in such cases is for the jury. *Mitchell v. Union Terminal R. Co.*, 122-237.

It will not necessarily constitute contributory negligence that a person at a highway crossing seeing danger of a collision with his team imminent, attempts to so control the team as to prevent injury. *Ibid.*

It is usually a question for the jury whether one whose animals are injured at a highway crossing by a train was guilty of contributory negligence with reference thereto. *Kuehl v. Chicago, M. & St. P. R. Co.*, 126-638.

Before there can be a recovery on account of negligence of the railway company in failing to give statutory signals, or for running at an exceedingly high rate of

speed at a highway crossing, it must be shown that the person suffering injury from such negligence did not contribute to the injury by negligence on his own part, and he cannot in all cases rely upon the railway company to give the signals required by statute. A person possessing the ordinary powers of seeing and hearing cannot, without negligence on his part, knowingly approach a railway crossing and fail to discover an approaching train which he can readily see or hear within sufficient length of time to enable him, with reasonable effort, to avoid danger. *Crawford v. Chicago G. W. R. Co.*, 109-433.

Injuries to stock: The statutory signals are intended for the protection, as far as possible, of animals as well as men, and a failure to give such signals when approaching a crossing makes the company absolutely liable for injuries to stock on the crossing, provided it appears that if such signals had been given they would have prevented the animals going on the track or frightened them away from the crossing. *Graybill v. Chicago, M. & St. P. R. Co.*, 112-738; *McGill v. Minneapolis & St. L. R. Co.*, 113-358.

It is for the jury to determine whether the signals were given as required, and if not, whether the failure to give them was the cause of the injury to the animals. *Ibid.*

Private crossings: The statute does not require the sounding of the engine whistle on approaching a private crossing. The term, "any road crossing," as used, designates a highway crossing. *Nichols v. Chicago, M. & St. P. R. Co.*, 125-236.

There is no common law duty to give signals on approaching private crossings. The omission to give such signal might constitute negligence as by reason of peculiar or extraordinary circumstances where ordinary prudence would require an alarm or signal to be given by an approaching train. *Ibid.*

SEC. 2073. Stopping at railway crossings.

This section is as to the forfeiture provided penal in character. The offense denounced is the omission of the engineer to stop the train as required, and the liability of the company is for the commission of the offense on the part of the engineer. There is no liability on the part of the company unless the engineer has been at fault, and the company may have the advantage of any excuse that would be available to the engineer. The burden of proof is not sustained by evidence of the fact alone that the train was not stopped at the crossing. *State v. Chicago, M. & St. P. R. Co.*, 122-22.

This section is not unconstitutional as imposing a penalty on a railway company

Evidence: Testimony of witnesses that they did not hear the crossing whistles sounded does not even create a conflict with positive evidence that the signals were given at the whistling posts. *Payne v. Chicago & N. W. R. Co.*, 108-188.

If the person injured at the crossing would not have heard the signals if given, then the omission to give them will not render the company liable. *Ibid.*

Positive evidence that the signal at a railroad crossing is not given is not to be discredited because in conflict with evidence of other witnesses that such signals were given. *Kinyon v. Chicago & N. W. R. Co.*, 118-349.

Testimony of witnesses in a situation to hear and likely to have heard a crossing signal, if one had been given, that they did not hear any such signal, is not to be ignored and treated as of no weight because opposed to the testimony of witnesses who say that the signal was actually given, or that they heard such signal. The testimony of the witnesses who were in a situation to hear and likely to hear a signal, if given, is not to be treated as merely negative evidence. *Selensky v. Chicago G. W. R. Co.*, 120-113.

Evidence of persons in a situation to hear and whose attention was not diverted that they did not hear a signal which other witnesses testified to having heard, is not merely negative evidence. *Mackerall v. Omaha & St. L. R. Co.*, 111-547.

As between witnesses who are in an equally advantageous position as to hearing sounds and signals, those who testify that they did not hear are entitled to the same credit as those who testify that they did hear, and the former should not be discredited by an instruction that, as compared with other witnesses, their testimony is negative. *Stanley v. Cedar Rapids & M. C. R. Co.*, 119-526.

for an offense of its employe. The requirement is only that the company secure obedience by its employes to the requirements of the statute. *Ibid.*

Where the company whose track is crossed by the track of another company does not demand the installation of an interlocking system as authorized by Code § 2063, it must comply with statutory requirement for the stopping of its trains approaching such crossings. If it does insist on the installation of an interlocking system by the other company, it must thereafter bear its share of the expense of maintaining such interlocking system. *Minneapolis & St. L. R. Co. v. Gowrie & N. W. R. Co.*, 123-543.

SEC. 2074. Contract or rule limiting liability.

A contract between an express company and its servant, exempting the express company from liability for injuries to the servant, and authorizing it to contract for like exemption from liability with a railroad company, and the corresponding contract between the express company and the railroad company, exempting the latter from liability for injuries to servants of the express company, are invalid. *O'Brien v. Chicago & N. W. R. Co.*, 116 Fed. 502.

As a railroad company may absolutely refuse to check as baggage of a passenger that which is merchandise, it may, notwithstanding the provisions of this section, make any regulations in regard to the waiver of such condition which it sees fit to adopt. *Weber Co. v. Chicago, St. P., M. & O. R. Co.*, 113-188.

Limitations of liability in a bill of lading are void. *McMillan v. American Express Co.*, 123-236.

A railroad company contracting for the carriage of goods beyond the end of its line may, in the contract with reference to such carriage, limit its liability, notwithstanding the provisions of this section. *Hartley v. St. Louis, K. & N. W. R. Co.*, 115-612.

It may be stipulated that stock is to be in charge of the shipper or his agent while in transit, free transportation being furnished to such person, and that the shipper assumes the duty of loading and unloading, attending to, feeding and watering such stock at his own expense and risk. In case damage results from lack of care in these respects on the part of the shipper or his agent the company will not be liable unless the loss is due to the failure of the company to discharge duties not assumed and undertaken by the shipper. *Grieve v. Illinois Cent. R. Co.*, 104-659.

SEC. 2074-a. Repeal—action against joint carriers. That chapter seventy-four (74) of the laws of the thirtieth general assembly be, and the same is hereby, repealed and there is hereby enacted as a substitute therefor the following:

That in all cases where a railway company bills property to a point beyond the terminus of its own railway and provides by contract that it shall not be liable for the destruction of, or damage to, such property beyond the terminus of its own railway and the said property is damaged or destroyed between the place of shipment and place of destination to which it was billed, the initial carrier and the connecting carrier or carriers if more than one, over whose line, or lines, of railway the property shall have been carried between the place of shipment and said place of destination, may be joined as defendants in one action, brought in any county from or into which shipment shall be made, or suit may be brought in any county through which shipment shall be made and service of original notice may be made on any of said carriers in any county of the state, where the carrier to be served has a station agent, by serving such notice on such station agent. [31 G. A., ch. 89, § 1.] [32 G. A., ch. 101.]

The burden is on the shipper in the first instance to show in such case that injury to stock from want of care did not result from his own negligence and if occasioned by failure to do what he has undertaken then that such failure resulted from the omission on the part of the company to perform some duty devolving upon it. *Ibid.*

A contract between a railroad company and the shipper of stock by which the latter is to have the entire charge and care of the stock and the company is not to be liable for damages for failing to feed and water, is not void under the statute as a contract limiting liability. *Burgher v. Chicago, R. I. & P. R. Co.*, 105-335.

A contract for the transportation of live stock, exempting the carrier from liability for loss or damage received from heat, suffocation, crowding, maiming, etc., is invalid. *Powers v. Chicago, R. I. & P. R. Co.*, 130-615.

A limitation of liability for a horse to \$100, named in the contract as "the release value of the horse," held invalid under the provisions of this section. *Lucas v. Burlington, C. R. & N. R. Co.*, 112-594.

The case of *Solan v. Chicago, M. & St. P. R. Co.*, 95-260, is affirmed on appeal to U. S. supreme court. *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133.

The case of *Griswold v. Illinois Cent. R. Co.*, 90-265, followed in a case involving a similar state of facts. *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.*, 175 U. S. 91.

This section is not applicable to a contract exempting a railroad company from liability to one permitted to erect a building on its right of way, for loss thereof by fire. *Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co.*, 175 U. S. 91.

SEC. 2074-b. Liability of joint carriers. On proof being made by the owner of the property shipped, that the same has been destroyed or damaged in transit between the said place of shipment and the place of destination, the liability of a common carrier shall attach to all the defendants and judgment shall be entered accordingly against them all unless one or more of the defendants shall prove that it was not, or they were not, liable, in which case judgment shall go only against the remaining defendant or defendants. [31 G. A., ch. 89, § 2.]

SEC. 2075. Lien of judgment.

A pending right of action against a railroad, which is not reduced to judgment before the sale of the property under mortgage foreclosure, is not preserved by this section. *Winter v. Iowa Cent. R. Co.*, 111-342.

Section 1309 of Code of '73 had no application to street railways. *Fidelity Loan & Trust Co. v. Douglass*, 104-532.

SEC. 2076. Repeal—classification of railroads. That section two thousand seventy-six (2076) of the code is hereby repealed and the following enacted in lieu thereof:

"All railroads of the state shall be classified in accordance with the gross amount of their several annual earnings within the state, per mile, for the preceding year, as follows: Class 'A' shall include those whose gross annual earnings per mile shall be four thousand dollars or more; class 'B' shall include those whose gross annual earnings per mile shall be three thousand dollars or any sum in excess thereof less than four thousand dollars; class 'C' shall include those whose gross annual earnings per mile shall be less than three thousand dollars. In determining the classification of any railroad, the entire railroad property owned or operated by any company shall be considered as a single railroad, and the aggregate gross earnings of the entire railroad within the state shall be divided by the entire mileage owned or operated within the state, to ascertain the gross earnings per mile of such railroad." [32 G. A., ch. 102, § 1.]

SEC. 2077. Repeal—passenger rates. That section two thousand seventy-seven (2077) of the code is hereby repealed and the following enacted in lieu thereof:

"All railroad corporations according to their classifications as herein prescribed shall be limited to compensation per mile for the transportation of any person with ordinary baggage not exceeding one hundred and fifty pounds in weight as follows: Class 'A,' two cents; class 'B,' two and one-half cents; class 'C,' three cents; and for children twelve years of age or under one-half the rate above prescribed, provided, however, that every railroad corporation shall be entitled to charge a fare of not to exceed ten (10) cents for the transportation of each passenger with ordinary baggage for any distance not exceeding five miles. A charge of ten cents may be added to the fare of any passenger when the same is paid upon the cars, if a ticket might have been procured within a reasonable time before the departure of the train, except in those cases where a minimum of ten (10) cents is charged for a distance of less than five miles as above provided." [32 G. A., ch. 102, § 2.]

Plaintiff suing for wrongful ejection from a train for the refusal to pay ten cents additional on account of not having a ticket has the burden of alleging facts to show that he could not have procured

a ticket within a reasonable time before the departure of the train upon which he took passage. *Bowsher v. Chicago, B. & Q. R. Co.*, 113-16.

SEC. 2077-a. Bulletins posted. It shall be the duty of all railway companies on all lines of railway operated by them, to keep posted in the

waiting room of each passenger station, a bulletin plainly showing the time of arrival and departure at such station of all trains carrying passengers. [29 G. A., ch. 87, § 1.]

SEC. 2078. Repeal—classification of railways. The law as it appears in code section two thousand and seventy-eight (2078) is hereby repealed and the following enacted in lieu thereof:

“The executive council shall at its regular meeting on the second Monday in July in each year classify the different railways, as provided by section two thousand and seventy-six (2076) of the code, from information as to gross earnings obtained from the annual reports of railways made to the executive council for assessment and taxation, if it shall be satisfied of the correctness of same, or from information obtained by said executive council from any other source, and, when there shall be any change in classification, shall issue a certificate to any corporation or corporations affected by such change, certifying the class to which they are respectively assigned; any change of rates by any corporation pursuant to any change of classification shall take effect and be in force from and after the date of such certificate.” [30 G. A., ch. 75.]

SEC. 2079. Automatic couplers and brakes—on new or repaired cars.

It is not negligence *per se* not to equip engines and tenders with the latest coupling device, in the absence of any statutory provision as to automatic couplers on engines and tenders. *Bryce v. Burlington, C. R. & N. R. Co.*, 119-274.

The test to be applied in determining the sufficiency of the automatic coupler as complying with the statutory requirement is whether the person operating the coupler is required to go between the ends

of the cars; and this test applies to the act of coupling as well as to that of uncoupling. The use of a coupler not complying with these conditions constitutes actionable negligence. *Chicago, M. & St. P. R. Co. v. Voelker*, 129 Fed. 522.

The statutory provision being for the protection of the lives and limbs of persons, is to be so construed as to prevent the mischief, and advance the remedy so far as the words fairly permit. *Ibid.*

SEC. 2080. Automatic couplers. After January 1st, 1898, no corporation, company or person, operating a railroad, or any transportation company using or leasing cars, shall have upon any railroad in this state any car that is not equipped with such safety automatic coupler: Provided that the board of railroad commissioners shall have power upon a showing which it shall deem reasonable, to extend the time within which any such corporations shall be required to comply with the provisions of this section; but no such extension shall be made beyond January 1st, 1900. [23 G. A., ch. 18, § 2.] [27 G. A., ch. 50, § 1.]

SEC. 2083-a. Exempt from liability. That no corporation, company or person shall be liable to any prosecution in any court of this state for any fines or penalties incurred under the provisions of section two thousand and eighty-three (2083) of the code in so far as the same relates to the operation of cars not equipped with safety automatic couplers only, as provided by section twenty hundred and eighty (2080) of the code, from the first day of January, 1898, up to and including the time of taking effect of this act; and every such corporation, company, or person shall be, and is hereby, released from all criminal prosecution, penalties, fines, and forfeitures for failure to have cars equipped with such safety automatic couplers during such period. [27 G. A., ch. 51, § 1.]

SEC. 2083-b. Pending litigation. This act shall in no manner affect pending litigation. [27 G. A., ch. 51, § 2.]

TAXES IN AID OF RAILROADS.

SEC. 2084. May be voted. Taxes not exceeding five per cent. on the assessed value of any township, town or city may be voted to aid any rail-

way company, trolley or electric railway which is or may become incorporated under the laws of the state, to aid in the construction of a projected railroad or any trolley or electric railway within the state, as hereinafter provided. [25 G. A., ch. 27; 24 G. A., ch. 18; 20 G. A., ch. 159, § 2.] [29 G. A., ch. 85, § 1.]

SEC. 2085. Petition—notice—submission—certificate—levy—collection. When a petition is presented to the trustees of any township or the council of any town or city, signed by a majority of the resident freehold taxpayers of such township, town or city, asking that the question of aiding any railroad company incorporated under the laws of the state in the construction of a projected railroad within it be submitted to the voters thereof, it shall be the duty of the trustees or council, as the case may be, immediately to give notice of a special election, by publication in some newspaper printed in said township, town or city, if any there be, and, if not, then in some newspaper published in the county, and also by posting copies of said notice in five public places in such township, town or city at least ten days before such election, which shall state the time and place of holding the same, the name of the company, and the line of the road proposed to be aided, the rate per cent. of the tax to be levied, whether one-half thereof shall be collected the first year and one-half the following year, or whether the whole is to be collected in one year, the amount of work required to be done and when and where the same shall be done, to what point said railroad shall be fully completed, and any other conditions which shall be performed before such tax or any part thereof shall become due; and in no case shall such tax become due until such railroad is fully completed according to the conditions in said notice. The trustees or council, as the case may be, shall cause to be prepared the form of the proposition to be submitted. The proposition shall be printed and placed upon the ballots and the election shall be conducted in the same manner as provided with respect to like or similar propositions in the chapter on elections; and if a majority of the votes polled be for the adoption of the proposition, then the clerk of the township, city or town, or the clerk of election, shall forthwith certify to the county auditor the result thereof, the rate per cent. of tax voted, the year or years during which the same is to be collected, the name of the company to which voted, and the time, terms and conditions upon which the same, when collected, is to be paid under the conditions and stipulations in said notice, together with an exact copy of the notice under which the election was held, which the county auditor shall at once cause to be recorded in the office of the recorder of deeds; the expense thereof, and of publishing the notice, and all the expenses of the election, shall be paid by the railway company to which it is proposed to vote the tax. When such certificate has been made and recorded, the board of supervisors of the county shall, at the time of levying the ordinary tax next following, levy such taxes as are voted under the provisions hereof, as shown by said certificate, and cause the same to be placed on the tax lists of the proper township, town or city, indicating in their order thereupon when and in what proportion the same are to be collected, and upon what conditions the same are to be paid to the railway company, a certified copy of which order shall accompany the tax lists. The taxes shall be collected at the same time or times specified in the order, and in the same manner, and subject to the same laws after they are collectible, as other taxes, or as may be stated in the petition and notices for the election, except as otherwise provided. [20 G. A., ch. 159, § 3.] [29 G. A., ch. 85, § 2.]

A condition in the proposition for voting a tax that the railroad shall be operated in connection and solely with a certain

other specified railroad system for a specified time and in active competition with other specified roads does not render the

taxes invalid. *Bras v. McConnell*, 114-401.

Printing of surplusage on the ballot will not necessarily render the election invalid. *Ibid.*

In a particular case held that the form of ballot was sufficient and was not calculated to mislead the voter in expressing his views. *Ibid.*

Under a notice of the voting of an aid

SEC. 2086. Notice—conditions—limit of tax. The stipulations and conditions in the notices prescribed in this chapter must conform to those set forth in the petition asking for the election; and the aggregate amount of tax voted in any city, town or township shall not exceed five per cent. of the assessed value of the property therein, respectively. The right to vote taxes within the limits herein provided shall exist after the expiration of ten (10) years from the exercise to the limit of the right herein granted. Nothing herein shall authorize a tax of five per centum within such period named to steam railroads and also five per centum within such period to interurban railways. [25 G. A., ch. 27; 24 G. A., ch. 18; 20 G. A., ch. 159, § 4.] [29 G. A., ch. 86, § 1.]

SEC. 2087. Money paid out—certificates. The moneys collected under the provisions of this chapter shall be paid out by the county treasurer to the treasurer of the railway company for whom the same was voted, upon the orders of the president or managing director thereof, at any time after the trustees of such township or council of such town or city voting the same, or a majority thereof, shall have certified to the county treasurer that the conditions required of the railway company and set forth in the notice for the special election have been complied with, which certificate said township trustees or council of such town or city shall make when conditions have been sufficiently complied with to entitle the railway company thereto, or when the conditions are fully complied with on the part of the railway company; but if the costs and expenses of holding the election and of recording the certificates have not been paid, then the treasurer shall first deduct from the moneys collected the amount thereof, and pay same to the parties entitled thereto. [20 G. A., ch. 159, § 5]

SEC. 2088. Certificates of taxes exchangeable for stock or bonds. The county treasurer when required shall, in addition to a tax receipt, issue to each taxpayer, on the payment of any taxes voted under the provisions of this chapter, a certificate showing the amount of tax paid, the name of the railway company entitled thereto, and when the same was paid; and he may charge twenty-five cents for each certificate issued. Said certificates shall be assignable, and, when presented by any person holding the legal title thereto to the president, managing director, treasurer or secretary of the railroad company receiving the taxes paid, as shown by such certificates, in sums of one hundred dollars or more of taxes, it shall issue or cause to be issued to said person the amount of stock of the company desiring the benefit from said taxes, to the amount of said certificate or certificates, and if the taxes paid as shown by said certificate or certificates amount in the aggregate to more or less than any certain number of shares of stock, then the holder thereof shall be entitled to receive the full number of shares of stock covered by said certificates, and may make up in money the balance of any share when the certificates held by him are not equal to one full share of such stock, which stock for such purpose shall be estimated at par. When it shall be proposed in the petition and notice calling an election to issue first mortgage bonds not exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge, and

tax containing a stipulation that the road should be built to a particular place and that the depot should be within 100 rods of a certain street, of that place, held that the stipulations were substantially complied with, and that the company was entitled to the tax. *Whitney v. Chicago, A. & N. R. Co.*, 133-508.

not exceeding the sum of eighteen thousand and five hundred dollars per mile for the ordinary four feet eight and one-half inch gauge in lieu of stock, it shall be lawful to issue bonds of the denomination of one hundred dollars in the same manner as is provided for the issue of stock, and in such case the petition and notice shall state the amount of bonds per mile to be issued, the rate of interest, and the time of payment of the interest and principal thereof. [23 G. A., ch. 19, § 1; 20 G. A., ch. 159, § 6.]

Where there is no prohibition of the issuance of bonds the stockholder cannot complain that the bonds of the company have been issued prior to the delivery to him of the stock to which he has become entitled. *Whitney v. Chicago, A. & N. R. Co.*, 133-508.

SEC. 2089. Liability of directors. The board of directors of any railway company receiving taxes voted in aid thereof under the provisions of this chapter or any member thereof, who shall vote to bond, mortgage or in any manner incumber said road to an amount exceeding the sum of eight thousand dollars per mile for a railroad of three feet gauge, or exceeding the sum of eighteen thousand five hundred dollars per mile for the ordinary four feet eight and one-half inch gauge, not including in either case any debt for ordinary operating expenses, shall be liable to the stockholders or either of them for double the amount, estimated at its par value, of the stock by him held, if the same should be rendered of less value or lost thereby. [23 G. A., ch. 19, § 2; 20 G. A., ch. 159, § 7.]

SEC. 2090. Forfeiture of tax. Should the taxes voted in aid of any railroad under the provisions of this chapter remain in the county treasury for more than one year after the same have been collected, the right to them by the railroad company shall be forfeited, and the persons who paid the same entitled to receive back from the county treasurer their *pro rata* shares thereof remaining, and in all cases where any taxes have been voted or levied upon the real or personal property in any township, town or city to aid in the construction of any railroad, and the road in aid of which they were voted or levied has not been built, completed or operated into or through such township, town or city, it shall be the duty of the board of supervisors of the county where said taxes have been voted and levied and still remain on the tax books to give the railway company in aid of which the tax was voted at least thirty days' notice in writing, to be served like original notices, of their intention to cancel such taxes, and thereupon to cause the same to be cancelled and stricken from the tax books of the county, which cancellation shall remove all liens created by the levy thereof. In all cases where the railway company to whom taxes have been voted neglects or refuses to receive such taxes, or to require or permit the same to be collected and certificates therefor to be issued, for the period of one year after they become due and collectible, and in all cases where taxes have been voted in aid of any railroad, and the conditions upon which the same were voted have not in fact been complied with, and the time in which said conditions were to be fulfilled has expired, the same shall be forfeited, and the county officers of the county in which they have been levied and entered upon the tax books shall enter cancellation thereof upon the proper records; and in all cases where any taxes to aid in the construction of any railroad may be voted upon the inducement or promise offered on the part of said railroad company, or any duly authorized agent thereof, for any rebates or exemptions from said tax or any part thereof, or any agreed price to be paid for the stock that may be issued in lieu of said tax, or a division of said tax, or any portion or percentage thereof, with any of the voters or taxpayers as an inducement to procure said tax to be voted, all taxes so procured to be voted shall be void. [20 G. A., ch. 159, § 8.]

SEC. 2091. Taxes paid in labor or supplies. Nothing contained in this chapter shall preclude any taxpayer who may contract with a railroad company for which taxes may be voted to pay his tax, or any part thereof, in labor upon the line of said railroad, or in material for its construction, or supplies furnished or money paid for the construction thereof, in pursuance of the terms and conditions stipulated in the notices of election, in lieu of a payment to the county treasurer. Upon presenting to the county treasurer a receipt from such railroad company or its duly authorized agent, specifying the amount of such payment, the same shall be credited by the treasurer on his tax, with the same effect as though paid to him in money, and when such receipts have been presented and credited they shall have the same validity in his settlement with the board of supervisors as the orders from the railroad company provided for in this chapter. Laborers shall have a lien upon any tax voted in aid of a railroad company for the amount due them for labor performed in the construction of said railroad. [Same, § 9.]

The lien here provided for in favor of laborers is not a mechanic's lien, nor is it a common law lien. Neither possession nor filing of a statement or claim is essen-

tial. *Kent v. Muscatine, N. & S. R. Co.*, 115-383.

Such a lien is assignable. *Ibid.*

SEC. 2091-a. What statutes apply. All of the provisions of sections two thousand and eighty-four, two thousand and eighty-five, two thousand and eighty-six, two thousand and eighty-seven, two thousand and eighty-eight, two thousand and eighty-nine, two thousand and ninety, and two thousand and ninety-one of the code are hereby made applicable to trolley or electric railways. And wherever the word "railroad" appears in any of said sections the same shall be held to include trolley or electric railroad; and wherever the words "railroad company" or "railway company" appear in said sections the same shall be held to include trolley railway company, and electric railway company. Provided, that no stock shall be issued by any such company except upon payment therefor of the full par value thereof in cash or its equivalent. [29 G. A., ch. 85, § 2.]

SEC. 2093. Notice. A public notice to all whom it may concern of the time of filing such petition, the object thereof, and the term of court at which the application will be made for authority to make the change, and requiring all persons desiring the repayment of money or return of property, as in this chapter provided, to appear and present their claims therefor, must be published in a newspaper printed in each county in which the change is to be made, once each week, for a period of ten successive weeks before the term of court at which the application is to be heard. The court may order any additional notice or publication that it may think proper. [16 G. A., ch. 118, § 2.] [31 G. A., ch. 9, § 7.]

SEC. 2100. Powers.

The corporation provided for in this section is not a railroad company. But a railroad company may, irrespective of this section, construct a union depot, and in so doing it does not lose any of the powers possessed by it under the general law. *Morgan v. Des Moines U. R. Co.*, 113-561.

A railroad company may purchase and own such right of way as it sees fit, and use it in connection with the operation of a union depot without securing the consent of the railroad commission. *Ibid.*

SEC. 2110-a. Hours of service limited—exceptions. It shall be unlawful for any railway company within the state of Iowa, or any of its officers or agents to require or permit any employe engaged in or connected with the movement of any rolling stock, engine or train, to remain on duty more than sixteen (16) consecutive hours, or to require or permit any

such employe who has been on duty sixteen (16) consecutive hours to perform any further service without having at least ten hours for rest, or to require or permit any such employe to be on duty at any time to exceed sixteen (16) hours in any consecutive twenty-four (24) hours; provided, however, that this section shall not apply to work performed in the protection of life or property in cases of accident, wreck, or other unavoidable casualty, or prevent train crews from taking a passenger train, or freight train loaded exclusively with live stock or perishable freight, to the next nearest division point upon such railroad; and provided further that it shall not apply to that time necessary for the trainmen to reach a resting place when an accident, wreck, washout, snow blockade or other unavoidable cause has delayed their train; and provided further that this section shall not apply to employes of sleeping car companies. [32 G. A., ch. 103, § 1.]

SEC. 2110-b. Penalty—investigation—prosecutions. Any superintendent, train master, train dispatcher, yard master or other official of any railroad in the state of Iowa, violating any of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than one hundred dollars (\$100) and not more than five hundred dollars (\$500) for each offense. It shall be the duty of the board of railroad commissioners to receive written statements of violations of this act and when so requested to hold the same without disclosure of the name of the person making such statement, and to investigate each and every complaint filed alleging such violation. The board in making such investigation shall have the power to administer oaths, interrogate witnesses, take testimony, and require the production of books and papers, and must file a report of such investigation in writing with a full statement of its finding to the governor. In all cases of violation of this act, the board of railroad commissioners, through the attorney general, must at once begin the prosecution of all parties against whom evidence of violation is found; but this act shall not be construed to prevent any other person from beginning prosecution for violation hereof. [32 G. A., ch. 103, § 2.]

SEC. 2110-c. Street railways to furnish terminal facilities—compensation. That all persons, firms or corporations now or hereafter owning or operating electric street railways in any city (including cities organized under special charter) or town of this state, are hereby authorized and required to permit the use for interurban business only but not for local street railway business, of such of their terminals, tracks, poles and wires as are located in the streets, alleys and public places of said cities and towns, and such portions of their tracks, poles and wires as may cross property owned by said street railway companies in such cities and towns, by the passenger and combination baggage cars of interurban railway companies, for the transportation of passengers, mail, express and baggage; and said street railways shall furnish to said interurban railways, electric power for the operation of their cars and the transaction of their said business in said cities and towns, as to said tracks so furnished; but said street railways shall not be required to furnish electric power except during such hours as their street railway cars may be in operation; nor shall they be required to furnish such power where they have not power houses and machinery sufficient therefor; and they shall have the preference in the use of their own tracks and power so that their own cars shall not be delayed in transit; nor shall they be required to furnish car houses or car barns or access thereto. Said interurban railways shall pay a reasonable compensation for the privileges and power that may be furnished them as above mentioned under this act. If an agreement for the

use of the facilities so furnished and the compensation for the same cannot be made between the interested parties the question as to the amount of such compensation and the conditions under which said facilities shall be furnished, used and operated, shall be heard and determined by the board of railroad commissioners of the state of Iowa, on petition to the said board by either party to the controversy, ten days' notice in writing of such petition being served upon the opposite party; and any order entered by said board of railroad commissioners, or court upon appeal, shall be subject to modification or review from time to time, upon notice being given as herein provided. [32 G. A., ch. 104, § 1.]

SEC. 2110-d. Appeal to district court—commissioner—report—hearing. Each party to the proceeding shall have the right to appeal to the district court of the county where the street railway in question is located from any order made by the board of railroad commissioners under this act, which appeal shall be taken within twenty days from the date of the order appealed from, and shall be perfected by serving a notice of appeal upon the other parties to such proceeding and filing the same with the secretary of the board of railroad commissioners, and by filing within twenty days from the date of such order, a petition in the said district court, stating the facts and asking the court to determine the matter in controversy. The board of railroad commissioners shall, when such notice of appeal is filed with its secretary, forthwith certify to said district court a transcript of the papers and proceedings before said board, and its order thereon. The court, or a judge thereof, if the petition is filed in vacation, shall thereupon appoint a commissioner to examine into the necessity of such proceeding, and report the facts and his recommendation in such time as the court or judge may direct, and as soon as possible thereafter the court or judge shall appoint a time and place for the hearing of such petition. The proceedings shall be in equity and subject to all the rules of equity practice, except that the court shall require the issues to be made up at the first term after the petition is filed and give the proceeding precedence over other civil business and try the same thereat if possible. The action shall be triable *de novo* upon said appeal, except that the question of compensation for the tracks, poles, wires, terminals and power to be furnished shall first be tried to a jury in the same manner and with the same effect as jury trials in ordinary proceedings, and the jury shall assess, separately, compensation for power to be furnished, on such basis as the court shall direct. No such appeal shall suspend the order appealed from if the interurban railway company on whose behalf said order is made shall file such bond for the payment of damages and costs as the district court to which such appeal is taken, or a judge thereof, may order and require. In all cases payment of the compensation awarded shall be made or secured to be made as the board of railroad commissioners or court may order and require before the interurban company desiring the use of the same shall be entitled thereto. [32 G. A., ch. 104, § 2.]

SEC. 2110-e. Power furnished outside of city or town. Street railroad companies desiring so to do shall be authorized to furnish to interurban railway companies, power for the operation of the cars of interurban railway companies outside of cities and towns, but no street railroad company shall be required to furnish such power. [32 G. A., ch. 104, § 3.]

SEC. 2110-f. Applicable to interurban railways operating street railways. This shall not apply to those portions of the terminals, tracks, poles and wires of interurban railway companies which are located in the streets, alleys and public places of cities and towns and which are used by such companies for the transaction of a local street railway business; and

where an interurban railway company has heretofore built tracks in a city or town used for street railway purposes it may acquire the use of such tracks, poles and wires as may be necessary to complete a terminal loop for the cars operated on such tracks and for the use of its interurban cars only, under the provisions of this act. [32 G. A., ch. 104, § 4.]

SEC. 2110-g. Repeal acts in conflict. All acts and parts of acts in conflict herewith are hereby repealed. [32 G. A., ch. 104, § 5.]

SEC. 2110-h. Saving clause. The provisions of this act shall not affect any pending litigation. [32 G. A., ch. 104, § 6.]

SEC. 2110-i. Destruction of weeds—written notice. It shall be the duty of every corporation owning or operating a railroad in this state on written notice from the owner, lessee or occupant of any land abutting upon its right of way to cut and burn, or otherwise destroy once each year during the month of July, all cockle burrs, burdock weeds, quack grass and thistles on its right of way adjacent to said land. [32 G. A., ch. 105, § 1.]

SEC. 2110-j. Penalty. Any failure to comply with the provisions of this act shall be deemed as a misdemeanor and shall be punished accordingly. [32 G. A., ch. 105, § 2.]

SEC. 2110-k. Enforcement. It shall be the duty of the county attorneys in the respective counties to enforce the provisions of this act. [32 G. A., ch. 105, § 3.]

CHAPTER 6.

OF THE BOARD OF RAILROAD COMMISSIONERS.

SECTION 2113. Repeal—powers and duties. That section twenty-one hundred thirteen (2113) of the code be and the same is hereby repealed and the following enacted in lieu thereof:

“It shall from time to time carefully examine into and inspect the condition of each railroad, its equipment, and the manner of its conduct and management with regard to the public safety and convenience in the state; make semi-annual examination of its bridges, and report the condition thereof to the company to which they belong; and if found by it unsafe it shall immediately notify the railroad company whose duty it is to put the same in repair, which shall be done by it within ten days after receiving such notice. If any corporation fails to perform this duty the board may forbid and prevent it from running trains over the same while unsafe. And should any railroad or transportation company in this state fail to provide proper shelter for its patrons at stations where two or more tracks are operated, or fail, or refuse to connect by proper switches or tracks with the tracks or lines of other railroad or transportation companies the board may require such railroad or transportation company to provide the same in such manner and upon such conditions as it may determine. When, in the judgment of the board, any railway corporation fails in any respect to comply with the terms of its charter or articles of incorporation or the laws of the state; or when in its judgment any repairs are necessary upon its road; or any addition to its rolling stock, or addition to or change in its stations or station houses, or change in its rates of fare for transporting freight or passengers, or change in the mode of operating its road or conducting its business, is reasonable and expedient in order to promote the security, convenience, and accommodation of the

public, the board shall serve a notice upon such corporation, in the manner provided for the service of an original notice in a civil action, which notice shall be signed by its secretary, of the improvements and changes which it finds to be proper; and a report of such proceedings shall be included in its annual report to the governor as provided in the next section; but nothing in this section shall be so construed as relieving any railroad company from its present responsibility or liability for damage to person or property." [32 G. A., ch. 106.]

SEC. 2116. Duty of railroad to transport. Every railway corporation shall, when within its power to do so, and upon reasonable notice, furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight, and receive and transport such freight with all reasonable dispatch, and provide and keep suitable facilities for the receiving and handling thereof at any depot on the line of its road; and shall also receive and transport in like manner the empty or loaded cars furnished by any connecting road, to be delivered at any station or stations on the line of its road, to be loaded or discharged or reloaded and returned to the road so connecting; and for compensation it shall not demand or receive any greater sum than is accepted by it from any other connecting railroad for a similar service. In any suit or action in court brought against a railroad corporation for the purpose of enforcing rights arising under the provisions of this section, the burden of proving that the provisions of this section have been complied with by such railroad corporation, shall be upon such railroad corporation. [17 G. A., ch. 77, § 10.] [32 G. A., ch. 107.]

SEC. 2118. Cumulative.

The powers given the railroad commissioners to enforce performance by railroads of the duties imposed upon them by the statute as to private crossings and

the like matters, do not exclude other remedies. *Swinney v. Chicago, R. I. & P. R. Co.*, 123-219.

SEC. 2119. Orders of commissioners enforced.

The authority given to the railroad commissioners to enforce the duties imposed by law on railroad companies does not exclude the remedy by mandamus to compel a railroad company to construct a

private crossing where the lands of one owner are separated by the railroad right of way and track. *Swinney v. Chicago, R. I. & P. R. Co.*, 123-219.

SEC. 2120-a. Investigation of interstate freight rates. It is hereby made the duty of the board of railroad commissioners to exercise constant diligence in informing themselves of the rates, charges, rules, and practices of common carriers engaged in the transportation of freight from points in this state to points beyond its limits, and from points in other states to points in this state, also in territory wholly outside this state; and whenever it shall come to the knowledge of the board of railroad commissioners either from their own investigation or by complaint made to them in any manner whatsoever that the rates charged by any common carrier on interstate business are unjust or unreasonable, or that such rates, rules or practices discriminate unjustly against the citizens, industries or interests of this state, or place any of the citizens, industries or interests of this state at an unreasonable disadvantage as compared with those of other states, or are levied or laid in violation of the act to regulate commerce, or in conflict with the rulings, orders or regulations of the interstate commerce commission, it shall be the duty of the board of railroad commissioners to immediately call the attention of the officials of railroads operating in this state to the fact and to urge upon them the propriety of changing such rate or rates, rules or practices. [32 G. A., ch. 108, § 1.]

SEC. 2120-b. Appeal to interstate commerce commission—prosecutions. Whenever such rates, rules or practices are not changed or adjusted so as to remove or remedy such discrimination within a reasonable time, it shall be the duty of the board of railroad commissioners, whenever it can legally be done, to present the facts involved in such discrimination to the interstate commerce commission and appeal to it for relief and thereafter, if deemed necessary, by said board of railroad commissioners, they shall prosecute any charge or charges growing out of any such discrimination at the expense of the state, before said interstate commerce commission. [32 G. A., ch. 108, § 2.]

SEC. 2120-c. Attorney general to assist. In all work devolving upon the railroad commission they shall receive, upon application, the services of the attorney general of this state, and he shall also represent them, whenever called upon to do so, before the interstate commerce commission. [32 G. A., ch. 108, § 3.]

SEC. 2120-d. Railroad commissioners to have supervision. The railroad commissioners of this state shall have general supervision over any and all wires for transmitting electric current or any other wire whatsoever crossing under or over any track of a railroad in this state. [32 G. A., ch. 109, § 1.]

SEC. 2120-e. Regulations. Within thirty (30) days from the taking effect of this act said railroad commissioners shall make regulations prescribing the manner in which such wires shall cross such railroad tracks in this state. [32 G. A., ch. 109, § 2.]

SEC. 2120-f. Wires must be strung in manner prescribed. It shall hereafter be unlawful for any corporation or person to place or string any such wire for transmitting electric current or any wire whatsoever across any track of a railroad in this state except in such manner as may be prescribed by the railroad commissioners as provided by this act. [32 G. A., ch. 109, § 3.]

SEC. 2120-g. Examination of wires already strung. The board of railroad commissioners shall, as soon as possible after the taking effect of this act, either by personal examination or otherwise, obtain information where the tracks or railroads are crossed by wires strung over said tracks, contrary to or not in compliance with the rules prescribed by the railroad commissioners as contemplated by this act, and shall order such change or changes to be made by the persons or corporations owning or operating such wires as it may deem necessary to make the same comply with said rules and within such reasonable time as it may prescribe. [32 G. A., ch. 109, § 4.]

SEC. 2120-h. Minimum height. In case such wires cross over said track, in no case shall said board of railroad commissioners prescribe a less height than twenty-two (22) feet above the top of the rails of any railroad track for any wire. [32 G. A., ch. 109, § 5.]

SEC. 2120-i. Wires across railroad right of way at highways. The board of railroad commissioners are hereby authorized to provide for and regulate the crossing of wires over and across railroad rights of way at highways and other places within the state. [32 G. A., ch. 109, § 6.]

SEC. 2120-j. Penalty—enforcement. Any person or corporation who string or maintain any wire across any railroad track in this state at a different height or in a different manner from that prescribed by the said board of railroad commissioners shall forfeit and pay to the state of Iowa the sum of one hundred dollars (\$100) for each separate period of ten days during which such wire is so maintained, said forfeiture to be recov-

ered in a civil action brought in any court of competent jurisdiction in the name of the state of Iowa, by the attorney-general, or by the county attorney of the county in which such wire is situated, at the request of the said board of railroad commissioners, and it is hereby made the duty of the said attorney general and county attorney to bring such action forthwith upon being so requested. [32 G. A., ch. 109, § 7.]

SEC. 2120-k. Railroad commissioners to investigate accidents—report. That upon the occurrence of any serious accident upon any railroad within this state, which shall result in personal injury, or loss of life, the corporation operating the road upon which the accident occurred shall give immediate notice thereof to the board of railroad commissioners whose duty it shall be, if they deem it necessary, to investigate the same, and promptly report to the governor the extent of the personal injuries, or loss of life, and whether the same was the result of mismanagement or neglect of the corporation on whose line the injury or loss of life occurred. Provided, that such report shall not be evidence or referred to in any case in any court. [32 G. A., ch. 110.]

SEC. 2121. Salaries. The board shall keep an office in the capitol at the seat of government, and each commissioner shall receive a salary of twenty-two hundred dollars a year. The secretary of the board shall receive a salary of eighteen hundred dollars a year. [17 G. A., ch. 77, § 6.] [32 G. A., ch. 2, § 7.]

CHAPTER 7.

OF THE REGULATION OF CARRIERS BY RAILWAY.

SECTION 2124. Unjust discrimination.

The provision of 22 G. A., chap. 28, in relation to unjust discriminations and the punishment therefor, held applicable to cases wherein railway companies voluntarily fixed joint rates, irrespective of pro-

visions of 23 G. A., chap. 17 (Code §§ 2152-2157), relating to the fixing of schedules of joint rates by the railroad commissioners. *Blair v. Sioux City & P. R. Co.*, 109-369.

SEC. 2128-a. Common carriers to redeem tickets. It shall be the duty of every railroad company, corporation, person or persons acting as common carriers of passengers in the state of Iowa, to provide for the redemption, at the place of purchase and at the general passenger agent's office of said carrier of the whole or any integral part of any passenger ticket or tickets that such carrier may have sold, as the purchaser or owner has not used for passage or received transportation for which such ticket should have been surrendered; and said carrier shall there redeem the same at a rate which shall equal the difference between the price paid for the whole ticket and the cost of a ticket between the points for which said ticket has been actually used, and no carrier shall limit the time in which redemption shall be made to less than ten days from date of sale at the place of purchase and six months from date of sale at general passenger agent's office. [28 G. A., ch. 71, § 1.]

The requirement of the statute is that provision shall be made for the redemption of tickets which means that the person or persons in charge of the ticket window and authorized to sell tickets shall be prepared to make redemption when called upon to do so. The statute is not satisfied by the mere appointment of one person who may or may not have his sta-

tion at the window where the ticket business is transacted, as the one through whom redemption must be made. *Rohrig v. Chicago, R. I. & P. R. Co.*, 130-380.

Unless the company adopts some regulation limiting the time for redemption of tickets, provided for by 28 G. A., chap. 71, demand therefor may be made at any time within the period of the general

statute of limitations. *Jolley v. Chicago, M. & St. P. R. Co.*, 119-491.

The company is afforded time in which to investigate, but must at its peril discharge the statutory obligation if found to exist, within the period fixed, and the holder of a ticket is not bound to apply a second time within ten days to have his ticket redeemed. *Ibid.*

Formal tender of the tickets is not essential, provided the agent has notice that

the ticket holder presents them for redemption, and refuses at the time to accept them for that purpose. *Ibid.*

The remedy provided by the statute is for those purchasing tickets of passage in good faith and for actual use. One who purchases them for the purpose of subsequently presenting them for redemption and collecting the penalty in case the redemption is refused, is not entitled to relief. *Ibid.*

SEC. 2128-b. Notice posted. No railroad company, corporation, person or persons doing business in the state of Iowa, as common carrier of passengers, whose rate of fare is regulated by statute of this state, shall sell or issue to any person, at the maximum rate allowed by law, any ticket or tickets bearing any condition of limitation as to the time of use, or as to transferability, without first providing for the redemption of said ticket, as directed by the preceding section hereof, and also having notice of such provision and privilege of redemption conspicuously posted at each place where sales of tickets are made by such common carriers in this state. A failure to provide for the redemption of such ticket or to give notice as above provided shall make all conditions and limitations as to time of use or transferability of no force or effect. [28 G. A., ch. 71, § 2.]

SEC. 2128-c. Penalty. Any railroad company, corporation, person or persons, who as common carriers shall sell or issue tickets as set forth in the preceding sections, and shall refuse or neglect to redeem the same, as by said sections provided, within ten days of date of demand, shall forfeit and pay to the owner of such ticket the purchase price of said ticket, and the further sum of one hundred dollars. [28 G. A., ch. 71, § 3.]

SEC. 2128-d. Mileage books. Nothing in this act shall prohibit the sale of mileage books or tickets, at less than the maximum rates allowed by law, bearing reasonable conditions of limitation, as to the right of use for passage. [28 G. A., ch. 71, § 4.]

SEC. 2130. Penalty in treble damages.

The penalty of treble damages authorized in case recovery is had for unlawful discrimination in rates should not be increased by allowing interest on the damages thus awarded. *Blair v. Sioux City & P. R. Co.*, 109-369.

While it is the duty of the carrier to provide proper facilities for the interchange of traffic between such carrier and

a connecting carrier, or for the forwarding of goods over other lines, the carrier will not be liable in treble damages unless it appears that its failure was the result of undue preferences or unlawful combinations. The statutory provision is penal in character and is to be strictly construed. *Clark v. American Express Co.*, 130-254.

SEC. 2145. Discrimination—punishment.

When joint rates are established between all the points on two or more lines of road, if within the state, extortion and

discrimination are prohibited. *Blair v. Sioux City & P. R. Co.*, 109-369.

SEC. 2152. Joint rates.

When two or more companies enter into an agreement for joint rates, which agreement covers all stations upon the line in any given state, they virtually create a new and independent line, and become sub-

ject to the law preventing unjust discrimination and unreasonable exaction. *Blair v. Sioux City & P. R. Co.*, 109-369.

The corresponding section of 23 G. A., chap. 17, held not unconstitutional. *Ibid.*

SEC. 2153. Repeal—joint rates over connecting lines. That section two thousand one hundred and fifty-three of the code be and the same is hereby repealed and the following enacted in lieu thereof:

“Every owner or consignor of freight to be transported by railway from any point within this state to any other point within this state shall have the right to require that the same shall be transported over two or more connecting lines of railway, to be transferred at the connecting point or points without change of car or cars if in carload lots, and with or without change of car or cars if in less than carload lots, whenever the distance from the place of shipment to destination, both being within this state, is less over two or more connecting lines of railway than it is over a single line of railway, or where the initial line does not reach the place of destination; and it shall be the duty, upon the request of any such owner or consignor of freight, made to the initial company, of such railway companies whose lines so connect, to transport the freight without change of car or cars if the shipment be in a carload lot or lots, and with change of car or cars if it be in less than carload lots, from the place of shipment to destination, whenever the distance from the place of shipment to destination, both being within this state, is less than the distance over a single line, or when the initial line does not reach the point of destination, for a reasonable joint through rate. This section shall apply to interurban railways and their connection with ordinary steam railways.” [32 G. A., ch. 111, § 1.]

SEC. 2155. Repeal—schedule of joint rates. Section two thousand one hundred and fifty-five of the code be and the same is hereby repealed and the following enacted in lieu thereof:

“The board of railroad commissioners shall, within ten days after this act takes effect, notify in writing every railway company owning or operating a railway within this state that it will, upon a day named in such notice, which day shall not be more than thirty days after giving said notice, take up for investigation the subject of establishing joint through rates, as herein provided, between the railway lines in this state. It shall also give a similar notice, directed “To whom it may concern,” and so publish the same that it will have general circulation throughout the state. All corporations, partnerships and persons interested in the subject may present themselves at the hearing and be heard, under such rules and regulations as the board may prescribe. At the end of the investigation, which shall be carried on with all due diligence, the said board of railroad commissioners shall make and publish a schedule of joint through railway rates for such traffic and on such routes as in its judgment the fair and reasonable conduct of business requires shall be done by carriage over two or more lines of railway, and will promote the interests of the people of this state. In the making thereof, and in changing, revising or adding to the same, the board shall be governed as nearly as may be by the preceding sections of this chapter, and shall take into consideration, among other things, the rates established for shipments within this state for like distances over single lines, the rates charged by the railway companies operating such connecting lines for joint inter-state shipments, and the increased cost, if any, of a joint through shipment as compared with a shipment over a single line for like distances. In establishing such rates for shipments in less than carload lots, in cases where at the connecting point or points in the line of shipment the connecting railways have not and are not required to have a common station or stopping place for loading or unloading freight, the board shall make such lawful regulations as in its judgment will be fair and just respecting the transportation of such freight from the usual unloading place of one railway to the usual loading place of the other. The joint through rates thus established shall be promulgated by mailing a printed copy thereof to each railway company affected thereby, and shall go into effect within ten days after they are so promulgated; and from and after that time an official printed schedule

thereof shall be *prima facie* evidence, in all the courts of this state, that the rates therein fixed are just and reasonable for the joint transportation of such freight between the points and over the lines described therein. The said board shall deliver a printed copy of said schedule to any person making application therefor. The share of any railway company of any joint through rate shall not be construed to fix the charge that it may make for transportation for a similar distance over any part of its line for any single rate shipment or the share of any other joint rate. The board, upon such reasonable notice as it may prescribe, may, upon its own motion or upon the application of any person, firm or corporation interested therein, revise, change or add to any joint through rates fixed or promulgated hereunder; and any such revised, changed or added joint rates shall have the same force and effect as the rate or rates originally established. The said board is empowered to authorize, upon proper hearing, any railway company whose line connects the point of shipment with the point of destination but requires a longer haul than the joint haul over which a joint rate has been established, to charge the joint rate without affecting the charge upon any other part of its line, except that the charge for a like kind of property must not be greater for a shorter than for a longer distance over its railroad, all of the shorter haul being included within the longer. This section shall apply to interurban railways and their connection with ordinary steam railways." [32 G. A., ch. 111, § 2.]

SEC. 2157-a. Transportation — conditions. On and after May 1, 1904, common carriers of live stock, in car load lots, upon receiving, in this state, for shipment one or more car loads of horses or mules or two or more car loads of other live stock, shall upon demand of the owner of such animals offered for shipment, issue to such owner, or the actual agent or employe of such owner, without other consideration transportation from the place of receiving such shipment to the place of destination, and return, such transportation to be limited to one person for each shipment, as is above set out. When a single shipment aggregates six cars or more, such owner shall be entitled, on demand, as is above provided, to transportation for one additional person, such additional person to be an actual agent or employe of such owner, and such common carrier shall in like manner and under similar conditions issue transportation for one person to destination of shipment only to the shipper of one car load of cattle, hogs or sheep. The return transportation herein provided for is to be delivered, upon demand, at the office of the carrier at the place of destination, upon proper identification of the person so entitled to same, and shall be good for transportation if presented within forty-eight hours from the time of the delivery of such shipment at place of destination. [30 G. A., ch. 76, § 1.]

SEC. 2157-b. Penalty. Any common carrier violating the above provisions shall forfeit and pay to the owner of any shipment, as is above provided, three times the amount of the regular fare expended by such owner for himself, or his agent, in going from point of shipment to point of destination, and return, of a shipment of stock as herein provided. [30 G. A., ch. 76, § 2.]

SEC. 2157-c. Trespasser. Any person other than the owner, his agent or employe, as is described in section 1 hereof, attempting to use, or using, the transportation therein provided for, shall be considered a trespasser upon the trains or premises of such common carrier. [30 G. A., ch. 76, § 3.]

SEC. 2157-d. Water closets in cabooses. That the cabooses or cars attached to such stock trains, and in which the holders of such transporta-

tion are required to ride when accompanying such live stock to market, shall be provided with suitable water closets for the use of such persons while in transit, provided that the provisions of this section shall not go into effect until January 1, 1905, and that all such railroads shall be allowed until said time to comply with the requirements of this section. [30 G. A., ch. 76, § 4.]

SEC. 2157-e. Penalty. Any railroad in this state engaged in the transportation of live stock, and failing or refusing to comply with the requirements of the foregoing section, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars (\$100.00) for each day's negligence or refusal to comply therewith; and all moneys so collected as fines shall be paid into the public school funds of the state. [30 G. A., ch. 76, § 5.]

SEC. 2157-f. Issuance or acceptance of free passes—what prohibited. No common carrier of passengers shall, directly or indirectly, issue, furnish or give any free ticket, free pass or free transportation for the carriage or passage of any person within this state except as permitted in the second section hereof. Nor shall any common carrier, in the sale of tickets for transportation at reduced rates, discriminate between persons purchasing the same, except the persons described in the second section of this act. Nor shall any person accept or use any free ticket, free pass or free transportation except the persons described in said section. The words "free ticket," "free pass," "free transportation" as used in this act shall include any ticket, pass, contract, permit or transportation issued, furnished or given to any person, by any common carrier of passengers, for carriage or passage, for any other consideration than money paid in the usual way at the rate, fare or charge open to all who desire to purchase. [32 G. A., ch. 112, § 1.]

SEC. 2157-g. What permitted. The persons to whom free tickets, free passes, free transportation and discriminating reduced rates may be issued, furnished, or given are the following, to-wit: (a) the officers, agents, employes, attorneys, physicians, and surgeons, of such common carriers of passengers whose chief and principal occupation is to render service to common carriers of passengers; (b) to the families of the persons included in sub-division "a" hereof; (c) the general officers of any such common carrier; (d) employes on sleeping cars, express cars, and linemen of telegraph and telephone companies, railway mail service employes, postoffice inspectors, customs inspectors and immigration inspectors, newsboys on trains, baggage agents; (e) persons injured in wrecks and physicians and nurses attending such persons; (f) passengers traveling with the object of providing relief in cases of railroad accident, general epidemic, pestilence, or other calamitous visitation; (g) necessary caretakers of live stock, vegetables and fruit, including return transportation to forwarding station; (h) the officers, agents or regularly accredited representatives of labor organizations, composed wholly of employes of railway companies; (i) inmates of homes for the reform or rescue of the vicious or unfortunate, including those about to enter and those returning home after discharge, and boards of managers, including officers, and superintendents of such homes; (j) superannuated and pensioned employes and members of their families and widows of such members; (k) employes crippled and disabled in the service of a common carrier of passengers; (l) policemen and firemen of any city wearing the insignia of their office within the limits of such city; (m) ministers of religion, traveling secretaries of Railroad Young Men's Christian Associations, inmates of hospi-

tals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; (n) indigent, destitute and homeless persons, while being transported by charitable societies or hospitals, and necessary agents, employes in such transportation; (o) school children to and from public or parochial schools; (p) the state fish and game warden, and his car and necessary assistants therewith, when engaged in the performance of official duties.

In any prosecution under this act if it is claimed that a free ticket, free pass or other transportation was wrongfully issued or given to physicians or surgeons, attorneys, agents, employes, it shall be incumbent upon the defendant to prove the character of the service rendered, or to be rendered. The provisions of this act shall not be construed to prohibit the interchange of passes for the persons to whom free tickets, free passes, or free transportation may be furnished or given under the provisions of this section. Nothing in this act shall operate to repeal the provisions of section two thousand one hundred fifty (2150) of the code so far as said section refers to the members of the national guard, nor shall it operate to repeal section two thousand one hundred fifty-one (2151) of the code. Nothing in this act shall be construed to invalidate any existing contract between a street railway company and a city where a condition of a franchise grant requires the furnishing of transportation to policemen, firemen, and city officers, while in the performance of official duties. [32 G. A., ch. 112, § 2.]

SEC. 2157-h. Testimony—immunity from prosecution. No person, within the purview of this act shall be privileged from testifying in relation to anything herein prohibited, but no person having so testified shall be liable to any prosecution or punishment for any offense concerning which he was required to give his testimony. [32 G. A., ch. 112, § 3.]

SEC. 2157-i. Penalty. Any common carrier, its officer, agent or representative, violating any of the provisions of this act shall be fined in a sum not less than one hundred dollars (\$100) and not more than one thousand dollars (\$1,000) for each offense, or in the discretion of the court shall be imprisoned in the county jail for not less than thirty (30) and not more than ninety (90) days; and any person other than the persons excepted in the second section of this act, who accepts or uses any free ticket, free pass or free transportation for carriage or passage within this state shall be subject to a like penalty. [32 G. A., ch. 112, § 4.]

SEC. 2157-j. Names of free pass beneficiaries reported. Every common carrier of passengers within the provisions of this act, shall on or before the first day of February of each year, file with the executive council of the state of Iowa, a sworn statement showing the names of all persons within this state to whom, during the preceding calendar year, it issued, furnished or gave a free ticket, free pass, free transportation or a discriminating reduced rate, except wage earners of common carriers in their ordinary employment and families of such wage earners, and disclosing such further information as will enable the council to determine whether the person to whom it was issued, was within the exception of this act. [32 G. A., ch. 112, § 5.]

SEC. 2157-k. Repeal. When this act takes effect, it shall repeal chapter ninety (90), laws of the thirty-first general assembly, and all acts and parts of acts inconsistent with this act. [32 G. A., ch. 112, § 6.]

SEC. 2157-l. Track scales—where located—weight certificates. That every person, firm or corporation engaged in operating any railroad within the state of Iowa shall equip the line of its track and thereafter maintain thereon in good order, track scales of sufficient capacity to weigh all carloads of coal that may be transported over the said railroad, and

shall weigh the same at the request of any owner, consignor or consignee of such commodities, and furnish written certificates of such weights to such owner, consignor or consignee as hereinafter provided. Such track scales shall be so installed and maintained at all division stations along the line of such railroads within the state of Iowa, and at such other stations as the board of railroad commissioners shall from time to time direct. [32 G. A., ch. 113, § 2.]

SEC. 2157-m. Weighing of coal at point where shipment originates. That every person, firm or corporation engaged in operating any railroad within the state of Iowa, over which coal, in carload lots shall be transported for hire, shall weigh such coal at point where such shipment originates unless covered by weight agreement between consignor and railway company, provided such point is equipped with track scales. If not so equipped, it shall be weighed at first practicable point en route where track scales are provided. Said person, firm or corporation shall furnish to said shipper a bill of lading showing date and place weighed, also the gross, tare and net weight for each carload of coal so weighed. The tare weight shall be determined by using actual weight of empty car at loading station, provided track scales are maintained at such point. [32 G. A., ch. 113, § 3.]

SEC. 2157-n. Weighed at destination upon request—fee. Such coal shall be weighed at destination upon request of consignee when there are track scales at such point. If not equipped with track scales at such point, then at nearest practicable point en route where such scales are maintained and certificate of weight showing actual gross, tare and net weights, shall be furnished to consignee and settlement of freight charges based on these weights. A reasonable charge of not more than \$1.00 per car, may be made for such weighing on request. [32 G. A., ch. 113, § 4.]

SEC. 2157-o. How weighed. Cars when weighed on track scales shall be uncoupled, clear and unhampered at both ends, carefully weighed by competent weighmen and certificates issued upon request of consignees, showing gross, tare and net weights. [32 G. A., ch. 113, § 5.]

SEC. 2157-p. Prima facie evidence. Certificates mentioned in this act shall be *prima facie* evidence of the facts therein recited in any action arising between consignors and consignees and common carriers. [32 G. A., ch. 113, § 6.]

SEC. 2157-q. Penalty. Any common carrier operating in this state violating any of the provisions of this act by neglecting or refusing to weigh cars or to furnish certificates of weights as herein provided shall be guilty of a misdemeanor and shall be, upon conviction thereof, fined in the sum of not more than one hundred and twenty-five dollars (\$125.00) for each and every violation. [32 G. A., ch. 113, § 7.]

SEC. 2157-r. Reconsignment without charge. Upon request of the consignee it shall be the duty of any common carrier of freight to re-consign, re-bill and re-ship from any place of destination within the state to any other place within the state any property in car load lots, whether accompanied by any person or not, brought to said place of destination over its own or other line and treat the same in all respects as an original shipment between such places, provided the charges to first place of destination are paid or secured to the satisfaction of such company. [32 G. A., ch. 114.]

SEC. 2157-s. Duty of common carriers of freight. That it is hereby made the duty of all common carriers of freight within this state to move cars of live stock at the highest practicable speed consistent with reason-

able safety, and the reasonable movement of its general traffic. [32 G. A., ch. 115, § 1.]

SEC. 2157-t. Railroad commissioners to prescribe speed. In order to enforce the duty prescribed in section one, the board of railroad commissioners shall immediately and from time to time investigate the practice of the common carriers with respect to the movement of live stock; and if it ascertains at any time that the common carriers or any of them are not moving cars of live stock with the proper speed, then upon notice to any such common carrier or carriers, the said board shall prescribe the speed at which and the conditions under which cars of live stock shall be moved within this state by any such carrier or carriers. The order shall specify the time at which it shall go into effect, which shall be as soon as, in the judgment of the board, the carrier or carriers affected can, with reasonable diligence, readjust its or their time tables. The power to prescribe speed and determine conditions for the movement of cars of live stock within this state is hereby expressly conferred upon the said board of railroad commissioners. [32 G. A., ch. 115, § 2.]

SEC. 2157-u. Enforcement. Any order, ruling or regulation made by the board under this act shall be enforceable as provided in section two thousand one hundred and nineteen (2119) of the code. [32 G. A., ch. 115, § 3.]

CHAPTER 8.

OF TELEGRAPH AND TELEPHONE LINES.

SECTION 2158. Right of way.

Under § 1324, Code of 1873, as amended by 19 G. A., chap. 104, providing that any person or company may construct a telephone line along the public highways of the state, held that the term "public highways" as used included city streets, and that a telephone company might occupy such streets without the city's consent.

Chamberlain v. Iowa Telephone Co., 119-619.

Where grant is made to a telephone company to use the streets of a city without limitation as to territory it has the right under such grant to extend its service to meet the demands of the public. *State v. Nebraska Tel. Co.*, 127-194.

SEC. 2163. Liable for mistakes.

A telegraph company being engaged in a public employment may be liable in tort for breach of its obligations arising under a contract *Cowan v. Western Union Tel. Co.*, 122-379.

Whether a telegraph company has used reasonable diligence as to the delivery of a message confided to it is to be determined upon the consideration of all the facts of the case, including improper or defective address, and is for the jury. *Hurlburt v. Western Union Telegraph Co.*, 123-295.

Negligence being shown, damages for mental pain and anguish resulting from failure to deliver may be recovered. *Ibid.*

The statutory provision as to the liability of a telegraph company does not create a right of action in the addressee of a death message to recover damages for negligent delay in the delivery where none existed before, and therefore held that

such provision was ineffective to sustain a recovery of damages for mental anguish by the addressee unaccompanied by any physical injury. *Rowan v. Western Union Tel. Co.*, 149 Fed. 550.

Negligent delay in delivering a telegram containing an enquiry as to the price of land, but no proposition to buy which if accepted would have constituted a contract of sale, will not authorize recovery of damages for the delay based on loss of the sale. *Bennett v. Western Union Tel. Co.*, 129-607.

In an action against a telegraph company for damages resulting from negligent delay in transmitting a proposition for the exchange of real estate, held that as the proposition was made by mail and did not contemplate a response by telegram, it was for the jury to say whether the unreasonable delay in the acceptance of the contract through a telegraphic response

was the cause of the loss of the benefits of the bargain *Lucas v. Western Union Tel. Co.*, 131-669.

One who acts in response to a telegram apparently addressed to a person of a different name, cannot recover damages

against the telegraph company for injuries resulting to him by reason of the fact that the telegram was not intended for him, although the telegram has been delivered to him by the company. *Bowyer v. Western Union Tel. Co.*, 130-324.

SEC. 2164. Negligence presumed—notice of claim.

The burden is upon the company to prove that mistake or delay in the transmission or delivery of a message is not due to its own negligence. *Cowan v. Western Union Tel. Co.*, 122-379.

It is error to admit in evidence a notice in writing of a claim for damages, where there is no allegation in the pleadings as to such notice. *Heald v. Western Union Tel. Co.*, 129-326

Failure to allege notice is a good ground

for motion in arrest of judgment in an action on a claim as to which notice is required. *Ibid.*

The objection that notice of a claim against a telegraph company for damages due to negligence was not given within sixty days, as required by statute, may be raised for the first time in a motion in arrest of judgment. *Free v. Western Union Tel. Co.*, 110 N. W. 143.

CHAPTER 9.

OF EXPRESS COMPANIES.

SECTION 2165. Repeal. That sections 2165 and 2166 of the code be and the same are hereby repealed. [32 G. A., ch. 116, § 1.]

The provisions of Code § 2074 prohibiting contracts limiting the liability of a carrier are applicable to express companies. *McMillan v. American Express Co.*, 123-236.

SEC. 2165-a. Subject to regulations. All express companies operating and doing business in this state are declared to be common carriers, and it shall be the duty of every such express company or common carrier to transport all property, parcels, money, merchandise, packages, and other things of value which may be offered to them for transportation, at a reasonable charge or rate therefor; and all laws so far as applicable, now in force or hereafter enacted, regulating the transportation of property by railroad companies, shall apply with equal force and effect to express companies. [32 G. A., ch. 116, § 2.]

SEC. 2165-b. Supervision by railroad commissioners—schedule of joint rates. The railroad commissioners of this state shall have general supervision of all express companies operating and doing business in this state; and shall inquire into any unjust discrimination, neglect or violation of the laws of this state governing common carriers, by any express company doing business therein, or by the officers, agents or employes thereof; and they shall have power and it shall be their duty, to fix and establish reasonable, fair and just rates of charges including a schedule of maximum joint rates for each kind or class of property, money, parcels, merchandise, packages, and other things to be charged for and received by each express company or carriers by express, separately or conjointly, on all such property, money, parcels, merchandise, packages and other things which by the contract of carriage are to be transported separately or conjointly by such express companies, or carriers by express, doing business over the line of any railroad or other carrier between points wholly within the state of Iowa, which rates or charges shall be made to apply to all such express companies or express carriers, and may be changed or modified by said commissioners from time to time in such manner as may become necessary. [32 G. A., ch. 116, § 3.]

SEC. 2165-c. Schedule of rates for each company — prima facie evidence. Within six months from the taking effect of this act it shall be the duty of said railroad commissioners, and they are hereby directed, to prepare and make for each express company doing business in this state a schedule of reasonable maximum charges of rates for transporting property, money, parcels, merchandise, packages, and other things carried by such express company or companies between points wholly within the state of Iowa; and in all actions brought against such common carriers wherein there are involved the charges thereof for the transportation of any property, or any unjust discrimination in relation thereto, the schedules or reasonable maximum rates of charges so made by the railroad commissioners shall be taken as *prima facie* evidence in all courts that the rates fixed therein are reasonable and just maximum rates of charges for which said schedules have been prepared. [32 G. A., ch. 116, § 4.]

SEC. 2165-d. Printed schedules posted and displayed. It shall be the duty of every such company or common carrier engaged in transporting property, money, parcels, merchandise, packages and other things, to print in clear and legible type the schedules of rates for transportation of such property, money, parcels, merchandise, packages, and other things, so made by such railroad commissioners, and shall post in each of its offices or places of business where patrons visit for the purpose of making and receiving shipments, and keep displayed in each office or place of business within convenient access, and for the inspection and use of the public during customary business hours such printed schedule of rates of charges and any amendments thereto, and shall also post and display in similar manner any special rules and regulations which may be promulgated by them or said railroad commissioners for the information of their patrons. [32 G. A., ch. 116, § 5.]

SEC. 2165-e. Excessive compensation—penalty. It shall be unlawful for any express company or common carrier to charge, demand, collect or receive a greater compensation for such transportation of property, or for any service in connection therewith between the points named in such schedules than the rates and charges which are specified in the schedules made by said railroad commissioners and in effect at the time. Any such express company or common carrier, any officer, representative, or agent or any express company, or carrier, who knowingly violates the provisions of this act shall forfeit to the state of Iowa the sum of five hundred dollars for each offense, to be recovered as by law provided. [32 G. A., ch. 116, § 6.]

SEC. 2165-f. Refusal to transport—liable for damages—penalty. Each and every express company or carrier by express, as herein defined, doing business within the state of Iowa, shall at all convenient times during the hours of business accept and receive for prompt transportation and shipment destined to points on their own line, or to points on the lines of other express companies operating within the state, or for points beyond said state, all property, parcels, money, merchandise, packages and other things of value which may be offered to them, or either of them, for transportation by the public, and any express company or other common carrier refusing to transport goods as above provided taking the same in the order presented, shall be liable to the party injured for damages sustained by reason of its refusal, and in addition thereto shall be liable to a penalty of not less than five (5) nor more than five hundred (500) dollars, to be recovered in each case by the owner of the goods in any court having jurisdiction in the county where the wrong is done, or where the common carrier resides or has an agent, and each case of refusal shall be construed as a separate offense under this act. [32 G. A., ch. 116, § 7.]

TITLE XI.

OF THE MILITIA.

CHAPTER 1.

OF THE MILITIA.

SECTION 2168-a. Repeal—Iowa national guard. That section twenty-one hundred and sixty-eight (2168) of the code of Iowa is hereby repealed and the following enacted in lieu thereof:

The active militia shall be designated "Iowa National Guard" hereafter referred to as "the guard," recruited by volunteer enlistments and shall consist of four regiments of infantry, one signal company, and, at the discretion of the commander-in-chief, of two batteries of artillery and two troops of cavalry and the necessary staff departments, with such other officers and enlisted men as are hereinafter prescribed. [29 G. A., ch. 88, § 1.]

SEC. 2169-a. Repeal—governor to call out. That the law as it appears in section twenty-one hundred and sixty-nine-a (2169-a) of the supplement to the code be and the same is hereby repealed and re-enacted to read as follows:

When a requisition shall be made by the president of the United States for troops, the governor, as commander-in-chief, shall order into service the national guard of the state, as organized and officered unless otherwise directed in such requisition; or such portion thereof as may be necessary, and if insufficient, so many of the militia as is required, designating the same by draft if a sufficient number do not volunteer, and shall commission officers therefor; and while so in the service, the national guard and militia shall be subject to the same regulations as those of the United States army, and receive the same compensation and subsistence as when in active service of the state until mustered into the United States service, and the same compensation, subsistence and allowances as officers and men of like rank and service in the United States army thereafter. The state shall pay for such service only that part not paid by the United States. [30 G. A., ch. 77, § 1.] [31 G. A., ch. 91, § 1.]

SEC. 2173-a. Repeal—enlistments. The law as it appears in section twenty-one hundred and seventy-three-a (2173-a) of the supplement to the code is hereby repealed and re-enacted to read as follows:

All enlistments shall be for three years except that enlistments made within ninety days from date of discharge from the guard, United States army, or the organized and disciplined militia of any state, shall be considered continuous service in the guard, and may be for one, two or three years as the soldier may elect; and made by signing the enlistment prescribed by the adjutant general and taking the following oath or affidavit which may be administered by the enlisting officer, to-wit: "You do solemnly swear (or affirm) that you will bear true allegiance to, and that

you will support the constitution of the United States and that of the state of Iowa, and will, as a member of the national guard, serve the United States and the state of Iowa faithfully through your term of service, unless sooner discharged and that you will obey the orders of the commander-in-chief and such officers as may be placed over you, and the laws and regulations governing the military forces." [30 G. A., ch. 77, § 2.] [31 G. A., ch. 91, § 2.]

SEC. 2174. Repeal—staff of commander-in-chief. That the law as it appears in section twenty-one hundred and seventy-four (2174) of the supplement to the code, be and the same is hereby repealed and re-enacted to read as follows:

The staff of the commander-in-chief shall consist of an adjutant general who shall be chief of staff and acting quarter-master general, an assistant adjutant general, a quarter-master general who shall also act as commissary general, a surgeon general, a judge-advocate general, a general inspector of small arms practice, a chief of engineers, a chief signal officer, and seven aids; all of whom shall have served honorably in the regular or volunteer service of the United States, or for not less than one year in the guard. The adjutant general and assistant adjutant general shall be appointed and commissioned by the commander-in-chief, and shall hold office until their successors are appointed and commissioned. The assistant adjutant general shall be appointed upon the recommendation of the adjutant general. The other officers above enumerated may at the discretion of the commander-in-chief be appointed and commissioned by him or detailed for such service from the active membership of the guard, or their duties may be performed by United States army officers regularly or specially detailed, for service with the guard or in the state, by the war department. The adjutant general shall have the rank of brigadier general, and the assistant adjutant general that of colonel. All other officers above enumerated if appointed and commissioned to such offices, shall have the rank of colonel, and if detailed from the active membership of the guard, shall retain their rank in the guard and shall not be relieved from their regular duties by reason of such detail. United States army officers regularly or specially detailed for service with the guard or in the state, may be assigned positions on the staff with their rank in the United States service or such higher rank, not above that of colonel, as the commander-in-chief may designate. [31 G. A., ch. 91, § 3.]

SEC. 2175. Repeal—adjutant general—duties. The law as it appears in section twenty-one hundred and seventy-five (2175) of the supplement to the code is hereby repealed and re-enacted to read as follows:

The adjutant general shall issue and transmit all orders of the commander-in-chief, and shall keep a record of appointments, of all officers commissioned by the governor, of all general and special orders and regulations, and of such matters as pertain to the organization of the military force and his duties. He shall reside at the capital and hold his office at the pleasure of the governor, and shall perform the duties of quartermaster general. He shall have charge of the state arsenal and grounds and all other property of the state kept or used for military purposes, and receive and issue all quartermaster and ordnance stores and camp equipage upon the order of the commander-in-chief. The adjutant general shall furnish at the expense of the state such blanks and forms as shall be approved by the commander-in-chief. He shall in each year preceding a regular session of the general assembly make out a detailed report of the transactions of his office, the expenses thereof and such other matters as shall be required by the commander-in-chief for the period since the last preceding report,

and the governor may at any time require a similar report. Upon the recommendation of the adjutant general, there may be appointed an assistant adjutant general with the rank of major, who shall hold his office at the pleasure of the governor. The assistant adjutant general shall be on duty with the adjutant general, and shall perform such duties under the direction of the adjutant general as the commander-in-chief may prescribe, and in the absence of the adjutant general, shall perform the duties of that officer as acting adjutant general. [30 G. A., ch. 77, § 3.] [31 G. A., ch. 91, § 4.]

SEC. 2176-a. Repeal—adjutant general—compensation. That the law as it appears in section four (4) of chapter 77, of the acts of the thirtieth general assembly, be and the same is hereby repealed and re-enacted to read as follows:

When requisition shall be made on the governor of Iowa by the president of the United States for troops, and during the time the Iowa troops are in the service of the United States under call of the president, the salary of the adjutant general shall be increased so that he shall receive in full compensation for his services, pay and allowances equal to that of a brigadier general of the United States army. [31 G. A., ch. 91, § 5.]

SEC. 2178. Repeal—regimental staff—band. That the law as it appears in section five (5) of chapter 77, of the acts of the thirtieth general assembly, be and the same is hereby repealed and re-enacted to read as follows:

The regimental staff shall be appointed and commissioned by the governor upon recommendation of the regimental commander, and shall consist of one major surgeon and two assistant surgeons or as many as may be required for volunteer regiments in the United States army, who shall receive the approval of the surgeon general as to their professional qualifications before being commissioned, an adjutant, a quartermaster, a commissary, a chaplain, and also for each battalion one adjutant and one quartermaster commissary officer, each of which officers shall have the same rank as corresponding officers in the United States army. The chaplains shall have the right of promotion as provided for in the regulations of the United States army. One inspector of small arms practice may be detailed by the commanding officer of each regiment from the officers of his command. The commander of each regiment shall appoint by warrant from the enlisted men of his regiment, a non-commissioned staff, consisting of a regimental sergeant major, a sergeant major for each battalion, a quartermaster sergeant, a commissary sergeant, two color sergeants, two mounted orderlies with rank of sergeant and four orderlies not mounted, with rank of corporal, the state to furnish mounts. The commissions of regimental staff officers shall expire when the officer nominating them, or his successor, shall make new nominations for their respective offices, and such nominations shall be confirmed by the commander-in-chief. Each regimental commander, subject to the approval of the commander-in-chief, may cause to be enlisted and organized a band, composed of one chief musician, one principal musician, one drum major, four sergeants, eight corporals, one cook and not more than sixteen privates. The enlisted men of the medical department for each regiment shall consist of a first class sergeant, two sergeants, one cook and twelve to fifteen privates, two-thirds of whom may be privates of the first class. The members of such bands and hospital detachments except as otherwise provided, shall be subject to the same regulations and receive the same compensation as other enlisted men of like grade. The regimental commander shall appoint the non-commissioned officers of the band, and upon the recommendation of the company com-

manders and surgeons, shall appoint the non-commissioned officers of each company and hospital detachments and issue warrants to the persons so appointed. [31 G. A., ch. 91, § 6.]

SEC. 2179-a. Repeal—company and troop-officers. The law as it appears in section twenty-one hundred and seventy-nine-a (2179-a) of the supplement to the code is hereby repealed and re-enacted to read as follows:

A company of infantry shall consist of a captain, a first lieutenant, a second lieutenant, a first sergeant, a quartermaster sergeant, four sergeants, six corporals, two cooks, two musicians, an artificer, and not less than forty nor more than sixty-four privates and non-commissioned officers. A signal company shall consist of one captain, one first lieutenant, one second lieutenant, one first sergeant, eight sergeants, sixteen corporals, two cooks, two musicians, an artificer, and not less than forty nor more than sixty-four privates and non-commissioned officers. A cavalry troop or battery of light artillery shall have the same officers, non-commissioned officers and number of enlisted men as an infantry company, and a farrier, a blacksmith and a saddler. In time of war or public danger the commander-in-chief may increase the enlisted strength of such organizations as he may deem necessary. Company officers shall be elected by the officers and enlisted men of the company and shall hold office for five (5) years, unless their resignation shall have been accepted or they are dismissed by sentence of court-martial. [30 G. A., ch. 77, § 6.]

SEC. 2180. Election of officers. All elections of company officers shall be ordered by the regimental commander. All elections of field officers shall be ordered by the commander-in-chief. Such orders shall be sent to the commanding officer of the company in which said election is ordered, who shall issue his order for such election, giving at least six days' notice thereof, by posting in three public places accessible to the members of his command, and, where practicable, the same shall be published in one or more newspapers in the county where said company is located. All voting shall be in person and by ballot, and a majority of all votes cast shall elect. The senior officer present at such election shall preside. The returns of elections attested by the presiding officer shall be made within five days from the date thereof to the commanding officer of the regiment, who shall promptly forward the same through military channels to the adjutant-general, who, upon approval of the commander-in-chief, shall issue commissions accordingly. At the organization of a new company, the election shall be conducted under such regulations as the adjutant-general shall prescribe. [26 G. A., ch. 102, § 15; 24 G. A., ch. 31, § 8; 18 G. A., ch. 74, § 15.] [28 G. A., ch. 72, § 4.]

SEC. 2181-a. Repeal. That section twenty-one hundred eighty-nine (2189) of the code be and the same is hereby repealed. The law as it appears in section 7 of chapter 77 of the acts of the thirtieth general assembly be and the same is hereby repealed. [31 G. A., ch. 91, § 8.]

SEC. 2183. Repeal—term of service—resignation—discharge. The law as it appears in section twenty-one hundred and eighty-three (2183) of the code is hereby repealed and re-enacted to read as follows:

Every officer of the guard shall be held to duty for the full term of his commission, unless his resignation shall have been sooner accepted, or he shall have been dismissed by sentence of court-martial. Every enlisted man of the guard shall be held to duty for the full term of his enlistment unless regularly discharged for good and sufficient cause by the regimental commander, approved by the commander-in-chief. All company officers and members of a company or band permanently removing their place of resi-

dence from the station of such company or band, except in time of war or public danger, and all members of the guard who have served the full term for which they were commissioned or enlisted, shall upon application be entitled to honorable discharge exempting them from military duty except in time of war or public danger, and it shall be the duty of a company officer upon permanently removing his place of residence from the station of such company to resign his commission and upon failure to do so his commission may be revoked by the commander-in-chief. The term of enlistment of a member of a company or band shall be deemed to have expired upon such removal and he shall be discharged accordingly. [30 G. A., ch. 77, § 8.]

SEC. 2184. Repeal—parades—encampments. The law as it appears in section twenty-one hundred and eighty-four (2184) of the code is hereby repealed and re-enacted to read as follows:

The guard may parade for encampment or drill annually, by company, battalion, regiment or brigade as ordered by the commander-in-chief, and the members thereof, or assignments of details therefrom, at the discretion of the commander-in-chief, may be called out or detailed for target practice, school of instruction or such other practice or instruction as the commander-in-chief may order. In lieu of the encampments provided in paragraph one of this section, the commander-in-chief may, in his discretion, order part or all of the guard to participate in field maneuvers or other exercises for instruction in conjunction with troops of the United States army, for a period of not more than fifteen days. [30 G. A., ch. 77, § 9.] [31 G. A., ch. 91, § 7.]

SEC. 2188. Repeal—penalties. The law as it appears in section twenty-one hundred and eighty-eight (2188) of the code is hereby repealed and re-enacted to read as follows:

Any person who shall trespass upon the encampment grounds or the camp grounds of the military force of the state in active service, or of the guard called out for encampment, drill, target practice or other duty, or interrupt, molest or interfere with any member of the guard in the discharge of his duty, or sell any malt or spirituous or other intoxicating liquor within one mile of such encampment, camp or station, except a person engaged in the business prior to the establishment of such encampment, camp or station under permit issued by lawful authority, shall be guilty of a misdemeanor and punishable therefor, and the commanding officer of such force may order the arrest of such person and cause him to be delivered to a peace officer or magistrate as soon as practicable. [30 G. A., ch. 77, § 10.]

SEC. 2189. Repeal—special duty—drill. [31 G. A., ch. 91, § 8.]

SEC. 2190. Repeal—arms, equipment, uniforms and other property—bond. That section twenty-one hundred and ninety (2190) of the code, be and the same is hereby repealed and re-enacted to read as follows:

All officers to whom shall be issued, or who shall be accountable for, arms, equipment, uniforms and any other state or United States property for military uses, or who shall have the control, custody or disbursement of funds as provided for in this chapter, shall before the delivery to them of such arms, equipment, uniforms and other state or United States property, and the receipt of such funds, be required to execute and deliver to the adjutant general a bond therefor, with sureties to be approved by the governor and payable to the state, in such amount as may be fixed by the commander-in-chief, conditioned according to law, for the proper care, use and return in good order, wear, use and unavoidable loss and damage excepted, of all such state and United States property, and the proper and

faithful disbursement and accounting of all funds coming into the hands of such officer; upon the violation of any of the conditions of such bond, action thereon shall be brought by the adjutant general upon behalf of the state of Iowa, and any recovery thereon shall be credited to the guard funds of the state. It shall be the duty of the attorney general of the state to prosecute all actions upon such bonds. [31 G. A., ch. 91, § 9.]

SEC. 2191. Repeal—inspection—schools of instruction. That section twenty-one hundred and ninety-one (2191) of the code, be and the same is hereby repealed and re-enacted to read as follows:

The commander-in-chief shall require such inspections of the different organizations of the guard, and such schools of instruction for officers and enlisted men, as he may deem proper and necessary. The inspection shall be made by United States army officers, either on regular or special detail with the guard or in the state, where such officers are available for that purpose, and if made by other officers the commander-in-chief shall fix their compensation therefor in the orders for such inspectors. Schools of instruction may be ordered when sufficient funds are available beyond other requirements of this chapter. [31 G. A., ch. 91, § 10.]

SEC. 2192. Embezzlement of state property. Any officer or soldier of the guard knowingly making any false certificate of muster or false return of state property in his hands, or wilfully neglecting or refusing to apply all money drawn from the state treasury for the purpose named in the requisition therefor, shall be punished by imprisonment in the penitentiary not exceeding five years, or by fine in the amount of money not so applied, or both such fine and imprisonment, and all costs of prosecution. [26 G. A., ch. 101, § 26.] [18 G. A., ch. 74, § 26.] [31 G. A., ch. 91, § 11.]

SEC. 2199. Military board. An examining board of three or more competent officers, appointed by the commander-in-chief, shall convene at such times and places as he shall direct, whose duty it shall be to examine into the capacity, qualifications, propriety of conduct and efficiency of commissioned officers or any person who shall have been elected or appointed, who shall be ordered before it, and, upon the report of said board, if adverse to such officer and approved by the commander-in-chief, the commission of such officer shall be vacated, or the commission withheld. No officer shall be eligible to sit on such board whose rank of promotion would in any way be affected by the proceedings, and two members at least shall be of equal or superior rank to the officer examined. If any officer shall refuse to report himself before said board when directed, the commander-in-chief may, upon the report of such refusal by such board, vacate his commission. [26 G. A., ch. 102, § 34; 24 G. A., ch. 31, § 14; 18 G. A., ch. 74, § 35.] [29 G. A., ch. 88, § 8.]

SEC. 2201. Payment for uniforms—service badges. Uniforms in kind may be issued by the state under such provisions as the commander-in-chief may direct, or, in lieu thereof, there may be annually paid to each officer and soldier of the guard the sum of four dollars to be paid under like provisions, but in no event will the state be liable for the payment of any money in lieu of uniforms, or for any purpose contemplated in this chapter, unless such payment can be made without exceeding the annual appropriation provided by this chapter. The adjutant general shall procure from the available funds at his disposal, service badges for members of the guard, as follows: For five years' honorable service, a "silver badge" suspended from a silver bar, and for each additional five years of honorable service including twenty years, a "silver bar" with number of years' service enameled thereon; said bars to be attached, in their order,

to the lower edge of the badge. For twenty-five years or more honorable service, a "gold badge" suspended from a gold bar, the design and selection of the badges and bars as above provided for, to be made by a committee of officers designated by the commander-in-chief. Service badges shall be the absolute property of those to whom they are awarded. [26 G. A., ch. 102, § 36; 24 G. A., ch. 31, § 15; 18 G. A., ch. 74, §§ 37, 38.] [31 G. A., ch. 91, § 12.]

SEC. 2203. Repeal—allowance for headquarters—allowance for postage, supplies, etc. That section fourteen (14) of chapter ninety-one (91) of the acts of the thirty-first general assembly be, and the same is hereby repealed and the following enacted in lieu thereof:

There shall be allowed annually to each regimental and company commander the sum of one hundred dollars (\$100) for postage, stationery, issuing orders, making official returns, keeping official records, conducting the correspondence of his office and all other paper work required by orders or regulations, which sum shall be payment in full for said services; and for like purposes to each chief musician of bands the sum of fifty dollars (\$50), and for like purposes to each general inspector of small arms practice, major surgeons and regimental inspectors of small arms practice, the sum of fifty dollars (\$50). All payments to be made semi-annually and in the amounts as herein provided. [32 G. A., ch. 117, § 1.]

SEC. 2204. Repeal—company and band allowance—hospital allowance. That the law as it appears in section twenty-two hundred and four (2204) of the supplement to the code, be and the same is hereby repealed and re-enacted to read as follows:

There shall be allowed annually to each company and band for armory rent, lights, fuel and janitor service and like necessary expenses, not to exceed the sum of six hundred dollars (\$600.00), to be paid in such amounts, either in part or whole and under such regulations as a board of officers appointed by the commander-in-chief shall prescribe, and approved by him. There shall be allowed annually to each regimental hospital detachment for armory rent, fuel, lights and like necessary expenses, the sum of one hundred dollars (\$100.00), or so much thereof as may be necessary to be paid under such regulations as the commander-in-chief may prescribe, provided that said sum shall be paid only when a majority of the detachment is located at one station under the command of a medical officer, who shall, at least twice a month, conduct drills of the detachment. [31 G. A., ch. 91, § 15.]

SEC. 2204-a. Allowance for rifle ranges. The commander-in-chief may designate the location of four regimental rifle ranges, and the expenditure of the sum of two thousand dollars, or so much thereof as may be necessary, is hereby allowed for the acquisition and construction thereof, such sums to be expended under the direction of such officer or board of officers as the commander-in-chief may direct, and the sum of two hundred dollars (\$200.00), or so much thereof as may be necessary, shall be allowed annually for expenditure in like manner for the rental and maintenance of each of said ranges, and the sum of one hundred dollars (\$100.00) annually, for each, company, or so much thereof as may be necessary, shall be allowed upon such conditions as the commander-in-chief may prescribe for the procurement, construction and maintenance of company rifle ranges. These payments to be made when sufficient funds are available beyond other requirements of this chapter. [31 G. A., ch. 91, § 13.]

SEC. 2211. Repeal—compensation of adjutant general and assistants. That section twenty-two hundred and eleven (2211) of the code, be repealed and the following enacted in lieu thereof:

The adjutant general shall receive an annual salary of two thousand dollars in times of peace; the assistant adjutant general shall receive an annual salary of one thousand five hundred dollars, and there shall be appointed a record clerk in the adjutant general's office, who shall have charge of the war records under direction of the adjutant general, who shall receive a salary of twelve hundred dollars per annum, and such assistants shall be employed in the adjutant general's and quartermaster general's department as shall, in the opinion of the commander-in-chief be actually necessary, and any person so employed shall receive for the time actually and necessarily on duty such compensation as the commander-in-chief may prescribe. [28 G. A., ch. 72, § 7.] [31 G. A., ch. 91, § 16.]

SEC. 2212. Repeal—compensation of officers and men. The law as it appears in section twenty-two hundred and twelve (2212) of the supplement to the code is hereby repealed and re-enacted to read as follows:

The military force, when in active service of the state upon the call of the governor or sheriff of any county, and the guard when paraded for drill, encampment, target practice, school of instruction, or other duty under orders of the commander-in-chief, shall be paid the following compensation for time actually on duty; each commissioned officer shall receive the pay of his rank in the United States army, at the time of such service, without allowances, increase or additions on account of length of service, and without subsistence, forage or any allowances other than transportation, quarters and stationery. Enlisted men shall be furnished transportation, subsistence and quarters, and in addition thereto shall receive the following per diem: Chief musician, three dollars (\$3.00); principal musician, drum major, first class sergeant, regimental sergeant major, commissary sergeant, quartermaster sergeant, color sergeant, first sergeant two dollars (\$2.00); battalion sergeant major, company quartermaster sergeant, sergeant and cook one dollar and seventy-five cents (\$1.75); corporal, farrier, saddler, blacksmith, one dollar and fifty cents (\$1.50); private one dollar and twenty-five cents (\$1.25). Enlisted men who have served continuously for three years and not more than five years, shall receive an added amount of fifteen per cent of the above per diem, and those who have served continuously five years or more, an added amount of twenty-five per cent of the above per diem. When in actual service of the state, pursuant to the order of the governor, the compensation of the military force shall be paid out of the state treasury, and when such service is rendered upon the call of the sheriff of a county, such compensation shall be paid from the treasury of the county whose sheriff called for such military force. The claims for such services shall be audited and allowed in the former case by the executive council and in the latter by the board of supervisors, upon presentment of proper claim therefor, at its next session. Should any part of the compensation above provided be paid from the United States, there shall be paid from the state or county treasury only that part thereof not paid by the United States. When on duty on rifle practice, range competition, or schools of instruction, officers shall receive such compensation or allowances as the commander-in-chief shall designate in orders with reference thereto. [30 G. A., ch. 77, § 11.] [31 G. A., ch. 91, § 17.]

SEC. 2213. Repeal—allowance for company drill—band practice—hospital corps drill. That section twelve (12) of chapter seventy-seven (77) of the acts of the thirtieth general assembly be and the same is hereby repealed and the following enacted in lieu thereof:

There shall be allowed annually to each company for miscellaneous military uses not otherwise provided for by the state, not to exceed the sum of five hundred dollars (\$500), the same to be paid semi-annually; companies showing full attendance and actual drill of those present of two hours each week shall be entitled to the full sum of five hundred dollars (\$500), and companies showing lesser attendance at drill shall be paid proportionately, provided that when a company's attendance at drill falls below fifty per cent., it shall be deemed inefficient and forfeit its right to any allowance under this section. And for like purposes and under like requirements to each regimental band the sum of two hundred fifty dollars (\$250), and to each regimental hospital corps under like requirements, the sum of one hundred twenty-five dollars (\$125). The same to be paid under such regulations as the commander-in-chief shall prescribe. [32 G. A., ch. 117, § 2.]

SEC. 2213-a. Warrants—how drawn. For the purpose of carrying out the provisions of section one of this act the auditor of state is hereby authorized to draw warrants upon the state treasurer upon the certificate of the adjutant general approved by the governor. [28 G. A., ch. 73, § 2.]

SEC. 2214. Repeal—appropriation. The law as it appears in section twenty-two hundred and fourteen (2214) of the supplement to the code be and the same is hereby repealed and the following enacted in lieu thereof:

There is appropriated out of any moneys in the treasury not otherwise appropriated, the sum of one hundred thousand dollars (\$100,000.00) per annum, or so much thereof as may be necessary, for the support of the guard under the provisions of this chapter not applying to active service, which shall be drawn by a warrant, drawn by the auditor of state on the state treasurer, upon the certificates of the adjutant general approved by the governor, showing for what purpose each draft is to be or has been used, and no indebtedness shall be created in excess of such annual appropriation. [30 G. A., ch. 77, § 13.] [31 G. A., ch. 91, § 18.] [32 G. A., ch. 117, § 3.]

SEC. 2214-a. Stoppage of compensation. Compensation, subject to payment by the state of Iowa, to the officers and enlisted men of the Iowa National Guard for military services shall be subject to stoppage for payment of loss or damage to public property issued them for military uses. [32 G. A., ch. 117, § 4.]

CHAPTER 1-A.

OF THE NAVAL MILITIA.

SECTION 2215-a. Naval militia. At the discretion of the governor as commander-in-chief, there may be organized a naval force and be designated as "naval militia" and shall consist of one ship's crew and commissioned officers therefor, and prescribe regulations governing the said naval militia. [29 G. A., ch. 90, § 1.]

SEC. 2215-b. Officers. The ship's crew shall be commanded by an officer with the rank of commander, one lieutenant commander, who shall be the executive officer, one lieutenant who shall be the navigation and ordnance officer, one ensign who shall be the aide to the commander, one surgeon with the rank of lieutenant, one engineer with the rank of lieutenant, one assistant engineer with rank of lieutenant junior grade. There shall be allowed to such ship's crew such number of petty officers as the

commander-in-chief shall order and direct. Two buglers and not less than forty, nor more than sixty-four petty officers and men. [29 G. A., ch. 90, § 2.]

SEC. 2215-c. Organization—discipline and exercise. The organization of the naval force shall conform as nearly as practicable to the provisions of the laws of the United States, and the system of discipline and exercise shall conform as nearly as may be to that of the navy of the United States. The governor shall have the power to alter, annex, consolidate and disband the same whenever in his judgment it is for the good of the service. [29 G. A., ch. 90, § 3.]

SEC. 2215-d. Uniform. The uniform of the naval militia shall conform to the regulations in force for the navy of the United States. [29 G. A., ch. 90, § 4.]

SEC. 2215-e. Election and appointment of officers. The commissioned officers of the naval militia shall be elected by the officers and men of the ship's crew, under such regulations as the commander-in-chief may prescribe and the ensigns and petty officers shall be appointed by the commander of the naval militia. The time and place of holding elections for officers shall be the same as prescribed for elections in the Iowa National Guard. Provided, the naval militia can be organized and equipped without expense to the state of Iowa, or to the appropriation for the maintenance of the Iowa National Guard, or the appropriation made by the general government to aid the national guard of the several states. [29 G. A., ch. 90, § 5.]

TITLE XII.

OF THE POLICE OF THE STATE.

CHAPTER 1.

OF THE SETTLEMENT AND SUPPORT OF THE POOR.

SECTION 2216. Who liable to maintain.

The obligation to support children being under these sections primarily upon their father and mother, and secondarily upon their grandfather, in the absence of inability of nearer relatives, held that the grandfather was not bound for their support, although the evidence showed that their father had abandoned his wife and had no property subject to execution, where there was no showing that he was absent or unable to provide for his children. *Johnson County v. Stratton*, 111-421.

Liability of a grandparent for support of children can be predicated only on proof that the parent is unable, because of physical or mental disability, to earn a living by labor. The inability of such parent to earn sufficient support for himself and children, not due to physical or mental disability, is no ground for throwing the liability for their support upon the grandparent. *Monroe County v. Abegglen*, 129-53.

SEC. 2217. Same.

The grandparent is not liable for the support of his grandchildren where it appears that the parents are capable of furnishing such support. *Monroe County v. Abegglen*, 129-53.

The fact that the father of such children has secured a divorce from their

mother, the daughter of the grandparent who is sought to be charged with such support, and has subsequently remarried and become encumbered with another family, is no reason why the support of his children should be thrown upon the grandparent. *Ibid.*

SEC. 2234. Application for relief—action of supervisors.

If the board of supervisors has in fact employed a competent and efficient physician to care for the poor, the township trustees are not authorized to employ another simply because they believe the county physician is inattentive, neglectful or incompetent. *Lacy v. Kossuth County*, 106-16.

A certificate from the township trustees attached to the account of a physician presented to the board of supervisors is properly admissible in evidence. *Ibid.*

Where a physician is employed by the board of health to attend upon a person

infected with contagious disease he is entitled to compensation from the county if the infected person is a poor person, notwithstanding the employment by the county of another physician to attend generally upon the poor. *Ibid.*

Where it appeared that the board of supervisors had employed a physician but the case in question was not one which would come within his care under his contract of employment, held that the claim of another physician for services rendered in such case was properly allowed. *Taylor v. Woodbury County*, 106-502.

SEC. 2235. Payment of claims.

The physician may claim for services performed by another physician under his direction. *Taylor v. Woodbury County*, 106-502.

Even though the services for which

claim is made was originally rendered without proper legal sanction, yet the giving of the certificate contemplated in this section cures any such defect in the claim. *Ibid.*

SEC. 2244. Admission to poor house—labor.

Although persons admitted to the poor house may be required to perform such labor as may be suited to their age and strength, the proceeds of which are to be appropriated to the use of the poor house, nevertheless the board of supervisors may

make a contract with reference to the labor of an insane inmate by which his services are to be accepted in full payment for his board and lodging, and his estate relieved from liability therefor. *Marshall County v. Lippincott*, 111 N. W. 801.

SEC. 2250. Illegitimates.

The putative father of an illegitimate child being chargeable for its support, the child may recover civil damages for in-

juries resulting from sale of intoxicating liquors to the father. *Goulding v. Phillips*, 124-496.

SEC. 2252. "Poor person" defined.

The provisions as to the support of poor persons are to be construed as contemplating only those who having no property are

unable because of physical or mental disability to earn a living by labor. *Monroe County v. Abegglen*, 129-53.

CHAPTER 2.

OF THE CARE OF THE INSANE.

SECTION 2253-a. Repeal—state hospitals—names. That section two thousand two hundred fifty-three (2253) of the code be and the same is hereby repealed and the following enacted in lieu thereof:

The hospital for the insane at Mount Pleasant shall be known by the name of "Mount Pleasant State Hospital"; the one at Independence, "Independence State Hospital"; the one at Clarinda, "Clarinda State Hospital"; and the one at Cherokee, "Cherokee State Hospital." [29 G. A., ch. 91, § 1.]

SEC. 2266. Finding of commissioners—warrant—confinement.

The board of insane commissioners is not required to make a finding upon the question of legal residence of a person

found to be insane. *Brown v. Lambé*, 119-404.

SEC. 2267. Appeal from finding. Any person found to be insan in proceedings herein authorized may appeal from such finding to the district court by giving the clerk thereof, within ten days after such finding has been made, notice in writing that an appeal is taken, which may be signed by the party, his agent, guardian or attorney, and, when thus appealed, it shall stand for trial anew. Upon appeal it shall be the duty of the county attorney to prosecute the action on behalf of the informant without additional compensation. [18 G. A., ch. 152, §§ 1, 2.] [29 G. A., ch. 92, § 1.]

SEC. 2270. Settlement in another county. If the commissioners find that the person committed to the hospital has or probably has a legal settlement in some other county, they shall, after the time allowed for an appeal, or, in case an appeal is taken, after the same is finally disposed of, immediately notify the auditor of such county of such finding and commitment, and the auditor so notified shall thereupon inquire and ascertain if possible whether the person in question has a legal settlement in that county, and shall immediately notify the superintendent of the hospital and the commissioners of the county from which such person was committed of the result of such inquiry. If the legal settlement of a person

committed cannot for a time be ascertained, and is afterwards found, the notices required shall then be given. If in either of the above cases the auditor of the county in which it is alleged that the patient has a legal settlement shall find adversely to the decision of the commissioners of the county from which the patient was committed, and said commissioners are unwilling to accept his findings, they shall, through the auditor of their county, forthwith apply to the district court through proper legal proceedings for a determination of the case. Any county whose officials shall fail either in cases now in dispute or disputes which may hereafter arise to apply to the district court as herein provided, within six months from the date of the receipt of notice from the auditor of the county in which it is claimed the patient has a legal settlement shall be liable for the maintenance of said patient. If, upon hearing, the court shall find that the patient has no legal settlement in either of the counties in dispute, the board of control shall at once be notified by the auditor of the county from which the patient was committed, in accordance with the provisions of section one (1) chapter ninety-two (92) acts of the thirty-first general assembly and the proceedings thereafter with reference to said patient shall be as provided in said section. The residence of any person found insane who is an inmate of any state institution shall be that existing at the time of admission therein. [24 G. A., ch. 24, § 2; C., '73, § 1402.] [32 G. A., ch. 118.]

SEC. 2279. Insane prisoners—inquiry—confinement.

The commissioners of insanity have no authority to inquire as to the sanity of a prisoner under arrest on indictment, and the provisions of this section are in this respect invalid. The court should proceed under the provisions of Code § 5540. *Stone v. Conrad*, 105-21.

SEC. 2283. At expense of state. Patients in a hospital having no legal settlement in the state, or whose legal settlement cannot be ascertained, shall be supported at the expense of the state. The trustees of any asylum may authorize the superintendent to remove any patient who has no legal settlement within the state. The cost of such removal to be paid directly from the state treasury, upon a sworn statement of the superintendent and the approval of the trustees appended to each voucher. [21 G. A., ch. 47; C., '73, § 1419.] [31 G. A., ch. 92, § 3.]

SEC. 2287. Repeal—escape—expenses of capture and return. That section two thousand two hundred and eighty-seven (2287) of the code and chapter 79 of the acts of the thirtieth general assembly amendatory thereof are hereby repealed and in lieu thereof is enacted the following:

“If any patient shall escape from a state hospital for the insane the superintendent shall cause immediate search to be made for him and if he cannot be found, shall cause notice of such escape to be given forthwith to the clerk of the district court of the county where he belongs and if found to be in that county the clerk shall at once notify the superintendent of the place where the patient can be found, and when so notified or when otherwise informed of the place in which the patient may be taken the superintendent shall send an employe of the hospital or other person for him and cause him to be returned to the hospital unless for good reasons a different course be deemed advisable by the superintendent, and is approved by the board of control. In case of apparent necessity the patient may be taken into custody and restrained by the local authorities until he is taken by the representative of the hospital. All actual and necessary expenses incurred in the capture, restraint and return to the hospital of the patient shall be paid on itemized vouchers sworn to by the claimants

and approved by the superintendent and the board of control of state institutions from any money in the state treasury not otherwise appropriated." [31 G. A., ch. 93.]

SEC. 2291-a. Repeal—amount allowed for care of patients. That section twenty-two hundred and ninety-one (2291) of the code be and the same is hereby repealed. [29 G. A., ch. 157, § 1.]

SEC. 2291-b. Repeal—amount allowed for care of patients. That chapter fifty-four of the acts of the twenty-seventh general assembly is hereby repealed and in lieu thereof is enacted the following:

Section 2291. The board of control of state institutions of Iowa may from time to time fix the monthly sum for the board and care of each patient in the hospitals for the insane, which sum for the hospitals at Clarinda, Independence and Mount Pleasant shall not exceed twelve dollars, and for the hospital at Cherokee shall not exceed fifteen dollars. Said sum shall be placed to the credit of the hospital entitled thereto upon certificate of the board of control of state institutions, based upon reports of the superintendent, and paid from the state treasury, as provided by chapter one hundred eighteen (118) of the acts of the twenty-seventh general assembly and acts amendatory thereof, and the certificate of the board shall be competent evidence of the amount due for the time therein stated. The amount credited a hospital for any month shall be based on the average number of patients in the hospital for the preceding month. When the average number of patients in the hospital at Cherokee shall be more than six hundred, the monthly sum shall not exceed fourteen dollars, and when such number shall be more than seven hundred fifty patients the monthly sum such shall not exceed thirteen dollars, and when such number shall be more than nine hundred patients the monthly sum shall not exceed twelve dollars. Provided, however, that so much of the monthly sum as exceeds twelve dollars shall be paid by the state from any money in the state treasury not otherwise appropriated and shall not be charged to any county or person. [29 G. A., ch. 157, § 1.]

SEC. 2291-c. Repeal—support for Cherokee state hospital. Section 2 of chapter one hundred forty (140) of the acts of the twenty-eighth general assembly is hereby repealed and in lieu thereof is enacted the following:

That in order to maintain the hospital for the insane at Cherokee and provide for the patients therein during the first month of its occupancy, the superintendent is authorized to estimate before the opening of the hospital for the support of five hundred fifty patients for such first month, and the sum of eight thousand two hundred fifty dollars is hereby appropriated for that purpose. [29 G. A., ch. 157, § 2.]

SEC. 2291-d. Appropriation for transferring patients. The sum of six thousand dollars, or so much thereof as shall be necessary, is hereby appropriated out of any money in the state treasury not otherwise appropriated to pay the expenses of transferring patients in hospitals for the insane to other hospitals, made advisable by the opening of the hospital at Cherokee. The money required for the purpose stated shall be drawn by and on the estimate of the superintendents of the several hospitals, approved by the board of control of state institutions, and may be so drawn before the expenses are incurred or vouchers therefor are filed. Any unexpended balance of money so drawn shall be returned to the state treasury. An itemized statement of the money so drawn and of the expenses so incurred and paid and of the balance, if any, returned to the state treasury shall be made by the board of control and filed in the office of the auditor of state. [29 G. A., ch. 157, § 3.]

SEC. 2292. Repeal—charged to the county—how certified and paid. Section twenty-two hundred and ninety-two (2292) of the code relating to the expense of the insane, is hereby repealed and the following enacted in lieu thereof:

“The superintendents of the hospital for the insane and hospital for inebriates shall certify to the auditor of state on the first days of January, April, July and October, the amount not previously certified by him due the state from the several counties having patients chargeable thereto, and the auditor of state shall thereupon charge the same to the county so owing and the board of supervisors shall at the time of levying other taxes estimate the amount necessary to meet this expense the coming year including cost of commitment and transportation of patients and shall levy a tax therefor. Taxes thus levied and collected, cannot be used for any other purpose or transferred to any other fund. Should any county fail to levy a tax sufficient to meet this expense the deficiency shall be paid from the general county fund. Should any county fail to pay these bills within sixty days from the date of certificate from the superintendent, the auditor of state shall charge the delinquent county the penalty of one per cent. per month on and after sixty days from date of certificate until paid. The superintendent shall at the time of mailing certificate to the auditor of state, send a duplicate copy to the auditor of each county having a patient chargeable thereto, and the county auditor upon receipt of such certificate, shall thereupon pass the same to the credit of the state in his ledger of state accounts, and at once issue a notice to his county treasurer, authorizing him to transfer the amount from the insane or county fund, to the general state revenue, which notice shall be filed by the treasurer as his authority for making such transfer, and shall include the amount so transferred in his next remittance of state taxes to the treasurer of state, designating the fund to which it belongs.” [31 G. A., ch. 94.]

SEC. 2297. Estates of patients liable.

The wife does not become liable to the county for the support of her husband as a patient in the insane hospital. *Blackhawk County v. Scott*, 111-190.

The state has no common law right of recovery against the estate of one who has received the benefits of treatment as an insane person in the hospitals of the state, and there is no statutory provision creating a liability which may be enforced by the state against the patient or his property. *State v. Colligan*, 128-536.

The estate of an insane person cannot be taxed with the costs of the hearing on the question of insanity and commitment under such hearing. *In re Estate of Westlake*, 125-314.

In defense to an action to recover from the estate of an insane person the expense of maintaining him by the county, it may be shown that under an agreement with

the board of supervisors he rendered services on the poor farm for an agreed compensation in full payment for his board and lodging. *Marshall County v. Lippincott*, 111 N. W. 801.

A father is liable to the county for the care and support of his minor son at the hospital for the insane. The statutory provision does not impose a tax nor is it open to objection that it authorizes the taking of private property without just compensation. *Guthrie County v. Conrad*, 133-171.

The question of the insanity of the person for whose support recovery is sought against his parent may be litigated in the action. *Ibid.*

The fact that the insane person is placed in the hospital without the consent of those liable for his support will not relieve them from the statutory liability. *Ibid.*

SEC. 2308. County insane fund. The board of supervisors, when levying taxes for general purposes, shall include therein a tax of one and one-half mill or less, as may be necessary, for the purpose of raising a fund for the support of such insane persons as are cared for and supported by the county in the insane ward of the county poor-house, or elsewhere outside of any state hospital for the insane, which shall be known as the

county insane fund, and shall be used for no other purpose than the support of such insane persons. [27 G. A., ch. 55, § 1.]

SEC. 2308-a. Costs and expenses—how paid. That in all cases where the commissioners of insanity of a county find to be insane a person who does not have a legal settlement within that county, the costs and expenses of the arrest, care, investigation and commitment of such person authorized by law, including the costs of appeal if an appeal be taken and the person is found to be insane on appeal, shall be paid in the first instance by the county in which such person is so found to be insane. If such person is found to have a legal settlement in another county of this state, such costs and expenses shall be audited and paid by the supervisors of that county in the manner provided for the payment of other claims. If such person be found to have no legal settlement within this state, such costs and expenses shall be paid out of any money in the state treasury not otherwise appropriated, on vouchers executed by the auditor of the county which has paid them and approved by the board of control of state institutions. Such vouchers shall contain an itemized statement of the costs and expenses, and payment shall be made to the treasurer of the county. [30 G. A., ch. 78.]

CHAPTER 2-A.

OF THE DETENTION AND TREATMENT OF DIPSOMANIACS, INEBRIATES AND THOSE ADDICTED TO THE EXCESSIVE USE OF NARCOTICS.

SECTION 2310-a1. Board of control to provide department. That the board of control is hereby directed to provide for the detention and treatment of dipsomaniacs, inebriates and persons addicted to the excessive use of morphine or other narcotics, in one or more of the hospitals for the insane at the discretion of said board. Said department thus provided for to be designated as a hospital for inebriates. [29 G. A., ch. 93, § 1.]

SEC. 2310-a2. Examination—commitment. That all dipsomaniacs, inebriates and persons addicted to the excessive use of morphine or other narcotics, who shall be citizens of the state of Iowa and residents of the county from which they might be committed to the hospital for inebriates may be brought before the district court or judge of the county where they reside for examination and commitment to said hospital for inebriates. Their examination, trial and commitment shall be governed by the same statutes as now apply to and govern the examination and commitment of incorrigibles to the state industrial school. If it shall be determined by said district court or judge, that such person is addicted to dipsomania, inebriety or to the excessive use of narcotics, he or she shall be committed to such hospital for inebriates, as may be established by the board of control as above provided for. The term of detention and treatment shall be, for the first commitment not less than one, nor more than three years; and for the second commitment not less than two nor more than five years. The governor shall parole a patient on conditions named in the following section. [29 G. A., ch. 93, § 2.]

SEC. 2310-a3. Conditions of parole. If after thirty days of such treatment and detention a patient shall appear to be cured, and if the physician in charge and the superintendent of said institution shall so recommend, the governor shall parole said patient, provided that said patient shall pledge himself or herself to refrain from the use of all intoxicating

liquors as a beverage, or other narcotics, during the remaining part of his or her term of commitment and shall avoid the frequenting of places and the association of people tending to lead them back to their old habits of inebriety.

And shall send the following report on the first day of every month during term of parole to the governor, which report must be inquired into and approved as correct by the clerk of the district court of the county wherein the patient resides, and said patient shall furnish the clerk of the district court with satisfactory evidence of his sobriety and good habits.

Report of.....to superintendent of hospital for inebriates at.....Iowa.

I,.....being on parole from the hospital for inebriates at.....Iowa, do hereby certify that I have up to this date, being the first day of.....190.., refrained from the use of all intoxicating liquors as a beverage, and all narcotics of any kind whatsoever, except it be a moderate use of tobacco.

.....
.....

I have carefully inquired into the record of.....as named above and do hereby certify that I believe the statements contained in his above report are true.

.....

Clerk district court of Iowa in and for.....county, Iowa.

Dated this.....day of....., 190..

And if at any time the patient on parole, for any reason fails to make the above report, the sheriff of the county wherein such patient resides shall without further writ or warrant, return said patient at once to the hospital from which he or she has been paroled on receiving notice of such failure from the clerk of the district court of the county wherein the patient resides, or any three reputable citizens thereof. And the patient so returned shall be detained and treated during the full term of his commitment. [29 G. A., ch. 93, § 3.]

SEC. 2310-a4. What statutes apply. That all statutes of the state providing for the trial, commitment, detention and treatment of incorrigibles sent to industrial schools shall be applicable to trial, detention and treatment of all patients committed under the provisions for this act, except in so far as they may be modified by the provisions of this act. [29 G. A., ch. 93, § 4.]

SEC. 2310-a5. Expenses—how paid. That the expense of trial, commitment and treatment of such persons so committed under the provisions of this act shall be borne and paid in the same manner and out of the same fund as the expenses of insane patients are borne and paid, and the estates of such patients shall be liable therefor to the same extent as in the case of insane persons. [29 G. A., ch. 93, § 5.]

SEC. 2310-a6. State hospital for inebriates. The industrial home for the adult blind at Knoxville shall hereafter be called the state hospital for inebriates, and shall be used for the detention, care, and treatment of all male dipsomaniacs, inebriates, and persons addicted to the excessive use of morphine, cocaine, or other narcotic drugs. [30 G. A., ch. 80, § 1.]

SEC. 2310-a7. Officers and employes. The officers and employes of said hospital shall consist of a superintendent, who shall be a reputable physician, and such other officers and employes as the board of control of state institutions shall deem necessary for the proper operation of said institution. Said superintendent shall be appointed by the board of control of

state institutions for the term of four years and shall receive such salary as said board may fix, not exceeding two thousand dollars (\$2,000.00) per annum. [32 G. A., ch. 80, § 2.]

SEC. 2310-a8. Control. The board of control of state institutions shall have the same power and control over said hospital as is now given it with reference to the several institutions mentioned in chapter one hundred and eighteen (118) of the acts of the twenty-seventh general assembly and all amendments thereto, and said act and amendments shall apply to and govern said hospital in every respect in so far as they are not in conflict with the provisions of this act. [30 G. A., ch. 80, § 3.]

SEC. 2310-a9. Notice of opening of hospital. When said hospital buildings are erected, refitted, equipped, furnished, and ready for occupancy, said board of control shall mail written notice to every judge of the district court and to every clerk of the district court in the state, notifying them that said hospital is open for the reception of patients. [30 G. A., ch. 80, § 4.]

SEC. 2310-a10. Male patients. Said hospital shall receive all male patients regularly committed to it who are dipsomaniacs, inebriates, or who are addicted to the excessive use of morphine, cocaine, or other narcotic drugs. Provided, however, that whenever in the opinion of the board of control of state institutions it shall be necessary to restrict the number of admission for lack of room, said board may notify by mail each district judge and each clerk of the district court in the state of the fact, and that patients will not be admitted except on application approved by the superintendent, and after such notice is given it shall not be lawful for the clerk of any court to issue a warrant for the commitment of any patient to said hospital unless such clerk has been notified by the superintendent in writing that the patient can be received, and until such notice from the superintendent is received the order of commitment shall be suspended. The superintendent shall in such cases grant applications for admission in the order in which they are received. When the board of control is of the opinion that the necessity for such restriction has ceased to exist it may discontinue it and give notice thereof as was required to establish it, and when such notice is given the restriction shall cease. [30 G. A., ch. 80, § 5.] [31 G. A., ch. 95.]

SEC. 2310-a11. Application for commitment. Applications for commitment to said hospital shall be made to the judge of the district court of the district which embraces the county in which the person whom it is proposed to commit resides, and said application may be made in person by any dipsomaniac, inebriate, or user to excess of morphine, cocaine, or other narcotic drug, or it may be made against any such person by his wife, or other relative, or by his guardian or by any other person, such person having first obtained the consent of the district judge for so doing. [30 G. A., ch 80, § 6.]

SEC. 2310-a12. Examination—commitment. On presentation of the application provided for in section six (6) hereof, unless made in person by an inebriate, dipsomaniac, or user to excess of narcotic drugs, the judge shall issue an order, which may be served by any peace officer, directing him to bring the accused person before him for examination, and on his appearance, unless he demands a formal trial, the judge shall hear any evidence which may be adduced touching the accusation. The accused may be represented by counsel and the judge may, if he deems it necessary, require the county attorney of the county where the hearing is had to attend and assist in such hearing. In case said application be voluntarily or involuntarily made and the said judge shall determine that the accused

is a proper person to be committed to said hospital, he shall make an order committing him thereto; otherwise he shall be discharged. The term of detention and treatment shall be until the patient is cured and not exceeding three years. Provided that before a person shall be committed to a state hospital for inebriates satisfactory evidence shall be submitted to the trial court or judge showing that the person committed is not of bad repute or of bad character apart from his or her habit for which the commitment is made and that there is reasonable ground for believing that the person if committed will be cured of such habit, and provided further, that the board of control of state institutions may discharge any person committed to a state hospital under the provisions of this act on the recommendation of the superintendent when satisfied that such person will not receive substantial benefit from further hospital treatment. [30 G. A., ch. 80, § 7.] [32 G. A., ch. 119.]

SEC. 2310-a13. Formal trial. If the accused shall not voluntarily apply for commitment and shall prior to the beginning of the hearing before the judge, demand a formal trial, the judge shall continue the hearing to the next term of the district court, or if the court shall be in session the case shall be transferred to it, and in either case the cause shall be docketed and tried as a civil case, and all papers used before the judge shall be filed with the clerk of the court; pending such hearing the judge may make such order in relation to the custody, restraint or control of the accused as he shall deem necessary. [30 G. A., ch. 80, § 8.]

SEC. 2310-a14. Warrant of commitment. If on a formal trial the accusation is proven the judge of the court shall impose sentence of detention, as provided in section seven (7) hereof, and the clerk of the court shall issue a warrant of commitment in accordance therewith to said hospital. If the truth of the charge is not established he shall be discharged. [30 G. A., ch. 80, § 9.]

SEC. 2310-a15. Costs and expenses. All costs and expenses incurred in the arrest of the accused and other costs incurred in any hearing before the judge, and all costs and expenses of trial, and the costs and expenses incurred in taking the accused to the hospital, shall be taxed up on the proceeding or trial as the case may be and be made a matter of record in the proper books of the office of the clerk of the district court of the county where the accused resided and shall be paid by the county and may, if he be committed, be recovered by it of the accused. [30 G. A., ch. 80, § 10.]

SEC. 2310-a16. Per capita allowance. The board of control of state institutions shall fix the per capita monthly allowance which may be charged by said hospital for the care, treatment, and maintenance of each patient therein, which shall not exceed the sum of twenty dollars (\$20.00) per capita per month, which shall be certified by the superintendent of [to] said board and paid out as provided in chapter one hundred and eighteen (118) of the acts of the twenty-seventh general assembly applicable to state hospitals for the insane. Provided, however, that so much of the monthly sum as exceeds fifteen dollars (\$15) shall be paid by the state from any money in the state treasury not otherwise appropriated and shall not be charged to any county or person. Provided, that until the average number of patients in said hospital shall exceed two hundred per month, it shall be credited by the auditor of state and the treasurer of state with not to exceed the sum of four thousand dollars (\$4,000.00) per month, which may be drawn as above provided. [30 G. A., ch. 80, § 11.]

SEC. 2310-a17. Rules and regulations—blanks. The superintendent of said hospital, subject to the approval of the board of control, shall prepare rules and regulations for the government of said hospital and its

inmates, and said board of control shall cause to be prepared a blank form of warrant or order of commitment which shall contain such printed questions as may tend to bring out the previous history, condition and treatment of the accused, which blanks shall be furnished to the district judges and to the clerks of the district court. The judge when he investigates the charge and the clerk of the court when the case is tried, shall, so far as they are able, fill out said blanks. [30 G. A., ch. 80, § 12.]

SEC. 2310-a18. Patients to labor—treatment. Patients received at said hospital shall be required to labor if in the opinion of the superintendent it is for their physical and mental welfare, and the method of treatment shall be that which is deemed best to eliminate the effects of the alcohol or narcotic drug and to build up the system physically and mentally and which will tend to strengthen the moral character of the patient and enable him to resist the temptation to drink or use narcotic drugs. [30 G. A., ch. 80, § 13.]

SEC. 2310-a19. Conditions of parole. Any patient whom the superintendent believes to be cured may be paroled, conditioned on said patient's signing a written pledge agreeing to refrain from the use of all intoxicating liquors as a beverage, and from the use of morphine and cocaine or other narcotic drugs during the term of his commitment and shall avoid frequenting places and the association of people tending to lead him back to his old habits of inebriety. And said paroled patient must make written reports to the superintendent of said hospital at the beginning of each month on blanks to be furnished the clerk of the district court for that purpose, to the effect that he has not during the month past in any respect violated any of the terms and conditions of his parole, which reports must be investigated and approved by the clerk of the district court of the county in which the patient resides, who may demand from said paroled patient satisfactory evidence as to the truth of the statement. If, at any time, a patient on parole shall fail to make said report, or shall fail in any respect to fulfill all of the conditions upon which said parole was granted, he may without any further proceeding whatever and on the written order of the superintendent of said hospital be taken and returned to the hospital, there to be detained and treated as provided herein. Said patient so violating his parole may be returned by any peace officer, or by any officer or person whom the superintendent of the hospital may direct so to do, and in every such case all of the expenses of such taking and return of such patient shall be paid by said hospital and shall be certified by the superintendent thereof to the auditor of state and the amount thereof shall be by him and by the treasurer of state credited to the support fund of said hospital and shall be drawn by said hospital as other funds are drawn. [30 G. A., ch. 80, § 14.]

SEC. 2310-a20. Misdemeanor. Any patient in said hospital who shall without due authority leave the hospital, including its grounds and any other place to which he may be permitted to go, shall be guilty of a misdemeanor and shall upon conviction be punishable by imprisonment in the county jail not less than thirty nor more than ninety days, and the district court of the county in which the institution is situated as well as the district court of any county in which the patient may be found shall have jurisdiction in such cases. The board of supervisors of the county in which such prosecution is had shall certify to the board of control of state institutions an itemized statement of the costs of prosecution and maintenance incurred by the county wherein such prosecution is had, which certificate shall be indorsed by the trial judge stating that the amount, as shown by said certificate is correct. On receipt of such certificate, the said board of control shall order a warrant issued in favor of the treasurer of the county wherein

such prosecution is had, for the amount of the costs and expenses so incurred, which shall be payable out of the support or contingent fund of said hospital for inebriates. [30 G. A., ch. 80, § 15.] [31 G. A., ch. 96.]

SEC. 2310-a21. Refusal to work. Any patient in said hospital who, shall be required to work as hereinbefore provided, and who shall refuse so to do, or who shall violate any of the rules and regulations of the hospital, shall be subject to punishment therefor and shall not be paroled. [30 G. A., ch. 80, § 16.]

SEC. 2310-a22. Commitment of females. Females who are dipsomaniacs, inebriates, or addicted to the excessive use of morphine, cocaine, or other narcotic drugs, may be committed to a state hospital for the insane to be designated by the board of control, for treatment, and all the provisions of this act, so far as applicable and except as modified by this section, shall apply in such cases and also to the cases of such females as may remain in the hospital for inebriates connected with any state hospital. [30 G. A., ch. 80, § 17.]

SEC. 2310-a23. Transfer of patients—appropriation. When the hospital for inebriates is open for the reception of patients the board of control shall cause to be transferred to it all male persons then in the inebriate hospitals connected with the insane hospitals of the state, and for the purpose of covering the expense of said transfer there is hereby appropriated the sum of four thousand dollars (\$4,000.00), or so much thereof as may be necessary, out of any funds in the state treasury not otherwise disposed of. [30 G. A., ch. 80, § 18.]

SEC. 2310-a24. Penalties. Any person who shall furnish any patient of said hospital for inebriates, or any patient who has been or may hereafter be committed to any insane hospital as an inebriate, dipsomaniac, or as one addicted to the excessive use of narcotics, any intoxicating liquor or narcotic drug, except on the written prescription of the superintendent, shall be guilty of a felony, and on conviction thereof shall be punished by imprisonment in the state penitentiary for not less than six months nor more than one year, or by a fine, not less than five hundred dollars (\$500.00) nor more than one thousand dollars (\$1,000.00) at the discretion of the court. Any person who shall knowingly furnish any intoxicating liquor or narcotic drug to one who has been discharged from either of said institutions as cured, except upon the written prescription of a reputable practicing physician, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than three hundred dollars (\$300.00) and not more than one thousand dollars (\$1,000.00) and stand committed to the county jail until such fine is paid. [30 G. A., ch. 80, § 19.]

SEC. 2310-a25. Per capita support for first month. For the purpose of the maintenance of said hospital for inebriates during the first month of its operation the superintendent thereof may estimate in advance of said opening and on the basis of a population of three hundred inmates at twenty dollars (\$20.00) per capita per month for the necessary supplies to operate the hospital for the first month, and the aggregate of said per capita shall be credited to said institution by the auditor of state and treasurer of state and may be drawn against as provided in chapter 118 of the acts of the twenty-seventh general assembly. [30 G. A., ch. 80, § 20.]

SEC. 2310-a26. Additional land and buildings—appropriation. To carry out the purposes of this act and provide for the purchase of the necessary land, and to erect proper additional buildings and out-buildings, and to refit the present buildings, and to equip and furnish the same, and to purchase all necessary animals, tools, implements, and other needed

articles, there is hereby appropriated the sum of one hundred and twenty-five thousand dollars (\$125,000.00), or so much thereof as may be necessary, out of any funds available therefor, and on the passage and publication of this act the board of control shall proceed to purchase land, and erect, refit, equip and furnish said buildings as are herein provided for. [30 G. A., ch. 80, § 21.]

SEC. 2310-a27. Repeal—acts in conflict. Section three thousand two hundred twenty-one (3221) of the code and all acts and parts of acts in conflict with this act are hereby repealed; provided, however, that nothing in this act shall in any way interfere with the execution of any commitment heretofore made under chapter ninety-three (93) of the acts of the twenty-ninth general assembly; and provided, further, that commitments may continue to be made under such act up to the time the hospitals for inebriates provided for herein shall be formally declared ready for the reception of patients. [30 G. A., ch. 80, § 22.]

SEC. 2310-a28. Insane patients—expenses. Whenever any person committed to and received in the hospital for inebriates shall become insane, it shall be the duty of the superintendent to file, or cause to be filed, with the commissioners of insanity of Marion county, Iowa, an information charging the said patient with insanity and the said insane commission shall proceed to inquire into the sanity of said patient as provided in title XII, chapter two (2) of the code. In the event that said person shall be judged insane, he shall be transferred to the hospital for the insane, where he shall be detained until such time as that he shall be discharged by the superintendent of the insane hospital, when he shall be returned to the hospital for inebriates, where he shall remain under the terms of the original commitment. All the expense incident to the commitment of said patient to the state hospital for the insane, including the expense of the hearing before the commissioners of insanity of Marion county, and the expense of returning said patient to the hospital for inebriates, shall in the first instance be paid by said hospital for inebriates, and an itemized statement thereof shall be certified by said superintendent to the auditor of state, and said auditor of state and treasurer of state shall credit said hospital with the amount of said expense, which may be drawn by said hospital in the same manner as other funds to its credit in the treasury of the state are drawn, and the auditor of state is authorized to collect said sum from the county where the patient has his legal residence. [30 G. A., ch. 80, § 23.]

SEC. 2310-a29. Physical condition of patients. Whenever the physical condition of any patient shall become such that, in the judgment of the superintendent, further confinement will prove injurious to the health of said patient, the state board of control may parole him, under proper conditions and restrictions, for such period of time as it may deem advisable. [30 G. A., ch. 80, § 24.]

SEC. 2310-a30. Escape—expenses. In case of the escape of any patient from the hospital, all necessary expense incurred in the recapture and recommitment of such patient, shall be paid by the state. [30 G. A., ch. 80, § 25.]

SEC. 2310-a31. Subject to prosecution. Whenever any person shall have been committed to the state hospital for inebriates under the provisions of this act, he shall still be subject to prosecution for any public offense committed against the penal statutes of the state and he shall, at all times, be subject to arrest notwithstanding such commitment. Such person shall, when discharged be returned to said hospital at the

expense of the county in which said prosecution was pending and concluded. [30 G. A., ch. 80, § 26.]

SEC. 2310-a32. Traveling expenses of paroled or discharged patients. That when an inebriate person is paroled or discharged from the state hospital for inebriates at Knoxville or from any state hospital in which female inebriates are kept and is unable to furnish or obtain money for the necessary traveling expenses from the hospital to the place of commitment, the superintendent of the hospital with the approval of the board of control of state institutions may furnish said patient with transportation to the place where he or she was committed or to any other point he or she may select which is not more distant from the hospital than the place of commitment. [31 G. A., ch. 97.]

CHAPTER 3.

OF DOMESTIC ANIMALS.

SECTION 2311. Meaning of terms.

The owner of an animal within the terms of this section may be one having less than an absolute or unqualified title.

Getchell & Martin Lumber & Mfg. Co. v. Peterson, 124-599.

SEC. 2312. Male animals running at large.

The owner of a bull, turning him loose on his own field, with knowledge or notice that the partition fence separating his field from a field of an adjoining owner is insufficient to restrain him, cannot complain that the animal is taken up by the adjoining owner as running at large. *Conway v. Jordan*, 110-462.

Tender of the damages cannot be made until the constable has taken possession of the animal and estimated the damages done. *Ibid.*

One who has been damaged by a bull which has escaped from the custody of its owner, is not limited to a proceeding by distraint; but having distrained the animal to prevent further damage, he may surrender him to the owner and recover

such damages as he has suffered, in an action at law. *Burleigh v. Hines*, 124-199.

This statutory provision is applicable without regard to the sufficiency of partition fences through which the animal escapes from custody of the owner on to the land of another owner and there causes damage by getting with calf the blooded cows of such adjoining owner. *Ibid.*

The damage to be recovered in such case is the depreciation in value resulting at once on the serving by the bull of the cows thus gotten with calf and a subsequent disposal by the owner of the cows, of one or more of them, will not relieve the owner of the bull from liability for the damage to the cows thus disposed of. *Ibid.*

SEC. 2313. Distraint damage feasant—recovery.

Where an animal passes from the premises of the owner to the premises of an adjoining owner, through a defective fence, the latter may restrain him for damage done. *Conway v. Jordan*, 110-462.

By distraining a bull which the owner improperly allows to get beyond his control, such distraint being only for the pur-

pose of preventing further damage, the person who thus distrains does not waive the right to sue for damages and elect to rely upon proceedings under the distraint. He may surrender the animal to the owner and afterwards recover in an action such damages as he has suffered. *Burleigh v. Hines*, 124-199.

SEC. 2314. What animals not permitted to run at large.

The damages for which animals are distrained must be assessed by the township trustees on notice given as required in Code § 2317. *Holaman v. Marsh*, 116-483.

Animals which have escaped from the

owner's close and are under the control of no one are running at large within the statutory provision with reference to trespasses by such animals. *Foster v. Bussey*, 132-640.

SEC. 2316. Apportionment of damages.

Where separate trespasses are committed by the stock of different owners, the damage from each trespass are to be considered as distinct as separate, and there is no occasion to apportion the aggregate

damages from such trespasses against the different owners in proportion to the number of animals belonging to each engaged in the trespass. *Foster v. Bussey*, 132-640.

SEC. 2317. Assessment of damages—sale.

The damages for which animals running at large may be distrained under Code § 2314, must be assessed by the township trustees on notice given to them by the person making distraint. *Holaman v. Marsh*, 116-483.

One who distrains trespassing animals is entitled to compensation for their keeping although by reason of defective township organization there are no trustees competent to assess the damages. *Robinson v. Halley*, 124-443.

SEC. 2318. Assessment made—appeal.

The fact that there were no trustees of the township wherein stock was distrained to appraise the damage, does not affect the rights of recovery thereof. The owner of the trespassing stock which is distrained

by an adjoining land owner should bear the burden of the keeping of the animals, rather than an innocent party. *Robinson v. Halley*, 124-443.

SEC. 2340. Dogs killed. It shall be lawful for any person to kill any dog caught in the act of worrying, maiming or killing any sheep or lamb, or other domestic animal, or any dog attacking or attempting to bite any person, and the owner shall be liable to the party injured for all damages done, except when the party is doing an unlawful act. The provisions of this section shall not apply to any damage done by a dog affected with hydrophobia. [25 G. A., ch. 84; C., '73, § 1845.] [30 G. A., ch. 81.]

Prior to the amendment of this section the owner of one dog was only liable for the portion of damage done by his own dog acting in concert with others in inflicting an injury by killing stock. *Anderson v. Halverson*, 126-125.

The fact that a dog is harbored on the premises, title to which is in the wife, will not render the wife liable for injuries committed by such dog, the husband being presumed to be the head of the family and responsible for such injury. *Burch v. Lowary*, 131-719.

In an action under this section for injury inflicted by a dog, the only defense available to the dog's master is the doing of an unlawful act at the time of the attack by the person injured. *Van Bergen v. Eulberg*, 111-139.

The unlawful act of the person injured that will defeat liability of the owner of the dog must be one that directly contributes to the injury sustained. *Beckler v. Merringer*, 131-614.

Mere negligence of the party injured is not sufficient to defeat his recovery for the injury, and the burden is not on the plaintiff to show freedom from contributory negligence, but it is on the defendant to show that the plaintiff was guilty of some unlawful act. *Ibid.*

Permitting an animal to run at large in the public highway is not such unlawful act as will defeat the action of the

owner of such animal against the owner of a dog causing injury to it. *Ibid.*

Where a horse is frightened in the highway by a dog, and as a consequence, after running some distance is injured by coming into collision with a barbed wire fence, the owner of the dog is liable for the injuries which are the proximate result, although there is an intervening cause contributing to the injury, if it is not the efficient cause thereof. *Ibid.*

Plaintiff having left his horse and buggy in defendant's livery stable went to the buggy at a seasonable hour and in a proper manner to get some article therefrom and was bitten by defendant's dog. Held, that plaintiff not being a trespasser was entitled to recover, whether defendant's employes knew of his presence at the place or not. *Shultz v. Griffith*, 103-150.

Negligence by the injured party, whether of omission or commission, does not exempt the owner of a dog from liability for injuries committed by such dog unless the negligence amounts to an unlawful act. *Ibid.*

Persons who have possession of and harbor dogs are liable therefor as owners under the statutory provision making owners liable for injuries committed by dogs except when the party injured is doing unlawful acts. *Ibid.*

While this section was evidently intended to do away with the necessity of prov-

ing scienter, still the plaintiff is not precluded from proving those facts which would have been necessary to a right of action at common law. *Sanders v. O'Callaghan*, 111-574.

At common law a person was not entitled to keep a vicious dog on his premises for the purpose of keeping off tres-

passers, provided they came there in the day time and on some innocent mission. *Ibid.*

In an action for damages on account of injuries received from a vicious dog, plaintiff must show freedom from contributory negligence. *Ibid.*

SEC. 2341. Repeal. That chapter ninety-eight (98) of the acts of the thirty-first general assembly be and the same is hereby repealed and the following enacted in lieu thereof: [32 G. A., ch. 120, § 1.]

SEC. 2341-a. Registration of pedigree—fee. Any owner or keeper of any stallion kept for public service, or any owner or keeper of any stallion kept for sale, exchange, or transfer, who represents such animal to be pure bred, shall cause the same to be registered in some stud book recognized by the department of agriculture at Washington, D. C., for the registration of pedigrees, and obtain a certificate of registration of such animal. He shall then forward the same to the secretary of the state board of agriculture of the state of Iowa, whose duty it shall be to examine and pass upon the correctness and genuineness of such certificate filed for enrollment. In making such examination said secretary shall use as his standard the stud books recognized by the department of agriculture at Washington, D. C., and shall accept as pure bred, any animal registered in any such stud book. And if such registration is found to be correct and genuine, he shall issue a certificate under the seal of the department of agriculture, which certificate shall set forth the name, sex, age, and color of the animal, also the volume and page of the stud book in which said animal is registered. For each enrollment and certificate he shall receive the sum of one dollar, which shall accompany the certificate of registration when forwarded for enrollment. [32 G. A., ch. 20, § 2.]

SEC. 2341-b. Posting certificate of registration. Any owner or keeper of a stallion for public service who represents or holds such animal as pure bred, shall place a copy of the certificate of the state board of agriculture on the door or stall of the stable where such animal is usually kept. [32 G. A., ch. 120, § 3.]

SEC. 2341-c. Grade stallion. Any owner or keeper of a stallion kept for public service, for which a state certificate has not been issued, must advertise said horse or horses by having printed handbills, or posters, not less than five by seven inches in size, and said bills or posters must have printed thereon immediately preceding or above the name of the stallion the words "grade stallion," in type not smaller than one inch in height, said bills or posters to be posted in a conspicuous manner at all places where the stallion or stallions are kept for public service. [32 G. A., ch. 120, § 4.]

SEC. 2341-d. Transfer of certificate—fee. If the owner of any registered animal shall sell, exchange or transfer the same, and file certificate, accompanying the same with a fee of fifty cents, with the secretary of the state board of agriculture, who shall, upon receipt of the original state certificate, properly transferred, and the required fee, issue a new certificate to the then new owner of the animal. And all fees provided by this act shall go into the treasury of the department of agriculture. [32 G. A., ch. 120, § 5.]

SEC. 2341-e. Publishing false pedigrees—penalty. Any person who shall fraudulently represent any animal, horse, cattle, sheep or swine to be pure bred, or any person who shall post or publish or cause to be

posted or published any false pedigree or certificate, or shall use any stallion for public service, or sell, exchange or transfer any stallion, representing such animal to be pure bred, without first having such animal registered, and obtaining the certificate of the state board of agriculture as hereinbefore provided, or who shall violate any of the provisions of this act, shall be guilty of a misdemeanor, and be punished by a fine of not more than one hundred dollars, or imprisoned in the county jail not exceeding thirty days or by both such fine and imprisonment. [32 G. A., ch. 120, § 6.]

SEC. 2348. Bounties.

While the board may require other evidence than the verified statement of the claimant that the animals had been destroyed, it is not intended to invest the board with the discretion to pay or not if

the essential facts are established to its satisfaction, and on the refusal of the board to pay in a proper case action may be maintained against the county. *Bourrett v. Palo Alto County*, 104-350.

SEC. 2348-a. **Amount of bounty.** There shall be paid from the general fund of the county a bounty not exceeding ten cents for each pocket gopher caught and killed within the county, provided that the person entitled to such bounty shall make, as hereinafter provided, proof of destruction of such animal within thirty days after the same was destroyed. [32 G. A., ch. 121, § 1.]

SEC. 2348-b. **Proofs required.** The person catching and killing any such animal shall remove and present to the officers, before whom he makes his proof, both front feet and claws of each animal for which he claims the bounty, and the person claiming the bounty shall furnish written proof, under oath, that each animal for which he claims the bounty was caught and killed within the county against which he presents the claim for bounty, and the board of supervisors may require in addition to the above any other and further proof which it deems necessary and reasonable to show that each animal for which the bounty is claimed was caught and killed within the county against which the claim is presented. [32 G. A., ch. 121, § 2.]

SEC. 2348-c. **To whom presented.** The claws and other proofs required may be presented to the county auditor; and the board of supervisors of each county may appoint registrars or other officers in other parts of the county to whom claws of the animal caught and other proofs of the killing may be presented. [32 G. A., ch. 121, § 3.]

CHAPTER 4.

OF FENCES.

SECTION 2355. Partition fences.

The rights and duties of adjacent owners of land with respect to partition fences is purely statutory, and as the statute prior to the enactment of the present Code recognized a hedge fence as a proper form of partition fence and did not specify the height nor required trimming, the owner maintaining such partition fence was not liable to adjoining owners for damage due to the height and untrimmed condition of such hedge *Kinney v. Kinney*, 104-703.

One of the adjoining owners cannot by injunction compel the other owner to take out and destroy a division hedge on the ground that it has become a nuisance, such a hedge being considered common property of the two owners. *Harndon v. Stultz*, 124-440.

The rule as to partition fences has no reference to the boundary which is the thread of a non-navigable stream and on which it is impracticable to erect any

fence. In such case the bed of the stream must necessarily be regarded as unenclosed land, and the duty to fence devolves on neither one of the adjoining owners. *Foster v. Bussey*, 132-640.

The sufficiency of a partition fence is of

SEC. 2356. Powers of fence viewers.

Fence viewers have no power to decide as to a disputed line, either by measurements of their own or by accepting a disputed survey of another. *Boyd v. Schoop*, 107-10.

But two modes of dividing partition fences are recognized by statute, one by written agreement and the other by order of fence viewers. If neither of these methods has been followed, the mere fact that a portion of the partition fence has

no consequence in determining the liability for damage committed by a bull which the owner does not restrain as required by Code, § 2312. *Burleigh v. Hines*, 124-199.

been erected for the owner of the premises by a tenant does not give rise to liability to the adjoining owner for injuries caused by stock escaping through such defective fence. In the absence of division either of the adjoining owners has the right to build such portions of fence as he may see fit and the duty of maintaining every portion of it rests on both alike. *DeMers v. Rohan*, 126-488.

SEC. 2359. Service of notice. The notice by the fence viewers provided for in this chapter may be served upon any owner nonresident of the county where his land is situated, by publication thereof, once each week, for two consecutive weeks in a newspaper printed in the county in which the land is situated, proof of which shall be made as in case of an original notice and filed with the fence viewers, and a copy delivered to the occupant of said land, or to any agent of the owner in charge of the same. [31 G. A., ch. 9, § 1.]

SEC. 2360. Orders—notice.

The action of the fence viewers is not illegal because their findings are put in writing in another township, provided they

are duly recorded by the clerk in the proper township. *Miles v. Tomlinson*, 110-322.

SEC. 2361. Division recorded.

In providing for a written agreement as to partitioning the fence and specifying the circumstances under which such agreement will be binding, the intention to ex-

clude any other form of partition by mutual act is manifest. *DeMers v. Rohan*, 126-488.

SEC. 2367. Lawful fence defined.

One whose close is surrounded by a lawful fence is entitled to damages against the owner of the animals which have es-

caped from his premises and being at large have broken through such lawful fence. *DeMers v. Rohan*, 126-488.

SEC. 2369. Appeal.

The correctness of the findings of the fence viewers is to be determined on appeal, and not on *certiorari*. *Miles v. Tomlinson*, 110-322.

of the fence viewers is effected by the filing of a bond as in the case of an appeal from a judgment of a justice of the peace. *Hahn v. Lumpa Estate*, 131-722.

An appeal from the order or decision

CHAPTER 5.

OF LOST GOODS.

SECTION 2372. Advertisement—title vests—sale. In all cases where the appraisalment of any such property shall not exceed the sum of twenty

dollars, the taker-up shall advertise the same on the door of the court-house, and in three other of the most public places in the county, within five days after the appraisalment, and if no person shall appear to claim and prove such property within six months of the time of taking up, it shall vest in the taker-up; but if the value thereof shall exceed the sum of twenty dollars, the county auditor, within five days from the time of the reception of the justice's certificate at his office, shall cause an advertisement to be posted on the door of the court-house, and at three other of the most public places in the county, and also a notice to be published once each week, for three weeks successively in some public newspaper printed in this state; and if such property be not claimed or proved within ninety days after the advertisement of the same, as aforesaid, the taker-up shall deliver the same to the sheriff of the county wherein it was taken up, who shall thereupon proceed to sell it at public auction to the highest bidder for ready money, having first given ten days' notice of the time and place of sale; and the proceeds of all such sales, after deducting the costs and other necessary expenses, shall be paid into the county treasury. [C., '73, § 1513; R., § 1507.] [31 G. A., ch. 9, § 18.]

SEC. 2374. Disposition of property unclaimed. In all cases where such lost goods, money, bank notes or other things shall not exceed the sum of ten dollars in value, the finder shall forthwith advertise the same on the door of the court house and in three other of the most public places in the county where the same was found; and if no person shall appear to claim and prove such money, goods, bank notes or other things within twelve months from the time of such advertisement, the right to such property, when the same shall consist in goods, money or bank notes, shall be vested in the finder; but if the value thereof shall exceed the sum of ten dollars, the county auditor, within five days from the receipt of the justice's certificate, shall cause to be posted upon the court house door, and in three of the most public places in the county, a notice thereof, which shall also be published, once each week, for three weeks successively in some public newspaper printed at the county seat; and if the said goods, money, bank notes or other things be not reclaimed within six months after the finding, the finder, if the same shall consist in money or bank notes, shall deliver the same to the county treasurer, after deducting the necessary expenses hereinafter provided for; if in bills, notes of hand, patents, deeds, mortgages, or other instruments of value, the same shall be delivered to the county auditor to be preserved in his office for the benefit of the owner when an applicant shall prove his title thereto; if in goods or merchandise, the same shall be delivered to the sheriff of the county, who shall thereupon proceed to sell the same at public auction to the highest bidder for ready money, having first given ten days' notice of the time and place of such sale; and the proceeds of such sale, after deducting the costs and other expenses, shall be paid into the county treasury. [C., '73; §§ 1510, 1515, R., § 1509.] [31 G. A., ch. 9, § 19.]

CHAPTER 6.

OF INTOXICATING LIQUORS.

SECTION 2382. Manufacture, sale or keeping for sale prohibited. No one, by himself, clerk, servant, employe or agent, shall, for himself or any person else, directly or indirectly, or upon any pretense, or by any device, manufacture, sell, exchange, barter, dispense, give in consideration of the purchase of any property or of any services or in evasion of the

statute, or keep for sale, any intoxicating liquor, which term shall be construed to mean alcohol, ale, wine, beer, spirituous, vinous and malt liquor, and all intoxicating liquor whatever, except as provided in this chapter, or solicit, take, or accept any order for the purchase, sale, shipment, or delivery of any such liquor, or aid in the delivery and distribution of any intoxicating liquor so ordered or shipped, or own, keep, or be in any way concerned, engaged or employed in owning or keeping any intoxicating liquor with intent to violate any provision of this chapter, or authorize or permit the same to be done; and any clerk, servant, employe or agent engaged or aiding in any violation of this chapter shall be charged and convicted as principal. Provided, that nothing herein shall prohibit traveling salesmen soliciting orders for the purchase, sale, and shipment of intoxicating liquors, from persons legally authorized to sell or dispense the same. [23 G. A., ch. 35, § 2; 22 G. A., ch. 71, § 1; 20 G. A., ch. 8, § 1; 20 G. A., ch. 143, §§ 10, 11; 17 G. A., ch. 119, § 4; C., '73, §§ 1523, 1540-2, 1554-5; R., §§ 1559, 1562, 1581, 1587; C., '51, §§ 929-31.] [28 G. A., ch 74, §§ 1, 2.]

Proof that a liquor used as a beverage contains alcohol is sufficient to establish its character as intoxicating liquor, however much the alcohol may be diluted or however weak its intoxicating effect as a beverage may be. *State v. Colvin*, 127-632.

Proof of the sale of beer is *prima facie* evidence of the sale of an intoxicating liquor and the burden is on the person charged with such sale to show, if he can, that the liquor so sold was not intoxicating. *State v. Spiers*, 103-711.

The fact that the seller is not aware of the intoxicating character of the liquor sold is no defense. *Wilson v. Cory*, 114-208.

Violation by an agent of the conditions of the mulct law will render the principal liable to the penalties of the prohibitory law. *Hawks v. Fellows*, 108-133.

Sale of alcohol without a permit is unlawful even though it is to be used for scientific purposes. *In re Application of Henery*, 124-358.

The statute provides against every possible scheme that may be devised for the purpose of evading the provisions of the law prohibiting the unlawful sale of intoxicating liquors, and an acquittal in a prosecution for unlawfully selling or keeping for sale is a bar to a subsequent proceeding for the seizure and destruction of the same liquors as kept for unlawful sale. *State v. Cobb*, 123-626.

The gift of liquor which is prohibited by the statute is a gift resorted to for the purpose of avoiding the law by a subter-

fuge or by an indirect dealing intended to conceal unlawful sales, and held that the giving of a drink of liquor from samples by a traveling salesman of a foreign dealer for the purpose of testing the quality of the liquor was not within the prohibition of the statute. *State v. Bernstein*, 129-520.

Where an insured building is described as used for saloon purposes, the fact that the occupant does not conduct his saloon in strict compliance with the law does not vitiate the policy. *Petty v. Mutual Fire Ins. Co.*, 111-358.

The provisions of 28 G. A., chap. 74, amending this section so as to make criminal the soliciting of orders in the state for sales of liquors outside the state to be shipped into the state, is unconstitutional as an interference with interstate commerce. *State v. Hanaphy*, 117-15.

Where a dealer in cigarettes brought into the state packages thereof which were opened by him and contents consisting of small packages containing ten each were exposed for sale and sold, held, that such small packages were not original packages within the meaning of the law as to interstate commerce, and that the seller was punishable under the anti-cigarette law. (Code §§ 5006, 5007.) The court considers the case of *State v. Coonan*, 82-400, relating to sales of intoxicating liquors in original packages, and overrules it in so far as it is inconsistent with this case. *McGregor v. Cone*, 104-465. But see *State v. McGregor*, 76 Fed. 956.

SEC. 2384. Nuisance—penalty—abatement—attorney's fee.

While it is not necessary, in order to warrant an injunction, that actual sales must be shown up to the date of the action to enjoin, yet there must be some evidence of the existence of the nuisance at that time. If no nuisance exists when the ac-

tion is brought, plaintiff is not entitled to a decree. *Sharp v. Arnold*, 108-203.

It is the use of the place in which the inhibited acts are done, rather than the doing of the acts, which constitutes the offense of nuisance here described. There-

fore, held that where blank bills of lading for intoxicating liquors were sent to a banker, and persons desirous of purchasing liquors were in the habit of paying the banker for such bills of lading, thereby procuring the liquors from the freight depot, held that such banker was properly convicted for maintaining a nuisance. The use of the building or place for the prohibited purpose renders it a nuisance, although the party charged owns neither the liquors or the place. *State v. Snyder*, 108-205.

The sale of alcohol even though for scientific purposes without a permit is unlawful and constitutes a nuisance. *In re Application of Henery*, 124-358.

In an action for abatement of liquor nuisance and for injunction, evidence of illegal sales after the commencement of the action is competent, the charge being of a continuing offense. *Hall v. Coffin*, 108-466.

Either the selling in violation of law or the keeping with intent to sell renders the place where the liquors are sold or kept for sale a nuisance. *State v. Thompson*, 130-227.

The discovery of liquor on the premises is presumptive evidence of keeping for illegal sale. But in itself such keeping has no tendency to prove the act of selling. *Ibid.*

The finding of intoxicating liquors in the possession of one not legally authorized to sell is presumptive evidence that such liquors are kept for illegal sale. *State v. Stevens*, 119-675.

SEC. 2385. Permits.

If the liquor sold by the permit holder is so compounded with other substances as to lose its distinctive character as an intoxicant, and to be no longer desirable for use as a stimulating beverage, and is in fact a medicine, then the permit holder is not guilty of violating the law in making a sale without a written request. *State v. Gregory*, 110-624.

The written requests on which sales are made are admissible in evidence in a prosecution against the seller, and if such requests are defective, the seller is liable. The permit holder should refuse to make a sale on a written request unless he has reason to believe the statements made therein are true, and in no case should he make such sale unless he knows the per-

The fact that liquor found in the possession of defendant is shown to have been in fact owned by another does not prevent such possession from being evidence of keeping for unlawful purposes. *Ibid.*

Where the mulct law is in force, and the seller has complied with its conditions, proof of the mere sale of liquor is not sufficient to sustain a conviction under this section. *State v. Miller*, 114-396.

It is not necessary in an indictment for maintaining a place for the illegal sale of intoxicating liquor to negative defendant's right to sell under the mulct law, nor to specify in what respect the mulct law has been violated by defendant. It is for the defendant in the first instance to introduce evidence of compliance with the conditions of the mulct law, if he relies upon the provisions of that law as a justification or excuse for selling. *State v. Donahue*, 120-154.

Where an indictment describes a nuisance as kept in a particular building, situated in a certain town, it is necessary to prove the keeping in the place as charged. *State v. Schuler*, 109-111.

An indictment for keeping a nuisance, alleging that defendant used a certain building as a drug store "with the intent to sell there intoxicating liquors, to-wit (describing them), and then and there did sell the same," held sufficient, where the words "then and there," were construed as designating the drug store as the place of the unlawful sale. *State v. Pinckney*, 111-34.

son applying therefor is not a minor, intoxicated, or in the habit of using intoxicating liquors as a beverage. When proper requests have been made the question of the seller's good faith in making the sale is for the jury. *Ibid.*

The keeping for sale by druggists of tonics or other preparations containing a small percentage of alcohol is not a violation of a druggist's permit if it appears that such preparations are not capable of being used as beverages. *In re Application of Henery*, 124-358.

In stating the purpose for which liquor is required in the request provided for by Code § 2394, the purchaser must state a purpose or use authorized by this section. *State v. Swallum*, 111-37.

SEC. 2386. Pharmacists—manufacturers of proprietary medicines. If any such registered pharmacist or manufacturer of proprietary medicines shall sell, barter, give, exchange, dispose of or use intoxicating liquors in any manner or for any purpose other than authorized in the preceding section, he shall be liable to all the penalties and proceedings provided for in this chapter, and upon proof of such violation by a registered pharmacist, the clerk of the district or superior court shall transmit

to the commissioners of pharmacy a certified copy of the record thereof within ten days after its entry, and upon receipt of such certified copy said commissioner may strike his name from the list of registered pharmacists and cancel his certificate. The commissioners of pharmacy are empowered to make such further rules and regulations, not inconsistent with law, with respect to the purchase, keeping and use of intoxicating liquors by registered pharmacists and manufacturers of proprietary medicines, as they shall think proper to prevent abuses of the privilege, and shall revoke the certificate of registration of any pharmacist for repeated violation of this chapter. Said commissioners are authorized to draw from the state treasury an amount not exceeding fifty per cent. of the clear proceeds of all fees collected and paid into the treasury of any county on account of violations of the provisions of this chapter or the chapter regulating the practice of pharmacy, prosecuted by the commissioners, the amounts so drawn to be used solely in prosecutions instituted by them for failure to comply with the provisions of such chapters. The court or clerk thereof, before whom any prosecution is instituted or prosecuted by the commissioners of pharmacy, shall certify to the auditor of state all such cases, and the amount of fees imposed and collected therein. The expenses thus incurred by the commission shall be audited by the executive council, and the amount thereof shall be drawn from time to time upon the warrants of the state auditor. [23 G. A., ch. 35, §§ 13, 17; 22 G. A., ch. 71, § 18.] [27 G. A., ch. 56, § 1.]

SEC. 2387. Application for permit.

A decree entered by consent will bar one who has been enjoined from the selling of intoxicating liquors from receiving a permit under the provisions of the statute. *In re Thoma*, 117-275.

A judgment finding defendant guilty of violating his liquor permit whether entered by confession or in settlement of criminal or civil proceedings for such violation renders him ineligible to receive another permit within two years. *In re Application of Wilhelm*, 124-389.

A sale of alcohol without a permit, although to be used only for scientific purposes is unlawful and a sufficient ground for refusing the issuance of a permit on application within six months after such unlawful sale. *In re Application of Henry*, 124-358.

A drug store in which soda water and

ice cream are sold is not a restaurant within the language of the statute prohibiting the issuance of permits for the sale of intoxicating liquors to the keepers of restaurants. *Ibid.*

Where the applicant has voluntarily surrendered his permit in consequence of an action for its revocation being brought, his application for a new permit should be denied unless he alleges and proves that he has not knowingly been engaged in the unlawful sale of liquor within two years next before making the application. *In re Application of Smith*, 125-128.

A particular description of the place in the petition for a permit and in the notice of the application therefor are absolutely necessary to give the court jurisdiction to hear the application and grant the permit. *Muncey v. Collins*, 132-50.

SEC. 2388. Notice. Notice of an application for a permit must be published, once each week, for three consecutive weeks in a newspaper regularly published and printed in the English language, and of general circulation in the township, town or city where the applicant proposes to conduct the business, or, if none be regularly published therein, then in one of the papers selected by the board of supervisors for the publication of its proceedings, the last publication of which shall be not less than ten nor more than twenty days before the first day of the term at which the hearing is to be had. This notice shall state the name of the applicant, with the firm name, if any, under which he is doing business, the purpose of the application, the particular location of the place where the proposed business is to be carried on, and that the required petition is or will be on file in the clerk's office of the court (naming it) at least ten days before the first day of the term (naming it) when the application will be made.

A copy of such notice shall be served upon the county attorney in the same manner and for the same length of time as is required of original notices in said courts. [23 G. A., ch. 35, § 3; 22 G. A., ch. 71, § 2.] [30 G. A., ch. 2, § 7.]

SEC. 2389. Hearing—remonstrances.

Permits are not granted as a matter of course, and the requirement of the statutory provisions as to particularity of description in the petition and notice as to the place where the privilege is to be exercised is for the purpose of advising the court and public and those who may desire to resist the application as to the exact location where the business is to be conducted. Such description is therefore essential. *Muncey v. Collins*, 132-50.

In an action to restrain the defendant from selling intoxicating liquors under a permit not sufficiently describing the place where sales were authorized to be made, the defendant is not entitled to have the decree of the court giving him a permit to sell amended so as to make the permit sufficient. *Ibid.*

The statute is not mandatory with reference to the term of court at which the application for a permit to sell intoxicating liquors shall be passed upon. While it is provided that on the filing of a re-

monstrance, the court shall fix a day in the term for the trial, and all applications shall be tried at the first term after completed service has been made of the required notice, if the business of the court shall allow, nevertheless the court may, in the exercise of its discretion, postpone the hearing to the next term, like other business. *Cox v. Burnham*, 120-43.

Any citizen of the county wherein the application is made, may file a remonstrance or objection to granting the permit, and when a remonstrance is thus filed a trial is to be had and the issue is to be determined by the court. *In re Application of Smith*, 126-128.

A remonstrant becomes in effect a party to the proceeding and may appeal from a decision granting the permit. *Ibid.*

The question whether the public necessities or conveniences require the granting of a permit is addressed to the discretion and judgment of the trial court. *In re Application of Henery*, 124-358.

SEC. 2390. Bond—to be recorded. No permit shall issue until the applicant shall execute to the state a bond in the penal sum of one thousand dollars, with good and sufficient sureties to be approved by the clerk of the court, conditioned that he will well and truly observe and obey the laws of the state now or hereafter in force in relation to the sale of intoxicating liquors, that he will pay all fines, penalties, damages and costs that may be assessed or recovered against him for a violation of such laws during the time for which the permit is granted, and the principal and sureties in said bond shall be liable thereon, jointly and severally, for all civil damages and costs that may be recovered against the principal in any action brought by a wife, child, parent, guardian, employer or other person under the provisions of this chapter. The bond, after being approved and recorded by the clerk, shall be deposited with the county auditor, and suit may be brought thereon at any time by the county attorney, or by any person for whose benefit the same is given. The clear proceeds of all other money which may be collected for breaches of the bond shall go to the school fund of the county. If at any time the sureties on the bond shall file with the court or clerk a written request for release, or become insolvent, or be deemed insufficient by the court granting the permit, or its clerk, such court or clerk shall require a new bond to be executed within a reasonable time to be fixed. If the permit holder fails or neglects to furnish a new bond within the time so fixed, the permit shall from that date become null and void. [23 G. A., ch. 35, § 5; 22 G. A., ch. 71, § 4.] [28 G. A., ch. 75, § 1.]

Sales made elsewhere than in the place specified in the permit, while the permit holder continues in business in such place, will undoubtedly constitute a breach of his bond. But where the permit holder has ceased to conduct business in the au-

thorized locality and is making sales in another building not covered by the permit, although corresponding in general to the description of the permit, the surety will not be liable. *Carter v. Nicol*, 116-519.

SEC. 2392. Permit issued. Upon taking said oath and filing said bond, the clerk of the court granting the same shall issue a permit to the applicant, authorizing him to keep and sell intoxicating liquors as in this chapter provided. The permit so issued shall specify the building, give the street and number or location in which intoxicating liquors may be sold by virtue of the same, and the length of time the same shall be in force, unless sooner revoked. Provided that upon the expiration of the lease or destruction of the building where such business is conducted, or for other good and sufficient cause shown, consent in writing of the bondsmen having been obtained therefor, or a new bond given, the district court of the county which granted said permit, or a judge of said court, may change the place specified in said permit to some other place in the same city, town, or township upon motion therefor. A copy of said motion, and notice of the time when and the place where the same will be heard, shall be given to the county attorney of the county where said place is situated, at least five days before said hearing. [23 G. A., ch. 35, §§ 5, 16.; 22 G. A., ch. 71, § 7.] [27 G. A., ch. 57, § 1.]

A liquor license or privilege is not a property right which cannot be revoked without due process of law. *McConkie v. Remley*, 119-512.

The permit is a trust reposed in the holder, granted after being shown worthy, and may be revoked. An order granting a permit confers no property right and amounts to no more than a mere privilege to sell under certain conditions. *McCoy v. Clark*, 104-491.

Where the permit holder keeps for sale or sells contrary to law he may be enjoined for maintaining a nuisance. *Ibid.*

Where a permit holder takes orders at various places and delivers liquor in pursuance of such orders, and receives payment on delivery, the sales are to be deemed made at such places, and not at the place for which the permit is had. *Carter v. Bartel*, 110-211.

SEC. 2393. Record—costs. The clerk of the court granting the permit shall preserve as a part of the record and files in his office all petitions and other papers except bonds pertaining to the granting or revocation of permits, and keep suitable books in which bonds and permits shall be recorded. The books shall be furnished by the county like other public records. Whether said permit be granted or refused, the applicant shall pay the costs incurred in the case, and, when granted, he shall make payment before any permit issue, except the court may tax the cost of any witnesses summoned by private persons resisting said application, and the fees for serving such subpoenas, to such persons, when it is shown that such witnesses were summoned maliciously, or without probable cause to believe their evidence material. The fees in such cases shall be as provided in actions at law in the district court. [23 G. A., ch. 35, § 9; 22 G. A., ch. 71, § 10.] [28 G. A., ch. 75, § 2.]

SEC. 2394. Requests to purchase.

The seller must believe the statements under the application to be true; he must know the applicant, or have him identified; and he must know or obtain proof that such applicant is not in the habit of using intoxicating liquors as a beverage. The

Where the permit and bond describe the premises intended to be covered, they do not apply to sales in a different building, although it may be covered by the same description to which the place of business had been removed. *Carter v. Nicol*, 116-519.

Where the order granting a permit provided that it should be in force for a specified time, held that the fact that the permit issued by the clerk in pursuance of such order stated that the right to sell was to continue until revocation of the permit or so long as the applicant's registration as a pharmacist was in effect, was no protection to the applicant in selling liquor after the time limited in the order granting the permit. *State v. Brown*, 109 N. W. 1011.

law is violated by sale to persons in the habit of using liquor as a beverage, although the seller is ignorant of such habit. The seller sells at his peril. *Harlan v. Richmond*, 108-161.

If the applicant makes the purchase for

another he must give the street and number of the user, and in such case is only required to state his own residence generally, but if he is to use the liquor himself he must describe his residence with the same particularity required when he purchases for another, that is, if his residence is in a numbered city he must give his own street and number. The purchaser must not be allowed to avoid these requirements of the law, even though by oversight, forgetfulness or mistake. *State v. Swallum*, 111-37.

The purchaser must specify in his request the exact purpose and use for which the liquor is required, which must be a use which is lawful under Code § 2385. *Ibid.*

SEC. 2397. Returns by permit holders.

Where there was a violation of the law as to sale of intoxicating liquors, which consisted in a failure of a permit holder to make proper returns of sales, and an injunction was sought to restrain the permit holder from selling, held that, as it appeared that the permit holder had gone out of business, and was not intending to make further sales, the injunction was properly denied. *Redley v. Greiner*, 117-679.

SEC. 2399. Illegal sales by permit holder—evidence.

Although sales by a permit holder are only made on signed applications for such liquor to be used for medicine, yet if the seller has knowledge that the purchaser is a minor, or is in the habit of using liquor as a beverage, the sale is unlawful. *State v. Skillicorn*, 104-97.

The seller of intoxicating liquors is bound to know at his peril whether a person to whom he sells is within the prohibited class. Where a large number of sales appear to have been regularly made to the same person, and the character and habits of sobriety of persons to whom such sales were made were shown to be such as to bring them within the prohibited class, held, that a presumption of illegal sales would arise. *Hall v. Coffin*, 108-466.

The good faith of the seller is immaterial in determining whether the require-

Sales on written request, not containing the statements required by statute, are unlawful. *State v. Harris*, 122-78.

Where a sale would be illegal but for the identification required by statute, it cannot be transformed into a legal sale by proof that upon some former occasion a sale had been made to such purchaser which was legal because preceded by a proper identification and statement. *State v. Mulhern*, 130-46.

The question of good faith in making sales under a permit only arises when proper requests have been made. Prohibition is the rule, and permission to sell is the exception, and he who claims the right to sell must bring himself within the exception. *State v. Gregory*, 110-624.

The requests for liquor which are required to be preserved and returned by the permit holder may be introduced in evidence as against him. *State v. Mulhern*, 130-46.

Returns of sales made by the permit holder to the county auditor cannot be considered unless introduced in evidence and made a part of the record in the case. *State v. Hatlestad*, 132-188.

ments of the law as to sale of intoxicating liquors have been complied with. *Peak v. Bidinger*, 133-127.

It is no defense to a permit holder in an action against him to recover damages on account of unlawful sales, that he had no knowledge that the person to whom the sales were made was in the habit of becoming intoxicated. *Bistline v. Ney*, 111 N. W., 422.

A pharmacist renders the place in which his business is carried on a nuisance by violation of the law as to sales under his permit, and in an action to enjoin his place of business as a nuisance, will not be permitted to say that although the statutory regulations have been violated, he has acted in good faith. *Rizer v. Tapper*, 133-628.

SEC. 2400. Revocation of permit. Permits shall be deemed trusts reposed in the recipients, and may be revoked upon sufficient showing by order of a court or judge. Complaint may be presented at any time to the district or superior court, or a judge thereof, which shall be in writing and signed and sworn to by three citizens of the county in which the permit was granted. A copy of the complaint shall, with a notice in writing of the time and place of hearing, be served on the accused five days before the hearing, and if the complaint is sufficient, and the accused appear and deny the same, the court or judge shall proceed without delay, unless continued for cause, to hear and determine the controversy. If continued or appealed at the instance of the permit holder, his permit may, in the discretion of the court,

be suspended during the controversy. The complainant and accused may be heard in person or by counsel, or both, and proofs may be offered by the parties; and if it shall appear upon such hearing that the accused has in any way abused the trust, or that liquors are sold by the accused or his employes in violation of law, or dispensed unlawfully, or he has in any proceeding, civil or criminal, within the last two years, been adjudged guilty of violating any of the provisions of this chapter, the court or judge shall revoke and set aside the permit; the papers and order in such case shall be immediately returned to and filed by the clerk of the court, and, if heard by a judge, the order shall be entered of record as if made in court; and if in this or any other proceeding, civil or criminal, it shall be adjudged by the court or judge that any registered pharmacist, proprietor or clerk has been guilty of violating any provision of this chapter, such adjudication may be by the commissioners of pharmacy regarded as sufficient, if repeated, to work a forfeiture of his certificate of registration. It shall be the duty of the clerk to forward to the commissioners of pharmacy transcripts of such judgments or orders without charge therefor, and as soon as practicable after final judgment or order has been made and entered. [23 G. A., ch. 35, § 7; 22 G. A., ch. 71, § 8.] [27 G. A., ch. 58, § 1.]

SEC. 2401. How business conducted — partner — clerks — physicians. A permit holder may employ not more than two registered pharmacists as clerks to sell intoxicating liquors in conformity to the permit and the law; but in such cases the acts of clerks in conducting the business shall be considered the acts of the permit holder, who shall be liable therefor as if he had personally done them, and in making returns, the verification of such requests as may have been received, attested and filled by the clerk must be made by such clerk, and the clerk who transacted any of the business under the permit must join in the general oath required of the employer, so far as relates to his own connection therewith. If for any cause a registered pharmacist who holds a permit shall cease to hold a valid and subsisting certificate of registration or renewal thereof, his permit shall be forfeited and be null and void. Nothing contained in this chapter shall be construed to prevent licensed physicians from in good faith dispensing liquors as medicines to patients actually sick and under their treatment. In case a permit holder shall die, his personal or legal representative may continue the business, subject to the provisions thereof, through the agency of any reputable registered pharmacist, upon the approval of the court granting such permit, or the clerk thereof, and the giving of a bond as hereinbefore provided. A partner who is a registered pharmacist, not holding a permit, shall have the same rights and be subject to the same restrictions as clerks; and for whose acts the permit holder shall be held responsible the same in all respects as for his clerks. [23 G. A., ch. 35, §§ 2, 15; 22 G. A., ch. 71, § 16.] 28 G. A., ch. 76, § 1.]

Illegal sales of liquor made by a clerk although without authority may render the principal liable for nuisance. *State v. O'Malley*, 132-696.

juries resulting from liquor furnished to a patient by a physician cannot be shown in a prosecution for illegal sale of such liquor. *State v. Campbell*, 129-154.

The fact of settling a civil suit for in-

SEC. 2402. Intoxication punished.

To justify an arrest without a warrant on a charge of being intoxicated, it must be found that the person arrested was in

fact in a state of intoxication. *Snyder v. Thompson*, 112 N. W. 239.

SEC. 2403. Repeal—sale or gift of intoxicating liquors—what prohibited. The law as it appears in section twenty-four hundred three (2403) of the code, and section twenty-four hundred three (2403) of the

supplement to the code, is hereby repealed, and the following enacted in lieu thereof:

“No person by himself, agent or otherwise, shall in any manner procure for, or sell or give any intoxicating liquors to any minor for any purpose, except upon written order of his parent, guardian, or family physician, or give to or in any manner procure for or sell the same to any intoxicated person, or to one in the habit of becoming intoxicated.” [32 G. A., ch. 122, § 1.]

The statute absolutely prohibits the sale of liquor to a minor for any purpose whatever, and the seller is bound at his peril to know whether the person to whom he sells is within the prohibited class. *Fielding v. La Grange*, 104-530.

Proof that the purchaser was in fact under the age of majority makes out a *prima facie* case of sale to a minor, although there is no evidence that he had not attained his majority by marriage as provided in Code § 3188. *State v. Mulhern*, 130-46.

The penalty herein provided for is not covered by the bond required under Code § 2448, Par. 3, of one who carries on the business of selling under the mulct law, nor that provided for in Code § 2422, as to bonds required of permit holders. *Headington v. Smith*, 113-107.

Liability for illegal sale to minors and intoxicated persons cannot be enforced against the surety on a bond purporting to be executed in pursuance of the provisions of the mulct law, when it appears that the mulct law was not in force in the locality where the business was carried on. *Gorman v. Williams*, 117-560.

SEC. 2403-a. Penalty. Any person violating any of the provisions of section one hereof shall be guilty of a misdemeanor, and upon conviction thereof be fined in a sum not less than twenty-five dollars, nor more than two hundred dollars, and costs of prosecution, and shall stand committed to the county jail until such fine and costs are paid. [32 G. A., ch. 122, § 2.]

SEC. 2405. Action to abate nuisance—injunction—contempt.

A temporary injunction may be granted against a person holding a permit to sell intoxicating liquors for keeping for sale or selling the same in his pharmacy contrary to law. *McCoy v. Clark*, 104-491.

The granting of a temporary writ as a matter of course follows the continuance of an application for the temporary writ, but not a general continuance of the action. *Powers v. Winters*, 106-751.

An injunction may properly be granted against the premises on which the nuisance is maintained and the owner thereof. *Carter v. Bartel*, 110-211.

Where a case is made for an injunction it is error to refuse a preliminary writ. One who has been engaged in the traffic of intoxicating liquors in violation of law cannot avoid an injunction by simply making a profession of change of heart. *Donnelly v. Smith*, 128-257.

A partner and the partnership are liable for damages for the illegal and unauthorized sale of intoxicating liquors by which a wife is deprived of support which her husband should give her. *Mathre v. Story City Drug Co.*, 130-111.

Where liquor is sold to an intoxicated person, and his death is caused by drinking the same, the administrator of the estate cannot recover damages for his death against the person selling the liquor in violation of this section. *Bissell v. Starzinger*, 112-266.

The action to recover the penalty provided for sales to minors or habitual drunkards, may be brought in the county of defendant's residence, irrespective of the place of sale. *Carrier v. Bernstein*, 104-572.

Such an action cannot be joined with an action by a wife to recover damages for sales of liquor to her husband. *Ibid.*

The provisions of the mulct law do not relieve one who sells under its provisions from liability for sales to minors or habitual drunkards. *Ibid.*

It is error to refuse a temporary injunction on the application of a citizen where it appears that the defendant operating under the mulct law is maintaining a place for the sale of liquor otherwise than in strict compliance with the provisions of the mulct law. *State v. Roney*, 133-416.

The notice of an application for a temporary injunction in vacation must show the name of the judge to whom the application will be made, and the specific place at which the application will be made. The original notice of the beginning of the action in which a temporary and also a permanent injunction will be asked is not sufficient. *Beck v. Vaughn*, 111 N. W. 994.

If the notice is not given as required, the preliminary injunction will be void for want of jurisdiction, and its enforcement may be enjoined. *Ibid.*

Permanent injunction: A decree of injunction should not be entered for the closing of a building and making the costs and attorney's fees in the action a lien thereon where it appears that the illegal sales in the building have been without the knowledge or consent of the owner and for a very short time. *Merryfield v. Swift*, 103-167.

An injunction cannot be granted against a person to restrain him from selling liquor independent of the place where it is sold. *State v. Frahm*, 109-101.

Where a permanent injunction has already been granted against the members of a firm, another decree for an injunction against them as individuals should not be granted. *Carter v. Bartel*, 110-211.

An injunction may properly be granted against the premises on which the nuisance is maintained and the owner thereof. *Ibid.*

Where it appears that defendant has in good faith abandoned the business before the trial and sold his interest in the premises on which the crime is charged to have been carried on, no injunction should be granted. *Patterson v. Nicol*, 115-283.

Where an injunction was sought to restrain a permit holder from making further sales, on the ground that he had violated the provisions of the law with reference to sales by such person, and it appeared that the defendant had gone out of business and had no intention of making further sales, held that the injunction was properly refused. *Redley v. Greiner*, 117-679.

A showing that on the eve of the trial the defendant has abandoned the business is not sufficient to warrant the court in refusing to grant an injunction, and in such case the court may properly tax costs and attorney's fees to such defendant. *Drummond v. Richland City Drug Co.*, 133-266.

Primarily a suit under this section has for its object the termination of the unlawful use of the particular premises, and the resulting consequence of restraining one found guilty from establishing a nuisance elsewhere is only incidental. Therefore, if the action is abated under the provisions of Code § 2410 by the giving of bond no judgment can be rendered which will have effect as to a nuisance subsequently established on the premises.

Morris v. Lowry, 113-544; *Morris v. Connolly*, 113-545.

One who is enjoined from the unlawful sale of intoxicating liquor may, without violating such injunction, make sales in compliance with the provisions of the mulct law. *Landt v. Remley*, 113-555.

A prior injunction will not bar a second action to enjoin for the same nuisance where it appears that the prior injunction was secured through the fraud of the defendant. *Cameron v. Tucker*, 104-211.

A prior injunction against the owner of premises will not bar a second action for an injunction against such owner and sureties on his bond given under the provisions as to the mulct tax. *Ibid.*

An injunction restraining defendant from illegally selling liquors in a certain building is not void by reason of the recital therein that defendant was not the owner of the premises during the time of the previous sales and that subsequently the premises have been sold and possession thereof given to another, it appearing that such change of possession did not take place until after the temporary writ had been issued and served. *Ohlrogg v. District Court*, 126-247.

The general allegation that defendant has established and is keeping, using and maintaining a certain building described as a place for the sale of intoxicating liquors in violation of law, and as a place for keeping intoxicating liquors with intent to sell the same in violation of law, is sufficient in an action to enjoin the nuisance. But if it appears that the defendant is entitled to keep and sell intoxicating liquors by virtue of a permit, then the petition should further recite facts which render the keeping and sale of liquor by such person unlawful. *Abrams v. Sandholm*, 119-583.

Where it appears that the defendant is still engaged in the business and that the owner has taken no steps to abate the nuisance, the latter cannot complain of the granting of an injunction. *McCracken v. Miller*, 129-623.

The good faith of the person instituting the proceedings cannot be inquired into, nor the authority of the attorney purporting to represent him, where he has appeared as a witness and accepted responsibility for the action. *Rizer v. Tapper*, 133-628.

SEC. 2406. How brought and tried—evidence—attorney's fee—investigation by county attorney—report. Actions to enjoin nuisances may be brought in the name of the state by the county attorney, who shall prosecute the same to judgment, or any citizen of the proper county may institute and maintain such a proceeding in his name. The action when brought shall be triable at the first term of court after due and timely service of notice of the commencement thereof has been given; and in such action evidence of the general reputation of the place described in the

petition shall be admissible for the purpose of proving the existence of such nuisance. If the plaintiff is successful in the action, an attorney's fee of twenty-five dollars shall be taxed as costs in his favor.

Such action, when brought by a citizen, shall not be dismissed upon the motion of either the plaintiff or defendant until the county attorney shall have been notified in writing of the filing of such motion, and until such county attorney shall have made a personal investigation of the place of business sought to be enjoined, and of all matters set forth in said motion for dismissal, and shall have filed, in writing, a report of his findings in said cause, and his recommendation in reference to the disposition of the same. If any such action shall remain upon the docket for two terms of court, without trial, it shall be the duty of the judge of such court to order the plaintiff and his attorney or attorneys of record, to appear in open court for examination as to the reasons why such cause has not been brought on for trial; and it shall be the duty of the county attorney to conduct such examination, if the judge shall so order. Whenever the court shall have reason to believe that any action commenced under this section has not been brought or prosecuted in good faith said court shall direct the grand jury to investigate all the facts and circumstances connected with the bringing and prosecution of the same. [21 G. A., ch. 66, § 1.] [30 G. A., ch. 82.]

This section fixes the amount of the attorney's fee which is to be allowed in such cases under the general provisions of Code § 2429. *Carter v. Bartel*, 110-211.

An additional attorney's fee may be taxed against the defendant on an appeal to the supreme court in which he is unsuccessful. *Drummond v. Richland City Drug Co.*, 133-266.

The limitation of this section as to the amount of the fee does not apply to the allowance of an attorney fee under § 2429 providing for the allowance of such fee in proceedings to punish for contempt. *Lingelbach v. Hobson*, 130-488.

If the suit for an injunction is instituted by a citizen, he is free to employ any attorney he may choose, and he may prosecute a proceeding for contempt in violating the injunction when secured without the interposition of the county attorney. *Brennan v. Roberts*, 125-615.

Where the action is brought in the name of the state, it must be brought by the county attorney. The defendant is not

bound to respond in such an action brought by an attorney other than the county attorney. *Beik v. Vaughn*, 111 N. W. 994.

The judge may issue a temporary writ of injunction in vacation on the petition of the state or citizens of the county under this section, as well as on the petition of a citizen of the county under Code § 2405. *Young v. Preston*, 131-292.

The mere fact of the possession of liquor is evidence of keeping for illegal sale where it does not appear that the defendant is entitled to sell by virtue of a permit or some other lawful authority. *Abrams v. Sandholm*, 119-583.

One who consents to the prosecution of an injunction suit in his name and testifies that he is the plaintiff in such proceeding cannot deny the authority of the attorney by whom the proceeding is prosecuted, and attorney fees may be taxed in favor of such attorney. *Plank v. Hertha*, 132-213.

SEC. 2407. Violation of injunction.

It is no defense that accused has acted in good faith upon the advice of counsel in regard to selling liquor in violation of the injunction. *State v. Stevenson*, 104-50.

It is immaterial that the judge calls the defendant to answer for contempt by notice or citation rather than by warrant of arrest, if the defendant actually appears and submits himself to the jurisdiction of the court for the purposes of the case. *State v. Thompson*, 130-227.

A decree enjoining a party to the suit from selling liquor is self-executing and its violation is a contempt, though no for-

mal writ of injunction has issued and been served on such defendant. *Bartel v. Hobson*, 107-644.

Where the defendant who is enjoined is represented in the case by attorney when the decree is rendered, he is chargeable with notice of the decree. *Hawks v. Fellows*, 108-133.

Violation by an agent of an injunction will subject the principal to punishment for contempt. *Ibid.*

Where it appeared that one charged with contempt in violating an injunction had not complied with the conditions of

the mulct law, held that an order discharging him in a proceeding for contempt was improper, and on *certiorari* it was annulled. *Jones v. Byington*, 128-397.

Whether the provisions of Code § 5337 as to withdrawal of a plea of guilty in a criminal prosecution is applicable to proceedings to punish for violation of a liquor injunction or not, it is too late to withdraw such plea after the judgment of the court has been pronounced, although it is not yet entered of record. *Beatty v. Roberts*, 125-619.

This section requires the setting out of the alleged facts constituting the violation of the injunction, but an information reciting the issuance of an injunction, the knowledge thereof, and the selling and keeping for sale of liquor in violation of its terms, is sufficient. It was not intended to require the setting out of the evidence upon which the proceeding must finally be determined. *McGlasson v. Scott*, 112-289.

SEC. 2408. Abatement.

The existence of a nuisance being established, a decree, as provided in this section, must be given, unless action has been abated by the owner giving bond, and paying costs before order of abatement, as

A judgment in an injunction proceeding should be proved either by the record itself or by an authenticated copy thereof. *Ibid.*

The specific provision that there shall be a trial on the issue raised by the denial of the defendant in a proceeding to punish for a contempt in violating an injunction against the sale of intoxicating liquors is in harmony with the general law. See Code § 4465. *Drady v. District Court*, 126-345.

A proceeding to punish for contempt in the violation of an injunction to abate a liquor nuisance may be prosecuted without the aid of the county attorney. *Brennan v. Roberts*, 125-615.

If the judge, imposing a fine for violation of an injunction, acts without jurisdiction, the person upon whom a fine is sought to be imposed is not bound to appeal, but may enjoin its enforcement. *McConkie v. Landt*, 126-317.

provided in Code § 2410. Such abatement should have the effect of closing the building referred to against all uses, unless sooner released by proceedings under that section. *McCoy v. Clark*, 109-464.

SEC. 2410. Abatement by owner. If the owner appears and pays all costs of the proceeding, and files a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk, auditor and treasurer of the county, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept therein within a period of one year thereafter, the court, or, in vacation, the judge, may, if satisfied of his good faith, order the premises closed under the order of abatement to be delivered to said owner, and said order of abatement cancelled so far as the same may relate to said property; and if the proceeding be an action in equity, and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment, lien, penalty or liability to which it may be subject by law. [21 G. A., ch. 66, § 7.] [29 G. A., ch. 94, § 1.]

The giving of a bond abates the action, and not simply the nuisance, and therefore in such a case no judgment can be ren-

dered. *Morris v. Lowry*, 113-544; *Morris v. Connolly*, 113-545.

SEC. 2412. Prepayment of fees not required—costs taxed to plaintiff.

One who procures a temporary injunction without complying with the statutory provisions with reference thereto so that the proceeding is void, is liable for costs

in an action instituted against him, and others, to enjoin the enforcement of the decree. *Beck v. Vaughn*. 111 N. W. 994.

SEC. 2413. Search warrant—seizure.

While the information should state the name of the owner or keeper of the intoxicating liquor so that in case of seizure notice thereof may be given to him, yet

the determination as to who owned or kept it is important only when the owner or keeper resists unsuccessfully a judgment of forfeiture, and it becomes neces-

sary to tax costs. Where the claimant of the liquor states that he was the keeper thereof, there is no occasion for the jury to determine that fact, and he is liable

for costs as fixed by the finding that the liquor was kept for illegal purposes. *State v. Intoxicating Liquors*, 109-145.

SEC. 2415. Notice—trial—judgment—appeal.

In a proceeding to forfeit liquor charged to be kept for illegal purposes, the presumption arising under Code § 2427 that the keeping by a person not authorized to sell and on premises not used exclusively for a private dwelling, throws the burden upon a claimant of the liquor to show not only that he did not keep the liquor for illegal sale, but also that it was not kept

by any one for that purpose. *State v. Intoxicating Liquors*, 109-145.

Acquittal in a prosecution for the unlawful sale or keeping for sale of intoxicating liquors is a bar to a subsequent proceeding for the seizure and destruction of the liquors so kept. *State v. Cobb*, 123-626.

SEC. 2418. Civil action for damages by wife, parent, child, etc.

In an action for damages for the sale of intoxicating liquors the person injured is not required to establish all the elements of an injury actionable at common law. And held that the wife of one who committed suicide while intoxicated by reason of unlawful sales of liquor to him by a permit holder might recover damages without showing that her husband would not have committed suicide had the defendant not sold him the liquor. It is sufficient in such case to show that the act was committed while the husband was in fact intoxicated with liquor unlawfully sold to him by defendant. *Bistline v. Ney*, 111 N. W. 422.

The measure of damages in an action for loss to a wife by reason of causing the intoxication of her husband is dependent on what the husband had in fact done for the support of the wife prior to the wrongful acts of defendant in selling him intoxicating liquors. *Bellison v. Apland*, 115-599.

It is error to instruct the jury that the defendant in such a case is liable for all damages sustained by plaintiff on account of the intoxication of her husband where it appears that the husband procured intoxicating liquors elsewhere, which he drank, and which contributed to his besotted condition during the time complained of. *Ibid.*

Evidence of former suits of the same character by the wife against other defendants is admissible on the question of plaintiff's good faith in bringing the action. *Ibid.*

An action by a wife for damages for the sale of intoxicating liquor to her husband cannot be joined with an action to recover a penalty for sale to minors or intoxicated persons. *Carrier v. Bernstein*, 104-572.

In an action to recover damages for permanent injuries received by the husband by reason of the intoxication complained of, he may be permitted as a witness to exhibit to the jury his physical condition. *Favre v. Manderscheid*, 117-724.

A joint action may be maintained against different persons who contributed to the intoxicated condition causing injury to the husband, although the defendants were conducting separate places of business and did not act in concert. *Ibid.*

A wife, suing for injuries sustained by reason of the sale of intoxicating liquors by defendant to her husband, is not limited to the recovery of damages resulting from habitual intoxication, but may recover for damages resulting from specific intoxications, so far as defendant may have contributed thereto. *League v. Ehmke*, 120-464.

The fact that by reason of habitual intoxication the husband was not furnishing support to his wife prior to the time of the sales to her husband by the defendant, will not defeat the liability of the defendant for continuance of such condition by reason of sales made by him. *Ibid.*

A seller who by his acts contributes to a condition of habitual intoxication, cannot escape liability for specific injuries due to a particular fit of intoxication, not caused by liquor sold by him. *Ibid.*

Although the language of Code § 2418 differs slightly from that of section 1557 of the Code of '73, nevertheless, one who is entitled to sell liquors by reason of the mulct law, but who sells without compliance with the conditions of the law, is liable in civil damages to a wife who is injured by reason of such sales to her husband. *Ibid.*

In an action to recover damages for the death of a person caused by the sale of intoxicating liquors to him, life tables showing his expectancy of life are admissible in evidence. *Knott v. Peterson*, 125-404.

The fact that the husband, for whose death, due to the defendant's wrongful act in selling him intoxicating liquors, the wife seeks recovery, has on account of the habits of intoxication failed to support his wife prior to his death is not to be taken into account in measuring the amount of her recovery. *Ibid.*

In an action for damages resulting from the sale of intoxicating liquors to plaintiff's husband, held that testimony tending to show that the husband was addicted to the use of intoxicating liquors six or seven years prior to the time involved in the action was incompetent as a part of plaintiff's case. *Mathre v. Devendorf*, 130-107.

It is not competent for the defendant to show by way of defense that the plaintiff has instituted a suit against another for damages for sales of liquors to her husband within the same period of time covered by the petition in the case on trial. *Ibid.*

The wife is entitled to recover in such cases for only such damages as she has suffered by reason of defendant's act. *Ibid.*

The jury should not be permitted to give double damages by means of allowance for impaired ability to secure or hold remunerative employment in addition to damages to plaintiff's support or means of support. *Ibid.*

It is competent to show that the intoxication of the plaintiff's husband prevented him from securing or holding a per-

manent position of employment. *Mathre v. Story City Drug Co.*, 130-111.

Ordinarily a firm or a partner will not be liable for the wilful or negligent tort of a partner acting beyond the scope of his authority; but an exception to this rule exists where the damage claimed is for unlawful sale of intoxicating liquors. *Ibid.*

In an action by a child for damages on account of sale of liquor to a parent, evidence of the number of children, even though immaterial, will not be prejudicial. *Shull v. Arie*, 113-170.

Under this section both principal and agent are liable, but the principal is liable for an authorized sale made by the agent. *Ibid.*

Damages may be recovered in behalf of an illegitimate child who has been recognized by the parent. *Goulding v. Phillips*, 124-496.

The bondsmen of one who purports to sell in compliance with the conditions of the mulct law, but has not filed the requisite consent of adjoining property owners, are liable for damages provided for under this section. *Breeding v. Jordan*, 115-566.

SEC. 2419. Transportation to one not holding permit.

The crime described in this section may be charged in the language of the statute. *State v. Reilly*, 108-735.

An individual engaged in illegal traffic in intoxicating liquors, if not a carrier, falls within the designation of "other persons" under the language of this section. *Ibid.*

Notwithstanding the so-called Wilson law, the statutory provisions as to transportation of liquors into the state have no application to carriers transporting such liquors into the state from another state. *Rhodes v. Iowa*, 170 U. S. 412.

Although by arrangement between the seller of intoxicating liquors in one state and the buyer thereof in another, the goods may be shipped C. O. D. by the seller to the buyer, without subjecting them to the provisions of the law of the state to which they are shipped, with reference to the sale of intoxicating liquors (*American Express Co. v. Iowa*, 196 U. S. 133, 25 Sup. Ct. Rep., 182, overruling 118 Iowa, 447), yet the legal effect of such transaction as to the time when

title to the liquor passes from the seller to the buyer may be controlled by evidence as to the intention of the parties. *Hamilton v. Schlitz Brewing Co.*, 129-172.

The transportation and delivery of a C. O. D. package of liquor by an express company does not render the company liable for damages resulting from the sale thereof. *Chambers v. Adams Express Co.*, 128-154.

An express company receiving liquors from a consignor outside of the state, to be transported to a consignee in the state and delivered to him on payment of the purchase price and charges of transportation, the shipment having been made in pursuance of an order of the consignee, accepted by the consignor, acts as the agent of the consignee in the transportation of liquors and as the agent of the consignor in the collection of the charges, and cannot be deemed the seller nor an agent of the seller of the liquors, in violation of federal or state law. *United States v. Adams Exp. Co.*, 119 Fed. 240.

SEC. 2422. Lien of judgment—liability of sureties—costs—evidence.

Where the real owner of property has an opportunity to make defense in the action he is bound by the judgment declaring a lien on such property. *State v. Mateer*, 105-66.

Where defendant has been convicted of maintaining a liquor nuisance, the gov-

ernor may remit the fine, but cannot remit the costs nor suspend their execution. *Ibid.*

The bond here provided for does not cover the penalty authorized by Code § 2403 in case of sales to minors. *Headington v. Smith*, 113-107.

Authority to sell under the provisions

of the mulct law is not the same as that given to a permit holder. *Ibid.*

Action against the surety on a liquor seller's bond for civil damages caused by sale of liquor, may be maintained without making the principal a party. *Knott v. Peterson*, 125-404.

The premises on which a liquor nuisance is maintained are liable to a judgment for a fine imposed for the illegal keeping of liquors, although constituting the home-

stead of the seller. *Jasper County v. Sparham*, 125-464.

One who takes the property by conveyance prior to the enforcement of the fine takes it subject to the judgment. *Ibid.*

The indictment for a liquor nuisance need not specifically describe the premises on which the judgment will become a lien, but the property may be identified by evidence when it is sought to enforce the lien against it. *Ibid.*

SEC. 2423. Payments—contracts—negotiable paper.

In general: An action under this section to recover back payments made for intoxicating liquors is an action for the enforcement of a statutory penalty, and cannot therefore be removed to the federal courts. *Hamilton v. Joseph Schlitz Brg. Co.*, 100 Fed. 675.

The person named in this section as "receiver," and who is made liable for a return of the money, is evidently the person to whom it belonged when paid by the purchaser. It is not participation in making the sale nor the handling of the money that renders one liable for its return, but only the receipt of such money by him as his own. *Foley v. Leisy Brg. Co.*, 116-176.

A contract for the sale of property, a part consideration of which is an indebtedness for intoxicating liquors, is wholly void, and the person who has contracted to convey may have his title quieted as against the person with whom the illegal contract of conveyance was made. *Lindt v. Uihlein*, 109-591.

One who claims title to real property in consideration of the illegal sale of intoxicating liquors cannot, after his title is adjudged to be void on that ground, assert the rights of an occupying claimant. *Lindt v. Uihlein*, 116-48.

Money loaned to a partnership engaged in the business of unlawful sale of liquors may be recovered back, it not appearing that the loan was made to enable the partnership to violate the law. *Grey v. Callan*, 133-500.

A note and mortgage given to secure payment for the interest of a party engaged in the business of illegally keeping and selling intoxicating liquors is invalid and cannot be enforced. *Singer v. McNamara*, 111 N. W. 925.

Sales in another state: Where a salesman has only authority to take orders subject to approval, and no part of the price is paid, nor any part of the goods delivered when the orders are taken, which are to be filled in another state, the contract is not in violation of the laws of this state. *Sachs v. Garner*, 111-424.

Money paid for liquor sold and shipped at a point outside of the state on orders there received and approved cannot be recovered back under this section. *Brown v. Wieland*, 116-711.

As to payments for liquors unlawfully sold in this state, the obligation to repay exists from the time the payment is made, and only demand is necessary to maintain an action on the claim, and therefore such a claim may be introduced by way of counter claim, under the provisions of Code § 3570, although at the time the original action is brought no demand has yet been made. *Ibid.*

An order given for liquor subject to approval in another state becomes binding upon such approval and the shipment of the liquor in response thereto and the payment of the purchase price may be enforced. *Bowlin Liquor Co. v. Brandenburg*, 130-220.

Where the sale of intoxicating liquors actually takes place in another state, no recovery may be had for payments made therefor. *Hamilton v. Schlitz Brewing Co.*, 129-172.

Prohibition being the rule, the burden is upon one seeking to recover payment for intoxicating liquors sold to show that the sales, if made in this state, were lawful. But if it appears that the sale was made in another state it will not be presumed to have been unlawful. *Westheimer v. Habinck*, 131-643.

If sold in another state and shipped to this state for delivery, to the purchaser, the liquors while in the hands of the carrier and still subject to the control and direction of the seller do not become subject to the police regulations of the state. *Ibid.*

When the buyer accepts liquors shipped to him on his order, given to the seller in another state, his liability is on the contract of sale thus made in the state where the seller resides, even though in the meantime he has countermanded the order. His acceptance is to be deemed a waiver of the countermand, rather than as giving rise to an action on implied contract. *Gross v. Feehan*, 110-163.

A contract between a principal in another state and an agent in this state to sell intoxicating liquor in original packages prior to the passage of the act of congress subjecting the traffic in intoxicating liquors brought into the state to the regulations of the state, was not unlawful. *Green v. Schoenhofen Brg. Co.*, 103-252.

A note and mortgage given to secure payment for the interest of a party engaged in the business of illegally hand-

ling intoxicating liquor cannot be enforced. *Singer v. McNamara*, 111 N. M. 925.

SEC. 2424. Requisites of indictment or information—testimony of purchaser.

Under the special statutory provisions as to prosecutions for liquor nuisances, it is not necessary in the indictment to

allege that the liquors kept by the defendant were sold or kept in violation of law. *State v. Brown*, 109 N. W. 1011.

SEC. 2425. Several counts—second conviction.

A prosecution under this section is within the jurisdiction of a justice of the peace, although the aggregate of the fines imposed may be in excess of \$10, but this is because more than one offense may be

charged in the information, the penalty for each offense being within the constitutional limitation. *State v. Babcock*, 112-250.

SEC. 2427. Evidence of illegal selling or keeping—license.

The presumption which arises from the finding of liquor on the premises of defendant is that the liquor is kept by some one for illegal sale, and in a prosecution for forfeiture of such liquor the burden is on defendant claiming to be the owner of the liquor to show not only that he did not keep the liquor for illegal sale, but that it was not kept by any one for that purpose. *State v. Intoxicating Liquors*, 109-145.

The possession of a federal license to sell liquor is presumptive evidence of the selling and keeping for sale. *McCracken v. Miller*, 129-623.

The discovery of liquor on the premises is presumptive evidence of keeping for illegal sale, but does not tend to prove the act of selling in violation of law. *State v. Thompson*, 130-227.

SEC. 2429. Attorney's fees.

The provisions of this section as to the amount of the attorney's fees are limited by those of Code § 2406 and the cases provided for in that section. *Carter v. Bartel*, 110-211.

Under this section the limitation of § 2406 as to the amount of the fee to be allowed in an action to enjoin a nuisance is not applicable. *Lingelbach v. Hobson*, 130-488.

The statute authorizes the taxation of attorney's fees as a part of the costs and also allows ten per cent. for collecting the penalty imposed. *Brennan v. Roberts*, 125-615.

The ten per cent. of the fine, in addition to the attorney's fee which is to be allowed to the attorney prosecuting the case, cannot be recovered either as costs or otherwise until the fine has been collected. *McConkie v. Landt*, 126-317.

The statute contemplates the allowance of reasonable attorney's fees in favor of the attorney by whom the injunction proceeding is actually prosecuted without objection on the part of the person who ostensibly appears as prosecutor. *Plank v. Hertha*, 132-213.

SEC. 2431. Evasions.

Statutes designed to regulate the sale of intoxicating liquors are to be construed and interpreted by the rules having application to statutes generally, save as modified by the provisions of this section, that

it shall be the duty of courts and jurors to construe the general chapter relating to the subject of intoxicating liquors so as to prevent evasion. *Cox v. Burnham*, 120-43.

MULCT TAX.

SEC. 2432. Payment of—lien.

The mulct tax is not payable by a registered pharmacist who has a permit for the sale of intoxicating liquors, although he sells in violation of his permit. *In re Assignment of Shonkwiler*, 104-67.

Where at the time the mulct tax law went into effect certain premises were already leased under terms by which the

lessor could terminate the lease in the case of illegal sale of liquor on the premises, and the lessor had knowledge of illegal sales and did not take steps to terminate the lease, held, that the premises were subject to the tax. *In re Smith*, 104-199.

No notice to the lot owner of the assess-

ment and levy of the mulct tax is necessary. It is a tax to be assessed and levied by virtue of a general law upon certain persons and property coming within the provisions of the act. The statute contemplates that the person liable to the tax shall appear and pay the same without notice. *Ibid.*

The mulct tax is to be assessed against every person, other than registered pharmacists holding permits, who is engaged in selling or in keeping with intent to sell intoxicating liquors, and upon the real property, and the owner thereof, in or upon which such liquors are sold or kept with intent to sell. The tax is to be assessed regardless of the fact that no petition of consent has been secured or permission to sell granted. The petition and permission are important only in determining whether prosecution under the prohibitory law is barred; they have no relation to the taxing provision. *Ibid.*

The mulct tax may properly be levied against the owner of the premises who, by the use of ordinary care and diligence, might have known of the unlawful sales of liquor thereon. *David v. Hardin County*, 104-204.

Under provisions of prior statutes requiring a levy of the mulct tax annually by the board of supervisors, held that where sales were continued for more than six months of the year there could not be any abatement of the full amount of the annual tax. *Hubbell v. Polk County*, 106-618.

The provisions of the prior statute as to time of making the levy held directory only and that a levy in December instead of in September was valid. *Ibid.*

Although the tax is payable in quarterly installments, the liability therefor attaches at the beginning of each annual period. *Kane v. Grady*, 123-260.

It is the property used in connection with the business, and this alone, which is liable for the tax. If a man has divided his property in good faith, so that a part is not used in connection with the business, such part is not liable for the tax, whether it be a part of the same plat lot, or a distinct or separate portion of the same block of buildings. It does not follow that because, for the purpose of a general assessment, property has been treated as one tract, the entire tract is subject to mulct tax. *Lucas County v. Leonard*, 107-593.

On the other hand, the mulct tax is not limited in its application to the ground only upon which the building used for the purpose stands. The law intends to subject to the tax not only the building and the ground upon which it stands, but also all land appurtenant and used in connection therewith. *Ibid.*

Where property was sold at tax sale for the mulct tax at the instance of the bondsman who was liable for the payment of the tax, and the sale was subsequently set aside as invalid, held that such bondsman could not recover from the county the amount paid by him at the sale under the provisions of Code § 1446. *Guedert v. Emmet County*, 116-40.

This so-called tax is merely a charge or license exacted for the privilege of carrying on the business of selling intoxicating liquors, and is therefore not a tax within the meaning of the federal bankrupt law requiring trustees in bankruptcy to pay all taxes legally due and owing by the bankrupt in advance of the payment of dividends to creditors. *In re Ott*, 95 Fed. 274.

The tax imposed by the mulct liquor law is a charge or license exacted for the privilege of carrying on the business of vending liquors. It confers no right on the person engaged in the business, but imposes an impediment to the transaction of such business. *Hodge v. Muscatine County*, 121-482.

An action to recover a mulct tax may be maintained against the person conducting the business and the sureties on his bond. *Carroll County v. Ley*, 127-230.

But the mulct tax is not a personal obligation against the owner of property which can be enforced in an action at law. *Ibid.*

The provisions of the original mulct law, so far as they were re-enacted in the Code, have been in full force and effect ever since their original enactment and the bond given with reference to observance of the original law was effectual under the provisions of the Code. *O'Brien County v. Mahon*, 126-539.

The provisions with reference to the bond to be given by a seller under the mulct law contemplate the particular location of the place of sale, and it is for damages occasioned by the sale of intoxicating liquors there, and not elsewhere, that the bondsmen are liable. *O'Banion v. DeGarmo*, 121-139.

SEC. 2433. Return by assessor. In the months of December, March, June, and September of each year, and before the twentieth day of each of said months, the assessor of each township, town or city, or assessment district thereof, shall return to the county auditor a list of persons who are, or since the last quarterly return have been, engaged in carrying on within said township, town, city or assessment district the business of selling or

keeping for sale intoxicating liquors, or maintaining any place where such liquors are sold or kept for sale, and also a description of the real property wherein or whereon such business is carried on or such place is maintained, with the name of the occupant or tenant and owner or agent. At least five (5) days before the assessor makes the return above contemplated to the county auditor he shall give to the person found in possession of each place which he intends to list, or is required to list, and to the tenant occupant and owner of such place a notice in writing that he intends to return such list to the county auditor charging the property itself and the owner of the property therein described and the person who owns or conducts the business with the mulct tax. But if any one of the persons to whom the assessor is herein required to give notice does not reside within the assessor's assessment district it shall be sufficient for the assessor to mail, at least five days before he makes such return to the auditor, a copy of such notice to such person at his last known post-office address; and if there is any one whose post-office address cannot be ascertained by the assessor it shall be sufficient as to such person for the assessor to post a copy of such notice in some conspicuous place on the front of the property about to be listed as liable to the tax. Service of notice on any agent having general charge of the property or on any agent renting or collecting rent on the property so used or having authority to rent or collect rent on such property, or on any member of the owner's family over fourteen (14) years of age shall be equivalent to notice to the owner of such property. The assessor shall give notice in each case in such one of the ways above provided as the circumstances of the case require, and he shall show in his return to the auditor that he has given notice and the manner of the service. The return signed by the assessor shall in all cases be admissible in evidence without further proof, and such return shall have the same force and effect as the oath of the assessor. The burden of proof shall in all cases be upon the party claiming that notice was not given. The county auditor shall furnish to the several assessors of his county, printed blanks upon which to give the notice contemplated in this amendment. Any assessor wilfully failing to comply with the provisions of this section shall pay a fine of fifty dollars and costs for each offense. [25 G. A., ch. 62, § 2.] [29 G. A., ch. 95, § 1.]

SEC. 2435. Statement by citizens. Should the assessor for any reason fail to perform his duty, any three citizens of the county can, by verified statement on information and belief, addressed to the county auditor, procure the listing of names and places as above provided, with the same force and effect as if done by the assessor. At least five (5) days before listing the property or names with the county auditor as contemplated in code section twenty-four hundred thirty-five (2435) such citizens shall give notice in writing of their intention so to do to the same parties and in the same manner as required of the assessor in section one (1) of this amendment, and proof of the service of notice shall be made by the affidavit of one or more of the citizens making the return, which affidavit shall be returned to and filed with the auditor with the list of names and property sought to be charged; and the return and affidavit of the citizens so filed with the county auditor shall be admissible in evidence in the same way and with the same force and effect as the return of the assessor. [25 G. A., ch. 62, § 3.] [29 G. A., ch. 95, § 2.]

SEC. 2436. Quarterly installments—lien—penalty.

Under previous statutory provisions levy of the tax by the board of supervisors was essential. *Smithberg v. Archer*, 108-215.

Where one sells liquor after the beginning of a period for which taxes are to be paid he becomes liable for the entire

amount of the tax, and evidence of subsequent abandonment of the business before the expiration of the period is immaterial. *State v. Miller*, 114-396.

A surety on the bond who pays the tax is not subrogated to the county's rights

under this section: *Knoll v. Marshall County*, 114-647.

The liquor seller is liable for the full tax for the quarter in which he commences business and the liability of his surety is the same. *O'Brien County v. Mahon*, 126-539.

SEC. 2437. List certified to treasurer—mulct tax account. On the last day of December, of March, of June, and of September in each year, the county auditor shall certify to the county treasurer a complete list of the names of persons returned to him by the assessors, or entered on the sworn statements made to him by citizens as aforesaid, together with a description in each case of the real property wherein or whereon the business is carried on or the place maintained, and the name of the occupant or tenant, and the owner or agent of such property, and the county auditor shall keep in his office in books to be provided for that purpose an account to be known as the "Mulct Tax Account" in which memoranda of all moneys which may come into his hands and those of the county treasurer, from the mulct tax, shall be entered; and the county treasurer shall keep a like account and record of all mulct tax coming into his hands. Settlement of such accounts shall be made with the board of supervisors at the January and June sessions of the board, which settlement shall be published with the proceedings of the board. [25 G. A., ch. 62, § 10.] [30 G. A., ch. 83, § 1.]

The mulct tax is made a lien only on the real property wherein or whereon the business is conducted. *O'Banion v. DeGarmo*, 121-139.

The notice by citizens of the county of an application to the auditor to have places listed as subject to mulct tax, which have been omitted by the assessor, must be

notice in writing, proof of the service of which is to be made by the affidavit of one of the citizens making the application, and proof of service of such notice by a constable is insufficient. *National Loan & Inv. Co. v. Board of Supervisors*, 111 N. W., 1008.

SEC. 2438. Entry of tax—payments made to county treasurer. The county treasurer shall thereupon enter upon a book known as the "mulct tax book" a quarterly installment of the mulct tax, as due and payable by the person carrying on such business or keeping such place, and as a lien and charge upon and against the real property wherein or whereon such business is carried on or such place maintained. All payments of mulct tax shall be made to the county treasurer upon a certificate from the county auditor showing the amount due. [25 G. A., ch. 62, § 10.] [30 G. A., ch. 83, § 2.]

SEC. 2439. When delinquent—sales for—redemption—title in the county. After the expiration of one month from the date when such tax becomes due and payable, if not paid, it shall be delinquent and collectible by the treasurer in the same method as that in which other delinquent taxes are collectible, and all the provisions as to the collection of other delinquent taxes shall apply. Tax sales for such delinquent taxes shall also be made on the first Monday in June of each year, in the same manner and to the same effect as on the first Monday in December, and all the provisions of law as to tax sales in December shall apply to such sales in June. When real estate offered at tax sale under this section shall be passed for want of bid covering amount of tax due thereon, it shall be advertised and sold by the treasurer at next semi-annual tax sale. The treasurer shall appoint, prior to such sale, three appraisers who shall appraise the value of any and all property to be offered at such sale, taking into account any superior, valid lien thereon, and file a separate appraise-

ment for each parcel; and the cost thereof shall be added to the penalty. If at the sale an amount less than the tax and penalty and less than the appraisal is offered, the property shall be sold to the county; at the appraised value, if it is less than the tax and penalty; or at the tax and penalty, if they are less than the appraised value. The provisions of sections fourteen hundred and thirty-six (1436), fourteen hundred and thirty-seven (1437), and fourteen hundred and thirty-eight (1438) of the code shall apply to the redemption; but the supervisors may allow redemption for any amount deemed advantageous to the county; and in default thereof after notice to redeem as provided by section fourteen hundred and forty-one (1441) of the code, the treasurer shall execute a deed to the county, without fee, and such deed shall have, so far as applicable, all the effect as provided by section fourteen hundred and forty-four (1444) of the code as to vesting in the county all the right, title, interest and estate of the former owner in and to the land conveyed. On redemption or on final sale of the property the proceeds shall be applied as provided by section twenty-four hundred and forty-five (2445) of the code. While thus acquiring title the county, to protect its interest, may bid in the property at ordinary tax sale and acquire title under the same terms and conditions as other tax sale purchasers. [25 G. A., ch. 62, § 12, 13.] [31 G. A., ch. 99.]

A suit in equity cannot be maintained against the owner of the land on which the nuisance is situated to enforce the pay-

ment of the tax. *Crawford County v. Laub*, 110-355.

SEC. 2441. Application for remission.

The board of supervisors in considering an application for remission of the mulct tax has no power to determine the question of priority as against a mortgage of the premises, nor can the district court on appeal from the action of the board of supervisors consider such question. *David v. Hardin County*, 104-204.

The word "year" as used in 25 G. A., chap. 62, with reference to the mulct tax, has reference to a calendar year; and therefore where the tax was not payable in advance because the case was not one where consent to the sale could be given, and the property was not shown to be subject to assessment until near the end of the calendar year, held that the board of supervisors at its January meeting could only levy such tax on the premises for the remainder of the preceding calendar year. *Ibid.*

But where the place had been used for more than six months of the calendar year for sale of liquor and the board at its September meeting levied a tax of six hundred dollars against the property, held, that under the statute the owner was not entitled to a remission of any portion of the tax on the ground that the premises had thus been used for less than one year. *Engelthaler v. Linn County*, 104-293.

Notice of the proceedings against the property need not be given to the property owner, nor is the fact that the owner did

not know of the sale of liquor on his premises controlling, and Code §§ 2433 *et seq.* are not unconstitutional in this respect. *Newton v. McKay*, 130-596.

The mulct tax is imposed upon all except permit holders who carry on the business of selling or keeping for sale intoxicating liquors. Payment of the tax does not in itself constitute a bar to proceedings for the unlawful sale of liquors. It is not therefore a license. The legislature may impose a tax without legalizing the business taxed. *Ibid.*

The statutory provisions as to the assessment and collection of the mulct tax do not involve notice of the assessment or levy of the tax. Notwithstanding the omission of any provision for such notice, the statute is not unconstitutional. *Hodge v. Muscatine County*, 121-482.

Such statute confers no right but imposes an impediment to the transaction of the business. It is a tax on that business levied to meet the burdens imposed on the general public by what is thought to be the result of the conduct of such business. *Ibid.*

As the property owner may apply to the board of supervisors for remission of the tax, notice to the property owner of the imposition of such tax by the board is not essential to its validity. *Hodge v. Muscatine County*, 196 U.S. 276.

SEC. 2445. Tax divided and apportioned.

The county treasurer is not entitled to a collection fee under Code § 490 for the

portion of the regular mulct tax which is to be paid to the city, but may collect

such fee as to any additional mulct tax imposed by the city and collected by him. *Waverly v. Bremer County*, 126-98.

The full amount of the tax is recover-

SEC. 2447. Effect of payment.

The business of selling intoxicating liquor in compliance with the provisions of the mulct law is lawful, and a note given by one partner in such business to another for the purchase of the interest of the latter in such business is valid. *Phillips v. Gifford*, 104-458.

A condition in such note that it shall be void "if the payor is obliged to abandon his present business on account of a change of the liquor law by the next legislature," held to be a valid condition. *Ibid.*

A person operating under the mulct law is engaged in a lawful occupation. *State v. Miller*, 114-396; *Iowa City v. McInerney*, 114-586.

The statute confers no right but imposes an impediment to the transaction of the business. It is a tax on that business levied to meet the burdens imposed on the general public by what is thought to be the result of the conduct of such business. *Hodge v. Muscatine County*, 121-482.

The mulct tax is imposed upon all except permit holders, who carry on the business of selling or keeping for sale intoxicating liquors. Payment of the tax does not in itself constitute a bar to proceedings for the unlawful sale of liquors. It is not therefore a license. The legislature may impose a tax without legalizing the business taxed. *Newton v. McKay*, 130-596.

The provisions of the mulct law do not

SEC. 2448. When a bar—conditions. In any city, including cities acting under special charters, of five thousand or more inhabitants, no proceedings shall be maintained against any person who has paid the last preceding quarterly assessment of mulct tax, nor against any premises as a nuisance on account of the selling or keeping for sale therein or thereon, by such person, of such liquors, provided the following conditions are complied with; and in any city of over twenty-five hundred and less than five thousand inhabitants, when a written statement of consent that intoxicating liquors may be sold in such city, signed by eighty per cent. of the voters residing in such city, voting therein at the last preceding election, as shown by the poll list of said election, shall have been filed with the county auditor, and shall by the board of supervisors at a regular meeting, or at a special meeting called for that purpose, have been held sufficient, and its findings entered of record, which statement when thus found sufficient, shall be effectual for the purpose herein contemplated until revoked, said city shall come within the provisions of this section:

1. *Statement of consent—action of supervisors.* A written statement of general consent that intoxicating liquors may be sold in such city, signed by a majority of the voters residing in such city, voting therein at the last preceding election, as shown by the poll list of said election, shall have been filed with the county auditor and shall, by the board of supervisors, at a regular meeting, have been held sufficient, and its finding entered of

able by the county, one half the amount recovered being for the use of the city or town in which the business is conducted. *O'Brien County v. Mahon*, 126-539.

relieve the parties selling in accordance therewith from liability to a wife for damages by reason of sales to her husband nor from the penalty provided for sales to minors or habitual drunkards. *Carrier v. Bernstein*, 104-572.

Violation of the provisions of the mulct law by an agent subjects the seller to the penalties of the prohibitory law as to the sale of liquor. *Hawks v. Fellows*, 108-133.

Notwithstanding a mistake of law on the part of one carrying on a business under the supposed protection of the mulct law, he renders himself liable to the penalties of the prohibitory law if he violates the conditions under which he is authorized to conduct the business. *State v. Gifford*, 111-648.

One who sells in compliance with the mulct law does not violate a previous injunction restraining him from making further unlawful sales, but if he attempts to act under the mulct law without complying with its provisions he violates such injunction. *Landt v. Remley*, 113-555.

Prohibition is still the rule in this state, and freedom from the penalties imposed by the liquor law for the sale of intoxicants the exception, and he who would bring himself within the exception must prove compliance with all the conditions imposed to secure immunity. *Schuneman v. Sherman*, 118-230.

record, which statement when thus found sufficient, shall be effectual for the purpose herein contemplated, until revoked, as hereinafter provided.

2. *Resolution of council—consent of property owners—officers barred—limits.* The person appearing to pay the tax shall file with the county auditor a certified copy of a resolution regularly adopted by the city council, consenting to such sales by him, and a written statement of consent from all the resident freeholders owning property within fifty feet of the building where said business is carried on. But in no case shall said business be conducted by any person holding any township, town, city or county office, or within three hundred feet of any church building, schoolhouse, or cemetery, nor within one-half mile of the place where any agricultural fair is being held.

3. *Bond.* He shall file with the county auditor, to be approved by the clerk of the district court, a bond to the county, in the sum of three thousand dollars, conditioned upon the faithful observance of all the provisions of this chapter relating to the mulct tax, and for the payment of all damages that may result from the sale of intoxicating liquors upon the premises occupied by the obligor. Said bond shall be signed by himself as principal, and by two sureties who shall qualify each in double the amount of the bond, and neither of whom shall be surety on any other like bond, provided that any surety company, authorized to do business in this state, under the laws thereof may become sole surety on any and all bonds required under this section.

4. *Place of sale.* Said selling or keeping for sale of intoxicating liquors shall be carried on in a single room having but one entrance or exit, and that opening upon a public business street. The bar where liquors are furnished shall be in plain view of the street, unobstructed by screens, blinds, painted windows or any other device. There shall be no chairs, benches, nor any other furniture in front of the bar, and only such behind the bar as is necessary for the attendants. A list of names of all persons employed about the place shall be filed with the county auditor, and no persons shall be permitted behind the bar except those whose names are so listed.

5. *Conduct.* The place shall be conducted in a quiet, orderly manner.

6. *Gaming and amusements.* There shall be no gambling or gaming with cards, dice, billiards or any other device, nor any music, dancing or other form of amusement or entertainment, either in the room where said business is carried on or in any adjoining room or building controlled by the person, partnership or corporation carrying on said business.

7. *Obscene pictures.* There shall be no obscene or impure decorations, inscriptions, placards or any such thing in the place.

8. *Females.* No female shall be employed in the place.

9. *Opening and closing.* The place shall not be open nor any sales be made earlier than five a. m. nor later than 10 p. m. on any day. It shall not be open at all, nor shall any sales be made, on the first day of the week, commonly called Sunday, nor on any election day or legal holiday, nor on the evening of such days.

10. *Minors, drunkards, intoxicated persons.* No minor, drunkard or intoxicated person shall be allowed in the room, and no sales of intoxicating liquors shall be made to any minor, drunkard or intoxicated person, or knowingly to any person who has taken any of the so-called "cures for drunkenness."

11. *Written notice not to sell.* No sale of intoxicating liquors shall be made to any person whose wife, husband, parent, child, brother, sister, guardian, ward over fourteen years of age, or employer, shall by written notice forbid such sales.

12. *Payment of tax.* If the name of a person desiring to carry on the business of selling or keeping for sale intoxicating liquors, or maintaining a place where such liquors are sold or kept for sale, has not been entered by the auditor on the list of such persons as hereinbefore provided for, or if the property wherein or whereon such business is to be conducted has not likewise been entered by the auditor on such list, then the name of such person and the description of such property shall be entered upon such list by the treasurer, and a quarterly installment of tax shall be paid as though the name of such person and the description of such property had been duly entered upon such list at the last preceding quarterly assessment for such purpose. [25 G. A., ch. 62, § 17; 18 G. A., ch. 82; 18 G. A., ch. 147; 17 G. A., ch. 119, § 2; C., '73, § 1114.] [29 G. A., ch. 96, § 1.] [31 G. A., ch. 100.]

[The amendment by the 31 G. A. ignored code supplement where same appeared. The change has been to the code supplement.]

Conditions; burden of proof: As against a charge of violating an injunction in selling intoxicating liquors the defendant claiming to act in compliance with the mulct law has the burden of showing performance of all the conditions which are in their nature conditions precedent, but it is for the complaining party to show violations of the law involving matters of conduct only, as that sales are made to minors or on Sunday. *Jones v. Byington*, 128-397.

The seller who relies on compliance with the mulct law as a defense against liability for civil damages in an action by the wife for sale of liquor to her husband, has the burden of alleging and proving full and complete compliance with the conditions imposed by the mulct law. *League v. Ehmke*, 120-464.

In an indictment for maintaining a place for the illegal sale of intoxicating liquors, it is not necessary to negative the right of defendant to sell under the mulct law. If defendant claims that his act was lawful because in compliance with the provisions of the mulct law, he must prove not only that he has complied with the provisions as to securing the consent of the proper authorities, but also that he has conducted his place in accordance with the provisions of this and other paragraphs relating to the method of conducting such business. *State v. Donahue*, 120-154.

Par. 1. *Statement of consent:* Under 25 G. A., chap. 62, the authority to determine whether the petition of consent was sufficient was not vested in the city council, and its action in granting permission to sell was not conclusive. *State v. Pressman*, 103-449.

In determining the sufficiency of the signatures to the petition the poll books and registration lists are the best evidence of who cast ballots at the last election. *Ibid.*

One who acts under the mulct law, in relying on the sufficiency of a petition of consent, does so at his peril, and if the

statement of consent is insufficient he may be punished for illegal selling. *Bartel v. Hobson*, 107-644.

The Official Register of the state is, by Code § 177, made conclusive evidence as to the number of inhabitants in the city. *In re Sale of Intoxicating Liquors*, 108-368.

The poll list is made the only and exclusive evidence as to who voted in the particular localities. *Porter v. Butterfield*, 116-725; *Wilson v. Bohstedt*, 110 N. W. 898.

A statement of consent filed before the present Code went into effect is not effectual under its provisions to suspend the penalties of the prohibitory law. The privilege to sell acquired under such a statement of consent does not constitute a right which is protected as against the repeal of prior statutes resulting from the adoption of the Code. *West v. Bishop*, 110-410.

The board of supervisors is made a special tribunal for the determination of the sufficiency of the statement of consent, not only as to the county at large, but also as to each and every subdivision thereof, and its findings can only be questioned on appeal. Parol evidence is inadmissible, in the absence of a finding by the board as to the sufficiency of the statement of consent, to show the requisite number of signers for any town within the county. *Schuneman v. Sherman*, 118-230.

One who sells liquor does so at his peril, and cannot rely on parol evidence that the statement of consent, not approved by the board of supervisors, was in fact sufficient as applied to the locality in which he sells. *Ibid.*

One who voluntarily pays a mulct tax without ascertaining whether the required general statement of consent has been filed cannot recover back the tax paid on the theory that it was paid under a mistake of fact, if it appears that the statement of consent was not sufficient. *Ahl-ers v. Estherville*, 130-272.

A statement of consent filed prior to the taking effect of the Code not being effective after the time when the Code took effect, held that taxes paid in reliance on such statement were paid under mistake of law and could not be recovered back. *Ibid.*

Par. 2; Resolution of council: Where the application is for permission to a firm to sell intoxicating liquors under the mulct law, the authority given by the council to such firm is not available to one member of the firm to whom the business is transferred. *State v. Zermuehlen*, 110-1.

Consent of property owners: The filing of a statement of consent by adjoining property owners is a condition precedent to the right to sell under the mulct law, and sales made before such statement of consent is filed is unlawful. *Landt v. Remley*, 113-555.

Where property within fifty feet of the building where the business is carried on is owned by a partnership, the consent of each partner is essential. *Close v. O'Brien*, 112 N. W. 800.

The purchaser of property from an owner who has consented to the maintenance of a saloon within fifty feet of his property does not take the property subject to the consent previously given by his grantor, and a new statement of consent by such purchaser must be filed by the saloon keeper at the beginning of the next tax year. *Conway v. District Court*, 132-510.

The consent of an adjoining property owner cannot be withdrawn during the year for which the annual tax is payable although it is paid in quarterly installments, but such withdrawal may be effectual as to the next annual payment. *Kane v. Grady*, 123-260.

If the room in which sales of liquor are made is less than fifty feet from the premises of a property owner who does not consent, the occupant cannot by constructing a board partition which is fifty feet from such premises leaving an unoccupied space between such partition and the wall of the room render the consent of such property owner unnecessary. *McCull v. Rally*, 127-633.

An agreement to pay a property owner a sum of money in consideration of his giving consent that a saloon may be established within fifty feet of his property, is against public policy and void. *Greer v. Severson*, 119-84.

The consent of neighboring property owners required by the statute is not intended to be the subject of barter and sale. *Ibid.*

Par. 3. Bond: The bond here provided for does not cover the payment of assessments required by city ordinance, under Code § 2455. *Ottumwa v. Hodge*, 112-430.

Nor does the bond cover the penalty specified by Code § 2403 for sales to minors. *Headington v. Smith*, 113-107.

The sureties on the bond are liable for sales which are unlawful under Code § 2418, although the seller, purporting to act under the provisions of the mulct law, has failed to file the requisite consent of adjoining property owners. *Breeding v. Jordan*, 115-566.

Where the bondsman bought in at tax sale the property of his principal, the sale being at his instigation and for taxes for which he was liable, held that he could not recover the amount paid from the county upon the setting aside of the sale as invalid. *Guedert v. Emmet County*, 116-40.

Where a bond was given in supposed compliance with the mulct law, but it appeared that at the time the provisions of the mulct law were not in force in the city where the business was carried on, held that no liability under such bond for illegal sales to minors and intoxicated persons, under the provisions of Code § 2403, could be enforced against the surety on such bond. *Gorman v. Williams*, 117-560.

The surety on the bond who pays the amount of the tax is not subrogated to any lien of the county against the property for the payment of such tax. *Knoll v. Marshall County*, 114-647.

While the surety on the bond may recover from the principal the amount which he is required to pay, he is not subrogated to the remedy of the county against the principal and the county may proceed at its election to enforce the bond or punish the principal for illegal selling. *O'Brien County v. Mahon*, 126-539.

A bond given to enable a dealer to do business under the mulct law is effectual as a common law obligation although it does not strictly conform to the statutory requirement. *Ibid.*

The county may elect to collect the mulct tax by action on the bond or to prosecute the principal for illegal sales made by him after failure to pay the tax, and the tax is due and payable whether the principal complies with the law or not. By resorting to one remedy the county does not necessarily waive the other. *Ibid.*

It is not necessary in the bond to describe the premises on which the business is to be conducted. *Ibid.*

Interest may be recovered in an action on the bond on account of the delinquency of the principal in paying the tax. *Ibid.*

The surety on the bond of a liquor seller, selling in accordance with the provisions of the mulct law, is liable under a judgment rendered against his principal in a civil action to recover damages in favor of one who is injured by such sale. *Knott v. Peterson*, 125-404.

An action on his bond given by one who sells liquor under the mulct law must be

confined to sales made on the premises described in the bond. *O'Banion v. DeGarmo*, 121-139.

Par. 4. Place of sale: The keeping of a place for the sale of intoxicating liquors, as authorized by the mulct law, does not warrant the peddling of such liquors in other parts of the city, either at wholesale or at retail. *Cameron v. Fellows*, 109-534.

Compliance with the mulct law will not authorize the maintenance of a cold storage warehouse wherein intoxicating liquors are kept for sale, and the filling of orders from such warehouse by delivery to purchasers at different places about the city. *Carter v. Miller Brewing Co.*, 111-457.

The statutory provision as to one entrance is violated where, in addition to the front door, the room has a door leading into another room or shed, where liquor is stored. *State v. Bussamus*, 108-11.

Where there was a door connecting the place where liquor were sold with a cellar which was used as a store-room for such liquor, which cellar had an outside entrance, the room in which the sales were made having also an outside entrance, held that the use of the room and the cellar together constituted a violation of the provisions of this section. *Powers v. Klatt*, 111-357.

It is a violation of the law to have a smaller room partitioned from the main room to be used for a store-room, or to so use a cellar connected with the main room having also an entrance from the street. *Garret v. Bishop*, 113-23.

The maintenance of a cold storage warehouse separate and removed from the saloon in which the business of selling liquor under the mulct law is prosecuted by the defendant is a violation of the requirement that the business shall be carried on in a single room having but one entrance or exit. *Bell v. Hamm*, 127-343.

It is a violation of the law to carry on the business in two rooms, one a bar room proper, the other a basement room underneath in which liquors are kept, the two being connected by a flight of stairs, with egress from the basement room to other rooms in the building and through them into a side street. *Jones v. Byington*, 128-397.

It is not a violation of the provision requiring the business to be carried on in a single room, having but one entrance or exit, and that opening upon a public street, that there is within the room used as a place for selling liquor an icebox or cooling room, in which beer and other liquor intended for sale are kept, if such cooling room is not a room which could be resorted to for the purpose of concealment while buying or drinking intoxicating liquor. *State v. Donahue*, 120-154.

There is no exception in the statute to

the requirement that the room in which the liquors are sold shall have but one entrance or exit, and an additional doorway may not be maintained, even for the convenience of the proprietor or his employees. *State v. Gifford*, 111-648.

One who conducts the business of selling intoxicating liquors under the mulct law in a place having a back door which may be used for purposes of entrance and exit, aside from the principal entrance, should be enjoined. *State v. Roney*, 133-416.

Under the evidence in a particular case held that a place from which the sale of intoxicating liquors was made was not a single room, having but one entrance or exit, and that opening upon a business street. *Bartel v. Hobson*, 107-644.

A liquor dealer having paid but one tax under the mulct law has no right to keep for sale, and sell, intoxicating liquors from two wholly separate and independent rooms in the same building. *Thomas v. Arte*, 122-538.

The location of a saloon in the basement of a building with the bar so situated that it is not in the plain view of pedestrians using the street or sidewalk in the ordinary manner is not in compliance with the statute. *McCull v. Rally*, 127-633.

A basement saloon so constructed that the only entrance is through a long hall after descending from the street does not have an opening upon a public street in the sense required by the statute. *Ibid.*

Where there were curtains in the window and a sign painted thereon, and flower jars, none of which obstructed the full view of the interior of the premises from the sidewalk in front, held that there was no violation of the mulct law as to the condition of the premises. *Lingeibach v. Hobson*, 130-488.

Par. 9. Opening and closing: The act of keeping a saloon open on election day is punishable by reason of this provision, and the city council cannot provide for the punishment of the same act, either under Code § 2455, or under the general powers given by Code § 680. *Iowa City v. McInerney*, 114-586.

The provision that sale shall not be made on legal holidays forbids the sale on the 4th of July or on any other of the days specified in Code § 3053, as holidays with relation to the protesting and dishonor of negotiable instruments. *Brennan v. Roberts*, 125-615.

Keeping the place open for any length of time after ten o'clock and for any purpose, even though it be the cleaning of the place or the counting of the money after door is closed and customers are excluded will constitute a violation of the law. *Lingelbach v. Hobson*, 130-488.

Par. 10. Minors, etc.: It is a violation of the provision that no minor shall be allowed in the room that the proprietor

allows his own minor son to be in the room and behind the bar. *Jones v. Byington*, 128-397.

SEC. 2449. Cities under five thousand and towns.

Where the petition of consent was presented after the taking effect of the Code, held that it was immaterial that some of the signatures to the petition had been affixed thereto before the Code took effect. *Cameron v. Fellows*, 109-534.

In determining whether the percentage of signers is sufficient the statement of consent is to be compared with the poll books of the general election preceding the time when the petition is filed. *Ibid.*

But one general petition of consent for the county may be canvassed by the board of supervisors, and in acting on that petition the board may determine with reference to particular towns whether the number of signers to the general petition who reside in that town, and in the township in which it is located, constitutes the required proportion of voters in such town and township. But the board has no authority to canvass a subsequent petition with reference to a particular town not found on the canvass of the general petition to be one in which sales of liquor may be made. *Meyer v. Hobson*, 116-349.

To authorize the sale of liquors in a town there should be a finding by the board of supervisors in connection with their canvass of the statement of consent, that there are the requisite number of signers in such town, and in making such determination the board may hear evidence. Therefore in an action in which the right to sell liquors in such town is involved the finding of the board of supervisors on the sufficiency of the number of signers in the town is the only evidence which may be considered. If there is no finding as to the town by the board, then there is no right to sell. *Hill v. Gleisner*, 112-397.

The board of supervisors canvassing a statement of consent for the sale of intoxicating liquors in the county and making no specific finding that the majority of voters in a certain town in the county had signed the petition cannot long after correct its records so as to make the finding sufficient to legalize the selling of liquor in such town. *Brickley v. Westphal*, 111 N. W. 829.

SEC. 2450. Sufficiency of statement—finding—appeal. All statements of general consent, filed with the county auditor as provided in the two preceding sections, shall be publicly canvassed by the board of supervisors, at a regular meeting, at least ten clear days notice of such intended canvass having been previously published by the county auditor in the official newspapers of the county, and its finding as to the result in the city having over five thousand inhabitants, or the county, as the case may be, and the various towns and townships therein, shall be entered of record. And such finding shall be effectual for the purpose herein contemplated until revoked as herein provided. If the board shall find the statement sufficient, any citizen of the county may, within thirty days thereafter, upon filing a sufficient bond for the costs, file with the clerk of the district court a general denial as to the statement of general consent, or any part thereof, whereupon the county attorney shall cause notice thereof to be served upon the person or persons filing said statement of consent with the county auditor, and said party shall within ten days file with said clerk a bond conditioned to pay the costs of the hearing in the district court, in a sum to be fixed by the clerk of said court. If such bond be filed, then the auditor shall certify the statement of consent and all papers and records to the district court, where the matter shall be tried *de novo*, the county attorney appearing for the state, but if no bond be filed, then the order of the board of supervisors finding the statement of general consent sufficient shall be considered and treated as set aside and null and void. The costs in all cases of appeal shall be taxed against the losing party. Should the board of supervisors find the statement of general consent insufficient, any party aggrieved may appeal therefrom to the district court by filing, within thirty days thereafter, with the clerk of said court a sufficient bond for the costs. Upon the filing and approval of said bond, the auditor shall certify the statement of consent and all papers and records to the

district court, where the matter shall be tried *de novo*. All costs shall be taxed against the appellant, whether the finding of the board is sustained or reversed, and in such actions the county attorney shall appear and defend the finding of the board. Only one statement of general consent from any county, city or town, or city or town acting under special charter, therein entitled to file the same, shall be canvassed by the board of supervisors in any one year. When said petition of general consent is found sufficient by the board of supervisors or the city council, as the case may be, it shall, unless revoked under section twenty-four hundred and fifty-one (2451) of the code, be in force and effect for the period of five years only; and all petitions and statements of general consent in force and effect previous to the first day of July, nineteen hundred and six (1906) shall, unless revoked under section twenty-four hundred and fifty-one (2451) of the code, be and become null and void on and after five years from July 1, 1906. [31 G. A., ch. 101.]

Where the record of the findings of the board as to the number of signers shows the number of voters and the number of signers in each of the election precincts, it is sufficient, although the aggregate for each township is not footed up. *Cameron v. Fellows*, 109-534.

The statute requires the county attorney to appear against the statement in all proceedings before the district court upon appeal. *Green v. Smith*, 111-183.

The proceeding here contemplated is a special proceeding, and there is no right to a trial by jury in the district court. *Ibid.*

No right vests until the statement of consent has been adjudged sufficient, and one who has signed the general statement may, before action is taken thereon, withdraw his consent and by proper written notice and request to the board annul his former act in affixing his signature. *Ibid.*

The sufficiency of the statement of consent may be passed upon by the board of supervisors at an adjourned meeting provided for at a regular meeting of the board. *Butterfield v. Treichler*, 113-328.

Notice of the hearing should be given ten clear days before the hearing, it is not necessary that notice be given ten days before the first day of the regular session of the board. *Ibid.*

The poll lists do not show in what towns the voters resided, and therefore in determining the result of the statement of consent with reference to the number of voters signing, resident in the various towns and townships in the county, the board of supervisors and the court on appeal can receive testimony. *Porter v. Butterfield*, 116-725.

The appeal is to be tried by the court without a jury, and it is error to submit the questions of fact to the jury in such a case. *Ibid.*

The costs on appeal are to be taxed against the losing party. *Ibid.*

The "general denial as to the statement of general consent" contemplated by the statute as the basis of an appeal from the

action of the board in approving the statement of consent is not a technical pleading, but a general exception or objection. *Stokesbury v. Korte*, 129-434.

Service of notice by the county attorney of such general denial upon the person or persons filing the statement of consent is not jurisdictional. *Ibid.*

Such notice may be served upon the person who files the statement with the auditor, although in doing so he acts as attorney or agent for others. *Ibid.*

The appeal is not made dependent upon the action or consent of the county attorney, and the objecting citizen or citizens may be represented on the appeal by other counsel than the county attorney, who is required to appear only as the representative of the public. *Ibid.*

A pleading by the objector in the district court describing himself as a citizen of the county is a sufficient allegation that he is such citizen. *Ibid.*

Where legal proceedings to test the validity of the action of the board of supervisors in approving a statement of consent has been commenced within the period during which the poll books are directed to be preserved, they may be subsequently properly introduced in evidence, although the time for their destruction in the ordinary course has passed. *Reed v. Jugenheimer*, 118-610.

Such a proceeding is to be tried before the district court *de novo*, and the burden is upon the petitioners to show that the statement of consent is sufficient. *Ibid.*

The statement of consent is a public record and the fact that it is temporarily out of the keeping of its legal custodian will not in absence of proof of alteration, prevent its admission in evidence on the trial of an appeal from the action of the supervisors. *Wilson v. Bohstedt*, 110 N. W. 898.

In a proceeding for review notice to the person or persons filing the statement of consent is all that is required. No notice to persons who have acted or may intend

to act in reliance on such petition of consent is provided for. *Fitzgibbon v. Macy*, 118-440.

Nor is it contemplated that notice be given to all the persons signing the statement of consent, but only to those presenting it to the auditor and causing it to be filed. *Ibid.*

It is not required that such notice be given with the county auditor, but it should, with proper proof of service, be filed with the clerk of the district court. *Ibid.*

The provision requiring the persons filing a general statement of consent to give bond within ten days after service of notice of review by the district court, is mandatory, and on failure to file such bond within the time specified, the order of the board of supervisors finding the general statement of general consent is not sufficient is to be treated as null and void. *Ibid.*

The provision of Code § 2450 that only one statement of general consent shall be canvassed by the board of supervisors in any one year, does not relate to the filing of more than one petition, but to the final consideration thereof by the board, and if the first statement filed is insufficient, and before the board has finally acted upon it by making the canvass necessary to determine its sufficiency, another statement, which is sufficient, is filed and properly

brought up for consideration, the board may approve it. *In re Canvass of Statement of Consent, etc.*, 120-680.

The trial provided for in court as to the sufficiency of the statement of consent canvassed by the board of supervisors is by special proceedings, without a jury, but not in equity, and the applicants are not entitled to a continuance in order to take testimony by deposition. *Dye v. Augur*, 110 N. W. 323.

The general denial which must be filed by those opposing the statement of general consent within thirty days may be amended after that time so as to show the persons contesting to be citizens of the county. *Ibid.*

Where a general allegation of citizenship is made in the denial and not controverted except by a general denial thereof, no issue is raised requiring the introduction of proof. *Ibid.*

The board obtains jurisdiction to canvass the statement only by notice given to the public of a hearing at which any citizen may appear and contest the sufficiency of the consent. Therefore the board of supervisors has no authority at a subsequent meeting to nullify the effect of the record which has already been made on such a hearing. *Brickley v. Westphal*, 111 N. W. 829.

SEC. 2451. Forfeiture or revocation. Whenever any of the conditions of the third preceding section shall be violated, or whenever the council of the city or town or city acting under special charter shall by a majority vote direct it, or whenever there shall be filed with the county auditor a verified petition, signed by a majority of the voters of the said city, town, or city acting under special charter, or county, as the case may be, as shown by the last general election, requesting it, then the bar to proceedings as provided in the second and third preceding sections shall cease to operate, and the persons engaged in the sale of intoxicating liquors shall be liable to all of the penalties provided in this chapter. [25 G. A., ch. 62, § 19.] [28 G. A., ch. 78, § 1.]

This section does not provide for any action by the board of supervisors with reference to a petition to remove the bar to the enforcement of the prohibitory liquor law which has been declared by the board in determining the sufficiency of the general petition of consent in the county. *Meyer v. Hobson*, 116-349.

The board of supervisors is neither permitted nor required to pass upon the sufficiency of the revocation. The filing thereof *ipso facto* removes the bar. *McConkie v. Remley*, 119-512.

There is no provision for the revocation of the consent of an adjoining property owner. No revocation of consent will be effectual during the annual period for which consent has been given but it may be effectual as to the succeeding annual period. *Kane v. Grady*, 123-260.

The sureties on the bond may be liable for unlawful sales, although the seller, purporting to act under the mulct law, has not filed the required consent of the adjoining property owners. *Breeding v. Jordan*, 115-560.

SEC. 2452. False signatures—time of signing.

The provision of Code § 2452 that every general statement of consent shall be accompanied by the affidavit of some reputable person, showing that said person

personally witnessed the signing of each name appearing thereon, and making any false statement contained in said affidavit punishable as perjury, does not impose

upon the board the duty of determining the sufficiency and truthfulness of such affidavits where it is admitted that the statement of consent is signed by the genuine signatures of a sufficient number of persons qualified to sign it. *In re Canvass of Statement of Consent, etc.*, 120-680.

The requirement that the signatures to the general statement shall show the voting precinct of the signers is not applicable to a written withdrawal of signatures by those who have already signed. *Dye v. Augur*, 110 N. W. 323.

SEC. 2455. Additional taxes and regulations.

The bond required by Code § 2448, Par. 3, does not cover payments required to be made by the city ordinance. *Ottumwa v. Hodge*, 112-430.

A city has no authority to provide by ordinance for the punishment of the act of keeping a saloon open on election day, as prohibited in Code § 2448. Such provision

would be inconsistent with the criminal laws of the state. *Iowa City v. McInnerny*, 114-586.

The mulct tax required to be paid by one selling intoxicating liquors under the mulct law is a tax. *Ahlers v. Estherville*, 130-272.

SEC. 2461-a. "Bootlegger" defined. Any person who shall, by himself, or his employe, servant or agent, for himself or any person, company or corporation, keep or carry around on his person, or in a vehicle, or leave in a place for another to secure, any intoxicating liquor as herein defined, with intent to sell or dispose of the same by gift or otherwise, in violation of law, shall be termed a bootlegger. [30 G. A., ch. 84, § 1.]

SEC. 2461-b. Penalty. Every such bootlegger may be restrained by injunction from doing or continuing to do any of the acts prohibited by law, and all the proceedings for injunctions, temporary and permanent, and for fines and costs for violation of same, as defined by law, shall be applicable to such person, company or corporation, and the fact that an offender has no known or permanent place of business or base of supplies, or quits the business after the commencement of an action shall not prevent a temporary or permanent injunction, as the case may be, from issuing. [30 G. A., ch. 84, § 2.]

SEC. 2461-c. Annual mulct tax—quarterly installments. Every person, partnership or corporation that shall engage in the business of holding intoxicating liquors in store and collecting for the owner thereof the purchase price of said liquors from those to whom they have been conditionally sold or from those not authorized by law to sell the same, shall pay to the treasurer of the county where the business is carried on an annual mulct tax of six hundred dollars in quarterly installments on the first day of January, of April, of July, and of October; and such tax shall be paid for each separate office or place where such business is carried on, and all the provisions of the law relating to the levying, collecting and enforcing of what is known as the mulct tax shall apply and govern in the levying and collecting of the tax herein provided for so far as applicable. [32 G. A., ch. 123, § 1.]

SEC. 2461-d. First quarter payable in advance. No person, partnership or corporation shall engage in the business described in section one of this act without first paying the tax herein required for the quarter during which such business is carried on; and when the tax is so paid it shall go into the general fund of the county collecting the same. [32 G. A., ch. 123, § 2.]

SEC. 2461-e. Sale of intoxicants near military reservations—penalty. No person shall open, maintain or conduct any shop or other place for the sale of wine, beer or any other intoxicating liquors, or sell the same at any place within a distance of one mile from any permanent military post or reservation established by the United States within the state of Iowa; and any person violating the provisions of this section shall be

punished by a fine not to exceed fifty dollars for each offense, or by imprisonment in the county jail for a term not to exceed thirty days, or by both such fine and imprisonment. [32 G. A., ch. 124.]

CHAPTER 7.

OF FIRE COMPANIES.

SECTION 2467. Removal of fire apparatus. No person shall remove any engine or other apparatus for the extinguishment of fire from the house or other place where it is kept or deposited, except in time of fire or alarm thereof, unless authorized so to do by the president, director or foreman of the company to whom the same shall belong. Any person violating the provisions of this section shall be guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars (\$100.00), or by imprisonment in the county jail not exceeding thirty (30) days. [C., '73, § 1565; R., § 1767.] [32 G. A., ch. 125, § 1.]

SEC. 2468. False alarms. No person or persons shall cause or give a false alarm of fire, by setting fire to any combustible material, or by crying or sounding an alarm, or by any other means, without cause. Any person violating the provisions of this section, shall be guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars (\$100.) or by imprisonment in the county jail not exceeding thirty (30) days. [C., '73, § 1566; R., § 1768.] [32 G. A., ch. 125, § 2.]

CHAPTER 8.

OF THE BUREAU OF LABOR STATISTICS.

SECTION 2469. Commissioner. The bureau of labor statistics shall be under the control of a commissioner, biennially appointed by the governor by and with the advice and consent of the executive council, whose term of office shall commence on the first day of April in each odd-numbered year and continue for two years, and until his successor is appointed and qualified. He may be removed for cause by the governor, with the advice of the executive council, record thereof being made in his office; any vacancy shall be filled in the same manner as the original appointment. He shall give bonds in the sum of two thousand dollars with sureties to be approved by the governor, conditioned for the faithful discharge of the duties of his office, and take the oath prescribed by law. He shall have an office in the capitol, safely keep all records, papers, documents, correspondence, and other property pertaining to or coming into his hands by virtue of his office, and deliver the same to his successor, except as hereinafter provided. Provided, however, that the term of office of the labor commissioner which shall commence on the first day of April, 1906, shall expire on the 31st day of March, 1907. [20 G. A., ch. 132, §§ 1-4.] [31 G. A., ch. 102, § 1.]

SEC. 2470. Duties—report. The duties of said commissioner shall be to collect, assort, systematize and present in biennial reports to the governor statistical details relating to all departments of labor in the state, especially in its relations to the commercial, social, educational and sanitary conditions of the laboring classes, the means of escape from, and the

protection of life and health in factories, the employment of children, the number of hours of labor exacted from them and from women, and to the permanent prosperity of the mechanical, manufacturing and productive industries of the state; and he shall, as fully as practicable, collect such information and reliable reports from each county in the state, the amount and condition of the mechanical and manufacturing interests, the value and location of the various manufacturing and coal productions of the state, also sites offering natural or acquired advantages for the profitable location and operation of different branches of industry; he shall, by correspondence with interested parties in other parts of the United States, impart to them such information as may tend to induce the location of mechanical and producing plants within the state, together with such other information as shall tend to increase the productions, and consequent employment of producers; and in said biennial report he shall give a statement of the business of the bureau since the last regular report, and shall compile and publish therein such information as may be considered of value to the industrial interests of the state, the number of laborers and mechanics employed, the number of apprentices in each trade, with the nativity of such laborers, mechanics' and apprentices' wages earned, the savings from the same, with age and sex of laborers employed, the number and character of accidents, the sanitary condition of institutions where labor is employed, the restrictions, if any, which are put upon apprentices when indentured, the proportion of married laborers and mechanics who live in rented houses, with the average annual rental, and the value of property owned by laborers and mechanics; and he shall include in such report what progress has been made with schools now in operation for the instruction of students in the mechanic arts, and what systems have been found most practical, with details thereof. Such report shall not contain more than six hundred printed pages, and shall be of the number, and distributed in the manner, provided by law. He shall make a report to the governor during the year 1906, and biennially thereafter. The report for the year 1906 shall cover the period only from the date of his last preceding biennial report. [20 G. A., ch. 132, § 5.] [29 G. A., ch. 97, § 1.] [31 G. A., ch. 102, § 2.]

SEC. 2471. Power to secure evidence—witness fees—how paid. The commissioner of the bureau of labor statistics shall have the power to issue subpoenas, administer oaths and take testimony in all matters relating to the duties herein required by said bureau, said testimony to be taken in some suitable place in the vicinity to which testimony is applicable. Witnesses subpoenaed and testifying before the commissioner of the bureau shall be paid the same fees as witnesses before a justice's court, such payment to be made out of the general funds of the state on voucher by the commissioner, but such expense for witnesses shall not exceed one hundred dollars annually. Any person duly subpoenaed under the provisions of this section, who shall wilfully neglect or refuse to attend or testify at the time and place named in the subpoena, shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any court of competent jurisdiction, shall be punished by a fine not exceeding fifty dollars and costs of prosecution, or by imprisonment in the county jail not exceeding thirty days: *provided*, however, that no witness shall be compelled to go outside the county in which he resides to testify. [26 G. A., ch. 86, § 2; 20 G. A., ch. 132, § 6.] [29 G. A., ch. 97, § 2.]

SEC. 2472. Right to enter premises—violation or neglect—written notice—prosecution. The commissioner of the bureau of labor statistics shall have the power, upon the complaint of two or more persons, or upon

his failure to otherwise obtain information in accordance with the provisions of this chapter, to enter any factory or mill, workshop, mine, store, business house, public or private work, when the same is open or in operation, upon a request being made in writing, for the purpose of gathering facts and statistics such as are contemplated by this chapter, and to examine into the methods of protection from danger to employes, and the sanitary conditions in and around such buildings and places, and make a record thereof. If the commissioner shall learn of any violation of, or neglect to comply with the law in respect to the employment of children, or in respect to fire escapes, or the safety of employes, or for the preservation of health, he shall give written notice to the owner or person in charge of such factory or building, of such offense or neglect, and if the same is not remedied within sixty days after service of such notice, such officer shall give the county attorney of the county in which such factory or building is situated, written notice of the facts, whereupon that officer shall immediately institute the proper proceedings against the person guilty of such offense or neglect. And any owner or occupant of such factory or mill, workshop, mine, store, business house, public or private work, or any agent or employe of such owner or occupant, who shall refuse to allow any officer or employe of said bureau to so enter, or who shall hinder him, or in any way deter him from collecting information, shall be deemed guilty of a misdemeanor, and, upon conviction thereof before any court of competent jurisdiction, shall be punished by a fine of not exceeding one hundred dollars and costs of prosecution, or by imprisonment in the county jail not exceeding thirty days. [26 G. A., ch. 86, § 3.] [29 G. A., ch. 97, § 3.]

Statements of the labor commissioner with reference to an examination of machinery cannot be shown for the purpose of negating defects therein where it does

not appear that the commissioner has made any examination. *Brusseau v. Lower Brick Co.*, 133-245.

SEC. 2477. Repeal—compensation and expenses. That section twenty-four hundred and seventy-seven (2477) of the code be and the same is hereby repealed and the following enacted in lieu thereof:

"The commissioner of the bureau of labor statistics shall receive a salary of eighteen hundred dollars per annum and shall be allowed a deputy at a salary of fifteen hundred dollars per annum payable monthly; he shall also be allowed one factory inspector at a salary of one hundred dollars per month, one office clerk at a salary to be fixed by the committee on retrenchment and reform. The appointment by the commissioner of such factory inspector shall be subject to the approval of the executive council. Said commissioner shall be allowed necessary postage, stationery and office expenses; the said salaries and expenses shall be paid as the salaries and expenses of other state officers are provided for. The commissioner or any officer or employe of the bureau of labor statistics shall be allowed, in addition to his salary, his actual and necessary traveling expenses while in the performance of his duties, said expenses to be audited by the executive council and paid out of the general fund of the state upon a voucher verified by the commissioner or his deputy; but the total of the expense for the officers and employes of said bureau, other than the salaries of the commissioner, his deputy, the factory inspector and clerk, shall not exceed fifteen hundred dollars per annum." [30 G. A., ch. 85.] [32 G. A., chs. 126, 127.]

SEC. 2477-a. Child labor in factories, mills, etc.—age limitation. No person under fourteen years of age shall be employed with or without wages or compensation in any mine, manufacturing establishment, factory,

mill, shop, laundry, slaughter house or packing house, or in any store or mercantile establishment where more than eight persons are employed, or in the operation of any freight or passenger elevator. [31 G. A., ch. 103, § 1.]

SEC. 2477-b. Where life and health are endangered—age limitation. No person under sixteen years of age shall be employed at any work or occupation by which, by reason of its nature or the place of employment, the health of such person may be injured, or his morals depraved, or at any work in which the handling or use of gunpowder, dynamite or other like explosive is required, and no female under sixteen years of age shall be employed in any capacity where the duties of such employment compel her to remain constantly standing. [31 G. A., ch. 103, § 2.]

SEC. 2477-c. Hours of labor—noon intermission. No person under sixteen years of age shall be employed at any of the places or in any of the occupations recited in section 1 hereof before the hour of six o'clock in the morning or after the hour of nine o'clock in the evening, and if such person is employed exceeding five hours of each day, a noon intermission of not less than thirty minutes shall be given between the hours of eleven and one o'clock, and such person shall not be employed more than ten hours in any one day, exclusive of the noon intermission, but the provisions of this section shall not apply to persons employed in husking sheds or other places connected with canning factories where vegetables or grain are prepared for canning and in which no machinery is operated. [31 G. A., ch. 103, § 3.]

SEC. 2477-d. List posted. Every person, firm or corporation having in its employ, at any of the places or in any of the occupations recited in section 1 of this act, any persons under sixteen years of age, shall cause to be posted at some conspicuous location at the place of such employment, and where same shall be accessible to inspection at all times during business hours, a list of the names of such persons, giving after each name, the date of the birth of such person and the date when employed. [31 G. A., ch. 103, § 4.]

SEC. 2477-e. False statements—other violations—penalty. Any parent, guardian or other person, who having under his control any person under sixteen years of age causes or permits said person to work or be employed in violation of the provisions of this act, or any person making, certifying to, or causing to be made or certified to, any statement, certificate or other paper for the purpose of procuring the employment of any person in violation of the provisions of this act, or who makes, files, executes or delivers any such statement, certificate or other paper containing any false statement for the purpose of procuring the employment of any person in violation of this act, or for the purpose of concealing the violation of this act in such employment, and every person, firm or corporation, or the agent, manager, superintendent, or officer of any person, firm or corporation, whether for himself or such person, firm or corporation, either by himself or acting through any agent, foreman, superintendent or manager, who knowingly employs any person or permits any person to be employed in violation of the provisions of this act, or who shall refuse to allow any authorized officer or person to inspect any place of business under the provisions of this act, if demand is made therefor at any time during business hours, or who shall willfully obstruct such officer or person while making such inspection, or who shall fail to keep posted the lists containing the names of persons employed under sixteen years of age and other information as required by this act, or who shall knowingly insert any false statement in such list, or who violates any other provision of this act, shall be deemed guilty

of a misdemeanor, and upon being found guilty thereof, shall be fined not to exceed one hundred dollars or be imprisoned in the county jail not to exceed thirty days. [31 G. A., ch. 103, § 5.]

SEC. 2477-f. Enforcement. It shall be the duty of the commissioner of the bureau of labor statistics to enforce the provisions of this act, and such commissioner and his deputies, factory inspectors, assistants and other persons authorized by him in writing, state mine inspectors, and county attorneys, mayors, chiefs of police and police officers, acting under their written directions, city and town marshals, sheriffs and their deputies within the territories where they exercise their official functions, and any person having authority therefor in writing from the judge of a court of record within the territory over which such judge has jurisdiction, shall have authority to visit any of the places enumerated in section 1 of this act, and make an inspection thereof to ascertain if any of the provisions of this act are violated or any person unlawfully employed thereat, and such persons shall not be interfered with or prevented from asking questions of any persons found at the place being inspected by them with reference to the provisions of this act. It shall be the duty of the county attorney to investigate all complaints made to him of the violation of this act, and to attend and prosecute at the trial of all cases for its violation upon any information that may be filed within his county. [31 G. A., ch. 103, § 6.]

SEC. 2477-g. Repeal—acts in conflict. All acts and parts of acts in conflict with the provisions of this act are hereby repealed. [31 G. A., ch. 103, § 7.]

SEC. 2477-h. Failure to procure employment—fee returned. Every person, firm or corporation who shall agree or promise, or who shall advertise through the public press, or by letter, to furnish employment or situations to any person or persons, and in pursuance of such advertisement, agreement or promise, shall receive any money, personal property or other valuable thing whatsoever, and who shall fail to procure for such person or persons acceptable situations or employment as agreed upon, within the time stated, or agreed upon, or if no time be specified then within a reasonable time, shall upon demand return all such money, personal property or valuable consideration of whatever character, except an amount not to exceed one dollar to be charged as a filing fee. [32 G. A., ch. 128, § 1.]

SEC. 2477-i. Copy of application or agreement furnished applicant. It shall be unlawful for any person, firm or corporation to receive any application for employment from, or enter into any agreement with, any person to furnish or procure for said person any employment unless there is delivered to any such person making such application or contract at the time of the making thereof a true and full copy of such application or agreement, which application or agreement shall specify the fee or consideration to be paid by the person seeking employment. [32 G. A., ch. 128, § 2.]

SEC. 2477-j. Division of fees between employment bureau and employer prohibited. It shall be unlawful for any person, firm or corporation or any person employed or authorized by such person, firm or corporation to hire or discharge employes, to receive any part of any fee or any percentage of wages or any compensation of any kind whatever, that is agreed upon to be paid by any employe of said person, firm or corporation to any employment bureau or agency for services rendered to any such employe in procuring for him employment with said person, firm or corporation. [32 G. A., ch. 128, § 3.]

SEC. 2477-k. Investigation by labor commissioner. The commissioner of the bureau of labor statistics, or his deputy, shall have authority

to examine at any time the records, books and any papers relating in any way to the conduct of any employment agency or bureau within the state, and must investigate any complaint made against any such employment agency or bureau, and if any violations of law are found he shall at once file or cause to be filed an information against any person, firm or corporation guilty of such violation of law. [32 G. A., ch. 128, § 4.]

SEC. 2477-1. Penalty. Any person, firm or corporation violating any of the provisions of this act, or who shall refuse access to records, books or other papers relative to the conduct of such agency or bureau, to any person having authority to examine same, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars (\$100.00), or imprisonment in the county jail not to exceed thirty days. [32 G. A., ch. 128, § 5.]

CHAPTER 9.

OF MINES AND MINING.

SECTION 2479-a. Repeal by striking out—board of examiners. That chapter nine (9), title twelve (12) of the code be and the same is hereby amended by striking out section twenty-four hundred and seventy-nine (2479) and inserting in lieu thereof the following:

The executive council shall appoint a board of five examiners consisting of two practical miners and two mine operators, all holding certificates of competency as mine foremen, and one mining engineer, each of whom shall have had at least five years actual experience in his profession immediately preceding his appointment, who shall hold office for a term of two years. The members of said board shall qualify by taking oath to perform the duties devolving upon them fairly, faithfully and impartially, without fear or favor, uninfluenced by personal or political considerations. No member of said board shall be interested in or connected with any school, scheme, plan or device having for its object the preparation, education or instruction of persons in the knowledge required of applicants for certificates of competency. Any member of said board shall be summarily removed from office by the executive council, upon due notice and hearing, for violation of the law, misfeasance or malfeasance in the performance of his duties, or for other sufficient cause, and his successor shall thereupon be appointed by the said executive council for the unexpired term. [29 G. A., ch. 98, § 1.] [30 G. A., ch. 86.]

SEC. 2482. Inspection districts—powers and duties of inspector. The governor shall divide the state into three inspection districts, and assign one inspector to each district, who shall devote his entire time to his work, and, before entering thereon, procure, to be paid for by and to belong to the state, all instruments necessary for the discharge of his duties, including a complete set of standards, balances and other means of adjustment in testing any and all apparatus used in weighing, and shall examine, test and adjust, as often as occasion demands, all scales, beams and other apparatus used in weighing coal at the mines. He shall examine all the mines in his district as often as the time will permit, which examination shall be made at least once in every six (6) months of all mines having an average output of fifty tons or more of coal per day, keep a record of the inspections made, showing date, the condition in which the mine is found, the extent and manner in which the laws relating to the government of mines and their opera-

tion are observed and obeyed, the progress made in improvements for the better security to health and life, number of accidents happening and their character, the number employed, and such other and further matters as may be of public interest and connected with the mining industries of the state. He shall have the right at all reasonable times, by night or by day, to enter any mine in his district, or any district to which he may be sent by the governor for the purpose of ascertaining its condition, and the manner of its operation, by making personal examination and inquiry in relation thereto, but not so as to unnecessarily obstruct or impede the working of the mines; and to this end the mine owner or person in charge shall furnish such mine inspector all assistance in his power, and forthwith, upon the happening of any accident to any miner in or about the mine by reason of the working thereof which causes loss of life, shall report the same, by mail or otherwise, to the mine inspector and the coroner of the county. Each inspector shall have and maintain, at some suitable place in his district, to be approved by the governor, an office, and shall reside in the district and remain therein, unless otherwise engaged in the conduct of his official duties. [22 G. A., ch. 54, § 2; 21 G. A., ch. 140, §§ 1, 2, 6; 20 G. A., ch. 21, §§ 1, 2, 6.] [29 G. A., ch. 99, § 1.]

SEC. 2483. General office—report to governor—compensation. The three inspectors shall maintain a general office in the capitol, and keep therein all records, correspondence, documents, apparatus or other property pertaining to their office; they shall meet in said office biennially on or before August fifteenth preceding the regular session of the general assembly, and make report to the governor of their official doings, including therein all matters which by this chapter are specially committed to their charge, adding such suggestion as to needed future legislation as in their opinion may be important. Each inspector shall receive for his services the sum of eighteen hundred dollars per annum and actual traveling expenses, not exceeding seven hundred and fifty dollars yearly, the traveling expenses to be paid quarterly upon an itemized statement duly verified and audited by the state auditor. [22 G. A., ch. 52, § 1; 21 G. A., ch. 140, §§ 3, 4; 20 G. A., ch. 21, §§ 3, 4.] [28 G. A., ch. 79, § 1.] [32 G. A., ch. 129.]

SEC. 2485. Maps of mines—surveys—double damages.

The statute authorizing the recovery of double damages occasioned by the removal of coal from the land of an owner without his authority is not unconstitutional. *Mier v. Phillips Fuel Co.*, 130-570.

Evidence in a particular case considered

and held sufficient to show such trespass as a basis for the recovery of double damages; but held that evidence as to removal of coal from adjoining land was irrelevant and should not have been admitted. *Ibid.*

SEC. 2488. Ventilation. The owner or person in charge of any mine shall provide and maintain, whether the mine be operated by shaft, slope or drift, an amount of ventilation of not less than one hundred cubic feet of air per minute for each person, nor less than five hundred cubic feet of air per minute for each mule or horse employed therein, which shall be so circulated throughout the mines as to dilute, render harmless and expel all noxious and poisonous gases in all working parts of the same; [But in no case shall the air current be a greater distance than sixty feet from the working face, except when making cross cuts in entries for an air-course; then in that case the distance shall not be greater than seventy feet, provided, however, that the district mine inspector may in writing grant permission to go beyond the limit herein mentioned when the conditions are such in a special case as to require it. When the air current is carried to the working face of the rooms, in double-room mining, such air current shall be treated as that contemplated in this act.] to do this, artificial means

by exhaust-steam, forcing-fans, furnaces, or other contrivances of sufficient capacity and power, shall be kept in operation. If a furnace is used, it shall be so constructed, by lining the up-cast for a sufficient distance with incombustible material, that fire cannot be communicated to any part of the works. When the mine inspector shall find the air insufficient, or the men working under unsafe conditions, he shall at once give notice to the mine owner or his agent or person in charge, and upon failure to make the necessary changes within a reasonable time, to be fixed by him, he may order the men out, to remain out until the mine is put in proper condition. [22 G. A., ch. 56, § 3; 20 G. A., ch. 21, § 10.] [27 G. A., ch. 59, § 1.]

Failure of a mine owner to so far remove or dilute noxious gases as to render the mine a safe place for the miners to

work will render him liable. *Mosgrove v. Zimbleman Coal Co.*, 110-169.

SEC. 2489. Safety appliances—competent engineers—boys not employed.

Whether a roof which is in a dangerous condition should be propped by the miner or by the mine owner is to be determined by the jury with reference to whether it is the roof of a room under the charge of the miner, or of an entry for the safety of which the mine owner is responsible. *Taylor v. Star Coal Co.*, 110-40.

The requirement that safety gates shall be maintained at the entrance to a mine shaft contemplates the guarding of the shaft opening so as to prevent involuntary entrance and not an absolute and complete covering of the shaft. *Jacobson v. Smith*, 123-263.

An employe engaged at work on top

of the cage in a mine shaft cannot complain of the negligence of the mine owner in not providing the cage with a cover. *Ibid.*

The superintendent of a mine having the authority to provide an engineer as a substitute for the regular engineer in charge of the hoisting machinery and power, held that the superintendent himself attempting to operate such machinery and power in the absence of the engineer rendered the employer liable for damages from his own incompetency to discharge such duty. *Beresford v. American Coal Co.*, 124-34.

RELATING TO EXAMINATION OF MINE FOREMEN, PIT BOSSES AND HOISTING ENGINEERS.

SEC. 2489-a. Certificate of competency. That from and after January 1st, 1901, it shall be unlawful for any person to discharge, or attempt to discharge, any of the duties of mine foreman, pit boss, or hoisting engineer at any coal mine, whose daily output is in excess of twenty-five tons, unless he shall hold a certificate of competency for such position as provided in this act. But in case of the discharge, resignation, or disability of any person lawfully performing such duties the owner, agent, operator, or managing officer of said mine shall have a reasonable time within which to secure the services of a certificated person to take the place of the one so discharged, resigned, or disabled; and during such time a competent and capable person, whether certificated as provided in this act or not, may be temporarily employed to perform such services. [28 G. A., ch. 82, § 1.]

SEC. 2489-b. How procured. Any person may secure the certificate of competency herein provided for by appearing before the board created by section twenty-four hundred and seventy-nine (2479) of the code for the examination of state mine inspectors, and submitting to such examination as to his qualifications, or producing such evidence of service, as required by this act. [28 G. A., ch. 82, § 2.]

SEC. 2489-c. Board of examiners to adopt rules—compensation. The board of examiners referred to in the last preceding section shall meet at such times and places, shall adopt such rules, conditions, and regulations, and shall prescribe and conduct such examinations as shall be more effi-

cient to give effect to the spirit and intent of this act. The members of said board shall each receive the sum of five dollars per day for every day actually employed in the discharge of the duties imposed herein, together with their actual expenses incurred in the performance of such duties, which expenses shall be itemized and verified as provided by section 2480 of the code, but they shall not be allowed compensation for more than seventy days in any one year. [28 G. A., ch. 82, § 3.]

SEC. 2489-d. Certificate of competency—how issued. The certificate of competency herein provided shall be issued (1) to any person who shall satisfactorily pass such examination, written or oral, as may be prescribed by said board; (2) to any person who shall produce satisfactory evidence that he has for a period of four years immediately preceding the examination, continuously and capably performed the duties of mine foreman, pit boss, or hoisting engineer as the case may be. [28 G. A., ch. 82, § 4.]

SEC. 2489-e. Fees—certificates recorded. Every person applying for a certificate under this act shall pay to said examining board a fee of two dollars, and every successful applicant shall pay to said board an additional fee of two dollars; all of said fees to be accounted for and covered into the state treasury. Each certificate issued under this act shall be recorded in the office of the examining board, and shall show the name, age, residence, and years of experience of the person to whom it was issued. [28 G. A., ch. 82, § 5.]

SEC. 2489-f. Penalty. No owner, agent, operator, or managing officer of any coal mine to which this act applies shall employ any mine foreman, pit boss, or hoisting engineer who does not hold the certificate herein contemplated. And any person violating any of the provisions of this act shall be punished by fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both fine and imprisonment, in the discretion of the court. [28 G. A., ch. 82, § 6.]

SEC. 2490. Scales and weighers—records—payment in money. The owner or operator shall, if the miners are paid by weight, provide the mine with suitable scales of standard make, and require the person selected to weigh the coal delivered from the mine to be sworn before some person authorized to administer oaths, to the effect that he will keep the scales correctly and truly balanced, and accurately weigh and a true record keep of each car delivered, which oath, with that of the check-weighman hereinafter provided for, shall be conspicuously displayed with record of weights at the place of weighing, which record shall carry the account of each miner by itself, be open to the inspection at all proper times of miners and all others having a pecuniary interest in the mine, and all damages sustained on account of a failure to weigh and credit to the proper person any coal mined shall be recoverable in an action brought within two years from the time the right thereto accrued, and a knowledge of a violation of this provision by the miner shall not be a defense thereto. The miners employed and working in any mine may furnish a competent check-weighman, who, before entering upon his duties, shall make and subscribe to an oath to the effect that he is duly qualified and will faithfully discharge his duties as check-weighman, and he shall at all proper times have access to and the right to examine the scales, machinery or apparatus used in weighing and seeing all measures and weights of coal mined and the accounts kept thereof; but not more than one person on the part of the miners collectively shall have this right, and such examination and inspection shall be so made as to create no unnecessary interference with the use of such scales, machinery or apparatus. The owner or agent shall, where the miner is by contract

to be paid by the ton or other quantity, unless otherwise agreed upon in writing, weigh the coal before screening, and the miner shall be credited at the rate of eighty pounds to the bushel and two thousand pounds to the ton, but no payment shall be demanded for sulphur, rock, slate, black-jack, dirt or other impurities which may be loaded or found with the coal. Where ten or more miners are employed, such owner or agent shall not sell, give, deliver or issue, directly or indirectly, to any person employed, in payment for labor due or as advances for labor to be performed, any script, check, draft, order or other evidence of indebtedness payable or redeemable otherwise than in money at the face value, and he shall not compel or in any manner endeavor to coerce any employe to purchase goods or supplies from any particular person, firm, company or corporation; but all wages shall be paid in money upon demand semi-monthly, by paying for those earned during the first fifteen days of each month not later than the first Saturday after the twentieth of said month, and for those earned after the fifteenth of each month not later than the first Saturday after the fifth of the succeeding month. A failure or refusal to make payment within five days after demand shall entitle the laborer to recover the amount due him, and one dollar per day additional for each day such payment is neglected or refused, not exceeding the sum due, and in any action therefor the court shall tax as a part of the costs a reasonable attorney fee to plaintiff's attorney. [25 G. A., ch. 98; 22 G. A., ch. 53, §§ 1-3; 22 G. A., ch. 54, §§ 1, 3; 22 G. A., ch. 55, § 1.] [28 G. A., ch. 80, § 1.] [28 G. A., ch. 81, § 1.]

Section applied. *Mitchell v. Burwell*, 110-10.

SEC. 2491. Penalties.

Where a miner was injured by the fall of slate in an entry, held that the question as to whose duty it was to inspect and re-

pair was to be determined in view of the custom and usage in the business. *Thayer v. Smoky Hollow Coal Co.*, 121-121.

SEC. 2494. Penalty. Any person, firm or corporation, either by themselves, agents or employes, selling or offering to sell for illuminating purposes in any mine in this state any adulterated or impure oil, or oil not recognized by the state board of health as suitable for illuminating purposes as contemplated in this chapter, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty-five dollars nor more than one hundred dollars for each offense; and any mine owner or operator or employe of such owner or operator who shall knowingly use, or any mine operator who shall knowingly permit to be used, for illuminating purposes in any mine in this state any impure or adulterated oil, oil that has not been inspected and approved by an inspector, or any oil the use of which is forbidden by this chapter, shall, upon conviction thereof, be fined not less than five dollars nor more than twenty-five dollars. [26 G. A., ch. 92, § 2.] [27 G. A., ch. 60, § 1.]

SEC. 2495-a. Repeal—testing oil. That section twenty-four hundred and ninety-five (2495) be stricken out and the following substituted therefor:

It shall be the duty of an inspector of petroleum products to inspect and test all oil offered for sale, sold, or used for illuminating purposes in coal mines in this state, and for such purpose he may enter upon the premises of any person. If upon test and examination the oil shall meet the requirements made and provided by the state board of health, he shall brand, over his own official signature and date, the barrel or vessel holding the same with the words "Approved for illuminating coal mines." Should it fail to meet such requirements, he shall brand it over his official signature and date, "Rejected for illuminating coal mines." All inspection shall be made

within this state, and paid for by the person for whom the inspection is made at the rate of ten cents per barrel or vessel, which charge shall be a lien on the oil inspected, and be collected by the inspector. Each inspector shall be governed in all things respecting his record, compensation, expenses, and returns to the treasurer of state and secretary of state as provided in sections twenty-five hundred and six and twenty-five hundred and seven of the code. It shall be the duty of the inspector whenever he has good reason to believe that oil is being sold or used in violation of the provisions of this chapter to make complaint to the county attorney of the county in which the offense was committed, who shall forthwith commence proceedings against the offender in any court of competent jurisdiction. All reasonable expenses for analyzing suspected oil shall be paid by the owner of the oil whenever it is found that he is selling or offering to sell impure oil in violation of the provisions of this chapter. Such expenses may be recovered in a civil action, and in criminal proceedings such expenses shall be taxed as part of the costs. [27 G. A., ch. 60, § 2.]

SEC. 2495-b. Shot examiners—proof of competency. In all mines, where the coal is blasted from the solid, competent persons shall be employed to examine all shots, before they are charged. Said examiners to have the power to prohibit the charging and firing of any shot which, in their judgment is unsafe. Before entering upon the discharge of their duties, said examiners shall give proof of their competency to the state mine inspector of the district in which the mine, where they are employed, is located, and said inspector shall certify to the operator of each mine the persons who have given proof of their competency to act in the capacity of shot examiners. The state mine inspector to have the power to refuse to give permission to any person to act as shot examiner who, in his judgment, is not sufficiently competent; or he may revoke the permission granted, should it appear that a shot examiner is negligent, or careless in the performance of his work. [29 G. A., ch. 100, § 1.]

SEC. 2496-a. Transportation of powder into coal mines. That no person, firm or corporation, shall be permitted to transport, carry or convey by any electrical process whatever, any powder or other explosives, into any coal mine where twenty or more persons are employed therein until after the coal miners and other employes have ceased their work and have departed from the mines. [32 G. A., ch. 130, § 1.]

SEC. 2496-b. Storage of powder—what permitted. No operator or other person in charge of any coal mine, shall suffer or permit under any circumstances the storing of powder, or other explosives, in any coal mine except as follows: Each miner shall be permitted to have in his separate and individual possession at one time not more than two kegs containing twenty-five pounds of powder each, and other explosives sufficient for one day's use. Such powder, or other explosives, shall be kept by the miner in a wooden or metallic box or boxes securely locked, and said boxes shall be kept at a reasonable distance from the track; nor shall black powder and high explosives be kept in the same box. [32 G. A., ch. 130, § 2.]

SEC. 2496-c. Supply for following day—where deposited. It shall not be construed as storing powder, as defined in section two hereof, to deposit the powder, or other explosives, at the end of the electrical or mechanical haulage at the face of the mine for the following day's use; provided, that it is transported, conveyed or deposited in conformity with the provisions of section one hereof. [32 G. A., ch. 130, § 3.]

SEC. 2496-d. Transportation and delivery—by whom done. The transportation and delivery of all powder and other explosives in said coal

mines shall be done by the operator or by men employed by him for that purpose. [32 G. A., ch. 130, § 4.]

SEC. 2496-e. Penalty. Any person, firm or corporation violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be fined in any sum not exceeding one hundred dollars, or be imprisoned in the county jail not exceeding thirty days. [32 G. A., ch. 130, § 5.]

CHAPTER 10.

OF THE GEOLOGICAL SURVEY.

SECTION 2500. Repeal—detailed reports—co-operation with other surveys. That sections twenty-five hundred (2500), twenty-five hundred and one (2501) and twenty-five hundred and two (2502) of the code be and the same are hereby repealed and there is hereby enacted as a substitute therefor the following:

He shall make detailed maps and reports of counties and districts as fast as the work is completed, which shall embrace such geological, mineralogical, topographical and scientific details as are necessary to make complete records thereof, and, when the information obtained warrants it, the results of any special investigation made by him may be brought together in a report for publication, accompanied by proper illustrations and diagrams. He shall co-operate with the United States geological survey and with adjoining state surveys in the making of topographic maps and the study of geologic problems of the state when in the opinion of the geological board such co-operation will result in profit to the state. He shall, before the first day of January of each year, make to the geological board a full report of the work in the preceding year, together with such minor reports and papers as may be considered desirable for publication. 31 G. A., ch. 104, §§ 1, 2.]

SEC. 2501. Annual report—bulletins. The annual report, together with bulletins of educational and scientific value, and special bulletins containing information necessary for the immediate use of the people at large, shall be published by the state under the direction of the board, and disposed of as other published reports of state officers when no special provision is made, but the copies remaining in the control of the board after such distribution, after retaining a sufficient number to supply probable future demands, shall be sold to persons making application therefor at the cost price of publication, the money thus accruing to be turned into the treasury of the state. [31 G. A., ch. 104, § 3.]

SEC. 2502. Expenses. The members of the board shall be allowed actual expenses incurred in attending to the duties assigned to them by this chapter. Postage, stationery and office expenses of the state geologist shall be paid by the state, as are the expenses of the other state officers but all other expenses of the survey shall be audited and allowed by the board; and the entire expenses provided for under this chapter, aside from the above exception relating to office supplies and expenses, and that of the publication and distribution of reports and bulletins, shall not exceed the sum of eight thousand dollars per annum, which amount is hereby appropriated annually, to be paid out on warrants of the state auditor on the presentation of bills duly audited and allowed as provided in this section. [31 G. A., ch. 104, § 4.]

CHAPTER 11.

OF INSPECTION OF PETROLEUM PRODUCTS.

SECTION 2503. Inspectors—chief inspector. The governor shall appoint inspectors of products of petroleum, not exceeding fourteen in number, one of whom shall be designated as chief inspector, who shall have general supervision of the inspection service of the state, except in the matter of making reports and the payment and receipts of fees. All differences arising in the inspection of oils shall be referred to the chief inspector and his decision of the question shall be final. The chief inspector shall make such recommendations to the state board of health as may be deemed necessary to improve the inspection service. He shall devote his time and service wholly to the inspection of oil and the duties of his office. Inspectors may appoint such deputies, helpers and branders as may be necessary in the proper discharge of their official duties, but such appointments before becoming effective must be submitted to, approved and confirmed, and their compensation fixed by the executive council as in their judgment may be necessary, equitable and just. Each inspector shall be a resident of the state, and not interested directly or indirectly in the manufacture or sale of products of petroleum. His term of office shall begin on the first day of July in each odd-numbered year. He shall give bond to the state in the penal sum of five thousand dollars, conditioned upon the faithful performance of his duties, with sureties who shall, in addition to the usual justification, make oath, entered on the bond, that they are not directly or indirectly interested in the manufacture or sale of products of petroleum for illuminating purposes, which bond shall be for the benefit of all persons injured through the failure of the inspector to perform his duties, and shall be filed with, and the sureties thereon approved by, the secretary of state. Provided however, that the term of office of the inspectors appointed during the year 1906 shall expire on the 30th day of June, 1907. [30 G. A., ch. 87, § 1.] [31 G. A., ch. 105, § 1.]

SEC. 2504. Regulations. The state board of health shall make rules and regulations for the inspection of petroleum products, for the government of inspectors, and prescribe the instruments and apparatus to be used. Such rules and regulations shall be approved by the governor, and, when so approved, shall be binding upon all inspectors. [30 G. A., ch. 87, § 2.]

SEC. 2505. Inspection—branding—fees—supplies. Each inspector shall be furnished, at reasonable expense to the state, with the necessary supplies, instruments and apparatus for testing, and shall promptly make inspection, and test and brand all illuminating oils kept for sale, and for such purpose may enter upon the premises of any person. He shall reject all oils for illuminating purposes which will emit a combustible vapor at a temperature of 105 degrees, standard Fahrenheit thermometer, closed test, not less than one-half pint of oil to be used in the flash test. If upon test and examination the oil shall meet the requirements, he shall brand over his official signature and date the barrel or package holding the same, "approved, flash test...degrees", inserting in the blank the number. Should it fail to meet the requirements, it shall be branded under his official signature and date, "rejected for illuminating purposes." All inspections shall be made within the state, and paid for by the person for whom the inspection is made, at the rate of ten cents per barrel, fifty-five gallons for this purpose constituting a barrel, which charge shall be a lien upon the oil inspected, and be collected by the inspector, reported and paid to the secretary of state, on or before the fifteenth day of each month. For the

purposes of this act, gasoline, benzine and naphtha shall be deemed illuminating oil. No gasoline shall be sold, given away or delivered to any person in this state until the package, cask, barrel or vessel containing the same has been plainly marked "gasoline" in such manner as the executive council may prescribe. There shall be no refund nor rebate of charges made or paid for inspection, except upon a duly verified certificate of the owner that the goods, for which such rebate is asked, have been disposed of outside of the state. Said certificate to be in such form as shall be prescribed by the secretary of state and shall be delivered to the inspector and attached to his monthly report. The expense of inspection shall be deducted from any rebate or refund so granted. Any person, firm, corporation or agent violating any of the provisions of this act shall be deemed guilty of a misdemeanor and punished accordingly. All necessary supplies, labels, instruments and apparatus as contemplated in this chapter, shall be purchased by the executive council, and shall be furnished to inspectors as needed by them, upon requisition therefor, made to the chief inspector, approved by him and forwarded to the executive council. Every person who receives products of petroleum for sale which have not been inspected as provided in this chapter, shall, within five days after the receipt thereof, notify the inspector of that inspection district that the same is in his possession; and to neglect so to do shall be deemed a misdemeanor. [30 G. A., ch. 87, § 3.]

The failure of the seller to label a vessel containing gasoline sold to a customer, as required by this section, held to constitute negligence *per se* so as to render the seller liable for injuries sustained by an infant

daughter of the purchaser in using the gasoline to start a fire, under the belief that it was the ordinary form of coal oil. *Ives v. Welden*, 114-476.

SEC. 2506. Record and report—reports from companies, agents, etc. Each inspector shall keep an accurate record of all oils inspected and branded, the number of gallons, the number and kind of barrels or packages, the date and number of gallons approved, the number rejected, the name of the person for whom inspection was made, and the amount of money received therefor, the necessary traveling expenses incurred, and the expenses incurred in prosecution, which record at all reasonable times shall be open to public inspection. A copy of this record duly verified under oath for the preceding month shall be filed with the secretary of state on or before the fifteenth day of each month, who shall examine said report and if found correct endorse his approval thereon, and certify the same to the executive council, and when approved by said council, the auditor of state shall issue his warrant upon the treasurer of state for the amount so approved and due the several inspectors, and no item of expense shall be allowed and paid not shown in such reports. It shall be the duty of all persons, firms or corporations, officers or agents thereof within the state, receiving any of the products of petroleum subject to inspection, to file with the secretary of state on or before the tenth day of each month, a certificate duly verified, in such form as shall be approved by the secretary of state, to cover the month preceding the one in which said report is made. Such report shall show the number of tanks or barrels, and if in tanks the tank number, of each product inspected for such person, firm, corporation, officer or agent, the amount of fees paid for such inspection, to whom paid, and, that the amounts so stated are all the products received by him or them which are subject to inspection during such period. For any failure to make the reports contemplated in this section the person, firm, corporation, officer, agent or employe shall be liable to a fine of not less than ten dollars nor more than one hundred dollars. [30 G. A., ch. 87, § 4.]

SEC. 2507. Compensation of inspectors—expenses. Each inspector shall be allowed as full compensation for his services all fees and commissions earned and collected by him up to fifty dollars per month, and twenty-five per cent of any sum collected in any one month in excess of fifty dollars, but in no case shall his compensation exceed one hundred dollars per month, except that the chief inspector shall be allowed twenty-five per cent. of any sum collected by him in any one month in excess of fifty dollars, up to and not exceeding one hundred and fifty dollars. Inspectors shall also be allowed such other sums necessarily and actually expended in the discharge of their official duties; and for necessary expenses incurred for prosecution of violation of the provisions of this chapter, and for necessary help in branding barrels. All money collected each month by inspectors, shall, on or before the fifteenth day of the following month, be paid to the secretary of state, and by him accounted for as other fees of his office. [30 G. A., ch. 87, § 5.]

Where an oil inspector dies after having rendered services for part of a month and his successor completes the service for that month, each is entitled to the maximum

salary for that part of a month during which he has served. *State v. Dyer*, 106-640.

SEC. 2508. Penalties—damages. If any person, company or corporation, or agent thereof, shall sell, or attempt to sell, any product of petroleum for illuminating purposes which has not been inspected and branded as in this chapter provided, or shall falsely brand any barrel or package containing such petroleum product, or shall refill with products of petroleum barrels or packages having the inspector's brand thereon, without erasing such brand and having the contents thereof inspected, and the barrel or package rebranded, or shall purchase, sell or dispose of any empty barrel or package without thoroughly removing the inspection brand, or shall knowingly or negligently sell or cause to be sold, or shall use or cause to be used, any product of petroleum mentioned in this chapter not inspected and tested, except as otherwise authorized herein; or if any person shall adulterate with any substance for the purpose of sale or use any product of petroleum to be used for illuminating purposes in such a manner as to render it dangerous, or shall sell or offer for sale, or use any product of petroleum for illuminating purposes, which will emit a combustible vapor at a temperature of less than 105 degrees, standard Fahrenheit thermometer, closed test, except as otherwise provided in this section for illuminating railway cars, boats and public conveyance, and except when the oils from which said gas or vapor is generated in closed reservoirs outside the building to be lighted thereby, and except the lighter products of petroleum when used in such lamps or apparatus which, having been submitted to the state board of health and having been examined and tested by said board shall be found to be safe for the use of the public and for street light by street lamps, shall be fined not less than ten dollars nor more than fifty dollars, or if any common carrier shall carry in any railway passenger, baggage, mail, or express car, street railway car, boat, stage coach, omnibus, or other means of public conveyance, or use or burn therein any oil or fluid, whether composed wholly or in part of petroleum or its products, which will ignite and burn at a temperature of 300 degrees Fahrenheit thermometer, open test, for lighting any lamp, vessel, or fixture of any kind, or boat or street railway car, stage coach or other means of public conveyance; or if any inspector shall falsely brand any package or barrel, or shall practice any fraud or deceit in office, or be guilty of any official misconduct or culpable negligence to the injury of another, or shall deal or have any pecuniary interest, directly or indirectly in any oils or fluids

sold for illuminating purposes while holding such office, he or such person, company, corporation or agent shall be fined not less than fifty dollars and shall be liable in a civil action for all damages which may be sustained on account thereof, and each such inspector shall be fined in a sum not less than ten dollars nor more than one thousand dollars, or imprisoned in the county jail not exceeding six months, or be punished by both fine and imprisonment. [30 G. A., ch. 87, § 6.]

The exception of the proviso in this section as to the "Welsbach Hydrocarbon Incandescent Lamp" is unconstitutional as attempting to confer a special privilege, but the whole section is not invalid on

that account, as the exception is not necessary to the completeness of the general statutory provision which had been in force prior to the attempt to incorporate the exception. *State v. Santee*, 111-1.

SEC. 2508-a. Duties of state board of health—examination of lamps and apparatus. The state board of health shall examine the particular design, mechanism, and workmanship of such lamps or apparatus as shall be presented to such board, and test said lamps or apparatus, and, if it shall find any lamp or apparatus to be safe, said board shall enter the findings of the board upon the records of the proceedings of said board. The board shall have power, in case it comes to the notice of the board that any lamp or apparatus which it has heretofore approved as safe, because either of change of design, the use of unsuitable material, or poor workmanship in the construction of such lamps or apparatus, or for any other cause, is unsafe as then manufactured, and dangerous to public safety to cancel its approval of such lamp or apparatus, and after such cancellation of the approval of said lamp or apparatus, it shall be unlawful to sell or use the same, and no lamps or apparatus manufactured or sold after such disapproval shall be used in burning the lighter products of petroleum for illuminating purposes. The state board of health shall notify by registered letter the several inspectors of any approval or disapproval by them of any lamp or apparatus submitted to them for examination. [30 G. A., ch. 87, § 7.]

SEC. 2509. Removal of inspectors. It shall be the duty of the governor to remove from office any inspector who is incompetent or unfaithful in the discharge of his official duty, or, having knowledge of the violation of any of the provisions of this chapter, shall neglect or refuse to prosecute the offender. In July of each year each inspector shall file with the secretary of the executive council an inventory of all instruments and apparatus belonging to the state, in his possession, or that of his deputy or helper, which shall be fully accounted for in such manner as may be prescribed by the executive council. [30 G. A., ch. 87, § 8.]

SEC. 2509-a. Biennial report. The secretary of state shall make and deliver to the governor a report, for the fiscal year ending on the thirtieth day of June in each even-numbered year, of all inspections made, the receipts and expenditures therefor, and such other items as are by this chapter required to be made of record. Provided, however, he shall make and deliver report to the governor for the fiscal year ending on the 30th day of June, 1906, which report shall cover the period only from the date of his last biennial report. [30 G. A., ch. 87, § 9.] [31 G. A., ch. 105, § 2.]

SEC. 2510. Repeal. The law as it appears in chapter eleven (11), title twelve (12), of the code and the law as it appears in sections two thousand five hundred and three (2503), two thousand five hundred and eight (2508) and two thousand five hundred and eight-a (2508-a), of the supplement to the code, relating to the inspection of petroleum products, are hereby repealed and the foregoing enacted in lieu thereof. [30 G. A., ch. 87, § 10.]

CHAPTER 11-A.

OF THE MANUFACTURE AND SALE OF LINSEED AND OTHER OILS, THE ADULTERATION THEREOF AND PENALTY.

SECTION 2510-a. Repeal. Sections two thousand five hundred and ten-a (2510-a), two thousand five hundred and ten-b (2510-b), two thousand five hundred and ten-c (2510-c), two thousand five hundred and ten-d (2510-d) and two thousand five hundred and ten-e (2510-e) of the supplement to the code are hereby repealed. [32 G. A., ch. 131, § 8.]

SEC. 2510-b. Duty of manufacturers and dealers. Every person, firm or corporation who shall expose for sale, or sell, within this state, any white lead, paint, or linseed oil shall accurately label the same as hereinafter required. [32 G. A., ch. 131, § 1.]

SEC. 2510-c. Paint defined. The term "paint" as used in this act shall include white lead in oil or any compound intended for the same use, paste or semi-paste, and liquid or mixed paint ready for use, or any compound intended for the same use. [32 G. A., ch. 131, § 2.]

SEC. 2510-d. Labels. Labels required by this act shall clearly and distinctly state the name and address of the manufacturer of the article, or the dealer therein, or of the party for whom the same is manufactured and show, with substantial accuracy, the percentage of each ingredient, both solid and liquid, contained therein (in continuous list with no intervening matter of any kind); provided, that in case of paint other than white paint, the ingredients, other than the coloring material, may be treated as one hundred per cent., in which case it shall be necessary to state the description or trade-name of such coloring matter and state, with substantial accuracy, its chemical analysis. The label shall also state, in case of liquid paints, oils, and other compounds, on packages holding one quart or more, the net measure of contents of each can, package or container. In case of white lead and other paints and compounds, the label shall show on package weighing four pounds or more the net weight of each can, package or container. [32 G. A., ch. 131, § 3.]

SEC. 2510-e. Flax seed or linseed oil—chemical and temperature tests. No person, firm or corporation shall manufacture for sale or expose for sale or sell within this state any flaxseed or linseed oil, unless the same answers a chemical test for purity recognized in the United States Pharmacopœia, or any flax seed or linseed oil as "boiled linseed oil" unless the same shall have been put in its manufacture to a temperature of 225 degrees Fahrenheit. [32 G. A., ch. 131, § 4.]

SEC. 2510-f. Tanks or vessels containing oil to be marked. No person, firm or corporation shall expose for sale or sell any flax seed or linseed oil, unless it is exposed for sale or sold under its true name, and each tank car, tank, barrel, keg, or vessel containing such oil has distinctly and durably marked therein the true name of such oil in ordinary bold faced capital letters not less than five lines pica in size, the words "pure linseed oil—raw," "pure linseed oil—boiled" as the case may be and the name and address of the manufacturer thereof. [32 G. A., ch. 131, § 5.]

SEC. 2510-g. Enforcement—bulletins. It is hereby made the duty of the state food and dairy commissioner to enforce the provisions of this act. The inspectors, assistants and chemists appointed by the state food and dairy commissioner shall perform the same duties and have the same authority under this act as are prescribed by chapter one hundred and sixty-six (166), laws of the thirty-first general assembly. The state food and dairy commissioner shall, from time to time, with the approval of the

executive council, publish bulletins, giving the results of inspections and analyses, together with such additional information as he may deem suitable. [32 G. A., ch. 131, § 6.]

SEC. 2510-h. Penalty. Whoever shall violate any of the provisions of this act shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not exceeding one hundred dollars. [32 G. A., ch. 131, § 7.]

SEC. 2510-i. When effective. This act shall take effect on January 1, 1908. [32 G. A., ch. 131, § 9.]

SEC. 2510-j. Sale of gasoline—conditions—penalty. Every person dealing at retail in gasoline in this state shall after the first day of January, 1907, deliver the same to the purchaser, in quantities of more than one quart and less than six gallons, only in barrels, casks, packages, cans or measures painted vermilion red and having the word "gasoline" plainly stencilled or marked thereon. No such dealer shall deliver kerosene in a barrel, cask, package or can painted or marked as above. Every person purchasing gasoline for use shall procure and keep the same only in barrels, casks, packages or cans painted and marked as above. No person keeping for use, or using, kerosene shall put or keep the same in any barrel, cask, package or can painted or marked as above. Any person violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by fine of not less than five, nor more than one hundred dollars. [31 G. A., ch. 106, § 1.]

SEC. 2510-k. Gasoline for manufacturing or mechanical purposes. This act shall not be construed to prohibit the use of gasoline from tanks or reservoirs, of not less than ten gallons capacity, for manufacturing or mechanical purposes. [31 G. A., ch. 106, § 2.]

SEC. 2510-l. Repeal—acts in conflict. All acts or parts of acts in conflict with this act are hereby repealed. [31 G. A., ch. 106, § 3.]

CHAPTER 12.

OF THE INSPECTION OF PASSENGER BOATS.

SECTION 2512. Certificates—fees. Any inspector, on the request of the owner, agent or master of any boat other than row-boat, upon the inland waters of the state having a carrying capacity of five or more passengers, shall carefully and thoroughly inspect such boat, its appliances and machinery, and, if found in proper condition and safe for the carriage of persons or passengers, give his certificate thereof, including therein the number of persons or passengers that may be carried, and on what waters; which certificate, or a copy thereof, shall be posted in a conspicuous place on the boat, and any boat so inspected and certified shall be entitled to run for the season following the date thereof. In like manner, upon the request of any pilot or engineer for a license as such, the inspector shall forthwith investigate the competency of the applicant, his acquaintance with and experience in his business, his habits as to sobriety, and other qualifications, and, if found capable of performing well his duties, and of good habits, he shall issue his certificate authorizing him to act as pilot or engineer, as the case may be, for five years from the date thereof, unless sooner revoked for cause, which revocation when made shall take effect upon approval by the governor. The inspector may charge and require advance payment for inspection, for each sailboat, one dollar, each boat propelled by other

power with a capacity of not more than twenty persons, five dollars, those of greater capacity, ten dollars, and for each applicant for license as pilot or engineer, three dollars. [22 G. A., ch. 107, §§ 3-5.] [28 G. A., ch. 84, § 1.]

SEC. 2513. Penalties. If any owner, agent or master of any such boat, having a capacity of carrying five or more persons, plying the inland waters of the state, shall hire, or offer to hire, such boat for the carrying of persons, or receive persons thereon for hire, without first obtaining annually, before the boating season, a certificate as in this chapter required, or if such owner, agent or master, having obtained such certificate, shall permit or receive for carriage on such boat a greater number of persons than authorized therein, or if any person shall act as pilot or engineer on any boat mentioned for which inspection and license are herein required, without first obtaining a license therefor, or if, having such license, he continues to follow such avocation after the same has been revoked, or has expired, he shall be fined in a sum not exceeding one thousand dollars, or imprisoned in the county jail not exceeding one year, or punished by both fine and imprisonment; but the provisions of this chapter shall not apply to vessels licensed by authority of the United States. [22 G. A., ch. 107, §§ 1, 3, 4.] [28 G. A., ch. 84, § 2.]

SEC. 2514. Reports. Each inspector annually, on or before the first day of January, shall report to the governor the number and date of licenses granted pilots or engineers, to whom issued, the date thereof, the number and kind of boats inspected, the time and place of inspection, upon what waters to be used and such other matters as may be considered useful or of general interest, with the total amount of fees received from all sources. [22 G. A., ch. 107, § 6.] [28 G. A., ch. 84, § 3.]

CHAPTER 13.

OF THE DAIRY COMMISSIONER AND IMITATION DAIRY PRODUCTS.

SECTION 2515. Appointment, bond, powers and duties of commissioner—office deputy—assistant—salaries—expenses—report. On or before the first day of April of each even-numbered year, the governor shall appoint a dairy commissioner, who shall have a practical knowledge of and experience in the manufacture of dairy products, and hold his office for two years from the first day of May following his appointment, and until his successor is appointed and qualified, subject to removal by the governor for inefficiency, neglect or violation of duty. He shall give bond in the sum of ten thousand dollars, conditioned for the faithful performance of his duties, with sureties to be approved by and filed with secretary of state. He shall keep on hand a supply of standard test tubes or bottles and milk measures or pipettes adapted for use by each milk testing machine, the manufacturers or dealers of which have filed with the dairy commissioner a certificate from the director of the Iowa agricultural experiment station, which shall certify that said milk testing machine, when properly and correctly operated, will produce accurate measurements of butter fat, and furnish to any person or corporation desiring the same for testing milk one such tube or bottle, and such milk measure or pipette for each factory, of the kind adapted for the machine operated therein, upon request therefor, certifying it to be accurate, reliable and standard, placing thereon the letters "D. C." as a permanent mark; the tubes or bottles and pipettes to be furnished at the actual cost thereof. He shall have and keep an office in the

capitol, and preserve therein all correspondence, documents, records and property of the state pertaining thereto, and may, when necessary, employ an office deputy at a salary of fourteen hundred dollars per year; the dairy commissioner may also appoint, upon the recommendation of the president of the Iowa state college of agriculture and mechanic arts, the director of the Iowa experiment station and the professor of dairying, two assistant[s], who shall perform such duties as may be assigned to him by the dairy commissioner, and who shall receive a salary of fourteen hundred dollars per year, and said deputy and assistant to the dairy commissioner shall be allowed, in addition to their salaries, actual and necessary traveling expenses when in the performance of their official duties, said expenses to be itemized, verified under oath, and when audited and approved by the executive council to be paid upon warrants of the state auditor upon the state treasurer, *provided*, that such expenditures shall not exceed the appropriation made for the dairy commissioner's office. During his term of office he shall hold no other official position nor any professorship in any state educational institution, and on or before the first day of November shall make annual report to the governor, which shall contain a detailed account of all his doings as commissioner, and the receipts and disbursements of his office since the preceding report, with such facts and statistics in regard to the production, manufacture and sale of dairy products, with such suggestions, as he may regard of public importance connected therewith. In the conduct of his office, he shall have power to issue subpoenas for witnesses, enforce their attendance, and examine them under oath by him to be administered, such witnesses to be allowed fees as in justices' courts, to be paid by the commissioner as part of the expenses of his office, and do such other acts and things as are necessary and proper in the enforcement of the provisions of this chapter. [25 G. A., ch. 47; 24 G. A., ch. 50, § 6; 23 G. A., ch. 52, § 5; 22 G. A., ch. 98, § 1; 21 G. A., ch. 52, §§ 11-14.] [28 G. A., ch. 85, § 1.] [30 G. A., ch. 88, § 1.] [32 G. A., ch. 132.]

SEC. 2516. Imitation butter or cheese.

These provisions, with those of the two made from pure milk and cream. *State v.* following sections, prohibit the sale of *Armour Packing Co.*, 124-323. oleomargarine which is the color of butter

SEC. 2522. Milk dealers—manufacturers and packers—reports—penalty. Every city milk dealer, or every person furnishing milk or cream to such dealer, or the employe of such milk dealer, and every person or corporation, or the employe of such person or corporation, who operates a creamery, cheese or condensed milk factory, or re-works or packs butter, shall maintain his premises and utensils in a clean and hygienic condition, and shall make, upon blanks furnished by the dairy commissioner, such reports and statistics as may be required for the purpose of compiling statistics authorized by this chapter, and such dealer, owner, operator or business manager shall make such returns and reports within thirty days after receiving the proper blank form from the dairy commissioner and shall certify to the correctness thereof. Whoever shall violate any provision of this section shall be punished by a fine of not less than twenty-five nor more than one hundred dollars, or by imprisonment in the county jail for not more than thirty days. [29 G. A., ch. 102, § 1.]

SEC. 2528-a. Access to factories, buildings, etc. The state food and dairy commissioner and his deputy and assistants shall have full access to all places of business, factories, buildings, wagons and cars used in the manufacture, sale or transportation within the state of any dairy products or imitation thereof. [31 G. A., ch. 107, § 1.]

SEC. 2528-b. Examination and inspection. They may examine and open any package, can or vessel containing, or believed to contain any article or product which may be manufactured, sold or exposed for sale in violation of the laws of this state relative to the dairy products and imitation thereof, and may inspect the contents therein and take therefrom samples for testing or analysis. [31 G. A., ch. 107, § 2.]

SEC. 2528-c. Penalty. Whosoever shall refuse to allow the inspection herein provided for or shall in any way hinder or obstruct the proper officers performing their duties hereunder shall be punished by fine not exceeding one hundred (100) dollars or by imprisonment in the county jail not exceeding thirty (30) days. [31 G. A., ch. 107, § 3.]

CHAPTER 14.

OF STATE VETERINARY SURGEON.

SECTION 2529. Appointment—qualification. The state veterinary surgeon shall be appointed by the governor, subject to removal by him for cause, who shall hold office for three years. He shall be a graduate of some regularly established veterinary college, skilled in that science, and shall be by virtue of his office a member of the state board of health. He shall maintain an office at the capitol in a room assigned for his use by the executive council, and his postage, stationery and office supplies shall be furnished by the state. [20 G. A., ch. 189, § 1.] [32 G. A., ch. 133, § 1.]

SEC. 2530. Powers—regulations. He shall have supervision of all contagious and infectious diseases among domestic animals in, or being driven or transported through, the state, and is empowered to establish quarantine against animals thus diseased, or that have been exposed to others thus diseased, whether within or without the state, and, with the concurrence of the state board of health, may make such rules and regulations as he may regard necessary for the prevention and suppression, and against the spread, of said disease or diseases, which rules and regulations the executive council concurring, shall be published and enforced, and in the performance of his duties he may call for the assistance of any peace officer. He may call experts to his assistance when the exigencies of any case demand such action, and may appoint a secretary, who shall receive a salary of seven hundred fifty dollars (\$750) per annum, which shall be paid from the state treasury. [20 G. A., ch. 189, § 2.] [32 G. A., ch. 133, § 2.]

SEC. 2533. Repeal—notice of contagious disease—duty of state veterinary surgeon—assistants. That section twenty-five hundred and thirty-three (2533) of the code be and the same is hereby repealed and the following enacted in lieu thereof:

“It shall be the duty of all local boards of health in the state, upon the appearance of any contagious or infectious disease among domestic animals, to notify the state veterinary surgeon at once of the existence of such contagious or infectious disease; and it shall be his duty, whenever notified in writing by a majority of any board of supervisors, township trustees, or of any city or town council, whether in session or not, of the existence of, or probable danger from, any contagious or infectious disease among domestic animals, to repair at once to the place designated in such notice, and make an investigation, and take such action as the exigencies of the case may demand. The governor may appoint such assistant state veterinary sur-

geons as may be deemed advisable, who shall act under the instruction of the state veterinary surgeon, and, when engaged in the discharge of their duties, shall receive the sum of five dollars (\$5) a day and their actual expenses, which compensation and expenses shall be paid from the state treasury upon itemized and verified accounts, audited and approved by the executive council." [32 G. A., ch. 133, § 3.]

SEC. 2534. Executive council to approve claims for destruction of stock—appeal. Whenever in the opinion of the state veterinary surgeon the public safety demands the destruction of any stock, the same may be destroyed upon the written order of such surgeon, with the consent of the owner, or upon approval of the governor, and by virtue of such order such surgeon, his deputy or assistant, or any peace officer, may destroy such diseased stock, and the owner thereof shall be entitled to receive its actual value in its condition when condemned, to be ascertained and fixed by the state veterinary surgeon and the nearest justice of the peace, who, if unable to agree, shall call upon the nearest or other justice of the peace upon whom they agree as umpire, and their judgment shall be final when the value of the stock, if not diseased, would not exceed twenty-five dollars; but in all other cases either party shall have the right of appeal to the district court, but such appeal shall not delay the destruction of the diseased animals. The veterinary surgeon shall at once file with the executive council his written report thereof, who shall, if found correct, indorse their finding thereon, whereupon the auditor of state shall issue his warrant therefor upon the treasurer of state, who shall pay the same out of any moneys at his disposal under the provisions of this act, but no compensation shall be allowed for stock destroyed while in transit through or across the state, and the word "stock," as herein used, shall be held to mean cattle, horses, mules and asses. [20 G. A., ch. 189, § 6.] [32 G. A., ch. 133, § 4.]

SEC. 2536. Appropriation. There is annually appropriated out of any moneys, not otherwise appropriated, the sum of seven thousand five hundred dollars, or so much thereof as may be necessary, for the uses and purposes herein set forth. [20 G. A., ch. 189, § 8.] [27 G. A., ch. 63, § 1.] [30 G. A., ch. 89.]

SEC. 2538. Repeal—compensation of veterinary surgeon—expenses. That section twenty-five hundred and thirty-eight (2538) of the code be and the same is hereby repealed, and the following enacted as a substitute therefor:

"The state veterinary surgeon shall receive an annual salary of eighteen hundred dollars (\$1800), which shall be paid in equal monthly installments from the state treasury, and shall also receive the actual expenses incurred by him in the discharge of his official duties. All claims for expenses shall be itemized, verified and paid from the state treasury when audited and allowed by the executive council." [32 G. A., ch. 133, § 5.]

CHAPTER 14-A.

OF THE PRACTICE OF VETERINARY MEDICINE, SURGERY AND DENTISTRY.

SECTION 2538-a. Unlawful practice. That it shall be unlawful for any person to practice veterinary medicine, surgery, or dentistry in this state, who shall not have complied with the provisions of this act. [28 G. A., ch. 93, § 1.]

SEC. 2538-b. Repeal—existing practitioners—registration. Section two (2) of chapter ninety-three (93) of the acts of the twenty-eighth

general assembly is hereby repealed and the following enacted in lieu thereof:

Any person of good moral character who has practiced the profession of veterinary medicine, surgery and dentistry in this state for a period of five years immediately preceding the passage of the act of which this is an amendment shall be deemed eligible to registration as an existing practitioner upon presenting to the board of veterinary medical examiners, created by the act of which this is an amendment, satisfactory evidence that such person is of good moral character and that such person had actually practiced veterinary medicine, surgery and dentistry in the state of Iowa for a period of five years immediately preceding the passage of the act of which this is an amendment, application for such registration to be made before July 4, 1902. [29 G. A., ch. 170, § 1.]

SEC. 2538-c. Graduates. Any person who is a graduate of a legally chartered and authorized veterinary college or veterinary department of any university or agricultural college, at the time of the passage of this act, or who shall hold a diploma from such institutions prior to 1901, shall be entitled to registration as an existing practitioner upon the presentation of his diploma, duly verified. All applications for such registration to be made before July 4, 1902. [28 G. A., ch. 93, § 3.] [29 G. A., ch. 170, § 2.]

SEC. 2538-d. State board of veterinary medical examiners—term—vacancies. The governor of the state shall appoint a board of examiners within sixty days after the passage of this act; said board to be known as the state board of veterinary medical examiners. This board shall consist of three qualified veterinarians, residents of the state, each of whom shall be a graduate of a legally chartered and authorized veterinary college or veterinary department of any university or agricultural college, and who shall be of good standing in the profession. One of these members shall be appointed for one year; one for two years; and each succeeding appointment shall be for three years. Each shall hold office until his successor is duly appointed and qualified. No member of any veterinary college or veterinary department of the state university or agricultural college, or any person connected therewith, shall be eligible to appointment upon said board. The governor shall fill any vacancy which shall occur on the board, and may remove any member of said board for continued neglect of duty, for incompetency, unprofessional, or dishonorable conduct. [28 G. A., ch. 93, § 4.]

SEC. 2538-e. Powers of board. This board shall have power to make all needed regulations for its government and proper discharge of its duties in accordance with this act, and shall have power to administer oaths, and take testimony concerning all matters within its jurisdiction. It shall also have the power to revoke any certificate issued by it when it is shown that such certificate was procured by false representation or where good cause for revocation of such certificate has arisen since the issuance thereof. [28 G. A., ch. 93, § 5.] [29 G. A., ch. 170, § 3.]

SEC. 2538-f. Meetings. The meetings of the examining board shall be held at least once a year, or at such times and places as it may elect. At any meeting of the board, a majority shall constitute a quorum to transact business, or to conduct examinations. [28 G. A., ch. 93, § 6.]

SEC. 2538-g. Certificate of qualification. Said board shall receive applications for registration, according to sections two and three of this act, and shall issue a certificate of qualification to all applicants who conform to the requirements for such registration, signed by the members of the board, provided that the certificate thus granted specifically and plainly states whether or not the one to whom it is granted is a graduate or non-

graduate in veterinary medicine. Such certificate shall be conclusive as to the rights of the lawful holder of the same to practice veterinary medicine, surgery, or dentistry in this state. [28 G. A., ch. 93, § 7.]

SEC. 2538-h. Registration fee. The fee for registration shall be five dollars (\$5), payable in advance to the secretary of the board. [28 G. A., ch. 93, § 8.]

SEC. 2538-i. Qualifications—examination—fee—license. From and after January 1st, 1901, any person not authorized to practice veterinary medicine, surgery, and dentistry in this state, and desiring to enter upon such practice, shall be a graduate of a legally chartered and recognized veterinary college or veterinary department of a university or agricultural college, and shall pass the examination required by said state board of veterinary medical examiners. The fee for such examination shall be fifteen dollars (\$15) payable in advance to the secretary of the board. The applicant shall be at least twenty-one years of age and of good moral character. Any person conforming to these requirements shall receive a license to practice veterinary medicine, surgery, or dentistry within this state, signed by the members of the board, which license shall be recorded in the office of the recorder of the county in which said person resides, the recording fee to be paid by holder of certificate:

(a) A certificate of registration showing that an examination has been made by the proper board of any state or foreign country, the holder thereof having been at the time of said examination a graduate of a legally chartered and authorized veterinary college, or veterinary department of any university or agricultural college, recognized as in good standing by the Iowa state board of veterinary medical examiners.

(b) A certificate of registration or license issued by proper board of any state or foreign country, may be accepted as evidence of qualification for registration in this state, provided that the holder thereof was at the time of such registration the legal possessor of a diploma issued by a legally chartered and authorized veterinary college or veterinary department of any university or agricultural college in any state or foreign country, and that the date thereto was prior to the legal requirement of the examination test in this state. The fee for such registration shall be fifty dollars (\$50.00). [28 G. A., ch. 93, § 9.] [29 G. A., ch. 170, § 4.] [30 G. A., ch. 90, § 1.]

SEC. 2538-i1. Restrictions. If by the laws of any state or foreign country, or rulings or decisions of the appropriate officers of boards thereof any burden, obligation, requirement, disqualification or disability is put upon veterinarians registered in any state or foreign country, or holding diplomas from any legally chartered and authorized veterinary college, or veterinary department of any university or agricultural college, recognized as in good standing by the Iowa state board of veterinary medical examiners, affecting the right of said veterinarians to be registered or admitted to practice in said state or foreign country, then the same or like burdens, obligations, requirements, disqualifications or disability shall be put upon the registration in this state of veterinarians registered in said state or foreign country or holding diplomas from any legally chartered and authorized veterinary college, or veterinary department of any university or agricultural college recognized as in good standing by the Iowa state board of veterinary medical examiners. [30 G. A., ch. 90, § 2.]

SEC. 2538-j. Register—treasurer to hold fees—bond—vouchers. The board shall keep a register of all registered practitioners in the state, setting forth such facts as the board shall see fit. All fees accruing under this act shall be held by the treasurer of the board, who shall execute good

and sufficient bond to said board to faithfully discharge his duties, and who shall pay out such funds, only, on vouchers, certified by a majority of said board. It shall be the duty of each person registered as a practitioner under this section, to pay to the secretary of the board an annual fee of one dollar, on or before June 1st of each year, as long as he shall continue in practice in the state of Iowa. [28 G. A., ch. 93, § 10.] [30 G. A., ch. 91, § 1.]

SEC. 2538-k. Compensation—expenses. Each member of said board shall be entitled to receive five dollars (\$5) per diem, also actual and necessary traveling expenses, incurred while actually engaged in the discharge of his official duties, provided such compensation and expenses do not exceed said income of fees accruing under this act. [28 G. A., ch. 93, § 11.]

SEC. 2538-l. Penalty. Any person violating any of the provisions of this act shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for a period of not more than thirty days for each and every such offense. It shall be the duty of the county attorney of the county in which violation occurs to conduct all proceedings against violators of this act. [28 G. A., ch. 93, § 12.]

SEC. 2538-m. Exceptions. Nothing in this act shall be construed to apply to commissioned veterinarians in the United States army or to persons who dehorn cattle, or castrate domestic animals, or to persons who gratuitously treat diseased animals. [28 G. A., ch. 93, § 13.]

SEC. 2538-n. Further penalty. Any person who shall, without having been authorized so to do legally, append any veterinary title to his name, or shall assume or advertise any veterinary title in such a manner as to convey the impression that he is a lawful practitioner of veterinary medicine or any of its branches, shall be guilty of a misdemeanor, and punished according to the provisions of section twelve (12) of this act. [28 G. A., ch. 93, § 14.]

SEC. 2538-o. Re-examinations. In case the examination of any person shall prove unsatisfactory and his name be not registered, he shall be permitted to present himself for re-examination within any period not exceeding twelve months next thereafter, and no charges shall be made for re-examination. [28 G. A., ch. 93, § 15.]

SEC. 2538-p. Board to render account to executive council. The board shall render under oath annually on January first to the executive council an account of all fees collected and per diem expenses paid, together with the necessary expenses of the board, and pay over the balance into the state treasury. [28 G. A., ch. 93, § 16.] [30 G. A., ch. 91, § 2.]

CHAPTER 15.

OF THE CARE AND PROPAGATION OF FISH AND THE PROTECTION OF BIRDS AND GAME.

SECTION 2539. Warden—compensation—duties—seizure without warrant—sale. There is hereby created the office of state fish and game warden. The warden shall be appointed by the governor, and hold his office for three years from the first day of April of the year of his appointment. He shall receive a salary of twelve hundred dollars annually to be paid out of the state treasury. He shall have charge and management of

the state fish hatcheries, which shall be used in stocking the waters of the state with fish native to the country and to the extent of the means provided by the state. He shall impartially and equitably distribute all fry raised by or furnished to the state, or for it through other sources, in the streams and lakes of the state; shall faithfully and impartially enforce obedience of the provisions of this chapter, and shall make a biennial report to the governor of his doings, together with such information upon the subject of the culture of fish and the protection of game in the country as he may think proper, accompanied with an itemized statement monthly to the executive council under oath of all moneys expended and for what purpose, and of the number and varieties of fish distributed, and in what waters. It shall be the duty of the fish and game warden, sheriffs, constables, and police officers of this state to seize and take possession of any fish, birds, or animals which have been caught, taken, or killed at a time, in a manner, or for a purpose, or had in possession or under control, or have been shipped, contrary to the provisions of this chapter. Such seizure may be made without a warrant. Any court having jurisdiction of the offense, upon receiving proof of probable cause for believing in the concealment of any fish, birds, or animals, caught, taken, killed, had in possession, under control, or shipped contrary to any of the provisions of this chapter, shall issue a search-warrant and cause a search to be made in any place therefor. Any fish, birds, or animals so found shall be sold for the purpose of paying the costs in the case, and the amount, if any, in excess of the costs shall be turned into the school fund of the county in which the seizure is made. Any net, seine, trap, contrivance, material, and substance whatever, while in use or had and maintained for the purpose of catching, taking, killing, trapping or deceiving any fish, birds, or animals contrary to any of the provisions of this chapter is hereby declared to be, and is, a public nuisance, and it shall be the duty of the fish and game warden, sheriffs, constables, and police officers of the state, without warrant or process, to take or seize any and all of the same. And abate and destroy any and all of the same without warrant or process and no liability shall be incurred to the owner or any other person for such seizure and destruction and said warden or his regularly constituted deputies or other peace officers as hereinbefore named shall be released from all liability to any person or persons whomsoever for any act done or committed or property seized or destroyed under or by virtue of this section. [23 G. A., ch. 34, § 12; 17 G. A., ch. 80, §§ 1, 4.] [27 G. A., ch. 64, § 1.] [29 G. A., ch. 103, § 1.]

SEC. 2539-a. Repeal. That section five (5) of chapter sixty-four (64) of the laws of the twenty-seventh (27th) general assembly be and the same is hereby repealed. [29 G. A., ch. 103, § 3.]

SEC. 2540. Fishing—what permitted. Between the first days of November and March, no one shall take from the waters of the state any salmon or trout, nor between the fifteenth day of November and the fifteenth day of May any bass, pike, croppies, pickerel, or catfish, or other game fish, nor shall any one person take of said fish from the waters of the state in any one day more than forty (40) of any or all of said kinds of fish, nor shall any one fish for or by any means catch any fish in any stream, which has been stocked with breeding trout one or two years old, within one year from the date of the stocking thereof, if notice of such fact is by the authority of the warden posted where a public road crosses such stream; nor shall any one at any time take from the waters of the state any fish, except minnows for bait, unless by hook and line; but any person may, between the fifteenth day of May and the fifteenth day of November, use not more than one trot line in streams only, and extending not more than

half-way across; nor shall any one place, erect or cause to be placed or erected, any trot line, seine, net, trap, dam or other device or contrivance in the water in such a manner as to hinder or obstruct the free passage of fish, up, down or through the same for the purpose of catching them, except as provided in the next section; nor have, erect or use, while fishing on or through the ice, any house, shed or other protection against the weather, or have or use any stove or other means for creating artificial heat. The possession of a spear or seine in or upon any of the public waters of the state, or upon the ice of the same, or on the shore within a limit of ten rods, or the taking or killing of any fish by any means within three hundred (300) feet of a fishway shall be unlawful.

No person shall, at any time, kill, destroy, have in possession or under control, for any purpose whatever, any bass, catfish, wall-eyed pike, or trout less than six (6) inches in length, except for the purpose of returning the same to the water from which they were taken, as soon as they are taken therefrom, with as little injury to the fish as possible. [26 G. A., ch. 80, § 1; 25 G. A., ch. 65; 23 G. A., ch. 34, §§ 2, 3, 6, 7; 17 G. A., ch. 80, §§ 5, 6; 16 G. A., ch. 70, § 6.] [27 G. A., ch. 64, §§ 2, 4.] [29 G. A., ch. 103, §§ 2, 4.] [30 G. A., ch. 92, §§ 1, 2.] [30 G. A., ch. 93.]

Fish and game are so related to the public welfare that they have, time out of mind, been the subjects of legal control, and their preservation has ever been a matter of legislative concern. Statutes relating to the preservation of fish and game are an abridgment of otherwise legal rights of the owners of the soil in taking fish and game thereon. *State v. Beardslay*, 108-396; *State v. Meek*, 112-338.

Several counts charging illegal seining

of fish may be embraced in a single information before a justice of the peace, and the fact that the aggregate fine which may be imposed under such information exceeds \$100 does not deprive the court of jurisdiction. *State v. Denhardt*, 129-135.

One who engages in the unlawful act of seining by which fish are taken and carried away may be punished although it does not appear that he assisted in carrying such fish away. *Ibid.*

SEC. 2540-a. Explosives—drugs—penalty. It shall be unlawful for any one to place in the waters of the state any lime, ashes, or drug of any kind or other substance, explode dynamite, gun cotton, giant powder or other compound or preparation or use electricity in any way with the intent to kill or so to affect any fish that it may be taken and any one guilty of any of said acts shall, upon conviction thereof be fined not less than fifty (\$50.00) dollars nor more than one hundred (\$100.00) dollars or imprisoned in the county jail not less than fifteen nor more than thirty days. [29 G. A., ch. 103, § 5.]

SEC. 2546. Taking by warden—written permits. The warden may take from any of the public waters of the state, at any time and in any manner, any fish for the purpose of propagating or re-stocking other waters, or exchanging with fish commissioners or wardens of other states. Provided, further, that the warden may, upon proper application in writing, made upon blanks furnished by said warden, issue to whomsoever he may see fit, written permits, upon blank forms to be furnished by said warden, suspending for a specified period specified portions of this chapter relating to fishing and authorizing the person to whom said permit is issued, to take from certain designated lakes of the state, having an area of not less than two (2) square miles, buffalo, carp, quillbacks, redborse, suckers and gar, as in said permit named, in any quantities and for all purposes; provided, however, that no such permit holder shall be authorized to exercise the rights granted in said permit, except in the presence and under the supervision of the warden or one or more of his regularly constituted deputies, without expense to the state, and provided that seining shall not be permitted between the first day of December and the fifteenth day of June. [23 G. A., ch. 34, § 2.] [29 G. A., ch. 103, § 6.] [30 G. A., ch. 94.]

The warden has no authority to take, or empower others to take, fish from the public waters for the purpose of stocking private ponds. *State v. Sears*, 115-28.

SEC. 2547. Rivers excepted—dams. Nothing herein contained shall be held to apply to fishing in the Mississippi or Missouri rivers, nor to so much of the Des Moines river as forms the boundary line between this state and Missouri, nor to forbid the erection of dams across the waters of the state for manufacturing or other lawful purposes, subject to the provisions of the following section. [23 G. A., ch. 34, § 11; 18 G. A., ch. 92; 16 G. A., ch. 70, § 10.] [29 G. A., ch. 104, § 1.]

SEC. 2548. Fish ways.

The legislature may provide for the passage of fish along, and their protection in, unnavigable as well as navigable waters. *State v. Beardsley*, 108-396.

One who acquires the right to maintain a dam by grant from the state is subject, without reservation in the grant, to the subsequent control of the legislature as to the construction of fishways. *State v. Meek*, 112-338.

But where, in an action before a justice of the peace having jurisdiction, it was determined that the owner of the dam was not liable for a violation of the statute in not maintaining a fishway, on the ground that by reason of the grant from the state the statute was not applicable to him, and this judgment was not appealed from, held that this constituted a prior adjudication. *Ibid.*

SEC. 2551. Game protected. No person shall trap, shoot or kill any pinnated grouse or prairie chicken between the first day of December and the first day of September next following; any woodcock, between the first day of January and the tenth day of July; any ruffed grouse or pheasant, wild turkey or quail, between the fifteenth day of December and the first day of November; any wild duck, goose or brant, rail, plover, sandpiper and marsh or beach bird, between the fifteenth day of April and the first day of September; or any gray or fox squirrel or timber squirrel, between the first day of January and the first day of September, provided that it shall be unlawful to kill any ruffed grouse or wild turkey prior to January 1, 1900. Shooting or killing quail on the public highway shall be in violation of law. No person shall kill any of the birds mentioned in this section from any artificial ambush of any kind or with the aid or use of any sneak boat or sink box or other device used for concealment in the open water, nor use any artificial light, battery or other deception, contrivance or device whatever, with the intent to attract or deceive any of the birds mentioned in this chapter, except that decoys may be used in hunting wild geese and ducks, but no person shall at any time hunt or shoot from any boat, canoe, contrivance or device whatever on any of the waters of this state between sunset and sunrise. [20 G. A., ch. 67; 18 G. A., ch. 193; 17 G. A., ch. 156, § 2.] [27 G. A., ch. 66, § 1.] [29 G. A., ch. 103, § 7.] [30 G. A., ch. 92, § 3.]

SEC. 2551-a. What prohibited. That it shall be unlawful for any person other than the owner, or person authorized by the owner, to kill, maim, trap, or in any way injure or capture any deer, elk, or goat except when distrained as provided by law. [27 G. A., ch. 65, § 1.]

SEC. 2551-b. Penalty. Any person violating the provisions of this act shall be deemed guilty of a misdemeanor and be punished by imprisonment in the county jail for a period not exceeding thirty (30) days or by a fine not exceeding one hundred (100) dollars, or by both such fine and imprisonment. [27 G. A., ch. 65, § 2.]

SEC. 2552. Killing for traffic—destroying eggs or nests. No person shall at any time, or at any place within this state, trap, shoot or kill for traffic any pinnated grouse or prairie chicken, woodcock, quail, ruffed grouse or pheasant; nor shall any one person shoot or kill during any one

day more than twenty-five of either kind of said named birds, or of wild turkey, duck, goose or brant; nor shall any one person, firm or corporation have more than twenty-five of either kind of said named birds, except ducks, in his or their possession at any one time, unless lawfully received for transportation; or catch or take or attempt to catch or take, with any trap, snare or net any of the birds or animals named in the preceding section; or in any manner wilfully destroy the eggs or nests of any of the birds named in this and the preceding section. [18 G. A., ch. 193, § 2; 17 G. A., ch. 156, § 3.] [30 G. A., ch. 95, §§ 1, 2.]

SEC. 2556. Penalty—what animals. If any person use any device, kill, trap, ensnare, buy, sell, ship, or have in his possession, or ship, take or carry out of the state, contrary to the provisions of this chapter, any of the birds or animals named or referred to herein, or shall wilfully destroy any eggs or nests of the birds named or referred to in the preceding sections, he shall be punished by a fine of ten dollars for each bird, beaver, mink, otter, or muskrat, or other animals named or referred to in this chapter; and ten dollars for each nest and the eggs therein, so killed, trapped, ensnared, bought, sold, shipped, had in possession, destroyed, or shipped, taken, or carried out of the state, and shall stand committed to the county jail for thirty days unless such fine and costs of prosecuting are sooner paid. [17 G. A., ch. 156, § 7.] [29 G. A., ch. 103, § 8.]

SEC. 2559. Prosecutions—attorney's fee—opinions of attorney-general. In all prosecutions under this chapter, any number of violations may be included in the information, but each one shall be set out in a separate count, and upon conviction there shall be taxed as a part of the costs in the case a fee of five dollars to the informant, and a like fee of five dollars to the attorney prosecuting the case, upon each count upon which there is a plea or verdict of guilty and judgment of conviction; but in no event shall this fee be paid out of the county treasury. Prosecutions for violations of any provision of this chapter may be brought either in the county in which the offense was committed, or in any other county where the person, company or corporation complained of has had or has in his or their possession any fish, birds or animals named herein and bought, sold, caught, taken, killed, trapped or ensnared in violation hereof. When requested by the fish and game warden the attorney-general shall give his opinion, in writing, upon all questions of law pertaining to the office of such warden. Nothing in this chapter shall be construed as prohibiting any person from instituting legal proceedings for the enforcement of any provisions hereof. [17 G. A., ch. 156, § 11.] [27 G. A., ch. 64, § 3.]

SEC. 2561. Protection of birds. No person shall destroy the nests or eggs of, or catch, take, kill or have in possession or under control for any purpose whatever, except specimens for use of taxidermists, at any time, any whippoorwill, night-hawk, bluebird, finch, thrush, linnet, lark, wren, martin, swallow, bobolink, robin, turtle-dove, catbird, snowbird, blackbird, or any other harmless bird except bluejays and English sparrows, but nothing herein shall be construed to prevent the removal of nests from buildings, and the keeping of song birds in cages as domestic pets. Any person violating any of the provisions of this section shall be fined not less than one dollar nor more than twenty-five dollars and costs of prosecution, and may be committed to the county jail until such fine and costs are paid. [29 G. A., ch. 103, § 9.]

The exception of specimens as to taxidermists has no reference to the killing of game birds during the prohibited sea-

son, under Code §§ 2551 and 2554. *State v. Fields*, 118-530.

CHAPTER 15-A.

IN RELATION TO THE PROTECTION OF GAME.

SECTION 2563-a. License for non-residents. That it shall be unlawful for any person not a *bona fide* resident of the state of Iowa to pursue, hunt or kill any game bird or animal in the state of Iowa at any time without first procuring a license therefor from the county auditor of the county in which said game is pursued, hunted, or killed. [28 G. A., ch. 86, § 1.]

SEC. 2563-b.—How issued—fees. It shall be the duty of the county auditor of such county to issue a license to any person a non-resident of the state of Iowa, whom he shall find to be a careful and prudent person and accustomed to the use of fire-arms, to pursue, hunt, and kill game in the county named in such license during the open season, for any term hereafter not exceeding one year ending on the first day of January next succeeding the issuance of the license, upon the payment of the sum of ten (\$10) dollars to the county treasurer as a license fee and the sum of fifty (50) cents to the county auditor for issuing the license, which may be revoked by the county auditor at any time for good cause shown. [28 G. A., ch. 86, § 2.]

SEC. 2563-c. Application filed. Any non-resident person who may desire such a license shall file an application with the county auditor properly sworn to, stating the name, age, occupation, and place of residence of the applicant, and the name of the county for which such license is wanted, and pay the fees as provided in section two (2) of this act. [28 G. A., ch. 86, § 3.]

SEC. 2563-d. Restrictions. Any such non-resident who may thus have obtained such a license shall be authorized thereby to hunt, pursue, or kill game in the county named therein, but not on the enclosed or cultivated lands of another without a permit in writing from the owner and only during the open season while such license is in force, and shall be authorized thereby to take from the state not to exceed twenty-five (25) game birds or animals of all kinds killed by himself or herself, which shall be carried openly for inspection with his or her license. [28 G. A., ch. 86, § 4.]

SEC. 2563-e. Penalty. That if any non-resident person shall pursue, hunt, or kill any game bird or animal in the state of Iowa, without such license or after the same has been revoked or at any time except during the open season, or if any non-resident person shall violate any of the provisions of this act, he or she shall be guilty of a misdemeanor and upon conviction shall be fined not less than twenty-five (25) dollars nor more than one hundred (100) dollars for each and every offense and shall stand committed to the county jail until such fine and costs are paid as provided by law in such cases, or be imprisoned in the county jail not to exceed thirty (30) days. [28 G. A., ch. 86, § 5.]

SEC. 2563-f. Repeal—game protection fund. That section 6 of an act of the twenty-eighth general assembly, entitled "An act to protect game and to provide a fund to pay the expenses of prosecution under this act," be and the same is hereby repealed and the following enacted in lieu thereof:

That all license money paid or collected under this act shall be credited by the county treasurer to a fund known as a game protection fund, to be used to defray the expenses of enforcing the law for the protection of game, such expenses to be allowed and ordered paid by the board of supervisors of the county. [28 G. A., ch. 87, § 1.]

SEC. 2563-g. Form of license. Such license shall not be transferable, and shall be in the following form:

HUNTER'S LICENSE.

STATE OF IOWA, }
 County of _____ }

This is to certify that _____ of _____ in the state of _____ having this day made application for a hunter's license, and having paid therefor the sum of ten dollars (\$10), as required by law, is hereby permitted to pursue, hunt and kill within the county of _____ and state of Iowa, but not on the enclosed or cultivated lands of another without a permit in writing from the owner, during the year ending January 1st, A. D. _____, any of the birds and animals protected by the game laws of this state, in conformity with the law under which this license is issued, during the time in said year when the shooting and killing of such birds and animals is not prohibited by law.

In witness whereof I have hereunto subscribed my name, and caused the seal of the county auditor to be affixed hereto, this _____ day of _____, A. D. _____.

_____, County Auditor.

[28 G. A., ch. 86, § 7.]

SEC. 2563-h. How enforced. It shall be the duty of county attorneys and all other peace officers to see that this act is strictly enforced, the same as other game laws of the state. [28 G. A., ch. 86, § 8.]

SEC. 2563-i. Using birds as targets—penalty. Any person who keeps or uses a live pigeon, fowl or other bird for the purpose of a target or to be shot at either for amusement or as a test of skill in marksmanship, or shoots at a bird kept or used as aforesaid, or is a party to such shooting, or leases any building, room, field or premises, or knowingly permits the use thereof, for the purpose of such shooting, shall upon conviction thereof be fined not less than ten dollars nor more than one hundred dollars or imprisoned in the county jail not exceeding thirty days. Nothing in this act shall apply to the shooting of wild game. [30 G. A., ch. 96]

SEC. 2563-j. Wild birds. That all wild birds, both resident and migratory, in this state, shall be, and are hereby declared to be the property of the state. [31 G. A., ch. 108, § 1.]

SEC. 2563-k. Sale of wild birds, plumage, etc., prohibited—game birds defined. That no person shall, within the state of Iowa, kill or catch, or have in his or her possession, living or dead, any wild bird other than a game bird, or purchase, offer or expose for sale, transport or ship within or without the state, any such wild bird after it has been killed or caught, except as permitted by this act. No part of the plumage, skin, or body of any bird protected by this section shall be sold or had in possession for sale, irrespective of whether said bird was captured or killed within or without the state. For the purpose of this act the following only shall be considered game birds: The Anatidæ, commonly known as swans, geese, brant and river and sea ducks; the Rallidæ, commonly known as rails, coots, mud-hens and gallinules; the Limicolæ, commonly known as shore birds, plovers, surf birds, snipe, woodcock, sandpipers, tatlars, and curlews; the Gallinæ, commonly known as wild turkeys, grouse, prairie chickens, pheasants, partridges, and quails. All other species of wild birds, either resident or migratory, shall be considered non-game birds. [31 G. A., ch. 108, § 2.]

SEC. 2563-l. Birds' nests and eggs. That no person shall, within the state of Iowa, take or needlessly destroy or attempt to take or destroy the nest or the eggs of any wild birds, or have such nest in his or her possession, except as permitted by this act. [31 G. A., ch. 108, § 3.]

SEC. 2563-m. Transportation of wild birds prohibited. That no person or persons, or any corporation acting as a common carrier, its officers, agents or servants, shall ship, carry, take or transport, either within or beyond the confines of the state, any resident or migratory wild non-game bird, except as permitted by this act. [31 G. A., ch. 108, § 4.]

SEC. 2563-n. Not applicable to holder of certificate. That sections 2, 3, 4, and 10 of this act shall not apply to any person holding a certificate giving the right to take birds, their nests, or eggs for scientific purposes only, as provided in section 6 of this act. [31 G. A., ch. 108, § 5.]

SEC. 2563-o. Permission certificate—fees. That certificates may be granted by the fish and game warden of the state to any properly accredited persons of the age of fifteen years or upward, permitting the holder thereof to collect birds, their nests or eggs for scientific purposes only. The applicant for the same must present to said officer written testimonials from two well known ornithologists who must be residents of Iowa, certifying to the good character, and fitness of said applicant to be entrusted with such privilege and must pay said officer one dollar to defray the necessary expenses attending the granting of such certificate. On proof that the holder of such certificate has killed any bird, or taken the nest or eggs of any bird for other than strictly scientific purposes, his certificate shall become void, and he shall be liable to a fine of one hundred dollars, or imprisonment of thirty days, or both, at the discretion of the court. [31 G. A., ch. 108, § 6.]

SEC. 2563-p. Certificates expire—when. That the certificates authorized by section 6 of this act shall expire on the 31st day of December of the year issued and shall not be transferable. [31 G. A., ch. 108, § 7.]

SEC. 2563-q. Birds not included. That the English, or European house sparrow, great horned owl, sharp shinned hawk, Cooper's hawk, and blackbirds and crows are not included among the birds protected by this act. [31 G. A., ch. 108, § 8.]

SEC. 2563-r. Domestic pets—parrots and canaries. That nothing in this act shall prevent a citizen of Iowa from taking or keeping any wild non-game bird in a cage as a domestic pet, provided that such bird shall not be sold, or exchanged, or offered for sale or exchange, or transported out of the state; and provided further that this act shall not be construed to forbid the selling or shipping of parrots, canaries or any other cage birds, which are imported from other countries or not native to any part of the United States. [31 G. A., ch. 108, § 9.]

SEC. 2563-s. Penalty. That any person who violates any of the provisions of this act shall be guilty of a misdemeanor, and shall be liable to a fine of five dollars for each offense, and an additional fine of five dollars for each bird, living or dead, or part of bird, or nest, or set of eggs or part thereof, possessed in violation of this act, or to imprisonment for thirty days, or both, at the discretion of the court. [31 G. A., ch. 108, § 10.]

SEC. 2563-t. Repeal—acts in conflict. All acts or parts of acts heretofore passed inconsistent with or contrary to the provisions of this act are hereby repealed. [31 G. A., ch. 108, § 11.]

SEC. 2563-u. Trapping, shooting or killing of pheasants prohibited. No person shall trap, shoot, kill or take in any manner, any Mongolian, ring-neck, English or Chinese pheasants in this state prior to the first day of October, A. D. 1915. [32 G. A., ch. 134, § 1.]

SEC. 2563-v. Penalty. Any person violating the provisions of this act shall upon conviction thereof be fined not to exceed one hundred dollars or imprisonment in the county jail not to exceed thirty days. [32 G. A., ch. 134, § 2.]

CHAPTER 16.

OF THE STATE BOARD OF HEALTH.

SECTION 2564. Appointment—meetings—officers—districts—vacancies—how filled. The state board of health shall consist of the attorney-general and the state veterinary surgeon, who shall be members by virtue of their offices, one civil engineer and seven physicians, to be appointed by the governor, each to serve for a term of seven years and until his successor is appointed; vacancies to be filled by the governor for the unexpired term. But no one of the seven physicians hereafter appointed shall be an officer or member of the faculty of any medical school, and the governor shall have the power to remove any member of said board for good cause shown. It shall meet semi-annually in July and January and at such other times as it may decide upon, such meetings to be held at the seat of government; suitable rooms, office supplies and furniture except postage and stationery, therefor to be provided by the custodian of the capitol. At the meeting held in July a president from their number, and a secretary who shall be a physician not of their number, shall be elected, and the latter have an office in the capitol. For the purposes contemplated in this section the state shall be divided into health districts, numbered and consisting respectively of the counties named as follows:

District No. 1. Allamakee, Butler, Bremer, Black Hawk, Buchanan, Chickasaw, Clayton, Delaware, Fayette, Floyd, Grundy, Howard, Mitchell, Winneshiek.

District No. 2. Benton, Cedar, Clinton, Dubuque, Iowa, Jones, Jackson, Johnson, Linn, Muscatine, Scott.

District No. 3. Appanoose, Davis, Des Moines, Henry, Jefferson, Keokuk, Louisa, Lee, Mahaska, Monroe, Wapello, Washington, Van Buren.

District No. 4. Cerro Gordo, Calhoun, Emmet, Franklin, Hancock, Humboldt, Hamilton, Hardin, Kossuth, Palo Alto, Pocahontas, Webster, Winnebago, Worth, Wright.

District No. 5. Buena Vista, Clay, Cherokee, Dickinson, Ida, Lyon, Osceola, O'Brien, Plymouth, Sioux, Sac, Woodbury.

District No. 6. Audubon, Adair, Cass, Crawford, Carroll, Greene, Guthrie, Harrison, Monona, Pottawattamie, Shelby.

District No. 7. Boone, Dallas, Jasper, Marshall, Madison, Marion, Polk, Story, Tama, Poweshiek, Warren.

District No. 8. Adams, Clarke, Decatur, Fremont, Lucas, Mills, Montgomery, Page, Ringgold, Taylor, Union, Wayne.

When vacancies occur in the state board of health, it shall be the duty of the governor to appoint to membership on the board physicians residing in the various health districts, until seven such districts are represented on the board. After which time the annual appointment shall be made from the physicians residing in the district not represented on the board the preceding year. [26 G. A., ch. 91; 20 G. A., ch. 173; 18 G. A., ch. 151, §§ 1, 9, 10, 12.] [27 G. A., ch. 67, § 1.] [28 G. A., ch. 88, § 1.] [30 G. A., ch. 97.]

[The amendment by 30 G. A., chap. 97, to the above section, ignored the same section as it appeared in the supplement to the code. The change is shown here as having been made to the code supplement. The amendment effected a change in the times of meetings of state board of health.]

SEC. 2565. Powers—regulations—reports.

In a prosecution for violation of the regulations of the state board of health, the rules of the board may be established

by certification of its secretary. *Pierce v. Doolittle*, 130-333.

SEC. 2567. Clerk of court to keep registry. The clerk of the court in each county shall keep a book in which shall be recorded all marriages and divorces occurring within the county, together with such data respecting the same as shall be required by the state board of health, and shall report to the secretary of the state board of health on or before the first day of August in each year such data respecting such marriages for the year ending June thirtieth (30th) immediately preceding. The clerk of the district court of each county shall keep a book in which shall be recorded all births and deaths occurring within the county as shown by the returns filed in his office by the assessor, as provided in section twenty-five hundred and sixty-six; and on or before the first day of June in each year shall furnish to the secretary of the state board of health a report of such births and deaths. [19 G. A., ch. 140; 18 G. A., ch. 151, § 3.] [31 G. A., ch. 110, §§ 1, 2.]

[Section 2567, which was amended by 31 G. A., chap. 110, was repealed by section 9 of chap. 109, 31 G. A. Section 6 of chapter 109 took the place of section 2567. The repealing act was approved at a later date than the amending act.]

SEC. 2568. Local board of health—quarantine.

The physician appointed as a health officer by a local board of health becomes simply an officer to assist in the administration of the law and the enforcement of the regulations of the board and is not required to treat the sick in his professional capacity. If called into service by the board of health to treat persons infected with contagious disease he is entitled to compensation, although the county may have had a contract with another physician to treat all the paupers of the county. The fact that the patient is a pauper is material in determining who shall pay the bill and not with reference to who shall perform the services. *Lacy v. Kossuth County*, 106-16.

A certificate of the board of health attached to a physician's claim against the county for compensation for services in treating a person infected with contagious disease is admissible in evidence as a part of the claim for such compensation. *Ibid.*

There is nothing to prevent a member of a city council from acting as physician under the employment of the board of health appointed by the mayor of the city. *Dewitt v. Mills County*, 126-169.

It being made the duty of local boards

of health to establish such relations as are necessary for the protection of the public health, and to proclaim and establish quarantine against infectious or contagious diseases, the members of such board are not individually liable for loss sustained by an individual on account of the establishment of a quarantine. *Beeks v. Dickinson County*, 131-244.

The provision that the mayor may declare a quarantine in case of infectious or contagious diseases, upon written notice given by any practicing physician of the existence of such disease, makes the written notice by such physician necessary before a quarantine against an individual can be declared, and in the absence of such notice there can be no punishment for violation of such quarantine. *State v. Kirby*, 120-26.

Expense of disinfecting premises is not chargeable to the county. *Schmidt v. Muscatine County*, 120-267.

Beyond the boundaries of the city the board of health of the city has no power or authority, and it cannot establish a smallpox pest house in an adjoining township. *Warner v. Stebbins*, 111-86.

(But see notes under § 2575-a.)

SEC. 2570. Care of infected person.

This section does not enlarge the territorial limits of the jurisdiction of the city board of health, as specified in Code, § 2568, nor authorize a transfer of patients having contagious diseases to the jurisdiction of the board of health of an adjoining township. *Warner v. Stebbins*, 111-86.

A physician employed by the local board of health to treat cases of contagious diseases is entitled to recover by way of compensation from the county for such treatment given by him as is reasonable under the circumstances. *Bay v. Monroe County*, 121-302.

Where it is made to appear that smallpox or other disease dangerous to the public health exists, the board of health has power to make provision for the care of the patients, and may provide nursing and medical attendance, which will be charged to the patients or those liable for his support, if able to pay; but if unable to pay it is to be at the expense of the county. A physician seeking to enforce a claim for such services against a county must show that the person to whom such services were rendered are unable to pay

the expense thereof. *Walker v. Boone County*, 123-5.

Before amendment of this section by 29 G. A., chapter 105, the liability of the county for the services of a physician employed by a local board of health to attend a person afflicted with a contagious disease as allowed by the board of health was absolute if the patient or those liable for his support were unable to pay. And held that the acceptance of a portion of the

claim as allowed by the board of supervisors did not defeat recovery for the balance. *Resner v. Carroll County*, 126-423.

While the statute as to local boards of health provides for the care of infected persons and for the payment of the expenses incurred on account thereof, it neither expressly or by implication provides for compensation to one who is injured by the establishment of a quarantine. *Beeks v. Dickinson County*, 131-244.

SEC. 2570-a. Repeal—care of infected person—expenses. That section two thousand five hundred and seventy-a (2570-a) of the supplement to the code and chapter ninety-eight (98) acts of the thirtieth general assembly be, and the same are hereby repealed and the following enacted in lieu thereof:

When any person shall be sick or infected with smallpox or other infectious or contagious disease dangerous to the public health, whether a resident or otherwise, the local board of health shall make such provisions as are best calculated to protect the inhabitants therefrom, and may remove such person to a separate house, or to a pest house, or detention or other hospital, and shall provide needful assistance, nurses, medical attendance and supplies. If in the judgment of said board such person cannot be removed, then he shall be cared for at the place where he resides in the same manner as above provided. In case of the removal of more than one person to the same house, or to any pest house, or detention or other hospital, said board shall provide needful assistance, nurses, medical supplies and attendance necessary for their proper care. All bills for expenses incurred in carrying out the provisions of this section, and in establishing, maintaining, or raising a quarantine, including disinfection and the building and furnishing of any pest house, detention or other hospital, shall be filed with the clerk of the local board of health, which board shall examine the same and act thereon at its next regular meeting after the same have been filed with the clerk and shall certify the amount allowed by it thereon to the county auditor, and the board of county supervisors shall act upon said bills as thus certified at its first regular meeting thereafter. The local board of health shall allow an amount on such bills as shall be reasonable, and the certificate of the local board of health shall be *prima facie* evidence of the correctness of said bills, but the board of supervisors may revise the amounts so allowed and fix the same. The expenses paid under the provisions of this section shall in no case exceed the reasonable value of the property furnished or services rendered and the county shall not advance such expenses until the same shall have been audited and allowed by the board of supervisors; and the said board of supervisors, shall, at the time it levies the general taxes, levy on the property of the city, town or township, from which such expenses were certified, a sufficient tax to reimburse the county to the extent of one-third of the amount paid by it under the provisions of this act. It is further provided that nothing herein contained shall be construed to prevent any person quarantined, as herein provided, from employing at his own expense, the physician or nurse of his choice. The forcible removal of sick or infected persons, as herein provided, shall be effected by an application made to any civil magistrate, in the manner provided for the removal and abatement of nuisances, who shall issue the warrant as directed in such cases, to remove such person or persons to the place designated by the local board of health, or to take possession of the condemned or infected houses or lodgings and such officer shall receive a

reasonable compensation for such services, to be determined and allowed by said local board. [31 G. A., ch. 111.]

The expense of fitting up a permanent detention hospital is to be paid by the county, and not by the persons who are detained and treated there. *Kurtz v. Polk County*, 109 N. W. 612.

SEC. 2570-a1. Saving clause. That nothing in this act shall in any manner affect pending litigation. [31 G. A., ch. 111, § 2.]

SEC. 2570-b. Repeal. That the law as it appears in section twenty-five hundred and seventy-b (2570-b) of the supplement to the code be and the same is hereby repealed. [30 G. A., ch. 98, § 2.] [31 G. A., ch. 111.]

[Section 2570-b was repealed by section 2, chap. 98, 30 G. A., and chap. 98, 30 G. A., was repealed by chap. 111, 31 G. A.]

SEC. 2571. Meetings of local board—regulations—reports—expenses—tax. Local boards of health shall meet for the transaction of business on the first Mondays of April and November in each year, and at such other times as may seem necessary. They shall give notice of all regulations adopted, by publication thereof in some newspaper printed and circulated in the town, city or township, or if there is none, by posting a copy thereof in five public places therein, and through their physician or clerk shall make general report to the state board at least once a year, and special reports when it may demand them, of its proceedings and such other facts as may be required, on blanks furnished by and in accordance with instructions from it. All expenses incurred in the enforcement of the provisions of this chapter, when not otherwise provided, shall be paid by the town, city or township; in either case all claims to be presented and audited as other demands. In the case of townships, the trustees shall certify the amount required to pay such expenses to the board of supervisors of the county, and it shall advance the same, and, at the time it levies the general taxes, shall levy on the property of such township a sufficient tax to reimburse the county, which, when collected, shall be paid to and belong to the county. [22 G. A., ch. 65; 18 G. A., ch. 151, §§ 15, 24; C., '73, §§ 416, 420.] [29 G. A., ch. 106, § 1.]

SEC. 2572. Regulations of state board. Local boards of health shall obey and enforce the rules and regulations of the state board; and peace and police officers within their respective jurisdictions, when called upon to do so by the local boards, shall execute the orders of such board. If any local board of health shall refuse or neglect to enforce the rules and regulations of the state board of health, the state board of health may enforce its rules and regulations within the territorial jurisdiction of such local board, and for that purpose shall have and may exercise all of the powers given by statute to local boards of health; and the peace and police officers of the state, when called upon by the state board of health to enforce its rules and regulations, shall execute the orders of such board. All expenses incurred by the state board of health in determining whether its rules and regulations are enforced by a local board of health, and in enforcing the same when a local board has refused or neglected to do so, shall be paid in the same manner as is now provided for the payment of the expenses of enforcing such rules and regulations by local boards of health. [29 G. A., ch. 107, § 1.]

SEC. 2573. Failure to comply with orders or regulations.

The violation by a physician of the rules of the state board of health is a misdemeanor punishable as provided in Code § 4906. The rules of the board may be proved by certification of the secretary. *Pierce v. Doolittle*, 130-333.

Rules prescribed by the board prior to the enactment of the Code of '97 continued in force after the enactment of such Code. *Ibid.*

SEC. 2575-a1. Location of pest houses — controversy — how settled. That when a controversy arises between municipalities or between boards of health thereof, respecting the location of pest houses or hospitals for the treatment of infectious or contagious diseases, such matter shall be referred to the president of the state board of health who shall forthwith appoint a committee of three (3) members thereof, which committee shall upon two days' notice to the parties interested, investigate the matter and make such order in the premises as the facts warrant, and such order shall be final. [29 G. A., ch. 108, § 1.]

A municipality may acquire in an ad- pest house. *Hanson v. Cresco*, 132-533.
joining school township a location for a

SEC. 2575-a2. Jurisdiction. The health officers of the municipality which is allowed to maintain a pest house or hospital for patients affected by infectious or contagious diseases outside the limits of said municipality, shall have exclusive jurisdiction and control of such pest house or hospital for the enforcement of all sanitary and health regulations. [29 G. A., ch. 108, § 2.]

SEC. 2575-a3. Removal — written permission. That no person known to be infected, or sick with any contagious disease dangerous to the public health shall move or be removed from one city, town or township to another city, town or township except as hereinafter provided and by written permission of the local board of health of the city, town or township to which such person is to be removed. [30 G. A., ch. 99, § 1.]

SEC. 2575-a4. Expenses—how paid. If any person known to be infected or sick with smallpox or other contagious disease dangerous to the public health shall with the knowledge or consent of any member of the local board of health of the city, town or township in which he resides be removed from said city, town or township to another city, town or township either with or without the permission of the local board of such city, town or township to which he is removed, all expense of quarantine or care of such person incurred by the city, town or township to which he is removed shall be paid by the city, town or township from which such person was so removed, in the manner provided in section two thousand five hundred and seventy-a (2570-a) of the supplement to the code. If said person be so removed to another county, said expenses shall in the first instance be paid by such county and recovered from the county from which such person had been removed. [30 G. A., ch. 99, § 2.]

SEC. 2575-a5. Same. When it is determined by any physician or health officer that any person is sick with smallpox or any other contagious disease dangerous to the public health while in any city, town or township other than the one in which he resides, provided the distance be not to exceed fifteen (15) miles from his place of residence, then and in that event if the person so diseased elect to be moved to the city, town or township in which he resides, he may be so removed by private conveyance along the least frequented highways under escort of a health officer to his abode immediately on determining that he is so diseased; and every such vehicle shall carry as a signal of warning, conspicuously displayed, a yellow flag not less than two feet square. All expenses of removal, care and quarantine of such person shall be paid by the city, town or township to which he is removed and shall be paid in the manner provided in section two (2) of this chapter. [30 G. A., ch. 99, § 3.]

SEC. 2575-a6. Misdemeanor. Any person who shall move, or any physician or any member of a local board of health who shall cause or assist any person known to be infected or sick with smallpox, or any contagious

disease dangerous to the public health to be removed from one city, town or township, to another city, town or township, contrary to the provisions of this act or of any regulation of the state board of health, shall be guilty of a misdemeanor, and be punished by a fine not exceeding one hundred dollars (\$100) or imprisonment not exceeding thirty (30) days, or both at the discretion of the court. [30 G. A., ch. 99, § 4.]

CHAPTER 16-A.

OF THE BACTERIOLOGICAL LABORATORY.

SECTION 2575-a7. Establishment. The bacteriological laboratory of the medical department of the state university at Iowa City, is hereby established as a permanent part of the medical department of the university work, and it shall in addition to its regular work perform all scientific analyses and tests, chemical, microscopical or other scientific investigations, which may be required by the state board of health, and it shall make prompt report of the results thereof, under such rules and regulations as the said state board of health may from time to time adopt. [30 G. A., ch. 101, § 1.]

SEC. 2575-a8. Director—reports. The professor of bacteriology of the medical department of the state university shall be the director of said laboratory and shall make or cause to be made all such analyses, tests and investigations as shall be required by the state board of health as provided in the preceding section, causing the same to be made without delay and giving such analyses, tests or investigations the preference of the point of time over all other work and shall make prompt report of the result thereof to the board of health or to such person or persons as the board of health may by rule or designation designate. [30 G. A., ch. 101, § 2.]

SEC. 2575-a9. Repeal — appropriation — purposes. That section three (3) of chapter one hundred and one (101) of the laws of the thirtieth (30th) general assembly and of chapter one hundred and thirteen (113) of the laws of the thirty-first general assembly be and the same are hereby repealed and the following enacted in lieu thereof:

“There is hereby appropriated out of any money in the state treasury not otherwise appropriated, for the purpose of more perfectly equipping the present bacteriological laboratory at the state university and for the purpose of enabling it to perform the duties hereby imposed, and to provide it with the necessary apparatus and assistants to render the same effective, the sum of six thousand dollars (\$6,000) annually or so much thereof as may be necessary, to be additional salary of the director, the assistants, the expenses of said laboratory as may be necessary by this act, including postage, stationery, and other contingent and miscellaneous expenses which may be incurred in the maintaining of said laboratory and performing the duties required therein by the provision of this act. The director shall receive such additional salary not to exceed twelve hundred (\$1,200) dollars per year as the state board of health may fix. The appropriations hereby provided shall be expended in the manner provided in section two thousand five hundred and seventy-five (2575) of the code.” [32 G. A., ch. 137, § 1.]

SEC. 2575-a10. Acts in conflict. All acts and parts of acts inconsistent with this act are hereby repealed. [32 G. A., ch. 137, § 2.]

CHAPTER 16-B.

OF REGISTRATION OF BIRTHS AND DEATHS.

SECTION 2575-a11. State registrar of vital statistics. That for the complete and proper registration of births and deaths for legal, sanitary and statistical purposes, the secretary of the state board of health is hereby constituted state registrar of vital statistics, and it shall be his duty to promulgate and enforce all necessary rules and regulations that may be required to carry out the purposes of this act. [31 G. A., ch. 109, § 1.]

SEC. 2575-a12. Certificates of death. The undertaker or the person in charge of the funeral of any person dying in Iowa, shall cause a certificate of death to be filled out, with all the personal particulars contained in the standard blanks adopted by the U.S. census bureau, and with a statement of cause of death by attending physician, or in his absence, by the health officer or coroner, and shall file it with the state registrar on or before the 5th day of each month for the month preceding and no sexton or superintendent of a cemetery shall permit interment, and no railroad or other transportation company shall permit shipment of the body unaccompanied by such certificate of death. [31 G. A., ch. 109, § 2.]

SEC. 2575-a13. State registrar to furnish blanks. The state registrar shall furnish blank certificates of death to physicians and undertakers, and all proper forms and instructions for the effectual execution of the law. [31 G. A., ch. 109, § 3.]

SEC. 2575-a14. Certified transcripts of certificates of death. It shall be the duty of the state registrar to furnish to the clerk of the district court of each county on or before the first day of February of each year, certified transcripts of the certificates of death filed with him from the respective counties as well as similar transcripts of deaths to the U. S. census bureau at Washington, and to arrange by counties, bind and deposit in the state historical building at Des Moines the original certificates; and transcripts sent each county shall be bound at the expense of said county, and preserved for reference by the clerk of the district court. [31 G. A., ch. 109, § 4.]

SEC. 2575-a15. Assessor to report births and deaths. It shall be the duty of all assessors at the time of making assessment to obtain and report to the clerk of the district court upon blanks adopted by the state registrar and furnished by the county auditor, such registration of births and deaths as occur within their respective districts for the year ending Dec. 31st, immediately preceding. [31 G. A., ch. 109, § 5.] [32 G. A., ch. 135.]

SEC. 2575-a16. Record of marriages and divorces and births. The clerk of the court in each county shall keep a book in which shall be recorded all marriages and divorces occurring within the county, together with such data respecting the same as shall be required by the state registrar and shall report to said state registrar on or before the first day of August in each year, such data respecting such marriages and divorces for the year ending June 30th immediately preceding, and the clerk of the district court of each county shall keep a book in which shall be recorded all births occurring within the county as shown by the returns filed in this [his] office by the assessor as provided in the section preceding, and on or before the first day of August in each year shall furnish to the state registrar a report of such births. [31 G. A., ch. 109, § 6.]

SEC. 2575-a17. Appropriation. There is hereby appropriated the sum of two thousand (2,000) dollars, annually, or so much thereof as may be necessary, to pay the expense of printing, postage, clerk hire, and such

other expenses as may be required. All bills to be itemized, certified to, and approved by the state registrar. [31 G. A., ch. 109, § 7.] [32 G. A., ch. 136.]

SEC. 2575-a18. Penalty. Any person acting as undertaker, sexton, agent of a transportation company, or other person, violating any of the provisions of this act shall be fined not less than ten dollars (\$10.00) and not more than one hundred dollars (\$100.00) or be imprisoned not more than sixty (60) days or be subject to both fine and imprisonment at the discretion of the court. It shall be the duty of the prosecuting attorney in each county upon complaint of the state registrar to prosecute in such cases and the state registrar shall endeavor to see that this act is uniformly and officially executed throughout this state. [31 G. A., ch. 109, § 8.]

SEC. 2575-a19. Repeal—acts in conflict. Sections twenty-five hundred sixty-six (2566) and twenty-five hundred sixty-seven (2567) of the code and chapter one hundred (100) of the laws of the thirtieth (30) general assembly and all other acts and parts of acts in conflict with this act are hereby repealed. [31 G. A., ch. 109, § 9.]

CHAPTER 16-C.

OF MATERNITY HOSPITALS.

SECTION 2575-a20. Erection, establishment or maintenance—permit. That from and after the taking effect of this act, it shall be unlawful to erect, or establish or maintain, conduct, keep or carry on, or to continue to maintain, keep or carry on, within this state, any lying-in or maternity hospital, or any institution or place for the reception, care and treatment of women in labor, or where females may be received, cared for and treated during pregnancy or after delivery, or any hospital wherein women are received, cared for and treated during pregnancy, or after delivery, the proprietor, owner or persons in charge of which, or any person representing them, undertakes to adopt or procure or assist in procuring the adoption or disposal of any child born therein, within two hundred feet of any church building, university, school or other institution of learning, or public park, or in a building situated within 75 feet of premises owned by another. And it shall from and after the taking effect of this act be unlawful to so erect, establish, maintain, conduct, keep or carry on, or continue to keep or carry on elsewhere in this state, any place or places above enumerated, for any such purpose or purposes, without having first obtained a permit in writing, as hereinafter provided. This act shall not apply to general hospitals for the treatment of diseases, obstetrics and surgical cases. [32 G. A., ch. 138, § 1.]

SEC. 2575-a21. Board of health to grant permit. The state board of health is hereby authorized to grant a permit in writing, to establish, maintain, conduct, keep or carry on such lying-in or maternity hospital, or hospital ward, or institution, or place for the reception, care and treatment of women in labor, for pay, or where females may be received, cared for or treated during pregnancy or during or after delivery, for pay, at any place within the state, except as prohibited in section one of this act; but only one such permit shall be issued for any one premises. [32 G. A., ch. 138, § 2.]

SEC. 2575-a22. Application—inspection of premises—issuance of permit—fees. Any person or persons who desire to obtain the permit

provided in section two of this act, shall file with the state board of health an application for said permit, naming each person to whom said permit is to be granted, and particularly describing the place or premises to be used for said purposes, and the location thereof; and shall also cause to be filed with said state board of health a statement signed by two regular physicians, holding a certificate, in force, from the state board of medical examiners of this state, to the effect that, to the personal knowledge of each of said physicians, said person, or each of said persons, is of good character and reputation; that he has personally examined the premises described in the application for said permit, and that the same are suitable and properly furnished for the uses described in section one of this act, and that such hospital or ward or other institution or place will be for the public convenience. Upon the filing of such application for a permit, together with said physicians' certificate, the state board of health shall satisfy itself as to the correctness of the matters set forth in said application and physicians' certificate, and shall cause said premises to be inspected, for which inspection a fee of five dollars shall be paid by the person or persons signing such application, and when so satisfied, and upon the payment of a fee of twenty-five dollars by the person or persons applying for said permit to the said state board of health, said state board of health shall issue its permit, particularly naming the person or persons to whom granted, the description and location of the premises to be used, and the purpose or purposes for which said permit is granted, which permit shall continue in force for one year from the date thereof, unless sooner revoked. Said permit may be renewed, from time to time, whenever said state board of health deem it proper so to do, and upon payment to said board of a fee of five dollars for each renewal thereof. Said permit shall not authorize the use of any other place or premises than the one named in said permit or in the renewal thereof. Provided that no fee mentioned in this section should [shall] be required of any religious or charitable institution conducting such lying-in or maternity hospital. [32 G. A., ch. 138, § 3.]

SEC. 2575-a23. Register of patients, births and deaths—reports. The person or persons in charge of the place described in said permit shall keep a true, accurate and complete register of all patients and of all births and deaths occurring upon said premises, giving date of entry of each patient, date of birth and name of each child born on said premises, and the age of all children dying thereon, and the same particulars, as well as the name, so far as known, of any woman patient dying on said premises; and said person or persons in charge of the place described in said permit shall furnish to the officer authorized by law to receive them, all of the particulars required by law to be furnished for the due registration of each birth or death occurring on said premises, except when such particulars have been furnished by the physician in attendance at birth, or attending on the person so dying thereon. The state board of health shall furnish blanks to all permit holders specified in this act and to be filled out and returned to the state board of health within twenty-four hours after the birth or death of any child or death of any woman patient dying on the premises described in such permit, giving date of birth and sex of each child born on said premises and name and age of the mother, and if the true name of the mother cannot be ascertained then the assumed name given by her, and the age and sex of all children dying on said premises. And the state board of health shall keep a record of same, which record shall be accessible to the members of the state board of health, members of the board of control of state institutions, the attorney general and any county attorney in the state, and to no other person except on order of a court of record. [32 G. A., ch. 138, § 4.]

SEC. 2575-a24. Articles of adoption—record. The person or persons in charge of the premises described in such permit shall not adopt or dispose of by adoption or procure or assist in the disposal by adoption of any child born thereon, without the articles of adoption being filed as required by law. Within twenty-four hours after the departure, removal or withdrawal from said premises of any child born thereon, or of the body of any such child, the person or persons in charge thereof shall enter upon said register a record of such departure, removal or withdrawal and the name or other description of said child, the name or names and respective residences of the person or persons who took said child or its body, the disposition made of said child or its body, the place to which the same was taken and where the same was left. [32 G. A., ch. 138, § 5.]

SEC. 2575-a25. Inspections—by whom made—report. Every person in charge of the premises described in any such permit, his servants, employes or agents, shall permit visitation or inspection of said premises, and of the register in this act provided to be kept, to be made at any time, by the state board or local board of health or by any person designated in writing by the state or local board of health for that purpose. It shall be the duty of the local board of health of the city, town or township in which such premises are maintained to inspect such premises at least once in six months; and to file an accurate report of such inspection with the city, town or township clerk of the city, town or township in which such premises are maintained, and that such report shall be preserved as a permanent record. [32 G. A., ch. 138, § 6.]

SEC. 2575-a26. Revocation of permit. Said permit may be revoked after reasonable notice by the state board of health, and a conviction under the succeeding section of this act shall operate to terminate and revoke said permit. [32 G. A., ch. 138, § 7.]

SEC. 2575-a27. Penalty. Any person violating any of the provisions of this act or making any false entry on the register required by this act to be kept, shall be guilty of a misdemeanor, and shall be punished by a fine of not more than two hundred and fifty dollars, or by confinement in the county jail not more than six months, or by both such fine and imprisonment. And the premises so unlawfully used are hereby declared to be a nuisance, and the same shall be subject to the procedure provided in section twenty-four hundred and five (2405), twenty-four hundred and six (2406) and twenty-four hundred and seven (2407) of the code, as far as applicable thereto. [32 G. A., ch. 138, § 8.]

CHAPTER 16-D.

OF THE PRACTICE OF NURSING.

SECTION 2575-a28. Certificate required. It shall be unlawful for any person to profess to be a registered nurse without first obtaining from the state board of health a certificate authorizing him or her to practice nursing in this state, except as hereinafter provided. [32 G. A., ch. 139, § 1.]

SEC. 2575-a29. Examining committee—qualifications of applicants—existing practitioners. At the annual meeting of the state board of health it shall select two physicians from its own membership, and two graduate nurses, residents of this state actively engaged in the practice of nursing, who, together with the secretary of the state board of health, shall constitute the examining committee for the year. The examinations pro-

vided for in this act shall be held in the city of Des Moines in July of each year and at such other times and places as the board of health shall direct. All applicants for certificates to practice nursing shall have attained the age of twenty-three (23) years and shall be of good moral character. They shall be graduates of training schools recognized as being in good standing by the state board of health of Iowa and shall have received at least two years' instruction in general hospital practice. After July 1st, 1910, no training school shall be accredited by the state board of health as a school of recognized standing which is not attached to a general hospital, and which does not have a course of study of at least three years. All graduate nurses who are residents of the state and who have been engaged in the practice of nursing prior to the passage of this act shall be granted a certificate without examination upon the payment of the registration fee of five dollars and the same rule shall apply to all nurses who graduate from a recognized school prior to July 1st, 1907. Nurses holding diplomas from hospital training schools of recognized standing upon application to the secretary of the state board of health shall be granted a permit to practice until the first examination of the board following the issuance of the said permit. [32 G. A., ch. 139, § 2.]

SEC. 2575-a30. Examination — fees—certificates — where registered. After the passage of this act, any person who is not exempt from examination by section two (2) of this act and who shall apply for a certificate to practice nursing shall be examined in the following subjects: elementary hygiene, anatomy, physiology, materia medica, dietetics, and also practical nursing, medical and surgical nursing, obstetrics, nursing of children and the rules and regulations of the state board of health relating to infectious diseases and quarantine and such other subjects as the examining board may require from time to time. Each applicant shall pay the secretary of the state board of health a fee of five dollars (\$5.00). If the examination be satisfactory to three members of said committee it shall so report to the state board of health; if the board find the report and ratings correct, it shall authorize its president and secretary to issue a certificate to the successful candidate for which such candidate shall pay an additional fee of one (\$1.00) dollar. This certificate shall confer upon the holder the right to practice as a registered nurse and be conclusive evidence thereof. The state board of health is empowered to recognize certificates issued to nurses under the laws of other states having substantially similar requirements to those existing in this state, provided, that such states recognize certificates issued by the state of Iowa; then certificates issued by authority of such other states may be deemed sufficient evidence of qualifications of the licentiate without further examination for certificate in this state; the fee for such certificate shall be ten (\$10.00) dollars. The holder of such certificate provided for in this act, shall cause the same to be registered in the office of the county recorder of the county wherein he intends to reside. [32 G. A., ch. 139, § 3.]

SEC. 2575-a31. Unlawful practice. No person after January 1st, 1908, except one holding a certificate under authority of this act shall advertise to be or assume the title of registered nurse or use the abbreviation R. N. or any other words, letters or figures to indicate that the person using the same is a registered nurse and it shall be unlawful for any graduate nurse to practice nursing as a graduate or registered nurse in the state of Iowa without first having registered under this act. [32 G. A., ch. 139, § 4.]

SEC. 2575-a32. Not applicable to certain nurses. This act shall not apply to any person nursing the sick with or without pay who does not in

any way assume to be a registered or graduate nurse. [32 G. A., ch. 139, § 5.]

SEC. 2575-a33. Refusal to grant certificates—revocation of certificates. The board of health may refuse to grant, or renew any certificate provided for in this act, to a person otherwise qualified, who obtained said certificate by false or fraudulent representation, or for immoral or unprofessional or dishonorable conduct, or for willful or repeated violation of the rules or regulations of the state board of health; and the board may revoke any certificate issued by it, for any such or similar cause; provided, that before the revocation of any certificate issued under the provisions of this act, the licentiate shall have been afforded an opportunity for a hearing before the board. At least twenty (20) days prior to the date set for such hearing, the secretary of the state board of health shall cause written notice, under registered mail, to be sent to the licentiate at his last known place of residence; said notice shall contain a statement of the charges, and the date and place set for the hearing before the board. If the party thus notified fails to appear, either in person or by counsel, at the time and place designated in said notice, the board may, after receiving satisfactory evidence of the truth of the charges and proper issuance of the notice, revoke said certificate. If the licentiate appear either in person or by counsel, the board shall proceed with the hearing as herein provided. The board may receive and consider affidavits and oral statements, and shall cause stenographic report of the oral testimony to be taken, which, together with all other papers pertaining thereto, shall be preserved for one year. If five (5) members of the board present at the hearing, are satisfied that the licentiate is guilty of any of the offenses charged, the certificate shall be revoked, for such time as the state board of health may determine. [32 G. A., ch. 139, § 6.]

SEC. 2575-a34. Compensation of examining committee—expenses. Each member of the examining committee, except the secretary, shall receive for his services out of the funds created by the payment of fees by applicants for examination such compensation as is allowed to the members of the state board of medical examiners for like services and the secretary shall receive his necessary expenses, incurred for services which cannot be performed at the capitol. All printing, postage and other contingent expenses, necessarily incurred under the provisions of this act shall be paid from said fund. All expenses incurred under the provisions of this act shall be itemized, verified, and audited and a warrant drawn therefor on the nurses' fund in the same manner as other expenses of the state board of health. [32 G. A., ch. 139, § 7.]

SEC. 2575-a35. Penalty. Any person who shall knowingly violate any of the provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof, shall be fined a sum not exceeding one hundred (\$100.00) dollars or imprisoned in the county jail not to exceed thirty (30) days. [32 G. A., ch. 139, § 8.]

CHAPTER 16-E.

OF THE PRACTICE OF EMBALMING.

SECTION 2575-a36. Unlawful practice. It shall be unlawful for any person to embalm or otherwise prepare for transportation by railway or other public conveyance except as hereinafter provided, the dead body of any human being, or to embalm or otherwise prepare any such body, or to practice, or publicly profess to practice the art of embalming without first

obtaining, from the state board of health, a license authorizing him to practice embalming in this state. [32 G. A., ch. 140, § 1.]

SEC. 2575-a37. Examining committee — applicants — qualifications. At the annual meeting of the state board of health, it shall select two physicians from among its own membership, and two licensed embalmers, residents of this state, who, together with the secretary of the state board of health, shall constitute the examining committee for the year. The examinations provided for in this act, shall be held in the city of Des Moines, in July and January of each year and at such other times as the board of health may direct. All applicants for license to practice embalming, shall have attained the age of twenty-one years, and shall have had not less than two years practical experience under a licensed embalmer in this state, or in lieu thereof, shall have had a practical experience of not less than one year under a licensed embalmer, and have completed the regular course of instruction in a school of embalming recognized as being in good standing by the state board of health of Iowa; in addition to all of said requirements, each applicant for an embalmer's license shall have actually embalmed not less than ten bodies, under the supervision of a licensed embalmer, prior to the date of examination. Each applicant for examination shall file with the secretary of the state board of health not later than ten days prior to the date of the next examination, a sworn statement of his age and other qualifications as required by this act, and a certificate of good moral character signed by three responsible citizens, one of whom must be a licensed embalmer personally acquainted with the applicant for at least one year. All applications under this act shall be upon blanks furnished by the state board of health. [32 G. A., ch. 140, § 2.]

SEC. 2575-a38. Examination—license—fee. After the passage of this act, each applicant for license to practice embalming, shall be examined in the following subjects: anatomy, sanitary science, the care, disinfection, preservation, transportation of and burial, or other final disposition of dead bodies, and the rules and regulations of the state board of health relating to infectious diseases and quarantine; he may also be required to demonstrate his proficiency as an embalmer by operations on a cadaver. The examination papers and oral answers shall, when concluded, be graded upon the scale of one hundred, each applicant first to pay, to the secretary of the state board of health, a fee of five dollars therefor. The average rating required to pass shall be fixed by the board of health prior to the examination. If the examination be satisfactory to three members of the examining committee, it shall so report to the state board of health; if the board find the report and ratings correct, it shall authorize its president and secretary to issue a license to the successful candidates, for which such candidates shall each pay an additional fee of one dollar. The license, while in force, shall confer upon the holder the right to practice embalming, or to otherwise prepare dead bodies for transportation, burial, or other authorized mode of final disposition, and be conclusive evidence thereof. [32 G. A., ch. 140, § 3.]

SEC. 2575-a39. Licenses renewed annually—licentiates of other states—fees—licenses registered. Any person now holding an unexpired license from the state board of health as an embalmer, shall be held to be licensed as an embalmer under the terms of this act, but all licenses now in force, or hereafter issued, shall expire on the thirtieth (30th) day of June following the date of issuance of such license. Licenses shall be renewed without examination annually by the state board of health within thirty (30) days after expiration, provided the holder of said license shall make written application to said board, and pay to the secretary thereof the sum

of one dollar renewal fee. The state board of health is empowered to recognize licenses issued to embalmers by authorities under the laws of other states having substantially similar requirements to those existing in this state, provided, that such states recognize licenses issued by the Iowa state board of health, then licenses issued by authority of such other states may be deemed sufficient evidence of qualifications of the licentiate without further examination for license in this state; the fee for such license shall be ten dollars. The owner of any license, or renewal, provided for in this act shall cause the same to be registered in the office of the local board of health of each city or town wherein he intends to practice the art of embalming, and no transportation permit shall be issued by the local board to any person not so recorded. [32 G. A., ch. 140, § 4.]

SEC. 2575-a40. Secretary of state board of health to keep record. The secretary of the state board of health shall keep a record of the names and residence of all persons to whom licenses have been issued, with the official number and date of issuance; a copy of this record, together with such other information as may tend to improve the public service shall be published annually. [32 G. A., ch. 140, § 5.]

SEC. 2575-a41. Refusal to grant licenses—revocation. The state board of health may refuse to grant, or renew, any license provided for in this act, to a person otherwise qualified, who obtained said license by false or fraudulent representation, or for habitual intoxication, or for immoral or unprofessional or dishonorable conduct, or for willful or repeated violation of the rules or regulations of the state board of health; and the board may revoke any license, issued by it, for any such similar cause; provided, that before the revocation of any license issued under the provisions of this act, the licentiate shall have been afforded an opportunity for a hearing before the board. At least ten (10) days prior to the date set for said hearing, the secretary of the state board of health shall cause written notice, under registered mail, to be sent to the licentiate at his last known place of residence; said notice shall contain a statement of the charges, and the date and place set for the hearing before the board. If the party thus notified fails to appear, either in person or by counsel, at the time and place designated in said notice, the board may, after receiving satisfactory evidence of the truth of the charges and the proper issuance of the notice, revoke said license. If the licentiate appear, either in person or by counsel, the board shall proceed with the hearing as herein provided. The board may receive and consider affidavits and oral statements, and shall cause a stenographic report of the oral testimony to be taken, which together with all other papers pertaining thereto shall be preserved for one year. If five (5) members of the board, present at the hearing, are satisfied that the licentiate is guilty of any of the offenses named in this section, the license shall be revoked. After the revocation of a license the licentiate, or holder thereof, shall not practice embalming or any of its branches in this state. [32 G. A., ch. 140, § 6.]

SEC. 2575-a42. Jurisdiction over transportation of dead bodies—rules and regulations. The state board of health shall have sole jurisdiction over the transportation of all dead bodies and of all methods preparatory thereto, and the said board is hereby authorized to make such rules and regulations, relating thereto, as in its opinion are necessary to subserve and protect the public health; said rules and regulations when made shall be enforced by the secretary of the state board of health. [32 G. A., ch. 140, § 7.]

SEC. 2575-a43. Removal or shipping permit. It shall be unlawful for any railway agent, express agent, baggage master, conductor, or other

person acting as such, to receive the dead body of any person for shipment, or transportation by railway or other public conveyance, to or from any point in this state or to a point outside of this state, unless said body be accompanied by a removal, or shipping permit signed by the health officer of the local board of health, and a certificate, attached to the outside box containing such body, showing the name and official number of the embalmer by whom it was prepared, and the method of preparation employed; provided, that nothing in this act shall be so construed as to prevent the shipment of dead bodies intended for use for anatomical purposes within this state when the same are so designated by the shipper. [32 G. A., ch. 140, § 8.]

SEC. 2575-a44. Compensation of examining committee—expenses. Each member of the examining committee except the secretary, shall receive for his services, out of the funds created by the payment of fees by applicants for examination or license, and renewals such compensation as is allowed the members of the state board of medical examiners for like services, and the secretary shall receive the sum of twenty-five dollars per month, and his necessary expenses incurred for services which cannot be performed at the capitol. All printing, postage, and other contingent office expenses necessarily incurred under the provisions of this act, shall be paid from said fund. Any balance of said funds remaining shall be turned over to the state treasurer for the use of the state. All expenses incurred under the provisions of this act shall be itemized, verified, and audited, and a warrant drawn therefor on the embalmers' fund in the same manner as other expenses of the state board of health. [32 G. A., ch. 140, § 9.]

SEC. 2575-a45. Penalty—enforcement. Any person who shall knowingly violate any of the provisions of this act, or who shall offer a forged removal, shipping or transportation certificate, or who shall certify falsely as to the preparation of a dead body, or who shall represent himself to be the *bona fide* owner of a license or renewal when such license or renewal was not regularly issued to him by the state board of health, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not exceeding one hundred dollars, or be imprisoned in the county jail for a period not exceeding thirty days, or both at the discretion of the court. It shall be the duty of the secretary of the state board of health, to see that the provisions of this act are properly administered and enforced throughout the state, and all peace officers and county attorneys shall aid him in their several capacities in the discharge of these duties. [32 G. A., ch. 140, § 10.]

SEC. 2575-a46. Repeal—acts in conflict. All acts or parts of acts in conflict with this act are hereby repealed. [32 G. A., ch. 140, § 11.]

CHAPTER 16-F.

OF NURSERY STOCK INFESTED WITH THE SAN JOSE SCALE—PUNISHMENT FOR BRINGING INTO THE STATE, AND TO PREVENT THE SPREAD OF THE SCALE.

SECTION 2575-a47. State entomologist—assistants—fees. The entomologist of the state experiment station is hereby constituted the state entomologist and charged with the execution of this act. He may appoint such qualified assistants as may be necessary, fix a reasonable compensation for their labor, and pay the same; and their acts shall have the same validity as his own. He shall, by himself, or his assistants, between the

first day of June and the fifteenth day of September, in each year, when requested by the owner or agent or where he has reasonable grounds to believe any dangerously injurious insect or plant disease exists, carefully examine any nursery, fruit farm, or other place where trees or plants are grown for sale, and if found apparently free from any dangerously injurious insect or plant disease, he shall issue his certificate stating the facts, and shall collect therefor a fee of not less than five dollars, nor more than fifteen dollars, according to the amount of stock inspected. It shall be unlawful to sell, or offer for transportation, any nursery stock unless accompanied by a copy of this certificate. [27 G. A., ch. 53, § 1.] [31 G. A., ch. 112, §§ 1, 2.]

SEC. 2575-a48. Quarantine—treatment—collection of cost. The state entomologist shall have authority, when requested by the owner or agent, or when he has reasonable grounds to believe any dangerously injurious insect or plant disease exists, to enter upon any grounds, public or private, for the purpose of inspection, and, if he finds any nursery, orchard, garden, or other place infested by the scale, he may, by himself or his assistants, enter upon such premises and establish quarantine regulations. If in his judgment any dangerously injurious insect or plant disease may be eradicated by treatment, he may, in writing, order such treatment, and prescribe its kind and character. In case any trees, shrubs, or plants are found so infested that it would be impracticable to treat them, he may order them burned. A failure for ten days after the delivery of such order to the owner or persons in charge to treat or destroy such infested trees or plants, as ordered, shall authorize the entomologist to perform this work by himself or his assistants, and to ascertain the cost thereof. He shall certify the amount of such cost to the owner or person in charge of the premises, and if the same is not paid to him within sixty days thereafter he shall certify the amount to the county auditor, who shall spread the same upon the tax books, to be collected as other taxes are, and turned over to the entomologist to become a part of the fund for carrying this act into effect. [27 G. A., ch. 53, § 2.] [31 G. A., ch. 112, § 1.]

SEC. 2575-a49. Inspection of nursery stock shipped into state. Where nursery stock is shipped into this state, accompanied by a certificate as herein provided, it shall be held *prima facie* evidence of the facts therein stated, but the state entomologist, by himself or his assistants, when they have reason to believe any such stock is infested with any dangerously injurious insect or plant disease, shall be authorized to inspect the same and subject it to like treatment as provided in section two of this act. [27 G. A., ch. 53, § 3.] [31 G. A., ch. 112, § 1.]

SEC. 2575-a50. Certificate of inspection — penalties. It shall be unlawful for any person, firm or corporation to bring into this state any trees, plants, vines, cuttings, or buds, commonly known as nursery stock, unless accompanied by a certificate of inspection, signed by the state entomologist of the state of Iowa or by another inspector duly approved by him, showing that the stock has been carefully inspected and found apparently free from any dangerously injurious insect or plant disease. Any person violating or neglecting to carry out the provisions of this act, or offering any hindrance to the carrying out of this act, shall be adjudged guilty of a misdemeanor and upon conviction before a justice of the peace shall be fined not less than ten dollars, nor more than one hundred dollars, for each and every offense, together with all the costs of the prosecution, and shall stand committed until the same are paid. All amounts so recovered shall be paid over to the state entomologist, and added to the fund herein provided for the carrying out the provisions of this act. [27 G. A., ch. 53, § 4.] [31 G. A., ch. 112, § 3.]

SEC. 2575-a51. Compensation. The state entomologist shall be allowed and paid for his services while engaged in this work, all his necessary traveling expenses and the sum of five dollars per day. All funds coming into his hands shall be paid over to the state treasurer, with an itemized statement of the source whence received. He shall certify the amount of his expenses and per diem to the auditor of state, who shall thereupon draw his warrant upon the treasurer of state for the amount, which shall be paid out of the funds provided for carrying this act into effect. [27 G. A., ch. 53, § 5.]

SEC. 2575-a52. Appropriation. There is hereby appropriated out of any moneys not otherwise appropriated, the sum of one thousand dollars (\$1,000), or so much thereof as may be necessary, for carrying out the provisions of this act. [27 G. A., ch. 53, § 6.]

CHAPTER 17.

OF THE PRACTICE OF MEDICINE.

SECTION 2576. Board of medical examiners—examinations—certificates. The state board of medical examiners shall consist of the physicians of the state board of health, and the secretary of the board of health shall be secretary thereof. It shall hold regular meetings in January and July and special ones as may be necessary, due notice thereof being given, at which it shall discharge the duties contemplated by this chapter. All examinations shall be in writing, each candidate for examination in any school of medicine being given the same set of questions, covering anatomy, physiology, general chemistry, pathology, surgery and obstetrics. In materia medica, therapeutics and the principles and practice of medicine, a set of questions shall be used corresponding to the school of medicine which the applicant desires to practice. The examination papers, when concluded, shall be marked upon a scale of one hundred, each candidate for examination first to pay to the secretary of the board a fee of ten dollars therefor. The average required to pass shall be fixed by the board prior to the examination. Each applicant shall, upon obtaining an order for examination, receive from the secretary a confidential number which he shall place upon his work when completed, so that the board, in passing thereon, shall not know by whom it was prepared. All matters connected therewith shall be filed with the secretary and preserved for five years as a part of the records of the board, during which time they shall be open to public inspection. If the examination is satisfactory to five members of the board, it shall issue its certificate, under its seal, signed by its president, secretary, and not less than three other members, who may, in the absence of the others, act as an examining board, and the different schools of medicine represented in the board of health shall be represented in said number. The certificate, while in force, shall confer upon the holder the right to practice medicine, surgery and obstetrics, and be conclusive evidence thereof. In all examinations made or proceedings had pursuant to the provisions of this chapter, any member of the board may administer oaths and take testimony in any manner authorized by law. Any one failing in his examination shall be entitled to a second one, within three months thereafter, without further fee. If any person shall by notice in writing apply to the secretary of the board for an examination or re-examination, and it fails or neglects for three months thereafter to give him the same, he may, notwithstanding any provision of this chapter, practice medicine until the next regular meeting of the board

without the required certificate. [22 G. A., ch. 66; 21 G. A., ch. 104, §§ 1-3.] [28 G. A., ch. 89, § 1.] [31 G. A., ch. 114.]

When the question of license arises collaterally in a civil action between the physician and one who employs him, due qualification under the statute will be presumed and the burden will be upon him who denies such license. *Lacy v. Kossuth County*, 106-16.

All who hold themselves out to heal the

sick regardless of the particular school according to which they practice, are to be examined in anatomy, physiology, general chemistry, pathology, surgery and obstetrics. *State v. Heath*, 125-585.

Magnetic healers, so called, come within the provision of the statute requiring a physician to procure a license. *Ibid.*

SEC. 2578. Repeal—refusal of certificate or revocation for cause. That section two thousand five hundred and seventy-eight (2578) of the code be and the same is hereby repealed and the following is enacted in lieu thereof:

“The board of medical examiners may refuse to grant a certificate to any person otherwise qualified and shall revoke any certificate issued by it to any physician, who is not of good moral character, or who solicits professional patronage by agents, or who profits by the acts of those representing themselves to be his agents, or who is guilty of fraudulent representations as to his skill and ability, or who is guilty of gross unprofessional conduct, or for incompetency, or for habitual intoxication or drug habit; or if the certificate has been granted upon false and fraudulent statements as to graduation or length of practice, the board of medical examiners shall, to safeguard the public health, revoke the certificate in the manner hereinafter set forth.” [32 G. A., ch. 141, § 1.]

The state board of examiners may revoke a certificate on account of “incompetency.” The person whose right is involved should in such case be given a fair opportunity to meet the charges and evidence against him, but it is not neces-

sary that the evidence be strictly confined to that which would be admissible in a court. Affidavits may be considered. *Traer v. State Board of Medical Examiners*, 106-559.

SEC. 2578-a. Revocation of certificate—procedure. Before the revocation of any certificate issued by the state medical examiners the licentiate shall have been afforded an opportunity for a hearing before the board. At least twenty (20) days prior to the date set for such a hearing, the secretary of the state board of medical examiners shall cause written notice to be personally served upon the defendant in the manner prescribed for the serving of original notice in civil actions. Said notice shall contain a statement of the charges and the date and place set for the hearing before the board. If the party thus notified fails to appear, either in person or by counsel at the time and place designated in said notice, the board shall, after receiving satisfactory evidence of the truth of the charges and the proper issuance of notice, revoke said certificate. If the licentiate appear either in person or by counsel, the board shall proceed with the hearing as herein provided. The board may receive and consider affidavits and oral statements and shall cause stenographic reports of the oral testimony to be taken which, together with all other papers pertaining thereto, shall be preserved for two years. If five members of the board, present at the hearing, are satisfied that the licentiate is guilty of any of the offenses charged, the license shall be revoked. After the revocation of a certificate the holder thereof shall not practice medicine, surgery or obstetrics in this state, for such times as the state board of health may determine. [32 G. A., ch. 141, § 2.]

SEC. 2578-b. Appeal. Any person aggrieved by any ruling or order entered under the provisions of this act shall have the right of an appeal to the district court in the county in which the alleged offense was com-

mitted, upon giving notice to the board of medical examiners of such appeal within twenty days after the entry of such ruling, order, or judgment. [32 G. A., ch. 141, § 3.]

SEC. 2579. Who deemed practitioner.

These statutory directions as to qualifications for the practice of medicine are not unconstitutional on the ground that they grant to some citizens or classes of citizens privileges or immunities which on the same terms are not equally granted to all. The statute merely establishes a rule of evidence by which qualifications to practice medicine shall be ascertained. *State v. Bair*, 112-466.

Those who are to be deemed as practicing medicine under the statutory provisions requiring a license to practice are of three classes: (1) those professing to be physicians, surgeons or obstetricians and assume the duties incident thereto; (2) those who make a practice of prescribing or do prescribe and furnish medicine and, (3) those who publicly profess to heal. *State v. Heath*, 125-585.

It is proper to charge in the indictment as contemporaneous acts which together considered constitute the practice of medicine without a license, that the defendant professed to cure and heal, and advertised so to do in newspapers, that he maintained an office with the sign of a doctor for this purpose, and that he actually undertook

to cure and heal diseases. *State v. White*, 132-226.

The statute prohibiting the practice of medicine without a license is not unconstitutional. *Ibid.*

The design of the law is not to render any mode of treatment whatsoever unlawful, but that every one before he shall undertake to prevent, cure or alleviate disease and pain as an occupation, shall have some knowledge of the nature of disease, its origin, its anatomical and physiological features, its causative relations, and of the preparation and action of drugs. *Ibid.*

In an indictment for practicing without a license, it is not necessary to allege specifically the time, place or circumstances of such unlawful practicing, nor is it necessary to allege that the prescribing of medicine or the practicing charged was for or upon human beings as distinguished from domestic animals. *State v. Kendig*, 133-164.

It is not necessary in the indictment to negative the exceptions contained in the statute. *Ibid.*

SEC. 2580. Penalties.

The practice of medicine is not a right but a privilege upon which the state may impose such license tax as it sees fit. *State v. Edmunds*, 127-333.

One, who publicly announces his skill in the art of healing under circumstances indicating an intention to treat the sick, is

guilty of a violation of the statute if without a certificate and not within the statutory exceptions, although he has not actually undertaken to render his services in any particular case. *State v. Heath*, 125-585.

SEC. 2581. Itinerant physician. Every physician practicing medicine, surgery or obstetrics, or professing or attempting to treat, cure or heal diseases, ailments or injuries by any medicine, appliance or method, who, by himself, agent or employe goes from place to place, or from house to house, or by circulars, letters or advertisements solicits persons to meet him for professional treatment at places other than his office at the place of his residence, shall be considered an itinerant physician; and any such itinerant physician shall, in addition to the certificate elsewhere provided for in this chapter, procure from the state board of medical examiners a license as an itinerant, for which he shall pay to the treasurer of state, for the use of the state of Iowa, the sum of two hundred and fifty dollars per annum. Upon payment of this sum, the secretary shall issue to the applicant therefor a license to practice within the state, as an itinerant physician, for one year from the date thereof. The board may, for satisfactory reasons, refuse to issue such license, or may cancel such license upon satisfactory evidence of incompetency or gross immorality. Any person practicing medicine as an itinerant physician, as herein defined, without having procured such license shall be guilty of a misdemeanor, and, upon con-

viction thereof, shall be fined not less than three hundred dollars, nor more than five hundred dollars, and costs, and shall be committed to the county jail until such fine is paid: *provided*, however, that nothing herein shall be construed to prevent any physician otherwise legally qualified from attending patients in any part of the state to whom he may be called in the regular course of business, or in consultation with other physicians. [29 G. A., ch. 109, § 1.]

An indictment for practicing as a non-licensed itinerant physician by professing to cure by dieting patients and prescribing exercises and furnishing eye glasses is sufficient. *State v. Edmunds*, 127-333.

The words "medicine, appliance or method" used in this section are not to be limited to a medicine or drug or something administered as such. *Ibid.*

SEC. 2582. Examination and diploma required—registration—fee. From and after January 1, 1899, all persons beginning the practice of medicine in the state of Iowa must submit to an examination as set forth in this chapter, and, in addition thereto, shall present diplomas from medical colleges recognized as in good standing by the state board of medical examiners, and all persons receiving their diplomas subsequent to January 1, 1899, shall present evidence of having attended four full courses of study of not less than twenty-six weeks each, no two of which shall have been given in any one year. The state board of medical examiners shall examine the graduates of the medical departments of the state university of Iowa and of such other medical colleges in this state as are recognized by said board of medical examiners as being in good and legal standing at the annual medical commencement and at the location of said state university and other medical colleges respectively:

(a) A certificate of registration showing that an examination has been made by the proper board of any state, on which an average grade of not less than seventy-five (75) per cent. was awarded, the holder thereof having been at the time of said examination the legal possessor of a diploma from a medical college in good standing in this state, may be accepted in lieu of an examination, as evidence of qualification. But in case the scope of said examination was less than that prescribed by this state, the applicant may be required to submit to a supplemental examination in such subjects as have not been covered.

(b) A certificate of registration or license, issued by the proper board of any state, may be accepted as evidence of qualification for registration in this state, provided the holder thereof was, at the time of such registration, the legal possessor of a diploma issued by a medical college in good standing in this state, and that the date thereof was prior to the legal requirement of the examination test in this state. The fee for such examination shall be fifty dollars. [28 G. A., ch. 89, § 2.] [30 G. A., ch. 102, § 1.]

SEC. 2582-a. Restrictions. If, by the laws of any state or the rulings or decisions of the appropriate officers or boards thereof, any burden, obligation, requirement, disqualification or disability is put upon physicians registered in this state or holding diplomas from medical colleges in this state, which are in good standing therein, affecting the right of said physicians to be registered or admitted to practice in said state, then the same or like burdens, obligations, requirements, disqualification or disability shall be put upon the registration in this state of physicians registered in said state, or holding diplomas from medical colleges situated therein. [30 G. A., ch. 102, § 2.]

SEC. 2583. Fees—compensation—expenses of board. Each member of the board of examiners shall receive, out of the fund created by the pay-

ment of fees by applicants for examination or certificates, the sum of eight dollars for each day, and necessary traveling expenses, for the time he is actually engaged in the discharge of his duties as a member of the board, and the secretary shall receive a sum not to exceed twenty-five (\$25.00) dollars per month and his necessary expenses incurred for services which cannot be performed at the capitol. All printing, postage, and other contingent office expenses necessarily incurred under the provisions of this chapter shall be paid from said fund. Any balance of said funds remaining shall be turned over to the state treasurer for the use of the school fund. [22 G. A., ch. 66; 21 G. A., ch. 104, § 6.] [27 G. A., ch. 68, § 1.] [28 G. A., ch. 90, § 1.]

CHAPTER 17-A.

OF THE PRACTICE OF OSTEOPATHY.

SECTION 2583-a. Diploma—examination—certificate. Any person holding a diploma from a legally incorporated school of osteopathy, recognized as of good standing by the Iowa Osteopathic association, and wherein the course of study comprises a term of at least twenty (20) months, or four (4) terms of five (5) months each, in actual attendance at such school, and which shall include instruction in the following branches, to-wit: Anatomy including dissection of a full lateral half of the cadaver, physiology, chemistry, histology, pathology, gynecology, obstetrics and theory of osteopathy and two full terms of practice of osteopathy, shall, upon the presentation of such diploma to the state board of medical examiners and satisfying such board that he is the legal holder thereof, be granted by such board an examination on the branches herein named, (except upon the theory and practice of osteopathy until such time as there may be appointed an osteopathic physician on the state board of health and medical examiners). The fee for said examination, which shall accompany the application, shall be ten dollars (\$10) and the examination shall be conducted in the same manner, and at the same place and on the same date that physicians are examined as prescribed by section twenty-five hundred and seventy-six (2576) of the code. The same general average shall be required as in cases of physicians; provided that osteopaths who are graduates of legally incorporated schools of osteopathy as above recognized, and who are at the time of the passage of this act engaged in the practice of osteopathy in Iowa, shall be entitled to receive a certificate upon the payment of the prescribed fee without such examination. Upon passing a satisfactory examination as above prescribed the said board of medical examiners shall issue a certificate to the applicant therefor, signed by the president and secretary of said board, which certificate shall authorize the holder thereof to practice osteopathy in the state of Iowa. This certificate when issued shall be registered with the recorder of the county in which the holder thereof resides and for which he shall pay a fee of fifty cents (50c). And the holder thereof shall not be subject to the provisions of section two thousand five hundred eighty (2580) of the code. [29 G. A., ch. 158, § 1.]

SEC. 2583-b. Drugs—major or operative surgery. The certificate provided for in the foregoing section shall not authorize the holder thereof to prescribe or use drugs in his practice, nor to perform major or operative surgery. [29 G. A., ch. 158, § 2.]

SEC. 2583-c. Revocation of certificate. The board of medical examiners may refuse to grant a certificate to any person otherwise qualified, who is not of good moral character. For like cause, or for incompetency,

or habitual intoxication, or upon satisfactory evidence by affidavit or otherwise that a certificate has been granted upon false and fraudulent statements as to graduation or length of practice, the said board may revoke a certificate by an affirmative vote of at least five (5) members of the board, which number shall include one or more members of the different schools of medicine represented in said board. After the revocation of a certificate, the holder thereof shall not practice osteopathy, surgery, or obstetrics in the state. [29 G. A., ch. 158, § 3.]

SEC. 2583-d. Fraudulent diploma—false representation—penalties. Any person who shall present to the board of medical examiners a fraudulent or false diploma, or one of which he is not the rightful owner, for the purpose of procuring a certificate as herein provided, or shall file, or attempt to file, with the recorder of any county in the state the certificate of another as his own, or who shall falsely personate any one to whom a certificate has been granted by such board, or shall practice osteopathy, surgery or obstetrics in the state without first having obtained and filed for record the certificate herein required, and who is not embraced in any of the exceptions contained in this chapter, or who continues to practice osteopathy, surgery or obstetrics after the revocation of his certificate, is guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than three hundred dollars (\$300), nor more than five hundred dollars (\$500) and costs of prosecution, and shall stand committed to the county jail until such fine is paid; and whoever shall file or attempt to file with the recorder of any county in the state the certificate of another with the name of the party to whom it was granted or issued erased, and the claimant's name inserted, or shall file or attempt to file with the board of medical examiners any false or forged affidavit of identification, shall be guilty of forgery. [29 G. A., ch. 158, § 4.]

SEC. 2583-e. Itinerant osteopath—license. Every person practicing osteopathy, or obstetrics, or professing to treat, cure or heal diseases, ailments or injury by osteopathic application or method, who goes from place to place, or from house to house, or by circulars, letters or advertisements solicits persons to meet him for professional treatment at places other than his office at the place of his residence, shall be considered an itinerant osteopath; and such itinerant osteopath shall, in addition to the certificate elsewhere provided for in this chapter, procure from the state board of medical examiners a license as an itinerant, for which he shall pay to the treasurer of state, for use of the state of Iowa, the sum of two hundred and fifty dollars (\$250) per annum. Upon payment of this sum, the secretary shall issue to the applicant therefor a license to practice within the state, as an itinerant osteopath, for one year from the date thereof. The board may, for satisfactory reasons, refuse to issue such license, or may cancel such license upon satisfactory evidence of incompetency or gross immorality. [29 G. A., ch. 158, § 5.]

SEC. 2583-f. Repeal—acts in conflict. All acts and parts of acts in conflict herewith are hereby repealed. [29 G. A., ch. 158, § 6.]

CHAPTER 18.

OF PRACTICE OF PHARMACY.

SECTION 2585. Secretary and treasurer. The commissioners of pharmacy shall annually, on the first Monday in May, elect a suitable person, who shall not be a member of said board, and who shall be known as

secretary and treasurer; said secretary and treasurer shall enter upon the discharge of his duties as soon as he shall have filed with the secretary of state a good and sufficient bond in the penal sum of three thousand dollars signed by at least two sureties, who shall justify in the aggregate to double the amount of said bond, and which shall bear upon its face the approval of the governor. The salary of said secretary and treasurer shall not exceed eighteen hundred dollars per annum. [26 G. A., ch. 59, § 1.] [32 G. A., ch. 2, § 8.]

Under a prior statute making no provision for a treasurer of the commission, under the statutes as to embezzlement,

held that a person appointed treasurer by the commission was not a public officer. *State v. Spaulding*, 102-659.

SEC. 2588. Registered pharmacists.

A registered pharmacist having a permit to sell intoxicating liquors is not liable for the payment of the mulct tax although he sells in violation of his permit. *In re Assignment of Shonkweiler*, 104-67.

A pharmacist selling liquor so compounded with other substances as to lose its distinctive character as an intoxicant, and to be no longer desirable for use as a stimulating beverage, and in fact a medicine, does not violate the prohibitory law, although he may be a permit holder, as

provided in Code § 2385. He is not required in such cases to take written requests. *State v. Gregory*, 110-624.

In an action against a person conducting a drug store for negligence of a clerk in compounding a prescription, it is no defense that the clerk was a registered pharmacist, although the principal was restricted to registered pharmacists in the employment of clerks. *Burgess v. Sims Drug Co.*, 114-275.

SEC. 2589. Repeal. The law as it appears in section twenty-five hundred and eighty-nine (2589) of the supplement to the code, and section twenty-five hundred and ninety (2590) of the code, is hereby repealed and the following enacted in lieu thereof: [31 G. A., ch. 115, § 1.]

SEC. 2589-a. Examination. The commission at such times and places as it may select and in such manner as it may determine, shall conduct an examination for all persons desiring to engage in and conduct business as registered pharmacists within the meaning of section twenty-five hundred and eighty-eight (2588) of the code. [31 G. A., ch. 115, § 2.]

SEC. 2589-b. Conditions—registration. No person shall be eligible to take this examination until he has passed his twenty-first birthday and has presented to the commission his own affidavit and that of his employer or employers, affirming that he has had not less than four years' practical experience (including the actual number of weeks he has spent in a reputable college of pharmacy as hereinafter defined) as clerk under the supervision of a registered pharmacist in a drug store or pharmacy in which physicians' prescriptions are compounded. Provided, however, that graduates of reputable pharmaceutical schools and colleges whose entrance and graduation requirements are equivalent to those prescribed by the American Conference of Pharmaceutical Faculties, for the year 1905, and whose course of study consists of two years of not less than thirty-six (36) weeks each, shall be eligible to take the examination without proof of experience as hereinbefore defined. Applicants who are graduates of a junior course, consisting of not less than thirty-six (36) weeks in pharmaceutical schools and colleges whose course consists of or is equivalent to the requirements above specified, shall be allowed one year's credit on store experience. If such applicant passes the required examination, he shall be granted a certificate of registration. Pharmacists thus registered shall have the sole right to keep and sell all medicines and poisons, except intoxicating liquors. [31 G. A., ch. 115, § 3.]

SEC. 2589-c. Assistant's certificate. If the applicant has passed his eighteenth birthday and has had at least two years' practical experience as

hereinbefore defined (including actual number of weeks spent in a reputable college of pharmacy as defined herein) and has presented to the commission his own affidavit and that of his employer or employers, affirming that he has had such experience, he shall upon passing a satisfactory examination, be granted an assistant's certificate to be exchanged for full registration when he shall have reached the age of twenty-one (21) years, and upon satisfactory proof that he has had since the taking of the examination, two additional years of practical experience in a drug store as defined herein. [31 G. A., ch. 115, § 4.]

SEC. 2589-d. Examination and registration fees. Each person furnished a certificate under this act shall be charged a fee of five dollars (\$5.00) which shall be in full for all services, and in case the examination of said person shall prove defective or unsatisfactory and his name be not registered, he shall be permitted to present himself for re-examination within any period not exceeding twelve (12) months next thereafter, and no charge shall be made for re-examination. The said commissioners are authorized to administer oaths pertaining to their said office and take a certificate of acknowledgment of instruments in writing. After registration, an annual fee of one dollar (\$1.00) for renewal certificate shall be paid on or before the 22nd day of March by all pharmacists and assistants who continue in business, and the conduct of such business without such renewal shall be a misdemeanor. [31 G. A., ch. 115, § 5.]

SEC. 2593. Repeal—sale of poisons. Section twenty-five hundred ninety-three (2593) of the code is hereby repealed, and the following enacted in lieu thereof:

“No persons shall sell at retail any poisons enumerated in the following schedule, to-wit: Acids, hydrochloric, nitric, and sulphuric, arsenic, chloral hydrate, chloroform, ammoniated mercury, atropine, arsenate of copper, aconitine, benzaldehyde, bromine, cyanide of potassium, cobalt, corrosive-sublimite, dionin, ether sulphuric, hyoscine, morphine, kermes mineral, cantharides, cotton root, croton oil, carboic acid, digitalis, denatured alcohol, ergot, hydrocyanic acid, nux vomica, opium and its preparations (excepting those containing less than two grains to the ounce), oils of bitter almonds, savin and pennyroyal, oxalic acid, phosphorus, strychnine and its salts, veratrum, and wood alcohol; without affixing to the bottle, box, or other package containing the poison, a label bearing the name of the article and the word poison distinctly shown, with the name and place of business of the registered pharmacist from whom the article was obtained, nor sell or deliver such poison unless upon due inquiry it be found that the party receiving it is aware of its character and represents it to be used for proper purposes, nor sell or deliver the poisons heretofore enumerated, without entering same in a book kept for that purpose, the date of sale, the name and address of purchaser, the name of the poison, the purpose for which it was represented to be required, and the name of the dispenser, which book shall be open for inspection by the proper authorities and preserved for at least five years, provided that nothing in this section shall apply to the sale of patent medicines, or to drugs used in the filling of prescriptions from physicians, veterinary surgeons or dentists; provided that it shall not be necessary to keep a record in said book of sales of denatured alcohol and wood alcohol, when it is ascertained they are to be used for mechanical purposes; provided however, that nothing herein contained shall be construed to permit or authorize the sale of any of the poisons herein named where the sale thereof is otherwise prohibited or regulated by law. The obtaining of any such poisons by any person under a false name or statement shall be deemed a violation of the provisions of this act. Any person

violating any of the provisions of this act shall be adjudged guilty of a misdemeanor and be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail not more than thirty days." [32 G. A., ch. 142.]

The provisions of this section have no application to the sale of phosphorous, and a pharmacist is not liable in damages for selling that substance without direction as to the care to be exercised in handling it. *Gibson v. Torbet*, 115-163.

One who sells poisons without the label required by statute is guilty of negligence rendering him liable for injury proximately resulting from his wrong. *Burk v. Creamery Pkg. Mfg. Co.*, 126-730.

SEC. 2594. Itinerant vendors of drugs.

One who merely sells eyeglasses for defective eyes may perhaps be considered an itinerant vendor of drugs under pro-

visions of this section. *State v. Edmunds*, 127-333.

SEC. 2596-a. Sale of cocaine and certain drugs. No person, firm or corporation shall sell, exchange, deliver or have in his possession with intent to sell, exchange or expose or offer for sale or exchange any coca (Erythroxlyn Coca), cocaine, alpha or beta eucaine or derivatives of any of them, or any preparation containing coca, cocaine, alpha or beta eucaine or derivatives of any of them, or cotton root, ergot, oil of tansy, oil of savin or derivatives of any of them, except upon the original written prescription of a registered physician or veterinarian or licensed dentist for medical, dental or veterinary purposes, and no such prescription shall be refilled. Provided that nothing in this act shall prevent the sale thereof to a wholesale or retail dealer in drugs, nor to a registered physician or veterinarian or licensed dentist. [However, nothing in this act shall be construed to prevent the sale thereof to a wholesale or retail dealer in drugs nor registered physician, or licensed dentist for use in the practice of his profession.] [29 G. A., ch. 110, § 1.] [32 G. A., ch. 143.]

SEC. 2596-b. Penalty. Any one found guilty of violating the provisions of section one of this act, for the first offense, shall pay a fine of not less than twenty-five dollars and not more than one hundred dollars and cost of prosecution. For the second offense, and each subsequent offense, he shall pay on conviction thereon, a fine of not less than one hundred dollars, and not more than three hundred dollars, or imprisonment in the county jail not to exceed three months. Any clerk, employe or agent, violating, or aiding in the violation of section one, shall be charged and convicted as principal. [29 G. A., ch. 110, § 2.]

SEC. 2596-c. Enforcement. Peace officers shall see that the provisions of this act are faithfully executed within their respective jurisdictions, and when they are informed, or have reason to believe that this act has been violated, and the proof thereof can be had, they shall file information to that effect against the offending party before a magistrate, who thereupon shall proceed according to law. The county attorney shall prosecute violators of this act. [29 G. A., ch. 110, § 3.]

CHAPTER 19-A.

BOARD OF DENTAL EXAMINERS AND PRACTICE OF DENTISTRY.

SECTION 2600-a. Repeal. That chapter nineteen (19) of title twelve (12) of the code be and the same is hereby repealed, and the following enacted in lieu thereof: [28 G. A., ch. 91, § 1.]

SEC. 2600-b. Board of examiners—how appointed—term. The board of dental examiners shall consist of five practicing dentists, who shall have been engaged in the continuous practice of their profession in this state for the period of five years preceding their appointment, one of whom shall be appointed annually by the governor, and hold office for the term of five years from and after the first day of August following his appointment, and until his successor is appointed. The Iowa state dental society shall, at the request of the governor, submit a list of dentists of recognized ability, from which he may select the member of the board to be appointed. All vacancies occurring in the board shall be filled in like manner, and the appointee hold office for the unexpired term of his predecessor. All members of the present board shall continue in office under this act until the expiration of their respective terms of office. [28 G. A., ch. 91, § 2.]

SEC. 2600-c. Officers—meetings—quorum. The board shall organize by selecting one of its members as president, and one as secretary and treasurer, and shall meet at least once each year, and at such other times as it may deem necessary, and at such place as it may select. A majority of the board shall constitute a quorum, and its meetings shall at all reasonable times be open to the public. [28 G. A., ch. 91, § 3.]

SEC. 2600-d. Examinations — license — record books — fees. The board shall at any regular meeting, and may at any special meeting, examine applicants for a license to practice dentistry as to their knowledge and skill in dental surgery, and shall issue to such applicants as are found to be qualified a license authorizing them to practice dentistry. The license shall be signed by each member of the board, attested by the president and secretary, and have the seal of the board affixed thereto; and shall be presumptive evidence of the right of the holder to practice dentistry in the state. The name, age, nativity, location, number of years of practice of the person to whom a license is given, the number of the license, and the date of the registration thereof shall be entered in a book kept in the office of the secretary of the board, which shall be open to the inspection of the public, under proper restrictions as to its safe keeping, and the number of the book and page containing such entries shall be noted on the face of the license. Each applicant for a license shall be a graduate of a reputable dental school, which is recognized as such by the board of dental examiners, and pay to the board a fee of twenty dollars before a license is issued. [28 G. A., ch. 91, § 4.]

SEC. 2600-e. Testimony—rules and regulations. The board shall have authority to take testimony in relation to all matters within its jurisdiction, and the presiding officer thereof, or of any committee appointed thereby, may issue subpoenas for, and administer oaths to, witnesses called to testify before the board or such committee; and it may make and adopt all necessary rules, regulations and by-laws not inconsistent with law necessary to enable it to perform the duties and transact the business authorized and required by this act. [28 G. A., ch. 91, § 5.]

SEC. 2600-f. Treasurer to give bond. The treasurer shall, on assuming the duties of his office, file with the secretary of state, a good and sufficient bond in the penal sum of one thousand dollars, conditioned for the faithful discharge of his duties; and shall keep a full and accurate account of all moneys received by him under the provisions of this act, and pay out the same upon the written order of the president countersigned by the secretary. [28 G. A., ch. 91, § 6.]

SEC. 2600-g. Compensation. Each member of the board shall receive the sum of five dollars for each day he is actually engaged in the duties of his office, with the actual expenses incurred by him in the discharge of such

duties, and the treasurer shall receive a salary not exceeding three hundred dollars per annum for his services as secretary and treasurer, which amounts shall be paid out of the fund received by the board under the provisions of this act, and from no other fund or source. [28 G. A., ch. 91, § 7.]

SEC. 2600-h. Biennial report—auditing committee. The board shall make a biennial report to the governor of its proceedings, including a full and accurate account of all moneys received and disbursed and shall publish said report with a list of dentists licensed to practice in this state, and the president shall appoint an auditing committee consisting of three practicing dentists of the state who are not members of the board, whose duty it shall be to audit the accounts of the board annually, and make a full report thereof, which report shall accompany the biennial report made by the board to the governor. Any sum of money, remaining after the payment of the compensation and expenses of the members of the board and the salary of the secretary and treasurer, shall be by the treasurer paid into the state treasury on or before the first day of May of each year. [28 G. A., ch. 91, § 8.] [31 G. A., ch. 116, § 4.]

SEC. 2600-i. License filed with clerk of district court—license filed in wrong county office—fee. Every person to whom a license is issued shall file the same for record with the clerk of the district court in the county in which he desires to practice dentistry and the clerk of the court shall be entitled to a fee of fifty cents for recording such license; and failure to so file such license for record within one year after it is issued by the board, shall work a forfeiture thereof and said license shall not be restored by the board except upon the payment to it the sum of twenty-five dollars as penalty therefor. Provided, however, that where a license to practice dentistry has been issued at any time prior to January 1, 1907, under the provisions of chapter nineteen (19) [of title twelve (XII)] of the code, or under the provisions of chapter nineteen (19)-A [of title twelve (XII)] of the supplement to the code, and the same in good faith, but by mistake, has been filed for record in the office of any other county officer of the proper county except that of the clerk of the district court, then the holder of such license shall be allowed six months from and after the taking effect of this act within which to file the same for record with the clerk of the district court in the county in which he desires to practice dentistry; and from and after the date of said filing the holder of such license shall be authorized to practice dentistry the same as though said license had been originally filed with the proper officer. [31 G. A., ch. 116, § 3.] [32 G. A., ch. 144.]

SEC. 2600-j. Penalty. It shall be unlawful for any person to practice dentistry in this state without having complied with the provisions of this act, and any person who shall violate the provisions thereof shall be deemed guilty of a misdemeanor, and upon a conviction shall be punished by a fine not exceeding two hundred dollars or imprisonment in the county jail not more than forty days, or by both such fine and imprisonment. [28 G. A., ch. 91, § 10.]

SEC. 2600-k. Who not eligible to appointment on board. No member of a dental college faculty, or no person connected therewith, shall be eligible to an appointment upon the state board of dental examiners. [28 G. A., ch. 91, § 11.]

SEC. 2600-l. Provisions as to physicians, dental students and registered practitioners. Nothing herein shall be construed to prevent physicians and surgeons from extracting teeth in the practice of their profession, or to prevent *bona fide* students of dentistry, in the regular course of their instruction, from operating upon patients at clinics, or under the supervision and in the presence of their preceptors, but no fee or salary for

such operations shall be received, either directly, or indirectly, by any such student of dentistry. And nothing herein shall be construed to prohibit the practice of dentistry in this state by any practitioner who has been duly registered in accordance with the laws of Iowa existing prior to the passage of this act; or any person who is a member of an incorporated society or community and practicing dentistry solely for and among the members of such community or incorporated society without charge or compensation. [28 G. A., ch. 91, § 12.]

SEC. 2600-m. License for practitioners from other states—fee. The board of dental examiners may, without examination, issue license to practice to any dentist who shall have been in legal practice in some other state or territory for a period of at least five years, upon the certificate of the board of dental examiners or a like board of the state or territory in which such dentist was a practitioner; certifying his competency and that he is of good moral character and upon payment of twenty-five dollars (\$25.00). Provided, however, that the state from which any practitioner may come shall have, and maintain equal standards of laws regulating the practice of dentistry and recognize exchange certificates issued by the board of examiners of the state of Iowa. [31 G. A., ch. 116, § 1.]

SEC. 2600-n. Change of residence to another state — certificate—fee. Any duly licensed dentist of the state of Iowa who is desirous of changing his residence to that of another state or territory shall upon application to the board of dental examiners, and the payment of a fee of five dollars (\$5.00) receive a certificate which shall attest that he is a duly licensed dentist of the state of Iowa. [31 G. A., ch. 116, § 2.]

CHAPTER 20.

OF THE SOLDIERS' HOME.

SECTION 2602. Admission. All persons named in section twenty-six hundred and one of this act, not having sufficient means for his or her own support, who are disabled by disease, wounds, old age or otherwise, who served in Iowa regiments or batteries, or were accredited to the state of Iowa, or who have been residents of the state for three years next preceding the date of application, shall be eligible to admission into said home. Before admission such person shall file with the officer having charge of such home a certificate signed by the board of supervisors of the county in which such person resides stating that such person is a resident of such county. Such certificate shall be conclusive evidence of the residence of such person in all matters affecting the liability of the county with respect to the expenses of such person in case of insanity or any other cause for which the county may be liable. If the applicant is entitled to admission and is not a resident of the state, a record shall be made thereof on admission. Nothing in this act shall be construed to bar any person from admission who is entitled to such admission under section twenty-six hundred and two (2602) of the code. [21 G. A., ch. 58, §§ 2, 4.] [32 G. A., ch. 145.]

SEC. 2604. Commandant—inferior officers. The board of trustees shall appoint a commandant to serve during the pleasure of the board, and who shall be one who has an honorable discharge from the United States army or navy, and whose salary shall not exceed twenty hundred dollars per year, and use and occupancy of the commandant's house with lights, fuel and water, which shall include all allowances. The commandant may

appoint, subject to the approval of the board, the adjutant, quartermaster and surgeon, together with such assistant surgeons as may, from time to time, be required, and the said adjutant and quartermaster shall be of like qualifications, as to service in the army or navy, with himself, and also a matron and other necessary subordinate employes, and they shall be subject to removal by him for misconduct or incompetency, but in the case of every removal a detailed statement of the cause shall be reported at once to the board of trustees and subject to its approval. The board shall fix the compensation to be paid the subordinate officers and employes of the home, not to exceed that paid for like services in similar institutions. Provided, that the adjutant, quartermaster and surgeon shall also be furnished without charge the houses erected by the state and now occupied by such officers, together with lights, heat, fuel and water. [21 G. A., ch. 58, § 16.] [29 G. A., ch. 111, § 1.] [29 G. A., ch. 112, § 1.] [31 G. A., chs. 117, 118.]

SEC. 2606. Rules for admission. The board of trustees may receive into the home dependent honorably discharged Union soldiers, sailors or marines, and their wives, if married prior to the year 1885, provided that the widow of an honorably discharged Union soldier, sailor or marine, who prior to the year 1885 married such honorably discharged Union soldier, sailor, or marine, and who subsequent to the year 1885 married an honorably discharged soldier, sailor or marine shall be eligible to admission to the home under such rules and regulations and subject to such conditions as the said board may prescribe, and permit such husband and wife to occupy a cottage on the grounds, or such other quarters as may be specifically set apart for such; *provided*, such soldiers shall have the qualifications for membership prescribed in sections twenty-six hundred and one and twenty-six hundred and two of this act. Subject to the same rules and regulations, such army nurses and the mother or widow or any Union soldier, sailor or marine as would be eligible to admission to the home, and as are unable to support themselves, may be admitted therein, and be supported and maintained, and receive the same allowance from the state as is granted to other members of the home. [24 G. A., ch. 95, §§ 4, 5.] [31 G. A., ch. 119.]

SEC. 2606-a. Restriction as to pension money. The board of control shall not adopt or enforce any rule in the Iowa soldiers' home which will deprive any member of the home of any part of the pension money which such member receives from the United States government, except as provided for in this act. [28 G. A., ch. 92, § 1.]

SEC. 2606-b. Penalty for intoxication. Any member of the home, who shall, while a member of the home, be convicted twice by any court of justice, of violating the criminal statutes of the state, or who shall twice be found guilty by the commandant, or a court martial, if the member so elect, of intoxication or other misdemeanors, shall be required to deposit the money received from the United States government as a pension, with the commandant, immediately on the receipt of his pension check. In cases where such pensioner has a wife, child, or parent dependent upon him for support, at least one-half of such pension money shall be sent to such dependent person, and if there be two or more dependent relatives the pensioner may determine to whom one-half of the pension received by him shall be sent. The other half of such pension money, as well as all money received from such pensioners as have no dependent relatives, shall be kept on deposit by the commandant for such pensioner, subject to the direction of the board of control, and the money so deposited may be paid out with the consent of the depositor, subject to the approval of the commandant under such rules as the board of control may provide, but in case the pensioner abstain from intoxication and is not guilty of further violation of the crim-

inal statutes of the state for a period of ten months from the date of conviction or of intoxication, as hereinbefore provided, he shall be entitled to receive two dollars for the eleventh month and four dollars for the twelfth month following such conviction, from his said pension; and if, during these two months he shall conduct himself in an orderly and sober manner, he shall then have the same control of his pension money as though he had not been twice convicted of violating the criminal statutes, or of being intoxicated as provided in this act. In case any depositor is discharged from the said home, any balance of such deposit in the hands of the commandant, after his ticket has been purchased, shall be paid to such pensioner thirty (30) days after his discharge, and in the case of the death of such depositor the money shall be paid to his heirs, legatees, or legal representatives. No assignment of the money deposited with the commandant, or any claim therefor shall be valid. [28 G. A., ch. 92, § 2.] [29 G. A., ch. 169, § 1.] [30 G. A., ch. 103.]

SEC. 2606-c. Repeal—pension money—when deposited. Section three (3) of said chapter is hereby repealed, and the following is enacted in lieu thereof:

Each member of the home who receives a pension, and who has a wife or minor children, shall deposit with the commandant forthwith on receipt of his pension check one-half of the amount thereof, which shall be sent at once to the wife if she be dependent upon her own labor or others for support, or, if there be no wife, to the guardian of the minor child or children if dependent upon others for support. Provided, however, that the commandant if satisfied that the wife has deserted her husband, or is of bad character, or is not dependent upon others for support, may pay the money deposited as aforesaid to the guardian of the dependent minor child or children. [29 G. A., ch. 169, § 2.]

SEC. 2606-d. Repeal—acts in conflict. All acts and parts of acts, in conflict with the provisions of this act, are hereby repealed. [28 G. A., ch. 92, § 4.]

SEC. 2608. Annual appropriation—support. For the general support of said home, there is hereby appropriated the sum of fifteen dollars per month for each member, and ten dollars per month for each officer and employe not a member of the home, or so much thereof as may be necessary, to be estimated by the average number present for the preceding quarter. These appropriations to be drawn monthly on the requisition of the board of trustees of the home in the usual manner, and then only in such amounts as the wants of the home may require. [23 G. A., ch. 58; 22 G. A., ch. 121.] [27 G. A., ch. 72, § 1.] [29 G. A., ch. 113, § 1.] [32 G. A., ch. 146.]

[The above section was amended by section one of chapter 72 of the acts of the 27 G. A., by striking out the first three and a portion of the fourth line of the original section, and then by inserting after the word "member" in the seventh line thereof the word "present." There is no word "member" in the seventh line, but there is the word "number" after which the word "present" has been inserted.]

TITLE XIII.

OF EDUCATION.

CHAPTER 1.

OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION.

SECTION 2622. Duties—teachers' conventions and institutes. He shall be charged with the general supervision of all the county superintendents and the common schools of the state; may meet county superintendents in convention at such points in the state as may be most suitable for the purpose, at which proper steps may be taken looking toward securing a more uniform and efficient administration of the school laws. He shall appoint, upon the request of county superintendents, the time and place for holding teachers' institutes, such institutes to be called when it is probable that not less than twenty teachers will be present, and remain in session not less than six working days, of which time and place of meeting he shall give notice to the county superintendent of the proper county. He shall attend teachers' institutes thus called in the several counties of the state, so far as consistent with his official duties, and assist in their management and instruction. He shall have power to collect, publish and distribute statistical and other information relative to public schools and education in general; to visit teachers' association meetings and make tours of inspection among the common schools and other institutions of learning in the state, and may deliver addresses upon subjects relative to education; to prepare, publish, and distribute blank forms for all returns he may deem necessary, or that may be required by law, of teachers, or school officers; to publish and distribute annually leaflets and circulars relative to arbor day, memorial day, and other days considered by him worthy of special observance in public schools, the number thereof to be fixed by the executive council; to prepare questions for the use of county superintendents in the examination of applicants for teachers' certificates; and to prepare, publish, and distribute, among teachers and school officers, courses of study for use in the rural and high schools of the state, the number thereof to be fixed by the executive council. When any county superintendent fails to make any report as required of him by law the superintendent of public instruction may appoint some suitable person to perform such duties and fix reasonable compensation therefor, which shall be paid by the delinquent county superintendent. [C., '73, §§ 1577, 1584; C., '51, § 1080.] [28 G. A., ch. 94, § 1.] [31 G. A., ch. 3, § 6.]

SEC. 2625. Reports. He shall on the first day of January report to the auditor of state the number of persons in each county between the ages of five and twenty-one years, and biennially to the governor; which report shall contain a statement of the condition of the common schools in the state, the number of school townships and districts therein, number of independent districts, number of teachers, number of schools, number of school houses and value thereof, number of persons of school age, number

of scholars in each county attending school the previous year, number of books in district libraries, the value of all apparatus in schools, and such other statistical information as may be of public importance, plans matured or adopted for the more perfect organization and efficiency of the common schools; and any suggestions he may deem important, regarding further legislation, which will strengthen the common schools of the state. Provided, however, that he shall make a report during the year 1906, which said report shall cover the period only from the date of his last biennial report, and shall report to the governor biennially thereafter. [22 G. A., ch. 82, § 29; C., '73, §§ 1582-3; C., '51, § 1086.] [31 G. A., ch. 121.]

SEC. 2627. Salary and expenses. The salary of the superintendent of public instruction shall be twenty-two hundred dollars per annum, and that of his deputy eighteen hundred dollars, to be paid monthly upon the warrant of the state auditor, and, in addition thereto, the state superintendent shall receive three hundred dollars annually, or so much thereof as may be necessary, to pay actual traveling expenses incurred in the performance of official duties, to be allowed upon an itemized and verified account filed with the state auditor, who shall draw his warrant upon the state treasurer for the amount allowed. [22 G. A., ch. 109, § 1; 21 G. A., ch. 118, § 5; C., '73, § 3760.] [28 G. A., ch. 94, § 2.] [32 G. A., ch. 2, § 5.]

CHAPTER 2.

OF THE BOARD OF EDUCATIONAL EXAMINERS.

SECTION 2629. Meetings—examinations. The board shall meet for the transaction of business at such times and places as the president may direct, and shall annually hold at least two public examinations of teachers, to be conducted by a member or the secretary of the board or by such qualified person or persons as the board may select. All examinations shall be conducted in accordance with rules and regulations adopted by the board, not inconsistent with the laws of the state, and a record shall be kept of all of its proceedings. It may issue state certificates and state diplomas to such teachers as are found upon examination to possess a good moral character, thorough scholarship and knowledge of didactics, with successful experience in teaching, or with such other training and qualifications as the board may require. The examination for certificates and diplomas shall cover orthography, reading, writing, arithmetic, geography, English grammar, bookkeeping, physiology, history of the United States, algebra, botany, natural philosophy, drawing, civil government, constitution and laws of the state, and didactics; those for diplomas, in addition to the foregoing, geometry, trigonometry, chemistry, zoology, geology, astronomy, political economy, rhetoric, English literature, general history, and such other studies as the board may require. [19 G. A., ch. 167, §§ 2-4.] [28 G. A., ch. 95, § 1.] [29 G. A., ch. 114, § 1.] [32 G. A., ch. 6, § 2.]

SEC. 2630-a. Repeal. Section twenty-six hundred and thirty (2630) of the code is hereby repealed, and the following enacted in lieu thereof. [28 G. A., ch. 96, § 1.]

SEC. 2630-b. Special certificates. The educational board of examiners may issue a special certificate to any teacher of music, drawing, penmanship, or other special branches, or to any primary teacher, of sufficient experience, who shall pass such examination as the board may require in the branches, and methods pertaining thereto, for which the certificate is sought. Such certificates shall be designated by the name of the branch

and shall not be valid for any other department or branch. The board shall keep a complete register of all persons to whom certificates or diplomas are issued. [28 G. A., ch. 96, § 2.]

SEC. 2630-c. Validation authorized. The state educational board of examiners is hereby empowered to validate certificates issued by state departments of education in other states, where such certificates were issued upon evidence of scholarship and experience equivalent to that required for like certificates under the laws of this state. [32 G. A., ch. 149.]

SEC. 2631. How long valid—revocation—fees. A state certificate shall authorize the holder to teach in any public school in the state for five years thereafter, and a diploma shall confer such authority for life; but any certificate or diploma may be revoked by the board for sufficient cause, or such cause as would, if known at the time, have prevented issuance thereof, provided the holder of such certificate or diploma shall have due notice, and shall be allowed to be present and make his defense. For each certificate issued the applicant shall pay two dollars, and for each diploma five dollars, which may be required before the examination is commenced. All moneys obtained from this source shall be paid into the state treasury. [19 G. A., ch. 167, §§ 5, 6.] [32 G. A., ch. 6, § 3.]

SEC. 2632. Registration—repealed. [31 G. A., ch. 122, § 1.]

SEC. 2634-a. Repeal—compensation—secretary — employes — salaries. That section twenty-six hundred and thirty-four-a (2634-a) of the supplement to the code be, and the same is hereby, repealed and the following enacted in lieu thereof:

“Each member of the board shall receive for the time actually employed in such service, his actual necessary expenses, and those not salaried officers or employes of the state or any institution thereof shall be paid in addition, three (\$3.00) dollars per day. The board shall have power to employ a secretary and prescribe his duties. He shall receive a salary not exceeding one hundred (\$100.00) dollars per month and actual necessary expenses while engaged in the performance of his duties at places other than the capitol. The board shall have power to employ such persons as are necessary to assist in examinations and in reading answer papers and for clerical work and other necessary assistance. Persons so employed shall receive, not to exceed fifty cents per hour for the time actually employed and actual traveling expenses to and from the place where their services are required. All expenditures authorized to be made under the provisions of chapter two (2) of title thirteen (XIII) of the code and of the supplement to the code and amendments thereto and under the provisions of chapter one hundred twenty-two (122), acts of the thirty-first general assembly and under the provisions of this act shall be certified by the chairman of the educational board of examiners to the executive council for payment. If found correct the executive council shall cause same to be paid from any funds paid into the state treasury under the provisions of section twenty-six hundred thirty-one (2631) of the code and chapter one hundred twenty-two (122), acts of the thirty-first general assembly and amendments thereto.” [32 G. A., ch. 6, § 4.]

SEC. 2634-a1. Printing. This act shall be construed as giving legal authority to the educational board of examiners to obtain all the necessary printing for the performance of their duties, as required by law, in the same manner as the printing is provided for state officers. [32 G. A., ch. 6, § 5.]

SEC. 2634-b. Educational examiners to inspect and supervise. That the state board of educational examiners shall constitute a board for the inspection, recognition and supervision of the schools designed for the instruction and training of teachers for the common schools. [29 G. A., ch. 115, § 1.]

SEC. 2634-c. Accredited schools—annual visitations. That schools desiring state recognition shall apply to the board of educational examiners which shall then proceed to inspect such schools with reference to course of study, equipment and faculty. All schools that shall meet the requirements of the board of educational examiners shall be known as accredited schools. Such schools shall have an annual visitation by some member of the board of educational examiners, or some one appointed for that purpose by said board, who shall receive compensation as is provided for in section 2634 of the code. [29 G. A., ch. 115, § 2.]

SEC. 2634-d. Certificates—fees. Graduates of approved accredited schools who shall pass the required examination for a two years' certificate shall receive from the state board of examiners a certificate for two years, which may be renewed under such rules as said board may prescribe. Applicants for a certificate shall pay a fee of \$2.00, one-half of which shall be returned in case of failure. [29 G. A., ch. 115, § 3.]

SEC. 2634-e. Sworn statement. At the close of each school year, the principal or superintendent of each accredited school shall file with the board of examiners a sworn statement, showing the name, age, postoffice address, studies and attendance of each of the students in his school taking the prescribed teachers' course. [29 G. A., ch. 115, § 4.]

SEC. 2634-f. Graduates from accredited colleges. That the state educational board of examiners may accept graduation from the regular and collegiate courses in the state university, state normal schools, and the state college of agriculture and mechanic arts, and from other institutions of higher learning in the state having regular and collegiate courses of equal rank, as evidence that a teacher possesses the scholarship and professional fitness for a state certificate. [32 G. A., ch. 148, § 1.]

SEC. 2634-g. State certificates granted. That in all cases where such graduation shows the extent and quality of scholarship that is required by section twenty-six hundred and twenty-nine (2629) of the supplement to the code, and when the teacher possesses a good moral character and satisfies the board of being professionally qualified, there shall be granted by the said board of examiners a state certificate valid for five years to teach in any public school in the state. [32 G. A., ch. 148, § 2.]

SEC. 2634-h. Renewal. That at the close of said five years' period upon proof of at least three years' successful teaching experience, the educational board of examiners may renew such state certificate. [32 G. A., ch. 148, § 3.]

CHAPTER 3.

OF THE STATE UNIVERSITY.

SECTION 2641. Reports. On the first day of October preceding the meeting of the general assembly, the president of the university shall make a report to the board of regents, which shall exhibit the condition and progress of the institution, the different courses of study pursued, the branches taught, the means and methods of instruction adopted, the number of students, their names, classes, and residences, with such other matters as he may regard important. The board of regents, on the fifteenth day of October in each even-numbered year, shall make report to the governor, which report shall show the number of professors, tutors, and other officers, the compensation of each, the condition of the university fund, the income received therefrom, the amount of expenditures with the items thereof,

and such other information and such recommendations as it shall regard important. [22 G. A., ch. 82, § 29; C., '73, §§ 1600-1.] [31 G. A., ch. 123.]

SEC. 2644. Tax for buildings. For the purpose of providing for the erection, improvement and equipment of such necessary buildings as shall be determined upon by the board of regents of the state university, there shall be levied a special tax of one-tenth of a mill on the dollar upon the assessed valuation of the taxable property of the state for the erection of buildings for the state university; and the proceeds thereof shall be carried into the treasury to the credit of said state university, said levy to commence with the levy made by the executive council in August, 1896, and the same levy shall be made annually after said first levy for the five successive years thereafter. Any amount in excess of the sum of fifty-five thousand dollars raised by any one of such levies shall be paid into the state treasury. The money realized from such levy shall be held by the treasurer of state, and drawn as provided by law. The amount so realized by said levies shall be in lieu of all appropriations for the erection of buildings for said state university during said period of six years. The board of regents or managing board of the state university shall have authority to expend from time to time in the purchase of books for the university library not to exceed forty-one thousand and nine hundred dollars (\$41,900) in the aggregate, and warrants shall be issued therefor, payable when the additional year's tax herein authorized is collected. There shall also be paid out of said additional year's tax the sum of thirteen thousand and one hundred dollars (\$13,100) expended in restoring the burned library building and repairing and replacing apparatus injured and destroyed, and in preserving the damaged books and property and warrants shall be issued therefor. [26 G. A., ch., 114.] [27 G. A., ch. 75, §§ 1, 2.]

SEC. 2644-a. Repeal. That chapter ninety-seven (97) of the acts of the twenty-eighth (28) general assembly of the state of Iowa, is hereby repealed. [29 G. A., ch. 171, § 1.]

SEC. 2644-b. Levy of special tax—purposes—how drawn. For the purpose of providing for the erection, repair and improvement of such necessary buildings as shall be determined upon by the board of regents of the state university, there shall be levied annually for five years a special tax of one-fifth (1-5) of a mill on the dollar upon the assessed valuation of the taxable property of the state, and the proceeds thereof shall be carried into the treasury to the credit of the said state university. Said levy shall be first made with the levy made for state purposes in the year nineteen hundred and two (1902), and the same levy shall be made annually for the four successive years thereafter. The money realized from such levy for said university shall be held by the treasurer of the state for the purposes hereinbefore provided and drawn upon requisition of the board of regents. The funds to be realized from the tax levies herein provided for shall not be anticipated by issuing warrants or other obligations of the state. [29 G. A., ch. 171, § 2.]

SEC. 2644-c. Colonel of cadets. That the commandant and instructor of military science and tactics in the Iowa State university, the college of agriculture and mechanic arts and the state normal school be given the rank of colonel of cadets, and the governor of the state of Iowa is hereby authorized to issue commissions therefor, upon the request of the president of such educational institution. [29 G. A., ch. 116, § 1.]

CHAPTER 4.

OF STATE COLLEGE OF AGRICULTURE AND MECHANIC ARTS.

SECTION 2646. Board of trustees. The college shall be under the management and control of a board of trustees, of which the governor and superintendent of public instruction shall be members, by virtue of office, but neither the president nor other officer or employe of the college and farm shall be eligible to membership therein. [20 G. A., ch. 76, § 1; C., '73, §1604; R., §1714.] [27 G. A., ch. 76, § 1.]

SEC. 2650. Annual meetings—fiscal year—report. Annual meetings of the board of trustees shall be held at the college during the month of June of each year; the chairman may call special meetings, when found expedient. The fiscal college year shall begin on the first day of July, and end on the thirteenth day of June of each year. The board shall make a biennial report to the governor. [16 G. A., ch. 159, § 9; C., '73, §§ 1609-10; 27 G. A., ch. 76, § 2.]

SEC. 2667. Loans. It may loan said funds upon approved real estate security, subject to the following regulations:

1. Each loan shall be for a term not exceeding ten years, at a rate of interest to be fixed by said board, payable annually;

2. Each loan shall be secured by a mortgage paramount to all other liens upon improved farm lands in the state, the loan not to exceed fifty per cent. of the cash value thereof, exclusive of buildings;

3. Principal and interest shall be payable to the order of the board at the office of the state treasurer, the notes and mortgages to provide for the payment by the borrower of all expenses, attorney fees and costs incurred in collecting the same;

4. A register containing a complete abstract of each loan, and showing its actual condition, shall be kept by the secretary of said board, and be at all times open to inspection. The attorney-general, under the direction of the executive council, shall prepare the necessary blanks, forms and instructions to carry into effect the provisions of this section and to keep such loans secure and unimpaired. [25 G. A., ch. 110, § 1; 20 G. A., ch. 193, § 2; 28 G. A., ch. 98, § 1.]

SEC. 2674-a. Repeal. That chapter 99 of the acts of the twenty-eighth general assembly of the state of Iowa, is hereby repealed. [29 G. A., ch. 172, § 1.]

SEC. 2674-b. Levy of special tax—purpose—how drawn. For the purpose of providing for the erection, repair and improvement and equipment of such necessary buildings as shall be determined upon by the board of trustees of the Iowa state college of agriculture and mechanic arts, there shall be levied annually for five years a special tax of one-fifth of a mill on the dollar upon the assessed valuation of the taxable property of the state, and the proceeds thereof shall be carried into the treasury to the credit of the said college. Said levy shall be first made with the levy made for state purposes in the year nineteen hundred and two (1902) and the same levy shall be made annually for the four successive years thereafter. The money realized from such levy for said college shall be held by the treasurer of the state for the purpose hereinbefore provided, and drawn upon requisition of the board of trustees. The funds to be realized from the tax levies herein provided for shall not be anticipated by issuing and discounting warrants or other obligations of the state. [29 G. A., ch. 172, § 2.]

SEC. 2674-c. Repeal not to affect collection and expenditure of taxes. The repeal of said chapter 99 acts of the twenty-eighth general

assembly shall in no manner affect the collection and expenditure of the taxes heretofore levied thereunder, but the same shall be collected and expended as though said act remained in full force. [29 G. A., ch. 172, § 3.]

SEC. 2674-d. Department of ceramics. That the trustees of the Iowa state college [of agriculture] and mechanic arts be, and they are hereby required to establish in said college a department of ceramics for the technical and practical education of clay workers, cement manufacturers and users and other allied pursuits in all branches of those arts which exist in this state or which can be profitably introduced and maintained in this state from the mineral resources thereof; including the geology and properties of clays, cement materials, fuels, and other minerals required, and the testing of the products thereof; also the manufacture of fire brick, pressed brick, paving brick and of glazed and enameled brick of all kinds, of sewer pipe, drain tile, fire proofing and terra cotta, of pottery, porcelain, china and other specialties; also including the details of the manufacture and uses of cement and the details of other allied industries. [31 G. A., ch. 124, § 1.]

SEC. 2674-e. Investigation of clays, cement materials and mineral products. Be it further enacted, that the said college shall provide as a part of its engineering experiment station work for the investigation of clays, cement materials, fuels, and other mineral resources of the state with especial reference to their economic uses, and for the publication and dissemination of information useful to such industries and for the testing of the products thereof. [31 G. A., ch. 124, § 2.]

SEC. 2674-f. Highway commission—duties. That the Iowa state college of agriculture and mechanical [mechanic] arts at Ames, shall act as a highway commission for Iowa, whose duties it shall be:

1. To devise and adopt plans and systems of highway construction and maintenance, suited to the needs of the different counties of the state, and conduct demonstration in such highway construction, at least one each year at some suitable place, for the instruction of county supervisors, township trustees, superintendents, students of the college, and others.

2. To disseminate information and instruction to county supervisors, and other highway officers who make request; answer inquiries and advise such supervisors and officers on questions pertaining to highway improvements, construction and maintenance, and whenever the board of supervisors of a county adjudge that the public necessity requires a public demonstration of improved highway construction or maintenance in said county, and so request and agree to furnish necessary tools, help, and motor power for same, the commission shall furnish as soon as practicable thereafter, a trained and competent highway builder for such demonstration, free to the county.

3. To formulate reasonable conditions and regulations for public demonstrations; and to promulgate advisory rules and regulations for the repair and maintenance of highways.

4. To keep a record of all the important operations of the highway commission, and report same to the governor at the close of each fiscal year. [30 G. A., ch. 105.]

CHAPTER 5.

OF THE NORMAL SCHOOL.

SECTION. 2680. Report to governor. The board shall biennially, through its secretary, make a detailed report to the governor of its proceedings during the preceding two years, which report shall show the number of

teachers employed, the compensation of each, the number of pupils and classification, an itemized statement of receipts and expenditures, and such further information with such recommendations as may be regarded important to the interests of the institution, and with reference to its connection with the educational work of the state; provided that the report made in the year 1906 shall cover the period only from the date of its last biennial report. [22 G. A., ch. 64, § 2; 16 G. A., ch. 129, § 9.] [31 G. A., ch. 125.]

SEC. 2682. Appropriation. There is hereby appropriated the sum of twenty-eight thousand five hundred dollars annually as an endowment fund for the payment of the teachers of said normal school, and the further sum of nine thousand dollars annually as a contingent fund therefor. The amount herein appropriated shall be drawn and paid quarterly on the first days of March, June, September and December, on the requisition of the board of trustees of the school. [29 G. A., ch. 117, § 1.]

SEC. 2682-a. Special tax—purpose—how drawn. For the purpose of providing for the erection, repair and improvement and equipment of such necessary buildings as shall be determined upon by the board of trustees of the state normal school, there shall be levied annually for five years, a special tax of one-tenth of a mill on the dollar upon the assessed valuation of the taxable property of the state, and the proceeds thereof shall be carried into the treasury to the credit of said state normal school. Said levy shall be first made with the levy made for state purposes in the year nineteen hundred and two (1902) and the same levy shall be made annually for the four successive years thereafter. The money realized from such levy for said state normal school shall be held by the treasurer of the state for the purposes hereinbefore provided and drawn upon requisition of the board of trustees of said state normal school. [29 G. A., ch. 117, § 1.]

CHAPTER 5-A.

OF REPORTS FROM EDUCATIONAL INSTITUTIONS.

SECTION 2682-b. Reports—what to contain. That the secretary of the state university, the secretary of the state college of agriculture and mechanic arts and the secretary of the state normal school be required hereafter to make report to each general assembly within three (3) days after the said general assembly shall have convened. Said reports shall show in plain manner the amount available each fiscal year from state appropriations and all other sources, for the erection, equipment, improvement and repair of buildings, also the funds received from state appropriations, interest on endowment funds, tuition, laboratory fees, janitor fees, donations, rent of lands and from all sources whatsoever going to effect the annual income of the support funds of said institutions. Any appropriation or funds received for any special purpose whatsoever shall also be reported. Hospital receipts and sales of departments shall be listed separately. The report shall show how the moneys thus received were expended, giving under separate heads the cost of instruction, administration, maintenance and equipment of departments, and the general expenses of the institutions. It shall clearly state the number of professors, instructors, fellows and tutors and the number of students enrolled in each course during each year of the biennial period. Students attending the short courses shall be reported separately. The amount of unexpended balances of

departments remaining in the hands of the treasurer and the amounts undrawn from the state treasury on the 30th of June of the last year of the biennial period shall be given. The report of the secretary of the state college of agriculture and mechanic arts shall also show the receipts of the experiment station from all sources for each fiscal year and how such funds were expended. [30 G. A., ch. 104.]

CHAPTER 6.

IOWA SOLDIERS' ORPHANS' HOME.

[27 G. A., ch. 78, § 1.]

SECTION 2683. Trustees and officers. The Iowa soldiers' orphans' home, located at Davenport, shall be under the management and control of three trustees, one of whom shall be a resident of Scott county. They shall, at their meeting in May after the regular session of the legislature, elect a president and secretary from their number, and shall elect a treasurer who shall be a resident of the county in which the home is situated, and he shall serve without compensation. The treasurer shall give a bond in a sum to be fixed by the board, with good and sufficient sureties, to be filed with and approved by the secretary of state, and conditioned for the faithful discharge of his duties and the safe keeping and proper disbursement of all money coming into his hands by virtue of his office. The secretary shall keep full and accurate minutes of the doings of the board, the meetings of which shall be held at the home. The board of trustees shall examine all applications for admission, and reject any for good and sufficient cause. It shall appoint a superintendent, who shall hold his or her office at its pleasure and subject to its direction. The superintendent, subject to the board, shall have charge of the institution and its conduct, and the board shall make biennial reports to the governor of the condition of the home, financial and otherwise. [22 G. A., ch. 74; 22 G. A., ch. 82, § 30; 16 G. A., ch. 94, §§ 4, 10; C., '73, §§ 1623-4, 1629, 1632.] [27 G. A., ch. 78, § 2.]

SEC. 2685. Admissions. All destitute children of soldiers, sailors and marines residents of the state, orphans of soldiers under fifteen years of age, who are destitute or unable to care for themselves, shall be admitted upon applications approved by the board of trustees of the home and become wards of the state, and such other destitute children of like age who have a legal settlement in the state, and whose applications for admission are approved by the board of supervisors or a judge of a court of record, shall be received into the home, but none in the latter class shall be so admitted as long as there are applicants denied in the former; all applications in the latter class to be made to a judge in the district of the applicant's residence, or the board of supervisors of the county in which the applicant is living. [21 G. A., ch. 111; 16 G. A., ch. 94, §§ 1, 2.] [27 G. A., ch. 78, § 3.] [31 G. A., ch. 126.]

SEC. 2688. Regulations. All children admitted to the home shall be subject to the rules and regulations of the same, and, subject to the approval of the trustees, may be expelled by the superintendent for disobedience and refusal to submit to proper discipline. They shall also be discharged upon arriving at the age of sixteen years, or sooner if possessed of sufficient means to provide for themselves. [16 G. A., ch. 94, § 3.; C., '73, § 1634.] [27 G. A., ch. 78, § 4.]

SEC. 2690. Repeal—acts in conflict. Section 2690 of the code and all acts and parts of acts in conflict with this act are hereby repealed. [31 G. A., ch. 127, § 5.]

SEC. 2690-a. Placing of child by adoption. That any child in the Iowa soldiers' orphans' home who is an orphan or has been abandoned by its parents, and any child in the home who is not an orphan and who has not been abandoned, with the consent in writing of its parents, or if but one be living, with the consent in writing of the survivor, may be adopted by any citizen of this state on the recommendations of the superintendent with the approval of the board of control of state institutions. The adoption shall be by an instrument in writing to be signed by the superintendent, subject to the approval, in writing, of the board of control, and by the person adopting, and except as herein otherwise provided such instrument shall be signed and recorded as provided by chapter 7 of title XVI of the code as amended and the adoption shall create the rights and liabilities provided by said chapter as amended. [31 G. A., ch. 127, § 1.]

SEC. 2690-b. Placing of child by contract. Any orphan child and any child who was abused, wrongfully treated, neglected or abandoned at and before the time it was committed to the home, or who has no home, or who, if returned to the home of its parents, guardian or other person who would have charge of it, would be apt to be subjected to conditions and influences tending to induce it to lead a dissolute, immoral or vicious life, may be placed by the superintendent, with the approval in writing of the board of control, with any person or any family of good standing and character where it will be properly cared for and educated. The child if not adopted as hereinbefore described, shall be placed under articles of agreement to be signed by the person or persons taking the child and the superintendent, approved by the board of control, which shall provide for the custody, care, education, maintenance and earnings of the child for a time to be therein fixed which shall not extend beyond the time when the child shall attain its majority. [31 G. A., ch. 127, § 2.]

SEC. 2690-c. Child taken from person with whom placed. In case any child, whether adopted or placed under articles of agreement for a term of years, is not furnished the care, education, treatment and maintenance required by the articles of adoption or agreement, the board of control may cause the child to be taken from the person or persons with whom it is placed, and may make such other disposition of it as shall seem to be for its best interests. And in case legal proceedings are necessary to recover the possession of such child they may be instituted and carried on in the name of the superintendent, and the county attorney of the county in which the child is placed shall, if requested by the superintendent, act as his attorney in the proceedings. [31 G. A., ch. 127, § 3.]

SEC. 2690-d. Interference of parent or other person prohibited. It shall not be lawful for any parent or other person not a party to the placing of a child by adoption or for a term of years under the provisions of this act, to interfere in any manner with or to assume or exercise any control over such child or his earnings while so placed, but such earnings shall be used, held, or otherwise applied for the exclusive benefit of the child. [31 G. A., ch. 127, § 4.]

SEC. 2691. Appropriation—salaries. For the support of the home, there is appropriated, out of any money in the state treasury not otherwise appropriated, or so much thereof as may be needed, twelve dollars monthly for each child actually supported, and, in addition, the expense of his transmission to the home, payable upon the sworn statement of the superintendent filed with the state auditor, who shall draw his warrant upon the state treasury therefor; the number of children to be ascertained by taking the average attendance for the preceding month. The salary of the superintendent and assistants shall be fixed by the board of trustees, subject to the

approval of the executive council. [16 G. A., ch. 94, § 5; C., '73, §§ 1630-1.] [30 G. A., ch., 106, § 1.]

SEC. 2692. Repeal—counties liable. That the law as it appears in section twenty-six hundred and ninety-two (2692) of the supplement to the code is hereby repealed and the following enacted in lieu thereof:

“Each county shall be liable for sums paid by the home in support of all its children, other than the children of soldiers, to the extent of six dollars (\$6.00) per month each, which shall be charged to the county, and collected as a part of the taxes due the state, and paid by the county at the same time state taxes are paid; the cost of support in excess of the six dollars (\$6.00) per capita per month shall be paid by the state from any money in the state treasury not otherwise appropriated.” [30 G. A., ch. 106, § 2.]

CHAPTER 6-A.

OF STATE AGENTS.

SECTION 2692-a. State agents—appointment—salary—office—supplies. That the board of control of state institutions is authorized to appoint not more than two persons to act as state agents for the soldiers' orphans' home, and for the industrial school. The salaries of such agents shall be fixed by said board and they may hold their positions during its pleasure. The board shall procure and furnish the agents with office room and such furniture, books, blanks and supplies as may be necessary for the proper discharge of their duties in the same manner as supplies are now furnished other officers of the board. Provided that the board may furnish such office room and supplies to said agents at one or more of the institutions for which they are to act, and may require the institutions to furnish the agents with room, board and facilities for transacting business when stopping therein without charge. [31 G. A., ch. 181, § 1.]

SEC. 2692-b. Duties. The duties of the agents shall be as prescribed by law and by the board of control. In addition to other duties they shall be required to find suitable homes, positions and employment when desirable for inmates of said institutions who are to be or have been released, to inspect the homes of such persons, to exercise supervision over such persons, examine into their conduct and environment, and when the conduct of any such persons who have not been finally discharged has been bad or in violation or [of] any of the conditions of their release to return them or cause them to be returned to the institutions from which they were released, or in such cases or when the environment or associations are bad to require them to obtain other homes or places of employment. The state agent shall keep records of their acts and report to the board of control when required the work they do, and results accomplished, the treatment received and the failure or progress made by the persons under supervision and other information required by the board. [31 G. A., ch. 181, § 2.]

SEC. 2692-c. Appropriation. There is hereby appropriated out of any money in the state treasury not otherwise appropriated the sum of five thousand dollars (\$5,000.00) for the payment of salaries and expenses of the state agents and other expenses incurred under the provisions of this act, such salaries and expenses to be paid in the manner provided by section twenty-seven hundred twenty-seven-a of the supplement to the code. Provided that the board of control may cause to be advanced from the funds hereby appropriated to each agent from time to time sums to be used in defraying the official expenses of such agent, but the aggregate amount

of the money so advanced and not expended at any time shall not exceed the sum of two hundred fifty dollars, and the agent shall give security to be approved by the board for the proper use of and accounting each month for all money so advanced. [31 G. A., ch. 181, § 3.]

SEC. 2692-d. Repeal. Chapter 157 of the acts of the thirtieth general assembly and all other acts and parts of acts in conflict with this act are hereby repealed. [31 G. A., ch. 181, § 4.]

CHAPTER 7.

OF THE INSTITUTION FOR FEEBLE-MINDED CHILDREN.

SECTION 2695-a. Admission of certain women. That all feeble-minded women under forty-six years of age who are residents of the state of Iowa may be admitted to the institution for feeble-minded children at Glenwood. [29 G. A., ch. 118, § 1.]

SEC. 2695-b. What statutes apply. The provisions of chapter seven (7) of title XIII of the code, in regard to the admission and maintenance of children in said institution, shall apply to the admission and maintenance of feeble-minded women authorized by this act. [29 G. A., ch. 118, § 2.]

SEC. 2700. Support. For the support of the institution, there is appropriated out of any money in the state treasury, not otherwise appropriated, the sum of twelve dollars monthly for each inmate therein supported by the state, counting the actual time such person is an inmate and so supported. Upon the presentation to the state auditor of a sworn statement of the average number of inmates supported in the institution by the state for the preceding month, he shall draw his warrant upon the state treasurer for such sum. [23 G. A., ch. 56; 19 G. A., ch. 40, § 9.] [27 G. A., ch. 79, §§ 1, 2.]

SEC. 2700-a. Repeal—ordinary expenses. That all of section twenty-seven hundred of the code, after the word "sum" in the eighth line, is hereby repealed. [27 G. A., ch. 79, § 2.]

CHAPTER 8.

OF THE INDUSTRIAL SCHOOL.

SECTION 2703-a. Repeal. That section two thousand seven hundred two (2702) and section two thousand seven hundred three (2703) of the code be and the same are hereby repealed. [28 G. A., ch. 100, § 1.]

SEC. 2704. Repeal—placing under contract of boys and girls—conditions. That section 2704 of the supplement to the code is hereby repealed and in lieu thereof is enacted the following:

"That boys and girls committed to the industrial school who were abused, wrongfully treated, neglected or abandoned at and before the time they were committed to said school, or who have no home, or who if returned to the homes of their parents, guardians or other persons who would have charge of them, would be subjected to conditions and influences tending to induce them to lead dissolute, immoral or vicious lives, may be placed by the superintendent, with the approval in writing of the board of control of state institutions, with any persons or in any families of good standing and

character where they will be properly cared for and educated. They shall be so placed under articles of agreement to be signed by the person or persons taking them and the superintendent, approved by said board of control, which shall provide for their custody, care, education, maintenance and earnings for a time to be fixed in said articles which shall not extend beyond the time when the persons bound shall attain their majority. In case a boy or girl so placed be not given the care, education, treatment and maintenance required by this agreement, the board of control may cause the boy or girl to be taken from the person or persons with whom placed and replace or may release or finally discharge him or her as may seem best. It shall not be lawful for any parent or other persons not a party to the placing of a boy or girl to interfere in any manner or assume or exercise any control over such boy or girl or his or her earnings which shall be used, held or otherwise applied for the exclusive benefit of such boy or girl. In case legal proceedings are necessary to enforce any right hereby conferred on any boy or girl, the county attorney of the county in which such proceedings should be instituted shall on request of the superintendent, approved by the board of control, institute and carry on in the name of the superintendent, the proceedings in behalf of the superintendent." [31 G. A., ch. 128.]

SEC. 2705-a. Repeal. That section two thousand seven hundred five (2705) of the code be and the same is hereby repealed. [28 G. A., ch. 100, § 3.]

SEC. 2705-b. Superintendent to make written report. The superintendent of the industrial school at Mitchellville shall, on or before the first day of January of each year, and at any other time when so requested by the board of control of state institutions, make a report to the said board in writing, touching all matters required of him by said board. [28 G. A., ch. 100, § 4.]

SEC. 2707. Superintendent. The superintendent with such subordinate officers and employes as he may appoint, shall have charge and custody of the inmates of the school. He shall discipline, govern, instruct, employ, and use his best endeavors to reform the pupils in his care, so that, while preserving their health, he may promote, as far as possible, moral, religious and industrious habits, regular, thorough and progressive improvement in their studies, trade and employment. He shall have charge of all the property of the institution. [C., 73, §§ 1651-2.] [28 G. A., ch. 100, § 5.]

SEC. 2708. Commitment. When a boy over the age of nine years and under sixteen, or girl over the age of nine years, and under eighteen, of sound mind, excepting married women, prostitutes, or any girl who is pregnant, shall be found guilty in any court of record of any crime excepting that of murder, the court in its discretion may, instead of entering judgment of conviction, order and direct the party to be sent to the industrial school, if a boy to the department at Eldora, if a girl, to that at Mitchellville, which order, certified by the clerk of the court and under its seal, shall be sufficient authority for his or her transfer to and confinement in said school. If such a boy or girl is convicted before any inferior court of a crime, or shall be found to be guilty of being a disorderly person, he or she may be forthwith sent by the court, accompanied with all the papers filed in his office upon the subject, in custody of an officer, to a judge of a court of record, who shall thereupon issue an order, directed to the parent or guardian of the party, or to such person as may have him or her in charge, or with whom he or she last resided, or one known to be nearly related to him or her, or if he or she be alone and friendless, then to any person the judge may appoint to act as guardian for the purposes of the case, requiring him or her to appear at a time and place stated and show cause why the party

should not be committed to the industrial school, which order shall be served by an officer by delivering a copy to the party to whom it is addressed, or by leaving it with some person of full age at the residence or place of business of said party, and immediate return shall be made to the judge of the service. At the time and place mentioned in the order, or to which the hearing may be adjourned, on the appearance of the parent or guardian, or, in case of their failure to appear, then after the appointment of some suitable person as guardian for the purposes of the case, the judge shall proceed to take the voluntary examination of the boy or girl, to hear the statements of the party appearing for him or her, and such testimony in relation to the case as may be produced, and if upon such examination and hearing he shall be satisfied that the boy or girl is a fit subject for the industrial school, he may commit him or her to said school, until he or she arrives at the age of twenty-one (21) years, by warrant, which warrant shall state the place in which the party resided at the time of arrest, and his or her age, as near as can be ascertained, and shall command the officer to take and deliver without delay to the superintendent of said school or other person in charge thereof the said boy or girl, and the statement as to residence or age shall be conclusive thereof for the purposes of this chapter. With the warrant, the judge shall also transmit a statement of the nature of the complaint, and such other particulars concerning the accused as he may be able to ascertain. If the judge is of the opinion that the boy or girl is not a fit subject for the school, or if said boy or girl shall appeal from the decision of the court in which the conviction was had, he shall remand him or her to the custody of the officer who had him or her in charge, to be returned to the magistrate before whom the conviction was had, to be dealt with according to law. [16 G. A., ch. 38, §§ 2-4; C., '73, §§ 1653-8.] [28 G. A., ch. 100, §§ 6, 12.] [29 G. A., ch. 119, §§ 1, 2.] [31 G. A., ch. 129.]

[Chapter 80 of the acts of the 27 G. A., amending above section, was repealed by the 28 G. A., chapter 100, section 11 (section 2711-a, herein). Section 1, chapter 119, of the acts of the 29 G. A., repeals section 12, chapter 100, 28 G. A., amending said section.]

SEC. 2708-a. Repeal. That section twelve (12), section thirteen (13), and section fourteen (14) of chapter one hundred (100), laws of the twenty-eighth general assembly be, and the same are hereby repealed. [29 G. A., ch. 119, § 1.]

SEC. 2709. Complaint by parent or guardian. If any parent or guardian shall make complaint to a judge of a court of record that any boy or girl, over the age of seven years, and under the age of sixteen years, the child or ward of such parent or guardian, is habitually vagrant, disorderly or incorrigible, said judge shall issue a warrant to the sheriff or constable to cause said boy or girl to be brought before him at such time and place as he may appoint, when and where he shall examine the parties, and if in his judgment the boy or girl is a fit subject for the industrial school, he may issue an order, with the consent of said parent or guardian indorsed thereon, to [be] executed by the sheriff or constable, committing said boy or girl to the custody of the superintendent of said school for reformation and instruction until he or she attains the age of twenty-one (21) years; but security for the payment of the expenses of said complaint, commitment and transportation to the school, and the expenses of board thereat, may, in the discretion of the judge, be required of said parent or guardian before such order is executed. [19 G. A., ch. 150; C., '73, § 1659.] [28 G. A., ch. 100, §§ 7, 11.] [29 G. A., ch. 119, §§ 1, 3.]

[Chapter 80 of the acts of the 27 G. A., amending above section, was repealed by the 28 G. A., chapter 100, section 11, (section 2711-a, herein.) Section 1, chapter 119, of

the acts of the 29 G. A., (section 2708-a, *supra*) repeals section 13, chapter 100, 28 G. A., amending said section.]

SEC. 2710. Return to county. If any person committed to the industrial school shall prove unruly or incorrigible, or if his or her presence shall be manifestly and constantly dangerous or detrimental to the welfare of the school, the board of control of state institutions may order his or her removal to the county from which he or she came, and deliver to the jailer of such county, where proceedings shall be resumed as if no committal had been made to the industrial school. [C., '73, § 1662.] [28 G. A., ch. 100, § 8.]

SEC. 2711. Discharge—parole. No one shall be committed to the industrial school for a longer term than until he or she attains the age of twenty-one (21) years, and the board of control of state institutions may at any time after one year's service order the discharge or parole of any inmate as a reward for good conduct. And the board may, in exceptional cases, discharge or parole inmates without regard to the length of their service or conduct, when satisfied that the reasons therefor are urgent and sufficient. If paroled upon satisfactory evidence of reformation, the order may remain in effect or terminate under such rules and regulations as the board may prescribe. The binding out or the discharge of an inmate as reformed, or having arrived at the age of twenty-one (21) years, shall be a complete release from all penalties incurred by the conviction for the offense upon which he or she was committed to the school. [25 G. A., ch. 106; 19 G. A., ch. 150; C., '73, §§ 1660-1.] [28 G. A., ch. 100, §§ 9, 11, 14.] [29 G. A., ch. 119, §§ 1, 4.] [29 G. A., ch. 120, § 1.]

[Chapter 80 of the acts of the 27 G. A., amending above section, was repealed by the 28 G. A., chapter 100, section 11 (section 2711-a, herein). Section 1, chapter 119, of the acts of the 29 G. A., (section 2708-a, *supra*), repeals section 14, chapter 100, 28 G. A., amending said section.]

SEC. 2711-a. Repeal. That chapter 80 of the laws of the twenty-seventh general assembly be and the same is hereby repealed. [28 G. A., ch. 100, § 11.]

SEC. 2713. Repeal—support fund. That section 2713 of the supplement to the code as amended by chapter 143 of the acts of the thirtieth general assembly is hereby repealed, and in lieu thereof is enacted the following:

"For the support of the industrial school there is appropriated out of any money in the state treasury not otherwise appropriated, or so much thereof as may be necessary, thirteen dollars monthly for each boy and sixteen dollars monthly for each girl actually supported in said school, counting the average number therein for each month; the monthly statement for each department to be verified by its superintendent and presented to the state auditor who shall draw his warrant upon the state treasurer for the same: provided, however, that when the average number of inmates in the department for boys shall be less than 500 for any month said department shall be credited by the auditor of state and the treasurer of state with the sum of five thousand five hundred dollars, and when the average number of inmates in the department for girls shall be less than two hundred for any month said department shall be credited by the auditor of state and the treasurer of state with the sum of three thousand dollars, and any sum which shall be credited to either department as aforesaid shall be drawn from the state treasury as the regular monthly per capita allowance is drawn." [31 G. A., ch. 130, § 1.]

SEC. 2713-a1. Appropriation for dental work. There is further appropriated out of any money in the state treasury, not otherwise appro-

priated, the sum of one thousand (\$1,000.00) dollars for the industrial school at Eldora and four hundred (\$400.00) dollars for the industrial school at Mitchellville. The same, or so much thereof as shall be necessary, shall be used, in connection with the support fund heretofore appropriated, to furnish proper dental work for those supported in said schools. The statements to be made and vouchers drawn for said funds shall be as provided in the first (1) section of this bill. [31 G. A., ch. 130, § 2.]

CHAPTER 8-A.

IOWA INDUSTRIAL REFORMATORY FOR FEMALES.

SECTION 2713-a. Name and location. There is hereby established at Anamosa, Iowa, the Iowa industrial reformatory for females. [28 G. A., ch. 102, § 1.]

SEC. 2713-b. Management—officers—rooms. Said reformatory shall be under the control of the board of control of state institutions, and the immediate management of it shall be under such officers as said board may deem proper, but the chief executive officer of said institution, so selected by the board, shall appoint all subordinate officers and employes, as provided in chapter one hundred eighteen (118), acts of the twenty-seventh general assembly, and the salary or compensation to be paid any officer or employe of said reformatory shall be fixed in the manner provided in said chapter. Said reformatory may use and occupy the building now known as the female department of the penitentiary at Anamosa, except the two rooms on the lower floor at the right of the main entrance of the said female department, which may be used as store rooms by said penitentiary and reformatory, and said rooms shall be under the control of the warden of the penitentiary. [28 G. A., ch. 102, § 2.]

SEC. 2713-c. When opened. Said reformatory may be opened under the direction of the board of control of state institutions as soon as the female department of the penitentiary and the warden's house shall be completed. [28 G. A., ch. 102, § 3.]

SEC. 2713-d. Instruction. Any woman or girl committed or transferred to said institution shall be instructed in piety and morality, and in such branches of useful knowledge as are adapted to her age and capacity, and in some regular course of labor, as is best suited to her age, strength, disposition, and capacity, and as promises best to secure the reformation and future well-being of the inmate, and to that end the board of control is authorized to establish, and cause to be operated, in such institutions, schools for education and industrial training as may be deemed best. [28 G. A., ch. 102, § 4.]

SEC. 2713-e. Commitments. All girls who may now be committed under chapter eight (8), title thirteen (13) of the code, to the industrial school at Mitchellville, may, in the discretion of the district court or judge thereof, be committed to said industrial school or to this reformatory; provided, however, that no girl under nine years of age shall in any event be committed to said reformatory or to said industrial school under the provisions of this act or of chapter 8, title 13, of the code. [28 G. A., ch. 102, § 5.]

SEC. 2713-f. Commitments continued. Any woman or girl over the age of fourteen years, who may be an inmate of the industrial school for girls, whom the superintendent of such school may report to the board of

control of state institutions as being unruly and incorrigible, and whose presence is dangerous and detrimental to the welfare of such school, may be, upon investigation of the charge by the board or control, and the same being substantiated, ordered transferred by said board of control to said reformatory to be kept there, under such rules and regulations as may be provided therefor and for the length of time prescribed by chapter eight (8) of title thirteen (13) of the code. [28 G. A., ch. 102, § 6.]

SEC. 2713-g. Discharge or parole. The board of control shall have power to order the discharge or parole of any person who is confined under the provisions of this act in said reformatory, said discharge or parole to be a reward for good conduct and for proficiency in studies, and for excellency in work in the industrial department. If paroled, such order shall remain in effect, or terminate under such rules and regulations as may, with the approval of the board, be prescribed. [28 G. A., ch. 102, § 7.]

SEC. 2713-h. Officers of penitentiary to serve. The physician, chaplain, and storekeeper at the Anamosa penitentiary shall also serve in the same capacity for the Iowa industrial reformatory for females, for the compensation already provided by law. [28 G. A., ch. 102, § 8.]

SEC. 2713-i. Board to notify judges and clerks. At least thirty days prior to the opening of said institution for the reception of inmates, the board of control shall officially notify each judge of the district, superior, or police courts, and each clerk of the district court, of each county in this state, of the time when such institution shall be open for the reception of inmates. [28 G. A., ch. 102, § 9.]

SEC. 2713-j. Board to name officers and fix salaries. The board of control of state institutions shall determine what officers may be necessary at said institution, in addition to the superintendent heretofore provided for, and fix the salaries of the same, and may prescribe their duties, and they shall be appointed in the manner prescribed in chapter one hundred eighteen (118), acts of the twenty-seventh general assembly, which chapter shall apply to and govern said institution in all respects, except as herein provided. [28 G. A., ch. 102, § 10.]

SEC. 2713-k. Heat, light, water, etc. Heat, light, water, sewer facilities, power to operate machinery if needed, shall all be furnished to said reformatory free by the penitentiary at Anamosa. [28 G. A., ch. 102, § 11.]

SEC. 2713-l. Per capita appropriation—estimates for supplies. There is hereby appropriated for the support, care, maintenance, clothing, and transportation of the inmates of the said reformatory, and for the purpose of maintaining the schools therein, the sum of fifteen dollars per month per capita, or so much thereof as may be necessary for each inmate thereof; said per capita to be based upon the average number present for the preceding month, and to be available one month in advance. The chief executive officer of said institution is hereby authorized, a month in advance of said opening, to make estimate herein provided for all supplies for the operation of said institution, on the basis of fifty inmates for the first month. Thereafter, all the provisions of chapter one hundred eighteen (118) acts of the twenty-seventh general assembly, relating to estimates, vouchers, reports, and otherwise, shall apply to this institution, providing that said estimates shall be made by the warden of the penitentiary at Anamosa, Iowa, upon information furnished by the chief executive officer of said institution, and the said warden shall return to the board of control of state institutions said estimates for approval; and requisitions for supplies needed in said reformatory shall be made upon said warden by such officer of said reformatory as the board of control may designate, and said requi-

sitions shall be honored by the said warden and the storekeeper of said penitentiary. [28 G. A., ch. 102, § 12.]

SEC. 2713-m. Appropriation for industries. For the purpose of establishing and operating proper industries in said institution, there is hereby appropriated the sum of one thousand dollars, or so much thereof as may be necessary, and for the purpose of furnishing said reformatory there is hereby appropriated the sum of fifteen hundred dollars, or so much thereof as may be necessary. [28 G. A., ch. 102, § 13.]

SEC. 2713-n. Government and discipline. The board of control of state institutions is hereby authorized to make any provisions for the government, discipline, and control of said institution, not herein specifically provided for, and not in conflict with law. [28 G. A., ch. 102, § 14.]

CHAPTER 9.

OF THE COLLEGE FOR THE BLIND.

SECTION 2715. Admission. All blind persons, residents of the state, of suitable age and capacity, shall be entitled to an education in this institution at the expense of the state, and non-residents may also be entitled to the benefits thereof, if they can be accommodated therein, upon paying to the treasurer sixty-six dollars quarterly in advance. [17 G. A., ch. 72, § 1; C., '73, §§ 1672, 1680; R., §§ 2147-8.] [30 G. A., ch. 107.]

SEC. 2717. Report. On or before the fifteenth day of August in each even-numbered year, the principal of the college shall report to the governor the number of pupils in attendance, the name, age, sex, residence, place of nativity and cause of blindness, with the studies pursued, trades taught, and a complete statement of the expenditures made, and the number, kind and value of articles manufactured and sold. Provided that the report for the year 1906 shall cover only the period from the date of the last biennial report. [22 G. A., ch. 82, § 32; C., '73, § 1677.] [31 G. A., ch. 131.]

SEC. 2718-a. Repeal — appropriation — support. That section twenty-seven hundred and eighteen (2718) of the code and chapter eighty-two (82) of the acts of the twenty-seventh general assembly be and they are hereby repealed, and in lieu thereof is enacted the following:

For the support of the college and to meet the ordinary and current expenses thereof, including the compensation of officers, teachers and other employes, the purchase of supplies of food, clothing, furniture and furnishings, books, maps, apparatus, and other incidental expenses, there is hereby appropriated, out of any money in the state treasury not otherwise appropriated, or so much thereof as may be needed, twenty-two dollars per month for nine months each year, for each resident pupil actually supported in the college. Said sum shall be placed to the credit of the college on the certificate of the board of control of state institutions which shall show the average number of pupils in the college for the preceding month, and shall be paid from the state treasury, as provided by chapter one hundred eighteen (118) of the acts of the twenty-seventh general assembly and acts amendatory thereof. [29 G. A., ch. 121, § 1.]

SEC. 2718-b. Prior expenses—allowance. All expenses of the college incurred prior to the first day of March, A. D. 1902, shall be paid from the funds heretofore authorized by section twenty-seven hundred and eighteen (2718) of the code, as amended and the monthly allowance authorized by this act shall be computed from the first day of February, A. D. 1902. [29 G. A., ch. 121, § 2.]

CHAPTER 10.

OF THE INDUSTRIAL HOME FOR THE BLIND.

SECTION 2722-a. Board of control to close institution—expenses of inmates. As soon as practicable after the passage of this act, the board of control of state institutions is directed to close the industrial home for the blind at Knoxville, to cease all manufacturing thereat, and to cause to be sent to their homes in this state, all of the inmates therein, who may desire to return home, paying the actual expenses thereof, and they are also authorized to give each of said inmates a sum not exceeding twenty-five dollars to cover their incidental expense on their journey home. [28 G. A., ch. 103, § 1.]

SEC. 2722-b. Custodian. Said board of control is hereby authorized to employ a proper person as a custodian, whose business it shall be to care for said buildings and all other state property on said farm. He shall live in the building, and shall be paid such sum per month as the board may deem proper for his services. [28 G. A., ch. 103, § 2.]

SEC. 2722-c. Authority to lease the farm. Said board is authorized to lease the farm and collect the rental thereof, or they may, if a suitable arrangement can be made, make the lessee of the farm the custodian of said buildings and property. [28 G. A., ch. 103, § 3.]

SEC. 2722-d. Disposition of personal property. Said board is authorized to sell such of the personal property at said institution or on said farm as they may deem proper to any person, or they may sell the same to any other institution under their control, which may need the same, or any part of it at a price to be fixed by them. Groceries and other perishable articles and other articles which cannot be disposed of at a fair price, may in the discretion of the board, be given to the industrial school at Mitchellville for use in said institution. [28 G. A., ch. 103, § 4.]

SEC. 2722-e. Disposition of rent or sale money. All money received by said board for rent or for sale of personal property shall be paid into the state treasury and placed to the credit of said institution. [28 G. A., ch. 103, § 5.]

SEC. 2722-f. Appropriation. There shall be available for the purpose of carrying out the provisions of this act the moneys collected from rent and from sales of personal property, and there is hereby further appropriated for said purpose the sum of three thousand dollars or so much thereof as may be necessary, and the board is empowered to draw in the name of the present superintendent of said industrial home a sufficient sum in advance on filing vouchers therefor, to in their judgment pay all expenses of transportation of inmates to their homes, and the incidental expenses above provided, on a certificate reciting the facts to said officers. All other sums to be drawn in the manner provided by chapter 118, acts of the twenty-seventh general assembly. [28 G. A., ch. 103, § 6.]

SEC. 2722-g. Authority to transfer balances. The treasurer of state is hereby authorized to transfer the following balances of special appropriations to the general funds of the state, viz: of appropriations made in chapter 86, acts of the twenty-fourth general assembly. A balance of \$82.95 of the appropriations "for additional furniture and machinery." A balance of \$118.50 "for planting orchard and small fruits." A balance of \$228.39 "for icehouse and cold storage." Also of chapter 144 of the acts of the twenty-fifth general assembly, a balance of \$60.00 of the item "for the building and grounds." [28 G. A., ch. 103, § 7.]

SEC. 2722-h. Acts in conflict repealed. All acts and parts of acts in conflict with this act are hereby repealed. [28 G. A., ch. 103, § 8.]

CHAPTER 11.

OF SCHOOL FOR THE DEAF.

SECTION 2724. Admission. Every resident of the state, of school age and suitable capacity, who is deaf and dumb, or so deaf as to be unable to acquire an education in the common schools, shall be entitled to receive an education in the institution at the expense of the state, and non-residents similarly situated may be entitled to an education therein, upon the payment of sixty-six dollars quarterly, in advance. Each superintendent of common schools, on or before the first day of November, shall report to the superintendent of the institution the name, age and postoffice address of each deaf and dumb person, or person so deaf as to be unable to acquire an education in the common schools, between the ages of five and twenty-one years and residing in his county. [C., '73, §§ 1688-9; R., §§ 2156, 2160.] [30 G. A., ch. 108.]

SEC. 2726. Repeal—expenses—charged to county—how certified and paid. Section twenty-seven hundred twenty-six (2726) of the code relating to the expenses of the inmates of the school for the deaf, is hereby repealed, and the following enacted in lieu thereof:

“When pupils are not supplied with clothing, or transportation, it shall be furnished by the superintendent who shall make out an account therefor against the parent or guardian, if the pupil be a minor, and against the pupil if he have no parent or guardian, or has attained the age of majority, which bill shall be certified by him to be correct, and shall be presumptive evidence thereof in all courts. The superintendent shall on the first days of April, and October of each year, certify to the auditor of state the amounts due from several counties, and the auditor of state shall thereupon pass the same to the credit of the institution, and charge the amount to the proper county. The superintendent shall at the time of sending certificate to the auditor of state, send a duplicate copy to the auditor of the county of the pupil's residence, who shall, when ordered by the board of supervisors, proceed to collect the same by action if necessary, in the name of the county, and when so collected, shall pay the same into the county treasury. The county auditor, shall upon receipt of said certificate, pass the same to the credit of the state, and thereupon issue a notice to the county treasurer authorizing him to transfer the amount from the general county fund to the general state revenue, which shall be filed by the treasurer as his authority for making such transfer, and shall include the amount in his next remittance of state taxes to the treasurer of state, designating the fund to which it belongs.” [31 G. A., ch. 132.]

SEC. 2727-a. Repeal—appropriation—support. That section twenty-seven hundred and twenty-seven (2727) of the code and chapter eighty-three (83) of the acts of the twenty-seventh general assembly be and they are hereby repealed and in lieu thereof is enacted the following:

For the support of the school and to meet the ordinary and current expenses thereof, including the compensation of officers, teachers and other employes, the purchase of supplies, of food, clothing, furniture and furnishings, books, maps, apparatus and other incidental expenses, there is hereby appropriated out of any money in the state treasury not otherwise appropriated, or so much thereof as may be needed, twenty-two dollars per month for nine months of each year, for each resident pupil actually supported in the school. Said sum shall be placed to the credit of the school on the certificate of the board of control of state institutions which shall show the average number of pupils in the school for the preceding month, and shall be paid from the state treasury, as provided by chapter

one hundred eighteen (118) of the acts of the twenty-seventh general assembly and acts amendatory thereof. [29 G. A., ch. 122, § 1.]

SEC. 2727-b. Prior expenses—monthly allowance. All expenses of the school, incurred prior to the first day of April, A. D. 1902, shall be paid from the funds heretofore authorized by section twenty-seven hundred and twenty-seven (2727) of the code, as amended, and the monthly allowance authorized by this act, shall be computed from the first day of February, A. D. 1902. [29 G. A., ch. 122, § 2.]

CHAPTER 11-A.

OF THE SALARIES OF THE CHIEF EXECUTIVE OF CERTAIN STATE INSTITUTIONS AND THE QUALIFICATION OF THE SUPERINTENDENT OF THE SCHOOL FOR THE DEAF.

SECTION 2727-c. Salaries. From and after July 1, 1898, the annual salary of the chief executive officer of the following institutions shall be: For the institution for feeble-minded children at Glenwood, twenty-four hundred dollars; for the industrial school, boys' department, at Eldora, eighteen hundred dollars; for the school for the deaf at Council Bluffs, fifteen hundred dollars; for the college for the blind at Vinton, twelve hundred dollars; for the Iowa soldiers' orphans' home at Davenport, fifteen hundred dollars; for the industrial school, girls' department, at Mitchellville, eighteen hundred dollars; for the industrial home for the blind at Knoxville six hundred dollars. The superintendent of the school for the deaf shall be proficient in the use of the sign language. [27 G. A., ch. 74, § 1.] [28 G. A., ch. 141, § 1.] [31 G. A., ch. 133.]

CHAPTER 11-B.

OF THE BOARD OF CONTROL OF STATE INSTITUTIONS.

SECTION 2727-a1. Nomination—term of office — confirmation — salaries—removal—vacancies. The governor shall, prior to the adjournment of the twenty-seventh general assembly, nominate and, with the consent of two-thirds of the members of the senate in executive session, appoint three electors of the state, not more than two of whom shall belong to the same political party, and no two of whom shall reside at the time of their appointment in the same congressional district, as members of a board to be known as a "board of control of state institutions." Said member shall hold office, as designated by the governor, for two, four, and six years respectively. Subsequent appointments shall be made as above provided and, except to fill vacancies, shall be for a period of six years. The board shall at all times be subject to the above limitations and restrictions. No nomination shall be considered by the senate until the same shall have been referred to a committee of five, not more than three of whom shall belong to the same political party, to be appointed by the president of the senate without the formality of a motion, which committee shall report to the senate in executive session, which report shall be made at any time when called for by the senate. The consideration of nominations, by the senate, shall not be had on the same legislative day the nominations are re-

ferred. The chairman of the board for each biennial period shall be the member whose term first expires, and each member thereof shall receive a salary of three thousand dollars (\$3,000.00) per annum. The governor may, by and with the consent of the senate, during a session of the general assembly, remove any member of the board for malfeasance or non-feasance in office, or for any cause that renders him ineligible to appointment, or incapable or unfit to discharge the duties of his office, and his removal when so made shall be final. When the general assembly is not in session the governor may suspend any member so disqualified, and shall appoint another to fill the vacancy thus created, subject, however, to the action of the senate when next in session. All vacancies on said board that may occur while the general assembly is not in session shall be filled by appointment by the governor, which appointment shall expire at the end of thirty days from the time the general assembly next convenes, and vacancies occurring during a session of the general assembly shall be filled as regular appointments are made and before the end of said session. [27 G. A., ch. 118, § 1.]

SEC. 2727-a2. Oath—bond—examination—not excused from testifying. Each member of the board shall take the oath, and qualify, as required by section one hundred and seventy-nine of the code, and shall devote his whole time to the duties of his office. Before entering on the duties of his office, each member shall give an official bond in the sum of twenty-five thousand dollars (\$25,000.00), conditioned as provided by law, signed by sureties, to be approved by the governor, and when so approved, said bonds shall be filed in the office of the secretary of state. No member of the board of control shall be eligible to any other lucrative office in the state during his term of service or for one year thereafter or to any position in any state institution during the term for which he was appointed, nor within one year after his term shall have expired. The said board of control shall be subject to the examination of the joint committee on retrenchment and reform, created by section one hundred and eighty-one of the code. The claim that any testimony or evidence sought to be elicited or produced on such examination may tend to criminate the person giving or producing it, or expose him to public ignominy, shall not excuse him from testifying or producing evidence, documentary or otherwise; but no person shall be prosecuted or subjected to penalty or forfeiture for and on account of any matter or thing concerning which he may testify or produce such evidence, provided that he shall not be exempted from prosecution and punishment for perjury committed in so testifying. [27 G. A., ch. 118, § 2.]

SEC. 2727-a3. Officers—secretary—salary—acting secretary—supplies. The board shall be provided by the proper authorities with suitably furnished offices at the seat of government, and shall employ a competent secretary, who shall receive a salary not to exceed two thousand dollars (\$2,000.00) per annum, and may also hire a stenographer and such other employes as may be necessary. In the absence or disability of the secretary, and the business of the board requires it, the board of control may appoint a member of the board as acting secretary during such absence or disability, who shall at such time have the powers of the secretary of the board. Said appointment shall be made of record in the proceedings of the board, and no additional compensation shall be paid because of the service of such acting secretary. This board shall, by the proper authorities, be also furnished with all necessary books, blanks, stationery, printing, postage stamps, and such other office supplies as are furnished other state officers. It shall present to each general assembly an itemized account of

its expenditures, to the end that the legislature may, for the future, fix the maximum amount of such expenditures. [27 G. A., ch. 118, § 3.] [28 G. A., ch. 143, § 4.]

SEC. 2727-a4. Appropriation. There is hereby appropriated from any funds in the state treasury not otherwise appropriated sufficient thereof to pay the salaries and expenditures hereby authorized. [27 G. A., ch. 118, § 4.]

SEC. 2727-a5. Traveling expenses—governor's approval. In addition to the salaries paid the members of the board and the secretary or other employes they shall be entitled to the necessary traveling expenses, by the nearest traveled and practicable route, incurred in going from Des Moines to the different institutions, or to other places in the state, when on official business. No expenditure for traveling expenses to other states shall be made by the board, or by any officer or agent thereof, or by any officer, employe, or agent of any state institution subject to this board, unless the authority to make such trip is granted at a meeting of the board of control upon a written resolution, adopted by the board, which shall state the purpose of such trip, and the reason the same is deemed necessary. Said resolution, if adopted, shall then be submitted to the governor for his written approval, and if he does not approve the same such trip shall not be made at the expense of the state. [27 G. A., ch. 118, § 5.]

SEC. 2727-a6. Itemized statement. Before any expenses of the members of the board, any officer, or agent, thereof, or before any expenses incurred by others under the direction of the board, or the expenses of any officer or employe of any institution under the charge of the board, shall be paid, a minutely itemized statement of every item of expenditure shall be presented to the proper authority, duly verified, which verification shall aver that the expense bill is just, accurate and true, and is claimed for cash expenditures, or cash disbursements, truly and actually made and paid to the parties named, as shown by said statement. Unless the statement is so verified and duly audited, payment thereof shall not be had. The expense bills of the members of the board, the secretary and its other employes, when so verified, shall be presented to the governor for his written audit, before payment is made. The salaries and such actual expenses of the board, and of the secretary and other officers, and the salaries of employes, shall be paid monthly by the treasurer of state, upon the warrant of the auditor of state. [27 G. A., ch. 118, § 6.]

SEC. 2727-a7. Official seal. The board shall have an official seal, and every commission, order, or other paper executed by the board may, under its direction, be attested with its seal affixed, by the secretary, or any member of the board. [27 G. A., ch. 118, § 7.]

SEC. 2727-a8. Institutions under control. The board of control shall have full power to manage, control, and govern, subject only to the limitations contained in this act, the soldiers' home; the state hospitals for insane; the college for the blind; the school for the deaf; the institution for the feeble-minded; the soldiers' orphans' home; the industrial home for the blind, the industrial school, in both departments; and the state penitentiaries. Within ten days after the appointment and qualification of the members of the board, it shall organize and assume the duties vested in said board, but shall not exercise full control of the institutions until July 1, 1898. [27 G. A., ch. 118, § 8.]

SEC. 2727-a9. Powers—duties—annual statement. The boards of trustees and commissioners now charged with the government of the institutions named in section eight hereof shall on and after July 1, 1898,

have no further legal existence. All trustees now in office shall continue in office until July 1, 1898. The powers possessed by the governor and executive council, with reference to the management and control of the state penitentiaries, shall, on July 1, 1898, cease to exist in the governor and executive council, and shall become vested in the board of control; and the said board is, on July 1, 1898, and without further process of law, authorized and directed to assume and exercise all the powers heretofore vested in or exercised by the several boards of trustees, the governor, or the executive council with reference to the several institutions of the state herein named. The duties imposed on the executive council, by statute, to establish a uniform system of books and accounts for state institutions, and to cause the same to be examined annually by a skilled accountant, and to annually require a settlement with the officers of each state institution, are transferred from said council to the board of control as to the institutions herein named. Nothing herein contained shall limit the general supervisory or examining powers vested in the governor by the laws or constitution of the state, or that are vested by him in any committee appointed by him. The board shall prepare annually for publication, in accordance with the provisions of section one hundred and sixty-three of the code, a statement of the cost for the preceding year of maintaining each of said institutions, including improvements, itemized so far as practicable, and so arranged as to show the cost of the various kinds of provisions and supplies. [27 G. A., ch. 118, § 9.]

SEC. 2727-a10. Investigation—witnesses—contempt of court. It shall be the duty of said board, or a committee thereof, to visit and inspect, at least once in six months, the institutions named, and investigate the financial condition and management of such institutions; and in aid of any investigation the board shall have the power to summon and compel the attendance of witnesses; to examine the same under oath, which any member thereof shall have the power to administer; and shall have access to all books, papers and property material to such investigation, and may order the production of any other books or papers material thereto. Witnesses other than those in the employ of the state shall be entitled to the same fees as in civil cases in the district court. The claim that any testimony or evidence sought to be elicited or produced on such examination may tend to criminate the person giving or producing it, or expose him to public ignominy, shall not excuse him from testifying or producing evidence, documentary or otherwise; but no person shall be prosecuted or subjected to any penalty or forfeiture for and on account of any matter or thing concerning which he may testify or produce such evidence, provided that he shall not be exempted from prosecution and punishment for perjury committed in so testifying. And it shall be the duty of the board to cause the testimony so taken to be transcribed and filed in the office of the secretary of the board at the seat of government within ten days after the same is taken, or as soon thereafter as practicable and when so filed the same shall be open for the inspection of any person. Any person failing or refusing to obey the orders of the board issued under the provisions of this section, or to give or produce evidence when required, shall be reported by the board to the district court or any judge thereof, and shall be dealt with by the court or judge as for a contempt of court. [27 G. A., ch. 118, § 10.]

SEC. 2727-a11. Monthly visitation—may appoint a woman—visiting committee abolished. The board, by a committee, or its secretary, shall visit each hospital for the insane once each month, and in making such visits shall be vested with and exercise the powers and functions now granted the visiting committee to such hospitals, except that the discharge of employes for cause shall be left with the superintendent as hereinafter

provided. If the board deem it prudent, it may appoint a woman who resides within fifty miles of any hospital, whose duty it will be to visit such hospital, when directed by the board, and to report to the board, and who shall be paid the same compensation from the funds of the institution visited as is now provided for members of the visiting committee, upon proper audit of the bill for such services and expenses by the board, in the manner provided for payment of current expenses of institutions. The visiting committee to the hospitals for the insane is hereby abolished, and the members are relieved from further duty upon the passage of this act. [27 G. A., ch. 118, § 11.]

SEC. 2727-a12. Biennial report. The board shall make reports to the governor and legislature of its observations and conclusions respecting each and every of the institutions named, including the regular biennial report to the legislature, covering the biennial period ending June 30th, preceding the regular session of the general assembly. Said biennial report shall be made not later than November 15th in the year preceding the meeting of the general assembly, and shall also contain the reports which the executive officers of the several institutions are now or may be by the board required to make, also a statement of visitations to the several institutions and when and by whom made. [27 G. A., ch. 118, § 12.]

SEC. 2727-a13. Books and accounts. It shall keep at its office a proper and complete system of books and accounts with each institution, which shall show every expenditure authorized and made thereat and said books shall exhibit an account of each extraordinary or special appropriation made by the legislature, with every item of expenditure thereof. [27 G. A., ch. 118, § 13.]

SEC. 2727-a14. Uniform system of records and accounts—expert help. It shall prescribe the form of records and the kind of accounts to be made and kept by the institutions heretofore specified. In providing for the books of accounts the said board shall establish as uniform a system as possible, compelling similar institutions to keep similar books in the financial operations of such institutions; and the board shall institute and require the keeping of a perfected system of accounts, and requisitions showing the purchase, storing and consumption of supplies for subsistence, construction or other purposes. For the purpose of establishing said system of accounts, the board is authorized to employ competent and expert help, and to inaugurate in the institutions on July 1, 1898, the most modern and complete method of accounts. The board shall, within six months after the passage of this act, determine the kinds and quality of provisions and supplies for the several institutions subject to its charge. [27 G. A., ch. 118, § 14.]

SEC. 2727-a15. Biennial estimates of special appropriations. It shall prepare for the use of the legislature, biennial estimates of appropriations necessary and proper to be made for the support of the said several institutions, and for the extraordinary and special expenditures for buildings, betterments, or other improvements. [27 G. A., ch. 118, § 15.]

SEC. 2727-a16. Suggestions for legislation. The board shall incorporate in its report to the legislature, suggestions respecting legislation for the benefit of the several institutions, or for the dependent, defective or criminal classes of the state. The board and its secretary shall on request, attend the meetings of legislative committees to which such questions may be submitted for consideration, and furnish such committees such information in regard to its doings and the conduct of such institutions as may be demanded. [27 G. A., ch. 118, § 16.]

SEC. 2727-a17. Plans and specifications—limited to amount of appropriation — penalty. It shall prepare plans for all betterments, improvements or buildings costing more than one thousand dollars (\$1,000) for which it may recommend an appropriation. But when an appropriation for any amount has been made, there shall be no expenditure thereof until the board has secured suitable plans and specifications prepared by a competent architect, and accompanied by a detailed statement of the amount, quality and description of all the material and labor required for the completion of said structure; and no plan or plans shall be adopted, and no betterments, improvements or buildings constructed, that contemplate the expenditure of more money for completion than the amount appropriated by the legislature therefor, unless exempted from the provisions of this section by the act making such appropriation. In no event shall the board direct or permit an expenditure for any purpose in excess of the amount appropriated by law, or contemplated by the statute, and the members of the board, its officers and agents, are subject to the provisions of sections one hundred seventy-eight, one hundred and eighty-two, one hundred eighty-four, one hundred eighty-five, one hundred eighty-six, one hundred eighty-seven and one hundred eighty-nine of the code, to the same extent as if said named persons were particularly specified in said sections. The violation of any of the provisions of either of the sections of the code above named by any of such named officers or persons, shall be deemed a misdemeanor, and on conviction the offender shall be fined in any sum not less than two hundred dollars, nor more than five thousand dollars, in the discretion of the court, or imprisoned in the county jail not exceeding one year, or by both such fine and imprisonment. [27 G. A., ch. 118, § 17.]

SEC. 2727-a18. Report to governor. It shall investigate and report to the governor any abuses or wrongs alleged to exist in the state institutions referred to in this act. [27 G. A., ch. 118, § 18.]

SEC. 2727-a19. What to inspect. The board or any member thereof at the stated visits to any of the institutions under its control shall inspect every part of each institution, and all the places, buildings and grounds belonging thereto, or used in connection therewith. They shall make an examination of the general and special dietary, the stores, and methods of supply; as far as circumstances may permit they shall see every inmate of the soldiers' home, and the charitable institutions, especially those admitted since the preceding visit, and shall give such as may require it, suitable opportunity to converse with the members of the board apart from the officers and attendants. They shall, if deemed necessary, examine under oath the officers, attendants, guards and other employes, and make such inquiries as will determine their fitness for their respective duties. [27 G. A., ch. 118, § 19.]

SEC. 2727-a20. Recommendations—quarterly conferences. The board shall, during the first six months after its creation, meet in conference as often as it may determine, the superintendents, wardens and other executive officers of each of the said institutions, or as many thereof as it deems practicable, and consider in detail, all questions of management, and the methods to be adopted to secure the economical management of the several institutions, and shall send to such officers such recommendations in regard to the management and improvement of the institutions, as it may deem necessary or advisable, and the board is vested with power to enforce such recommendations and directions. After six months from the creation of the board a consultation and conference of the superintendents, wardens and chief executive officers shall be held quarterly with

the board at its office in Des Moines, at a time to be designated by the board, at which meeting all matters concerning the government and management of the institutions shall be considered and discussed, and the chairman of the board of control shall preside at such meetings, and full minutes thereof shall be preserved by the secretary of such board, who shall be secretary of said meeting. [27 G. A., ch. 118, § 20.]

SEC. 2727-a21. Districts. The board shall divide the state into proper districts from which the several institutions may receive patients or inmates. The limit of such districts may, from time to time, as the occasion warrants, be changed or altered. And in making such districts, or the rearrangement thereof, the superintendents, wardens, or executive heads of the institutions shall be consulted, at a time and place to be fixed by the board. When the districts are established, or a change thereof is had, the board shall notify the proper county or judicial officers, of such establishment or change. [27 G. A., ch. 118, § 21.]

SEC. 2727-a22. Record—transfer—managing officer. The board shall keep in its office, accessible only to the members, secretary and proper clerks, except by the consent of the board, or on the order of a judge or court of record, a record showing the residence, sex, age, nativity, occupation, civil condition and date of entrance or commitment of every person; patient, inmate, or convict in the several institutions governed by the board, the date of discharge of every such person from the institution, and whether such discharge was final, and the condition of the person at the time he left the institution. The record shall also indicate if a person is transferred from one institution to another, and to what institution; and if dead, the date and cause of death. This information shall be furnished to the board by the several institutions, and such other obtainable facts as the board may from time to time require. It is the duty of the managing officer of each institution, who shall be named by the board within ten days after the commitment or entrance of a person, patient, inmate or convict to the institution, to cause a true copy of his entrance record to be made and forwarded to the office of the board of control. When a patient or inmate leaves, or is discharged, transferred, or dies in any institution, the superintendent or person in charge shall, within ten days thereafter, send such information to the office of the board, all of which information shall be furnished on forms which the board may prescribe. [27 G. A., ch. 118, § 22.]

SEC. 2727-a23. State architect—expenses—assistant draftsman. The board may employ an architect who shall be skilled in the most improved method of sanitation, and competent to prepare plans, specifications, estimates and details for the buildings, betterments, and every item of equipment which may be necessary in any of the institutions, whose duty shall be to perform the work usually done by architects in preparing plans and specifications, and supervising the work of construction on all the buildings, betterments and improvements done at institutions under the control of the board. Said architect shall also perform such other labor as may be designated by the board, and shall receive a compensation to be by the board fixed, which, including expenses, shall in no event exceed three thousand dollars (\$3,000) per annum. In cases of sufficient magnitude, the board may secure the advice of a consulting architect, or may procure plans and specifications and drawings from other architects, but the expense thereof shall not exceed fifteen hundred dollars in any one year. The state architect shall be entitled to receive in addition to the compensation for his services fixed by the board, his necessary traveling expenses within the state when engaged in official business, and the board may allow him compensation for assistant draftsmen for services performed for the state

when, in the opinion of the board, such services are necessary, provided, however, that the total amount allowed for traveling expenses and draftsmen shall not exceed two thousand dollars in any biennial period. [27 G. A., ch. 118, § 23.] [29 G. A., ch. 160, § 1.] [30 G. A., ch. 109.]

SEC. 2727-a24. Institution officers—term of office—removal—qualifications. It shall be the duty of the board to appoint a superintendent, warden or other chief executive officer of each institution under the control of the board. The tenure of office of said officers shall be four years from the date of their appointment, and the superintendent, warden or other chief executive officer now in charge of the several institutions placed under the control of this board and who is now holding under an election or contract for a definite term shall continue in office until the expiration of such term or contract, all other superintendents, wardens, or other chief executive officer shall hold office until January 1, 1899. This provision shall not be applicable to the present warden at the Anamosa penitentiary, and the warden-elect, W. A. Hunter, shall hold his office for the time for which he has been elected. The superintendent, warden, or other chief executive officer of any of the institutions named, may be removed by the board for misconduct, neglect of duty, incompetency, or other proper cause showing his inability or refusal to properly perform the duties of his office, but such removal shall be had only after an opportunity is given such person to be heard before such board upon preferred written charges, but the removal, when made, shall be final. The officers of the several institutions shall have the qualifications, and perform the duties now imposed and required of them by the statute, except as the same are modified or abrogated in this act. In case there is an alleged or seeming conflict between the powers of the superintendents or other executive officers and the board of control, the determination of such question by the board shall be final. [27 G. A., ch. 118, § 24.]

SEC. 2727-a25. Power to investigate question of insanity. The board shall have the power to investigate the question of the insanity and condition of any person committed to any state hospital, and shall discharge any person so committed or restrained, if, in its opinion, such person is not insane, or can be cared for after such discharge, without danger to others, and with benefit to the patient, but in determining whether such patient shall be discharged, the recommendation of the superintendent of such hospital shall be secured. The granting of this power to the board to serve as a commission for the determination of the insanity of a person is merely permissive, and does not repeal or alter any statute respecting the discharge or commitment of inmates to the state hospitals. [27 G. A., ch. 118, § 25.]

SEC. 2727-a26. Power to transfer. Patients shall be sent to the state hospital and convicts shall be sent to the penitentiary located in the district embracing the county from which they are committed. But the board may transfer the inmate in any hospital, or the convict in any penitentiary to another hospital or to the other penitentiary, at the expense of the state, and shall see that proper record thereof is made at the hospitals and penitentiaries, and in the office of the board. [27 G. A., ch. 118, § 26.]

SEC. 2727-a27. Collection of information—bulletins—forms. The board shall gather and present information embodying the experience of soldiers' homes, charitable, reformatory and penal institutions in this and other countries, regarding the best and most successful methods of caring for the insane, delinquent and criminal classes. And it shall encourage and urge the scientific investigation of the treatment of insanity and epilepsy by the medical staffs of the insane hospitals, and the institution for the

feeble-minded, and shall publish from time to time, bulletins and reports of the scientific and clinical work now done in said institutions, or which it may require to be done therein. It shall also provide for the several institutions the forms for statistical returns to be made by them in their annual and other reports. [27 G. A., ch. 118, § 27.]

SEC. 2727-a28. Repeal. The law as it appears in section 2727-a28 of the supplement to the code and all acts and parts of acts in conflict with this act are hereby repealed. [31 G. A., ch. 92, § 3.]

SEC. 2727-a28-a. Non-resident insane—care and removal. That when the commissioners of insanity of any county shall find to be insane a person who is a non-resident of this state, or whose residence is found by the commissioners to be unknown, they shall at once report the case to the board of control of state institutions and furnish it with a copy of the evidence taken on the question of the legal settlement of the insane person. The board shall investigate the case and if the legal settlement can not be ascertained the board shall cause him to be taken to a state hospital for the insane as a charge of the state, and if the legal settlement of the patient is found thereafter to be in any county of this state the cost of maintaining him shall be charged to that county and collected as provided by law in other cases. If the board of control find that the insane person is a non-resident of this state it may cause him to be conveyed to the place of his legal settlement forthwith or to a state hospital for the insane, there to be treated and cared for until released, at the cost of the state. When the legal settlement of any non-resident patient received in a state hospital is known or if then unknown is afterwards ascertained, he may be transferred to the place of his legal settlement if his condition permit such transfer, unless the cost thereof, or other reasons, shall, in the opinion of the board of control, make the transfer inadvisable. No patient to be maintained at the expense of the state shall be received in a state hospital without the formal order of the board of control. [31 G. A., ch. 92, § 1.]

SEC. 2727-a28-b. Transfers of insane persons—expenses. The transfer of insane persons to state hospitals or to the places of their legal settlement under the provisions of this act or under the provisions of chapter 78 of the acts of the thirtieth general assembly shall be made according to the directions of the board of control, and when practicable by employes of state hospitals, and the actual and necessary expenses of such transfers shall be paid on itemized vouchers sworn to by the claimants and approved by the board of control from any funds in the state treasury not otherwise appropriated. [31 G. A., ch. 92, § 2.]

SEC. 2727-a29. Questionable commitment. The superintendents for the hospitals for the insane and the institution for the feeble-minded are required to immediately notify the board if there is any question as to the propriety of the commitment or detention of any person received at such institution, and said board, upon such notification, shall inquire into the matter presented, and take such action as may be deemed proper in the premises. [27 G. A., ch. 118, § 29.]

SEC. 2727-a30. Protection against fire—means of escape. It shall be the duty of the board to compel the superintendent, warden or other chief executive officer of each of the institutions under the control of the board, to provide at each institution, adequate and ready means of protection against fire, and to construct proper means of escape for the inmates and attendants where the same are not already constructed and to establish and enforce rigid rules and regulations, by which the danger of fire shall be minimized, and prevent, as far as possible injury to the persons of the inmates, and the loss or destruction, by any cause, of the property of the state. [27 G. A., ch. 18, § 30.]

SEC. 2727-a31. Official bonds. It shall be the duty of the board of control to require its secretary and each officer and employe of said board, and of every institution under its control who may be charged with the custody or control of any money or property belonging to the state, and who is not now required by statute to give bond, to give an official bond, properly conditioned, and signed by sufficient sureties, in a sum to be fixed by the board, which bond shall be approved by the board, and filed in the office of secretary of state. [27 G. A., ch. 118, § 31.]

SEC. 2727-a32. Inventory of stock and supplies. The board shall require within thirty days after its organization, the chief executive officer of each institution under its charge, to make a complete, minute and accurate inventory of the stock and supplies on hand, the amount and value thereof, which inventory shall be under the following heads: Live stock, produce of the farm on hand, carriages and vehicles, agricultural implements, machinery, mechanical fixtures, real estate, beds and bedding in inmates' department, other furniture in inmates' department, personal property of the state in superintendent's department, ready-made clothing, dry goods, provisions and groceries, drugs and medicines, fuel, library, and all other property under such other heads as the board may deem proper. A like inventory shall be submitted by the proper officer of each institution to the board when the annual report of said officer is submitted to the board. [27 G. A., ch. 118, § 32.]

SEC. 2727-a33. Gifts or gratuities—penalties. No member of the board of control, or officer, agent or employe thereof, and no superintendent, officer, manager or employe of any of the institutions under the charge and control of said board, shall, directly or indirectly, for himself or any other person or for any institution under the charge of said board, receive or accept any gift or gratuity from any person or persons, firm or corporation who are dealers in goods, merchandise or supplies which may be used in any of said institutions, or from any employe, servant or agent of such person or persons, firm or corporation. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction be punished as provided in section four thousand nine hundred and four of the code, and such violation shall be cause for his removal from office. [27 G. A., ch. 118, § 33.]

SEC. 2727-a34. Contents of biennial report—daily record. The board shall publish in its biennial report to the legislature the name and salary of every employe of said board, the name and salary of each officer and employe in the several institutions, subject to its control. It shall be the further duty of the board to require the proper officer of each institution to keep in a book prepared for the purpose, a daily record, to be made each day, of the time and the number of hours of service of each employe, and the monthly pay-roll shall be made from such time book, and shall be in accord therewith. When an appropriation is based on the number of inmates in or persons at an institution, the board shall require a daily record to be kept of the persons actually residing at and domiciled in such institution. [27 G. A., ch. 118, § 34.]

SEC. 2727-a35. Political influence or contribution prohibited. Any member, employe, or officer of the board of control, or any officer or employe of a state institution subject to this board, who by solicitation or otherwise, exerts his influence directly or indirectly, to induce other officers or employes of the state to adopt his political views or to favor any particular person or candidate for office, or who shall in any manner contribute money or other thing of value to any person for election purposes shall be removed from his office or position by the proper authorities. [27 G. A., ch. 118, § 35.] [28 G. A., ch. 143, § 2.]

SEC. 2727-a36. Solicitation of contributions for political purposes a misdemeanor. Any person who demands or solicits, from any member, employe, or officer of the board of control, or from any officer or employe of any institution subject to this board, a contribution of money or other thing of value, for election purposes, or for the payment of the expenses of any political committee or organization, shall be deemed guilty of a misdemeanor and punished accordingly. [28 G. A., ch. 143, § 3.]

SEC. 2727-a37. Assistants — discharged. The superintendent, warden, or other chief executive officer of the several institutions shall appoint all assistants, guards and employes required in the management of the institution the number of whom shall be determined by the board. It is hereby declared a misdemeanor for the members of the board, or any officer thereof, to exert any influence by solicitation or otherwise, on the managing officer of an institution in the selection of any employe or assistant. The said chief executive officer may, at his pleasure, discharge any person employed, but shall keep in the record of employes the date of such discharge, and shall place opposite his name the reason therefor. [27 G. A., ch. 118, § 36.]

SEC. 2727-a38. Institution salaries. The board shall, prior to July 1, 1898, and annually thereafter fix, with the written approval of the governor, the annual or monthly salaries of all the officers and employes in the several institutions, except such as are fixed by the general assembly. The board shall classify the officers and employes into grades, and the salaries and wages to be paid in each grade, shall be uniform in similar institutions in the state. The schedule of wages so fixed shall become operative on July 1st of each year. The salaries and wages shall be included in the monthly estimates as hereinafter provided, and paid in the same manner as other expenses of the several institutions. Officers entitled to food supplies for their families shall receive such allowances from the supplies furnished for the patients and inmates of the institution. The word "family" shall be construed to mean only the wife and minor children of an officer. [27 G. A., ch 118, § 37.]

SEC. 2727-a39. Local treasurer abolished. The treasurers of the institutions placed under the management of the board of control will be relieved of their duties, and all such offices will be abolished on July 1, 1898. Such local treasurer shall account to the proper authorities for all moneys, books, records, vouchers or other evidences of property belonging to his office, and in his possession. It shall be the duty of the state treasurer to receive all moneys and evidences of indebtedness in the hands of said treasurer, and a failure on the part of any such treasurer to properly account to the state treasurer on July 1, 1898, without further process of law, shall be by the said state treasurer immediately reported to the attorney-general for such action as may be proper in the premises. [27 G. A., ch. 118, § 38.]

SEC. 2727-a40. Moneys remitted to state treasurer. All moneys belonging to the state, derived from any source at any of the institutions under the control of this board, shall be by the proper executive officer, named by the board, accounted for and remitted to the state treasurer on the first day of each month, and all funds for the necessary expenditures of such institutions shall be drawn from the state treasury, as provided in this act. [27 G. A., ch. 118, § 39.]

SEC. 2727-a41. Triplicate estimates—revision—purchase of supplies. The superintendent, warden, or other chief executive officer, as may be designated by the board of control, shall on or before the fifteenth day of each month, cause to be prepared triplicate estimates in minute detail, including estimated cost of each item, of all the expenditures required for

the institution for the ensuing month. Such estimate shall also include a statement of the source and amount of all the revenues received by the said institution and accounted for to the state treasurer on the first day of each month. Two of said triplicate estimates shall be sent to the office of the board, and the third shall be kept by said superintendent, warden, or other chief executive officer. The board may revise the estimates for supplies or other expenditures, either as to quantity, quality or the estimated cost thereof, and shall certify that it has carefully examined the same, and that the articles contained in such estimate, as approved or revised by it, are actually required for the use of said institution. When the estimates have been so certified and revised, a copy of such revised estimate, duly certified, shall be sent to the institution, and another copy retained by the board. The certified copy sent to the institution shall be sufficient authority to the management of the institution to purchase the supplies enumerated in said estimate, at prices not to exceed those therein named, and not otherwise. Said supplies shall be so purchased as to permit at least thirty days' time to pay therefor, and the steward, clerk, or other officer of the institution, designated by the board, shall require itemized bills to be rendered by the persons who furnish supplies, in duplicate, for all purchases, whether made upon contract or otherwise, which shall be in the following form:

The state of Iowa, on account of the.....
Institution (Date).

To.....Dr. (Here insert an itemized account
of goods or property purchased.)

The state of..... }
County of..... } ss.

I,, on oath say that the foregoing bill of account is correct and just, and wholly unpaid; that the exact consideration therein charged for was received by the said institution; that neither the same nor any part thereof has since been commuted; and that neither bonus, commission, discount, nor any other consideration, directly or indirectly, has been given, or stipulated, within my knowledge or belief, because of the purchase thereof, as therein set forth, or for any other reason. (To be signed by the person having personal knowledge of the facts therein set forth.)

Sworn to and subscribed before me this.....day
of.....

I hereby certify that the above account is correct, and that the articles therein charged have been received in good order by the.....
institution.

.....
Steward, clerk or other designated officer.

It shall be endorsed as follows:

No.,Institution. \$.....

Passed upon by the board of control on the.....day
of....., and ordered paid.

[27 G. A., ch. 118, § 40.]

Secretary of the board of control.

SEC. 2727-a42. Monthly statement—affidavit. The steward, clerk or other officer who may be designated by the board, shall prepare a monthly statement showing purchases and expenditures of every kind for the preceding month, which shall be signed by such officer, approved by the chief

executive officer of the institution, and filed with the board on a day certain to be fixed by said board. Attached thereto shall be the affidavit of such steward, clerk, or officer, as the case may be, stating that the goods and other articles therein specified were purchased and received by him or under his direction at the institution, and were purchased at a fair, cash, market price, on credit not exceeding thirty days, and that neither he nor any person in his behalf had any pecuniary or other interest in the purchases made, or received any pecuniary or other benefit therefrom, directly or indirectly, by commission, percentage, deductions, or in any other manner whatever, and that the articles contained in such bill conformed in all respects to the invoiced goods received and ordered by him, or the samples from which the goods were purchased, both in quality and quantity. If any invoice or statement, or part thereof, is found objectionable, the board shall endorse its disapproval thereon, with its reason therefor, and return it to the management of the institution, and when the matter complained of is corrected, said statement and invoice shall be returned to the board. [27 G. A., ch. 118, § 41.]

SEC. 2727-a43. Pay roll — triplicate abstract — state treasurer. When the monthly statement is so made, approved and verified, it shall be forwarded to the board of control, together with the original invoices of the purchases and a complete and itemized statement of every expense of said institution, including the receipted pay-roll, for the examination and audit of the board, which board shall fix a regular time for the auditing of the accounts of the institution for the preceding month. The monthly pay-roll of each institution shall show the name of each officer and employe, when first employed, the monthly pay, time paid for, the amount of pay, and any deductions for the careless loss or destruction of property. This requirement shall be observed in all cases, and in no event shall a substitute be permitted to receive compensation in the name of the employe for whom he is acting. When the said accounts are audited, the secretary of the board of control shall, under the seal of the board, prepare in triplicate an abstract showing the name, residence and amount due each claimant, and the institution and the fund thereof on account of which the payment is made, which abstract shall also be certified by at least one member of the board, who shall be so authorized by the board, and the proceedings granting such authority shall be preserved in the records of the board. He shall deliver one copy thereof to the auditor of state, another to the treasurer of state, and the third shall be retained in the office of the board. Upon such certificate the auditor of state shall, if the institution named has sufficient funds, issue his warrant upon the treasurer of state for the gross amount as shown by such certified abstract. Said last named officer, upon being furnished by the board with a certified copy of such abstract as herein provided, shall send checks of the treasurer of state to the several persons for the amounts of their respective claims, as certified by the board of control. The treasurer of state shall preserve in his books a record of each check and remittance in the proper manner, showing the date of the issuance of each check, the name of the person to whom it was made payable, and such other data as may be evidence for the state, showing the payment of such indebtedness. The pay-roll of each institution can be paid by a single check sent to the steward, clerk or other officer designated by the board of control. If the treasurer of state shall require more clerical help because of this enactment, the executive council may authorize him to employ an assistant. [27 G. A., ch. 118, § 42.] [28 G. A., ch. 143, § 5.]

SEC. 2727-a44. Contingent fund. The board of control may permit a contingent fund, not to exceed in any institution two hundred and fifty

dollars (\$250.00), to remain in the hands of the managing officer of such institution, from which expenditures may be made in case of actual emergency requiring immediate action to prevent loss or danger to the institution or to the inmates thereof. A full, minute, and itemized statement of every expenditure made during the month from such fund, shall be submitted by the proper officer of said institution to the board under such rules and regulations as may be by said board established. If necessary, the board shall make proper requisition upon the auditor of state for a warrant on the state treasurer to secure the said contingent fund for each institution. [27 G. A., ch. 118, § 43.]

SEC. 2727-a45. Blanks and forms. The board of control shall formulate and furnish to each institution proper blanks and forms for all statements and accounts necessary to furnish the information required of such institution. [27 G. A., ch. 118, § 44.]

SEC. 2727-a46. Duties of institution officers. The stewards of the hospitals for the insane, the clerks of the prisons, and the proper officer of the other institutions who shall be designated by the board, shall have charge of and be accountable for all the supplies and stores of such institution, and shall be charged therewith at their invoice value, and shall in conjunction with the chief executive officer of each institution, make or direct all purchases for such institution as may be ordered by the board, under the estimates as hereinbefore provided. Such officer shall issue all the stores upon requisition approved by the superintendent or other officer designated by the board, which shall be his voucher therefor. He shall present monthly to the board of control an abstract of all expenditures, together with the accounts and pay-rolls for the preceding month, and shall examine and register all goods delivered, according to their amount and quality, and if found to correspond with the samples, and in good order, and correct in charge, he shall certify the bills as herein provided. He shall quarterly take an account of the subsistence supplies and stock in his possession and under his control, and transmit a copy of such invoice, duly verified, to the board; and at the close of the biennial period he shall make a consolidated report of all purchases, and all other transactions of his department, to the state board. If it shall appear that there is any shortage in the stores of the institution, the board shall appoint a committee from its number to investigate the cause thereof, and if it shall appear that the said shortage resulted from unavoidable loss, without the negligence of such steward, clerk or other designated officer shall be credited therewith; otherwise, he shall be charged with the amount thereof, and shall be required to pay the same into the state treasury within sixty days after the determination of the loss. If default shall be made in said payment, he shall forfeit his office, and suit shall be instituted upon his official bond to recover the same. [27 G. A., ch. 118, § 45.]

SEC. 2727-a47. Purchase of supplies from one institution for use of another. Without complying with the provisions of chapter one hundred and eighteen (118) of the laws of the twenty-seventh general assembly, requiring estimates to be made, the board of control is empowered to direct the purchase of materials, or any articles of supply, for any institution subject to its management, from any other institution under its control, which purchase shall be made at the reasonable market value of the commodity so purchased, the value thereof to be ascertained and fixed by the said board, and payments therefor shall be made as between institutions in the manner provided by law for payments for supplies. [28 G. A., ch. 143, § 1.]

SEC. 2727-a48. Rules—additional duties. The board of control is authorized to make its own rules for the proper execution of its powers, and

may require the performance of additional duties by the officers of the several institutions, so as to fully enforce the requirements, intents and purposes of this enactment, and particularly so much thereof as relates to the making of the estimates and furnishing proper proofs of the expenditures or use of all stocks of subsistence and supplies. [27 G. A., ch. 118, § 46.]

SEC. 2727-a49. Contracts. Contracts may be entered into under the direction of the board of control by the proper officers of one or more of the institutions for staples and other articles of supplies, as may be found feasible by the board for the institutions to purchase in bulk for use or consumption for periods longer than thirty days. Such contracts shall not, however, be made except in conformity with the provisions of this act relating to estimates. If thought advisable, such contracts may be executed by the representative of one institution, who may be designated by the board to act for other institutions. [27 G. A., ch. 118, § 47.]

SEC. 2727-a50. Purchase of supplies. It shall be the duty of the board to make specific rules and regulations respecting the manner in which supplies shall be purchased and contracts made for the several institutions, so as to insure the competition and publicity necessary to secure the economical management of each institution. Jobbers, or others desirous of selling supplies to an institution shall, by filing with the chief executive officer of such institution, or with the secretary of the board, a memorandum showing their address and business, be afforded an opportunity to compete for the furnishing of the supplies under such limitations and rules as the board may prescribe. In purchasing all supplies, local dealers shall have the preference, when such can be given without loss to the state. When samples are furnished the same shall be properly marked and preserved for six months after purchase of such merchandise. [27 G. A., ch. 118, § 48.]

SEC. 2727-a51. Letting of contracts — labor of inmates utilized. Contracts for the erection, repairs or improvements of buildings, grounds, or properties of the institutions under charge of this board, and for which appropriations have been or may be made by the legislature, must be let for the whole or for any part of the work to be performed, by the chief executive officer of the institution, subject, however, to the same rules and regulations as herein provided for the furnishing of estimates by said institution to, and the approval and revision thereof by the board of control. If the cost of the erection or betterment is not in excess of three hundred dollars (\$300) the board may permit the management of the institution to construct the same by day's labor, without contracting the work. All plans or specifications for the said erections, repairs and improvements, shall be prepared by the architect of the board, under the board's direction. The board shall determine to what extent and for what length of time, and by what means advertisements are to be inserted in newspapers for proposals for the said erections, repairs or improvements. All contracts shall be awarded by the management of the institution to the lowest responsible bidder, subject to the provisions of this act, and the approval of the board, prior to the execution of the contract. The management of the institution has the right to reject any and all bids, and to re-advertise, upon the approval of the board. A preliminary deposit of money or certified check upon a solvent bank in such amount as the board may prescribe shall be required as an evidence of good faith, upon all proposals for the construction of said buildings, repairs and improvements, which deposit or certified check shall be held by the management of the institution under the direction of the board. The provision of this section which requires all work to be let by contract, shall not be mandatory as to the labor on the construction work at the penitentiaries, but the board shall establish such rules,

and enforce the provisions of this act so that the construction work at the penitentiaries shall be performed in a manner agreeable thereto, with the strictest accountability exacted in the consumption of all supplies for construction purposes, and in the expenditure of the public moneys. On proper representations the board is authorized to so construct the erections, betterments and improvements at other institutions that the work of inmates may be utilized, if it is found to be advantageous to the state, and a substantial saving made, but the attempt to use such labor shall not permit a substantial departure from the requirements of this section; and in no case shall any expenditure be made except on estimates submitted to and approved by the board, as provided herein. No payment shall be authorized for construction purposes until satisfactory proof has been furnished to the board of control, by the proper officer or supervising architect, that the contract has been complied with by the parties; and all payments shall be made in a manner similar to that in which the current expenses of the several institutions are paid. [27 G. A., ch. 118, § 49.]

SEC. 2727-a52. Cherokee commission abolished. The members of the building commission authorized to construct the hospital for the insane at Cherokee shall be relieved from such duty, and the commission abolished on July 1, 1898. Before said last named day the said commission shall surrender to the board of control all plans, specifications, books, records and other properties belonging to or in the possession of the said commission, or any member thereof. The said board shall succeed to and be vested with all the powers of the said building commission, and all duties thereof will be performed by said board, and all legislation affecting the powers, duties or obligations of said building commission shall, so far as applicable, apply with equal force to the said board of control. The said board shall call upon any of the superintendents of the hospitals for the insane for such information or service as the board shall deem proper; and the said superintendents shall respond to such call for the compensation provided in the act relating to the building commission of the hospital for the insane at Cherokee. All outstanding obligations of said commission shall be executed and performed by the board of control, but this shall not prevent said board from selecting all its agents or employees in the work of construction, which shall be executed in a manner agreeable to and pursuant to the provisions of this act. [27 G. A., ch. 118, § 50.]

SEC. 2727-a53. Educational institutions. In addition to the powers heretofore mentioned to be exercised by the board of control, the said board shall investigate thoroughly the reports and doings of the regents of the state university, and the trustees of the state normal school, and the state college of agriculture and mechanic arts and the books and records of said institutions, for the purpose of ascertaining:

1. Whether the persons holding positions have faithfully accounted for all moneys of the state which have been drawn from the state treasury or have come into their hands otherwise.

2. If appropriations have been drawn from the state treasury in accordance with law and so expended.

3. Whether such persons have drawn money for services per diem, mileage or expenses, or otherwise, not authorized by law, or have authorized expenditures without authority of law. [27 G. A., ch. 118, § 51.]

SEC. 2727-a54. Powers as to the same. The said board shall have power to visit the educational institutions, subpoena and examine witnesses and enforce attendance, and to require the production of books, records, papers and memoranda. [27 G. A., ch. 118, § 52.]

SEC. 2727-a55. Investigation of management. It shall be the duty of said board to investigate the manner in which all contracts for the educational institutions have been let, and to ascertain whether or not the matters in charge of such officials are conducted in an economical and business-like manner; and to report the result of such investigation to the governor with the other reports to be filed with that officer. [27 G. A., ch. 118, § 53.]

SEC. 2727-a56. Estimates of cost, etc. And when any one of the three last above named educational institutions shall ask appropriations for any buildings or betterments, said institution or institutions shall first have prepared by the architect provided for in this act estimates of the cost, plans and specifications of said buildings or betterments, and submit the same to the following general assembly. [27 G. A., ch. 118, § 54.]

SEC. 2727-a57. Repeal. Existing laws relating to the institutions referred to in this act, which are not inconsistent with the provisions of this act, shall remain in force, and all acts or parts of acts in conflict with, or inconsistent with this act, are hereby repealed. [27 G. A., ch. 118, § 55.]

SEC. 2727-a58. Board of control supervision—insane—county and private institutions. All county and private institutions wherein insane persons are kept are hereby placed under the supervision of the board of control of state institutions. [28 G. A., ch. 144, § 1.]

SEC. 2727-a59. Visitation, when and by whom—reports. It shall be the duty of said board of control as soon as practicable after the passage of this act, and at least twice annually thereafter, by one or more of its members or by some competent and disinterested person, whom the board shall appoint, to visit every private and county institution wherein insane persons are kept. Said visitor shall carefully examine into the capacity of said institutions for the care of insane patients, the number kept therein, and their sex, the arrangement of buildings and the method of their construction, their adaptation for the purposes intended, their condition as to sewerage, ventilation, light, heat, cleanliness, means of water supply, fire escapes and fire protection, the care of patients, their food, clothing, medical attendance, and treatment, their employment, if any, the number, kind, and sex of employes, their duties and salaries, including nurses, attendants, and night watches, the cost to the state or county maintaining patients, which shall in all cases be kept separate and distinct from the cost of keeping papers, and such other information which the said board shall deem proper. Said visitors shall make a written report including all of said matters to said board. [28 G. A., ch. 144, § 2.]

SEC. 2727-a60. Patients to have a hearing. The person making the visit above provided for shall see all patients in the institutions and shall give each an opportunity to converse with him out of the hearing of any officer or employe of the institution, and shall fully investigate and inquire into any complaint by making inquiry from the persons in charge of said institution, and others, and report the result thereof in writing to said board; but said board, before acting on said report adversely to the institution, shall give the persons in charge thereof a copy of such report and an opportunity to be heard thereon. [28 G. A., ch. 144, § 3.]

SEC. 2727-a61. Compensation of inspector. In case the inspection herein provided for shall be made by a person appointed by the board of control of state institutions, such person shall be allowed such a sum as the board may, in its discretion, deem proper, not to exceed five dollars (\$5.00) per day for the time actually employed in said work and in going to and from the same. The actual expenses of the person making the visit, and his per diem, if any, shall be allowed and paid when itemized, sworn to, and

approved, as provided for in chapter one hundred and eighteen (118) of the acts of the twenty-seventh general assembly in relation to the expenses of the board. [28 G. A., ch. A-144, § 4.]

SEC. 2727-a62. Board to make rules and regulations. As soon as all private and county institutions in which insane persons may be kept shall have been visited and reports thereon received, the board of control shall adopt reasonable rules and regulations touching the care and treatment of, and make orders in relation to, such insane patients as may be kept in said institutions, which rules and regulations shall not interfere with the medical treatment given to private patients by competent physicians. Copies of such rules and regulations, when adopted, shall be mailed to the chief executive officer of each private institution, and to the clerk of the district court, the chairman of the board of supervisors, and the officer in charge of the institution in all counties having county institutions caring for insane persons. The board shall allow in this case a reasonable time for the management of these institutions to comply with such rules and regulations. [28 G. A., ch. 144, § 5.]

SEC. 2727-a63. Failure to comply with board's rules—penalty. If any such institution shall fail, neglect, or refuse within the time fixed by the board to comply substantially in all respects with said rules, regulations, and orders, said board is authorized to remove all said insane persons kept therein at public expense, to the proper state hospital, or to some private or county institution or hospital for the care of the insane that has complied with the rules and regulations prescribed by said board of control, at the expense of the county which sent said patient to said institution. Such removal of patients, if to a state hospital, to be made by an attendant or attendants sent from the state hospital, and the cost of such removal including all expenses of said attendant, shall be certified, by the superintendent of the hospital receiving the patient, to the auditor of state, whereupon he shall draw his warrant upon the treasurer of state for said sum, which shall be credited to the support fund of said hospital and charged against the general revenues of the state and collected by the auditor of state from said county. And the board of control shall notify the guardian, or one or more of the relatives of patients kept therein at private expense, that the rules as to their care are being disregarded, and of the action taken by the board as to the other patients. And should the board of control believe any person in any such institution sane, or illegally restrained of liberty, it shall institute and prosecute proceedings in the name of the state of Iowa, before the proper officer, board, or court, for the discharge of such person. If a female is removed under the provisions of this section, at least one attendant shall be a female. [28 G. A., ch. 144, § 6.]

SEC. 2727-a64. Removal of patients from county asylum. Whenever it shall be found by said board of control that any patient cared for at public expense is confined in any private asylum or county institution, who is violent and whose case is acute and said board shall be of the opinion, after taking competent medical testimony, that said patient can be better cared for in the state hospital with better hopes of recovery, it may remove said patient to the proper state hospital, at the expense of the proper county, said expense to be recovered as provided for in section six (6) hereof. And whenever said board shall find any patient in a state hospital, who shall have become chronic, or likely to do as well in a county or private institution as in the state hospital, it may order the county to which the keeping of said patient is chargeable to remove him or her to some county or private institution in the state which shall have complied with the rules of said board relative to the keeping of insane patients; but in no case shall

a patient in a state hospital be thus transferred except upon the written consent of his or her immediate relatives, if any, or the commissioners of insanity of the county to which the patient is chargeable, and of the board of control; nor in the absence of the consent of said board shall a patient in a state hospital, who is not cured, be discharged. [28 G. A., ch. 144, § 7.]

SEC. 2727-a65. Insane of other counties—may keep when. The commissioners of insanity, with the consent of the board of supervisors of any county, having insane persons within such county, and having no proper facilities, either at a public or private institution, for the care, keeping and treatment of such persons within the county, may, with the consent of the board of control, provide for their care at the expense of said county at any convenient private or county institution having proper facilities for the care of the same, and which will care for them to the satisfaction of the said board of control, and which will comply with the rules and regulations that may be prescribed by the board of control, relative to the care and keeping of insane persons. [28 G. A., ch. 144, § 8.]

SEC. 2727-a66. Authority of private asylums to keep insane. No person shall be confined and restrained in any private institution or hospital for the care or treatment of the insane, except upon the certificate of a board of commissioners of insanity of some county in the state, or of two reputable physicians, at least one of whom shall be a *bona fide* resident of the state of Iowa, who shall certify that such person is a fit subject for treatment and restraint in said institution or hospital, which certificate shall be the authority of the owners and officers of said hospital or institution for receiving and confining said patient or person therein. [28 G. A., ch. 144, § 9.]

SEC. 2727-a67. Appropriation. To provide for the expenses of the inspection herein required and the per diem, there is hereby appropriated the sum of three thousand dollars (\$3,000.00), or so much thereof as may be necessary, from any funds of the state treasury not otherwise appropriated. [28 G. A., ch. 144, § 10.]

SEC. 2727-a68. Differences of opinion—how adjudicated. When a difference of opinion exists between the board of control and the authorities in charge of any private or county asylum in regard to the removal of a patient or patients as herein provided, the matter shall be submitted to the district court, or judge thereof, of the proper county and shall be summarily tried as an equitable action, and the judgment of the district court or judge shall be final. [28 G. A., ch. 144, § 11.]

SEC. 2727-a69. Annual appropriation — purpose. That there is hereby appropriated out of any money in the state treasury not otherwise appropriated the sum of two hundred fifty dollars annually for the payment of the actual and necessary expenses of persons who shall, at the solicitation of the board of control of state institutions, read papers at the quarterly conferences of the chief executive officers of the state institutions under the management of said board. The papers so read shall have especial application to the objects and work of one or more of said institutions. [30 G. A., ch. 110, § 1.]

SEC. 2727-a70. How and when payable. The money hereby appropriated shall be payable on the first day of July of each year and shall be paid from the state treasury as the expenses of the members of the board of control are paid. [30 G. A., ch. 110, § 2.]

SEC. 2727-a71. Special policemen. That upon the application and recommendation of the board of control of state institutions the governor shall commission any number of employes of any institution under the con-

trol of said board, not exceeding three, to be designated by the chief executive officer, to be special policemen thereof; and such officer or officers shall take an oath of office and shall have power to protect the property of such institution, to suppress riots, disturbances and breaches of the peace, and to enforce all laws for the preservation of good order, and may, upon view or information, without warrant, arrest any person trespassing upon the grounds or destroying the property of such institution, or violating any of the existing laws of the state, and bring such person so offending before the mayor or any justice of the peace within such township, to be dealt with according to law. This act shall not be construed to authorize any additional employes in any institution, or any increase of compensation to any employe so designated. [30 G. A., ch. 111.]

SEC. 2727-a72. Credited to support fund—record. That when an inmate of any state institution under the control of the board of control of state institutions dies intestate, leaving money on deposit with the chief executive or other officer of the institution, and administration of the estate of such intestate is not granted and no surviving spouse or heirs are known to the officers of the institution or are ascertained although diligent search for them be made, the money so left shall be transmitted to the treasurer of state at the end of one year from the death of the intestate and shall be credited to the support fund of the institution from which it was sent. A complete permanent record of the money so sent, showing by whom and with whom it was left, its amount, the date of the death of the owner, his reputed place of residence before he became an inmate of the institution, the date on which it was sent to the state treasurer and any other facts which may tend to identify the intestate and explain the case shall be kept by the chief executive officer of the institution and a transcript thereof shall be sent to and kept by the treasurer of state. [30 G. A., ch. 112, § 1.]

SEC. 2727-a73. Payment to party entitled thereto. The money so sent to treasurer of state, or any part thereof, shall be paid at any time within ten years from the death of the intestate to any person who is shown to be entitled thereto by evidence satisfactory to the board of control or to the district court of the county in which the institution from which the money was sent is located. Payment shall be made from the state treasury out of the support fund of such institution in the manner provided for the payment of other claims from that fund. [30 G. A., ch. 112, § 2.]

SEC. 2727-a74. Money now held. The provision of this act shall also apply to all money left by inmates of institutions who have heretofore died intestate and which is now held by the chief executive or other officer of the institutions. [30 G. A., ch. 112, § 3.]

CHAPTER 11-C.

OF THE STATE SANATORIUM FOR THE TREATMENT OF TUBERCULOSIS.

SECTION 2727-a75. State sanatorium established. There is hereby established a state sanatorium for the care and treatment of persons afflicted with incipient pulmonary tuberculosis which shall be called the state sanatorium for the treatment of tuberculosis. [31 G. A., ch. 120, § 1.] [32 G. A., ch. 147, § 1.]

SEC. 2727-a76. Superintendent, officers and employes. The officers and employes of said sanatorium shall consist of a superintendent and such other officers and employes to be appointed as the board of control of state

institutions shall deem necessary for the proper operation of said institution, including examining physicians. Said superintendent shall be a well educated physician with an experience of at least five years in actual practice of medicine. Said superintendent shall be appointed by the board of control of state institutions for the term of four years and shall receive such salary as the said board may fix, not exceeding two thousand five hundred dollars (\$2500.00) per annum. [31 G. A., ch. 120, § 2.] [32 G. A., ch. 147, § 1.]

SEC. 2727-a77. Control. The board of control of state institutions shall have the same power and control over said institutions as is now given it with reference to the several institutions mentioned in chapter one hundred eighteen (118) of the acts of the twenty-seventh general assembly and all amendments thereto, and said acts and amendments shall apply to and govern said sanatorium in every respect in so far as they are not in conflict with the provisions of this act. [31 G. A., ch. 120, § 3.] [32 G. A., ch. 147, § 1.]

SEC. 2727-a78. Appropriation. There is hereby appropriated fifty thousand dollars (\$50,000) for the purpose of carrying out the provisions of this act to be expended by the board of control, as herein provided for. [31 G. A., ch. 120, § 4.] [32 G. A., ch. 147, § 1.]

SEC. 2727-a79. Purchase of land—erection and equipment of buildings. As soon as practicable after the passage and publication of this act, and when the funds are available therefor, said board of control shall proceed to purchase the necessary land for said sanatorium, and erect, furnish and equip the needed buildings. In locating said sanatorium, it shall take into consideration climate, healthfulness, water supply, drainage, quality of soil, facility of access, timber protection to buildings and a suitable building site. Said site shall contain not less than 160 acres or whatever may be deemed necessary by the board of control. The buildings shall be planned to accommodate at least one hundred patients and necessary officers and employes. [31 G. A., ch. 120, § 5.] [32 G. A., ch. 147, § 1.]

SEC. 2727-a80. Proclamation of the opening. When said sanatorium buildings are erected, furnished, equipped and ready for use, said board of control shall notify the governor of the fact, who shall thereupon issue his proclamation of the opening of said sanatorium. [31 G. A., ch. 120, § 6.] [32 G. A., ch. 147, § 1.]

SEC. 2727-a81. Duties of superintendent. In addition to the duties which may now be imposed by law, the superintendent shall oversee and secure the individual treatment and professional care of each and every patient residing in the sanatorium. He shall prescribe rules subject to the approval of the board of control and not inconsistent with the statutes for the application, examination, reception and government of patients and their discharge, and shall keep a full record of their condition and prospects. He shall endeavor to stimulate the organization and assist in the establishment of hospital, dispensaries, in various counties or large centers of population, for the treatment of patients with advanced tuberculosis. He shall reside at the institution. [31 G. A., ch. 120, § 7.] [32 G. A., ch. 147, § 1.]

SEC. 2727-a82. What patients received—applications—examination. No patients shall be received except those afflicted with pulmonary tuberculosis in the incipient stage, and who show a reasonable probability of satisfactory improvement by treatment in the sanatorium. Any person wishing to become a patient in the institution shall first make application and if it shall appear to the superintendent from the answers to the questions therein that the applicant has been and is a *bona fide* resident of this

state and is in all other respects entitled under the law to admission, said applicant shall be sent by the superintendent to the examining physician living nearest to the residence of the applicant, and said applicant directed to report to said examining physician for an examination. Said examining physician shall examine said applicant fully with a view of ascertaining whether he is afflicted with incipient tuberculosis, and shall so far as possible fill out the blanks which may be furnished him for that purpose and shall mail the same to the superintendent of the sanatorium, who shall examine the same and if he finds that the applicant as shown by the answers, or by the examination of the examining physician, has been and is a *bona fide* resident of this state and is in all other respects under the law entitled to admission, he shall receive the applicant as a patient providing there is room, and if no room be then available, he shall enter the name on a book in the order in which the application is made, and the applicant shall be admitted in said order whenever there is room. In case it shall appear from the application itself, or from the report of the examining physician, that the applicant does not come within the provisions of the law, or in case the superintendent shall be in possession of reliable information which convinces him that the applicant is not entitled to the benefits of this act, he shall forthwith notify the applicant that he cannot be admitted as a patient. If, however, the superintendent after receiving the report of the examining physician, is in doubt as to whether it is a case of incipient pulmonary tuberculosis, he shall personally examine the applicant in case he presents himself at the institution for that purpose. [31 G. A., ch. 120, § 8.] [32 G. A., ch. 147, § 1.]

SEC. 2727-a83. Examining physicians. The board of control of state institutions shall on the recommendation of the superintendent, and on the approval of the said board appoint physicians in such localities in the state as they may deem proper, whose duty shall be to examine all persons who apply to them, and who have previously made application to the superintendent to be admitted as patient[s] in the sanatorium, provided, however, that the applicant shall in each case pay said examining physician the sum of three dollars (\$3.00) which shall be in full for such examination. He shall carefully fill out the blanks in the examination paper and shall also give any additional information he may possess which may aid in determining the eligibility of the person so examined for admission as a patient in the institution. Said examining physicians shall be graduates of a medical school in good standing under the laws of Iowa, and shall be selected, so far as it is practicable, because of his [their] experience with the knowledge of pulmonary diseases. [31 G. A., ch. 120, § 9.] [32 G. A., ch. 147, § 1.]

SEC. 2727-a84. Transportation and other expenses—how paid. In case an applicant who has been authorized to be received as a patient in the sanatorium, is without means to pay for the transportation and other necessary expenses to and from including treatment at the institution, and such fact is duly certified to by the board of health of the city, or incorporated town where the applicant resides, or by the majority of the township trustees in case the applicant resides outside of a city or incorporated town, and the superintendent is satisfied that such is the fact, then such expense shall be paid by the state out of any funds in the state treasury not otherwise appropriated after the same is certified by said superintendent and approved by the board of control. [31 G. A., ch. 120, § 10.] [32 G. A., ch. 147, § 1.]

SEC. 2727-a85. Per capita support. The board of control of state institutions shall fix the per capita monthly allowance which may be charged

by the said institution for the care, treatment and maintenance of each patient therein, which shall not exceed the sum of thirty dollars (\$30) per capita per month, which shall be certified by the superintendent to said board of control and paid out as provided in chapter one hundred eighteen (118) of the acts of the twenty-seventh general assembly. Provided that the average number of patients in said sanatorium shall not exceed two hundred per month, it shall be credited by the auditor of state and the treasurer of state with the sum of four thousand dollars (\$4,000.00) per month which may be drawn as above provided. [31 G. A., ch. 120, § 11.] [32 G. A., ch. 147, §§ 1, 2.]

SEC. 2727-a86. Charges for care, treatment and maintenance. Said sanatorium shall be open for all patients, but all patients who are able to pay, shall be charged such rate monthly as the board of control may fix, not exceeding the average actual per capita cost of care, treatment and maintenance. All sums so collected shall by the board of control be covered into the state treasury. [31 G. A., ch. 120, § 12.] [32 G. A., ch. 147, § 1.]

SEC. 2727-a87. Support for first month. For the purpose of the maintenance of the sanatorium during the first month of its operation, the superintendent thereof may estimate, in advance of said opening and on the basis of a population of two hundred patients at twenty dollars (\$20.00) per capita per month for the supplies to operate the sanatorium, to furnish and equip the same, and to purchase tools, animals, implements and other articles so far as then necessary, for the first month and the aggregate of said per capita shall be credited to said institution by the auditor of state and the treasurer of state and may be drawn against as provided in chapter one hundred eighteen (118) of the acts of the twenty-seventh general assembly. [31 G. A., ch. 120, § 13.] [32 G. A., ch. 147, § 1.] [32 G. A., ch. 147, § 3.]

SEC. 2727-a88. Repeal—acts in conflict. All acts and parts of act in conflict with this act are hereby repealed. [31 G. A., ch. 120, § 14.] [32 G. A., ch. 147, § 1.]

SEC. 2727-a89. Appropriation for collection and dissemination of information. There is hereby appropriated out of any funds in the state treasury not otherwise appropriated the sum of five thousand dollars (\$5,000) annually, or so much thereof as may be necessary, to be used by the board of control of state institutions for the collection and dissemination of information regarding tuberculosis. Said board of control may arrange exhibits, employ lecturers, co-operate with other institutions or organizations or use any means necessary to give to the people of the state a practical knowledge of tuberculosis. Said board of control shall, with the superintendent or such assistance as it may deem advisable, stimulate the organization of, and assist in establishing hospitals or dispensaries or make other provisions, in the various counties or large centers of population, for the treatment of patients in the advanced stages of tuberculosis. [32 G. A., ch. 147, § 4.]

SEC. 2727-a90. Appropriation for completion and equipment. There is hereby further appropriated the sum of fifty thousand dollars (\$50,000) for the purpose of completing and equipping said sanatorium and in making it ready for use. [32 G. A., ch. 147, § 5.]

CHAPTER 12.

OF COUNTY HIGH SCHOOLS.

SECTION 2728. How established. Any county may establish a high school in the following manner: When the board of supervisors shall be

presented with a petition signed by one-third of the electors of the county as shown by the returns of the last preceding election, requesting the establishment of a county high school at a place in the county named therein, it shall submit the question together with the amount of tax to be levied to erect the necessary buildings, at the next general election to be held in the county, or at a special one called for that purpose, first giving twenty days' notice thereof in one or more newspapers published in the county, if any be published therein, and by posting such notice, written or printed, in each township of the county, at which election the vote shall be by ballot, for or against establishing the high school, and for or against the levying of the tax, the vote to be canvassed in the same manner as that for county officers. Should a majority of all the votes cast upon the question be in favor of establishing such school, and the levying of such tax, the board of supervisors shall at once appoint six trustees, residents of the county, not more than two from the same township, who, with the county superintendent of common schools as president, shall constitute a board of trustees for said high school. [C., '73, §§ 1697-9, 1701.] [27 G. A., ch. 84, § 1.]

The provisions of Code § 2803 relating to tuition for pupils attending school in another district than that in which they reside, have no application to county high schools organized under this section. *Boggs v. School Township*, 128-13.

SEC. 2729. Trustees—officers. The trustees, within ten days after appointment, shall qualify by taking the oath of civil officers, and giving bond in such sum as the board of supervisors may require, with sureties to be approved by it, and shall hold office until their successors are elected and qualified, who shall be elected at the general election following. The trustees then elected shall be divided into two classes of three each and hold their office two and four years respectively, their several terms to be decided by lot; and in all county high schools heretofore established the terms of all trustees therefor shall expire on the first day of January, 1907, and at the general election in 1906 there shall be six trustees elected for each of said county high schools, three of whom shall be elected for two years, and three of whom for four years, and at each general election thereafter three trustees shall be elected for the term of four years. The trustees so elected to qualify in the same manner and at the same time as other county officers and all vacancies occurring to be filled by appointment by the board of supervisors, the appointee to hold the office until the next general election, and a majority of which trustees shall constitute a quorum for the transaction of business. At the first meeting held in each year, the board shall appoint a secretary and treasurer from their own number, who shall perform the usual duties devolving upon like officers. The treasurer, in addition to his bond as trustee, shall give one as treasurer, in such sum and with such sureties as may be fixed by the board, and receive all moneys from all sources belonging to the funds of the school, and pay them out as directed by the board of trustees, upon orders drawn by the president and countersigned by the secretary; both of which officers shall keep an accurate account of all moneys received and paid out, and at the close of each year, and whenever required by the board shall make a full itemized and detailed report. [C., '73, §§ 1699, 1700, 1704, 1711.] [31 G. A., ch. 135.]

SEC. 2730. Site—tax—approval of electors. As soon as convenient after the organization of the board, it shall proceed to select the best site that can be obtained without expense to the county, at the place named in the petition upon which the vote was taken, for the erection of the necessary school buildings, the title to be taken in the name of the county, and

shall procure plans and specifications for the erection of such buildings, and make all necessary contracts for the erection of the same, the cost of which, when completed, shall not exceed the amount of the tax so levied therefor. They shall also annually make and certify to the board of supervisors on or before the first Monday of September of each year, an estimate of the amount of funds needed for improvements, teachers' wages and contingent expenses for the ensuing year, designating the amount for each, which, in the aggregate shall not exceed in any one year, two mills on the dollar, upon the taxable property of the county. No expenditures for buildings or other improvements shall be made, or contract entered into therefor, by said board, involving an outlay of to exceed five hundred dollars in any one year, without the same first being submitted to the electors of the county in which said school be located, for their approval; the tax to be levied and collected in the same manner as other county taxes, and paid over by the county treasurer in the same manner as school funds are paid to district treasurers. [C., '73, §§ 1702-3, 1705.] [27 G. A., ch. 84, § 2.]

SEC. 2731. Management. Said board shall make no purchases, nor enter into any contracts in any year, in excess of the funds on hand and to be raised by the levy of that year. It shall employ, when suitable buildings have been furnished, a competent principal teacher to take charge of the school, and such assistant teachers as may be necessary, and fix the salaries to be paid them, and in the conduct of the school may employ advanced students to assist in the work. Annual reports shall be made by the secretary to the board of supervisors, which report shall give the number of students, with the sex of each, who have been in attendance during the year, the branches taught, the text-books used, number of teachers employed, salary paid to each, amount expended for library, apparatus, buildings, and all other expenses, the amount of funds on hand, debts contracted, and such other information as may be deemed important, and this report shall be printed in at least one newspaper in the county, if any is published therein, and a copy forwarded to the superintendent of public instruction. And for their services the trustees shall each receive the sum of two dollars per day for the time actually employed in the discharge of official duties, claims for services to be presented, audited, and paid out of the county treasury, in the same manner as other accounts against the county. [C., '73, §§ 1705-6, 1710, 1712.] [27 G. A., ch. 84, § 3.]

SEC. 2732. Regulations. The principal of any such high school, with the approval of the board of trustees, shall make such rules and regulations as is deemed proper in regard to the studies, conduct and government of the pupils; and any pupil who will not conform to and obey such rules may be suspended or expelled therefrom by the board of trustees. Said board of trustees shall make all necessary rules and regulations in regard to the age and grade of attainments necessary to entitle pupils to admission into the school, and shall on or before the tenth day of July of each year make an apportionment between the different school corporations of the county, of the pupils that shall attend said school, and shall apportion to each of said school corporations its proportionate number, based upon the number of pupils that can be reasonably accommodated in said school, and the number of pupils of school age, actual residents of such school corporations, as shown by the county superintendent's report last filed with the county auditor, of said county; said apportionment shall be published in the official papers of such county, to be paid for, as other county printing; pupils from the said school corporations to the number so designated in such apportionment, shall be entitled to admission into said school, tuition free, and none others, and it shall be unlawful to accredit pupils so attending to any other school corporation, than the one in which they are enumer-

ated for school purposes. Should there be more applicants for such admission from any school corporation than its proportionate number, so determined, then the board of directors of such school corporation shall designate which of said applicants shall be entitled to so attend. If the school shall be capable of accommodating more pupils than those attending under such apportionment, others may be admitted by the board of trustees, preference at all times being given to pupils desiring such admission, who are residents of the county. The board of trustees shall fix reasonable tuition for such pupils. If such pupils are residents of the county the school corporation from which they attend shall pay their tuition out of its contingent fund. The principal of such high school shall report to the said board of trustees under oath, at the close of each term the names and number of pupils attending such school during said term, from what school corporation they attended, and the amount of tuition, if any, paid by each, the same to be included in the annual report of the secretary of the board of trustees to the board of supervisors, provided for in section twenty-seven hundred and thirty-one (2731) of the code. The tuition so paid to be turned over to the treasurer of the board of trustees to be used in paying the expense of said school under the direction of said board. [C., '73, § 1709.] [27 G. A., ch. 84, § 4.]

The legislature may provide for the establishment and maintenance of county high schools, and require the payment of tuition for pupils attending from any one

district in excess of the number allotted to such district. *Boggs v. School Township*, 128-13.

SEC. 2733-a. Repeal—petitions to abolish—election. That section twenty-seven hundred and thirty-three of the code be repealed and the following substituted:

“Whenever citizens of any county having a county high school desire to abolish the same or to dispose of any part of the buildings or property thereof, they may petition the board of supervisors at any regular session thereof in relation thereto, and sections three hundred and ninety-seven (397), three hundred and ninety-eight (398), three hundred and ninety-nine (399) and four hundred (400) of the code shall apply to and govern the whole matter, including the manner of presenting and determining the sufficiency of such petitions and remonstrances thereto, so far as applicable. If an election is ordered the same shall be held at the time of the general election or at a special election called for that purpose and the proposition shall be submitted and the election conducted in the manner provided in title six (6) of the code. If any proposition as herein provided be legally submitted and adopted, the board of supervisors is hereby empowered to carry the same into effect.” [27 G. A., ch. 84, § 5.]

CHAPTER 13.

OF COUNTY SUPERINTENDENT.

SECTION 2734-a. Repeal. There is hereby repealed sections twenty-six hundred thirty-two (2632), twenty-seven hundred thirty-four (2734), twenty-seven hundred thirty-five (2735), twenty-seven hundred thirty-six (2736), twenty-seven hundred thirty-seven (2737) of the code, and sections twenty-seven hundred thirty-four (2734), twenty-seven hundred thirty-six (2736), twenty-seven hundred thirty-seven (2737) of the supplement to the code, and the following enacted in lieu thereof: [31 G. A., ch. 122, § 1.]

SEC. 2734-b. County superintendent—qualifications—deputy. The county superintendent, who may be of either sex, shall be the holder of a first grade certificate as provided for in this act, or of a state certificate or a life diploma and shall, during his term, be ineligible to the office of school director or member of the board of supervisors. If for any cause he is unable to attend to his official duties, he may appoint a deputy, who may act in his stead, except in visiting schools and trying appeals. He shall serve as the organ of communication between the superintendent of public instruction and school township, district or independent district authorities, and transmit to them or the teachers thereof all blanks, circulars or other communications designed for them. He shall visit the different schools in his county at least once during the school year and at such other times as he may be requested by a majority of the directors of any school corporation, and give personal instruction to the pupils for at least one-fourth of the day. The county superintendent shall on the first Monday of each month file with the county auditor an itemized and sworn statement of actual traveling expenses incurred during the previous month in visiting schools and in attending educational meetings within his county, and such expenses shall be paid by the county board of supervisors, but the total amount paid for any month shall not be more than twenty dollars. [31 G. A., ch. 122, § 2.]

One who had secured a first grade certificate from a county superintendent between the time of the passage of 31 G. A., chap. 122, and the time it took effect, but had not secured a first grade certificate

under the provisions of that act, held not qualified to hold the office of county superintendent. *State v. Huegle*, 112 N. W. 234.

SEC. 2734-c. Examinations. On the last Friday and Wednesday and Thursday preceding in the months of January, June, July and October, the county superintendent shall meet and, with such assistants as may be necessary, examine all applicants for a teachers' certificate. Such examinations shall be held at the county seat, in a suitable room which shall be provided for that purpose by the board of supervisors; but the county superintendent may at his discretion cause to be held at the time of any regular examination an additional examination at some other place in the county. The questions used in such examinations shall be furnished by the educational board of examiners, who shall cause the same to be printed, and the examinations shall be conducted strictly under rules prescribed by the board. [31 G. A., ch. 122, § 3.]

SEC. 2734-d. Subjects. The examination for the first grade certificate shall include competency in and ability to teach orthography, reading, writing, arithmetic, geography, grammar, history of the United States, didactics, elementary civics, elementary algebra, political economy, elementary economics, elementary physics, elements of vocal music, physiology and hygiene, which in each division of the subject shall include special reference to the effects of alcohol, stimulants and narcotics upon the human system. [31 G. A., ch. 122, § 4.]

SEC. 2734-e. Special certificates. That a special certificate may be issued for any subject, or any group of subjects, taught in the public schools of Iowa, under such regulations as the board of examiners may adopt. A special certificate shall be issued for a term of three years and shall be renewable under the same conditions as apply to the renewal of first grade certificates. It shall state the names of the subjects for which it is issued, and shall not be valid for the teaching of any other subjects. [31 G. A., ch. 122, § 5.]

SEC. 2734-f. Record kept. A record shall be kept by the county superintendent of all examinations taken within his county, with the name,

age and residence of each applicant and the date of examination. [31 G. A., ch. 122, § 6.]

SEC. 2734-g. First grade certificate—renewal. Applicants who have taught successfully for at least thirty-six weeks, or who have completed a course of study in an approved college or normal school and whose examination entitles them to the first grade certificate, shall receive the same for a term of three years from the date thereof, and such certificates shall be renewable without examination provided the applicants shall show by examination or otherwise that at least one line of professional inquiry has been successfully conducted during the life of the certificate, it being made the duty of the board to forward with each certificate subject to renewal, outlines setting forth various lines of professional study. It is provided further that each application for renewal shall be accompanied by such proof of successful experience and professional spirit as the educational board of examiners may require. [31 G. A., ch. 122, § 7.]

A certificate issued by a county superintendent prior to the taking effect of G. A., chap. 122, does not qualify the holder to fill the office of county superintendent under provisions of § 2 of the act. *State v. Huegle*, 112 N. W. 234.

SEC. 2734-h. Second grade certificate—renewal. Applicants whose examination entitles them to the second grade certificate only, shall receive the same for not to exceed two years, with the privilege of one renewal without further examination, under the same rules as govern the renewal of first grade certificates. [31 G. A., ch. 122, § 8.]

SEC. 2734-i. Third grade certificate. Applicants whose examination entitles them to the third grade certificate only, shall receive the same for six months, provided that the county superintendent may at his option extend such certificate to the first day of the July following its issue. A third grade certificate shall not be renewed and not more than two such certificates shall be issued to the same person. [31 G. A., ch. 122, § 9.]

SEC. 2734-j. Applicants without experience. Applicants who have had no experience in teaching, but whose examination entitles them to the first grade, shall receive a second grade certificate for two years, provided that when they have taught successfully under such certificate for not less than thirty-six weeks, they shall be entitled to receive a first grade certificate on the conditions herein provided for a renewal of a certificate. [31 G. A., ch. 122, § 10.]

SEC. 2734-k. Certificates renewed—conditions. Any person who has held a first grade certificate or a special certificate in any county of this state for one or more years prior to the taking effect of this act, may have the same renewed by the board of examiners, provided said person has taught continuously during the preceding school year, and provided further, that the members of the school board of the school corporation and the county superintendent of the county where such person has been employed and, if in a graded school, the principal or superintendent under whom such person has taught, certify to the success of the applicant in teaching and in government, and unite in recommending the applicant as a teacher of efficiency, scholarship and professional spirit. Under like recommendations the holders of second grade certificates with first grade per cents may have school credit given in lieu of the examination as the board may determine. [31 G. A., ch. 122, § 11.]

SEC. 2734-l. Qualifications of applicants. Before admitting any one to the examination, the county superintendent must be satisfied that the person seeking a certificate is of good moral character, of which fact he may require proof, and is in all respects other than in scholarship possessed of the necessary qualifications as an instructor. [31 G. A., ch. 122, § 12.]

SEC. 2734-m. Examination papers graded—certificates issued. As soon as the examination is completed the county superintendent shall forward to the superintendent of public instruction, a list of all applicants examined, with the standings of each in didactics and oral reading, and his estimate of each applicant's personality and general fitness, other than scholarship, for the work of teaching. He shall at the same time forward to the superintendent of public instruction the answer papers written, with the exception of those in didactics. Under the supervision of the educational board of examiners, the paper [s] shall be graded and the scholastic qualifications determined. The result of such examination of persons who pass the same shall be entered upon a certificate provided by such board, and shall be transmitted to the county superintendent of the county in which the person entitled thereto resides. [31 G. A., ch. 122, § 13.]

SEC. 2734-n. Competent readers — clerical help. Immediately following each examination authorized by this act, the board of examiners shall call to their assistance a sufficient number of competent readers previously selected by the board, ten of whom shall be county superintendents. The county superintendents so chosen shall be known as head readers and shall also constitute a review board in cases of doubt. They shall also make a list of applicants from each county, nearest the passing mark for a third grade certificate. The head readers shall receive necessary traveling expenses only. All other readers shall receive actual traveling expenses to and from the capitol and not to exceed fifty cents an hour for time actually employed in reading and marking answer papers. Such additional clerical help as may be required may be employed by the board at not to exceed thirty cents per hour for time actually employed. [31 G. A., ch. 122, § 14.]

SEC. 2734-o. Expenditures certified and paid. All expenditures authorized by this act shall be certified by the superintendent of public instruction to the executive council, who shall cause the auditor of the state to draw warrants therefor upon the treasurer of state, but not to exceed the fees paid into the treasury under the provisions of this act. [31 G. A., ch. 122, § 15.]

SEC. 2734-p. Application fee. Each applicant for a certificate shall pay a fee of one dollar, one-half of which shall be paid into the state treasury on or before the first day of the succeeding month, and one-half shall be paid into the county institute fund. [31 G. A., ch. 122, § 16.]

SEC. 2734-q. Registration fee. No person shall teach in any public school in this state whose certificate has not been registered with the county superintendent of the county in which such school is located. A registration fee of one dollar shall be charged for each year, or part of the year, for which the certificate or diploma is registered. All registration fees shall be paid into the county institute fund. [31 G. A., ch. 122, § 17.]

SEC. 2734-r. Third grade certificates, when not to be registered. In case a sufficient number of life diplomas, state certificates, first grade certificates, special certificates and second grade certificates are held in any county to supply the schools thereof, it shall not be incumbent on the county superintendent to register third grade certificates. [31 G. A., ch. 122, § 18.]

SEC. 2734-s. Special examination—provisional certificates. When a sufficient number of licensed teachers cannot be secured to fill the schools of any county, the board of examiners may, upon the request of the county superintendent, appoint a special examination for such county to be conducted in all respects as a regular examination and the answer papers to be forwarded to the president of the board as required in regular examinations, and thereupon provisional certificates may be issued by the educational board of examiners. [31 G. A., ch. 122, § 19.]

SEC. 2734-t. Certificates, where valid—revocation. All certificates provided for in this act shall be valid in any county within the state, when registered in such county, but a provisional certificate shall be valid, upon registration, only in the county in which it is issued and shall be issued for the same time and subject to the same extension as a third grade certificate, but no person shall be entitled to receive more than one provisional certificate, except upon the approval of the county superintendent. Any certificate or diploma issued by the board may be revoked for any cause which would have authorized or required a refusal to grant the same, or in case the holder thereof violates any of the provisions of this act. [31 G. A., ch. 122, § 20.]

SEC. 2734-u. Revocation of certificate — charges — trial — appeal. When in the judgment of the county superintendent there is probable cause for the revocation of a certificate or diploma held by any teacher employed in his county, or when charges are preferred, supported by affidavits charging incompetency, immorality, intemperance, cruelty or general neglect of the business of the school, the county superintendent shall within ten days transmit to such person a written statement of the charges preferred and set the time and place for the hearing of the same, at which trial the teacher shall be privileged to be present and make defense. If in the judgment of the county superintendent there is sufficient grounds for the revocation of the certificate or diploma, he shall at once issue in duplicate an order revoking the certificate or diploma, and the same shall become operative and of full force and effect ten days after the date of its issue, one copy of the order to be mailed to the holder of the certificate and the other to be mailed to the superintendent of public instruction. Provided that the person aggrieved by such order shall have the right to appeal to the superintendent of public instruction within ten days from the date of such mailing and in case of appeal the revocation shall not be effective until the same is affirmed, after full hearing, by the superintendent of public instruction. Provided further, that in the case of life diplomas or state certificates of whatever class, the revocation shall not be effective until affirmed by the educational board of examiners after full review by said board. [31 G. A., ch. 122, § 21.]

SEC. 2734-v. List of persons holding certificates and attending normal institute. The county superintendent shall annually, on the first Monday of September, file with the president of the educational board of examiners a list of all persons who for the preceding year have held certificates and have attended the normal institute, with the number of days attendance of each. A similar report of summer school attendance shall be secured by the president of the board. If any subsequent examination or renewal the board may give such credit for institute or summer school attendance as it may determine, any rule adopted to apply equally to all similar cases. [31 G. A., ch. 122, § 22.]

SEC. 2738. Normal institute. The county superintendent shall hold annually, a normal institute for the instruction of teachers and those who may desire to teach, and, with the concurrence of the superintendent of public instruction, procure such assistance as may be necessary to conduct the same, at such time as the schools in the county are generally closed. To defray the expenses of said institute, he shall require the payment of a registration fee of one dollar from each person attending the normal institutes, and the payment in all cases of one dollar from every applicant for a certificate: *provided* that, if the applicant is granted a two years' certificate, he shall pay one dollar additional. He shall monthly, and at the close of each institute, transmit to the county treasurer all moneys so

received, including the state appropriation for institutes, to be designated the "institute fund," together with a report of the name of each person so contributing, and the amount. The board of supervisors may appropriate out of the general fund such additional sum as it may find necessary for the further support of such institute. All disbursements of the institute fund shall be by warrants drawn by the county auditor, who shall draw said warrants upon the written order of the county superintendent, and said written order must be accompanied by an itemized bill for services rendered or expenses incurred in connection with the institute, which bill must be signed and sworn to by the party in whose favor the order is made and must be verified by the county superintendent. All said orders and bills shall be kept on file in the auditor's office until the final settlement of the county superintendent with the board of supervisors at the close of his term of office. No warrant shall be drawn by the auditor in excess of the amount of institute fund then in the county treasury. That the county superintendent shall furnish to the county board of supervisors a certified itemized account of the receipts and disbursements of all moneys collected and paid out by him for a normal institute, which account they shall examine, audit and publish a summary thereof with their proceedings next following the holding of the normal institute. The superintendent shall report to the board of supervisors the first of January annually a summary of his official financial transactions for the previous year. [17 G. A., ch. 54; 15 G. A., ch. 57; C., '73, § 1769.] [27 G. A., ch. 87, § 1.] [29 G. A., ch. 123, § 1.] [30 G. A., ch. 113.]

SEC. 2739. Reports. The county superintendent shall annually, on the last Tuesday in August, make a report to the superintendent of public instruction, giving a full abstract of the several reports made to him by the secretaries and treasurers of school boards, stating the manner in and extent to which the requirements of the law regarding instruction in physiology and hygiene are observed, and such other matters as he may be directed by the state superintendent to include therein, or he may think important in showing the actual condition of the schools in his county. At the same time, he shall file with the county auditor a statement of the number of persons of school age in each school township and independent district in the county. He shall also report, as provided by law, to the superintendent of the college for the blind, the name, age, residence and post-office address of every person, resident of the county, so blind as to be unable to acquire an education in the common schools; to the superintendent of the institution for the deaf and dumb, with the same detail, all persons of school age whose faculties in respect to hearing or speaking are so deficient as to prevent them from acquiring an education in such schools; and to the institution for the feeble-minded, all persons of like age who, because of mental defects, are entitled to admission therein. [21 G. A., ch. 1, § 2; C., '73, §§ 1771, 1772; R., § 2070.] [31 G. A., ch. 136, § 1.]

SEC. 2742. Compensation. He shall receive a salary of twelve hundred and fifty dollars a year, the expenses of necessary office stationery and postage, and those incurred in attendance upon meetings called by the superintendent of public instruction; claims therefor to be made by verified statements filed with the county auditor, who shall draw his warrant upon the county treasurer therefor; and the board of supervisors may allow him such further sum by way of compensation as may be just and proper. [19 G. A., ch. 161, § 1; C., '73, § 1776; R., § 2074.] [29 G. A., ch. 124, § 1.]

CHAPTER 14.

OF THE SYSTEM OF COMMON SCHOOLS.

SECTION 2743. School districts—corporate powers.

While it is not essential that contracts made by the board be limited to the term of office of the individual members, yet it is evidently the legislative intention that contracts with teachers shall not be made for more than one year. *Burkhead v. Independent Sch. Dist.*, 107-29.

A school township may maintain an action in equity to enjoin persons from assuming without authority to act as officers of a district within such township. *School Township v. Wiggins*, 122-602.

SEC. 2744. Names. Districts townships now existing shall hereafter be called school townships, subdivisions of which shall be called sub-districts. School corporations shall be designated as follows: The school township of (naming civil township), in the county of (naming county), state of Iowa; or, the independent school district of (naming city, town, or village, and if there are two or more districts therein, including some appropriate name or number), in the county of (naming county), state of Iowa; or, the rural independent school district of (some appropriate name or number), township of (naming township), in the county of (naming county), state of Iowa. [C., '73, § 1716; R., § 2026; C., '51, § 1108.] [27 G. A., ch. 91, § 1.]

SEC. 2745. Directors.

The management of school affairs is left to the discretion of the board of directors, and such discretion will not be interfered with by the courts so far as it is exer-

cised within the scope of the powers conferred upon the board. *Kinzer v. Independent School Dist.*, 129-441.

SEC. 2745-a. Duty of board of school directors—fence. It shall be the duty of all boards of school directors in school districts where the schoolhouse site adjoins the cultivated or improved lands of another to build and maintain a lawful fence between said site and cultivated or improved lands. [27 G. A., ch. 88, § 1.]

SEC. 2745-b. Rights of owner of adjoining lands. The owner of lands adjoining any schoolhouse site shall have the right to connect the fence on his lands with the fences around any schoolhouse site, but he shall not be liable to contribute to the maintenance of the fence around said site. [27 G. A., ch. 88, § 2.]

SEC. 2746. Annual meeting of corporation.

By reason of the provisions of this section as to giving notice of propositions to be submitted to and determined by the voters at school meetings, and Code § 2749, that the board may, or under certain conditions shall, provide in the notice for the annual meeting for submitting any proposition authorized by law to the voters, notice of the proposition to be submitted at such meeting is essential to the validity of their adoption, the statutory provision as to notice being construed as mandatory. *Goerdt v. Trumm*, 118-207.

The board may provide in the notice of

a school meeting for the submission of the question as to voting a schoolhouse tax. *Kinney v. Howard*, 133-94.

Unless there has been a valid order of the board of directors for the submission of a proposition, the adoption thereof by the electors is of no validity, even though notice of the submission of the proposition has been given. *McNees v. School Township*, 133-120.

The law presumes that the officer charged with the posting of the notices has performed his duty. *Calahan v. Handsaker*, 133-622.

SEC. 2747. Electors.

Women are expressly authorized to vote on the proposition whether a tax shall

be levied for the erection of a schoolhouse. *Kinney v. Howard*, 133-94.

SEC. 2749. Powers of electors.

Irregularity in recording the acts of the electors will not prevent such action being recognized and taken into account in a court of equity. *Locker v. Keiler*, 110-707.

It is not necessary that the ballot contain a recital of every preliminary step necessary to render the election valid. *Calahan v. Handsaker*, 133-622.

No specific form of ballot is prescribed; all that is necessary is that the ballot fairly and intelligently present the question that is to be voted upon. A substantial compliance with the statute is sufficient. So held where the question was as to the validity of bonds issued on a vote of the electors. *Ibid.*

Where the ballot prepared and used by the electors was in the form of the Australian ballot, with reference to the submission of propositions, and not in strict conformity with the statutory provision as to submission of propositions at school elections, held that the irregularity would not defeat the result of the election. *Kinney v. Howard*, 133-94.

The vote of the electors on a proposition of which notice of submission is given is of no validity unless the submission of such proposition has been duly authorized by the board of directors. *McNees v. School Township*, 133-120.

This provision does not take away the power previously existing in the board of directors to change the schoolhouse site without such vote. *James v. Gettinger*, 123-199.

SEC. 2750. Special meeting. The board of directors may call a special meeting of the voters of any school corporation by giving notice in the same manner as for the annual meeting, which shall have the powers given to a regular meeting with reference to the sale of school property and the application to be made of the proceeds, and to vote a schoolhouse tax for the purchase of a site and the construction of a necessary schoolhouse, and for obtaining roads thereto. [24 G. A., ch. 21; 18 G. A., ch. 84.] [28 G. A., ch. 104, § 1.]

SEC. 2751. Subdistrict meeting.

The failure to make a record of an election at an annual school meeting will not deprive the officer selected of his right to office. The statute does not declare that the record shall be the sole and exclusive

The electors of a district township having the power to vote a tax may rescind such vote unless, by so doing, they interfere with vested rights; and held that where the board and its officers had failed to certify a schoolhouse tax for collection, and the persons desiring to secure the schoolhouse for which the tax was levied had no interest except the right to bring action to compel the certification of the tax they had no such vested interest as to authorize them to object to the rescission of the tax. *Hibbs v. Board of Directors*, 110-306.

While a tax voted without the necessary notice is *ultra vires* as to the school district, yet if schoolhouses have been built in reliance on such tax, and a portion of the tax has been paid, taxpayers who have allowed the secretary to certify such tax to the board of supervisors cannot be heard to question the validity of such tax. *Loesche v. Goerd*, 123-55.

A schoolhouse tax voted by the electors, at their regular meeting, is enforceable against property which is brought into the school district by extension of its limits prior to the levy of such tax, although at the time the tax was voted the owner was not a resident and could not participate in the election, and notwithstanding the fact that the tax has been certified to the county board for levy before such annexation takes place. *Grout v. Illingworth*, 131-281.

evidence, and if the record be not kept as required, or if it does not contain evidence of the fact sought to be proved, parol evidence is admissible. *State v. Cahill*, 131-155.

SEC. 2752. Number of directors. The board of directors of a school township shall be composed of one director from each sub-district. But when there is an even number of sub-districts another member shall be elected at large by all the voters of the school township. When the school township is not divided into sub-districts, a board of three directors shall be elected at large, on the second Monday in March, by all the voters of the school township. [15 G. A., ch. 27; C., '73, §§ 1720-1; R., §§ 2031, 2035, 2075-6; C., '51, §§ 1112, 1721.] [27 G. A., ch. 92, § 1.]

SEC. 2754. Elections to independent districts—tie vote.—At the annual meeting in all independent districts members of the board shall be

chosen by ballot. If any district including all or part of a city of the first class, or a city under special charter, the board shall consist of seven members, three of whom shall be chosen on the second Monday in March, 1898, two on the second Monday in March, 1899, and two on the second Monday in March, 1900. In all other independent city, town, or village districts, and in all rural independent districts where the board now consists of six members, the board shall consist of five members, one of whom shall be chosen on the second Monday in March, 1898, two on the second Monday in March, 1899, and two on the second Monday in March, 1900. In all independent city, town, or village districts where the board now consists of three members such board shall hereafter consist of five members, three of whom shall be elected on the second Monday in March, 1898, one for one year, one for two years, and one for three years. In all other rural independent districts the board shall consist of three members, one of whom shall be chosen on the second Monday in March, 1898, and one each year thereafter. In districts composed in whole or in part of cities or towns, a treasurer shall be chosen in like manner, whose term shall begin on the first day of July, unless that date falls on Sunday, in which case on the day following and continue for two years, or until his successor is elected and qualified. The term of office of the incumbent treasurer in said district shall expire on the third Monday in March, 1898. In such districts the polls must remain open not less than five hours, and in rural independent districts and school townships not less than two hours. In each case the polls shall open at one o'clock p. m., except as provided in section twenty-seven hundred and fifty-six of this chapter. A tie vote for any elective school office shall be publicly determined by lot forthwith, under the direction of the judges. [22 G. A., ch. 51; 18 G. A., ch. 7, § 2; C., '73, §§ 1789, 1808.] [27 G. A., ch. 91, § 2.] [27 G. A., ch. 93, § 1.] [31 G. A., ch. 136, § 2.]

A deviation from the statutory provision as to the time for keeping the polls open will not invalidate the election where it appears that no one was thereby deprived of the opportunity to cast his ballot. *District Tp. v. Independent Dist.*, 112-321.

SEC. 2755. Election precincts—register of voters—notice. Each school corporation having five thousand or more inhabitants may be divided into such number of precincts as the board of directors shall determine, in each of which a poll shall be held at a convenient place, fixed by the board of directors, for the reception of the ballots of voters residing in such precinct. A separate register of the voters of each precinct shall be prepared by the board from the register of the electors of any city included within such school corporation, and for that purpose a copy of such register of electors shall be furnished by the clerk of the city to the board of directors. Before each annual meeting these registers shall be revised and corrected by comparison with the last register of elections of such cities, and shall have the same force and effect at school meetings held under this section, in respect to the reception of votes thereat, as the register of election has by law at general elections. The board of directors of such school corporation, on or before the last Monday preceding such election shall appoint two suitable persons to be registrars in each of the election precincts of such school corporation for the registration of voters therein, who shall have the same qualifications as registrars appointed for general elections and shall qualify in the same manner, and receive the same compensation to be paid by the school corporation. The registrars shall meet on the day of election at the voting place in the precinct in which they have been appointed and shall hold continuous session from nine o'clock in the forenoon until seven o'clock in the afternoon. Any person claiming to be a voter, and who is not already registered in the proper precinct, may appear before them in the election precinct where he claims he is entitled to vote and make and subscribe

under oath a statement in the registry book, which oath and statement shall be of the same general character, as that prescribed by section one thousand and seventy-seven (1077) of the code, and shall thereupon be granted a certificate of registration. Nothing in this section shall be construed to prohibit women from voting at all elections at which they are entitled to vote. The secretary must post a notice of the meeting in a public place in each precinct at least ten days before the meeting, and by publication once each week for two consecutive weeks preceding the same in some newspaper, published in the corporation, such notice to state the time, respective voting precincts and the polling place in each precinct, and also to specify what questions authorized by law, in addition to the election of director or directors, shall be voted upon and determined by the voters of the several precincts. [18 G. A., ch. 8, §§ 1-4.] [28 G. A., ch. 105, § 1.] [29 G. A., ch. 125, §§ 1-2.] [31 G. A., ch. 9, § 3,]

[The amendment by the 31 G. A., chap. 9, § 3, ignored the code supplement where the same section is found. The amendment was by inserting matter in line 17 of the code section, while the same words, after which the matter should be inserted, appears in line 32 of the code supplement, where the change has been made.]

SEC. 2757. Repeal — meetings of directors — election of officers. That section twenty-seven hundred fifty-seven (2757) of the code be and the same is hereby repealed and the following enacted in lieu thereof:

“The board of directors of all independent city, town and village corporations shall organize on the third Monday in March, and those of all other school corporations on the first day of July, unless that date falls on Sunday, in which case the day following. Such organization shall be effected by the election of a president from the members of the board, who shall be entitled to vote as a member. Such special meetings may be held as may be determined by the board, or called by the president, or by the secretary upon the written request of a majority of the members of the board, upon notice specifying the time and place, delivered to each member in person, but attendance shall be a waiver of notice. Such meetings shall be held at any place within the civil township in which the corporation is situated. On the first day of July, unless that date falls on Sunday, in which case on the day following, the board of all independent city, town and village corporations and the retiring board in all other school corporations shall meet, examine the books of, and settle with the secretary and treasurer for the year ending on the thirtieth day of June preceding, and for the transaction of such other business as may properly come before it. On the same day the board of each independent city, town and village corporation, except as provided in section twenty-seven hundred fifty-four (2754) of this chapter, and the new board of every other school corporation, shall elect from outside the board a secretary and treasurer, but in independent districts no teacher or other employe of the board shall be eligible as secretary. All officers shall be elected by ballot and the vote shall be recorded by the secretary. Should the secretary or treasurer fail to report as provided in sections twenty-seven hundred sixty-five (2765) and twenty-seven hundred sixty-nine (2769) of this chapter, it shall be the duty of the new board to take any action necessary to secure a proper settlement.” [31 G. A., ch. 136, § 3.]

SEC. 2758. Qualification of directors—vacancies. Any member of the board may administer the oath of qualification to any member elect, and to the president of the board. Each director elected in March, 1906, or at any regular election thereafter, shall qualify on or before the date for the organization of the board of the corporation in which he was elected by taking an oath to support the constitution of the United States and that of the state of Iowa, and that he will faithfully discharge the duties of his

office; and shall hold the office for the term to which he is elected, and until a successor is elected and qualified. In case of a vacancy, the office shall be filled by appointment by the board until the next annual meeting. In all rural school corporations, the term of office of directors whose terms expire on the third Monday in March, 1906, is hereby extended to July 1st, 1906. [C., '73, §§ 1752, 1790; R., §§ 2032, 2079; C., '51, §§ 1113, 1120.] [31 G. A., ch. 137.]

Where a board of directors, in the absence of the election of a new director to succeed one holding office, permitted the director then in office to qualify as his own successor, held that the director thus qualified was at least a *de facto* officer. *District Tp. v. Myles*, 109-541.

The term of a director does not begin at the time of his election, but at the time when by statute the regular meeting of the

board of directors following the election is to be held, at which the board is to be organized; and if the director elected is ineligible and is therefore unable to qualify, the vacancy is not caused by failure to elect, but by the failure to qualify, and the old director will hold over if he qualifies within ten days from that time. *State v. Cahill*, 131-155.

SEC. 2759. President—employment of counsel.

The president has no authority to represent that at the time of settlement with the treasurer the funds called for by his

accounts were produced, counted and found to be correct. *Independent Sch. Dist. v. Hubbard*, 110-58.

SEC. 2761. Duties of secretary.

Informality in the records kept by the secretary of the action of the board will not defeat subsequent proceedings based

on such action if in fact taken. *Kinney v. Howard*, 133-94.

SEC. 2762. Warrants. He shall countersign all warrants and drafts upon the county treasurer drawn or signed by the president; draw each order on the treasurer, specify the fund on which it is drawn and the use for which the money is appropriated; countersign and keep a register of the same, showing the number, date, to whom drawn, the fund upon which it is drawn, the purpose and the amount; and at each regular annual meeting furnish the board with a copy of the same. [19 G. A., ch. 46; C., '73, §§ 1739, 1782; R., §§ 2039, 2061; C., '51, §§ 1122-3.] [31 G. A., ch. 136, § 4.]

SEC. 2763. Repeal. That section twenty-seven hundred and sixty-three (2763) of the code be and the same is hereby repealed, and the following enacted in lieu thereof. [31 G. A., ch. 138, § 1.]

SEC. 2763-a. Notice of special meetings in certain school corporations. The secretary of the board of directors of any school corporation which is divided into precincts, shall give notice of all special meetings of the voters, as provided by section twenty-seven hundred and fifty-five (2755) of the supplement to the code. Each notice shall state the date, place and hours during which the meeting will be in session, and the object of the meeting. [31 G. A., ch. 138, § 2.]

Under this section before its repeal by 31 G. A., chap. 138, held that it had no application to submission of propositions to the electors. *Kinney v. Howard*, 133-94.

has posted the notices as required by statute, in the absence of a showing to the contrary. *Calahan v. Handsaker*, 133-622.

It will be presumed that the secretary

SEC. 2763-b. Same. The secretary of the board of directors for any school corporation, located wholly within or partly within the corporate limits of cities of the first class, cities of the second class, or incorporated towns, which may not have adopted the provisions of section twenty-seven hundred and fifty-five (2755) of the supplement to the code and divided into precincts, shall give notice of special meeting of the voters in the same manner as for the annual meeting, by posting at least five notices in five public places within said corporation, for not less than ten days next preceding the day of special meeting. Each notice shall state the date, place

and hours during which the meeting will be in session, and the object of the meeting. [31 G. A., ch. 138, § 3.]

SEC. 2763-c. Same. The secretary of the board of directors for any school township or for any school corporation not included in the preceding section, shall give ten days' printed or written notice of special meeting to the voters, posted in at least five public places within the corporation. The notice shall be posted at the door of each school house, and also at or near the last place of meeting, and each notice shall state the date, place and hours during which the meeting will be in session, and the object of the meeting. [31 G. A., ch. 138, § 4.]

SEC. 2764. Register of persons of school age. He shall, between the first day of June and the first day of July of each year, enter in a book made for that purpose, the name, sex and age of every person between five and twenty-one residing in the corporation, together with the name of the parent or guardian. [31 G. A., ch. 136, § 5.]

SEC. 2765. Reports. He shall notify the county superintendent when each school is to begin and its length of term, and, within five days after the regular July meeting in each year, file with the county superintendent a report which shall give the number of persons in the corporation, male or female, of school age, the number of schools and branches taught, the number of scholars enrolled and average attendance in each school, the number of teachers employed and the average compensation paid per month, distinguishing the sexes, the length of school in days, and the average cost of tuition per month for each scholar, the text-books used, number of volumes in library, the value of apparatus belonging to the corporation, the number of school-houses and their estimated value, the name, age and post-office address of each deaf and dumb or blind person in the corporation between the ages of five and twenty-one years, and this shall include those who are so blind or deaf as to be unable to obtain an education in the common schools, a like report as to all feeble-minded children of and between such ages, and the number of trees set out and in a thrifty condition on each school-house ground. [19 G. A., ch. 23, § 3; 16 G. A., ch. 112, § 1; C., '73, §§ 1744-5; R., § 2046; C., '51, §§ 1127-8.] [31 G. A., ch. 136, § 6.]

The auditor in apportioning school taxes has no authority to review the school census reported to him by the secretaries of school townships, and cannot be restrained by injunction from acting on the

census as thus reported because of the misconduct of a district secretary in taking the census of his township. *Judson v. Agar*, 111 N. W. 943.

SEC. 2767. Certifying tax.

After the voting of a tax for a school-house on a proposition submitted to the electors, and the certification of such tax to the board of supervisors, nothing re-

mains to be done before the board proceeds to the erection of the school-house. *Kinney v. Howard*, 133-94.

SEC. 2768. Duties of treasurer—payment of warrants. The treasurer shall receive all moneys belonging to the corporation, pay the same out only upon the order of the president countersigned by the secretary, keeping an accurate account of all receipts and expenditures in a book provided for that purpose. He shall register all orders drawn and reported to him by the secretary, showing the number, date, to whom drawn, the fund upon which drawn, the purpose and amount. The money collected by tax for the erection of school-houses and the payment of debts contracted therefor shall be called the school-house fund; that collected for the payment of school buildings bonds shall be called the school building bond fund; that for rent, fuel, repairs, and other contingent expenses necessary for keeping the school in operation, the contingent fund; and that received for the payment of teachers, the teachers' fund; and he shall keep a separate account

with each fund, paying no order that fails to state the fund upon which it is drawn and the specific use to which it is to be applied. Whenever an order cannot be paid in full out of the fund upon which it is drawn, partial payment may be made. All school orders shall draw lawful interest after being presented to the treasurer and by him indorsed as not paid for want of funds. [C., '73, §§ 1747-50; R., §§ 2048-50; C., '51, §§ 1138-40.] [31 G. A., ch. 139.]

Officers are presumed, in the absence of any showing to the contrary, to have properly discharged their duties, and the treasurer's book of account is rightly received in evidence in an action against the sureties on his bond to show the true statements of his account at the time such report was rendered. *Independent Sch. Dist. v. Hubbard*, 110-58.

A school treasurer may lawfully deposit the funds of the school district in a bank, under a contract between such treasurer and the bank, by which the bank agrees to furnish security to the treasurer for funds so deposited, and such contract is not contrary to public policy. *Hunt v. Hopley*, 120-695.

SEC. 2769. Financial statement. He shall render a statement of the finances of the corporation whenever required by the board, and his books shall always be open for inspection. He shall make an annual report to the board at its regular July meeting, which shall show the amount of the teachers' fund, the contingent fund, and the school-house fund held over, received, paid out, and on hand, the several funds to be separately stated, and he shall immediately file a copy of this report with the county superintendent. [16 G. A., ch. 112, § 2; C., '73, § 1751; R., § 2051; C., '51, § 1141.] [31 G. A., ch. 136, § 7.]

SEC. 2771. Quorum of board—filling vacancies. A majority of the board of directors of any school corporation shall constitute a quorum for the transaction of business, but a less number may adjourn from time to time. Vacancies occurring among the officers or members shall be filled by the board by ballot, and the person receiving the highest number of votes shall be declared elected, and shall qualify as if originally elected or appointed. When the board is reduced below a quorum, by resignation or otherwise, the secretary of the board, or if there be no secretary, the county superintendent, shall call a special election to fill the vacancies, giving notice in the same manner as for the annual meeting on the second Monday in March. [24 G. A., ch. 19; C., '73, §§ 1730, 1738; R., §§ 2037-8.] [28 G. A. ch. 106, § 1.] [32 G. A., ch. 150.]

SEC. 2772. Temporary officers—course of study—regulations.

The board has power to make rules and regulations as to the conduct of pupils, and a court will interfere with the making and enforcement of such rules only where the board has plainly exceeded its authority. *Kinzer v. Independent School Dist.*, 129-441.

But a rule may be so far unreasonable or beyond the exercise of discretion that the courts can say it is made without authority. *Ibid.*

The general character of the school and the conduct of its pupils as affecting the efficiency of the work to be done in the school room and the discipline of the school are matters to be taken into account

by the school board in making rules for the government of the school. While the board has no concern with the individual conduct of the pupils wholly outside of the school rooms and school grounds, while they are presumed to be under the control of their parents, yet the conduct of pupils which directly relates to and affects the management of the school and its efficiency is within the scope of proper regulation. *Ibid.*

Therefore held that a rule prohibiting the playing of football by pupils under the auspices of the school, or in a team purporting to represent the school was valid. *Ibid.*

SEC. 2773. School-house site — division of district — length of school. It may fix the site for each school-house, taking into consideration the geographical position, number and convenience of the scholars, provide for the fencing of school-house sites, determine the number of schools to be

taught, divide the corporation into such wards or other divisions for school purposes as may be proper, determine the particular school which each child shall attend, and designate the period each school shall be held beyond the time required by law. Every school shall be free of tuition to all actual residents between the ages of five and twenty-one years, and each school regularly established shall continue for at least twenty-four weeks of five school days each, in each school year commencing the first of July, unless the county superintendent shall authorize the board to shorten this period in any one or more schools, when in his judgment there are sufficient reasons for so doing. No school shall be in session during the time of holding a teachers' institute except by written permission of the county superintendent. [19 G. A., ch. 172, § 21; 17 G. A., ch. 54; 15 G. A., ch. '57; C., '73, §§ 1724, 1727, 1769; R., §§ 2023, 2037.] [31 G. A., ch. 136, § 8.]

The directors of a school township have power to change the site of a school-house without a vote of the electors. *James v. Gettinger*, 123-199.

The matter of the relocation of the school-house site is for the determination of the school board, subject to appeal to the county superintendent, and the action of the board cannot be questioned by injunction. *Kinney v. Howard*, 133-94.

Primarily the location of a school-house site is within the exclusive jurisdiction of the school board, subject to review on appeal to the county superintendent and from him to the state superintendent. After final decision on appeal to the state superintendent he has no authority to change such decision on account of subsequent change of conditions. *Doubet v. Board of Directors*, 111 N. W. 326.

SEC. 2774. Renting room.

The remedy against a school board for failing to provide school accommodations

is not by *certiorari*. *Molyneaux v. Molyneaux*, 130-100.

SEC. 2778. Contracts—election of teachers—employment of teachers in sub-districts. The board shall carry into effect any instruction from the annual meeting upon matters within the control of the voters, and shall elect all teachers and make all contracts necessary or proper for exercising the powers granted and performing the duties required by law. But the board may authorize any sub-director to employ teachers for the schools in his sub-district. Contracts with teachers must be in writing, and shall state the length of time the school is to be taught, the compensation per week of five days or month of four weeks, and such other matters as may be agreed upon, signed by the president and teacher, and filed with the secretary before the teacher commences to teach under such contract. [22 G. A., ch. 60; C., '73, §§ 1723, 1757; R., §§ 2037, 2055.] [28 G. A., ch. 107, § 1.]

In general: Under this section as amended by 28 G. A., chap. 107, the board of directors is authorized to carry into effect instructions from the annual meeting upon matters which are within the control of the voters, and have properly been submitted to them for action. The recording of the action of the electors is immaterial. *Kinney v. Howard*, 133-94.

A court of equity will not, at the suit of a resident taxpayer of a school district, brought against its officers, enforce repayment of money expended under an executed contract of which the school district retains the benefit, although the contract is invalid, there being no claim that the officers acted corruptly or fraudulently, or paid an unreasonable amount. *Kagy v. Independent Dist.*, 117-694.

Where the directors sign a contract in behalf of the district, although not in pursuance of any action of the board, they are not individually liable. *Hanna v. Wright*, 116-275.

Where directors individually signed a contract for apparatus purporting to bind the board of directors and not indicating an assumption of personal liability, held that they were not individually liable thereon and that the school district having through the board of directors accepted and received the benefit of the apparatus was bound by the contract. *Johnson v. School Corporation*, 117-319.

It is the vote of the directors which is binding on the district, and not the record thereof. And where no record of the action of the directors was made it may be

proven by oral testimony. *German Ins. Co. v. Independent Sch. Dist.*, 80 Fed. 366.

A contract or order given by members of the board of directors acting individually is not binding on the district, but such a contract may be ratified by the acceptance, retention and use by the school district of the property thus contracted or paid for. *Richards v. School Township*, 132-612.

Where contracts made by a board of directors with persons occupying a judiciary or official relation to the school corporation have been carried out, a taxpayer will not be allowed to maintain a suit in the name of the corporation against the contractor to recover the money paid to him under such contract, the benefits of which are retained by the school corporation. *Kagy v. Independent Dist.*, 117-694.

Contracts with teachers: The rules and

regulations of the district fixing the time for opening the schools are part of the contract. *Burkhead v. Independent Sch. Dist.*, 107-29.

Such a contract cannot be made for a longer time than one year. *Ibid.*

Where a teacher offered by way of tender of resignation to renounce his contract, but this offer was not accepted by the board of directors until after they were notified of its withdrawal, held that a discharge of the teacher, not in accordance with the provisions of Code § 2782 was not authorized. Also held that the fact that the teacher after such unauthorized discharge drew the balance of pay due him and delivered the key of the schoolhouse on demand of the board did not show an abandonment of the contract. *Curttright v. Independent Sch. Dist.*, 111-20.

SEC. 2779. Erection or repair of school-house.

The board of directors may delegate to a committee the ministerial duty of carrying out a contract for the erection of a schoolhouse, but the duty of selecting the site, adopting the plans and awarding the contract cannot thus be delegated. *Kinney v. Howard*, 133-94.

Upon refusal of the lowest bidder to enter into a contract for the construction of a school-house the board cannot disregard all the bids submitted and enter into a

contract with a non-bidder and hold the lowest bidder liable under his deposit for the difference between his proposition and the price fixed in such subsequent contract. *Cedar Rapids Lumber Co. v. Fisher*, 129-332.

A telegram to one whose bid was found to be the lowest, advising him that his was the lowest bid, held not to be such acceptance of his bid as to render the contract binding upon him. *Ibid.*

SEC. 2780. Allowances of claims—settlements—compensation of officers.

Claims against the school district must be audited and allowed by the board of directors and not by the president, and until such claim has been presented to

the board and the board has had an opportunity to act upon it, no suit can be maintained. *Pierson v. Independent Sch. Dist.*, 106-695.

SEC. 2782. Visiting schools—regulations—discharge of teachers—expulsion of scholars.

Where the validity of a teacher's contract is in question he is not limited to an appeal, but may sue in the courts. *Burkhead v. Independent Sch. Dist.*, 107-29.

While a teacher who has been discharged cannot sue for breach of contract on the ground that the discharge is wrongful without first appealing to the county superintendent, yet, where such an appeal has been taken, and decided in the teacher's favor, the action for the wrongful discharge may be maintained, although the decision of the county superintendent was not on the merits. *Jackson v. Independent Sch. Dist.*, 110-313.

Where a teacher tendered his resignation, which was not accepted by the board until after it was withdrawn, held that the discharge of the teacher, which was not in accordance with the provisions of this section, was not authorized. *Curttright v. Independent Sch. Dist.*, 111-20.

Where the action of the board in dis-

charging a teacher was reversed on appeal to the county superintendent on the ground that the teacher had been given no notice, or opportunity to be heard, held that the teacher might be tried on new charges, with due notice and a time fixed for the hearing, without reinstating such teacher in charge of the school, and that such action of the directors would not be enjoined. *White v. Wohlenberg*, 113-236.

The hearing having by reason of a temporary injunction been postponed until a time when the teacher's contract had expired, held that on dissolution of the temporary injunction the hearing to be had would relate back to the time when the further action of the board had been prevented by such temporary injunction. *Ibid.*

The board has authority to expel pupils who violate the reasonable regulations made for the government of the conduct of such pupils, in matters within the jurisdiction of the board. *Kinzer v. Independent School District*, 129-441.

SEC. 2783. Use of contingent fund—free text-books. It may provide and pay out of the contingent fund to insure school property such sum as may be necessary, and may purchase dictionaries, library books, including books for the purpose of teaching vocal music, maps, charts and apparatus for the use of the schools thereof to an amount not exceeding twenty-five dollars in any one year for each schoolroom under its charge; and may furnish school books to indigent children when they are likely to be deprived of the proper benefits of the school unless so aided; and shall, when directed by a vote of the district, purchase and loan books to scholars, and shall provide by levy of contingent fund therefor. [26 G. A., ch. 37; 25 G. A., ch. 34; 21 G. A., ch. 107; 19 G. A., ch. 149, § 1; C., '73, § 1729.] [30 G. A., ch. 115.]

Under this section, which differs from the corresponding section of the Code of '73, the board of directors may contract an indebtedness for books, payable out of the contingent fund, although no funds are on hand at the time from which the indebtedness may be paid. *Hanna v. Wright*, 116-275; *Johnson v. School Corporation*, 117-319.

The school board may charge the contingent fund beyond the appropriated

money on hand to an extent not exceeding \$25 for each school room under its control, and in an action against the school district for an indebtedness thus contracted, the burden is on the district to show that the indebtedness was contracted in excess of the amount which the school board might contract for that purpose. *Farmers' & Merchants' State Bank v. School Township*, 118-540.

SEC. 2785. Duties of directors—contracts. The board of directors of a school township may authorize the director of each subdistrict, subject to its regulations, to make contracts for the purchase of fuel, the repairing or furnishing of school-houses, and all other matters necessary for the convenience and prosperity of the schools in his subdistrict. Such contracts shall be binding upon the school township only when approved by the president of the board, and must be reported to the board. Each director shall, between the first and fifteenth days of June in each year, prepare a list of the heads of families in his subdistrict, the number and sex of all children of school age, and by the twentieth day of said month report this list to the secretary of the school township, who shall make full record thereof. The powers specified in this section cannot be exercised by individual directors of independent districts. [C., '73, §§ 1753-5; R., §§ 2052-3; C., 51, §§ 1124, 1142.] [31 G. A., ch. 136, § 9.]

SEC. 2791. Attaching territory to adjoining corporation.

In a particular case held that what was done by the superintendent and the board of directors was sufficient to make an effectual change of the boundary attempted, notwithstanding some irregularities in the way in which it was done. *Newlon v. Independent Dist.*, 109-169.

Under statutory provisions prior to the present Code, held that boundaries of independent districts might be changed under the same provisions as applied to the change of boundaries of district townships. *Ibid.*

Where it appears that the change has been made on grounds which are sufficient to authorize such change it will be presumed, until the contrary is shown, that the proceedings were regular and the grounds sufficient. *Ibid.*

SEC. 2792. Restoration.

This provision has no application to the severance of a portion of the territory

Where a property owner has acquiesced in the attempted change of boundary, and recognized it as valid, he cannot afterwards, nor can his grantee, question its validity. *Ibid.*

Where no natural obstacles exist there is nothing on which the county superintendent may base an order, and an action of his with reference to change of boundaries is without jurisdiction. *School Tp. v. Independent Dist.*, 110-30.

By virtue of the provisions of this section it is possible that an independent district may be reduced in size to less than four sections of land. *Rural Ind. School Dist. v. New Ind. School Dist.*, 120-119.

originally included in such testimony. *Williams v. Core*, 124-213.

SEC. 2793. Boundary lines changed. That section twenty-seven hundred ninety-three (2793) of the code be and the same is hereby repealed, and the following enacted in lieu thereof:

"The boundary lines of contiguous school corporations in the same county may be changed by the concurrent action of the respective boards of directors at their regular meetings in July, or at special meetings thereafter, called for that purpose. The corporation from which territory is detached shall, after the change, contain not less than four government sections of land, and its boundary lines must conform to the lines of congressional divisions of land. In the same manner, the boundary lines of contiguous school corporations in the same county may be so changed that one corporation shall be included in and consolidated with the other as a single corporation." [31 G. A., ch. 136, § 10.]

SEC. 2793-a. Corporation limits changed. When the boundary line between a school township and an independent city or town district is not also the line between civil townships, such boundary may be changed at any time by the concurrence of the boards of directors; but in no case shall a forty-acre tract of land, by the government survey, be divided; and such sub-divisions shall be excluded or included as entire forties. The boundaries of the school township or the independent district may in the same manner be extended to the line between civil townships, even though by such change one of the districts shall be included within and consolidated with the other as a single district. When the corporate limits of any city or town are extended outside the existing independent district or districts, the boundaries of said independent district or districts shall be also correspondingly extended. But in no case shall the boundaries of an independent district be affected by the reduction of the corporate limits of a city or town. [27 G. A., ch. 89, § 1.]

Property brought into a school district by annexation after the voting and certification of a schoolhouse tax, but before the levy of such tax, is subject to the tax, although the owner was not a resident of the district at the time the election was held. *Grout v. Illingworth*, 131-281.

SEC. 2794. Formation of independent district. Upon the written petition of any ten voters of a city, town or village of over one hundred residents, to the board of the school corporation in which the portion of the town plat having the largest number of voters is situated, such board shall establish the boundaries of a proposed independent district, including therein all of the city, town or village, and also such contiguous territory as is authorized by a written petition of a majority of the resident electors of the contiguous territory proposed to be included in said district, in not smaller sub-divisions than entire forties of land, in the same or any adjoining school corporations, as may best subserve the convenience of the people for school purposes, and shall give the same notices of a meeting as required in other cases, at which meeting all voters upon the territory included within the contemplated independent district shall be allowed to vote by ballot for or against such separate organization. When it is proposed to include territory outside the town, city or village, the voters residing upon such outside territory shall be entitled to vote separately upon the proposition for the formation of such new district, by presenting a petition of at least twenty-five per cent. of the voters residing upon such outside territory, and if a majority of the votes so cast is against including such outside territory, then the proposed independent district shall not be formed. [19 G. A., ch 118, § 1; 18 G. A., ch. 139; C., '73, §§ 1800-1; R., §§ 2097, 2105.] [29 G. A., ch. 126, § 1.]

A written petition of ten voters is essential before the board acquires jurisdiction to act. The territory with reference to which there is no petition cannot be included, but the proposed district need not necessarily contain all the territory for which the petition is presented. *Munn v. School Tp.*, 110-652.

The desirability or necessity for the independent district is for the determination of the electors. The board is to say whether the village contains one hundred residents, and whether the requisite number of electors have signed the respective petitions, and having so found, no option is left, save to fix the boundaries of the proposed district and order the election. *Ibid.*

On appeal from the action of the board to the county superintendent, the latter determines the question *de novo*, and may enter such order as ought to have been entered by the board. *Ibid.*

Although the language of this section before its amendment by 29 G. A., chap. 126, and the enactment of 27 G. A., chap. 89, did not in specific language authorize the formation of an independent district co-extensive with the territory of a city or town out of territory in part belonging to a school township, and in part to an independent district, nevertheless the manifest purpose of the legislature was to authorize such action. *Rural Ind.*

School Dist. v. New Ind. School Dist., 120-119.

Although, under the language of sections of the Code relating to the division of independent districts, it is provided in some cases that such districts shall not be reduced to a size less than four sections of land, nevertheless there is no provision in the Code that an independent district cannot exist containing less than that amount of territory. *Rural Ind. School Dist. v. New Ind. School Dist.*, 120-119.

While the assent of the voters, outside of the corporate limits, to the annexation of territory to an independent district embracing a city or town is to be separately ascertained, yet when the acquiescence of the majority of the outside voters is given and acted upon a portion of such voters cannot have their land severed from the independent district by proceedings in accordance with Code § 2792. *Williams v. Core*, 124-213.

Where a petition is presented to the proper board for the formation of an independent district to correspond with a town plat, an independent district may be formed which includes territory theretofore a part of a school township, and it is not essential that the board of directors of the township out of which the new district is formed shall concur in the formation thereof. *School Township v. Independent School Dist.*, 112 N. W. 5.

SEC. 2794-a. Consolidation—how effected. When a written description describing the boundaries of contiguous territory containing not less than sixteen (16) government sections within one or more counties is signed by one-third of the electors residing on such territory and approved by the county superintendent, if one county and by the superintendents of each if more than one county and by the state superintendent if the county superintendents do not agree, and filed with the board of the school corporation in which the portion of the proposed district having the largest number of voters is situated, requesting the establishment of a consolidated independent district, it shall be the duty of said board within ten days to call an election in the proposed consolidated independent district, for which they shall give the same notices as are required in sections twenty-seven hundred and forty-six (2746) of the code and twenty-seven hundred and fifty (2750) of the supplement to the code, at which meeting all voters residing in the proposed independent district shall be allowed to vote by ballot for or against such separate organization. If a majority of votes cast at such election shall be in favor of such independent organization, the organization of the proposed corporation shall be completed by the election of a board of directors as provided in section twenty-seven hundred and ninety-five (2795) of the code, said board to organize on the first day of July following unless that day falls on a Sunday, in which case on the day following. All taxes previously certified shall be void so far as the property within the limits of the consolidated independent district is concerned, and all taxes necessary for the new corporation shall be certified and levied as provided in section twenty-seven hundred and ninety-six (2796) of the code, but no school corporation from which territory is taken shall, after the change, contain less than four government sections, which territory

shall be contiguous and so situated as to form a suitable corporation. When it is proposed to include in such district a town, city or village, the voters residing upon the territory outside of the town, city or village shall be entitled to vote separately upon the proposition for the formation of such new district by presenting a petition of at least twenty-five per cent. of the voters residing upon such outside territory, and if a majority of the votes so cast is against including such outside territory, then the proposed independent district shall not be formed. [31 G. A., ch. 141.]

SEC. 2796. Taxes certified and levied.

This section relates to perfecting an organization already determined upon by the elected officers, and is directory only. *Munn v. School Tp.*, 110-652.

SEC. 2797. Rural independent districts.

Suit against the new districts on indebtedness of the old district must be brought in equity. *Fairfield v. Rural Ind. School Dist.*, 111 Fed. 108.

If the new districts have by agreement

divided and apportioned between them the indebtedness of the old district, then an action against them may be at law. *Fairfield v. Rural Ind. School Dist.*, 111 Fed. 153.

SEC. 2799. Uniting independent district.

The invalidity of the petition and notice cannot be urged by electors who were present and voted upon the proposition for consolidation. *Molyneaux v. Molyneaux*, 130-100.

The elections in the different districts

with reference to the consolidation need not be held on the same day and at the same time. If any such requirement is contemplated by the statute it is directory merely. *Ibid.*

SEC. 2800. Rural independent districts united into school township. A township which has been divided into rural independent districts may be erected into a school township by a vote of the electors, to be taken upon the written request of one-third of the legal voters residing in such civil township. Upon presentation of such written request to the township trustees, they shall call a meeting of the electors at the usual place or places of holding the township election, upon giving at least ten days' notice thereof by posting three written notices in each rural independent district in the township, and by publication in a newspaper, if one be published in such township, at which meeting the said electors shall vote by ballot for or against a school township organization. If a majority of the votes cast at such election be in favor of such organization, each rural independent district shall become a subdistrict of the school township, and shall organize as such on the first Monday in March following by the election of a director, notice of which shall be given as in other cases by the secretary of each of the rural independent districts, and the directors so elected shall organize as a board of directors of the school township on the first day of July following, unless that date falls on Sunday, in which case on the day following. [16 G. A., ch. 155; C., '73, §§ 1815-20.] [31 G. A., ch. 136, § 11.]

SEC. 2801. Division of school township into subdistricts. The board of any school township may by a vote of a majority of all the members thereof, at the regular meeting in July, or at any special meeting called thereafter for that purpose, divide the school township into subdistricts such as justice, equity and the interests of the people require, and may make such alterations of the boundaries of subdistricts heretofore formed as may be deemed necessary, and shall designate such subdistricts and all subsequent alterations in a distinct and legible manner upon a plat of the school township provided for that purpose, and shall cause a written

description of the same to be recorded in the records of the school township, a copy of which shall be delivered by the secretary to the county treasurer and also to the county auditor, who shall record the same in his office. The boundaries of subdistricts shall conform to the lines of congressional divisions of land, and the formation or alteration of subdistricts as contemplated in this section shall not take effect until the first Monday in March thereafter, at which time a director shall be elected for any subdistrict newly formed. [21 G. A., ch. 124; 16 G. A., ch. 109; C., '73, §§ 1725, 1738, 1796; R., § 2038.] [31 G. A., ch. 136, § 12.]

SEC. 2802. Repeal—changes of boundaries—division of assets and liabilities. That section twenty-eight hundred and two (2802) of the code be and the same is hereby repealed and the following enacted in lieu thereof:

“When any changes are made in the boundaries of any school corporations the new corporation shall elect a board of directors in accordance with the new boundaries, and such new boards shall organize as provided in section twenty-seven hundred and fifty-seven (2757) of this chapter. The boards of directors in office at the time the changes are made in the boundaries of the school corporations, shall continue to act until the boards of directors representing the newly formed districts have been duly organized, whereupon the new boards shall make an equitable division of all assets and liabilities of the corporations affected; and, if they cannot agree, the matters upon which they differ shall be decided by disinterested arbitrators, one selected by each board having an interest therein, and if the number thus selected is even then one shall be added by the county superintendent, and the decision of the arbitrators shall be made in writing, either party having the right to appeal therefrom to the district court.” [31 G. A., ch. 136, § 13.]

In making the division of assets and liabilities here contemplated the arbitrators are limited to those existing between the parties at the time the division is made. *Independent Dist. v. District Tp.*, 107-73.

In a suit by the holder of bonds of a district which has ceased to exist by reason of subdivision of its territory into new districts, a court of equity may enforce payment by the new districts in accordance with an equitable apportionment of the liability on the basis of taxable property and population. *Gamble v. Rural Ind. School Dist.*, 146 Fed. 113.

The schoolhouse and all its belongings are the property of the original district until awarded to the newly formed independent district. Such division must be made by the board, and not by the courts. *District Tp. v. Wiggins*, 110-702.

The division of assets on the severance

of the territory from an independent district necessitates either the sale of the schoolhouse and grounds of such district, or the payment to the district to which the severed territory should be attached of a portion of the value of such property. *Williams v. Core*, 124-213.

A district which is created from another district is liable for its proportion of the indebtedness of the parent district regardless of whether such indebtedness is in excess of the constitutional limitation of indebtedness which the new district might create. *Taylor v. School Dist.*, 97 Fed. 753.

The holder of bonds against the original district may maintain an action in equity against the new districts created out of the original district to enforce the payment of his bonds. *Everett v. Independent Sch. Dist.*, 109 Fed. 697.

SEC. 2803. Attending school in another corporation.

One district may become liable to another for children of the former attending school in the latter under implied contract. Therefore a settlement between the districts for tuition in such cases may be made after the attendance on which it is based has ceased. *Weldon Sch. Dist. v. Shelby Sch. Dist.*, 113-549.

The provisions for paying tuition for pupils attending in another district does not relate to high schools which are established under Code § 2728, and as to which special provision is made. *Boggs v. School Township*, 128-13.

SEC. 2804. School age—nonresidents.

The fact question as to the residence of the pupil who is required to pay tuition on that account is for the determination of the board, and its finding and judg-

ment on that question cannot be reviewed in an action of mandamus. The remedy is by appeal to the county superintendent. *Preston v. Board of Education*, 124-355.

SEC. 2806. School taxes—transportation fund. The board of each school corporation shall at its regular meeting in July, or at a special meeting called for that purpose between the time designated for such regular meeting and the third Monday in August, estimate the amount required for the contingent fund, not exceeding five dollars for each person of school age, but each school corporation may estimate not exceeding seventy-five dollars for each school thereof, and such additional sum as may be necessary not exceeding five dollars for each person of school age for transporting children to and from school; and also such additional sum as may be authorized in the chapter on uniformity of text-books; also such sum as may be required for the teachers' fund, which, including the amount received from the semi-annual apportionment, shall not exceed fifteen dollars for each person of school age therein, but each corporation may estimate not exceeding two hundred and seventy dollars, including such apportionment, for each regular school therein. No tax shall be estimated by the board after the third Monday in August, in each year. School corporations containing territory in adjoining counties may vote and estimate all taxes for school purposes in mills. The board shall apportion any tax voted by the annual meeting for school house fund among the several subdistricts in such a manner as justice and equity may require, taking as the basis of such apportionment the respective amounts previously levied upon said subdistricts for the use of such fund. [15 G. A., ch. 67, § 1; C., '73, §§ 1738, 1777-8, 1780; R., §§ 2033-4, 2037-44, 2088.] [28 G. A., ch. 108, § 1.] [31 G. A., ch. 136, § 14.]

Property which is within the limits of the school district at the time school taxes are determined and certified by the board of directors and levied by the board of

supervisors, is subject to such taxes, although annexed to the district after the election of the board of directors imposing such taxes. *Grout v. Illingworth*, 131-281.

SEC. 2808. Apportionment. The county auditor shall, on the first Monday in April and the first Monday in October of each year, apportion the school tax, together with the interest of the permanent school fund and rents on unsold school lands to which the county is entitled as shown in notice from the auditor of state, and all other money in the hands of the county treasurer belonging in common to the schools of the county and not included in any previous apportionment, among the several corporations therein, in proportion to the number of persons of school age, as shown by the report of the county superintendent filed with him for the year immediately preceding. He shall immediately notify the county treasurer of such apportionment and of the amount due thereby to each corporation. The county treasurer shall thereupon give notice to the president of each corporation, and shall pay out such apportionment moneys in the same manner that he is authorized to pay other school moneys to the treasurers of the several school districts. [C., '73, §§ 1781-2, 1841; R., §§ 1966, 2060.] [27 G. A., ch. 94, § 1.] [32 G. A., ch. 151, § 3.]

[The amendment by 32 G. A. was by adding matter after the word "fund" in the fourth line. The word "fund" only occurs in line three and the change has been made there.]

An action by one independent district against another to recover money collected as taxes on property in the plaintiff dis-

trict and erroneously paid by the county treasurer to the defendant is one for money had and received, and the statute

of limitations will commence to run at the time of payment and not from the discovery of the mistake. *Independent School District v. Independent School District*, 123-455.

The school census as reported to the auditor is conclusive as to the apportionment of taxes by him. *Judson v. Agar*, 111 N. W. 943.

SEC. 2809. Repeal—county auditor to report. That section twenty-eight hundred and nine (2809) of the code, relating to the school fund, be and the same is hereby repealed and the following enacted in lieu thereof:

“The county auditor, shall on the first Monday in January of each year, forward to the superintendent of public instruction a certificate of the election or appointment and qualification of the county superintendent, and shall also on the first day of January of each year make out and transmit to the auditor of state, in accordance with such forms as said auditor may prescribe, a report of the amount of permanent school fund held by the county and also the amount of interest due prior to January first, still remaining unpaid, and shall file said report with the auditor of state on or before the first day of February.” [32 G. A., ch. 151, § 2.]

SEC. 2812. Bonds.

Recitals in the bonds that they are not in excess of the constitutional limitation cannot be relied on by the purchaser. *Fairfield v. Rural Ind. Sch. Dist.*, 111 Fed. 453.

SEC. 2812-a. Repeal. That section twenty-eight hundred and twelve (2812) of the code, section one (1) of chapter ninety-five (95) of the acts of the twenty-seventh general assembly and chapter one hundred and forty-two (142) of the acts of the twenty-eighth general assembly be and the same are hereby repealed. [29 G. A., ch. 127, § 1.]

SEC. 2812-b. Repeal. That chapter one hundred and forty (140), laws of the thirty-first general assembly, be and the same is hereby repealed and the following sections enacted in lieu thereof: [32 G. A., ch. 152, § 1.]

SEC. 2812-c. School funding bonds. The board of directors of any school corporation may issue the bonds of said school corporation to pay any judgment against said school corporation or any indebtedness represented by bonds heretofore lawfully issued. Said bonds shall be known as school funding bonds and shall be authorized by resolution of the board. The proceeds derived from said bonds shall be applied in payment of any such outstanding judgment or bonded indebtedness, or said bonds may be exchanged for outstanding judgments or bonds, par for par. [32 G. A., ch. 152, § 2.]

It is not provided how the authority to issue bonds shall be given by the voters, and the sufficiency of the ballots on such a vote is to be determined under the provisions relating to annual meetings of the electors. *Calahan v. Handsaker*, 133-622.

SEC. 2812-d. School building bonds. For the purpose of borrowing money necessary to erect, complete, equip, furnish or improve a school house, or to purchase sites therefor, the board of directors of any school corporation, when they have been heretofore, or when they may hereafter be authorized by the voters at the annual meeting or at a special meeting called for that purpose, may issue the negotiable interest bearing bonds of said school corporation; said bonds to be known as school building bonds. [32 G. A., ch. 152, § 3.]

SEC. 2812-e. Form—duration—rate of interest—where registered. All of said bonds shall be substantially in the form provided for county bonds, but subject to changes that will conform them to the action of the

board providing therefor, shall run not more than ten years, and may be sooner paid if so nominated in the bond; be in denomination of not more than one thousand dollars (\$1,000) or less than one hundred dollars (\$100) each, to bear a rate of interest not exceeding six (6) per centum per annum, payable semi-annually, to be signed by the president and countersigned by the secretary of the board of directors, and shall not be disposed of for less than par value, nor issued for other purposes than this chapter provides. All of said bonds shall be registered in the office of the county auditor. The expenses of engraving and printing of bonds may be paid out of the contingent fund. [32 G. A., ch. 152, § 4.]

SEC. 2812-f. Redemption—treasurer to keep record. Whenever the amount in the hands of the treasurer, belonging to the funds set aside to pay bonds, is sufficient to redeem one or more of the bonds which by their terms are subject to redemption, he shall give the owner of said bonds thirty (30) days' written notice of the readiness of the district to pay and the amount it desires to pay. If not presented for payment or redemption within thirty days after the date of such notice, the interest on such bonds shall cease and the amount due thereon shall be set aside for its payment whenever it is presented. All redemptions shall be made in the order of their numbers. The treasurer shall keep a record of the parties to whom the bonds are sold, together with their postoffice addresses, and notice mailed to the address as shown by such record shall be sufficient. [32 G. A., ch. 152, § 5.]

SEC. 2813. Tax to pay bonds. The board of each school corporation shall, at the same time and in the same manner as provided with reference to other taxes, fix the amount of tax necessary to be levied to pay any amount of principal or interest due or to become due during the next year on lawful bonded indebtedness which amount shall be certified to the board of supervisors as other taxes, and levied by them on the property therein as other school taxes are levied, but such tax shall not exceed five mills upon the dollar of the assessed valuation of such property for money borrowed for improvements. [18 G. A., ch. 51, § 2; 18 G. A., ch. 132, § 6; C., '73, § 1823.] [27 G. A., ch. 95, § 2.]

SEC. 2814. Repeal—schoolhouse sites—acquisition. That section twenty-eight hundred and fourteen (2814) of the code be and the same is hereby repealed and the following enacted as a substitute therefor:

"Any school corporation may take and hold so much real estate as may be required for school house sites, for the location or construction thereon of school houses, and the convenient use thereof, but not to exceed one acre, exclusive of public highway, except in a city, town or village it may include one block exclusive of the street or highway as the case may be: or in districts consolidated under the provisions of section twenty-seven hundred ninety-nine (2799) of the code, or chapter one hundred forty-one (141) of the laws of the thirty-first general assembly, or in school townships holding not more than two school sites, may consist of not to exceed four acres, for any one site, unless by the owner's consent, which site must be upon some public road already established or procured by the board of directors and shall, except in cities, towns, or villages, be at least thirty rods from the residence of any owner who objects to its being placed nearer, and not in any orchard, garden or public park." [32 G. A., ch. 153.]

Ample grounds are essential for the exercise or recreation of the children and land may be condemned for the purpose

of providing such grounds in addition to grounds for a site already secured. *Independent Sch. Dist. v. Hewitt*, 105-663.

SEC. 2815. Condemnation.

Inconvenience due to the taking of property for school purposes and naturally resulting from such appropriation, by which the market value of the premises is unfavorably affected, should be considered in determining the damages resulting from such taking. *Haggard v. Independent Sch. Dist.*, 113-486.

Benefits will not be taken into account in determining the damage to be assessed. *Ibid.*

Notice of appeal is to be given to the county superintendent in such cases instead of to the sheriff, as directed in Code § 1999. *Ibid.*

Judgment for the damage to property should not be rendered against the school district on appeal where the property has not been actually appropriated. *Ibid.*

The power to obtain the opening of public roads for better access to a school-house having been conferred upon the district, it is fairly to be implied that the district may accomplish that purpose by purchase or by any of the usual and appropriate methods, by which a public way may be established. The district may through its board of electors petition the board of supervisors for a road for the benefit of the district, and the funds of the district may be lawfully appropriated for the payment of damages assessed in such proceeding. *Certiorari* will not lie to review the action of the board of supervisors in establishing such a road. *Brockway v. Board of Supervisors*, 133-293.

SEC. 2818. Appeal to county superintendent.

A teacher seeking to recover for the breach of his contract may sue thereon and is not limited to an appeal. *Burkhead v. Independent Sch. Dist.*, 107-29.

Where a teacher sued for a breach of contract, claiming that an attempted discharge was not in accordance with the requirements of Code § 2782, and therefore invalid, held that he was not to be denied relief because he had not appealed from the illegal action of the board in attempting to discharge him. *Curtright v. Independent Sch. Dist.*, 111-20.

The right of appeal to the county superintendent does not exclude the courts from considering on an application for mandamus whether in the matter complained of the board acted within the scope of its powers as defined by statute.

Kinzer v. Independent School Dist., 129-441.

The action of a school board in determining that a pupil is a non-resident and therefore must pay tuition, cannot be reviewed by mandamus, but only by appeal to the county superintendent. *Preston v. Board of Education*, 124-355.

The legality of the incorporation of an independent school district may be questioned in an action of *quo warranto*. Appeal to the county superintendent is not the exclusive remedy. *State v. Alexander*, 129-538.

The action of a school board with reference to a matter vested in their discretion with the right of appeal to the county superintendent cannot be controlled by injunction. *Kinney v. Howard*, 133-94.

SEC. 2820. Appeal to state superintendent—no money judgment.

Where a county superintendent acts without jurisdiction, an appeal to the state superintendent cannot confer such jurisdiction, and the correctness of an order made can be contested in the courts. *School Tp. v. Independent Dist.*, 110-30.

The state superintendent does not have authority to change his decision as to the proper location of a school-house site on account of change of conditions after the rendering of his decision. *Doubet v. Board of Directors*, 111 N. W. 326.

SEC. 2820-a. Indebtedness authorized—amount. Any independent school district containing, or contained in, any incorporated town or city of the second class, of three thousand or less population shall be allowed to become indebted, for the purpose of building and furnishing a school house or houses and procuring a site therefor, to an amount not exceeding in the aggregate, two and one-half per centum of the actual value of the taxable property within such independent school district such value to be ascertained by the last county tax list previous to the incurring of such indebtedness, anything contained in section two (2) chapter forty-one (41) of the acts of the twenty-eighth general assembly notwithstanding. [30 G. A., ch. 114, § 1.]

The change of the law as to the limit of indebtedness for schoolhouse purposes may be taken into account by the board of directors in changing their action with

reference to the establishment of a school-house. *Doubet v. Board of Directors*, 111 N. W. 326.

SEC. 2820-b. Petition. Provided, that before such indebtedness can be contracted in excess of one and one-quarter per centum of the actual value of the taxable property ascertained as provided in section one (1) of this act, a petition signed by a majority of the qualified electors of such independent district, shall be filed with the president of the board of directors asking that an election shall be called, stating the purpose for which the money is to be used, and that the necessary school house or houses cannot be built and furnished within the limit of one and one-quarter per centum of the valuation. [30 G. A., ch. 114, § 2.]

SEC. 2820-c. Question submitted. The president of the board of directors on the receipt of such petition shall within ten (10) days call a meeting of the board who shall call such election fixing the time and place thereof, and give four weeks notice thereof, by publication once each week, in some newspaper published in the said town or city, or if none be published therein in the next nearest town or city in the county. At such election the ballot shall be prepared and used in substantially the following form:

For the issuance of bonds in the sum of \$————— for school house purposes.

Against the issuance of bonds in the sum of \$————— for school house purposes.

[30 G. A., ch. 114, §'3.] [31 G. A., ch. 9, § 29.]

SEC. 2820-d. Bonds. If two thirds or more of all the electors voting at such election vote in favor of the issuance of such bonds, the board of directors shall issue the same and make provision for the payment of the same and the interest thereon as provided in section twenty-eight hundred twelve (2812) and twenty-eight hundred thirteen (2813) of the code. [30 G. A., ch. 114, § 4.]

[The above section refers to section 2812 of the code. Section 2812 of the code was repealed by 29 G. A., chap. 127, and a substitute enactment passed, which in turn was repealed by 31 G. A., chap. 140, and a substitute enactment passed, which was repealed by 32 G. A., chap. 152, and a substitute enactment passed.]

SEC. 2820-e. Consolidation authorized. That in all cities of the first class containing a population of fifty thousand or over, according to any census taken by the authority or under the direction of the state of Iowa or of the United States, all the territory embraced within the corporate limits of any such city may be consolidated into and become one independent school district, known as the independent school district of (naming the city), state of Iowa, in the manner following: [32 G. A., ch. 155, § 1.]

SEC. 2820-f. Petition—question submitted—consolidation effected—board of directors—officers. When a written petition, requesting the establishment of a consolidated independent district whose territory shall be co-extensive with that of such city, signed by one hundred voters of such city, is filed with the board of the school corporation, therein having the largest number of voters, it shall be the duty of said board within ten days, to call an election, at which all the voters residing in the proposed district shall be allowed to vote by ballot for or against the proposition, "Shall all the territory within the city of (naming it) be united into one school district?" The board calling said election shall divide the territory within the proposed district into such number of precincts as the board shall determine, and the judges of election shall make and certify a return of

the vote to the secretary of the same board which shall, on the next Monday after the election, canvass the returns made to the secretary, ascertain the result of the election, declare the same and cause a record to be made thereof, and in all other respects, except as inconsistent with the provisions of this act, the election shall be conducted as provided by law for elections in independent school districts in cities of the first class. If a majority of the votes cast at such election is favorable to the proposition, the consolidation and formation of said independent district shall thereby be effected, and the board of directors, treasurer, and other officers of the school corporation then holding office in the district affected by such consolidation having the largest number of voters, shall become the board of directors, treasurer and other officers of such consolidated district, and shall continue to hold their respective offices until the terms for which they were originally elected shall expire. The terms of office of all directors, treasurers and officers of boards in all the other districts affected by this act, lying wholly within such consolidated district and holding office at the time of such consolidation, shall cease and determine, and in case of districts lying partly without such consolidated district, the directors, officers and treasurers shall continue to have authority only over the territory lying within their districts, and without the consolidated district; provided that nothing herein contained shall affect the terms of employment of superintendents, principals, or teachers for the current school year, in which such consolidation may be effected. [32 G. A., ch. 155, § 2.]

SEC. 2820-g. Taxes. All taxes previously certified during that year, shall be void so far as the property within the limits of the consolidated independent district is concerned. And all taxes necessary for the new corporation for that year shall be certified and levied as provided in section twenty-seven hundred ninety-six (2796) of the code. All property belonging to districts affected by such consolidation shall become the property of the consolidated district, except that in case of districts lying partly without such city, the liabilities and assets of such districts shall be equitably apportioned in accordance with chapter one hundred thirty-six (136), section thirteen (13) acts of the thirty-first (31) general assembly, but nothing herein contained shall affect the rights of existing creditors. [32 G. A., ch. 155, § 3.]

SEC. 2820-h. Election expense. The expense of such election shall be borne by the consolidated district, in case such district shall be formed, otherwise by the separate districts in proportion to the assessed valuation therein within the proposed consolidated district. [32 G. A., ch. 155, § 4.]

CHAPTER 14-A.

OF COMPULSORY EDUCATION.

SECTION 2823-a. Duties of parents and guardians—penalty. Any person having control of any child of the age of seven (7) to fourteen (14) years inclusive, in proper physical and mental condition to attend school, shall cause such child to attend some public, private, or parochial school, where the common school branches of reading, writing, spelling, arithmetic, grammar, geography, physiology, and United States history are taught, or to attend upon equivalent instruction by a competent teacher elsewhere than school, for at least sixteen (16) consecutive school weeks in each school year, commencing with the first week of school after the first day of September, unless the board of school directors shall determine upon a

later date which date shall not be later than the first Monday in December. Provided, that this section shall not apply to any child who lives more than two (2) miles from any school by the nearest traveled road except in those districts in which the pupils are transported at public expense, or who is excused for sufficient reasons by any court of record or judge thereof. Any person who shall violate the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not less than three (\$3) dollars nor more than twenty (\$20) dollars, for each offense. [29 G. A., ch. 128, § 1.] [30 G. A., ch. 116, § 1.]

SEC. 2823-b. Reports to secretary. Upon notice from the secretary of the school corporation within which such school is conducted, it shall be the duty of each principal of each private or parochial school, once during each school year, and at any time when requested in individual cases, and within ten days from the receipt of such notice, to furnish to such secretary a certificate and report of the names, ages and attendance of the pupils in attendance at such school during the preceding year and from the time of the last preceding report to the time at which a report is required and any person having the control of any child between seven and fourteen years of age inclusive, who shall place the same under private instruction, not in a regularly conducted school, upon receiving notice from the secretary of the school corporation, shall furnish a like certificate stating the name and age of such child and the period of time during which said child has been under said private instruction; and any person having the control of such child who is physically and mentally unable to attend school, public or private, shall furnish proofs by affidavit or affidavits as to the physical or mental condition of such child. All such certificates, reports and proofs shall be filed and preserved in the office of the secretary of the school corporation as a part of the records of his office. [29 G. A., ch. 128, § 2.]

SEC. 2823-c. Certified copies. It shall be the duty of the secretary of the school corporation to furnish to any person interested, where so requested, certified copies of all certificates contemplated by this act, on file in his office. [29 G. A., ch. 128, § 3.]

SEC. 2823-d. Truant schools. The board of directors of any school corporation may establish truant schools, or set apart separate rooms in any public school building, for the instruction of children who are habitually truant from instruction, as contemplated by this act. Such directors may provide for the confinement, maintenance, and instruction of such children in such schools, under such reasonable rules and regulations as they may prescribe. If any child, committed or sent to the truant school shall prove insubordinate and escape from such school during school hours, or absent himself or herself therefrom without the consent of the persons in charge thereof, then it shall be the duty of the person in charge of said school with the consent of the parent or guardian to file information before the judge of a court of record, who may, if the charge be found to be true and the said child be habitually vagrant, disorderly, or incorrigible commit such child to one of the industrial schools of the state, under the same proceeding as is provided by section twenty-seven hundred eight (2708) of the code, so far as the same may be applicable. [29 G. A., ch. 128, § 4.]

SEC. 2823-e. Truant officers. The board of directors of each school corporation may, and in school corporations having a population of twenty thousand (20,000) or more shall at their annual meeting in each year, appoint one or more truant officers, who shall serve for one year, and who may be a constable or a member of the police force, whose duty it shall be to report violations of this act to the secretary of the school corporation, and see to the enforcement of the provisions of this act. It shall be the duty of

said truant officer or officers to apprehend and take into custody without warrant any child of the age of seven (7) to fourteen (14) years inclusive, who habitually frequents or loiters about public places during school hours without lawful occupation, or cannot produce a certificate as provided in section two (2) hereof, also any truant child who absents himself or herself from school, and place him or her in charge of the teacher having charge of any school which said child is entitled to attend, and which school may be designated to said officers by the person having legal control of such child: Provided, however, in case the school so designated by the parent or person having the care and control of said child be a public school it shall be such as directed by the rules and regulations of the school board and the statutes of the state, and if other than a public school, the maintenance of said child in such school shall be without expense to the school corporation or state. Upon failure of such child to properly attend, or when, on report of the teacher having the custody of such child, said child is shown to not properly conduct itself in the school where placed as herein provided, the child may be removed therefrom by the board of directors and placed either in a public school or a truant school conducted in said district. The truant officer or officers shall be entitled to such compensation for service rendered under this act, as shall be fixed by the board of directors appointing him or them, which compensation shall be paid from the contingent fund of said district. [29 G. A., ch. 128, § 5.] 30 G. A., ch. 116, § 2.]

SEC. 2823-f. Enforcement. It shall be the duty of the director or president of any board of directors, or any truant officers appointed by such board of directors, to enforce the provisions of this act, to sue for and recover the penalties herein provided, and to institute criminal prosecution against any person violating the provisions of this act, and any such officers neglecting to do so within thirty (30) days after a written notice has been served upon him by any citizen of said district, or the county superintendent of the county, within which the offending person shall reside, shall himself be liable for a fine of not less than ten (\$10) dollars nor more than twenty (\$20) dollars for each offense. [29 G. A., ch. 128, § 6.] [32 G. A., ch. 154.]

SEC. 2823-g. Teachers and school officers—duties. All teachers of the public schools of the state, and county superintendents, and school officers and employes shall promptly report to the secretary of the school corporation any violations of the provisions of this act, of which they have knowledge or information, and he shall promptly inform the president of the board of directors thereof and such president shall, if necessary, call a meeting of the board of directors to take such action thereon as the facts shall justify, and any child placed in any truant school may be discharged therefrom at the discretion of the board, upon sufficient assurance of the future good conduct of such child. [29 G. A., ch. 128, § 7.]

SEC. 2823-h. Provisions for punishment. The board of directors of every school corporation is hereby authorized to provide such reasonable methods of punishment of children who are habitually truant from school, or who habitually frequent or loiter about public places during school hours without lawful occupation, as may be necessary to carry out and make effectual the provisions of this act. [29 G. A., ch. 128, § 8.]

SEC. 2823-i. School census. It shall be the duty of all officers, empowered to take the school census, to ascertain the number of children of the ages of seven (7) to fourteen (14) years, inclusive, in their respective districts, the number of such children who do not attend school, and so far as possible the cause of failure to attend school. [29 G. A., ch. 128, § 9.]

CHAPTER 14-B.

OF THE SALE AND DISTRIBUTION OF THE SCHOOL LAWS OF IOWA.

SECTION 2823-j. County auditors—requisition—duplicate receipts. On or before the fifteenth day of November of each year, the auditor of each county shall make an estimate of the number of copies of the school laws of Iowa, as will, in his judgment, be required to supply the demand for such laws in his county, in addition to the number of copies of said school laws furnished by the state as provided for in section 2624, chapter 1, title 13 of the code. The county auditor shall transmit this estimate to the superintendent of public instruction, together with a requisition for the number of copies required. On receipt of the requisition the superintendent of public instruction shall forward to the county auditor the number of copies named in the requisition. On receipt of the copies transmitted to him, the county auditor shall execute receipts therefor in duplicate, one of which he shall immediately transmit to the superintendent of public instruction and the other to the state auditor. [27 G. A., ch. 90, § 1.]

SEC. 2823-k. Sale—price. The county auditor shall keep for sale at his office in the court house of the county, copies of the school laws of the state of Iowa, which he shall receive in the manner hereinbefore provided, at a price not to exceed twenty (20) cents per copy of such laws, bound in paper and not to exceed thirty (30) cents per copy of such laws bound in cloth and pay the proceeds of such sales into the county treasury on or before the fifteenth day of November of each year. [27 G. A., ch. 90, § 2.]

SEC. 2823-l. Statement of copies sold. The said county auditor shall also on or before the fifteenth day of November of each year, make out in writing under oath, a statement of the number of copies sold by him and not before accounted for, and the number remaining on hand and the amount paid to the county treasurer, and transmit such statement to the auditor of state, who shall charge the county treasurer with such amount, and the superintendent of public instruction shall certify to the state auditor the number of copies transmitted to each county auditor; and the state auditor shall charge each county auditor therewith, and subsequently credit him with such as may be sold or otherwise lawfully disposed of. [27 G. A., ch. 90, § 3.]

SEC. 2823-m. Copies delivered to successor. When the county auditor goes out of office, having any such copies remaining, he shall deliver them to his successor, taking his receipt therefor in duplicate, one of which shall be sent to the state auditor, which shall be his sufficient discharge for the same. [27 G. A., ch. 90, § 4.]

CHAPTER 14-C.

LIBRARIES FOR THE USE OF TEACHERS, PUPILS AND OTHER RESIDENTS IN SCHOOL DISTRICTS.

SECTION 2823-n. Library fund. The treasurer of each school township and each rural independent district in this state shall withhold annually, from the money received from the apportionment for the several school districts, not less than five nor more than fifteen cents, as may be ordered by the board, for each person of school age residing in each school corporation, as shown by the annual report of the secretary, for the purchase of books as hereinafter provided. When so ordered by the board of

directors, the provisions of this section shall apply to any independent district. [28 G. A., ch. 110, § 1.]

SEC. 2823-o. Purchase of books—distribution. Between the third Monday of September and the first day of December in each year the president and secretary of the board, with the assistance of the county superintendent of schools, shall expend all money withheld by the treasurer as provided in section one of this act, in the purchase of books selected from the lists prepared by the state board of educational examiners as hereinafter provided, for the use of the school district; in school townships the secretary shall distribute the books thus selected to the librarians among the several subdistricts, and at least semi-annually collect the same and distribute others. [28 G. A., ch. 110, § 2.]

SEC. 2823-p. State board of educational examiners to prepare lists of books. It is hereby made the duty of the state board of educational examiners to prepare annually or biennially lists of books suitable for use in school district libraries, and furnish copies of such lists to each president, secretary, and each county superintendent, as often as the same shall be published or revised, from which lists the several presidents and secretaries and county superintendents shall select and purchase books. [28 G. A., ch. 110, § 3.]

SEC. 2823-q. Record book. It shall be the duty of each secretary to keep in a record book, furnished by the board of directors, a complete record of the books purchased and distributed by him. [28 G. A., ch. 110, § 4.]

SEC. 2823-r. Librarian. Unless the board of directors shall elect some other person, the secretary in independent districts and director in subdistricts in school townships shall act as librarian and shall receive and have the care and custody of the books, and shall loan them to teachers, pupils, and other residents of the district, in accordance with the rules and regulations prescribed by the state board of educational examiners and board of directors. Each librarian shall keep a complete record of the books in a record book furnished by the board of directors. During the periods that the school is in session the library shall be placed in the school house, and the teacher shall be responsible to the district for its proper care and protection. The board of directors shall have supervision of all books and shall make an equitable distribution thereof among the schools of the corporation. [28 G. A., ch. 110, § 5.]

CHAPTER 14-D.

OF THE TEACHING OF THE ELEMENTS OF VOCAL MUSIC IN THE PUBLIC SCHOOLS.

SECTION 2823-s. Instruction in vocal music authorized. That the elements of vocal music, including when practical the singing of simple music by note, be taught in all of the public schools of Iowa, and that all teachers teaching in schools where such instruction is not given by special teachers be required to satisfy the county superintendent of their ability to teach the elements of vocal music in a proper manner. Provided, however, that no teacher shall be refused a certificate or the grade of his or her certificate lowered on account of lack of ability to sing. [28 G. A., ch. 109, § 1.]

SEC. 2823-t. Normal institute. That it shall be the duty of each county superintendent to have taught annually in the normal institute the elements of vocal music. [28 G. A., ch. 109, § 2.]

CHAPTER 15.

OF THE UNIFORMITY, PURCHASE AND LOANING OF TEXT-BOOKS.

SECTION 2824. Adoption—contract—agent.

The school board has no authority to contract with a book seller and pay him out of the contingent fund for handling school books when the district has not adopted the plan of purchasing the books for sale to pupils, and payment under such an arrangement may be restrained at the suit of a taxpayer. *Ries v. Hemmer*, 127-408.

The provision as to adoption of text-books by the board of directors merely empowers the board to adopt and purchase, without indicating the manner of doing so, and is subject to the requirement of Code § 2828, relating to the purchase of text books. *McNess v. School Township*, 133-120.

SEC. 2828. Bids. Before purchasing text-books under the provisions of this chapter, it shall be the duty of the board of directors, or county board of education, to advertise, by publishing a notice, once each week, for three consecutive weeks in one or more newspapers published in the county; said notice shall state the time up to which all bids will be received, the classes and grades for which text-books and other necessary supplies are to be bought, and the approximate quantity needed; and said board shall award the contract for said text-books and supplies to any responsible bidder or bidders offering suitable text-books and supplies at the lowest prices, taking into consideration the quality of material used, illustrations, binding, and all other things that go to make up a desirable text-book; and may, to the end that they may be fully advised, consult the county superintendent, or, in case of city independent districts, with city superintendent or other competent person, with reference to the selection of text-books; *provided* that the board may reject any and all bids, or any part thereof, and re-advertise therefor as above provided. [23 G. A., ch. 24, § 5.] [31 G. A., ch. 9, § 4.]

SEC. 2829. Change—question submitted.

The statute prohibits any change in the text-books adopted by the board of directors except as authorized at a regular meeting of the electors, upon notice of the submission of such proposition. *McNees v. School Township*, 133-120.

SEC. 2831. County board of education—question as to county uniformity. The county superintendent, the county auditor and the members of the board of supervisors shall constitute a county board of education. When petitions shall have been signed by one-third the school directors in any county, other than those in cities and towns, and filed in the office of the county superintendent of such county at least thirty days before the annual school elections, asking for a uniform series of text-books in the county, then such county superintendent shall immediately notify the other members of the county board of education in writing, and within fifteen days after the filing of the petitions said board of education shall meet and provide for submitting to the electors at the next annual meeting the question of county uniformity of school text-books. [25 G. A., ch. 24, §§ 8, 9.] [28 G. A., ch. 111, § 1.]

SEC. 2832. Selection of books—depositories—distribution—itemized accounts. Should a majority of the electors voting at such elections favor a uniform series of text-books for use in said county, then the county board of education shall meet and select the school text-books for the entire county, and contract for the same under such rules and regulations as the said board of education may adopt. When a list of text-books has been so selected, they shall be used by all the public schools of said county, except

as hereinafter provided, and the board of education may arrange for such depositories as it may deem best, and may pay for said school books out of the county funds, and sell them to the school districts at the same price as provided for in section twenty-eight hundred and twenty-four of this chapter, and the money received from said sales shall be returned to the county funds by said board of education monthly. The boards of school officers, who are hereby made the judges of the school meetings, shall certify to the board of supervisors the full returns of the votes cast at said meetings the next day after the holding of said meetings, who shall, at their next regular meeting, proceed to canvass said votes and declare the result. Unless otherwise ordered by the board of education, the county superintendent shall have charge of such text-books and of the distribution thereof among the depositories selected by the board; he shall render to the board at each meeting thereof itemized accounts of his doings, and shall be liable on his official bond therefor. [25 G. A., ch. 24, § 9.] [28 G. A., ch. 112, § 1.]

SEC. 2834. Officers not to be agents.

The statute prohibits any school director from engaging on his own account in the sale of school books and supplies to pupils, and the prohibition is not limited

to directors acting as agents of the board under Code § 2824. *State v. Wick*, 130-31.

CHAPTER 16.

OF THE SCHOOL FUND.

SECTION 2841. Notice—sale. When the board of supervisors shall offer for sale the sixteenth section or lands selected in lieu thereof, or any portion of the same, or any part of the five hundred thousand acre grant, the county auditor shall give at least forty days' notice, by written or printed notices posted in five public places in the county, two of which shall be in the township in which the land to be sold is situated, and also publish a notice of said sale, once each week, for four weeks preceding the same in a newspaper published in the county, describing the land to be sold and the time and place of such sale. At such time and place, or at such other time and place as the sale may be adjourned to, he shall offer to the highest bidder, subject to the provisions of this chapter, and sell, either for cash, or one-third cash and the balance on a credit not exceeding ten years, with interest on the same at the rate of not less than six per cent. per annum, to be paid at the office of the county treasurer of said county on the first day of January in each year, delinquent interest to bear the same rate as the principal. [23 G. A., ch. 23; 18 G. A., ch. 12, § 4; C., '73, § 1846; R., § 1971.] [31 G. A., ch. 9, § 5.]

SEC. 2849. Loans. The permanent school fund shall be loaned out by the county auditor, as it comes into the hands of the county treasurer, in sums of three thousand dollars or less to one person or company, in case it is found impracticable to keep the whole amount of funds loaned in sums of five hundred dollars or less to one person or company. In the event it can be kept loaned out in sums of five hundred dollars or less to one person or company, then no loan shall exceed five hundred dollars, nor shall a loan of said fund be made to or be carried by the county auditor, treasurer or member of the board of supervisors. Each loan shall be made for at least one and not more than five years, evidenced by promissory notes bearing not less than five per cent. per annum, payable annually, and delinquent interest to draw the same rate, to be secured by a mortgage on un-

incumbered real estate, situated in the county in which the loan is made, and appraised, as hereinafter provided, for at least double the sum borrowed; the appraisal to be made by three persons under oath, selected by the county auditor, who shall not in making the valuation take into consideration the buildings upon the lands, for which service each shall be allowed fifty cents, to be paid by the borrower, who shall also pay for recording the mortgage. [23 G. A., ch. 23; 19 G. A., ch. 174, § 2; 18 G. A., chs. 1, 2, 6; C., '73, §§ 1861-3; R., §§ 1981-3.] [28 G. A., ch. 113, § 1.]

SEC. 2850. Applications—taking up incumbrances. All applications to borrow from the permanent school fund shall be made to the auditor of the county in which the land is situated which it is proposed to mortgage as security, who shall cause the proper appraisal to be made, and, if satisfactory, shall examine any abstract of title which the proposed borrower may submit, or he may cause an abstract to be prepared at such proposed borrower's expense. If the title is found to be perfect, and the lands unincumbered, he shall certify this fact and submit the application and all the papers connected therewith to the board of supervisors at its next meeting, regular or called, at which meeting the loan shall be approved or disapproved. If the application is accepted, the auditor shall complete the contract by taking a note payable to the county, and a mortgage upon the lands securing the same, and certify the same to the treasurer, who shall pay over to the borrower the amount named in the note, less a fee of two dollars to be paid to the auditor for his services in addition to his salary. The board may reject the application for any good cause. And if it shall happen that a loan is made upon real estate which is in fact incumbered other than for taxes, the board of supervisors may, when necessary for the safety of the loan, appropriate out of any school fund on hand, if such incumbrance does not exceed one-half of the real value of the lands, so much as may be needed to take up and purchase the same, and may also at any meeting, by resolution, assign without recourse, upon payment of the amount due, any school fund note and mortgage to one holding a subsequent lien upon the mortgaged real estate. [C., '73, §§ 1864, 1868-9, 1875; R., § 1984.] [32 G. A., ch. 151, § 4.]

SEC. 2855. Repeal—lands bid in—losses—interest—rents. That section twenty-eight hundred and fifty-five (2855) of the code supplement relating to the permanent school fund, be and the same is hereby repealed and the following enacted in lieu thereof:

“When lands have been bid in by the county for the state under foreclosure of school fund mortgages and the time for redemption has expired a sheriff's deed shall be issued to the state for the use and benefit of the permanent school fund. The county auditor shall thereupon notify the auditor of state who shall give the county credit for the amount of principal in the original notes remaining unpaid. All lands hereafter acquired by the state under foreclosure proceedings shall be resold within two years from date of foreclosure and all such lands heretofore acquired shall be resold on or before January 1, 1909. Such lands shall be appraised, advertised and sold in the manner provided for the appraisal, advertisement and sale of the sixteenth section or lands selected in lieu thereof. When a resale is made the county auditor shall notify the auditor of state, who shall thereupon charge the county with the full amount of the resale, except that when the lands are sold for more than the unpaid portion of the principal, the excess shall be applied to reimburse the county for the costs of foreclosure and the interest paid by the county to the state by reason of default of payment of same by the makers of the notes, previous to the time when the right of redemption has expired, not, however, to exceed three years.

Any excess over and above the amount of the unpaid portion of the principal, costs of foreclosure and interest on the principal as above provided, shall inure to the state and be credited to the permanent school fund account. If the lands shall be sold for a less amount than the unpaid portion of the principal, the loss shall be sustained by the county and the board of supervisors shall at once order the amount of such loss transferred from the general fund of the county to the permanent school fund account. County auditors shall, on or before the first day of January of each year, report to the auditor of state the amount of all sales and resales made during the year previous, of the sixteenth section, five hundred thousand acres grant, escheat estates, and lands taken under foreclosure of school fund mortgages, and the auditor of state shall charge the same to the counties with interest from the date of such sale or resale to January first, at the rate of four and one-half per cent. per annum. The auditor of state shall, also, on the first day of January, charge to each county having permanent school funds under its control, interest thereon at the rate of four and one-half per cent. per annum for the preceding year, or such part thereof as such funds shall have been in the control of the county, which shall be taken as the whole amount of interest due from each county. All interest collected above the four and one-half per cent charged by the state shall be transferred to the general county fund. If any county fails or refuses to collect the amount of interest due the state, the deficiency shall be paid to the state from the general county fund. Any county delinquent in the payment of interest due the state shall be charged one per cent per month on the amount delinquent until paid. County auditors shall, upon the first day of January of each year, report to the auditor of state the amount of rents collected during the preceding year on unsold school lands and lands taken under foreclosure of school fund mortgages then in the hands of the county treasurer, and the auditor of state shall include the amount so reported in his semi-annual apportionment of interest." [32 G. A., ch. 151, § 1.]

CHAPTER 17.

OF THE STATE LIBRARY AND HISTORICAL COLLECTIONS.

[Section 2868 of the code is alluded to in the title of chapter 173 of the acts of the 29th G. A. as being repealed by said act, but the section is nowhere referred to in the body of the act itself.]

SECTION 2869-a. Repeal. That section 2869 of the code and chapter 148 of the acts of the twenty-seventh general assembly, be and the same are hereby repealed. [29 G. A., ch. 173, § 8.]

[Chapter 148 of the acts of the 27th G. A., was amended by chapter 145 of the acts of the 28th G. A., by adding thereto the following words: "and for such other purposes as in the judgment of the library board are for the best interests of the traveling library system as operated in the state of Iowa." In repealing said chapter 148, no mention is made of the amendment.]

[Sections 2871, 2872, 2873, and 2874 of the code, are alluded to in the title of chapter 173 of the acts of the 29th G. A., as being repealed by said act, but the same are nowhere mentioned in the body of the act itself.]

SEC. 2881. Repeal. Section two thousand two hundred eighty-one (2881) of the code, and section two thousand eight hundred eighty-one-f (2881-f) of the supplement to the code, and section six (6) of chapter one hundred fourteen (114) of the acts of the twenty-eighth general assembly, are hereby repealed. [32 G. A., ch. 156, § 1.]

[For substitute for this section see section 2881-f, *infra*.
The above section did not repeal section 2881 of the code supplement, but said section has been omitted herefrom as repealed.]

CHAPTER 17-A.

CONSOLIDATION OF THE MISCELLANEOUS PORTION OF STATE LIBRARY WITH THE HISTORICAL DEPARTMENT.

SECTION 2881-a. Consolidation—board of trustees. That the board of trustees of the Iowa state library and the board of trustees of the Iowa historical department be, and the same are hereby, empowered and directed to consolidate the miscellaneous portion of the Iowa state library (exclusive of the law section), or so much thereof as shall be regarded by said board as advisable, with the historical department; the aforesaid consolidation to take effect on the first day of January, nineteen hundred and one, or at any such later date as said trustees may direct; and that on and after January first, nineteen hundred and one, the board of trustees of the Iowa state library and the board of trustees of the Iowa state historical department shall cease to exist as such, and the aforesaid boards shall, by this act, become the board of trustees of the state library and the historical department of Iowa, and the newly constituted board shall thereafter be charged with all the duties and responsibilities imposed upon the boards aforesaid and possess all the powers thereof. [28 G. A., ch. 114, § 1.]

SEC. 2881-b. State librarian—curator—assistant librarian—reports. That after such consolidation the state librarian shall have general charge of the historical department and of the consolidated and law libraries. The curator of the museum and art gallery shall have charge of the museum, the art gallery, the newspapers, and historical periodicals. The assistant to librarian shall have charge of the law library, under the direction of the state librarian. The above officers shall serve out the terms for which they shall have been appointed, at the expiration of which their successors shall be appointed by the board of trustees, and shall hold their respective offices for the term of six (6) years. The state librarian shall submit to the governor biennially a report giving the history of said consolidated libraries for the preceding two years, accompanied by a like report by the curator of the museum and art gallery. [28 G. A., ch. 114, § 2.]

SEC. 2881-c. Furniture and fixtures. The executive council is authorized to procure the furniture and fixtures made necessary by such consolidation and pay for the same out of any money in the state treasury not otherwise appropriated. [28 G. A., ch. 114, § 3.]

SEC. 2881-d. Assignment of rooms. The board of trustees shall have the control of the respective departments above named, and shall assign rooms to be occupied by each of said officers. [28 G. A. ch. 114, § 4.]

SEC. 2881-e. Appropriations. There shall be annually appropriated, from any money in the state treasury not otherwise appropriated, the sum of ten thousand dollars for the use of the state library and historical department and museum, and the sum of four thousand dollars for the separate use of the law department, the money to be expended under the direction of the board of trustees of the state library and historical department; and the existing appropriations of five thousand dollars for the state library and six thousand dollars for the historical department shall be discontinued upon the consolidation aforesaid. [28 G. A., ch. 114, § 5.] [31 G. A., ch. 143.]

SEC. 2881-f. State librarian—curator—assistant librarian—salaries. From and after the taking effect of this act the salary of the state librarian shall be the sum of two thousand four hundred dollars (\$2,400) per annum; of the curator of the museum and art gallery the sum of one thousand six hundred dollars (\$1,600) per annum, and of the assistant to librarian the sum of one thousand eight hundred dollars (\$1,800) per annum. [32 G. A., ch. 156, § 2.]

SEC. 2881-g. Other assistants—salaries. As assistants (in addition to the curator of the museum and art gallery and the assistant to librarian) the state librarian may employ one first assistant at an annual salary of one thousand one hundred dollars (\$1,100); one second assistant at an annual salary of one thousand dollars (\$1,000); and one third assistant at an annual salary of nine hundred dollars (\$900). [32 G. A., ch. 156, § 3.]

SEC. 2881-h. Bonds. The state librarian shall give bond in the sum of five thousand dollars (\$5,000), and the curator of the museum and art gallery and the assistant to librarian shall each give bond in the sum of one thousand dollars (\$1,000), conditioned upon the faithful performance of their respective duties and a full and accurate accounting of all moneys coming into their hands in virtue of their respective offices. Said bonds shall be approved by the board of trustees of the state library and historical department. [32 G. A., ch. 156, § 4.]

SEC. 2881-i. Salaries—how paid. The salaries provided for in this act shall be paid in monthly installments out of any money in the state treasury not otherwise appropriated. [32 G. A., ch. 156, § 5.]

SEC. 2881-j. Custody of public archives. That for the care and preservation of the public archives the state library and historical department of Iowa are hereby given the custody of all the original public documents, papers, letters, records and other official manuscripts of the state executive and administrative departments, offices or officers, councils, boards, bureaus and commissions, ten years after the date or current use of such public documents, papers, letters, records or other official manuscripts. Provided, that the executive council shall have the power and authority to order the transfer of such records or any part thereof at any time prior to the expiration of the limit of ten years hereinbefore provided or to retain the same in the respective offices beyond such limit according as in the judgment of the council the public interest or convenience may require. [31 G. A., ch. 142, § 1.]

SEC. 2881-k. Repeal—transfer and delivery of public archives. That section 2 of said act be repealed and the following enacted in lieu thereof:

“That the several executive and administrative departments, officers or offices, councils, boards, bureaus and commissioners are hereby authorized to transfer and deliver to the executive council for arrangement, classification, labeling, filing and calendaring, and then to the state library and historical department for preservation such of the public archives as are designated in section one (1) of this act except such as in the judgment of the executive council should be longer retained in the respective offices.” [32 G. A., ch. 157, § 1.]

[The title of this act refers to chapter 142 of the laws of the 31 G. A.]

SEC. 2881-l. Repeal—state library and historical department authorized to receive archives. That section 3 of said act is hereby repealed, and the following enacted in lieu thereof:

“That the state library and historical department is hereby authorized and directed to receive from the executive council such of the public

archives as are designated in section one (1) of this act as rapidly as the same are properly arranged, classified, labeled, filed and calendared." [32 G. A., ch. 157, § 1.]

[The title of this act refers to chapter 142 of the laws of the 31 G. A.]

SEC. 2881-m. Hall of public archives. That for the care and permanent preservation by the state library and historical department of the public archives hereinbefore designated, the executive council is hereby authorized and directed to provide, furnish and equip such room or rooms in the historical memorial and art building (now in process of erection) as may be deemed necessary for the purposes of this act, and the room or rooms thus provided for shall be known as the hall of public archives. [31 G. A., ch. 142, § 4.]

SEC. 2881-n. Repeal—appropriation—how expended. That section 5 of said act is hereby repealed and the following enacted in lieu thereof:

"That for carrying out the purposes of this act there is hereby appropriated out of any moneys in the state treasury not otherwise appropriated the sum of six thousand dollars (\$6,000) annually for two years beginning July 1, 1907, to be expended under the direction of said executive council." [32 G. A., ch. 157, § 1.]

[The title of this act refers to chapter 142 of the laws of the 31 G. A.]

CHAPTER 18.

OF THE STATE HISTORICAL SOCIETY.

SECTION 2882-a. Annual appropriation—purposes. That there be and is hereby appropriated to the state historical society of Iowa, out of any money in the state treasury not otherwise appropriated, the sum of seven thousand five hundred dollars (\$7,500), annually hereafter as permanent support: For the continued publication of The Iowa Journal of History and Politics; for the continuation of the compilation and publication of the messages and proclamations of the governors of Iowa; for the collection, compilation and publication of documentary materials, relating to the history of Iowa, including such of the archives of the state and territory of Iowa as are of historical importance; for the publication of historical monographs, biographies, essays, lectures, bibliographs and indexes; for the proper maintenance of the library of the society, the collection and purchase of publications bearing upon Iowa and American history, and the proper classifying, cataloging and indexing of such material; for the carrying out of a systematic and scientific anthropological survey of the state; for conducting public lectures of an historical character; and for meeting the incidental and other necessary expenses incurred in connection with the prosecution of the work of the said state historical society of Iowa, as indicated in this act and title XIII, chapter 18, section 2882 of the code. [30 G. A., ch. 117, § 1.]

SEC. 2882-b. How paid. That the permanent annual appropriation herein provided for shall take the place and be in lieu of all other permanent annual appropriations heretofore made to the state historical society of Iowa, and the same shall be paid in quarterly installments on the order of the board of curators of the said state historical society of Iowa, the first installments to be paid July 1st, 1904. [30 G. A., ch. 117, § 2.]

CHAPTER 18-A.

LIBRARY COMMISSION AND FREE PUBLIC SCHOOL LIBRARIES.

SECTION 2888-a. State library commission — term — chairman. The governor shall appoint four persons, at least two of whom shall be women, who, with the state librarian and superintendent of public instruction and president of the state university, shall constitute a state library commission. The first members appointed by the governor shall be appointed for terms of two, three, four and five years from the first day of July, 1900, and all subsequent appointments shall be for terms of five years, except appointments to fill vacancies. The commission shall annually elect a chairman. [28 G. A., ch. 116, § 1.]

SEC. 2888-b. Repeal. That sections two (2), three (3), four (4) and five (5) of chapter one hundred sixteen (116) acts of the twenty-eighth general assembly be and the same are hereby repealed, and that the following be substituted therefor. [29 G. A., ch. 173, § 1.]

SEC. 2888-c. Duties of commission. The commission shall give advice and counsel to all free and other public libraries, and to all communities which may propose to establish them, as to the best means of establishing and maintaining such libraries, the section of books, cataloging, and other details of library management. It may print such lists and circulars of information as it shall deem necessary and as approved by the executive council. It may also conduct a summer school of library instruction, a clearing house for periodicals for free gift to local libraries and perform such other public service as may seem to it for the best interests of the state. [29 G. A., ch. 173, § 2.]

SEC. 2888-d. Traveling libraries. The state library board shall transfer to the Iowa library commission all associate and traveling libraries belonging to the state, and the said library commission is authorized to accept the same; and it shall be the duty of said commission to operate the said associate and traveling libraries, also to properly equip and circulate the books thus acquired, or subsequently purchased to be loaned within the state to libraries, schools, colleges, universities, library associations, farmers' institutes, granges, study clubs, charitable and penal institutions and individuals, free of cost except for transportation, under such conditions and rules as shall protect the interests of the state and best increase the efficiency of the service it is expected to render the public. [29 G. A., ch. 173, § 3.]

SEC. 2888-e. Secretary—assistants — duties — expenses — office. Said commission shall employ a secretary not of its own number, who shall serve at the will of the commission, and under such conditions as it shall determine. It may also employ such other assistants as shall be requisite in the performance of the work of the commission as set forth in sections two (2) and three (3) and number of assistants and their salaries and the salary of the secretary shall be fixed by the committee on retrenchment and reform. It shall be the duty of said secretary to keep a record of the proceedings of the commission; to keep accurate accounts of its financial transactions, and to act under the direction of the commission in supervising the work of the traveling libraries, in organizing new libraries and improving those already established, and in general to perform such other duties as may be assigned him by the commission. In addition to his salary he shall be allowed his necessary traveling expenses while absent from his office in the service of the commission, the same to be verified and certified and paid in the same manner as other expenses incurred by the commission. Said commission to have its office in the state library with storage and shipping

room in the basement of the capitol. The work in connection with the associate libraries shall be conducted by the library commission. [29 G. A., ch. 173, § 4.]

SEC. 2888-f. Biennial report. The secretary of the commission shall make a full report to the governor on library conditions and progress in Iowa on July first, nineteen hundred three (1903), with sketches of the free public libraries and illustrations of such library buildings as said commission may deem expedient; two thousand (2,000) copies of this report shall be printed, one thousand (1,000) of which shall be bound in cloth and biennially thereafter a like report shall be made to the governor, two thousand (2,000) copies of which shall be printed, one thousand (1,000) of the same to be bound in cloth, these reports to be printed and bound by the state the same as other public documents, and to be distributed under the direction of the commission, and such other printing and binding provided by this act shall be done by the state when allowed by the executive council. [29 G. A., ch. 173, § 5.]

SEC. 2888-g. Reports from libraries. The commission shall each year obtain from all free public libraries reports showing condition, growth, development and manner of conducting said libraries, and shall obtain reports from other libraries in the state at their discretion, and shall furnish annually to the secretary of state such information for publication in the Iowa official register as may be deemed of public interest. [29 G. A., ch. 173, § 6.]

SEC. 2888-h. Expenses—appropriation. No member of the commission shall ever receive any compensation for service as a member, but the traveling expenses of members in attending meetings of the commission or in visiting or establishing libraries; and other incidental and necessary expenses connected with the work of the commission, shall be paid, including the necessary expense in the maintenance and extension of the traveling library system, provided that the whole amount of said expense and salaries shall not exceed the sum of six thousand (\$6,000) dollars in any one year, not more than three thousand five hundred (\$3,500) dollars of said sum to be used in the payment of salaries and expenses of the commission and secretary. All bills incurred by the commission or by its members under the law shall be certified by the president and secretary of the commission to the state auditor, who shall issue warrants therefor upon the state treasury, and there is hereby annually appropriated from any funds in the state treasury not otherwise appropriated the sum of six thousand dollars (\$6,000) to carry into effect the provisions of this act, and any balance not expended in any one year may be added by the commission to the expenditure for any ensuing year. All accounts and bills for expenses of the secretary and members of the commission and all bills for expenditures by the commission, shall be itemized and verified and be audited and allowed by the executive council before being paid. [29 G. A., ch. 173, § 7.]

PART SECOND.

PRIVATE LAW.

TITLE XIV.

OF RIGHTS OF PROPERTY.

CHAPTER 1.

OF THE RIGHTS OF ALIENS.

SECTION 2889. Non-resident aliens — acquiring and holding real estate.

A right to inherit cannot be derived from a parent who has died a non-resident alien and who would on that account not have been entitled to the property if living. *Meier v. Lee*, 106-303.

SEC. 2889-a. Real property. That all corporations organized under the laws of any foreign country, and corporations organized under the laws of any state of the United States, one-half of whose stock is owned and controlled by non-resident aliens, shall have the right to own, hold, and dispose of any real property owned or held by any such corporations on the fourth day of July, 1888, or any real property acquired by any such corporations under the provisions of section six (6) of chapter eighty-five (85) of the laws of the twenty-second general assembly, or section twenty-eight hundred and ninety (2890) of the code. Provided, however, that any such corporation shall sell or dispose of any such property now owned by it within ten years from the taking effect of this act, and in default of such sale or disposition the provisions of sections twenty-eight hundred and ninety-one (2891), twenty-eight hundred and ninety-two (2892) and twenty-eight hundred and ninety-three (2893) of the code shall be applied thereto. [28 G. A., ch. 117, § 1.]

SEC. 2889-b. Bona fide contract. A *bona fide* contract for the sale of any such lands owned by any such corporation shall be held and considered as a sale within the provisions of the preceding section, and a good and valid deed of conveyance may be made by such corporation at any time upon the fulfillment of such contract by the purchaser of any such lands. [28 G. A., ch. 117, § 2.]

SEC. 2889-c. Sales, contracts, deeds, and conveyances legalized. All sales, contracts, deeds, or conveyances of lands owned by any such corporation on the fourth day of July, eighteen hundred and eighty-eight (1888), or acquired by any such corporation under the provisions of section six (6) of chapter eighty-five (85) of the laws of the twenty-second general assembly or section twenty-eight hundred and ninety (2890) of the code, bearing date on or after the fourth day of July, eighteen hundred and eighty-eight (1888), are hereby legalized and rendered of full force and effect, according to their terms, in so far as their validity or the validity of the titles conveyed thereby may be affected by chapter eighty-five (85) of the laws of the twenty-second general assembly, or any amendments thereto, or by chapter one (1), title fourteen (XIV) of the code. [28 G. A., ch. 117, § 3.]

CHAPTER 2-A.

OF SALE OF ABANDONED RIVER CHANNELS, SAND BARS OR ISLANDS, BOUNDARY COMMISSION.

SECTION 2900-a1. Repeal. That chapter one hundred and eighty-five (185) of the acts of the thirtieth general assembly be and the same is hereby repealed and the following enacted in lieu thereof: [31 G. A., ch. 212, § 1.]

SEC. 2900-a2. Sale authorized. That all land between high water mark and the center of the former channel of any navigable stream, where such channel has been abandoned, so that it is no longer capable of use, and is not likely again to be used, for the purposes of navigation, and all land within such abandoned river channels, and all bars or islands in the channels of navigable streams not heretofore surveyed or platted by the United States or the state of Iowa, and all within the jurisdiction of the state of Iowa shall be sold and disposed of in the manner hereinafter provided. [31 G. A., ch. 212, § 1.]

SEC. 2900-a3. Written applications—by whom made. It shall be the duty of the county auditor to file written application with the secretary of state, asking that certain land located within the county be surveyed, appraised and sold, whenever he is satisfied that such land is of the character contemplated by section one (1) of this act. If the county auditor fails or neglects to make such application, then any person desiring to purchase such land may file a written application with the secretary of state, asking that the said land be surveyed, appraised and sold. The said application whether made by the county auditor or by a person desiring to purchase the land, shall contain an accurate description thereof, stating whether the land is abandoned river channel, or land within such abandoned river channel, or an island or a sand bar in a navigable stream, and giving the number of township and range in which it is located, and the section numbers if possible, and also the estimated acreage. [31 G. A., ch. 212, § 2.]

SEC. 2900-a4. Survey. Upon receiving such application, it shall be the duty of the secretary of state to order a complete survey of such land to be made by the county surveyor of the county wherein the land is situated, and in case of the refusal or inability of such county surveyor to make such survey then the secretary of state shall appoint some other competent surveyor to make such survey. When such survey is made a full report thereof, with field notes, shall be filed with the clerk of the state land office, which report and field notes shall constitute the official survey of such land. [31 G. A., ch. 212, § 3.]

SEC. 2900-a5. Appraisalment. Upon the filing of such report, with the accompanying field notes, the secretary of state shall thereupon appoint a commission of three disinterested freeholders of the county wherein the land is situated, to view the land and make appraisalment of the value thereof, which appraisalment shall be returned and filed with the clerk of the state land office in the office of the secretary of state. The secretary of state, if he deems it necessary, may either go in person or send the clerk of the state land office into the county to make proper selection of the said commissioners, and the necessary expenses of such trip shall be paid in the manner hereinbefore provided. [31 G. A., ch. 212, § 4.]

SEC. 2900-a6. Fees. The surveyor making such survey shall be entitled to receive the sum of five dollars per day for his services as such surveyor and such additional amount as may be agreed upon and necessary for the services of chainmen and other attendants and other necessary expenses, the commissioners, for their services in making such appraisalment shall each be entitled to receive five dollars per day, for the actual time employed. [31 G. A., ch. 212, § 5.]

SEC. 2900-a7. Sale—how effected—rights of bona fide occupants. Such lands shall be sold in the following manner: Any person who has in fact lived upon any such land and occupied the same, as a home, continuously for a period of three or more years immediately prior to the time of the appraisalment thereof, and such occupancy has been in good faith for the purpose of procuring title thereto whenever by law such title could be vested in him by purchase from the proper authority, or any person who has acquired possession of such land by inheritance, or by purchase made in good faith from a former occupant, or occupants, whose occupancy dates back over a period of three years prior to the date of appraisalment of the land, shall have first right to purchase such land at the appraised value; provided such *bona fide* occupant shall file his application for the purchase thereof at the appraised value with the secretary of state within sixty (60) days after the day the appraisalment is made, and shall accompany such application with affidavits showing proof of such *bona fide* occupancy. If no application has been filed with such *bona fide* occupant within the sixty (60) day period above provided, then the secretary of state shall advertise the sale of such land once each week for four consecutive weeks in two newspapers of general circulation published in the county wherein the land is situated, and proof of publication shall be filed with the secretary of state. The sale shall be made upon written bids addressed to the secretary of state and the advertisements shall fix the time when such bids will be received and opened. All bids shall be opened by the secretary of state or by the clerk of the state land office at the time fixed, and the land thereupon may be sold to the highest bidder and at not less than the appraised value. [31 G. A., ch. 212, § 6.]

SEC. 2900-a8. Lease authorized—lands re-advertised—sale. If no application is filed for the purchase of the land within the sixty (60) day period by a *bona fide* occupant, and if no bids are received for the purchase thereof, on or before the date of the sale as advertised, then the secretary of state is authorized to lease the land for a period of from one to five years, upon as favorable terms as he can obtain. At the expiration of such lease he shall re-advertise the land for sale in the manner provided in section six (6) hereof. If no bids for the purchase of the land are received on the date of the second advertised sale, then the secretary of state shall submit the matter to the executive council, and they may either order the land re-appraised in the manner provided in section four (4) hereof, and then advertised and sold in the manner provided in section six (6) hereof, or

if they deem it advisable, they may authorize the secretary of state to sell the land for less than the appraised value. In such event the secretary of state shall re-advertise the land for sale in the manner provided in section six (6) hereof, and such advertisement shall also state that the land will be sold to the highest bidder without restrictions as to the appraised value. [31 G. A., ch. 212, § 7.]

SEC. 2900-a9. Deed or patent. When, upon full compliance with the conditions of this act, any person shall become entitled to a deed or patent for any land, a deed or patent shall thereupon be executed and delivered to such person by the governor, on behalf of the state, duly attested with the seal of the state attached thereto, which deed shall, in addition to the usual formalities, also recite the name of the party making application to have the land surveyed, appraised and sold, the date and the amount of the appraisement, the name of the party making final payment and entitled to a deed therefor, whether as *bona fide* occupant or as highest bidder, and also that such deed is given for the purpose of conveying such title and interest in the land as the state may at the time own and possess, and has the right to convey. A record of such conveyance shall be made and kept by the clerk of the state land office of the secretary of state. [31 G. A., ch. 212, § 8.]

SEC. 2900-a10. Previous survey. Whenever any such land shall be found to have been previously surveyed under and by virtue of any order of a court of record, and the record of such survey has been duly made and preserved, then and in that event, in the discretion of the secretary of state, a duly certified transcript of such record, together with the field notes accompanying the same, if obtainable, may be filed with the clerk of the state land office in the office of secretary of state, and when so filed shall obviate the necessity for any further survey of such land except when such survey becomes necessary for the purpose of execution of conveyance thereof, and the record of such transcript, when filed, shall constitute the official survey of such land. [31 G. A., ch. 212, § 9.]

SEC. 2900-a11. Boundary commission. If in any proceeding contemplated by the provisions of this act, it shall become necessary to determine the boundary line between the state of Iowa and either of the states adjoining, the matter shall then be at once referred to the executive council, who shall thereupon proceed to confer with the proper authority of such adjoining state, and if the co-operation of the proper authority of such adjoining state, shall be obtained, then the executive council shall appoint a commission of three disinterested, competent persons, who shall, in conjunction with the parties acting for such adjoining state, have authority to ascertain and locate the true boundary line between the state of Iowa and such adjoining state, so far as the particular land under consideration at the time, is concerned. The report of the commissioners with a statement of their findings shall be submitted to the executive council, who shall file the same with the clerk of the state land office in the office of the secretary of state. The line so ascertained and located shall constitute the true and permanent boundary line between the state of Iowa and such other state to the extent such line shall be so ascertainable and located. [31 G. A., ch. 212, § 10.]

SEC. 2900-a12. Commission — how constituted — compensation. The members of the commission shall be selected with reference to their fitness for the duties required and at least one of them shall be a competent surveyor and civil engineer. They shall receive for their services such amount as the executive council may deem reasonable, to be certified by the executive council to the auditor of state, who shall draw his warrant for the amount, and the same shall be paid out of the general fund. [31 G. A., ch. 212, § 11.]

SEC. 2900-a13. Purchase money refunded—when. If the grantee of the state, or his successors, administrators, or assigns, shall be deprived of the land conveyed by the state under this act by the final decree of a court of record for the reason that the conveyance by the state passed no title whatever to the land therein described, because title thereto had previously for any reason been vested in others, then the money so paid the state for the said land, shall be refunded by the state to the person or persons entitled thereto, provided the said grantee, or his successors, administrators or assigns, shall file a certified copy of the transcript of the said final decree with the executive council within one year from the date of the issuance of such decree, and shall also file satisfactory proof with the executive council that the action over the title to the land was commenced within ten (10) years from the date of the issuance of patent or deed by the state. The amount of money to be refunded under the provisions of this section shall be certified by the executive council to the auditor of state, who shall draw his warrant therefor, and the same shall be paid out of the general fund. [31 G. A., ch. 212, § 12.]

SEC. 2900-a14. Sales and leases for cash. All sales and leases of land under the provisions of this act shall be for cash. All money received for such sales and leases shall be paid into the state treasury by the secretary of state. [31 G. A., ch. 212, § 13.]

SEC. 2900-a15. Expenses of survey, appraisement and advertising—how paid. The expenses of the survey and the appraisement, the expenses of the secretary of state or the clerk of the state land office in making the trip into the county to select the commissioners to appraise the land, the expenses of advertising and re-advertising for sale of the land, and the expenses of re-appraising whenever such re-appraisement is deemed necessary, shall be certified by the secretary of state to the auditor of state, who shall draw his warrant for the amount, and the same shall be paid out of the general fund. [31 G. A., ch. 212, § 14.]

SEC. 2900-a16. Lands in possession of person or corporation for ten or more years—how sold. Provided, however, if any lands in the present or in any former channel of any navigable river, or island therein, or any lands formed by accretion or avulsion in consequence of the changes of the channel of any such river, have been for ten years or more in the possession of any person, company or corporation, or of his or its grantors or predecessors in interest under a *bona fide* claim of ownership, and the person, company or corporation so in possession, or his or its grantors or predecessors in interest, have paid state or county taxes upon said lands for a period of five years, and have in good faith and under *bona fide* claim of title, made valuable improvements thereon, and also in any other case where, in the judgment of the executive council, the person in possession of any land subject to the provisions of this act, has, in equity and good conscience, a substantial interest therein, then the said lands shall be sold to the person, company or corporation so in possession thereof as herein-after provided. [31 G. A., ch. 212, § 15.]

SEC. 2900-a17. Notice—action to determine title and value—patent. When any person, company or corporation so in possession of any such lands shall give to the secretary of state written notice of his or its claim, or whenever the executive council shall deem it advisable, it shall be the duty of the attorney general to bring an action in equity, in the district court of the county in which said lands are situated, against the party in possession thereof to determine the title of the state to such lands, and the value thereof, exclusive of improvements made thereon by the occupant or by his or its grantors or predecessors in interest. If the person, company

or corporation in possession of such land shall, after the court has determined the value thereof as herein provided, tender to the secretary of state the amount adjudged to be the value of said lands, exclusive of improvements made thereon by the occupant or by his or its grantors or predecessors in interest, a deed or patent of such land shall be executed by the governor, attested by the secretary of state, and delivered to the person, company or corporation making such tender, as provided by law. If the person, company or corporation so in possession shall fail to pay to the state the amount so adjudged within six months after the final determination of the action so brought by the state, then said lands shall be subject to the other provisions of this act. [31 G. A., ch. 212, § 16.]

SEC. 2900-a18. Applications under former law — deposit money refunded. All applications for the purchase of any such lands, filed under the provisions of chapter one hundred and eighty-five (185) of the acts of the thirtieth general assembly, shall, if the applicants so desire, stand as applications under this act, and such land shall, unless the same fall within the provisions of sections fifteen (15) and sixteen (16) hereof, be appraised and sold as herein provided. If the land described in any application is covered by the provisions of sections fifteen (15) and sixteen (16) of this act, and notice thereof is given to the secretary of state as provided in section sixteen (16) hereof, no deed or patent of such land, or any part thereof, shall be executed or issued until the title thereto shall have been established by the court as herein provided. If the party making such application, or his assignee, does not desire to prosecute his application, or if he does not purchase the land under this act, then all of the money deposited by him with the secretary of state under the provisions of chapter one hundred and eighty-five (185) of the acts of the thirtieth general assembly, shall be repaid to said applicant by the secretary of state; and if any part of the money so deposited has been expended by the secretary of state, then the amount so expended shall be certified by the secretary of state to the auditor of state, who shall draw his warrant upon the general fund in favor of the person entitled thereto. [31 G. A., ch. 212, § 17.]

CHAPTER 2-B.

OF MEANDERED LAKES AND LAKE BEDS.

SECTION 2900-a19. Survey and sale authorized—canals. The executive council of the state is hereby authorized and empowered to survey the meandered lakes and lake beds within this state, and sell the same as hereinafter provided, and to determine what lakes shall be maintained as the property of the state and what meandered lake beds belonging to the state may be drained, improved, demised or sold, and to grant authority to construct, equip and maintain canals between any of such lakes so maintained, where the public convenience requires it, said grant to be for such time and upon such terms as it may determine. [30 G. A., ch. 186, § 1.] [32 G. A., ch. 196.]

SEC. 2900-a20. Signed statements—survey—report. Upon the presentation to the executive council of a statement signed by not less than fifty (50) freeholders, twenty of whom shall be actual residents of the township or townships in which said lake or lake beds are situated, of any county that any meandered lake or lake bed in such county is detrimental to the public health or the general welfare of the citizens of the county, and that it is unwise to maintain such meandered lake or lake bed as a permanent

body of water, and that the interest of the state will be subserved by draining and improving such lake bed, the governor shall, within thirty (30) days after the receipt of such statement, appoint a competent engineer who shall at once examine the situation and condition of such lake or lake bed, make a survey and plat thereof, and ascertain whether its location is such that it can be drained and improved, and make a full report to the executive council of the area and depth of water in the lake and of its general physical condition, which report shall be accompanied by his plat, field notes and profile of his survey. [30 G. A., ch. 186, § 2.]

SEC. 2900-a21. Hearing—commissioner—notice. Upon receipt of the report of the engineer, the executive council shall determine whether such lake or lake bed shall be maintained and preserved as the property of the state, or whether the same shall be drained, improved and the land included within the meander lines thereof sold in the manner hereinafter specified; and to that end they may hear evidence upon any question involved in such determination at such time and place within the county, or within the counties if more than one, as may be fixed by the council, and may appoint a commissioner to take evidence in the county or counties, if more than one, in which the lake or lake bed is located, or at such other place or places within the state as may be directed by the executive council; and notice of the time and place of hearing by the council or by such commissioner shall be published once each week for four consecutive weeks in some newspaper within the county, or in a newspaper within each of the counties if more than one, where the lake or lake bed is located, the last publication being at least ten (10) days prior to the day fixed for such hearing. The compensation of such commissioner shall be fixed by the executive council, which compensation and the cost of the publication of such notice shall be paid from the state treasury upon the order of the council. [30 G. A., ch. 186, § 3.]

SEC. 2900-a22. Preservation or sale—drainage. If the executive council shall determine that such lake or lake bed ought not to be drained, demised or sold, the same shall be kept and maintained as the property of the state for the benefit of the general public. If the executive council shall determine that it is to the interest of the state and the general public that the lake or lake bed, as to which the statement is presented, be drained, improved, demised or sold, it may permit the same to be drained under the provisions of the drainage law of the state, and the land included within the meander lines of such lake, which belongs to the state, shall bear its just proportion of the expense of draining such lake and shall be assessed for such expense in the same manner as the lands of private individuals are permitted to be assessed under the drainage laws of the state. [30 G. A., ch. 186, § 4.]

SEC. 2900-a23. Power to sell and convey—deed or patent. When ever the executive council shall determine that any lake or lake bed within the state should be drained, improved, demised or sold, it shall have the right, either before or after such lake or lake bed is drained, to sell and convey by deed or patent the land lying within the meander lines of such lake or lake bed and which belongs to the state; and express authority is hereby given to the executive council to make such sale or sales for and in behalf of the state and to execute and deliver to the purchaser of such land the necessary deed or patent to insure to him title thereto, which deed or patent shall be executed by the governor in behalf of the state, and have the seal of the state attached thereto. But no sale of any of the lands composing any of the lake beds of the state shall be made by the executive council until a complete survey thereof has been made and the same sub-divided

to correspond with the government sub-divisions of public land. [30 G. A., ch. 186, § 5.]

SEC. 2900-a24. Appraisement. After such lake or lake bed has been surveyed and the land composing the same sub-divided as hereinbefore required, and a plat of such survey filed with the secretary of state, and the county auditor of the county in which said lake or lake bed is situated, the lands belonging to the state which lie within the meander lines of the original government survey, and composing the lake beds, shall be appraised by a commission appointed by the governor, consisting of three (3) disinterested freeholders of the state, one of whom shall be a resident of the county in which the land is situated, who shall examine and appraise said land, and return a written report of such appraisement to the governor, which report shall be filed in the office of the secretary of state. [30 G. A., ch. 186, § 6.]

SEC. 2900-a25. Sale—abutting land owners—grantee of county deemed bona fide purchaser—conveyance to counties—when. After the report of the appraisers has been received and filed in the office of the secretary of state, the executive council shall offer the land belonging to the state and composing such lake bed, and included in such survey and appraisement, for sale, and the persons owning lands abutting upon such lake bed and contiguous to lands owned by the state therein, shall have the first right to purchase the lands offered for sale by the state, in an amount sufficient to make the lands owned by them which abut upon the lake or lake bed and are contiguous to lands of the state, conform to the smallest government sub-divisions of public lands, at the price fixed by the appraisers. All other lands included in such survey and composing the lake bed belonging to the state, which may be sold under the provisions hereof, shall be sold for the highest price obtainable; but no sale of any of said land shall be made at less than the appraised value thereof. Provided, however, that in any case where it is made to appear to the executive council by a duly certified copy of the deed, certified to by the recorder of deeds and the county auditor of the county in which the lake or lake bed is situated, and by the sworn statement of the present owner, that the board of supervisors of the county in which such lake or lake bed is situated has heretofore, in good faith, sold and conveyed by deed, any lake or lake bed in such deed named, specified and described, to a *bona fide* purchaser who has paid to the county the reasonable value of such lake or lake bed, and who has heretofore paid taxes or made valuable improvements in such lake bed; then and in such case the governor shall execute, or cause to be executed, to the county in which such lake or lake bed is situated, a deed or patent, under the seal of the state, conveying to said county all the right, title and interest of the state of Iowa in and to such lake or lake bed, and the title so conveyed shall enure to the grantee of such lake or lake bed, holding the same under title derived from the county in which such lake or lake bed is situated, in the manner in this section provided. Any person or corporation to whom any county of this state has heretofore conveyed or attempted to convey any lake or lake bed in aid of, or because of the construction of any work of internal improvement, and which improvement was in fact constructed, shall be considered a *bona fide* purchaser who has paid to the county the reasonable value of such lake or lake bed within the meaning of this section, although in describing the said lake or lake bed in such conveyance apt words of description were not used and the said lake or lake bed was described as an unsurveyed portion or a numbered section of land, this amendment shall be operative notwithstanding any proceedings heretofore had under this chapter, provided an actual sale of said lake or lake bed involved, has not been

made by the executive council prior to the passage of this act. [30 G. A., ch. 186, § 7.] [32 G. A., ch. 197.]

SEC. 2900-a26. Cash sales—expenses. All sales of land under this act, except as otherwise provided in section seven of this act, shall be for cash, and the purchase price thereof shall be paid to the secretary of state and by him paid over to the state treasurer. All expenses of the survey of the lakes and lake beds herein provided for and the appraisement thereof, and all assessments made against the lands belonging to the state for draining such lakes or lake beds, shall be audited by the executive council and by it certified to the auditor of state and paid out of the general fund of the state treasury upon the warrant of the auditor of state. [30 G. A., ch. 186, § 8.]

SEC. 2900-a27. Net proceeds. After deducting all costs and expenses connected with the survey, appraisement, drainage and sale of said lands, the net proceeds derived from the sale thereof shall be transmitted by the treasurer of state to the county treasurer of the county in which the land is situated, and the county treasurer to whom such proceeds are transmitted shall execute his receipt in duplicate for the same to the treasurer of state, and one of such receipts shall be filed in the office of the county auditor in the county where the land is located. The money received by the county treasurer shall be placed to the credit of the county road fund and expended under the direction of the board of supervisors in the same manner as other road funds. [30 G. A., ch. 186, § 9.]

CHAPTER 2-C.

OF ISLANDS IN THE WATERS OF THE STATE.

SECTION 2900-a28. Sale or lease authorized. That the executive council of the state be, and it is hereby, authorized and empowered to sell, convey, lease or demise any of the islands belonging to the state which are within the meandered banks of rivers in the state, and to execute and deliver a patent or lease thereof. Provided that nothing in this act shall be construed to apply to islands in the Mississippi or Missouri rivers. [30 G. A., ch. 187, § 1.]

SEC. 2900-a29. Survey—appraisement—sale advertised—written bids. Before a sale of any island is made under the provisions of section one (1) hereof, the executive council shall cause a survey and plat of such islands to be made, showing its location and area, and the plat and notes of such survey shall be filed with the secretary of state. The land composing the island shall then be appraised by a commission appointed by the governor, consisting of three (3) disinterested freeholders of the state, who shall report their appraisal to the executive council. The sale of the island shall then be advertised once each week for four consecutive weeks in some newspaper of general circulation published in the county where the island is located, and proof of such publication filed with the executive council. The sale shall be made upon written bids addressed to the executive council of the state, and the advertisement shall fix the time when such bids will be received and opened. All bids shall be opened by the executive council at the time fixed, and the island may thereupon be sold to the highest bidder and at not less than its appraised value. [30 G. A., ch. 187, § 2.]

SEC. 2900-a30. Lease—written bids. If it shall be deemed expedient to lease any such island, a lease thereof may be made upon written bids

addressed to the executive council, and the island proposed to be leased shall be surveyed and platted, and notice of the leasing thereof and of the receiving and opening of bids shall be published, in the manner provided in section two (2) hereof, but no appraisalment shall be necessary. Upon the opening of the bids received by the executive council it may make a lease of such island to the highest bidder for such term as is deemed advisable. [30 G. A., ch. 187, § 3.]

SEC. 2900-a31. Sales and leases for cash—expenses. All sales and leases must be for cash, and the money received therefor shall be paid into the state treasury. All expenses incurred in making the survey, plat, appraisalment, sale or lease of any such island shall be certified by the executive council to the auditor of state, who shall draw his warrant upon the state treasury for the amount, and the same shall be paid from the general fund. [30 G. A., ch. 187, § 4.]

SEC. 2900-a32. Patent or lease. When any sale or lease of any island belonging to the state is made by the executive council as herein provided, the governor shall execute and deliver to the purchaser or lessee a patent or a lease thereof, as the case may be, duly attested by the seal of the state of Iowa. [30 G. A., ch. 187, § 5.]

CHAPTER 3.

OF PERPETUITIES AND GIFTS.

SECTION 2901. Disposition of property.

A railroad lease for a long term of years is not void under the statutory provisions against perpetuities. *Sioux City Terminal R. & W. Co. v. Trust Co.*, 82 Fed. 524; *First Nat. Bank v. Sioux City Terminal R. & W. Co.* 69 Fed. 441.

A restraint on alienation in violation of the statutory provision is invalid; but the language relied on as imposing such condition will be so construed if possible as to make it consistent with the grant. *Hubbird v. Goin*, 137 Fed. 822.

SEC. 2904-a. Acceptance of gifts, devises, or bequests authorized. Gifts, devises or bequests of property, real or personal, made to any state institution for purposes not inconsistent with the objects of such institution, may be accepted by its governing board, and such board may exercise such powers with reference to the management, sale, disposition, investment or control of property so given, devised or bequeathed, as may be deemed essential to its preservation and the purposes for which the gift, devise or bequest was made. [31 G. A., ch. 144.]

CHAPTER 4.

OF THE TRANSFER OF PERSONAL PROPERTY.

SECTION 2905. Conditional sales—recording.

Where a cash register was sold with a condition that the title should not pass to the purchaser until payment therefor was made, and there was no recorded instrument evidencing such sale, held that an attachment levied on the register and other property of the purchaser took priority over the title of the seller. *National Cash Register Co. v. Broeksmit*, 103-271.

A reservation of the title to the property by the vendor without recording is not valid as against a subsequent mortgagee without notice, although the subsequent mortgage is not recorded. *Union Bank v. Creamery Package Mfg. Co.*, 105-136.

Prior to the enactment of this statutory provision, it was held that an innocent purchaser of the property from one in

possession under a contract for conditional sale acquired no title thereto as against the original owner, unless the transaction was fraudulent. And under the statute, if the instrument is duly acknowledged and recorded, the purchaser acquires no title as against the original vendor, although the vendee has made an absolute contract to pay for the property, and has given notes for part of the purchase price. *National Cash Register Co. v. Zangs*, 127-710.

The instrument should be signed by the vendor or lessor; this is the plain provision of the statute. *National Cash Register Co. v. Schwab*, 111-605.

This section refers to sales which are to take effect on a condition to be performed by the vendee, and not to those conditioned on performance of some agreement by the vendor. *Davis Gasoline Engine Works Co. v. McHugh*, 115-415.

A conditional sale, such as is referred to in this section, involves delivery to the vendee as owner with reservation to the vendor of the title only for the purpose of security. Where the contract provides that there shall be no delivery until payment, the mere fact that the agent of the seller gives possession to the buyer for a temporary purpose does not bring the case within the provisions of the statute. Possession cannot be relied on as sufficient evidence of title. *Gaar v. Nichols*, 115-223.

To constitute a conditional sale, within the terms of the statute as to recording instruments evidencing such sale, there must be a delivery of possession to the purchaser with the intention of passing immediate ownership, subject only to the reservation of title to the seller as security for the purchase money. If the contract is conditional as to the transfer of ownership to the vendee, so that, on his failure to perform the condition no right as owner has passed to him, and no definite obligation to pay the purchase price has accrued, then the transaction is not a conditional sale, within the meaning of the

statute. In such a case the vendee has only an executory and conditional agreement to purchase, and until he exercises his right under such agreement, he remains simply a bailee. *Donnelly v. Mitchell*, 119-432.

The fact that the purchaser from the conditional vendee is at the time of advancing the money already in possession will not defeat his right to protection as against an unrecorded conditional sale. *Rock Island Plow Co. v. Maynard Sav. Bank*, 123-640.

The seller of goods under a contract of conditional sale, reserving the title until the goods are paid for, may by intervention reclaim the goods before the performance of the condition from an assignee for the benefit of creditors, without previous demand. *In re Assignment of Wise*, 121-359.

In such case, if a note has been given to the seller, for the purchase price, the value of the goods reclaimed by him should be credited thereon, and the balance may be proved as a claim against the insolvent estate. Under such circumstances the recording of the instrument of conditional sale is immaterial. *Ibid.*

An unrecorded instrument of conditional sale being void as against the creditors of the buyer without notice, the property sold passes to the trustees in bankruptcy. *In re Tweed*, 131 Fed. 355.

While a general creditor having no lien upon the property is not protected by the recording act, the assignee in bankruptcy may assert the claims of such creditor against the mortgagee. The provisions of the bankrupt act preserve for the equal benefit of all the creditors of the bankrupt the same rights in and to property held by him that any one of them might have acquired therein by purchase from or seizure or sale under judicial process against him if bankruptcy proceedings had not ensued. *In re Smith*, 132 Fed. 301.

Section applied. *Thomson v. Smith*, 111-718.

SEC. 2906. Sales or mortgages—recording.

Change of possession: It is the retention of actual possession by the vendor or mortgagor without the recording of the written instrument evidencing the transaction which renders it invalid as to subsequent levy of attachment or execution, and in case of property not capable of immediate actual delivery the question is not to what extent there has been a manual act of transfer from the vendor to the vendee, but whether, at the time of the levy, the vendor still retains the possession which had previously been in him as owner of the property. *Peycke v. Hazen*, 119-641.

Possession in third person: This section does not apply where the property at the time of sale or mortgage is not in the possession of the vendor or mortgagor. Possession may be taken by symbolical delivery, as by the turning over of the key to the premises where the property is kept. *Frank v. Levi*, 110-267.

Where the mortgagor of household goods, who resided in another state, the mortgage not being recorded, rented a room in the place in this state, where she intended to reside, and stored the goods therein, held that the goods were in her possession and therefore subject to attach-

ment by an officer levying execution thereon under a judgment against her, and not in the possession of the person from whom the room was rented so as to render recording unnecessary. *Young v. Evans*, 118-144.

Fraud: Under the circumstances of a particular case, held that mortgagees used reasonable dispatch in causing their mortgages to be filed for record and that therefore they were not guilty of fraud, although the mortgages were not recorded before credit was extended to the mortgagor. *Spencer Co. v. Papach*, 103-513.

Withholding from record does not alone render the mortgage fraudulent, nor is it fraudulent to provide in the mortgage that the mortgagor shall retain possession, sell at retail, and keep up the stock. *Ward v. Parker*, 128-124.

The taking of a mortgage upon property worth much more than the amount of the debt secured does not of itself render the mortgage void. *Ibid.*

The act of a creditor in withholding from record a chattel mortgage securing his debt, by agreement with the mortgagor, until the bankruptcy of the latter, while it may render the mortgage invalid as a lien as against subsequent creditors without notice, does not of itself affect his right to prove his debt in bankruptcy nor subordinate it to the claims of subsequent creditors. *In re Ewald*, 135 Fed. 168.

Innocent purchaser: A mortgagee under a mortgage to secure a pre-existing debt is not protected *Flannigan v. Alt-house*, 56-513; *Meyer v. Evans*, 66-179.

Where the mortgagee on the execution of the mortgage to secure an antecedent debt grants an extension of time on the debt secured he becomes entitled to protection under the recording laws. *Union Bank v. Creamery Package Mfg. Co.*, 105-136.

A person cannot unlawfully seize the mortgaged property and then transform himself into an innocent purchaser thereof by an *ex parte* cancellation of a debt due him from the owner. *Iowa Loan Co. v. Kimball Piano Co.*, 124-150.

Existing creditors: Failure to record a mortgage will not render it invalid as to a creditor whose claim antedates the giving of the mortgage. *Garner v. Fry*, 104-515.

A mortgagee whose mortgage is not recorded until after the death of the mortgagor is postponed to the claims of the prior creditors, and the administrator of the mortgagor in the interest of such creditors whose claims have been filed with him, may subject the property to the payment of such claims in priority to the lien of the mortgagee. *Blackman v. Baxter*, 125-118.

Actual notice: Notice to an agent, even

though by information brought to his knowledge before the beginning of his agency, will be presumed to have been retained for a reasonable time. *McClelland v. Saul*, 113-208.

Priority in recording is not material. The question under the recording act is whether the mortgage prior in time is recorded before rights of others without notice thereof have accrued. *Nicholson v. Aney*, 127-278.

An attaching creditor taking with actual notice is not protected against an unrecorded mortgage. Notice is sufficient if such as to put a reasonable man upon inquiry which would certainly lead to the knowledge or discovery of the rights of the mortgagee. *Aultman & Taylor Mach. Co. v. Kennedy*, 114-444.

The burden is on the party claiming as against an unrecorded chattel mortgage to show that he took without notice. *Diemer v. Guernsey*, 112-393.

One who takes a mortgage from one in possession acquires priority over a vendee of the property under a prior sale which is not recorded, in the absence of actual notice of such sale. *Martin v. Lesan*, 129-573.

The burden is upon the vendee in such case to show actual notice to the mortgagee. *Ibid.*

A creditor whose claim antedates the execution of the mortgage must obtain a lien as by attachment or other levy upon the mortgaged property before notice actual or constructive of the mortgage in order to be protected against it on account of failure to record. *Murphy v. Murphy*, 126-57.

A mortgagee accepting his mortgage with knowledge of a condition imposed for the benefit of other mortgagees is bound by such condition, and cannot question the validity of the prior mortgage. *First National Bank v. Reid*, 122-280.

Description: A defective description may be cured by a subsequent delivery of the property to the mortgagee as against persons who have not acquired any right or interest before such delivery. *Kelley v. Andrews*, 102-119.

Where the chattel mortgage described several mares "and all increase of said mares and the increase of the increase," held, that such description included future increase of the animals described and not merely the increase in existence at the time of the execution of the mortgage. *Hopkins Fine Stock Co. v. Reid*, 106-78.

In determining whether particular articles are covered by a chattel mortgage on a stock of goods under the head of furniture and fixtures, the situation of the parties and all the surrounding circumstances may be considered in determining the intent. *Brody v. Chittenden*, 106-524.

In such case held that jewelers might

be asked as witnesses to state whether regulators were regarded by the trade as part of the stock or as fixtures or as tools. *Ibid.*

The term "furniture" used in a chattel mortgage of a stock of jewelry may cover implements and instruments used in the business. *Ibid.*

For the purpose of sufficiently describing certain animals to be selected from a large number, it is not sufficient to allege merely characteristics common to the animals to be described and others, and if the essential distinction, such as a peculiar mark or brand, is not established, the description is not sufficient. *Packers' National Bank v. Chicago, M. & St. P. R. Co.*, 122-503.

Therefore held that a general description accompanied with the designation of a particular brand was not sufficient to constitute notice, it appearing that the brand had not been placed upon the animals at the time when it was important for the purchaser to know which animals were covered by such mortgage. *Ibid.*

No sufficient description is afforded by the sweeping statement to the effect that the instrument is intended as a conveyance to the mortgagee of all the property that the mortgagor has, or all that he ever expects to have, and the record of such conveyance does not impart notice to a purchaser of the property. *Farmers & Merchants Bank v. Stockdale*, 121-748.

The description of property in a chattel mortgage to be sufficient as against third persons having constructive notice only must be such as that the property can be identified by reference to the instrument itself, aided by such inquiries as may be indicated or directed thereby. *Ibid.*

Where there is no statement as to possession, ownership or location of the property, but only an enumeration of items, the description is insufficient to impart constructive notice. *Iowa Lumber Co. v. Cassidy*, 107-564.

Where the mortgage named certain items of property, and indicated by its provisions that the mortgagor was the owner of an interest in the property, and that it was located in the county where it was recorded, held that the description was sufficient to impart record notice. *Preston v. Caul*, 109-443.

In order that the record of a chattel mortgage be constructive notice the description of the property must be sufficiently definite so that one examining the record may be able from such description to ascertain the property with reasonable certainty. *Westinghouse Co. v. McGrath*, 131-226.

And held that a description which gave only the location of the property as within the county and the name of the owner of the property and its general character,

but did not specify the particular location nor the possession of such property was not sufficient. *Ibid.*

The description in a chattel mortgage of "25 acres of corn hereafter to be grown in Franklin county" held not to be sufficient as against a purchaser without actual notice. *Farmers & Merchants Bank v. Stockdale*, 121-748.

A description in a chattel mortgage of "one hundred and one yearlings and two-year-olds, branded with the letter F on left hip," held sufficient to warrant the introduction of parol evidence to show that the description was used with reference to certain animals intended by the parties to be covered by the mortgage. *Frick v. Fritz*, 115-438.

Whether or not the instrument on its face contains sufficient description to identify any property is always a question for the court; but whether or not, being sufficient in law, it is sufficient to cover the property in dispute where extrinsic evidence shows some mistake in the description is a question for the jury under proper instructions. *Livingston v. Stevens*, 122-62.

Whether certain property, corresponding to the description in the mortgage, was intended to be included is for the jury, while it is for the court to say whether the description is sufficient to impart notice of such an intention to third persons. *Chipman v. Weiny*, 112-702.

The whole description should be considered in determining whether or not a third person aided by the inquiry which the instrument itself suggests would be enabled to identify the property. It is error for the court to instruct that a defect or inaccuracy in the description is immaterial. *Packers' National Bank v. Chicago, M. & St. P. R. Co.*, 114-621.

Priority: Where sale of machinery was made to a tenant on condition that it should be set up on the premises, and a chattel mortgage given for the purchase price when accepted, held that the chattel mortgage took priority over the landlord's lien, although not recorded until some days after the machinery was set up and accepted. *Davis Gasoline Engine Co. v. McHugh*, 115-415.

The rights of a chattel mortgagee without notice of a prior unrecorded mortgage are superior to those of the holder of the prior mortgage, although possession thereunder was taken before the recording of the subsequent mortgage, and the prior mortgagee will not be given preference on the ground that he was a creditor. *Sheets v. Poff*, 123-714.

Books of account: No record is required of the assignment of books of account which are turned over to the assignee. *Preston v. Peterson*, 107-244.

Where possession in such case was

delivered to the assignee, held that subsequent possession by the assignor for a temporary purpose would not render the sale invalid for want of recording. *Ibid.*

When recording necessary: An unrecorded mortgage is not invalid as between the parties. *Aultman & Taylor Mach. Co. v. Kennedy*, 114-444.

A contract with reference to a stock of goods which did not provide for any lien thereon or transfer of title thereto, held not to be within the terms of the recording law. *Clement v. Swanson*, 110-106.

Waiver of lien: Parol evidence is competent to establish as against the mortgagee in favor of the purchaser of the mortgaged property a system or course of dealing authorized by the mortgagee inconsistent with the provisions of the mortgage, and waiving the mortgagee's lien. *Livingston v. Stevens*, 122-62; *Livingston v. Heck*, 122-74.

The assignee of an unrecorded mortgage cannot maintain an action for conversion against one claiming under the mortgagor through a sale made in good faith with consent of the mortgagee and without notice actual or constructive of the assignment. *Farmer v. Bank of Graettinger*, 130-469.

Residence: The residence of the mortgagor where the chattel mortgage is to be recorded may be different from his legal domicile. Therefore held that a mortgage given by a railroad contractor on property in his possession in a county where he was at work, and in which he actually resided with his family while engaged in performing his contract was properly recorded in such county, although his residence there was only for a temporary purpose. *In re Brannock*, 131 Fed. 819.

Recording in another state: Recording

of a chattel mortgage in North Dakota, where the mortgagor resides, held to be of no effect with reference to property covered by the mortgage situated in this state. *Aultman & Taylor Mach. Co. v. Kennedy*, 114-444.

As a general rule the law of the place where the property is situated at the time of the transfer governs the validity of the mortgage under the recording acts. *Ibid.*

Wife joining: A mortgage on one of three teams of horses, any one of which might be claimed as exempt from execution, is valid without the joinder of the wife therein. The acts of the husband in executing the mortgage constitute an election to claim one of the other teams rather than the team mortgaged as exempt. *Grover v. Younie*, 110-446.

A chattel mortgage on exempt property is not valid unless signed both by the owner and his wife. *Nicholson v. Aney*, 127-278.

Conceding that a mortgage of exempt property signed by the husband alone may afterwards be ratified and confirmed by the wife, such ratification will not relate back to the prejudice of intervening credits, lien holders or purchasers. *Nicholson v. Aney*, 127-278.

Whether an assignment of wages exempt from execution for a debt of the assignor must be in writing concurred in and signed by the wife of the assignor under the provision of Code § 2906 requiring encumbrances of exempt personal property to be so executed, *quaere*. *Peterson v. Ball*, 121-544.

An assignment of exempt earnings without the wife's consent is not prohibited by the requirement that she shall join in chattel mortgage of exempt property. *Dowling v. Wood*, 125-244.

CHAPTER 5.

OF REAL ESTATE.

SECTION 2912. Who deemed seized.

The owner of real property is presumed to be in possession thereof until adverse

possession has been taken by another. *Britt v. Gordon*, 132-431.

SEC. 2913. Estate in fee simple.

A fee may be created without the use of the word "heirs," and where a conveyance was made to the wife without limitation in the granting clause, but with a subsequent condition that the property was for her sole use and that she was not to have

the privilege of deeding or mortgaging it, held that the granting clause vested in the wife a fee title, and that the condition was void as a restraint upon alienation. *Teany v. Mains*, 113-53.

SEC. 2914. Conveyance passes—grantor's interest.

A remainderman who has a possibility coupled with an interest which may at some future time ripen into an estate, has

such interest as will support a conveyance by him to another. *McDonald v. Bayard Sav. Bank*, 123-413.

SEC. 2915. After-acquired interest.

Under a warranty deed a title subsequently acquired by the grantor inures to the grantee. *Hays v. Marsh*, 123-81.

SEC. 2916. Property in adverse possession of another.

Possession is not essential to the validity of a lease. *Beck v. Minnesota & Western Grain Co.*, 131-62.

SEC. 2917. Future estates.

An estate may be created, to begin in the future, and the grant of such an estate, while it passes no present title, does pass a present interest. *Lewis v. Curnutt*, 130-423.

While estates may be created to commence at a future day, the title is and

must be in some one at all times. *Wales v. Sammis*, 120-293.

Estates may be created by devise to commence at a future day, and a vested remainder may be supported by an estate for years. *Shafer v. Tereso*, 133-342.

SEC. 2918. Declarations of trust.

Express trusts: An express trust cannot be shown by parol evidence. *Hays v. Marsh*, 123-81; *Ostenson v. Severson*, 126-197.

In the absence of documentary evidence of an express trust it cannot be established. *Hoon v. Hoon*, 126-391.

Deeds which recite consideration as paid cannot be shown by parole to create a trust in favor of the grantor as against the grantee. *Byerly v. Sherman*, 126-447.

A deed reciting a consideration in hand paid cannot by parol evidence be converted into an instrument creating a trust. *Willis v. Robertson*, 121-380.

The requirement that an express trust must be evidenced in writing has no reference to trusts in personal property. *In re Estate of Fisher*, 128-18.

A trust of personal property may be established by parol. *Meritt v. Torrance*, 129-310.

An agreement by a mortgagee taking title to the property at foreclosure sale that he will reconvey on payment of the amount due under the mortgage amounts to the creation of an express trust which cannot be established by parol. *Donaldson v. Empire Loan & Inv. Co.*, 130-467.

An agreement to take title by sheriff's deed by way of security for an indebtedness is not an agreement for an express trust which must be in writing but it gives rise to a resulting or constructive trust. *McElroy v. Allfree*, 131-112.

Section applied. *Gregory v. Bowsby*, 115-327.

Resulting trust: The theory of a resulting trust is that he who supplies the purchase money intends it to be for his own benefit and not for that of another and that the conveyance is taken in the name of another as a matter of convenience or arrangement between them. If two or more advance the price and the deed is taken in the name of one only, a

trust will result in favor of the other for a share proportionate to the part of the price paid. Payment to raise a trust *pro tanto* must be for an aliquot part of the property. The burden being on the party alleging the trust to clearly establish it, the evidence must show that payment for an aliquot part was intended. *Culp v. Price*, 107-133.

A father paying the purchase price of land, the title being taken in his son's name, has a resulting trust therein unless the money paid is by way of advancement. But before the legal title will be disturbed the resulting trust must be established by clear and satisfactory evidence, and the presumption that the law raises that the conveyance is by way of advancement must be overcome by proof to the contrary intention. *Ibid.*

The father's testimony as to his intention is competent in such a case as are also his declarations made at the time. The fact that the son has already been provided for and that the father and other children are left unprovided for may also be taken into account. *Ibid.*

Evidence that the consideration for a conveyance was to be furnished after it was delivered will not show a resulting trust. *Burkhardt v. Burkhardt*, 107-369.

Where the trustee or other fiduciary buys property in his own name, but with trust funds, a resulting trust arises under the operation or construction of law. *Williams v. Williams*, 108-91.

Constructive trusts: An express agreement creating a trust cannot be proven by parol evidence, and the breach of an express promise to hold title for another will not constitute fraud on which a court of equity will build up a constructive trust. *Andrew v. Andrew*, 114-524.

An express trust in real estate cannot be established by parol evidence, and the breach of an express trust created by

parol as to real estate will not of itself constitute fraud on which a court of equity will build up a constructive trust. *Heddleston v. Stoner*, 128-525.

Mere breach of an express promise or refusal on the part of an alleged trustee to execute the trust reposed in him, however reprehensible, will not be sufficient to remove the bar of the statute and allow a trust in realty to be established by parol evidence. *Newis v. Topfer*, 121-433.

But this rule does not apply where it is made to appear that fraud has entered into the transaction. *Ibid.*

While an express trust cannot be established by oral evidence it is competent to

show fraud in a conveyance by taking advantage of confidential relations existing between members of a family so as to give rise to a constructive trust. *Gregory v. Bowsby*, 126-588.

Testamentary transactions: This provision appears to relate to transactions other than those of a testamentary nature. *Moran v. Moran*, 104-216.

Parol evidence is admissible to affix a trust to an unconditional devise only where it shows that the devisee by fraud induced the testator to make the devise on the representation that the devisee would take in trust for another who was the real object of the bounty. *Ibid.*

SEC. 2919. Conveyances by married women.

This section does not authorize the execution by the wife to the husband of a power of attorney, authorizing him to convey her contingent dower interest in his property. *Sawyer v. Biggart*, 114-489.

The wife may control or contract with reference to her property in the same man-

ner as other persons, and held that a quitclaim by the wife to the grantee of her husband claiming under a deed in which the wife did not join was effectual to cut off the wife's contingent right of dower. *Fowler v. Chadima*, 111 N. W. 808.

SEC. 2922. Title and possession of mortgagor.

Lawful possession of the premises by the mortgagee can only be obtained by the consent, express or implied, of the mortgagor who is deemed to hold the legal title. *Boggs v. Douglass*, 105-344.

The grantor in a conveyance which is found to be a mortgage is entitled to possession and ownership of the crops until

the expiration of the statutory period for redemption, after a decree determining the nature of his rights. *Harrington v. Foley*, 108-287.

In this state a mortgage does not create an estate, but simply a lien or charge upon the land to secure the debt. *Adams v. Holden*, 111-54.

SEC. 2923. Tenancy in common.

Conveyances or devises to two or more create a tenancy in common unless a contrary intent is expressed. *Gilmore v. Jenkins*, 129-686.

A conveyance to two or more gives rise to a tenancy in common and not to a general tenancy. *Anderson v. Acheson*, 132-744.

A conveyance to husband and wife cre-

ates a tenancy in common. *Bader v. Dyer*, 106-715.

One of several tenants in common can maintain an action of forcible entry and detainer against a lessee. The possession of one tenant is presumed to be in support of the common title of all. *Willis v. Weeks*, 129-525.

SEC. 2924. Vendor's lien.

The mere taking of a note for the purchase price does not waive the vendor's lien. In order to so operate it must be shown by a clear preponderance of the evidence that such was the express agreement of the vendor. *Zook v. Thompson*, 111-463.

The vendor executing a voluntary con-

veyance without any agreement for a consideration, is not entitled to a vendor's lien for the purchase price. *Ostenson v. Severson*, 126-197.

This section has no reference to one who takes property subject to a vendor's lien. *Owen v. Higgins*, 113-735.

SEC. 2924-a. Rule in Shelley's case abolished. The rule or principle of the common law known as the "rule in Shelley's case" is hereby abolished and is declared not to be a part of the law of this state. [32 G. A., ch. 159, § 1.]

SEC. 2924-b. Estate not enlarged. No express devise, bequest or conveyance of an estate for life or other limited estate in real or personal prop-

erty shall be enlarged or construed to pass any greater estate to the devisee, legatee, or grantee thereof by reason of any devise, bequest or conveyance to the heirs, heirs of the body, children, or issue of such devisee, legatee or grantee, provided that the passage of this act shall not in any manner or under any circumstances be so construed as to impair or affect the vested rights of any person in or to any lands or estates acquired prior to the taking effect hereof. [32 G. A., ch. 159, § 2.]

CHAPTER 6.

OF THE CONVEYANCE OF REAL ESTATE.

SECTION 2925. Recording.

Effect of recording: An instrument which is not in fact signed by the grantor nor acknowledged by him is not properly or lawfully recorded and imparts no notice and no one has a right to rely upon the fact that he apparently signed such instrument. *Sherod v. Ewell*, 104-253.

In searching the records of titles the searcher should go back of the day and hour at which the evidence of title in the holder in question was filed for record and examine the title with reference to any conveyance and incumbrance by such holder after the date of the conveyance under which he holds title. *Higgins v. Dennis*, 104-605.

Therefore, the searcher of title is charged with notice of an incumbrance recorded on the same day as and prior to the record of the conveyance by which title was acquired by the person executing such incumbrance, provided the incumbrance was executed after the actual execution of the conveyance. *Ibid.*

The law takes no notice of fractions of days with reference to the execution of deeds and mortgages where the order of their execution does not appear. *Ibid.*

Subsequent purchasers: An attaching creditor is not a subsequent purchaser for value. An unrecorded deed or other instrument creating a lien will take precedence over a subsequent attachment and a purchaser at judicial sale is bound to take notice of all instruments recorded up to the date of the same. *Rea v. Wilson*, 112-517.

Even though an unrecorded mortgage by mistake does not describe the land intended to be covered thereby, still the judgment lien is not entitled to priority over the unrecorded mortgage. Such priority accrues only in favor of the purchaser at judicial sale without notice of the mortgage. *Ibid.*

An attaching creditor is not a purchaser, but takes only the interest which his debtor had in the land at the time of attachment. Consequently an unrecorded

deed or prior equity takes precedence over his attachment. But a purchaser at judicial or sheriff's sale, whether he be the judgment creditor or a stranger, is a purchaser, and is generally protected from prior unrecorded deeds or equities. *Bush v. Herring*, 113-158.

A pre-existing indebtedness is a valuable consideration for the execution of a mortgage as between the parties and all others having no equitable interest in the property at the time of its execution. *Ibid.*

While the recording of a deed is not essential as against an attaching creditor, its delivery is. *Parlin, O. & M. Co. v. Martin*, 111-640.

An execution purchaser of an heir's interest in realty does not acquire priority over the right existing against the heir to deduct advancements from such interest. *Pinckney v. Collie*, 114-441.

A subsequent purchaser is not bound to look beyond the property index for information as to conveyances, and if the index shows none, there is no constructive notice. *Koch v. West*, 118-468.

One who pays money for a sheriff's certificate of sale becomes a purchaser entitled to protection under the recording acts. *Ibid.*

Inadequacy of consideration alone is not sufficient to defeat the claim of one who is otherwise entitled to protection as a purchaser. *Ibid.*

The term "subsequent purchasers" is used to describe purchasers claiming under a common grantor. One who has commenced an action affecting the title is not, by reason of the provision of Code § 3543 relating to *lis pendens*, entitled to protection as a subsequent purchaser as against an unrecorded deed. *Noyes v. Crawford*, 118-15.

A judgment creditor is not a purchaser under the recording act. *Foster v. Hobson*, 131-58.

The assignee of an ordinary judgment stands, as a rule, in no better position than his assignor with reference to un-

recorded instruments. But an assignee of a mortgage which has gone to foreclosure may stand in a better position. *Raymond v. Whitehouse*, 119-13.

For valuable consideration: A mortgagee in a mortgage executed to secure a pre-existing debt is not a *bona-fide* purchaser entitled to priority of lien over a prior unrecorded mortgage on the property. *Smith v. Moore*, 112-60.

The mere fact of failure to record can only be taken advantage of by a creditor who has changed position or extended credit on the strength of apparent ownership in the grantor. *Atkinson v. McNider*, 130-281.

Without notice: Although one who takes by quit-claim deed is not an innocent purchaser, and is charged with notice of equities, yet one who takes from such purchaser by warranty deed for value is not affected by outstanding equities of which he had no notice. *Hannan v. Seidentopf*, 113-658.

The burden of proof is upon the purchaser claiming in hostility to an unrecorded deed to show that he was a purchaser for value without notice. *Ibid.*

Possession by a tenant is notice, not only of his own rights, but of the rights of the landlord. *Ibid.*

One who acquires title to property is bound to know not only the rights of those in possession, but also the fact of such possession. *Ibid.*

A claim of a tenant in common for contribution on account of expenses with reference to the common property is not chargeable against a purchaser of the co-tenant's interest without notice, unless by reason of the possession of the tenant who has incurred such expense, notice is implied. *Rippe v. Badger*, 125-725.

By acquiescence and silent admission the mortgagee whose mortgage is not recorded tacitly represents to any one acquiring an interest in the property that the mortgagor is the owner of the title, free from incumbrance, and a subsequent purchaser for a consideration does not have the burden of proving want of actual notice. Under such circumstances it is for the mortgagee to show notice to the subsequent purchaser of the prior unrecorded mortgage. *Walter v. Brown*, 115-360.

The rule that a person holding a conveyance by quitclaim is bound to take notice of defects in his grantor's title does not apply to a purchaser in good faith from one who takes by conveyance in fraud of creditors. *Klay, Admr., v. McKellar*, 122-163.

SEC. 2926. Acknowledgment.

The unsupported testimony of the person whose acknowledgment is duly certified by a proper officer, that no such acknowledgment was made, is not suffi-

cient to overcome the presumption in favor of the certificate. *Swett v. Large*, 122-267.

SEC. 2930. Entries of transfers—or transcript. Whenever a deed of unconditional conveyance of real estate or transcript as provided in section four thousand two hundred and fifty-nine (4259) is presented, the auditor shall enter in the index book, in alphabetical order, the name of the grantee, and opposite thereto the number of the page of the transfer book on which such transfer is made; and upon the transfer book he shall enter in the proper columns the name of the grantee, the grantor, date and character of the instrument, the description of the real estate, and the number or letter of the plat on which the same is marked. [C., '73, § 1951.] [27 G. A., ch. 106, § 2.]

SEC. 2935. Repeal—indexes. That section twenty-nine hundred and thirty-five (2935) of the code be and the same is hereby repealed and the following enacted in lieu thereof:

The recorder must keep index books, the pages of which are so divided as to show in parallel columns:

1. Each grantor;
2. Each grantee;
3. The time when the instrument was filed;
4. The date of the instrument;
5. The nature of the instrument;
6. The book and page where the record thereof may be found;
7. The description of the real estate conveyed;

Separate index books shall be kept for mortgages and satisfactions or releases of same; one for those containing descriptions of lots, and one for

those containing lands; and separate books for other conveyances of real estate; one for lots, and one for lands. Also he shall keep an index book for powers of attorney and affidavits as provided for in section twenty-nine hundred fifty-seven (2957) of the code. All of above indexes to be arranged alphabetically in accordance with section twenty-nine hundred thirty-seven (2937) and indexed inversely in name of grantee, and in case of affidavits each and every affidavit filed for record shall be indexed in appropriately ruled columns as follows:

Affidavit.	Concerning Whom.	Concerning Lands in.							Remarks.
		Lot	Blk.	Addi-tion	Town	Sec.	Twp.	Rng.	

Affiant.	Date of Filing.					Date of Instrument.			Where Recorded	
	Month	Day	Year	Hour		Month	Day	Year	Book	Page
				A. M.	P. M.					

[32 G. A., ch. 158.]

A subsequent purchaser is not bound to look beyond the property index for information as to conveyances, and if the

index shows none, there is no constructive notice. *Koch v. West*, 118-468.

SEC. 2938. How recorded.

In matters relating to the record of title one may rely upon the public records as written, and the doctrine of *idem sonans* is not applicable where the initial letters which govern the indexing are not

the same; but that doctrine may be relied on to overcome a difference of spelling in other portions of the name. *Boyd v. Boyd*, 128-699.

SEC. 2941. Town lots. The recorder shall index and record all deeds, mortgages and other instruments affecting lots in cities, towns or villages, the plats whereof are recorded, in separate books from those in which other conveyances of real estate are recorded. Where any instrument contains a description of both land, and lots in cities, towns or villages, the plats whereof are recorded, he shall record such instruments in but one record and charge but one fee, but shall index in both land and town lot indexes. [C., '73, § 1947; R., § 2241.] [31 G. A., ch. 145.]

SEC. 2942. Acknowledgment of conveyances or incumbrances. The acknowledgment of any deed, conveyance or other instrument in writing by which real estate in this state shall be conveyed or incumbered, if made within this state, must be before some court having a seal, or some judge or clerk thereof, or some county auditor or his deputy, or justice of the peace within the county, or notary public within the county of his ap-

pointment or in an adjoining county in which he has filed with the clerk of the district court a certified copy of his certificate of appointment. And each of the officers above named is authorized to take and certify acknowledgements of all written instruments, authorized or required by law to be acknowledged. [25 G. A., ch. 52; 22 G. A., ch. 99; C., '73, §§ 277, 1955; R., §§ 201, 2226; C., '51, § 1217.] [27 G. A., ch. 96, § 1.]

What sufficient: Under statutory provisions prior to the present Code an acknowledgment by a deputy clerk of the district court was valid. *Hilpire v. Claude*, 109-159.

One having an interest, direct or contingent, in a conveyance, or its subject-matter, cannot take and certify an acknowledgment and the record of an instrument so acknowledged does not impart notice to third persons of the mortgagee's interest thereunder. But the mere fact that one is an officer of a corporation, or an agent of a co-partnership, does not disqualify him from taking an acknowledgment of an instrument made to his principal. *Bardsley v. German-American Bank*, 113-216.

Neither party to the conveyance can take his own acknowledgment of it before himself so as to entitle it to be recorded. *Blackman v. Henderson*, 116-578.

It is not competent for the cashier of a private bank as a notary public to acknowledge a mortgage executed to the bank. *Farmers & Merchants Bank v. Stockdale*, 121-748.

The authentication of the notary's seal to the certificate of acknowledgment is just

as essential as his signature, and when the certificate lacks this the instrument cannot properly be recorded. *Koch v. West*, 118-468.

Legalizing acts: In a legalizing act declaring valid instruments defectively acknowledged, but duly recorded, held that the words "duly recorded" meant "actually recorded." *Bresser v. Saarman*, 112-720.

Such a legalizing act, relating in general to the recording of instruments defectively acknowledged, held applicable to an instrument of adoption. *Ibid.*

An act legalizing the recording of conveyances defectively acknowledged is not effective as against a purchaser in good faith without notice before the taking effect of the act. *Blackman v. Henderson*, 116-578.

Defects in the acknowledgment are cured by a subsequent legalizing act. Therefore held that a city plat defectively acknowledged became effectual upon the tion of a subsequent legalizing act and that from the time the legalizing act took effect the plat was acknowledged and recorded as required by law. *Parriott v. Hampton*, 111 N. W. 440.

LEGALIZING ACTS.

[For table of legalizing acts see front of volume.]

SEC. 2942-a. Acknowledgments legalized. That the acknowledgments of all deeds, mortgages, or other instruments in writing heretofore taken or certified, and which instruments have been recorded in the recorder's office of any county of this state, including acknowledgments of instruments made by any private or other corporation, or to which such corporation was a party, or under which such corporation was a beneficiary, and which have been acknowledged before or certified by any notary public who was at the time of such acknowledgment or certifying a stockholder or officer in such corporation, be and the same are hereby declared to be legal and valid official acts of such notaries public, and to entitle such instruments to be recorded, anything in the laws of the state of Iowa in regard to acknowledgments to the contrary notwithstanding. [26 G. A., extra sess., ch. 23, § 1.]

SEC. 2942-b. Saving clause. This act shall not affect the rights of parties in any action or suit now pending in any court of this state. [26 G. A., extra sess., ch. 23, § 2.]

SEC. 2942-c. Legal and valid. That all acknowledgments of instruments, in writing, taken and certified according to the provisions and form prescribed by the code of 1873, which were taken and certified after the twenty-ninth day of September, 1897, and prior to the passage of this act, by officers having authority under the provisions of the code of 1873 to take and certify acknowledgments, are here declared to be legal and

valid, and of the same force and effect as though the same were taken and certified according to the form and provisions of the code; and as though the officers taking and certifying the same were authorized to take and certify acknowledgments. [27 G. A., ch. 165, § 1.]

When one pays a valuable consideration against an instrument defectively recorded, for a sheriff's certificate of sale he acquires such vested right as to protect him notwithstanding a legalizing act subsequently passed. *Koch v. West*, 118-468.

SEC. 2942-d. Acknowledgments by interested stockholders. That all deeds and conveyances of lands within this state heretofore executed but which have been acknowledged or proved according to and in compliance with the laws of this state before a notary public or other official authorized by law to take acknowledgments who was, at the time of such acknowledgment, an officer or stockholder of a corporation interested in any such deed or conveyance, or otherwise interested therein, are, if otherwise valid, hereby declared effectual and valid in law to all intents and purposes as though acknowledged or proved before an officer not interested therein; and if heretofore recorded in the respective counties in which such lands may be, the records thereof are hereby confirmed and declared effectual and valid in law to all intents and purposes as though said deeds and conveyances, so acknowledged or proved and recorded, had (prior to being recorded) been acknowledged or proved before an officer having no interest therein. [27 G. A., ch. 166, § 1.]

SEC. 2942-e. Acknowledgments defective in form—legalized. That the acknowledgments of all deeds, mortgages or other instruments in writing, taken and certified previous to the passage of this act, and which have been duly recorded in the proper counties in this state, and which are defective only in the form of the certificate of the officer taking the same, or by reason of such acknowledgment having been made before an official not qualified to take the same, but who was at the time qualified to take acknowledgments generally, be and are hereby declared to be as legal and valid for all purposes as if the form of the certificate had been made in accordance with law, and the official taking such acknowledgments duly qualified therefor. [29 G. A., ch. 249, § 1.]

SEC. 2942-f. Legalizing conveyances under power of attorney to husband or wife. No conveyance of real estate heretofore made, wherein the husband or wife conveyed or contracted to convey the inchoate right of dower to the other spouse, acting as the attorney in fact, by virtue of a power of attorney executed by such spouse, such power of attorney not having been executed as a part of a contract of separation, shall be held invalid as contravening the provisions of section three thousand one hundred and fifty-four (3154) of the code, but all such conveyances are hereby legalized and made effective. [29 G. A., ch. 237, § 1.] [30 G. A., ch. 118.]

SEC. 2942-g. Acknowledgments heretofore taken legalized. That the acknowledgments of all deeds, mortgages, or other instruments in writing heretofore taken or certified, and which instruments have been recorded in the recorder's office of any county of this state, including acknowledgments of instruments made by any private or other corporation, or to which such corporation was a party, or under which such corporation was a beneficiary, and which have been acknowledged before or certified by any notary public who was at the time of such acknowledgment or certifying a stockholder or officer in such corporation, be and the same are hereby declared to be legal and valid official acts of such notaries public, and to entitle such instruments to be recorded, anything in the laws of the state of Iowa in regard to acknowledgments to the contrary notwithstanding. [31 G. A., ch. 146, § 1.]

SEC. 2942-h. Acknowledgments without seal legalized. All deeds, mortgages, or other instruments in writing, for the conveyance of lands which have heretofore been made and executed, and the officer taking the acknowledgment has not affixed his seal to the acknowledgment, such acknowledgment shall, nevertheless, be good and valid in law and equity, anything in any law heretofore passed to the contrary notwithstanding. [31 G. A., ch. 146, § 2.]

SEC. 2942-i. Saving clause. This act shall not affect the rights of parties in any action or suit now pending in any court of this state. [31 G. A., ch. 196, § 3.]

SEC. 2942-j. Certain conveyances of real estate legalized. In all cases where, prior to the year eighteen hundred seventy (1870), an executor, administrator, or guardian, duly appointed, qualified and acting as such in another state without being appointed and qualified in the state of Iowa, conveyed in such trust capacity, real estate lying in this state, and such conveyance has been of record since prior to the first day of January, eighteen hundred seventy one (1871) in the county where the real estate so conveyed is located, such conveyance shall not be held void or insufficient by reason of the fact that it does not appear in such conveyance, or of record otherwise in the state of Iowa, that said executor, administrator or guardian was duly appointed and qualified as such in the state of Iowa, or that due and legal notice of all proceedings with reference thereto was served upon all interested or necessary parties, or that such executor, administrator or guardian was duly authorized by any order of court in Iowa, or in the state in which such administrator, executor, or guardian was acting, to make and execute such conveyance, or that no bond therefor was given, or no report thereof made, or the sale of such real estate approved by the proper court, and all such conveyances, deficient or irregular in any of the particulars above enumerated, are hereby declared valid and legal. [32 G. A., ch. 248.]

WHEREAS, Certain mayors, under section six hundred ninety-one (691) of the code of 1897, have taken the acknowledgments of written instruments and administered oaths in proceedings not connected with the administration of their offices, and;

WHEREAS, Certain notaries public, whose commissions expired July 4th, 1906, and who continued to act as such notaries public and who have since qualified as notaries public, desire to have their acts as such notaries public legalized. Now, therefore,

Be it enacted by the general assembly of the state of Iowa:

SEC. 2942-k. Legalized. All acknowledgments and taking of affidavits made by the mayors and notaries public, as described in the preamble hereof, be and the same are hereby legalized and made of full effect, the same as though said mayors and notaries public had been originally empowered to take said acknowledgments and administer said oaths. [32 G. A., ch. 249.]

SEC. 2943. Out of state. When made out of the state but within the United States, it shall be before a judge of some court of record, or officer holding the seal thereof, or some commissioner appointed by the governor of this state to take the acknowledgment of deeds, or some notary public or justice of the peace; and when made before a judge, or justice of the peace, a certificate, under the official seal of the clerk or other proper certifying officer of a court of record of the county or district, or of the secretary of state of the state or territory, within which such acknowledgment was taken, under the seal of his office, of the official character of said judge, or justice, and of the genuineness of his signature, shall accompany said certificate of acknowledgment. [C., '73, § 1956; R., § 2245.] [27 G. A., ch. 97, § 1.]

SEC. 2943-a. Notarial seals of nonresidents. That the notarial seal which purports to have been affixed to any instrument in writing, by any notary public residing elsewhere than in the state of Iowa, shall be *prima facie* evidence that the words thereon engraved conform to the requirements of the law of the place where such certificate purports to have been made. [28 G. A., ch. 118, § 1.]

SEC. 2948. Certificate of acknowledgment.

The requirement of this section as to stating the full title of the person before whom the acknowledgment is made is not applicable to acknowledgments of other instruments with reference to which there is no such specific requirement and in the acknowledgment of articles of incorporation it is sufficient that the venue is stated at the beginning of the certificate, and the notary subscribes as a "notary public,"

without specifically reciting that he is a notary public in and for said county, it being presumed that an officer acts only within the limits of his authority. *Smith v. Sherman*, 113-601.

The fact that the certificate of acknowledgment is left blank as to the name of the party who makes the acknowledgment does not render such certificate invalid. *Tennis v. Gifford*, 133-372.

SEC. 2957. Power of attorney—recording—revocation.

The statutory provision authorizing the recording of affidavits explaining defects in a chain of title does not enable one claiming title by adverse possession to

make out a title of record on which an abstract showing good title can be founded. *Fagan v. Hook*, 105 N. W. 155.

SEC. 2958. Forms of conveyances.

In the absence of warranty or of fraud inducing the conveyance there is no lia-

bility of the grantor for failure of title. *Harrison v. Palo Alto County*, 104-383.

CHAPTER 7.

OF OCCUPYING CLAIMANTS.

SECTION 2964. Proceedings.

This section has no application where the action is purely personal, seeking only a money judgment and not attempting to disturb either title to or possession of real property. *Central Trust Co. v. Hubinger*, 87 Fed. 3.

Loss or surrender of possession terminates the right to be regarded as an occupying claimant and to have relief as such under these statutory provisions. *Lindt v. Uihlein*, 116-48.

SEC. 2967. Color of title.

One who acquires title to real property in consideration of the illegal sale of intoxicating liquors, in violation of Code § 2423, and whose title is declared void on that account, cannot assert the rights of an occupying claimant with reference to improvements placed by him upon the premises. *Lindt v. Uihlein*, 116-48.

The statutory provisions as to occupying claimants furnish a special remedy, and one who seeks to avail himself of those

provisions must bring himself within the statute and pursue the course indicated. *Ibid.*

The proceeding contemplated does not involve recovery of a personal judgment against the land owner, but is in the nature of the assertion of a lien on the property by the party in possession, accompanied by the right to retain such possession until the lien is satisfied. *Ibid.*

CHAPTER 8.

OF THE HOMESTEAD.

SECTION 2972. Exempt.

In general: Statutes are to be liberally construed in favor of homestead rights.

Merchants' Nat. Bank v. Eyre, 107-13;
Edmonds v. Davis, 122-561.

Application of property to the payment of debts should be so made as to preserve, so far as possible, the homestead of the debtor. *Shaffer v. Chernyk*, 130-686.

In what property: A leasehold interest may be sufficient to support a homestead right. *White v. Danforth*, 122-403; *In re Estate of Ring*, 132-216.

A homestead right may exist as to property held by an equitable title as effectually as though it were held by a legal title. *Foster v. Rice*, 126-190.

An existing homestead right is not lost and a new one created by a conveyance absolute in form, but which is in fact a mortgage only. *Ibid.*

Matured crops raised on the homestead are not within the statutory exemption. (Affirming S. C., 142 Fed. 620.) *In re Sullivan*, 148 Fed. 814.

Evidence in a particular case held not sufficient to show that certain property claimed as a homestead was exempt because the money used in its purchase was obtained from the sale of a former homestead. *Johnson County Sav. Bank v. Carroll*, 109-564.

Purchase money: The homestead is not exempt from a claim for the purchase money. *Clifton Land Co. v. Davenport*, 130-94.

Disposal of homestead: The owner may dispose of the homestead without regard to the claims of creditors as to which the homestead is exempt. *Dettmer v. Behrens*, 106-585.

SEC. 2973. Family defined.

After the death of both the father and mother, the children or any number of them continuing to reside on the homestead property as members of the same family constitute a family, entitled to the homestead exemption. *In re Rafferty*, 112 Fed. 512.

To constitute one or more persons with another living together in the same house a family, it must appear that they are being supported by that other in whole or in part, and are dependent upon him therefor, and that he is under a natural or moral obligation to render such support. But the fact that the person thus dependent for support is an adult son does not prevent his being a member of the family of his mother. *Sheehy v. Scott*, 128-551.

The homestead statutes should be liberally construed, but to entitle the occupancy by a widow or widower to the homestead protection there must be a natural or moral obligation of support and a condition of dependence and actual support between such occupant and some person or persons residing with him or her on his premises. Therefore, held that a widower occupying premises and having

Rights of spouse: Both husband and wife are entitled to live upon and enjoy the homestead. But so long as the wife of the owner chooses to live elsewhere, she is not entitled to any benefit from it and the owner is entitled to have the full right to farm and cultivate it so long as he continues to live upon and occupy it as a homestead. *Ehrck v. Ehrck*, 106-614.

Failure to make the wife a party defendant in proceedings to foreclose a mortgage executed prior to the marriage will not entitle the wife to relief in an independent action. Her rights in the homestead are not in any way superior to the lien of such a mortgage. *Browneller v. Wells*, 109-230.

The husband is presumed to be the head of the family, and the homestead premises to be under his control, although the legal title is in the wife. *Burch v. Lowary*, 131-719.

Trustee in bankruptcy: A trustee in bankruptcy may maintain an action to require the setting off of the homestead of the bankrupt and subjecting the remainder of his property to the payment of claims of creditors. *Duffield v. Dosh*, 124-286.

An insolvent debtor cannot use non-exempt assets for the purchase of a homestead, and thus put it beyond the reach of the trustee in bankruptcy. *Clarke v. Sherman*, 128-353.

residing with him an adult daughter was entitled to a homestead in such premises. *Fox v. Waterloo Nat. Bank*, 126-481.

Under this section, as it stood in the Code of '73, which did not include the provision as to a party to whom the homestead is adjudged in a decree of divorce, held that such person did not have the homestead right while continuing to occupy the premises. *Clemans v. Penfield*, 111-511.

The provision as to cases of divorce is intended to apply to cases wherein the title to the homestead is in one of the parties to the divorce proceeding, and the court deems it proper to assign the homestead to the other so that the decree is the basis upon which the right to occupy the premises after the divorce is founded. *In re Pope*, 98 Fed. 722.

Where a married woman, after her adjudication as a bankrupt, was granted a divorce and awarded the homestead and the custody of a child, held that the homestead could not be subjected to the payment of her debts in the bankruptcy proceeding. *In re Le Claire*, 124 Fed. 654.

The provision that the divorced husband or wife to whom the homestead is

awarded in the decree is entitled to retain it as exempt during continual personal occupancy was first inserted in the Code of 1897; whether it is retroactive, *quaere*. *Fox v. Waterloo Nat. Bank*, 126-481.

The primary object of the exemption is the protection of the family, and as a general rule, when the family ceases to exist the exemption also ceases. Therefore,

held that where a widow with children acquired a homestead, her homestead rights in the premises terminated when the children ceased to reside with her. The exception as to continuance of the homestead right to the survivor remaining in possession of a homestead acquired during the existence of the marriage does not apply to such a case. *Fullerton v. Sherrill*, 114-511.

SEC. 2974. Conveyance or incumbrance.

In general: The homestead right is a favorite of the law, and the purpose of the statute is to require the utmost solemnity in the matter of its alienation. Such alienation must be by one instrument in the execution of which the husband and wife concur. Such conveyance cannot be effected by the action of the husband alone signing the instrument in his own right and under a power of attorney for his wife. *Keeline v. Clark*, 132-360.

Actual occupation by the family of the owner is sufficient declaration of the homestead character of the premises so that conveyance thereof can only be made by joint action of husband and wife. *Hostetler v. Eddy*, 128-401.

As by Code § 3157 conveyances between husband and wife are authorized, such a conveyance by one to the other of the homestead will be valid, although not executed by both. *Beedy v. Finney*, 118-276.

It seems that a sale by the husband alone of the fee title to the homestead, in which he reserves the right to use and occupy the property during the life of himself and wife, is valid and binding. *Allbright v. Hannah*, 103-98.

An agreement by the holder of the title as to the disposition to be made of the property after the homestead right in the premises has terminated is void without the joinder of the wife. *Reilly v. Reilly*, 110 N. W. 445.

The owner of the homestead may grant an easement therein without joinder by the husband or wife of such owner. *Stokes v. Maxson*, 113-122.

One who has acquired a homestead in premises for which he has a contract of purchase cannot transfer his rights under such contract without joinder of his wife in a joint written instrument and a subsequent acceptance of a lease of the property from one purchasing the legal title thereto subject to the contract will not enlarge the rights of creditors nor constitute an abandonment of the homestead. *Duffield v. Dosh*, 124-286.

Conveyance void: Failure of the wife to join in a conveyance of the homestead renders the conveyance invalid for any purpose. *Goodwin v. Goodwin*, 113-319.

Where persons living together as husband and wife under a claimed marriage which is invalid because the pretended husband has a former wife living undivorced, of which fact the pretended wife has no knowledge, a conveyance by the pretended husband of premises owned by him and used by the two as a home will not be invalid on account of failure of the pretended wife to join therein. *Ibid*.

A mortgage on the homestead in which the wife does not join is void, and the purchaser of the premises under foreclosure of such mortgage acquires no right thereto. *Way v. Scott*, 118-197.

Contract to convey: Where, under a contract by the husband having the legal title to convey the homestead, possession is given to the purchaser such contract is binding upon the wife upon the theory that by giving possession to the purchaser there is an abandonment of the homestead right. But in the absence of such delivery of possession as to constitute an abandonment, the contract of the husband without the assent of the wife is of no validity and the contract cannot be ratified so as to constitute an effectual conveyance save by the execution of a joint instrument in substantial compliance with the statute. *Alvis v. Alvis*, 123-546.

To constitute a valid conveyance there must be the concurrence of each with the knowledge of the other. *Ibid*.

The husband and wife must join in the execution of an instrument containing a granting clause applicable to each. It is not sufficient that one of them signs and acknowledges an instrument purporting to convey only the title of the other. *Ibid*.

A parol agreement to convey is not binding even though based upon good consideration and the payment of the consideration does not operate to create a trust in the homestead property in favor of the person making payment. *Ibid*.

A contract to convey a homestead in which the wife does not join is void as to both husband and wife, and no action for specific performance or for damages will lie as against either. *Hostetler v. Eddy*, 128-401.

No action for damages for breach of contract to convey a homestead, the wife not having joined in such contract, can be

maintained as against the husband. *Whelock v. Countryman*, 133-289.

A contract to convey the homestead is void if not signed by both husband and wife. *Caldwell v. Drummond*, 127-134.

Where husband and wife join in a contract to convey the homestead, and the wife agrees that upon the performance of the contract she will execute a conveyance, relinquishing her statutory rights in and to the land, the contract may be enforced as against her. *Cone v. Cone*, 118-458.

Foreclosure may be had of a bond for a deed although the premises have been occupied as a homestead and the wife has not joined in the contract. *Clifton Land Co. v. Davenport*, 130-94.

Where the husband has received money under a contract to convey the homestead in which the wife does not join, an action may be maintained against him to recover the amount so paid. *DeKalb v. Hingston*, 104-23.

Ratification: Where a contract to convey the homestead was consented to by the wife, but the written contract was not signed by her until some time after its execution by her husband, and she then united with her husband in the execution of a deed in pursuance of the terms of the contract, held that there was such ratification of the contract by the wife that a suit for specific performance could be based thereon. *Epperly v. Ferguson*, 118-47.

While the wife may ratify a sale of the homestead by her husband, in which she has not joined, she cannot do so after the rights of third parties have intervened and her ratification would prejudice such rights. *Stickley v. Widle*, 122-400.

If the wife joins in a contract to convey the homestead after its execution by the husband and before the time for performance by delivery of a deed, and joins with her husband in executing the deed, which

is tendered in performance of the contract, the vendee cannot rely upon the invalidity of the contract as excusing performance on his part. *Ketterick v. Eastlack*, 130-498.

Estoppel: The husband or wife of the owner may by conduct be estopped from setting up a homestead right as against one taking possession and making improvements under an oral contract of which the husband or wife has knowledge. *Eastwodd v. Crane*, 125-707.

Other property included: A deed covering other property together with the homestead may be valid as to the property not included in the homestead. *Pryne v. Pryne*, 116-82.

Where the owner of premises, a portion of which is used as a homestead, contracts to sell a part thereof, not including the improvements, and leaving enough property in extent and value to constitute the full homestead exemption, such contract is not invalid because of the failure of the husband or wife to join therein, though the portion sold might have been included in the homestead, had the owner elected to do so. The owner may select the homestead without the consent of the husband or wife. *Hall v. Gottsche*, 114-147.

Prior to the adoption of the provision it was held that a contract by the husband to convey land including the homestead would not be specifically enforced in the whole or in part. *Ormsby v. Graham*, 123-202.

Under the last clause of this section, which is first found in the present Code, the vendee under a contract to convey premises including a homestead may enforce his contract as to the portion not embraced in the homestead, the price to be paid being abated by deduction of the value of the portion embraced in the homestead. *Townsend v. Blanchard*, 117-36.

SEC. 2976. Liable for debts antedating purchase—by written contract.

Debts prior to acquisition: Where it is claimed that the homestead is liable for money borrowed to be used in paying therefor, it is not enough to show that the borrowed money was so used, but in order to confer a right to the lien it must also appear that it was a part of the contract that this should be done. *Johnson County Sav. Bank v. Carroll*, 109-564.

To render the homestead liable for money borrowed to pay the purchase price it must appear that the indebtedness was incurred at the time the homestead right attached. *Ibid.*

Where at the time the homestead was taken possession of the indebtedness which was subsequently attempted to be enforced against it had not been incurred, held that

the homestead was not liable to such indebtedness. *Ibid.*

The previously contracted debt for which a homestead may be sold on execution is one which has become a fixed obligation enforceable prior to the acquisition of the homestead. *Anderson v. Kyle*, 126-656.

In a particular case, held, that the evidence did not show that a note was executed in renewal of a prior note antedating the homestead so as to make the indebtedness a claim against the homestead. *In re Gardner's Estate*, 103-738.

The owner may make expenditures on the homestead and improvements thereto necessary to its preservation and suitability for homestead occupation, and the

expenditures therefor are protected as a part of the homestead right, even as against indebtedness contracted before the making of the improvements, though after the acquisition of the homestead. *Eber-sole v. Mott*, 112-596.

The homestead law has always received liberal construction in favor of the homestead occupant out of consideration of public policy and the very humane and beneficent purpose that inspired the enactment of the law. *Ibid.*

As against a judgment on a note dated subsequent to the acquisition of the homestead, the homestead is *prima facie* exempt. And where it was contended that the note was executed for a debt previously existing, by reason of conversion by the owner of the homestead of money belonging to the payee of the note, held that the burden was on the payee of the note not only to show conversion, but that it occurred before the acquisition of the homestead. *Walker v. Walker*, 117-609.

Where husband and wife occupied as a homestead property acquired by the husband with pension money and conveyed to the wife at his direction, held that the title in the wife was subject to sale for her antecedent debts. *Whinery v. McLeod*, 127-11.

As the homestead is liable for pre-existing debts, an insolvent debtor cannot use non-exempt property for the acquisition of a homestead which will be preserved to

him in bankruptcy proceedings. *Clarke v. Sherman*, 128-353.

Exhausting other property: It is not necessary to provide in a decree of foreclosure that the other real property covered by the lien shall be exhausted before resorting to the homestead. The statutes relating to homesteads make ample provision for the protection of homestead rights from sale on execution until other property of the judgment debtor is exhausted. *Kilmer v. Gallaher*, 107-676.

One who buys premises not constituting the homestead and assumes the payment of a mortgage covering such premises and also the homestead cannot afterwards enforce the mortgage as against the homestead. *Moore v. Olive*, 114-650.

The homestead is only secondarily liable for incumbrances to which it is subject with other property. *Bissell v. Bissell*, 120-127.

Where the entire property to be sold by the sheriff is included within the homestead right, there is no occasion for setting off or reserving from the sale, any portion as constituting the homestead; and if the property is subject to execution sale, a sale in gross may be proper. *Edinger v. Bain*, 125-391.

Lien of judgments: A judgment becoming a lien upon premises before the occupancy of such premises as a homestead may be enforced and the grantee does not have priority over the judgment lien. *Therme v. Bethenoid*, 106-697.

SEC. 2977. What constitutes.

Separate tracts: The homestead must embrace the house used as a home, and none other can be selected, but if there are two so used, either may be retained. *Knorr v. Lohr*, 108-181.

Under the provisions of the Code of '73, a homestead might consist of lots or tracts not contiguous, but in such case it must be shown that such lots or tracts were habitually and in good faith used as a part of the same homestead. *Kelley v. Williams*, 110-153.

While the homestead may consist of one or more contiguous lots or tracts, yet by changing the actual place of residence to other premises a lot which had previously been a part of the homestead by contiguity may cease to be homestead property. *White v. Danforth*, 122-403.

The homestead may be selected at any time before judicial sale, and no portion of the tract from which it may be selected is to be regarded as relinquished from the homestead rights, so long as the ownership and occupancy of the person claiming a homestead continues. *Lutz v. Ristine*, 112 N. W. 818.

Abandonment: An oral contract for the sale of the homestead, followed by possession taken thereunder, amounts to an

abandonment of the homestead. *Allbright v. Hannah*, 103-98.

The homestead right is purely statutory, and for the benefit of the family; and it may be waived or abandoned. The right of occupancy as a homestead does not affect the legal title, and when such right ceases by the death of the occupant, title descends to the issue of the owner, unless otherwise directed by will. *Reilly v. Reilly*, 110 N. W., 445.

The question of the existence of a homestead right does not rest merely in intention. It arises from the fact of occupancy as a home, and ends only with abandonment in fact. *Hostetler v. Eddy*, 128-401.

An intention by the occupant of premises formed before his marriage to abandon the same as his residence is immaterial with reference to a homestead right arising on subsequent marriage. *Hostetler v. Eddy*, 128-401.

One who conveys his homestead loses the homestead right although he afterwards acquires title to the property. *Jasper County v. Sparham*, 125-464.

While there may be a homestead right in premises held under a contract to convey, yet where husband and wife consented that the vendor should treat the contract

as forfeited by reason of provisions therein for forfeiture on non-payment of the purchase price, and the husband accepted a lease of the premises under which husband and wife continued to occupy, held, that the homestead right under the contract was abandoned. *Anderson v. Cosman*, 103-266.

Whether absence from the homestead shall be deemed an abandonment, or to have been with *animus revertendi*, depends on the facts of each particular case. *Wapello County v. Brady*, 118-482.

Occupancy of other property which could be claimed as a homestead is a strong circumstance tending to show an abandonment of the previous homestead. *Ibid.*

The owner of the homestead cannot have the option of choosing between two homes when either is seized by creditors. One or the other must be shown to have had that character prior to such seizure. *Ibid.*

When only verbal evidence of the *animus revertendi* is relied upon, the temptation opened to the witnesses interested is such as to call for careful scrutiny. *Ibid.*

After selecting and occupying a new homestead, the owner cannot claim the old homestead as exempt while being held for exchange or sale. *Stickley v. Widle*, 122-400.

When a person removes from his homestead for a temporary cause with the definite and settled purpose of returning, and that purpose is continuously held in good faith, there is no abandonment of the homestead right. *Maguire v. Hanson*, 105-215.

To constitute a homestead it is not sufficient that the claim is supported by the cultivation and use of the property. Actual occupation of the premises as a home for the owner and his family is required excepting in a few cases, as where a temporary absence from the home for authorized purposes will not affect its homestead character, or where the proceeds of one homestead are invested in property to be used for another homestead, in which case a reasonable time is allowed in which to make a change. But a mere intent to erect upon a lot or tract of land a house to be occupied as a home at some indefinite time, is not sufficient to give the property the homestead character. *Ibid.*

SEC. 2978. Extent—dwelling—appurtenances—value. If within a city or town plat, it must not exceed one-half acre in extent, otherwise it must not contain in the aggregate more than forty acres, but if, in either case, its value is less than five hundred dollars, it may be enlarged until it reaches that amount. It must not embrace more than one dwelling house, or any other buildings except such as are properly appurtenant thereto, but a shop or other building situated thereon, actually used and occupied by the owner in the prosecution of his ordinary business, and not exceeding three

Where there is no dwelling house to be occupied, the premises cannot constitute a homestead. *Blue v. Heilprin*, 105-608.

Where the homestead was abandoned by the owner without intention to return thereto, and two days later he made a conveyance of the premises, held, that the purchaser did not acquire the property free from debts which would have attached to it had it not been a homestead. *Chambers v. Jackson*, 106-6.

Removal from the homestead with intention to return only in a contingency which the owner wishes to avoid, as for instance if he intends "to go back to the place provided he cannot sell it," will constitute an abandonment. *Conway v. Nichols*, 106-358.

Where the evidence shows an intent to return, the period of absence alone being conditional, there is no abandonment. *Rand Lumber Co. v. Adkins*, 116-242.

A temporary removal from the premises with the intent of returning does not constitute an abandonment of the homestead. *Lutz v. Ristine*, 112 N. W., 818.

A temporary removal from the homestead and renting it to third parties will not be deemed an abandonment if the party having the homestead right intends to return and resume the occupancy thereof. *In re Pope*, 98 Fed., 722.

Although the husband who has a legal title to the homestead abandons it, nevertheless the wife is entitled to the same right therein, until cut off by proper proceedings, and the fact that she is in an insane asylum will not deprive her of such homestead right. *Way v. Scott*, 118-197.

Where the homestead character of the land is established, the burden of proof to show that it is liable for debts by reason of abandonment is upon the person making such claim. *Robinson v. Charleton*, 104-296.

Use: Where it appears that a room is used as a place of residence the owner should not be deprived of his statutory exemption because in the prosecution of his ordinary business the front windows and a portion of the room are devoted to that business. *Edmonds v. Davis*, 122-561.

Mere intention to occupy as a homestead in the future does not impress premises with the character of a homestead. *White v. Danforth*, 122-403.

hundred dollars in value, is appurtenant thereto. [C., '73, §§ 1996-7; R., §§ 2884-5; C., '51, §§ 1252-3.] [28 G. A., ch. 119, § 1.]

So far as this section restricts the extent of a homestead within a town plat, it is not applicable to homesteads already existing. *Sayers v. Childers*, 112-677.

The homestead is limited to one-half acre only when within a city or town plat. The fact that it is within the corporate limits of a city, if not within a platted portion thereof, does not bring it within such limitation as to extent. *Foster v. Rice*, 126-190.

To limit the homestead to one-half acre, under the provisions of § 1996, Code of '73, differing in language from this section, it was necessary that it lie not only within the limits of the municipality, but within a platted portion thereof, and held that such limitation did not apply where a tract of land not within the municipality was platted, and then the municipality was extended to include it. *Parrott v. Thiel*, 117-392.

SEC. 2979. Selecting—plating—notice to plat and record. The owner, husband or wife, may select the homestead and cause it to be platted, but a failure to do so shall not render the same liable when it otherwise would not be, and a selection by the owner shall control. When selected, it shall be marked off by permanent, visible monuments, and the description thereof shall give the direction and distance of the starting point from some corner of the dwelling, which description, with the plat, shall be filed and recorded by the recorder of the proper county in the homestead book, which shall be, as nearly as may be, in the form of the record books for deeds, with an index kept in the same manner. Should the homestead not be platted and recorded at the time levy is made upon real property in which a homestead is included the officer having the execution shall give notice in writing to said owner, and the husband or wife of such owner, if found within the county to plat and record the same within ten days after service thereof; after which time said officer shall cause said homestead to be platted and recorded as above, and the expense thereof shall be added to the costs in the case. [C., '73, §§ 1998-9; R., §§ 2286-7; C., '51, §§ 1254-5.] [27 G. A., ch. 98, § 1.]

Where a tract of eighty acres was occupied as a homestead, and a contract to convey forty acres of it was made to a son-in-law of the owner on condition that he should build a house and live thereon, which he did, held, that such contract constituted an election to regard the other forty acres of the tract as a homestead and was an abandonment of any homestead right in the tract referred to. *Allbright v. Hannah*, 103-98.

The selection of the homestead by the owner must control. *Ehrck v. Ehrck*, 106-614.

The owner may select the homestead without the consent of the husband or wife, and by a conveyance, incumbrance or contract may limit the selection by excluding from the homestead a portion of premises which might be included therein, but

The owner of a homestead is allowed but one shop or other building in which to prosecute his ordinary business. *Shaffer v. Chernyk*, 130-686.

The homestead being limited to forty acres, if the tract in which the homestead right exists exceeds forty acres in extent, the balance descends on the death of the owner like any other property, subject to the debts of the owner. *Porter v. Perkins*, 125-55.

The forty acres which may be claimed exempt as a homestead may be selected from any greater number of acres occupied by the owner, the only condition being that the tract selected shall include that forty of the whole on which is situated the house used by the owner as a home. *Lutz v. Ristine*, 112 N. W. 818.

not necessary to its existence to the full extent allowed by law. *Hall v. Gottsche*, 114-147.

Where the owners gave notice to the sheriff as to the portion of the premises claimed as a homestead and he offers the portion not included before selling the whole, the sale is not void, although the sheriff does not plat the homestead as here required. *Ackerman v. Hendricks*, 117-106.

Where the portions of the premises not included within the homestead were offered in forty acre tracts without bids being made, held that the sheriff was not bound to offer the entire portion of the premises not included within the homestead before proceeding to sell the entire premises. *Ibid.*

An execution sale of any portion of the premises which the owner might have claimed as his homestead is not valid

without a platting of the homestead either by the owner or the officer making the sale. *Lutz v. Ristine*, 112 N. W. 818.

SEC. 2981. Changes.

The proceeds of the homestead, held by the owner for the purpose of investment in another homestead, are exempt to him under the bankrupt law. *In re Johnson*, 118 Fed. 312.

The proceeds of a homestead are only exempt for a reasonable time, during which they are held for the purpose of investing them in another homestead, and held that where one had sold his homestead in another state and brought the proceeds with him to this state in the shape of notes and mortgages, not being entitled under the circumstances to acquire a homestead in this state, the proceeds of the former homestead were subject to the claims of creditors. *Campbell v. Campbell*, 129-317.

What will be a reasonable time during which the homestead may be held for the purpose of exchanging it or selling it and investing the proceeds in another home, must depend on the facts of each particular case. *Robinson v. Charleton*, 104-296

The owner of the homestead may convert it into money and hold the proceeds exempt for the purpose of procuring a new homestead, and with such proceeds may procure other property to be conveyed to his wife, although exceeding in extent that which he might retain as a homestead. The homestead being exempt from claims of creditors, no fraud upon creditors is committed if it is exchanged for other property which is taken in the name of the wife. *Richards v. Orr*, 118-724.

While the right of homestead will not attach to vacant land acquired by purchase, independently of a change of homestead, it will attach to vacant land taken in exchange for the homestead, or bought

with the proceeds of the homestead, when held in good faith for use as a home. *Blue v. Heilprin*, 105-608.

The property acquired for a new homestead will not be exempt from antecedent debts except to the extent in value of the old homestead. *Ibid.*

A lot purchased with money previously realized by the execution of a mortgage on the homestead is not exempt under this section. *Boettger v. Galloway*, 115-353.

Creditors are not prejudiced by the exchange of a homestead which is exempt from their claims for another homestead of greater value, being entitled to subject the new homestead to the extent of the increased value to the payment of the owner's debts. *Shaffer v. Chernyck*, 130-686.

The creditors are not entitled to subject the homestead to the extent to which it has been improved after the creation of the owner's obligations to them where such improvement does not result in substantial increase in value, but consists only in rendering the premises more convenient and suitable for homestead occupation. *Ibid.*

Where the widow claims one-third of the proceeds of her husband's estate sold for the purpose of paying debts, she cannot hold it as exempt for investment in a new homestead even though the property sold includes the homestead of her husband. *Edinger v. Bain*, 125-391.

One who selects a new homestead, retaining the old homestead for purpose of exchange or sale, thereby abandons the homestead exemption as to such old homestead. *Sticklely v. Widle*, 122-400.

SEC. 2985. Occupancy by surviving spouse—descent.

Election by widow: Where it does not appear that the widow has elected to take a homestead right in lieu of dower, the presumption is that she takes the dower right. *Pebbles v. Bunting*, 103-489.

The fact that the widow continues to reside upon a portion of the land belonging to her husband does not constitute an election to occupy the homestead for life in lieu of dower, where it does not appear that the premises occupied by her constituted the homestead of her deceased husband. *Ibid.*

If the widow elects to take one-third in fee she cannot assert any homestead right in the portion thus set apart to her. *Edinger v. Bain*, 125-391.

The right to the distributive share is primary, and an election is necessary in

order to retain the homestead for life. *Wold v. Berkholz*, 105-370.

Continuance in possession for more than ten years, but under an arrangement by which the wife was asserting her right to a distributive share and not a claim to the homestead, held not sufficient to show an election of the homestead right. *Ibid.*

The primary right of the surviving distributive share and unless she does something which in law amounts to an election to take the homestead in lieu thereof, the court will award her the distributive share provided by statute. Occupancy for less than a year before commencing proceedings to recover her distributive share held not to bar her right. *In re Estate of Lund*, 107-264.

The answer of the widow setting up the homestead character of the premises in another case in which she was not called upon to make an election between occupancy of the homestead and a distributive share held not to bar her right to the distributive share. The mere contention of the widow that she has elected to take the homestead, made before the time when she is required to make the election, will not deprive her of her distributive share. *Ibid.*

The primary right of the surviving spouse is to the distributive share; an election is called for when such survivor desires to take the homestead right. In a particular case held that the occupancy of the homestead was not such as to show an election to retain it in lieu of dower. The presumption of election to take the homestead, which might arise from continuance of occupancy, may be rebutted otherwise than by the actual setting apart of the distributive share. *McDonald v. Young*, 109-704.

The election of the surviving husband or wife to take the homestead in lieu of a distributive share may be found from occupancy alone, or from other testimony tending to show such purpose. *Deere v. Meyer*, 131-172.

There is no presumption that the continued occupancy of the homestead is by virtue of an election to retain the homestead for life, unless it appears that such occupancy is inconsistent with any other right to thus occupy. *Percifield v. Aumick*, 116-383.

Long continued occupancy by a widow of her husband's homestead raises a presumption of her election to take a life interest therein rather than a distributive share of the estate, and such possession is not adverse to the heirs. *Huit v. Huit*, 122-338.

As to election between homestead and distributive share see also notes in this supplement to Code § 3377.

Descent—exemption: The taking of a distributive share in the estate divests the homestead right, and the widow does not hold the distributive share thus taken exempt from liability for her debts. *Benjamin v. Doerscher*, 105-391.

The fact that the widow proposes to invest the proceeds of such distributive share in a new homestead will not exempt such proceeds from liability. *Ibid.*

On the death of the owner, the homestead passes to the widow, and she is entitled to use and occupy it at least for one year. *In re Estate of Ring*, 132-216.

If there be no survivor of husband or wife the homestead is to descend to the issue of either according to the rules of descent and is to be held by the issue exempt from the antecedent debts of their parents and their own. *Fox v. Waterloo Nat. Bank*, 126-481.

The right of heirs to inherit the homestead free from liability for the debts of the ancestor is not dependent on any homestead right in them. If the widow continues to occupy the homestead for life the debts of the deceased owner cannot be enforced against it either as to her or as to the heirs. But if she takes a one-third in fee, so far as this one-third does not include the homestead, or a portion of it, the homestead or the portion of it not so included descends to the heirs free from the debts of the owner. *Porter v. Perkins*, 125-55.

Any attempted change in boundary by the surviving husband or wife after the death of the owner will not affect the interest of the heirs therein and is thus declared to be exempt from liability for debts of the owner. *Ibid.*

An existing obligation of the heir is an indebtedness in such sense that the heir takes the homestead exempt therefrom. *Merchants' Nat. Bank v. Eyre*, 107-13.

Where the testator devised all his property to his widow for life, with the stipulation that after her death whatever remained should be divided among his children, held that the share of the proceeds of the homestead received by each child was not exempt from execution under this section. *First Nat. Bank v. Willie*, 115-77.

The proceeds of a voluntary sale by an heir of his interest in his ancestor's homestead, in the absence of a showing of intention to reinvest such proceeds in another homestead, are not exempt from execution for his debts. *Kinzer v. Stephens*, 121-347.

The homestead exemption being in derogation of common law, does not inure to the benefit of the heirs to whom the homestead descends, except as provided by statute. *Beatty v. Wardell*, 130-651.

Devises of the homestead taking otherwise than in accordance with the law of descent do not hold the homestead exempt from their antecedent debts. *Rice v. Burkhardt*, 130-520.

Estoppel: Adjudication in a proceeding to which the wife is a party, that the property in which she claims an interest did not constitute a homestead, will estop her from asserting a homestead right in her interest therein. *Atlee v. Bullard*, 123-274.

On the death of those entitled to occupy the premises as a homestead, the title descends to the issue of the owner according to the statutory rules of descent unless otherwise directed by will, and the owner may make such disposition of the title, subject to the right of occupancy as a homestead, as he sees fit. *Reilly v. Reilly*, 110 N. W. 445.

CHAPTER 9.

OF LANDLORD AND TENANT.

SECTION 2988. Apportionment of rent.

This section relates to an apportionment of rent between the executor and the reversioner *pro rata* as to time and with

reference to rent not accrued, that is, not due at the time of the death of the life tenant. *Gudgel v. Southerland*, 117-309.

SEC. 2991. Tenant at will—notice to quit.

One in possession with the assent of the owner, in the absence of further proof, is presumed to be a tenant at will. *Fischer v. Johnston*, 106-181.

One who goes into possession simply of the real estate of another is presumed to be a tenant in the absence of any proof to rebut such presumption. *Heddleston v. Stoner*, 128-525.

Where a tenant continues to occupy the premises with the assent of the landlord, such occupancy will be deemed to have been under the terms and conditions of the lease creating the tenancy. *Kennedy v. Iowa State Ins. Co.*, 119-29.

A tenant holding over after the expiration of his term is presumed to do so as tenant at will, and not under a covenant for renewal, unless the circumstances indicate an affirmative election to renew, rather than to hold as tenant at will. *Andrews v. Marshall Creamery Co.*, 118-595.

The thirty days' notice in writing to terminate a tenancy at will is not required where the tenant does not occupy the premises with the assent of the landlord after the termination of the written lease. *McClelland v. Wiggins*, 109-673.

SEC. 2992. Landlord's lien.

Rent payable: When no time for payment of rent is fixed, it is not payable until the end of the term. *Ingram v. Dailey*, 123-188.

Nature and extent: The lien attaches to crops grown upon the leased premises, whether they are exempt from execution or not. The provision that the lien does not apply to property exempt from execution relates only to "any other personal property of the tenant which has been used on the premises during the term." *Hipsley v. Price*, 104-282.

The lien commences as soon as the property intended to be kept on the premises as a part of the business of the tenant is brought thereon, and attaches to the property so brought as security for the payment of the rent for the entire term. *Des Moines Nat. Bank v. Council Bluffs Sav. Bank*, 150 Fed. 300.

Where the tenant, who subsequently became a bankrupt, retained possession after the termination of the lease under a contract to purchase, held that the landlord thereafter had no lien on the tenant's per-

sonal property for subsequently accruing rent on non-performance of the contract of sale, which was enforceable against the bankrupt's assets. *Ibid.*

Where the landlord seeks to establish a lien as to property owned by the lessee and used on the demised premises, the burden is not on him to show also that such property is not exempt from execution for the debts of the tenant, the grantee of such property relying upon the exemption. *Hays v. Berry*, 104-455.

The lien attaches for the rent of the entire term, although it can only be enforced for the rent due, but as to the entire rent provided for by the lease the indebtedness is absolute, though not yet due. *Brown v. Cairns*, 107-727.

The fact that the landlord reserves the right to sell the entire premises, or a part thereof, with the condition that the rent shall be abated accordingly, does not prevent the entire rent being an indebtedness when the lease is entered into. *Ibid.*

A landlord cannot assert a lien for other indebtedness than that arising from the

renting of the premises for the time covered by the lease, and if he attempts to do, so in such a way as to render it impracticable to determine what amount is due for the leased premises, he forfeits his entire lien. *First Nat. Bank v. Flynn*, 117-493.

The landlord has no right to the possession of the tenant's property under his lien until some part of the rent is actually due. *Hilman v. Brigham*, 117-70.

The lien for rent under an occupancy at will resulting from possession after the termination of a written lease attaches only for the length of time necessary to end a tenancy by notice, and not for an entire year, although the tenant has been holding over for more than a year, and the landlord's lien in such case is therefore inferior to a chattel mortgage executed on the tenant's property after the termination of the written lease and prior to the accrual of the rent for which the landlord's lien is claimed. *German State Bank v. Herron*, 111-25.

The landlord having a lien on the tenant's property may sue for its conversion. *Church v. Bloom*, 111-319.

The landlord will not be estopped from asserting his lien as against a purchaser from the tenant by reason of having previously failed to object to similar sales during the existence of prior leases, at least without knowledge of such previous sales being brought home to him. *Ibid.*

The landlord following the proceeds of the property on which he has a lien is confined to his remedy against the person receiving such proceeds and cannot recover for conversion as against one for whose benefit as surety such proceeds have been used. *Overholser v. Christensen*, 133-129.

The landlord may by his conduct estop himself by relying on his lien as against a purchaser from the tenant, but to constitute such estoppel it must appear that the purchaser has by payment, or otherwise, put himself in such a position as to suffer damage or injury from the action of the landlord in attempting to enforce his lien. *Gardner v. Roach*, 111-413.

The individual property of one member of a firm, which property is used and kept on the leased premises, is not subject to a landlord's lien for rent due from the firm. The lien and the remedy given the landlord are purely statutory, and the landlord must avail himself of them just as they are given. *Ward v. Walker*, 111-611.

Creditors claiming a lien upon a stock of goods of the tenant by a bill of sale and who do not take possession of the stock under such sale, are not personally liable to the landlord for rent as to which he has a lien on such stock. *Hartwig v. Iles*, 131-501.

Priority: A purchaser from the tenant of property used on the premises during the term takes subject to the lien of the landlord and cannot claim protection as a purchaser without notice. *Hays v. Berry*, 104-455.

One purchasing products of the farm from a subtenant takes subject to the landlord's lien against the original tenant. *Beck v. Minnesota & Western Grain Co.*, 131-62.

Demand by the landlord against such purchaser is necessary before maintaining action against him for conversion. But such demand may be made by an agent. *Ibid.*

The period within which suit must be brought to enforce the landlord's lien as against a purchaser from the subtenant is to be determined by the terms of the landlord's contract with the original tenant. *Ibid.*

Where, in a proceeding to enforce a landlord's lien by attachment, employes of the tenant properly file their claims, under the provisions of Code § 4022, such claims take priority over the landlord's lien. *Stuart v. Twining*, 112-154

Where exempt property covered by a chattel mortgage was left on the premises by the tenant at the end of his term, held, that the landlord acquired no lien thereon as against the mortgagee. *Bacon v. Carr*, 112-193.

A valid mortgage on personal property of a tenant, executed before the commencement of the term, creates a lien superior to that of the landlord. *Gasmick v. Steffensen*, 112-688.

Where a chattel mortgage on the property of the tenant is foreclosed, the landlord's lien may be satisfied out of the proceeds of the sale. *Dowie v. Christen*, 115-364.

Where machinery was sold to the tenant and set up on the premises under an agreement that a chattel mortgage should be executed for the purchase price when the machinery was set up and accepted, held that such chattel mortgage took priority over the landlord's lien. *Davis Gasoline Engine Co. v. McHugh*, 115-415.

A purchase money mortgage given by a tenant as a part of the transaction for purchase by him of property taken onto the leased premises, is a prior lien to the landlord's claim for future accruing rent. *Arnold v. Hewitt*, 128-671.

Injunction: A landlord is entitled to an injunction to restrain the removal from the premises of property thereon to the prejudice of his lien, without a showing that the tenant is insolvent. *Wallin v. Murphy*, 117-640.

Attachment: Where rent has accrued, the landlord may resort to his remedy by attachment, following the procedure prescribed for ordinary attachments, and is

not liable for wrongfully suing out an attachment, even though by reason of a counter claim, which is subsequently pleaded, no judgment for rent is secured. *Smeaton v. Cole*, 120-368.

In an action to enforce the landlord's lien by attachment the tenant cannot interpose by way of counterclaim, a claim for wrongful and malicious suing out of attachment. *Ingram v. Dailey*, 123-188.

The remedy by attachment is not compulsory. The landlord does not owe the tenant the duty of enforcing his lien against any specific portion of the property subject thereto nor does he deprive himself of the right to enforce his lien against property on which there is a junior incumbrance by omitting to enforce it against property not subject to such incumbrance. The doctrine of marshaling assets has no application in such case. *Citizens Savings Bank v. Woods*, 111 N. W. 929.

Waiver: If the landlord takes a mort-

SEC. 2993. Attachment.

The landlord's lien gives a right to the landlord to resort to appropriate proceedings to the property of the tenant subject to such lien to satisfy his demand for rent due, but the landlord is not bound to resort to an attachment for the preservation or enforcement of his lien. *Staber v. Collins*, 124-543.

No attachment can issue for the enforcement of the landlord's lien for rent not due. *Gray v. Bremer*, 122-110.

Where the landlord has several distinct causes of action against his tenant, only one of which is for rent, and he has blended his claims into one, he thereby waives the right to attachment. *Ladner v. Balsley*, 103-674.

While another action cannot be joined in a petition to enforce a landlord's lien for rent, yet where the tenant interposes a counter-claim, plaintiff may in reply set up other demands against the tenant which could not have been joined with the original cause of action. *Illsly v. Grayson*, 105-685.

A counterclaim for wrongful and malicious suing out of a landlord's attachment cannot be interposed in the action in which

the attachment is sought. *Ingram v. Dailey*, 123-188.

One who takes a mortgage on chattel property which is subject to a landlord's lien may take possession of the property under his mortgage so long as the landlord has not proceeded to enforce his lien by attachment of the property, but such attachment entitles the landlord to possession as against such mortgagee and he may under the attachment proceedings seize the property although the mortgagee has taken possession under the mortgage. *Brody v. Cohen*, 106-309.

An allegation that the sale of property by a tenant was fraudulent is immaterial, inasmuch as even a *bona fide* sale would not defeat the lien of the landlord's attachment. The landlord is not entitled to remedy by landlord's attachment as to property not subject to the landlord's lien. *Hillman v. Brigham*, 110-220.

Actual damages suffered by reason of the levy of a landlord's writ of attachment sued out when nothing is owing as rent, may be recovered as against the landlord suing out the attachment. *Sigler v. Murphy*, 107-128.

CHAPTER 10.

OF WALLS IN COMMON.

SECTION 2994. Resting wall on neighbor's land.

The terms "wall in common" and "party wall" are used synonymously, and neither term is of particular value in determining the meaning of the statutes relating

to party walls. The words "party wall" may mean a wall of which the adjoining owners are tenants in common, and the words "wall in common" may mean a wall

possessed in severalty by such owners. Primarily either term means a wall for the common benefit and convenience of both tenements which it separates. *Lederer v. Colonial Investment Co.*, 130-157.

The statutory provisions as a whole are not to be construed so as to entitle either of the adjoining owners to extend his joists or timbers into the common wall beyond its center. *Ibid.*

Where the entire party wall erected by one owner is covered by and contributes to the support of a building subsequently erected by the adjoining owner, the latter is bound to pay for his share of the wall erected by the former. *Monroe Lodge v. Albia State Bank*, 112-487.

Where the first owner builds his wall of the material and dimensions required by the statute, and sufficient to carry his own and a similar building that may be erected by the adjoining proprietor, he is entitled to compensation for the share of the wall so erected, even though a cheaper wall would have been sufficient for the purpose of the adjoining owner. *Ibid.*

The fact that the wall stands on the

SEC. 2995. Contribution by adjoining owner.

It is one-half of the appraised value of the wall at the time the adjoining proprietor uses it that is to be charged to him, not its value to him, but its value as a common wall. Ordinarily such value is arrived at by ascertaining the reasonable

boundary line between owners is of itself sufficient to put all parties on enquiry as to the rights of the respective owners, and neither is required to notify the grantees of the other that he claims an interest in the wall. *Howell v. Goss*, 128-569.

When a party wall is destroyed as the natural result of the action of the elements, and without fault of one owner, he is under no obligation to contribute to the rebuilding of the wall. There is no implication of a mutual easement of perpetual support applicable to future structures. *Jackson v. Bruns*, 129-616.

Under the provision that an adjoining owner may have the wall erected on the boundary line made a party wall by paying half of the present value, the right to an accounting for the use of such party wall accrues at the time such use commences. *Pier v. Salot*, 107 N. W. 420; 111 N. W. 989.

Where one owning a building sells to an adjoining owner the right to use the wall of such building as a party wall, it is to be presumed that the grantor acquiesced in the wall as the boundary line between the two premises. *Yunker v. White*, 111 N. W. 824.

cost of the wall, and deducting for any depreciation that may have occurred before the same is used by the contiguous owner. *Monroe Lodge v. Albia State Bank*, 112-487.

SEC. 2997. Repairs—expense apportioned.

Where the wall is torn down and rebuilt by one of the owners, not because of its defective condition, but in order to extend it to a greater height, the other owner is

not bound to contribute to the expense unless he makes use of the additional height to his own advantage. *Howell v. Goss*, 128-569.

SEC. 2998. Beams, joists and flues.

The right to build a wall in part upon adjoining property and the right of the adjoining owner to make it a wall in common by paying a portion of the value thereof are both acquired by statute and cannot be controlled by contract. If the adjoining owner does not request flues to be constructed for his use he cannot insist

upon using the flues which the builder of the wall has provided for his own use. *Koolbeck v. Baughn*, 126-194.

Neither owner has the right to so weaken the wall as to render it insufficient or unsafe for the other's use. *Lederer v. Colonial Investment Co.*, 130-157.

SEC. 2999. Height of wall—rebuilding.

Neither of the adjoining owners has a right to extend his joists or timbers beyond the center line of the common wall. *Lederer v. Colonial Investment Co.*, 130-157.

Where only one of the joint owners desires to add to the height of his building, and to do this it is necessary to rebuild

and enlarge the existing wall, he must do this at his own expense; but if the other joint owner subsequently desires to use the added portion of the new wall he must pay his fair proportion of the entire cost of raising and repairing. *Howell v. Goss*, 128-569.

SEC. 3000. Paying for share of adjoining wall.

An adjoining proprietor may make a wall built entirely on the other party's lands a wall in common, by complying

with the statutory provisions. *Lederer v. Colonial Investment Co.*, 130-157.

SEC. 3001. Openings—fixtures.

The adjoining owner who subsequently asserts the right to use the party wall on payment of a portion of the cost, cannot make use of the flues which were not con-

structed at his request and the use of which will be detrimental to the owner who first constructed the wall. *Koolbeck v. Baughn*, 126-194.

CHAPTER 11.**OF EASEMENTS IN REAL ESTATE.****SECTION 3004. Adverse possession—use.**

This section relates to titles by prescription, and not to those by dedication. *Hanger v. Des Moines*, 109-480.

The adverse possession of an easement cannot be predicated on proof merely of use. It must be established by evidence independent of use that the party claimed the easement as a right. *Brown v. Peck*, 125-624.

The fact of adverse possession must be established by evidence distinct from and independent of the use of the easement, and it must also appear that the person against whom the claim is made had express notice thereof. *Friday v. Henah*, 113-425.

The mere use of a right of way over another's land with knowledge thereof on the part of the latter, but without claim of right or title is insufficient to establish a right of way by prescription. *McBride v. Bair*, 112 N. W. 169.

The provision of this section does not prevent parol evidence of an intent by the grantor to create an easement and knowledge of such intent by the grantee. *O'Reagan v. Duggan*, 117-612.

The provisions of this section are not applicable to cases where dedication is claimed, and the use of the property may be shown as indicating such dedication. *Dodge v. Hart*, 113-685.

TITLE XV.

OF TRADE AND COMMERCE.

CHAPTER 1.

OF WEIGHTS, MEASURES AND INSPECTION.

SECTION 3016. Repeal—bushel by weight. That section three thousand and sixteen (3016) of the supplement to the code be and the same is hereby repealed, and the following enacted as a substitute therefor:

“A bushel of the respective articles hereafter mentioned, will mean the amount of weight in this section specified:

Apples	forty-eight pounds;
Alfalfa seed.....	sixty pounds;
Barley	forty-eight pounds;
Beans	sixty pounds;
Beets	fifty-six pounds;
Blackberries	thirty pounds;
Blue grass seed.....	fourteen pounds;
Bran	twenty pounds;
Broom corn seed.....	fifty pounds;
Buckwheat	fifty-two pounds;
Canary seed.....	fifty pounds;
Carrots	fifty pounds;
Castor beans.....	forty-six pounds;
Charcoal	twenty pounds;
Cherries	forty pounds;
Clover seed.....	sixty pounds;
Coke	thirty-eight pounds;
Corn in the cob.....	seventy pounds;
Corn in the ear unhusked.....	seventy-five pounds;
Cornmeal	fifty pounds;
Cucumbers	forty-eight pounds;
Currants	forty pounds;
Dried apples.....	twenty-four pounds;
Dried peaches.....	thirty-three pounds;
Flax seed.....	fifty-six pounds;
Gooseberries	forty pounds;
Grapes	forty pounds;
Green beans, unshelled.....	fifty-six pounds;
Green peas, unshelled.....	fifty pounds;
Hemp seed.....	forty-four pounds;
Hickory nuts.....	fifty pounds;
Hungarian grass.....	fifty pounds;
Kaffir corn.....	fifty-six pounds;
Lime	eighty pounds;

Millet seed.....	fifty pounds;
Oats	thirty-two pounds;
Onions	fifty-seven pounds;
Onion top sets.....	thirty pounds;
Onion bottom sets.....	thirty-two pounds;
Orchard grass.....	fourteen pounds;
Osage orange seed.....	thirty-two pounds;
Parsnips	forty-two pounds;
Peaches	forty-eight pounds;
Peanuts	twenty pounds;
Peas	sixty pounds;
Pop corn in the ear.....	seventy pounds;
Pop corn shelled.....	fifty-six pounds;
Potatoes	sixty pounds;
Quinces	forty-eight pounds;
Radish seed	fifty pounds;
Rape	fifty pounds;
Raspberries	thirty-two pounds;
Red top	fourteen [pounds];
Rutabagas	fifty pounds;
Rye	fifty-six pounds;
Salt	eighty pounds;
Sand	one hundred and thirty pounds;
Shelled corn	fifty-six pounds;
Sorghum saccharatum seed....	fifty pounds;
Spelt	thirty-five pounds;
Stone coal	eighty pounds;
Strawberries.....	thirty-two pounds;
Sweet corn	fifty pounds;
Sweet potatoes	forty-six pounds;
Timothy seed	forty-five pounds;
Tomatoes	fifty pounds;
Turnips	fifty-five pounds;
Walnuts	fifty pounds;
Wheat	sixty pounds;
Hen eggs	one and one-half pounds per dozen.”

[31 G. A., ch. 147, § 2.]

CHAPTER 2.

OF MONEY OF ACCOUNT AND INTEREST.

SECTION 3038. Rate of interest.

In the absence of contract to the contrary, money becoming due bears interest at the legal rate. *Kellenberger v. Oskaloosa Nat. B., L. & I. Ass'n*, 129-582.

A judgment may provide for interest on costs and attorney's fees as well as on the principal sum for which the judgment is rendered. *Hoyt v. Beach*, 104-257.

In recovering judgment under a policy of accident insurance providing for the payment of a fixed sum in the event of a specified loss, and also a weekly indemnity during disability, held, that judgment

should not include any allowance of interest on the amount which it should be found the company was liable to pay. *Hart v. National Masonic Acc. Assn.*, 105-717.

Where treble damages are allowed to be recovered by way of penalty they should not be increased by adding interest on the amount of the recovery. *Blair v. Sioux City & P. R. Co.*, 109-369.

Where a claim is for unliquidated damages, interest may be taken into account as an element of damage in arriving at the sum which will be a just and lawful

compensation for the injury sustained. *Christie v. Iowa Life Ins. Co.*, 111-177.

Interest does not accrue on a continuous open account without any settlement or balance being ascertained. *McFarland v. McCormick*, 114-368.

The receipt of a bank pass book, showing balance due, without objection to

SEC. 3039. On judgments and decrees.

The rate of interest named in a contract applies after maturity as well as before without express stipulation to that effect, but a provision for semi-annual rests is

SEC. 3040. Illegal rate prohibited.

Where the agent of the lender, under the authority of his principal, receives for the benefit of the principal commission in addition to the lawful rate of interest, the contract is usurious. *McNeely v. Ford*, 103-508.

Payment by the borrower of the necessary expenses of making the loan in addition to lawful interest will not constitute usury. *Iowa Sav. & L. Assn. v. Heidt*, 107-297.

Whether or not the contract is usurious does not depend upon the form the transaction is made to assume. Courts always look beyond the mere form and search diligently for the substance and intent, and where the lender was to have the legal rate of interest for the money loaned, and in addition thereto one-half the discount

SEC. 3041. Usury—penalty.

The defense of usury is personal to the debtor and cannot be maintained by a stranger to the contract. *Pardoe v. Iowa State Nat. Bank*, 106-345.

Accordingly held that the right of action given against a national bank to recover usury paid and the penalty thereon (U. S. Rev. Stat. §§ 5197, 5198) was not available except to a party who had personally or out of his own means paid usurious interest. *Ibid.*

The plea of usury cannot be interposed by one who is neither a party to the contract nor authorized by the debtor to avail himself of such plea. *Bacon v. Iowa Savings & Loan Ass'n*, 121-449.

SEC. 3042. Assignee.

The assignee whose right is saved to plead usury under this section is one who takes in good faith and holds with no

charges therein, amounts to an account stated. *Schoonover v. Osborne*, 108-453.

In an action on an administrator's bond the sureties are liable for interest from the time the administrator fails to account in accordance with the order of the court. *Ellyson v. Lord*, 124-125.

not applicable to interest thus allowed after the maturity of the contract in the absence of express agreement. *Rew v. Independent School District*, 125-28.

which the borrower was able to secure on paying another debt by the use of the money borrowed, held that the contract was usurious. *Weaver v. Burnett*, 110-567.

Where renewal notes are given for the same debt, usury in the first or any intermediate note may be pleaded as against the last note. *Polk County Sav. Bank v. Harding*, 113-511.

Where on the renewal of a loan there is no perfect agreement or suggestion of any kind that the transaction is to be a settlement or composition of the borrower's claim for usury, but the net result of the transaction is to perpetuate the usurious nature of the contract, the right of the borrower to plead usury is not cut off. *Hyland v. Phoenix Loan Assn.*, 118-401.

The defense of usury can be pleaded only by the borrower. Therefore the creditors of a bankrupt cannot set up the defense of usury against the claim of another creditor. *In re Worth*, 130 Fed. 927.

The defense of usury is as available to the debtor's trustee in bankruptcy as to the debtor himself. *In re Stern*, 144 Fed. 956.

Interest which has not been paid but only contracted for (covered for instance by notes not yet paid) cannot be recovered. *Talbot v. First Nat. Bank*, 106-361.

knowledge of the taint. *Spinney v. Miller*, 114-210.

CHAPTER 3.

OF NOTES AND BILLS.

SECTION 3043. Promissory notes negotiable.

The assignment of a negotiable instrument not transferable by delivery does not make the assignee a holder in due

course who is entitled to take free from defenses available against the assignor. *Hecker v. Boylan*, 126-162.

SEC. 3044. Assignment of non-negotiable instruments.

The assignee gains no better rights by reason of the assignment than his assignor had at the time the assignment was made. *Miller Brewing Co. v. Hansen*, 104-307.

SEC. 3046. When assignment prohibited.

This section does not apply where plaintiff is not in possession of the note on which suit is brought and the burden is upon him to show that it was transferred by the indorser while the owner thereof with intent to transfer title. *Moehn v. Moehn*, 105-710.

One who purchases a note and mortgage after maturity takes the same subject to all defenses or counter-claims of the mortgagor held against the mortgagee existing before notice of the transfer. While it is a general rule that the assignee of a mortgage securing paper overdue takes subject to all equities between the original parties, this rule does not apply to latent

equities of third parties. *Gibson v. McIntire*, 110-417.

A verbal assignment of a chose in action is valid. *Seymour v. Aultman*, 109-297.

A certificate of a mutual benefit association cannot be transferred to a creditor so as to give him a right to the benefit fund if it is expressly provided in the certificate that it shall be non-assignable. *Crocker v. Hugin*, 103-243.

The assignee is subject to all defenses which would have been available against the assignor. *Thomassen v. De Goey*, 133-278.

Section applied. *Spinney v. Miller*, 114-210.

SEC. 3047. Open account assignable. An open account of sums of money due on contract may be assigned, and the assignee will have a right of action thereon in his own name, subject to such defenses and counter-claims as are allowed against the instruments mentioned in the preceding section, before notice of such assignment is given to the debtor in writing by the assignee. But no sale or assignment, by the head of a family, of wages, whether the same be exempt from execution or not, shall be of any validity whatever unless the same be evidenced by a written instrument and if married unless the husband and wife, sign and acknowledge the same joint instrument before an officer authorized to take acknowledgments; and assignments of wages shall have priority and precedence in the order in which notice in writing of such assignments shall be given to the employer, and not otherwise. [20 G. A., ch. 183, § 2; C., '73, § 2087; R., § 1799; C., '51, § 952.] [31 G. A., ch. 148.]

These provisions are not applicable to the assignment of a chose in action. See Code §§ 3443 and 3461. *Peterson v. Ball*, 121-544.

SEC. 3049. Blank indorsement by one not a party.

A note bearing a blank endorsement by one not a party is notice to any one discounting it that the endorser is presumably an accommodation endorser, without

consideration, and hence a mere guarantor. This presumption can, however, be rebutted. *Lyon v. First Nat. Bank*, 85 Fed. 120.

SEC. 3051. What entitled to grace.

Under Code § 3051 grace was allowed only on negotiable paper. *Kilmer v. Galaher*, 116-666.

Days of grace are now abolished by the negotiable instruments act. See Supp. § 3060-a 85.

SEC. 3053. Holidays.

Sunday or any other day mentioned by this section as a holiday should not be excluded in estimating the three days within which a motion for new trial is to be filed. *German Sav. Bank v. Cady*, 114-228.

The days enumerated in this section as holidays with reference to presentation

and dishonor of negotiable paper are also holidays within the provisions of Code § 2448, par. 9, forbidding sales of intoxicating liquors to be made on any legal holiday. See also Code § 3541, relating to appearance in an action. *Brennan v. Roberts*, 125-615.

SEC. 3054. Notice of protest.

Although the statute permits notice by mail to endorsers, the law requires presentment and demand in person, and letters written to the maker before the day

of maturity demanding payment will not constitute sufficient demand to hold an indorser. *Closz v. Miracle*, 103-198.

SEC. 3056. When demand necessary.

This provision has no reference to the question as to admissibility of parol evidence to fix the time for performance of such contract. *Ingram v. Dailey*, 123-188.

In an action for failure to deliver prop-

erty in compliance with a contract providing for payment to be made in property, demand for the property must be proved. *Newburn v. Hyde*, 132-88.

SEC. 3060-a. Sections of code repealed. The following enumerated sections of title fifteen (15) chapter three (3) of the code are hereby repealed: Sections three thousand and forty-three (3043), three thousand and forty-five (3045), three thousand and forty-nine (3049), three thousand and fifty (3050), three thousand and fifty-one (3051), three thousand and fifty-two (3052), three thousand and fifty-four (3054), and three thousand and fifty-five (3055). [29 G. A., ch. 130, § 197.]

CHAPTER 3-A.
OF NEGOTIABLE INSTRUMENTS.**FORM AND INTERPRETATION.**

SECTION 3060-a1. Form of negotiable instrument. An instrument to be negotiable must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer.
2. Must contain an unconditional promise or order to pay a sum certain in money.
3. Must be payable on demand or at a fixed or determinable future time.
4. Must be payable to the order of a specified person or to bearer; and,
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty. [29 G. A., ch. 130, § 1.]

Iowa: A certificate of deposit, payable on a day certain in the future, is negotiable. *Bean v. Briggs*, 1-488; likewise municipal bonds, *Callahan v. Brown*, 31-333; *Clapp v. Cedar County*, 5-15; *Griffith v. Burden*, 35-138; but a land warrant is not, *Fort v. Wilson*, 3-153; nor a school order, *Nat. State Bk. v. Ind. Dist.*, 39-490; *Shepard v. Dist. Twp.*, 22-595; *Clark v. Des Moines*, 19-199.

(1) *Other states:* The writing may be in pencil. *Brown v. Butchers' Bank*, 6 Hill, 443.

(2) See section 3060-a3.

May designate particular kind of money, see section 3060-a6, subdivision 5.

(Code section 3045, which permitted the instrument to be made payable in money or labor, is repealed.)

(3) As to when it is payable on demand, see section 3060-a7. When at a future time, see section 3060-a4.

(4) As to when it is payable to order, see section 3060-a8.

For additional citation of authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 20.

(5) See section 3060-a126.

SEC. 3060-a2. Certainty as to sum—what constitutes. The sum payable is a sum certain within the meaning of this act although it is to be paid:

1. With interest; or
2. By stated installments; or
3. By stated installments, with a provision that upon default in payment of any installment, the whole shall become due; or
4. With exchange, whether at a fixed rate or at the current rate; or
5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity. [29 G. A., ch. 130, § 2.]

(2) *Other states:* *Markey v. Corey*, 108 Mich., 184; *Wright v. Irwin*, 33 Mich., 32.

(4) *Iowa:* This changes the rule in Iowa. *Culbertson v. Nelson*, 93-187.

Other states: In support of the rule, adopted by the act, see *Second Nat. Bk. v. Basuier*, 65 Fed. 58; *Hastings v. Thompson*, 54 Minn., 184; *Flagg v. School Dist.*, 4 N. D., 30.

(5) *Iowa:* See *Bank v. Marsh*, 89-273; *Sperry v. Horr*, 32-184. Amount is not rendered uncertain by stipulation that it may be reduced by showing overcharge. *Green v. Austin*, 7-521.

Other states: The rule adopted by the act is sustained by a great weight of authority outside of the decisions of this state. For some of them, supporting the rule, see *Bank v. Sutton Mfg. Co.*, 6 U. S., App., 312, 331; *Dorsey v. Wolff*, 142 Ill., 589; *Stoneman v. Pyle*, 35 Ind., 103; *Heard v. Dubuque Bk.*, 8 Neb., 10; *Stark v. Olson*, 44 Neb., 646.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 21.

SEC. 3060-a3. When promise is unconditional. An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or
2. A statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional. [29 G. A., ch. 130, § 3.]

(1) For authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 22.

(2) *Iowa:* Changes the rule in Iowa, *Charlton v. Reed*, 61-166; *Knepper v. Chase*, 7-145. See *Miller v. Poage*, 56-96.

Other states: In *Mott v. Havana Nat. Bk.*, 22 Hun., 354, it is held, that the clause "in part payment for a portable engine, which engine shall be and remain the property of the owner of this note, until the amount hereby secured is paid," did not destroy its negotiable character. The same as to a note containing provision "given in consideration of a certain patent right." *Hereth v. Meyer*, 33 Ind., 511.

For additional citation of authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 22.

SEC. 3060-a4. Determinable future time—what constitutes. An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein; or
3. On or before a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect. [29 G. A., ch. 130, § 4.]

(2) *Other states:* See *Mattison v. Marks*, 31 Mich., 421; *Buchanan v. Wren (Tex.)*, 30 S. W., 1077; *Albertson v. Laughlin*, 173 Pa. St., 525.

(3) *Iowa:* A note is not negotiable if made to mature when convenient. *Works v. Hershey*, 35-340; or at the option of the maker, *Woodbury v. Roberts*, 58-348.

Other states: A note payable in a certain number of days after the death of the maker, or upon demand after the death of the maker, is a good promissory note, because the event is sure to happen. *Carnwright v. Gray*, 127 N. Y., 92; *Hegeman v. Moon*, 131 N. Y., 462; *Shaw v. Camp*, 160 Ill., 425. But one payable when, or in a certain number of days after "A shall become of age," is not negotiable, because uncertain as to whether A will live so long. *Goss v. Nelson*, 1 Burr, 226. Likewise one payable when a certain ship shall arrive. *Coolidge v. Ruggles*, 15 Mass., 387.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 23.

(4) *Iowa*: No time of payment being specified, it is presumptively payable on demand. *Bank v. Price*, 52-570.

SEC. 3060-a5. Additional provisions not affecting negotiability. An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or
2. Authorizes a confession of judgment if the instrument be not paid at maturity; or
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or
4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal. [29 G. A., ch. 130, § 5.]

(1) *Iowa*: Coupling mortgage with a negotiable note, authorizing mortgagee to take possession of chattel, but not to sell until after maturity of note, does not destroy negotiability. *Bank v. Taylor*, 67-572; distinguishing *Smith v. Marlin*, 59-645, holding provision by which debt was liable to be diminished before maturity, destroyed negotiability.

Other states: A mere statement that collateral security has been deposited for the performance of the promise contained in the note does not affect its negotiability. *Wise v. Charlton*, 4 A. & E., 486; *Fancourt v. Thorne*, 9 Q. B., 312. And so with a provision authorizing sale of collateral if note be dishonored. *Perry v. Bigelow*, 128 Mass., 129; *Towne v. Rice*, 122 Mass., 67; *Biegler v. Merchants' L. & T. C.*, 62 Ill. App., 560. The contrary is held as to this clause "given as collateral security with agreement." *Costello v. Crowell*, 127 Mass., 293.

(2) *Iowa*: Provision authorizing attorney to confess judgment is illegal and no part of note, and therefore does not destroy negotiability. *Tolman v. Janson*, 106-455. This provision meets the requirements of some of the states where judgment notes are in use.

For authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 24.

(3) *Other states*: This provision is designed to meet the practice in some states of inserting waiver of the benefits of homestead and exemption laws. See *Zimmerman v. Anderson*, 67 Pa. St., 421.

(4) *Other states*: If the obligation to the maker to pay in money is certain, the right of the holder to elect to take payment in something other than money will not destroy its negotiable character. *Hodges v. Shuler*, 22 N. Y., 114.

See notes Crawford's Annotated Neg. Inst. Law (2 Ed.), section 24.

SEC. 3060-a6. Omissions — seal — particular money. The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

But nothing in this section shall alter or repeal any statute requiring in certain cases the nature of the consideration to be stated in the instrument. [29 G. A., ch. 130, § 6.]

(1) *Other states*: See section 3060-a36. True date may be shown by parol evidence between the immediate parties. *Bigge v. Piper*, 86 Tenn., 589.

(2) *Other states*: "Value received" not necessary. Daniel on Neg. Insts., section 108.

(3) See sections 3060-a3; 3060-a28; and 3060-a77.

(4) *Iowa*: See *Temple v. Hayes*, Morris, 9.

Other states: Corporate seal does not destroy negotiable character. *Chase Nat. Bk. v. Faurot*, 149 N. Y., 532; *Weeks v. Esler*, 143 N. Y., 374. Same as to municipal bonds. *Bank v. Village of Rome*, 19 N. Y., 20; *Mercer County v. Hackett*, 1 Wall, 83.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 25, note (d).

(5) *Iowa*: Note made payable in property destroys negotiability. *McCartney v. Smalley*, 11-85. So with one payable in currency. *Rindskoff v. Barrett*, 11-172; otherwise if shown that money was intended and so understood. *Haddock v. Wood*, 46-433; see *Culbertson v. Nelson*, 93-187.

Other states: A note made payable in gold coin is negotiable. *Chrysler v. Griswold*, 43 N. Y., 209. So one payable "in bank notes current in the City of New York." *Keith v. Jones*, 9 Johns, 120. One payable "in current funds at Pittsburg" held not negotiable. *Wright v. Hart's Admr.*, 44 Pa. St., 454.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 25, note (e).

A check payable in current funds is not a negotiable instrument. *Dille v. White*, 132-327.

SEC. 3060-a7. When payable on demand. An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or
2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when overdue, it is, as regards the person so issuing, accepting or indorsing it, payable on demand. [29 G. A., ch. 130, § 7.]

(1) For the distinctions between instruments payable on demand and those payable at sight, see Daniel on Neg. Insts., sections 617 and 619, and authorities there cited.

See notes to Crawford's Annotated Neg. Inst. Law (2 Ed.), Sec. 26, note (a).

(2) *Iowa*: A negotiable note transferred by indorsement after maturity is, as regards the person so issuing, accepting or indorsing, payable on demand and must be presented to all the makers in person, or at their usual places of residence or business within a reasonable time after transfer, and notice of non-payment immediately given to bind the indorser. *Graul v. Strutzel*, 53-712; *McKewer v. Kirtland*, 33-348; *Pryor v. Bowman*, 38-92; *Blake v. McMillen*, 33-150; *Bank v. Orvis*, 40-332; *Closz & Mickelson v. Miracle*, 103-198.

A draft or bill in which no time of payment is mentioned is, under the statutes, drawn payable on demand just as effectually as though the words "payable on demand" had been incorporated into it. *Blank v. Price*, 52-570.

Other states: As bearing on the text see *Messmore v. Morrison*, 172 Pa. St., 300; *James v. Brown*, 11 Ohio St., 601; *Libby v. Mekelborg*, 28 Minn., 38; *Roberts v. Snow*, 28 Neb., 425.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 26, note (b).

For other authorities relating to instruments issued, accepted or indorsed after maturity see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 26, note (c).

SEC. 3060-a8. When payable to order. The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or
6. The holder of an office for the time being.

Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty. [29 G. A., ch. 130, § 8.]

Other states: The first clause of this section states the rule of the law merchant requiring the word order, or other word of similar import to render the instrument negotiable. *Smith v. Kendall*, 6 T. R., 123; *Carnwright v. Gray*, 127 N. Y., 92.

See Crawford's Annotated Neg. Inst. Law (2 Ed.), section 27, note (a).

(2) See section 3060-a184. A note payable to the order of the maker requires the maker's indorsement to complete the same.

(5) For illustrations see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 27, note (c).

(6) *Iowa:* A collateral agreement referred to in an indorsement and specified therein does not destroy negotiability. *Leland v. Parriott*, 35-454; the words "et al. or order" following name of payee destroy negotiability. *Gordon v. Anderson*, 83-224.

Other states: A note payable to certain persons as trustees of an incorporated association, or their successors in office, is negotiable. *Davis v. Gore*, 6 N. Y., 124. If the identity of the payee can be ascertained with certainty it is sufficient, though not designated by name. *United States v. White*, 2 Hill, 59; *Blackman v. Lehman*, 3 Ala., 547.

SEC. 3060-a9. When payable to bearer. The instrument is payable to bearer:

1. When it is expressed to be so payable; or
2. When it is payable to a person named therein or bearer; or
3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or
4. When the name of the payee does not purport to be the name of any person; or
5. When the only or last indorsement is an indorsement in blank. [29 G. A., ch. 130, § 9.]

(2) *Iowa:* A note payable to "the bearer, M. C. Murdough," is not negotiable. *Warren v. Scott*, 32-22.

See section 3060-a30.

(3) For a discussion and a criticism of the authorities bearing upon this division of the section by Mr. Crawford, the author of the original negotiable instruments law, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 28, note (b).

(4) *Other states:* A check payable to "cash" or to "sundries." *Willets v. Phoenix Bank*, 2 Druer, 121; *Mechanics' Bank v. Stratton*, 2 Keyes, 365.

SEC. 3060-a10. Terms—when sufficient. The negotiable instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements thereof. [29 G. A., ch. 130, § 10.]

Other states: It is not necessary that the instrument be written in the English language but it may be in a foreign language. *Debbeian v. Gala*, 64 Md. 262, 265; and may be in pencil as well as ink. *Brown v. Butchers' Bank*, 6 Hill, 443. For rule governing construction of ambiguous instruments, see section 3060-a17.

SEC. 3060-a11. Date—presumption as to. When the instrument or an acceptance or any indorsement thereon is dated, such date is deemed *prima facie* to be the true date of the making, drawing, acceptance or indorsement, as the case may be. [29 G. A., ch. 130, § 11.]

Other states: Mistake in date may be shown between the immediate parties. *Cowing v. Altman*, 71 N. Y., 441. Where date is an impossible one, the law will adopt the nearest date. If dated Sept. 31, true date will be deemed to be Sept. 30. *Wagner v. Kenner*, 2 Rob. (La.), 120.

SEC. 3060-a12. Ante-dated and post-dated. The instrument is not invalid for the reason only that it is ante-dated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery. [29 G. A., ch. 130, § 12.]

Other states: A post-dated bill or check may be negotiated before the day of its date. *Brewster v. McCardle*, 8 Wend., 478.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 31.

SEC. 3060-a13. When date may be inserted. When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course; but as to him, the date so inserted is to be regarded as the true date. [29 G. A., ch. 130, § 13.]

Other states: See the following sections; also see *Redlich v. Doll*, 54 N. Y., 238.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 32, note (b).

SEC. 3060-a14. Blanks—when may be filled. Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time. [29 G. A., ch. 130, § 14.]

Other states: The leading authority upon the right of a person in possession to fill blanks when necessary to complete the instrument in a material particular is *Russell v. Langstaffe*, 2 Doug., 514. See *Androscoffin Bank v. Kimball*, 10 Cush., 373. If blank space is left for name of payee holder may fill with his own name. *Boyd v. McCann*, 10 Md., 118. The authority to complete the instrument, however, will not authorize the insertion of matter not essential to its completeness. *Weyerhauser v. Dunn*, 100 N. Y., 150.

The rule contained in the second clause of the section operates only where the instruction has been *delivered*; see the following section. As to rights of *bona fide* holder for value of such an instrument filled up contrary to agreement, see *Redlich v. Doll*, 54 N. Y., 234, 238.

For other authorities and a discussion of the rules adopted by this section, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 33, notes (a), (b) and (c).

Where one person signs a note in blank and delivers it to another for a specific purpose and the person to whom it is delivered with authority to fill the blanks for a specified amount fills out the blanks for an unauthorized amount and uses the

instrument for an unauthorized purpose, the person whose name is inserted as payee is not a holder in due course and cannot recover against the original signer. *Vander Ploeg v. Van Zuuk*, 112 N. W. 807.

SEC. 3060-a15. Incomplete instrument not delivered. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery. [29 G. A., ch. 130, § 15.]

Iowa: Delivery to payee by third party without authority is not binding. *Ware v. Smith*, 62-159; but delivery by third party in violation of agreement is not a defense as against an innocent purchaser. *Graff v. Logue*, 61-704.

Other states: The instrument must be complete and perfect when issued, or else authority reposed in some one to supply the part required to complete it afterwards. *Sedgwick v. McKim*, 53 N. Y., 307, 313; *Davis Sewing Mach. Co. v. Best*, 105 N. Y., 59-67.

For other authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 34.

SEC. 3060-a16. Delivery—when effectual—when presumed. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved. [29 G. A., ch. 130, § 16.]

Iowa: An alteration made after execution, before delivery without knowledge of surety, discharges surety from liability upon the note. *Marsh v. Griffin*, 42-403.

Other states: Delivery according to the purpose and intent of the parties is essential to its existence. *Burson v. Huntington*, 21 Mich., 416.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 35, notes (c) and (d).

SEC. 3060-a17. Construction where instrument is ambiguous. Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount.

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued.

4. Where there is conflict between the written and printed provisions of the instrument, the written provisions prevail.

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note, the holder may treat it as either, at his election.

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

7. Where an instrument containing the words "I promise to pay," is signed by two or more persons, they are deemed to be jointly and severally liable thereon. [29 G. A., ch. 130, § 17.]

(1) *Iowa:* No recovery at law can be had on a note which fails to state, in the body of it, the amount for which it is given. Marginal figures are no part of it, but a mere memorandum. *Hollen v. Davis*, 59-444.

Other states: Marginal figures are regarded as mere memoranda and no part of the instrument. *Smith v. Smith*, 1 R. I., 388.

(3) *Other states:* *Knisley v. Sampson*, 100 Ill., 54.

(4) *Other states:* But this rule does not permit of the rejection of any of the printed matter which, by any reasonable construction, may be reconciled with the written part. *Miller v. Hannibal & St. J. R. R. Co.*, 90 N. Y., 430.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 36, note (c).

(5) *Other states:* *Heise v. Bumpass*, 40 Ark., 547.

For illustrations and other authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 36, note (d).

(6) For rule as to irregular indorsers, see section 3060-a64.

(7) *Other states: Monson v. Drakeley*, 40 Conn., 559; *Dart v. Sherwood*, 7 Wis., 523.

SEC. 3060-a18. Liability of person signing in trade or assumed name. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name. [29 G. A., ch. 130, § 18.]

Other states: Presumption is that party takes instrument on the credit of the parties whose names appear thereon. *Briggs v. Partridge*, 64 N. Y., 363. A person may become a party to a bill or note by any mark or designation he chooses to adopt; provided it be used as a substitute for his name and he intends to be bound by it. *DeWitt v. Walton*, 9 N. Y., 574. See Crawford's Annotated Neg. Inst. Law (2 Ed.), section 37, where other authorities are cited.

SEC. 3060-a19. Signature by agent—authority—how shown. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency. [29 G. A., ch. 130, § 19.]

See *Conroe v. Case*, 74 Wis., 85. As to ratification of unauthorized signature see *Bartlett v. Tucker*, 104, Mass., 336; *Paul v. Berry*, 78 Ill., 158; *Bank v. Marine Bank*, 16 Wis., 120.

SEC. 3060-a20. Liability of person signing as agent, etc. Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of the words describing him as an agent, or as filling a representative character without disclosing his principal, does not exempt him from personal liability. [29 G. A., ch. 130, § 20.]

Iowa: For the rule in Iowa in cases where the makers attempt to sign in representative capacity, merely adding, however, after their own signature, the words "President," "Secretary," "Trustee," etc., see the following cases: *Wing v. Glick*, 4-73; *Am. Ins. Co. v. Stratton*, 59-697; *Scraper Co. v. Tuttle*, 61-423; *Lewis v. Tilton*, 64-220; *Hefner v. Brownell*, 70-591; *McCandless v. Belle Plaine Canning Co.*, 78-162; *Lee v. Percival*, 85-639; *Matthews v. Dubuque Mattress Co.*, 87-246; *Day v. Ramsdell*, 90-731; *Savings Bank & Trust Co. v. Swan*, 100-718.

Other states: But if the principal is plainly disclosed in the body of the instrument, one signing in a representative capacity, or as agent, is not personally liable. *Whitney v. Inhabitants of Stow*, 11 Mass., 368; *Haskell v. Cornish*, 13 Cal., 45; *Little v. Bailey*, 87 Ill., 239. And this would seem to be the rule adopted by this section of the act.

See Crawford's Annotated Neg. Inst. Law (2 Ed.), section 39, and notes thereto. See also Neg. Insts. Law, by Selover, section 24, and authorities cited.

Mr. Crawford, the author of the original draft of the act, in a note to section 39 of his work, says:

"In the original draft submitted to the Conference of Commissioners on Uniformity of Laws this section read as follows: 'Where a person adds to his signature words indicating that he signs for or on behalf of a principal, or in a representative capacity, he is not liable on the instrument; but the mere addition of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability. In determining whether a signature is that of the principal or of the agent by whose hand it is written, that construction is to be adopted which is most favorable to the validity of the instrument.' This is the English rule, and was the rule in New York prior to the statute. Under that rule a person signing for or on behalf of a principal was not liable on the instrument, notwithstanding he had no authority to bind his principal. There was an implied warranty on his part that he possessed such authority, and if he did not he became liable upon such warranty for the damages resulting from the breach. *Miller v. Reynolds*, 92 Hun, 400. But no action could be maintained against him on the instrument when by its terms it did not purport to bind him. And his liability upon the implied warranty did not accompany the transfer of the instrument, unless the claim founded upon the warranty was also assigned to the person to whom

the instrument was transferred. (*Id.*) The effect of the section, as it now stands, is to permit the holder to sue the agent on the instrument, if he was not duly authorized to sign the same on behalf of the principal."

SEC. 3060-a21. Signature by "procuration"—effect of. A signature by "procuration" operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority. [29 G. A., ch. 130, § 21.]

See notes to section 40, Crawford's Annotated Neg. Inst. Law (2 Ed.).

SEC. 3060-a22. Effect of indorsement by infant or corporation. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon. [29 G. A., ch. 130, § 22.]

For authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 41, notes (a) and (b).

SEC. 3060-a23. Forged signature—effect of. Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority. [29 G. A., ch. 130, § 23.]

Other states: *Buckley v. Sec. Nat. Bk. of Jersey City*, 35 N. J. Law, 400; *Whiteford v. Monroe*, 17 Md., 135.

In the absence of an estoppel or of an adoption or ratification of the signature, no rights can be acquired by a *bona fide* or other holder under a forged signature, against the person whose name is forged. *Mersman v. Werges*, 3 Fed. 378; *Butler v. Carns*, 37 Wis., 61; *Bank v. Adams*, 91 Ind., 280; *Bank v. Crafts*, 4 Allen, 447; *Wellington v. Jackson*, 121 Mass., 157.

See also Crawford's Annotated Neg. Inst. Law (2 Ed.), section 42, note (b).

CONSIDERATION OF NEGOTIABLE INSTRUMENTS.

SEC. 3060-a24. Presumption of consideration. Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value. [29 G. A., ch. 130, § 24.]

Iowa: A blank indorsement by person not the payee or indorsee thereof imports a sufficient consideration to sustain his contract of guaranty. *Veach v. Thompson*, 15-380.

See code section 3069. *Jones v. Berryhill*, 25-289; *Bank v. Hurford & Bro.*, 29-579.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 50, note (a).

See also Neg. Inst. Law by Selover, sections 87, 117, 145, 150 and 179, and authorities there cited.

SEC. 3060-a25. Consideration—what constitutes. Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such, whether the instrument is payable on demand or at a future time. [29 G. A., ch. 130, § 25.]

Iowa: An antecedent indebtedness is a sufficient consideration and a *bona fide* holder for value before maturity, of such a note is protected against latent equities. *Robinson v. Lair*, 31-9.

Other states: *Railroad Co. v. Nat. Bank*, 102 U. S., 14; *Swift v. Tyson*, 16 Pet., 1. These cases support the rule that a *bona fide* holder taking a negotiable instrument in payment of, or as security for an antecedent debt, is a holder for a valuable considera-

tion, entitled to protection against all the equities between the antecedent parties. See also *Bank v. Morse*, 163 Mass., 381; *Roberts v. Hall*, 37 Conn., 205; *Harold v. Kays*, 64 Mich., 439; *Spencer v. Sloan*, 108 Ind., 183.

For other authorities and a discussion of the rule adopted by the act, giving the states in which the rule is changed, see notes to section 51 of Crawford's Annotated Neg. Inst. Law (2 Ed.).

SEC. 3060-a26. What constitutes holder for value. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time. [29 G. A., ch. 130, § 26.]

In a note to the section of the New York act, the author of the act says: "If a party be a *bona fide* holder for value of a bill before its acceptance, it is not essential to his right to enforce it against a subsequent acceptor, that an additional consideration should proceed from him to the drawee. The bill itself implies a representation by the drawer that the drawee is already in receipt of funds to pay, and his contract is that the drawee shall accept and pay according to the terms of the draft. The drawee can, of course, upon presentment, refuse to accept, and in that event, the only recourse of the holder is against the prior parties thereto; but in case the drawee does accept the bill, he becomes primarily liable for its payment, not only to the indorsees, but also to the drawer himself." Citing *Heuertematte v. Morris*, 101 N. Y., 70.

SEC. 3060-a27. When lien on instrument constitutes holder for value. Where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien. [29 G. A., ch. 130, § 27.]

Other states: *Continental Nat. Bk. v. Bell*, 125 N. Y., 38, 42; *Rogers v. Squires*, 98 N. Y., 49.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 53.

SEC. 3060-a28. Effect of want of consideration. Absence of failure of consideration is a matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense *pro tanto*, whether the failure is an ascertained and liquidated amount or otherwise. [29 G. A., ch. 130, § 28.]

[The New York act contains the word "or" in place of the word "of" in first line.]

Other states: While the note itself is *prima facie* evidence of consideration, still as between the immediate parties, it is competent to show want of failure thereof. *Corless v. Howe*, 11 Gray, 125; *Breneman v. Furniss*, 90 Pa. St., 186. But burden of proof is on party alleging. *Jennison v. Stafford*, 1 Cush., 168. Failure of consideration does not affect the negotiability of the instrument. *Dingman v. Amsink*, 77 Pa., St., 114. The defense of want of consideration is governed by the *lex loci*. *Herdic v. Roessler*, 109 N. Y., 127, 133, 134. As to the matter of defense for partial failure of consideration, see *Black v. Rigway*, 131 Mass., 80.

See Daniel on Neg. Insts. Section 210.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 54, notes (a), (b) and (c).

As to when one is a holder in due course, see sections 3060-a26 to 3060-a29.

SEC. 3060-a29. Liability of accommodation party. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party. [29 G. A., ch. 130, § 29.]

Other states: The maker of an accommodation note lends his credit without instructions as to the manner of its use. *Lenheim v. Wilmarding*, 55 Pa. St., 73. He cannot set up want of consideration. *Carpenter v. Bank*, 106 Pa. St., 170-172. In respect to third persons, he is held to the character which he has assumed. *Stephen v. Bank*, 88 Pa. St., 157, 162-63. A mutual exchange of notes will not make them accommodation notes. *Rice v. Grange*, 131 N. Y., 149; *Woman v. Frost*, 52 N. Y., 422. But he may

retract his indorsement, if he is an accommodation indorser at any time before the paper is negotiated. *Berkeley v. Tinsley*, 88 Va., 1001, 1004. The provision of the statute probably does not apply to corporations, which as a general rule are without power to bind themselves as accommodation parties. *Bank v. Atkinson*, 55 Fed. 465; *Bank v. Bank*, 13 N. Y., 309; *Bank v. Globe Works*, 101 Mass., 57.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 55, notes (a) and (b).

NEGOTIATION.

SEC. 3060-a30. What constitutes negotiation. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof if payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery. [29 G. A., ch. 130, § 30.]

Iowa: A note made payable to bearer is negotiable by delivery and needs no indorsement. *Elliott v. Corbin*, 4-564; *Shelton v. Sherfey*, 3 G. Gr., 108. A note payable to J. S. or order, and endorsed by payee to S. T. or bearer, becomes, in the hands of subsequent holders, the same as a note payable to bearer. (*Id.*) A note payable to order can not be transferred by mere delivery, but should be endorsed by the payee or sued in his name, or the name of his legal representative. *Dawson v. Jewett*, 4 G. Gr., 157.

See *Pearson v. Cummings*, 28-344. A provision that a note is negotiable and payable at a certain place designated, does not affect its negotiability, nor prevent its negotiability elsewhere. *Schoharie Co. Bk. v. Bevard*, 51-257. Wrongful, unauthorized indorsement confers no rights upon transferee. *Thorpe Bros. & Co. v. Dickey*, 51-676.

As to what instruments are payable to bearer, see section 3060-a9. As to what instruments are payable to order, see section 3060-a8.

Other states: Indorsement is usually made by writing name on the back of the instrument, but the place is not essential. *Haines v. Dubois*, 29 N. J. Law, 259. Indorsement alone without delivery conveys no title. *Dann v. Norris*, 24 Conn., 337; *Middleton v. Griffith*, 57 N. J. Law, 442.

For citation of other authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 60.

SEC. 3060-a31. Indorsement—how made. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement. [29 G. A., ch. 130, § 31.]

Iowa: The assignee of a promissory note, under a transfer made in the body of a separate instrument, executed for an independent purpose, is not the holder of a legal title, discharged of prior equities, within the meaning of the law merchant. *Franklin v. Twogood*, 18-515. A holder of negotiable paper to be protected against equities existing between the original parties, must have acquired it by indorsement before maturity. A transfer, except by indorsement, even before maturity, carries no such consequences. *Grimm v. Warner et al.*, 45-106. The prevailing rule in this state is, that indorsements of negotiable paper shall be made thereon under the hand of the indorser. *Bettis v. Bristol*, 56-41. An assignee, as distinguished from an indorsee, acquires no greater rights than the assignor had. *Johnson v. Walker et al.*, 60-315.

Other states: *Crosby v. Roub*, 16 Wis., 616; *Folger v. Chase*, 18 Pick., 63; *French v. Turner*, 15 Ind., 59.

For citation of other authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 61, notes (a) and (b).

SEC. 3060-a32. Indorsement—must be of entire instrument. The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue. [29 G. A., ch. 130, § 32.]

Iowa: Prior to the act, an assignee of a note might sue in his own name, although only part of the amount was assigned to him. *Cochran v. Glover*, Morris, 151.

Other states: *Lindsay v. Price*, 33 Tex., 282. Indorsement of a partial payment on the instrument does not render it non-negotiable. *Smith v. Shippey*, 182 Pa. St., 24.

SEC. 3060-a33. Kinds of indorsement. An indorsement may be either in blank or special; and it may also be either restrictive or qualified, or conditional. [29 G. A., ch. 130, & 33.]

Other states: As to what is a special indorsement, see *Rice v. Stearns*, 3 Mass., 225; *Reamer v. Bell*, 79 Pa. St., 292. A blank indorsement may be converted into a special or full indorsement by the holder. See sec. 3060-a35. As to what are restrictive indorsements, see *Power v. Finney*, 4 Call, 411; *White v. Nat. Bank*, 102 U. S., 658; *Hook v. Pratt*, 78 N. Y., 371.

SEC. 3060-a34. Special indorsement—indorsement in blank. A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery. [29 G. A., ch. 130, § 34.]

SEC. 3060-a35. Blank indorsement—how changed to special indorsement. The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement. [29 G. A., ch. 130, § 35.]

Iowa: The holder of a note indorsed in blank may fill up the blank indorsement to himself, and thus recover as indorsee thereunder. *Leland v. Parriott*, 35-454; it then becomes a contract duly signed by the indorser. *Bernard v. Barry*, 1 G. Gr., 388; but the indorser of a note in blank cannot be bound by a contract of guaranty written over his indorsement. *Belden v. Hann*, 61-42.

Other states: *Beckwith v. Angell*, 6 Conn., 317.

SEC. 3060-a36. When indorsement restrictive. An indorsement is restrictive which either:

1. Prohibits the further negotiation of the instrument; or
2. Constitutes the indorsee the agent of the indorser; or
3. Vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive. [29 G. A., ch. 130, § 36.]

Other states: *Commercial Nat. Bk. v. Armstrong*, 148 U. S., 50; *Nat. Butchers' & Drovers' Bk. v. Hubbell*, 117 N. Y., 384; *Freeman's Bk. v. National Tube Works*, 151 Mass., 413; *Commercial Nat. Bk. v. Hamilton Nat. Bk.*, 42 Fed., 880; *Bank of Metropolis v. First Nat. Bk. of Jersey City*, 19 Fed. 658.

For other authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 66.

SEC. 3060-a37. Effect of restrictive indorsement—rights of indorsee. A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument.
2. To bring any action thereon that the indorser could bring.
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement. [29 G. A., ch. 130, § 37.]

(2) *Other states:* The holder of negotiable paper may sue in his own name, though but an agent for others. *Ward v. Tyler*, 52 Pa. St., 393. The right of a bank to sue in its own name on paper endorsed to it "for collection" is sustained by *Wintermute v. Torrent*, 83 Mich., 555; *Regina Flour Mill Co. v. Holmes*, 156 Mass., 11; *Spofford v. Norton*, 126 Mass., 333. *Contra*, *Rock County Nat. Bk. v. Hollister*, 21 Minn., 385.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), section 67.

SEC. 3060-a38. Qualified indorsement. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such an indorsement does not

impair the negotiable character of the instrument. [29 G. A., ch. 130, § 38.]

Iowa: But an indorsement without recourse, as when transferred by delivery only, makes the transferrer liable upon implied warranty only to the extent, that the paper so transferred is genuine and not forged or fictitious; that it is of the kind or description which it purports to be; that the transferrer has done nothing and will do nothing to prevent its collection; that the parties to the instrument are *sui juris*, and capable of contracting; that it has not been paid, and that he has practiced no fraud upon the transferee in the matter of said transfer. *Watson v. Chesire*, 18-202; *Allen v. Pegram*, 16-163; *Miller v. Dugan*, 36-433; but such indorser is liable if he knew at the time of transfer that the note was worthless. *Brown v. Zachary*, 102-433.

Other states: An indorsement may be qualified by adding the words "without recourse" or similar words. *Grant v. Fleming*, 46 Pa. St., 140. A qualified indorsement, however, does not put the transferee on inquiry as to the equities between the original parties. *Bisbing v. Graham*, 14 Pa. St., 14.

See Crawford's Annotated Neg. Inst. Law (2 Ed.), section 68.

SEC. 3060-a39. Conditional indorsement. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the conditions have been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally. [29 G. A., ch. 130, § 39.]

For note discussing this section and authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 69.

SEC. 3060-a40. Indorsement of instrument payable to bearer. Where an instrument, payable to bearer, is indorsed specially, it may nevertheless be further negotiated by delivery, but the person indorsing specially is liable as indorser to only such holders as to make title through his indorsement. [29 G. A., ch. 130, § 40.]

[The New York act does not contain the word "to" before the word "make" in line three.]

See Daniel on Negotiable Instruments, sec. 663-a696.

SEC. 3060-a41. Indorsement where payable to two or more persons. Where an instrument is payable to the order of two or more payees or indorsers who are not partners, all must indorse unless the one indorsing has authority to indorse for the others. [29 G. A., ch. 130, § 41.]

Other states: *Ryhiner v. Feickert*, 92 Ill., 305. A partner may indorse for the firm. *Childress v. Emory*, 8 Wheat., 642.

SEC. 3060-a42. Effect of instrument drawn or indorsed to a person as cashier. Where an instrument is drawn or indorsed to a person, as "Cashier" or other fiscal officer of a bank or corporation, it is deemed *prima facie* to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer. [29 G. A., ch. 130, § 42.]

Other states: The rule stated in the text is supported by the following authorities. *Bank v. Muskingum Bank*, 29 N. Y., 619; *Bank v. Hall*, 44 N. Y., 395; *Folger v. Chase*, 18 Pick., 63. The extension of the rule to fiscal officers was deemed wise by the Commissioners. See statement of Mr. Crawford in his work, Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 72.

In an action on a certificate of deposit made payable to the cashier of the bank issuing the certificate named as such and endorsed by him as cashier to the plaintiff, parol evidence is admissible to show that such person was the cashier of the

defendant bank when such endorsement was made, and that he was acting in that capacity in transferring the certificate. *Johnson v. Buffalo Center State Bank*, 112 N. W. 165.

In such an action it is not competent

for the defendant to show that the cashier was making use of his official title and authority in his own individual interest. *Ibid.*

The fact that the certificate thus issued and endorsed bore eight per cent. interest and that the plaintiff to whom it was endorsed transferred it instead of presenting it for payment, held insufficient to impute notice that it was not negoti-

ated in the regular course of business. *Ibid.*

Where an instrument is drawn or endorsed to a person as cashier or president of a bank it is *prima facie* payable to the bank, and may be negotiated by either the endorsement of the bank or the endorsement of the officer. *Griffin v. Erskine*, 131-444.

SEC. 3060-a43. Indorsement where name is misspelled, et cetera. Where the names [name] of a payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described adding, if he thinks fit, his proper signature. [29 G. A., ch. 130, § 43.]

Other states: Thus one who, while carrying on business on his own account in the name of a company, receives a note payable to the order of the company in the course of such business, may transfer the note by indorsing it in his own name. *Bryant v. Eastman*, 7 Cush., 111.

SEC. 3060-a44. Indorsement in representative capacity. Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability. [29 G. A., ch. 130, § 44.]

Other states: As to liability of executors and administrators, who accept or indorse, see *Schmittler v. Simon*, 101 N. Y., 554.

SEC. 3060-a45. Time of indorsement—presumption. Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed *prima facie* to have been effected before the instrument was overdue. [29 G. A., ch. 130, § 45.]

Other states: *Mason v. Noonan*, 7 Wis., 609. See sec. 3060-a52. See also Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 75.

SEC. 3060-a46. Place of indorsement—presumption. Except where the contrary appears every indorsement is presumed *prima facie* to have been made at the place where the instrument is dated. [29 G. A., ch. 130, § 46.]

Other states: An indorsement in Massachusetts of a note executed and payable in New York, is a Massachusetts' contract and governed by the law of that state. *Glidden v. Chamberlain*, 167 Mass., 486.

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 76.

SEC. 3060-a47. Continuation of negotiable character. An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise. [29 G. A., ch. 130, § 47.]

Other states: The law is well settled that a note or bill negotiable in form, is negotiable as well after as before it becomes due. *Nat. Bk. v. Texas*, 20 Wall., 72; *French v. Jarvis*, 29 Conn., 347. But by indorsement after maturity, the instrument becomes according to legal effect, payable on demand, so far as the indorser is concerned; and presentment for payment must be made within a reasonable time, and due notice of dishonor given the indorser. *Berry v. Robinson*, 9 Johns, 121; *Van Hoosen v. Van Alstyne*, 3 Wend., 79; *Patterson v. Todd*, 18 Pa. St., 426.

Other authorities are cited in Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 77. See sections 3060-a119 to 3060-a125.

SEC. 3060-a48. Striking out indorsement. The owner may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument. [29 G. A., ch. 130, § 48.]

Iowa: The holder of a negotiable note is presumed to have the beneficial interest in it and being the payee, may strike out any indorsement on it. *Gordon v. Pitt*, 3-385; the possession of a note by plaintiff, the payee thereof, is presumed to be rightful, and the erasure of an indorsement thereon will be deemed to have been made by due authority. *Goddard v. Cunningham*, 6-400; to the same effect. *Palmer v. State, Bank*, 19-112. See also 15-380.

Other states: The holder may strike out all intervening indorsements, and aver that the first blank indorser indorsed immediately to himself. Byles on Bills, 149; *Preston v. Mann*, 25 Conn., 127. This may be done at the trial and after the plaintiff has finished his case. *Vanarsdale v. Hax*, 107 Fed. 878.

Other authorities are cited in Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 78.

SEC. 3060-a49. Transfer without indorsement—effect of. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferee had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. [29 G. A., ch. 130, § 49.]

Iowa: A transferrer by delivery for value of a note impliedly warrants it to have received no material alteration prior to such transfer. *Snyder v. Reno*, 38-329; see *Miller v. Dugan*, 36-433.

Other states: See *Simpson v. Hall*, 47 Conn., 417; *Bank v. Bingham*, 118 N. Y., 349. See note to Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 79.

SEC. 3060-a50. When prior party may negotiate instrument. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same, but he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable. [29 G. A., ch. 130, § 50.]

Iowa: The signer of a note as security, who subsequently takes it up may reissue the note as often as he takes it up. *Wilkerson v. Daniels*, 1 G. Gr., 180; an accommodation note, having once been discounted and taken up by accommodated party, does not become void, but may be transferred to a third party before maturity, discharged of equities existing between original parties, notwithstanding second indorser's knowledge of its character, and that it has once been indorsed and taken up. *Washington Bank v. Crum*, 15-53.

Other states: See *Scott v. First Nat Bank*, 71 Ind., 445.

RIGHTS OF HOLDER.

SEC. 3060-a51. Right of holder to sue—payment. The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course discharges the instrument. [29 G. A., ch. 130, § 51.]

Other states: This rule holds good even when restrictively indorsed. See section 3060-a37. Where plaintiff is the payee the production of the paper is sufficient. *Williams v. Holt*, 170 Mass., 351.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 90.

SEC. 3060-a52. What constitutes a holder in due course. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That the instrument is complete and regular upon its face.
2. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. [29 G. A., ch. 130, § 52.]

(1) *Other states*: To determine the character of an indorsee as a *bona fide* holder for value without notice, the point of time at which he parts with his money, is

the important fact. If the paper was then on its face irregular—out of the usual course of business—the effect of that knowledge on the indorsee could not be prevented by subsequently putting it in regular shape. *Loose v. Bissell*, 76 Pa. St., 459, 462.

As to incomplete instruments and authority to fill up blanks therein see section 3060-a14, *supra*.

(2) *Iowa*: A transfer by indorsement is presumed to have been for a valuable consideration and before maturity. *Rea v. Owens*, 37-262; an assignee of a note and mortgage who takes, without notice, subsequent to an agreement for extension, and subsequent to the original date of maturity, takes it "after due" in such sense that he acquires no right which his assignor, could not have claimed and enforced. *Duncan v. Finn*, 79-658.

Other states: *Marsh v. Marshall*, 53 Pa. St., 396. A promissory note matures when, by its terms, the principal becomes due; and one who purchases it in good faith, for value, before maturity, is within the protection of the law merchant, although interest is overdue at the time of such purchase. *Kelly v. Whitney*, 45 Wis., 110. But see *Hart v. Stickney*, 41 Wis., 630; *Newell v. Gregg*, 51 Barb., 253. But a note payable in installments is overdue when the first installment is overdue and unpaid, and one who takes it afterwards, takes it subject to all equities between the original parties. *Vinton v. King*, 4 Allen, 562. A transfer upon the day of maturity is before the instrument is overdue; for the principal debtor has the whole of that day in which to pay. *Continental Nat. Bank v. Townsend*, 87 N. Y., 8. But see *Sargent v. Southgate*, 5 Pick., 312; *Pine v. Smith*, 11 Gray, 38. A check deposited with a bank on the day of its date cannot be considered overdue when so deposited. *Bank v. Manson*, 168 Mass., 425.

(3) *Iowa*: A holder of a note as collateral security for an antecedent indebtedness, and with no extension of time, is not a holder for value. *Noteboom v. Watkins*, 103-580; neither is one a *bona fide* holder, who received it as further security for a pre-existing debt without giving any new consideration, or incurring any additional responsibility. *Bank v. Hall*, 106-540. See *Johnson v. Barney*, 1-531; *Stotts v. Byers*, 17-303. That a promissory note was obtained by fraud will not affect the right of a *bona fide* holder thereof, to whom it was indorsed before maturity, nor that such holder purchased it for a considerably less amount than its face. *Sully v. Goldsmith*, 32-397.

Other states: See *Steckel v. Steckel*, 28 Pa. St., 233, 235. As to what constitutes value, see section 3060-a25, *supra*.

(4) *Iowa*: A *bona fide* holder of a note made payable to a fictitious payee may recover of the maker. *Lane v. Krekle*, 22-399. One not a *bona fide* holder for value before maturity but merely holding for the payee and not in his own right, is not protected. *Bank v. McNulty*, 36-229; nor is an assignee in insolvency. *Roberts v. Corbin*, 26-315; and one who holds under a transfer made in the body of a separate instrument executed for an independent purpose is not the holder of a legal title discharged of prior equities, within the meaning of the law merchant. *Franklin v. Truegood*, 18-515. But the holder of a note under purchase at judicial sale and without a notice is a *bona fide* purchaser. *Allison & Crane v. King*, 21-302.

Other states: As to what constitutes notice, see sec. 3060-a56, *infra*.

For other authorities under each of these propositions, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 91.

One whose name is inserted in a blank instrument as payee without authority of the original signer is not a holder in due course. A holder in due course is one to whom the instrument is transferred after it has become effectual as a negotiable instrument. *Vander Ploeg v. Van Zuuk*, 112 N. W. 807.

SEC. 3060-a53. When person not deemed holder in due course. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. [29 G. A., ch. 130, § 53.]

Other states: As to what constitutes reasonable time, see section 3060-a193. No absolute measure can be fixed. A day or two. *Field v. Nickerson*, 13 Mass., 131, 137; seven days, *Thurston v. McKeen*, 6 Mass., 428; and even a month, *Ranger v. Corey*, 1 Metc., 369, is not too long; while eight months, *Bank v. Jenness*, 2 Metc., 288; *Ayres v. Hutchins*, 4 Mass., 370; three months and a half, *Stevens v. Brice*, 21 Pick., 193; and even two months and a half, *Losee v. Durkin*, 7 J. R., 70, have been deemed sufficient to discredit a note.

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 92.

SEC. 3060-a54. Notice before full amount paid. Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount

agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him. [29 G. A., ch. 130, § 54.]

Other states: Dresser v. Missouri, etc., R. R. Construction Co., 93 U. S., 93.

SEC. 3060-a55. When title defective. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. [29 G. A., ch. 130, § 55.]

Other states: Commercial paper executed under duress is void, even though there may be some consideration to support it. Magoon v. Reber, 76 Wis., 392. The fraud in putting the paper in circulation must be a fraud against the defendant. Kinney v. Kruse; 28 Wis., 183.

For other authorities see note to Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 94.

SEC. 3060-a56. What constitutes notice of defect. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith. [29 G. A., ch. 130, § 56.]

Iowa: Certain facts held not to constitute notice of infirmity. Pond v. Agricultural Works, 50-596; the rule stated to be that, the circumstances coming to the knowledge of the purchaser before the purchase must be such as to require that he shall in good faith, inquire as to the validity of the note, and it is only where the failure to inquire evinces actual bad faith, that such notice is sufficient. Merrill v. Hole, 85-66; Cook v. Weirman, 51-561; Lake v. Reed, 29-258. Circumstances and inference therefrom may be sufficient to charge purchaser with notice. Trustee, etc., v. Hill, 12-462; Hoffman v. Leibfarth, 51-711. See Hawkins v. Wilson, 71-762. Knowledge of the transferrer is not imputable or chargeable to the purchaser. Stutzman v. Payne, 23-17.

Other states: In a note to the corresponding section Mr. Crawford says: "The holder is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's rights cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by the circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted mala fide, his title, according to settled doctrine, will prevail. Cheever v. Pittsburgh, Shenango & Lake Erie R. R. Co., 150 N. Y., 59, 65; American Exchange Nat. Bk. v. New York Belting, etc., Co., 148 N. Y., 705; Knox v. Eden Musee Am. Co., 148 N. Y., 454; Canajoharie Nat. Bk. v. Diefendorf, 123 N. Y., 202; Vosburgh v. Diefendorf, 119 N. Y., 357; Jarvis v. Manhattan Beach Co., 148 N. Y., 652; Murray v. Lardner, 2 Wall., 110; Swift v. Smith, 102 U. S., 442; Belmont v. Hoge, 35 N. Y., 65; Welsh v. Sage, 47 N. Y., 143; Bank v. Young, 41 N. J. Eq., 531; Bank v. Bank, 48 N. J. Law, 513; Phelan v. Moss, 67 Pa. St., 59; Moorehead v. Gilmore, 77 Pa. St., 118; Bank v. Morgan, 165 Pa. St., 199. While gross carelessness will not, as a matter of law, defeat title in purchaser for value, it may constitute evidence of bad faith. Bank v. Diefendorf, 123 N. Y., 191. The payment of value is a circumstance to be taken into account with other facts in determining the good faith of the purchaser, but it is not conclusive. Cunningham v. Scott, 90 Hun., 410, 411. The mere fact that the holder for value of a promissory note made by a third party receives it from a person engaged in the note brokerage business, as collateral security for a loan to such broker, is not sufficient to raise a doubt as to the authority of the broker to so deal with the note. Bank v. New York Belting & Packing Co., 148 N. Y., 698. And a bank has a right to assume as to notes offered to it, whether for discount or as collateral security, by a customer who has an account with it, and who is in the habit of borrowing money from it, that the customer is acting in good faith, and within his lawful rights. (Id.)

The fraudulent misappropriation by the broker of the proceeds of the discount is not sufficient to put the holder to the proof of his *bona fides*. *Sloan v. The Union Banking Co.*, 67 Pa. St., 470.

One who receives the notes of a corporation from one of its officers in payment of, or as security for, a personal debt of such officer, does so at his peril. *Prima facie*, the act is unlawful, and, unless actually authorized, the purchaser will be deemed to have taken them with notice of the rights of the corporation. *Wilson v. Metropolitan Ry. Co.*, 120 N. Y., 145, 150. And where the maker of a note which is payable to his order and purports to be indorsed by a corporation, procures it to be discounted for his own benefit, this of itself, if unexplained, is notice that the indorsement is not made in the usual course of business, but is for the accommodation of the maker. *Bank v. German-Am. Mut. Warehousing & Security Co.*, 116 N. Y., 281.

SEC. 3060-a57. Rights of holder in due course. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. [29 G. A., ch. 130, § 57.]

Iowa: That defendants were accommodation makers is no defense to an action by an indorsee, though received by plaintiff with knowledge of that fact, if note was taken in good faith for value in the usual course of business. *Winters v. Home Ins. Co.*, 30-172; nor is the rule changed by the fact that it was negotiated by one of the makers, the real debtor instead of the payee. *Id.* In the absence of statutes permitting same, fraud cannot be set up against a note in the hands of an innocent purchaser. *Temple v. Hays & Hendershott*, Morris, 9; *Lake v. Reed*, 29-258; *Lehman v. Press*, 106-389; *Wright, Dryden & Co. v. Flynn*, 33-159. Duress not a defense against a *bona fide* holder for value. *Veach v. Thomson*, 15-380. Latent infirmities no defense against *bona fide* holder. *Gage v. Sharp*, 24-15. County bonds issued without authority are invalid in hands of purchaser. *Hull v. Argalls v. County of Marshall*, 12-142. Forgery, in its execution, renders paper invalid even in the hands of an innocent holder for value before maturity. *Caulkins v. Whisler*, 29-495; *First Nat Bk. v. Zeins*, 93-140.

Other states: In a case construing this section of the Negotiable Instruments Law it has been held that under this law a *bona fide* holder may enforce a promissory note against the maker even though the note was given for a gambling debt, and that this statute has repealed the English statutes which were formerly in force in the District of Columbia. In the opinion, Alvey, C. J., says: "We know, moreover, that the great and leading object of the act, not only with congress, but also with the large number of the principal commercial states of the Union that have adopted it, has been to establish a uniform system of law to govern negotiable instruments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form, as fully as possible, all the law upon the subject, to avoid conflict of decisions, and the effect of mere local laws and usages that have heretofore prevailed. The great object sought to be accomplished by the enactment of the statute, to free the negotiable instrument, as far as possible, from all latent or local infirmities that would otherwise inhere in it to the prejudice and disappointment of innocent holders as against all parties to the instrument professedly bound thereby. This clearly could not be effected so long as the instrument was rendered absolutely null and void by local statutes, as against the original maker or acceptor, as is the case by the operation, indeed, by the express provision, of the statutes of Charles and Anna." *Wirt v. Stubblefield*, 17 App. Cas. D. C., 283.

See *Cromwell v. County of Sac*, 96 U. S., 60.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 96.

SEC. 3060-a58. When subject to original defenses. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter. [29 G. A., ch. 130, § 58.]

Mr. Crawford says in a note to section 97 of his work: "It was not deemed expedient to make provision as to what equities the transferee will be subject to; for the matter may be affected by the statutes of the various states relating to set-off and counterclaim. In an act designed to be uniform in the various states, no more can be done than fix the rights of holders in due course. On the question whether only such

equities may be asserted as attach to the bill, or whether equities arising out of collateral matters may also be asserted, the decisions are conflicting. In England it was decided in *Burroughs v. Moss*, 10 Barn. & Cress., 558, that the indorsee of an overdue bill is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters, such as general set-off is. This is a leading case, and has since been uniformly followed in that country."

Other states: See also *Long v. Rhawn*, 75 Pa. St., 128; *Young v. Shriner*, 80 Pa. St., 463; *Robinson v. Lymon*, 10 Conn., 31. A person to whom the instrument is transferred as a gift, takes it subject to all the equities then existing between the original parties, but not subject to those which arise thereafter. *Bank v. Wood*, 128 N. Y., 35; *Baxter v. Little*, 6 Met., 7.

SEC. 3060-a59. Who deemed holder in due course. Every holder is deemed *prima facie* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title. [29 G. A., ch. 130, § 59.]

Other states: The presumption is that the indorsee of negotiable paper receives it *bona fide* and for value. *Gray's Admr. v. Bank*, 29 Pa. St., 365. The holder may make out his title by presumption until it is impeached by evidence showing that the paper had a fraudulent or illegal inception. This being done, however, it devolves upon him to show the circumstances under which it came into his possession, and that he has acted in good faith. *Canajoharie Nat. Bk. v. Diefendorf*, 123 N. Y., 191; *Joy v. Diefendorf*, 130 N. Y., 6; *Sullivan v. Langley*, 120 Mass., 437; *Bank v. Iron Works*, 159 Mass., 158; *Hutchinson v. Boggs & Kirk*, 28 Pa. St., 294; and other authorities cited in Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 98.

One claiming to be the holder in due course and protected against the defense of fraud in the execution of the instrument has the burden of proving that he acquired title as such holder in due course, *i. e.*, in good faith and for value, without notice. *Keegan v. Rock*, 128-39.

LIABILITIES OF PARTIES.

SEC. 3060-a60. Liability of maker. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse. [29 G. A., ch. 130, § 60.]

Other states: The fact that the holder had other collateral securities for the same debt more than sufficient to cover it, from which, however, the debt had not been realized, is not a ground of defense on the part of the maker. *Lord v. Bank*, 20 Pa. St., 384.

SEC. 3060-a61. Liability of drawer. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder. [29 G. A., ch. 130, § 61.]

Other states: The transmission of a draft by mail by payee and its loss is not discovered for six months, discharges drawer. *Bank v. Farnsworth* (N. D.), 72 N. W. 901. But a knowledge of the facts and a new promise to pay by drawer waives his right to a discharge. *Id.*

SEC. 3060-a62. Liability of acceptor. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance, and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and
2. The existence of the payee and his then capacity to indorse. [29 G. A., ch. 130, § 62.]

(1) *Other states:* The discounting of a bill by the drawee who has not accepted it is neither payment nor a promise to pay according to its tenor and effect, but puts him in the position of an indorsee for value with the right of action against drawer and indorser. *Swope v. Ross*, 40 Pa. St., 186; *Bank v. Bank*, 46 N. Y., 77; *Bank v. Bank*, 59 N. Y., 67; *Bank v. Bank*, 10 Wheat., 333.

Numerous other authorities are cited by Mr. Crawford in his work on the Negotiable Inst. Law (2 Ed.), sec. 112.

SEC. 3060-a63. When person deemed indorser. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity. [29 G. A., ch. 130, § 63.]

See section 3060-a17, subdiv. 6, *supra*.

SEC. 3060-a64. Liability of irregular indorser. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.
2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.
3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee. [29 G. A., ch. 130, § 64.]

Other states: This section is intended to cover irregular indorsements. The decisions upon this subject are very conflicting. In some jurisdictions the person placing his signature on the back of a note before the payee has indorsed it, was deemed a joint maker. *Good v. Martin*, 95 U. S., 93. In other jurisdictions he was regarded as a guarantor and in still others an indorser.

For a discussion of the question and citation of additional authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 114.

SEC. 3060-a65. Warranty where negotiation by delivery, et cetera. Every person negotiating an instrument by delivery or by qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be.
2. That he has a good title to it.
3. That all prior parties had capacity to contract.
4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee. The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes. [29 G. A., ch. 130, § 65.]

Other states: This, of course, refers only to the implied warranty. An express warranty may be so framed as to exclude all other warranties which would otherwise be implied by the law. *Giffert v. West*, 37 Wis., 115.

(1) *Other states:* *Littauer v. Goldman*, 72 N. Y., 506; *Herrick v. Whitney*, 15 Johns, 240; *Coolidge v. Brigham*, 5 Metc., 68; *McConeghy v. Kirk*, 68 Pa. St., 200; *Bank v. Caverly*, 7 Gray, 216, 220. See the following section.

As to implied warranty as to the identity of the thing sold, see *Meyer v. Richards*, 163 U. S., 385.

(2) *Other states*: *Meriden Nat. Bk. v. Gallaudet*, 120 N. Y., 298, 303.

(3) *Other states*: One who indorses a promissory note purporting to be executed by a firm, thereby impliedly contracts that the note was made by the firm in whose name it is executed, and he cannot dispute the fact in an action upon the indorsement. *Dalrymple v. Hillenbrand*, 62 N. Y., 5. And a second indorser cannot dispute the legal capacity of the payee to indorse on the ground that she was a married woman. *Bank v. Caverly*, 7 Gray, 216, 217. And one indorsing a note of a corporation admits its capacity to execute the note. *Glidden v. Chamberlin*, 167 Mass., 486.

(4) *Other states*: As to implied warranty that the note is unpaid, see *Daskman v. Ullman*, 74 Wis., 474. And an instrument void for usury transferred without indorsement or representation as to its legality, action cannot be sustained against the vendor without alleging and proving scienter. *Littauer v. Goldman*, 72 N. Y., 506; *Meyer v. Richards*, 163 U. S., 385.

Otis v. Cullom, 92 U. S., 448, is an action against the vendor of municipal bonds payable to bearer, afterward held void because the legislature had no power to pass the acts under which they were issued. It was held no recovery could be had in the absence of an express warranty.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 115.

The statutory provision as to the warranty implied in negotiating an instrument by delivery or qualified indorsement has no application where the ques-

tion is as to whether the instrument has been accepted in satisfaction of an indebtedness. *Dille v. White*, 132-327.

SEC. 3060-a66. Liability of general indorser. Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

1. That matters and things mentioned in subdivisions one, two and three of the next preceding section; and

2. That the instrument is at the time of his indorsement valid and subsisting. And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it. [29 G. A., ch. 130, § 66.]

(1) *Other states*: *United States v. American Exchange Nat. Bk.*, 70 Fed. 232.

(2) *Other states*: Parol evidence of an agreement which would vary the legal liability of the indorser under his indorsement is inadmissible. *Eaton v. McMahon*, 42 Wis., 484. And while there has been some conflict in the decisions, the sounder doctrine puts all indorsements on substantially the same footing. The contract by bank indorsement is fixed by law, and should not be rendered uncertain by parol, any more than when written out in full. *Charles v. Denis*, 42 Wis., 56, 58. This is the rule adopted in the statute, which makes the indorser's obligation absolute.

Other authorities are to be found in note to sec. 116, Crawford's Annotated Neg. Inst. Law (2 Ed.).

SEC. 3060-a67. Liability of indorser where paper negotiable by delivery. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser. [29 G. A., ch. 130, § 67.]

Other states: The holder of paper payable to bearer and indorsed may sue upon it as bearer or indorsee at his election. Daniel on Neg. Insts., sec. 663-a; 3 Kent's Comm., 44.

In some states a note payable to a designated payee or bearer cannot be negotiated except by the indorsement of such person. See *Garvin v. Wiswell*, 83 Ill., 218; *Blackman v. Lehman*, 63 Ala., 547.

SEC. 3060-a68. Order in which indorsers are liable. As respects one another, indorsers are liable *prima facie* in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who

indorse are deemed to indorse jointly and severally. [29 G. A., ch. 130, § 68.]

Other states: This rule is general and applies to accommodation indorsers as well as to others. Such indorsements import, not a joint, but a several and successive liability, each indorser being responsible to all who succeed him. *Easterly v. Barber*, 66 N. Y., 433; *Kelley v. Borroughs*, 102 N. Y., 93; *McCarty v. Roots*, 21 How. (U. S.), 432; *Shaw v. Knox*, 98 Mass., 214; *Howe v. Merrill*, 15 Cush., 88; *Russ v. Sadler*, 197 Pa. St., 51.

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 118.

SEC. 3060-a69. Liability of agent or broker. Where a broker or other agent negotiates an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent. [29 G. A., ch. 130, § 69.]

Other states: *Meriden Nat. Bk. v. Gallaudet*, 120 N. Y., 289; *Cabot Bk. v. Morton*, 4 Gray, 156; *Worthington v. Cowles*, 12 Mass., 30.

PRESENTMENT FOR PAYMENT.

SEC. 3060-a70. Effect of want of demand on principal debtor. Presentment for payment is not necessary in order to charge the person primarily on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But, except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers. [29 G. A., ch. 130, § 70.]

Iowa: The failure of the plaintiff to demand payment at the specified place will not excuse the defendant or maker from providing for its payment. *Myers v. Byington*, 34-205; *Games v. Manning*, 2 G. Gr., 251; *Barker v. Brink*, 4 G. Gr., 59. To charge an indorser presentment, demand and notice must be given and shown by affirmative proof. *Bank of Red Oak v. Orvis*, 40-332. If there are joint makers, presentment and demand must be made upon all. *Id.* In absence of notice of dishonor, the institution of suit against makers is not sufficient to charge indorser. *Kaeter & Skinner v. Hock, Musser & Co.*, 11-536. In case of transfer after maturity, demand and notice must be given within reasonable time to charge indorser. *Jones v. Middleton*, 29-188; *Pryor v. Bowman*, 38-92.

Other states: As to there being no necessity for presentment to charge person primarily liable, see *Howard v. Boorman*, 17 Wis., 459; *Hills v. Place*, 48 N. Y., 520.

The rule adopted generally in the United States is that where a note is made payable at a particular bank or place, or a bill of exchange is drawn or accepted payable in like manner, it is not necessary in order to recover of the maker or acceptor to aver or prove presentment or demand of payment at such place on the day the instrument became due or afterward. The only consequence of a failure to make such presentment is that the maker or acceptor, if he was ready at the time and place to make the payment, may plead the matter in bar of damages and costs. *Parker v. Stroud*, 98 N. Y., 379, 384; *Cox v. Nat. Bk.*, 100 U. S., 713.

A draft drawn in another state, by one residing there, upon a party residing in this state, legal questions in reference to presentation and demand are to be determined by the laws of this state. *Sylvester v. Crohan*, 138 N. Y., 494; *Bank v. Lacombe*, 84 N. Y., 367.

SEC. 3060-a71. Presentment where instrument is not payable on demand. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof. [29 G. A., ch. 130, § 71.]

Iowa: Protest and notice of dishonor given on the day following expiration of days of grace too late to charge indorser. *Barker & Griffith v. Webster & Wells*, 10-

593. A presentment for payment before the last day of grace is premature, the note not being due until then. *Edgar v. Greer*, 8-394.

As to date of maturity, see sec. 3060-a85.

For citation of authorities under this section, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 131.

While the court may sometimes determine the reasonableness or unreasonableness of delay in presentment of a negotiable instrument as a matter of law, the question is ordinarily one of fact. If the drawer knows that the payee desires to make use of the draft for a particular purpose involving some delay in presentation for payment, he cannot complain of the delay reasonably contemplated. *West Branch State Bank v. Haines*, 112 N. W. 552.

Where the draft passes through the hands of several endorsees, no one of

whom is guilty of unreasonable delay, the fact that it is not presented within the time allowed for presentation by the original payee does not defeat recovery against the drawer. *Ibid.*

Where a bank check has been transferred, demand of payment is within a reasonable time if made through an intermediate bank, according to a general custom with reference to the collection of checks on small banks through other banks. *Plover Savings Bank v. Moodie*, 110 N. W. 29; 113 N. W.—.

SEC. 3060-a72. What constitutes a sufficient presentment. Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf.
2. At a reasonable hour on a business day.
3. At a proper place as herein defined.
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made. [29 G. A., ch. 130, § 72.]

(1) *Iowa*: Agent under parole authority may make demand. *Bank v. McLeran, et al.*, 26-306.

Other states: As to when possession of a negotiable instrument is sufficient evidence of a right to present and demand payment, see *Shedd v. Brett*, 1 Pick., 401. And payment to such person will always be valid unless he is known to the payer to have acquired possession wrongfully. Daniel on Neg. Insts., sec. 574.

(2) *Other states*: Except in cases where the instrument is payable at a bank, the holder has the whole day in which to present the same, the only limitation being that he must present it at a reasonable hour, and this may depend upon the circumstances of the case. *Bank v. Burton*, 58 N. Y., 430; *Farnsworth v. Allen*, 4 Gray, 453.

(3) See the following section.

(4) *Iowa*: Presentment for payment must be made to all the makers in person or at their usual places of residence or business. *Graul v. Strutzel*, 53-712; *Closz & Mickelson v. Miracle*, 103-198.

Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 132.

SEC. 3060-a73. Place of presentment. Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented.
2. Where no place of payment is specified and the address of the person to make payment is given in the instrument and it is there presented.
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment.
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence. [29 G. A., ch. 130, § 73.]

(3) *Iowa*: A demand made at a maker's residence, if he has no place of business, when he is not at home, is sufficient. *Bank v. Orvis*, 42-691.

Other states: *Gates v. Beecher*, 60 N. Y., 518, 522. Presentment at the maker's usual place of business during business hours, there being no one there to answer, is a sufficient demand to charge the indorser. *Baumgardner v. Reeves*, 35 Pa. St., 250;

Wallace v. Crilly, 46 Wis., 577. When addressed to the drawee at a particular house and accepted generally by him, see *Pierce v. Struthers*, 27 Pa. St., 249, 254; *Struthers v. Blake et al.*, 30 Pa. St., 139.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 133.

SEC. 3060-a74. Instrument must be exhibited. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it. [29 G. A., ch. 130, § 74.]

Iowa: Presentment to the maker personally or at his place of permanent residence or business is necessary to charge an endorser. *Bank v. Green, Thomas & Co.*, 11-476.

Other states: *Ocean Nat. Bk. v. Fant*, 50 N. Y., 474, 476; *Musson v. Lake*, 4 How., 262; *Freeman v. Boynton*, 7 Mass., 483.

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 134.

SEC. 3060-a75. Presentment where instrument payable at bank. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient. [29 G. A., ch. 130, § 75.]

Other states: *Salt Springs Nat. Bk. v. Burton*, 58 N. Y., 430; *Reed v. Wilson*, 41 N. J. Law, 29; *Shepard v. Chamberlain*, 8 Gray, 225. There seems to be a conflict of authorities as to the precise time as to when suit may be brought on a dishonored note payable at a bank. See *Church v. Clark*, 21 Pick., 309; *Blackman v. Nearing*, 43 Conn., 60; *Humphreys v. Sutcliffe*, 192 Pa. St., 336.

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 135.

SEC. 3060-a76. Presentment where principal debtor is dead. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative, if such there be, and if with the exercise of reasonable diligence he can be found. [29 G. A., ch. 130, § 76.]

Iowa: In case of partners, after dissolution of the firm, see *Mt. Pleasant Branch of State Bk. v. McLeran*, 26-306.

Other states: But there must be competent and legal proof of his death. *Weems v. Farmers' Bk.*, 15 Md., 231.

SEC. 3060-a77. Presentment to persons liable as partners. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm. [29 G. A., ch. 130, § 77.]

Iowa: In case of partners after dissolution of the firm, see *Mt. Pleasant Branch of State Bank v. McLeran*, 26-306.

Other states: *Gates v. Beecher*, 60 N. Y., 518; *Bank v. Hunt*, 2 Hill, 635.

SEC. 3060-a78. Presentment to joint debtors. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all. [29 G. A., ch. 130, § 78.]

Iowa: That presentment and demand must be made upon all the makers, see *Bank v. Orvis*, 40-332; *Graul v. Strutzel*, 53-712, *Closz v. Miracle*, 103-198.

Other states: *Gates v. Beecher*, 60 N. Y. 518; *Arnold v. Dreeser*, 8 Allen, 435. In some cases this might be impracticable, but such cases are covered by section 3060-a82, *infra*.

SEC. 3060-a79. When presentment not required to charge the drawer. Presentment for payment is not required in order to charge the

drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument. [29 G. A., ch. 130, § 79.]

Iowa: Kimball v. Bryan, 56-632.

Other states: Presentment is not dispensed with merely because the drawer has no funds in the hands of the drawee. *Life Ins. Co. v. Pendleton*, 112 U. S., 708; *Dickens v. Beal*, 10 Pet., 572.

Presentment for payment is not required to charge the drawer where he has no right to expect or require the drawee to pay the draft. *West Branch State Bank v. Haines*, 112 N. W. 552.

SEC. 3060-a80. When presentment not required to charge the indorser. Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation, and he has no reason to expect that the instrument will be paid if presented. [29 G. A., ch. 130, § 80.]

SEC. 3060-a81. When delay in making the presentment is excused. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence. [29 G. A., ch. 130, § 81.]

Other states: Windham Bk. v. Norton, 22 Conn., 213. In case of sickness of holder see *Wilson v. Senier*, 14 Wis., 380. If the facts are not disputed, the question of due diligence is one of law for the court; otherwise for the jury. *Belden v. Lamb*, 17 Conn., 451.

SEC. 3060-a82. When presentment may be dispensed with. Presentment for payment is dispensed with:

1. Where after the exercise of reasonable diligence presentment as required by this act cannot be made.

2. Where the drawee is a fictitious person.

3. By waiver of presentment, express or implied. [29 G. A., ch. 130, § 82.]

(1) *Iowa:* Demand of payment is unnecessary to charge indorser if the maker of the note has removed from the state before its maturity. *Whitely v. Allen*, 56-224. While the removal of the maker from the state dispenses with demand, notice of that fact and the fact of non-payment must still be given the indorser in order to charge him. *Leonard v. Olson*, 99-162. Mere insolvency of maker will not excuse demand on him in order to charge indorser. (*Id.*)

(3) *Iowa:* A promise to pay after maturity by an indorser with knowledge that note has not been presented and protested, will operate as a waiver of these requirements. *Hughes v. Bowen*, 15-446; *Campbell v. Varney*, 12-13; *Lomax v. Smyth & Co.*, 50-223. Certain facts considered and held not to be a waiver of demand. *Freeman v. O'Brien*, 38-406. Written promises to pay if maker does not made by indorser after maturity and with knowledge of protest for non-payment, amounts to waiver and renders him liable. *Davis v. Miller*, 88-114. An indorser in blank is bound, however, by waiver of presentation, protest and notice of non-payment contained in the body of the note, distinguishing. *Davis v. Miller, supra.*

Other states: Burden is on plaintiff to show due diligence. *Eaton v. McMahon*, 42 Wis., 484. It is the holder's duty to give the notary information as to the residence of the drawer or indorser. *Smith v. Fisher*, 24 Pa. St., 222. Presentment is not dispensed with by the insolvency of the maker or drawee. *Reinke v. Wright* (Wis.), 67 N. W. 737; *Bensonhurst v. Wilby*, 45 Ohio St., 340. As to when waiver may be made, see *Power v. Mitchell*, 7 Wis., 161. Waiver may result from implication and usage or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended. *Cady v. Bradshaw*, 116 N. Y., 188-191.

For a citation of other authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 142.

SEC. 3060-a83. When instrument is dishonored by non-payment. The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or

2. Presentment is excused and the instrument is overdue and unpaid. [29 G. A., ch. 130, § 83.]

SEC. 3060-a84. Liability of person secondarily liable, when instrument is dishonored. Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder. [29 G. A., ch. 130, § 84.]

Other states: The indorser's liability having been fixed by demand and notice of dishonor, he becomes an independent and principal debtor and does not stand in the capacity of a mere surety. *First Nat. Bk. v. Wood*, 71 N. Y., 405. 411.

Other authorities are cited in Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 144.

SEC. 3060-a85. Time of maturity. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable on the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before twelve o'clock noon on Saturday, when that entire day is not a holiday. [29 G. A., ch. 130, § 85.]

SEC. 3060-a86. Time—how computed. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment. [29 G. A., ch. 130, § 86.]

SEC. 3060-a87. Rule where instrument payable at bank. Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon. [29 G. A., ch. 130, § 87.]

Other states: There has been some conflict in the decisions as to the authority to pay a note or acceptance made payable there. The rule adopted in the statute is the one sustained by the weight of authority; and is also the rule which is most convenient in practice. It is supported by the following decisions: *Bank v. Bank*, 46 N. Y., 82; *Bank v. Hughes*, 17 Wend., 94; *Bank v. Henninger*, 100 Pa., 496; *Bedford Bk. v. Acoarn*, 125 Ind., 582.

The authorities holding the contrary are cited in Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 147.

SEC. 3060-a88. What constitutes payment in due course. Payment is made in due course when it is made at or after maturity of the instrument to the holder thereof in good faith and without notice that his title is defective. [29 G. A., ch. 130, § 88.]

Other states: Payment before the day of maturity is a defence which binds only the party receiving payment and those who stand in his shoes. *Watson v. Wyman*, 161 Mass., 96, 99.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 148.

NOTICE OF DISHONOR.

SEC. 3060-a89. To whom notice of dishonor must be given. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged. [29 G. A., ch. 130, § 89.]

Iowa: Where there are several indorsers of a note, the holder may elect to hold any one or all of the prior indorsers. To hold all liable he must give all notice of protest; otherwise it is only necessary to give those whom he wishes to hold notice. Likewise an indorser thus notified, in order to charge his prior indorsers must them notice; but when an indorser receives notice of non-payment and protest either from a subsequent indorser, or from the holder of the note, it inures to the benefit of all subsequent indorsees. *Hamilton v. Veach*, 19-419.

Other states: That this rule does not apply to guarantors, see *Brown v. Curtiss*, 2 N. Y., 225; *Allen v. Rightmere*, 20 Johns., 365; *Roberts v. Hawkins*, 70 Mich., 566.

SEC. 3060-a90. By whom given. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given. [29 G. A., ch. 130, § 90.]

Iowa: Notices of protest to several indorsers residing in the same town may be mailed to one, and will be sufficient to charge them all with notice, provided the party to whom they are sent shall again mail to the proper parties. *Van Brunt & Sons v. Vaughn*, 47-145. See *First Nat. Bk. v. Farneman*, 93-161.

Other states: That notice cannot be given by a stranger, see *Lawrence v. Miller*, 16 N. Y., 235, 237; *Chanoine v. Fowler*, 3 Wend., 173. A drawee who refuses acceptance cannot give notice. *Stanton v. Blossom*, 14 Mass., 116.

SEC. 3060-a91. Notice given by agent. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not. [29 G. A., ch. 130, § 91.]

Other states: *Drexler v. McGlynn*, 99 Cal., 143. A notice made out by a notary public who signed by mistake the maker's name instead of his own, without authority of the maker, is insufficient. *Cabot Bk. v. Warner*, 92 Mass., 522. Banks as agents for collection, have authority to receive and transmit notices on behalf of the owners of the paper. *West River Bk. v. Taylor*, 34 N. Y., 128, 130; *Colt v. Noble*, 5 Mass., 167.

An agent in giving notice represents and acts on behalf of his principal, and this, though he may be a notary acting in his official character. *Lawrence v. Miller*, 16 N. Y., 235, 238.

SEC. 3060-a92. Effect of notice given on behalf of holder. Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given. [29 G. A., ch. 130, § 92.]

Other states: A holder is not bound to give notice to any one but his immediate indorser. *West River Bank v. Taylor*, 34 N. Y., 128, 131; *Linn v. Horton*, 17 Wis., 150, 153.

SEC. 3060-a93. Effect where notice is given by party entitled thereto. Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of the holder and all parties subsequent to the party to whom the notice is given. [29 G. A., ch. 130, § 93.]

SEC. 3060-a94. When agent may give notice. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder. [29 G. A., ch. 130, § 94.]

Other states: *Rosson v. Carroll*, 90 Tenn., 90.

SEC. 3060-a95. When notice is sufficient. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument

does not vitiate unless the party to whom the notice is given is in fact misled thereby. [29 G. A., ch. 130, § 95.]

Other states: *Kilgore v. Bulkley*, 14 Conn., 362; *Tobey v. Lenning*, 14 Pa. St., 483; *Aiken v. Marine Bk.*, 16 Wis., 679.

SEC. 3060-a96. Form of notice. The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails. [29 G. A., ch. 130, § 96.]

Iowa: Notice of non-payment may be verbal as well as in writing. *First Nat. Bk. v. Ryerson*, 23-508. Certificate of notary which fails to show that the residences of the several parties were at the places where the notices were addressed to them, held sufficient. *Fuller & Warren v. Dingman*, 41-506. Certificate of protest considered and held sufficient. *Jones v. Berryhill*, 25-289.

Other states: *Brewster v. Arnold*, 1 Wis., 264. A notice which omits an essential feature of the note or misdescribes it, is an imperfect one, but not necessarily invalid. It is invalid only where it fails to give that particular information which it would have given but for its particular imperfection; and even in case the notice in itself be defective, if, from evidence *alimunde* of the attendant circumstances, it is apparent that the indorser was not deceived or misled as to the identity of the dishonored instrument, he will be charged. *Hodges v. Schuyler*, 22 N. Y., 114; *Artisans' Bk. v. Backus*, 36 N. Y., 106; *Gill v. Palmer*, 29 Conn., 57. To render the notice defective it must fail to convey sufficient knowledge to disclose the identity of the particular instrument dishonored. *Mills v. Bank of U. S.*, 11 Wheat., 431; *Bank of Alexandria v. Swaim*, 9 Pet., 33.

For numerous other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 167.

SEC. 3060-a97. To whom notice may be given. Notice of dishonor may be given either to the party himself or to his agent in that behalf. [29 G. A., ch. 130, § 97.]

Other states: *Fassin v. Hubbard*, 55 N. Y., 465, 471; *Bank v. Butler Colliery Co.*, 51 Hun, 63, 68.

SEC. 3060-a98. Notice where party is dead. Where any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence, he can be found. If there be no personal representative, notice may be sent to the last residence at last place of business of the deceased. [29 G. A., ch. 130, § 98.]

Other states: *Shoenberger's Executor v. Lancaster Savings Institution*, 28 Pa. St., 459; *Massachusetts Bk. v. Oliver*, 10 Cush., 557; *Goodnow v. Warren*, 122 Mass., 82.

SEC. 3060-a99. Notice to partners. Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution. [29 G. A., ch. 130, § 99.]

Other states: Where partners give a promissory note with one of them as maker and the other as indorser, the latter is not liable on his indorsement unless he be duly notified of the dishonor of the note. *Foland v. Boyd*, 23 Pa. St., 476; *Hubbard v. Matthews*, 54 N. Y., 43, 50.

SEC. 3060-a100. Notice to persons jointly liable. Notice to joint parties who are not partners must be given to each of them, unless one of them has authority to receive such notice for the others. [29 G. A., ch. 130, § 100.]

Other states: *Shepard v. Hawley*, 1 Conn., 367; *Boyd v. Orton*, 16 Wis., 495.

For distinction between parties who are partners and joint parties who are not partners, see *Gates v. Beecher*, 60 N. Y., 518, 526.

SEC. 3060-a101. Notice to bankrupt. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee. [29 G. A., ch. 130, § 101.]

Other states: Where the indorser has made a voluntary assignment for the benefit of creditors, notice to the assignee would bind the indorser and his estate. *Callahan v. Kentucky Bank*, 82 Ky., 231. To the same effect. *American Nat. Bk. v. Junk Bros.*, 94 Tenn., 634. *Contra, House v. Vinton*, 43 Ohio St., 346.

SEC. 3060-a102. Time within which notice must be given. Notice may be given as soon as the instrument is dishonored, and unless delay is excused as hereinafter provided, must be given within the times fixed by this act. [29 G. A., ch. 130, § 102.]

Other states: That the holder need not wait until the close of business hours, but may send notice at once, see *Bank of Alexandria v. Swan*, 9 Pet., 33; *Lenox v. Roberts*, 2 Wheat., 373; *Whitwell v. Brigham*, 19 Pick., 117.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 173.

SEC. 3060-a103. Where parties reside in same place. Where the person giving and the person to receive notice reside in same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.
2. If given at his residence, it must be given before the usual hours of rest on the day following.
3. If sent by mail, it must be deposited in the post-office in time to reach him in the usual course on the day following. [29 G. A., ch. 130, § 103.]

Other states: *Adams v. Wright*, 14 Wis., 408; Daniel on Neg. Insts., sec. 1038; *Phelps v. Stocking*, 21 Neb., 444.

See also Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 174.

The fixed rules of the negotiable instruments act relating to notice of dishonor are not applicable to presentment for payment of a bank check. *Plover Savings Bank v. Moodie*, 110 N. W. 29; 113 N. W.—.

SEC. 3060-a104. Where parties reside in different places. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.
2. If given otherwise than through the post-office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last sub-division. [29 G. A., ch. 130, § 104.]

Other states: *Stephenson v. Dickson*, 24 Pa. St., 148; *Whitwell v. Johnson*, 17 Mass., 449. In *Smith v. Poillon*, 87 N. Y., 590, 597, it is said: "From a careful examination of all these authorities and many others it is clear that the law is not precisely settled. It appears that at first it was supposed to be necessary that notice of dishonor should be given by the next post after dishonor, on the same day if there was one. That rule was found inconveniently stringent, and then it was held that when the parties lived in different places between which there was a mail, the notice could be posted on the next day after the dishonor, or notice of dishonor. Some of them hold that when there are several mails on the next day, it is sufficient to send the notice by any post of that day. Other authorities lay down the rule, in general terms, that the notice must be posted by the first practical and convenient mail of the next day; and that rule seems to be supported by the most authority in this state. What is a practical and convenient mail depends upon circumstances. It may be controlled by the usages of business and the customs of the people at the place of mailing, and the condition, situation and business engagements of the person required to give the notice. The rule should have a reason-

able application in every case, and whether sufficient diligence has been used to mail the notice, the facts being undisputed, is a question of law."

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 175.

SEC. 3060-a105. When sender deemed to have given due notice. Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails. [29 G. A., ch. 130, § 105.]

Other states: See *Windham Bk. v. Norton*, 22 Conn., 213; *Cook v. Foraker*, 193 Pa. St., 461.

SEC. 3060-a106. Deposit in post-office—what constitutes. Notice is deemed to have been deposited in the post-office when deposited in any branch post-office or in any letter box under the control of the post-office department. [29 G. A., ch. 130, § 106.]

Other states: See *Pearce v. Langfit*, 101 Pa. St., 507; *Johnson v. Brown*, 154 Mass., 105.

SEC. 3060-a107. Notice to subsequent party—time of. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor. [29 G. A., ch. 130, § 107.]

Other states: *Shelburne Falls Nat. Bk. v. Townley*, 102 Mass., 177; *Seaton v. Scovill*, 18 Kans., 435; *Linn v. Horton*, 17 Wis., 150.

SEC. 3060-a108. Where notice must be sent. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he is not given such address, then the notice must be sent as follows:

1. Either to the post-office nearest to his place of residence, or to the post-office where he is accustomed to receive his letters; or

2. If he lives in one place, and have his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning. But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section. [29 G. A., ch. 130, § 108.]

[The New York act contains the word "has" in place of the word "is" in line three.]

Other states: That notice must be sent to the address given, see *Bartlett v. Robinson*, 39 N. Y., 187.

(1) *Iowa:* A notice of presentment, non-payment and protest to charge indorser, must be sent him at his proper post-office, and when sent to wrong post-office, held insufficient. *Northwestern Coal Co. v. Bowman & Co.*, 69-150; but where notice is addressed to indorser at his former post-office, but which had been discontinued and business transferred to another, held sufficient. *Bank v. Owen*, 23-185.

Other states: *Bank of Columbia v. Lawrence*, 1 Pet., 578; *Nat. Bk. v. Cade*, 73 Mich., 449.

(2) *Other states:* *Bank of U. S. v. Carneal*, 2 Pet., 549; *Bank v. Marsh*, 7 N. Y., 481.

For citation of other authorities see Crawford's Annotated Neg. Inst. Law, (2 Ed.), sec. 179.

SEC. 3060-a109. Waiver of notice. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be expressed or implied. [29 G. A., ch. 130, § 109.]

Other states: See *Ross v. Hurd*, 71 N. Y., 14, 18; *Lowe v. Howard*, 10 Cush., 159.

But it must appear that the indorser had knowledge of the fact that the holder was in default. *Thornton v. Wynn*, 12 Wheat., 183; *Schierl v. Baumel*, 75 Wis., 75. And in

Massachusetts it is held that knowledge on the part of the indorser, that demand upon the maker has not been made, is material, and must be proved, notwithstanding the fact that he knew that the note had not been paid and that notice of non-payment had not been given, and was aware that he was discharged from all liability. *Parks v. Smith*, 155 Mass., 26, 33.

For a citation of other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 180.

SEC. 3060-a110. Whom affected by waiver. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only. [29 G. A., ch. 130, § 110.]

Iowa: A waiver of presentation, protest and notice of non-payment contained in the body of the note, is binding on one who indorses in blank. *Phillips v. Dippo*, 93-35; *Bank v. Sigstadt*, 96-491; *Bank v. Wilka*, 102-315.

Other states: *Lowry v. Steele*, 27 Ind., 168; *Bryant v. Taylor*, 19 Minn., 376. Where written above the signature, see *Woodman v. Thurston*, 8 Cush., 157.

SEC. 3060-a111. Waiver of protest. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest, but also of a presentment and notice of dishonor. [29 G. A., ch. 130, § 111.]

Other states: *Anville Nat. Bk. v. Kettering*, 106 Pa. St., 531; *Brewster v. Arnold*, 1 Wis., 264. In construing an allegation in a pleading that the instrument was duly protested, it will not be held to comprehend an averment that notice of dishonor was given to the indorser. *Cook v. Warren*, 88 N. Y., 37.

SEC. 3060-a112. When notice is dispensed with. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged. [29 G. A., ch. 130, § 112.]

Other states: *Hobbs v. Straine*, 149 Mass., 212.

For citation of authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 183.

SEC. 3060-a113. Delay in giving notice—how excused. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence. [29 G. A., ch. 130, § 113.]

Other states: *Martin v. Ingersoll*, 8 Pick., 1.

SEC. 3060-a114. When notice need not be given to drawer. Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person.
2. Where the drawee is a fictitious person or a person not having capacity to contract.
3. Where the drawer is the person to whom the instrument is presented for payment.
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument.
5. Where the drawer has countermanded payment. [29 G. A., ch. 130, § 114.]

(1) *Other states*: Where all members of the firm are members of the house which drew the bill, notice is not required to render the firm liable. *West Branch Bk. v. Fulner*, 3 Pa., St., 389.

(4) *Other states*: *Life Ins. Co. v. Pendleton*, 112 U. S., 708; *Wollenweher v. Ketterlinn*, 17 Pa. St., 389.

SEC. 3060-a115. When notice need not be given to indorser. Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the instrument.

2. Where the indorser is the person to whom the instrument is presented for payment.

3. Where the instrument was made or accepted for his accommodation. [29 G. A., ch. 130, § 115.]

(2) *Other states: In re Swift*, 106 Fed., 65, is a case arising under this statute.

(3) *Iowa: Possession by an indorser of a note at maturity waives demand and notice. Lomax v. Smyth*, 50-223.

Other states: French v. Bank of Columbia, 4 Cranch, 141; *Blenderman v. Price*, 50 N. J. L., 296.

SEC. 3060-a116. Notice of non-payment where acceptance refused. Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted. [29 G. A., ch. 130, § 116.]

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 187.

SEC. 3060-a117. Effect of omission to give notice of non-acceptance. An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission. [29 G. A., ch. 130, § 117.]

SEC. 3060-a118. When protest need not be made—when must be made. Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment as the case may be; but protest is not required, except in the case of foreign bills of exchange. [29 G. A., ch. 130, § 118.]

(1) *Iowa: Unless the specified place of payment be at a bank, a deposit of money at such place to meet the note will not be a payment, the holder not being required to make presentment at that place. Callanan et al. v. Williams, et al.*, 71-363; *Englert v. White*, 92-97; *Klindt v. Higgins*, 95-529; *Baumgartner v. Peterson*, 93-572.

The rule is probably otherwise where the specified place of payment is at a bank. *Bank v. Ingerson*, 105-349. Payment to payee, who is a trustee, before maturity, with knowledge of assignment, is not a satisfaction of the indebtedness, and such payment will not protect the maker. *Livermore v. Maxwell*, 87-705. Payment to an agent not in possession of the instrument is done at the peril of the payor; so, too, is payment before maturity, the paper remaining outstanding. *Security Co. v. Graybeal*, 85-543; *U. S. Bank v. Burson et al.*, 90-191. Where note is payable at a specified place, maker can only exonerate himself from payment of interest by showing that he had funds at the place for the discharge of the note. *Robinson v. Lair*, 31-9. Presumption of ownership arises from the possession of a note after maturity. *Graff v. Adams et al.*, 100-481; *Stoddard v. Burton*, 41-582; and payment of a note before maturity, made payable "on or before" to the holder thereof will be upheld. *Stoddard v. Burton, supra*.

Other states: Bay v. Church, 15 Conn., 129; *Legg v. Vinal*, 165 Mass., 555; *Stephenson v. Dickson*, 24 Pa. St., 148.

DISCHARGE OF NEGOTIABLE INSTRUMENTS.

SEC. 3060-a119. Instrument—how discharged. A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor.
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.
3. By the intentional cancellation thereof by the holder.
4. By any other act which will discharge a simple contract for the payment of money.

5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right. [29 G. A., ch. 130, § 119.]

(1) *Other states*: Possession of a bill by the acceptor after it has been in circulation, is *prima facie* evidence that it has been paid by him. *Baring v. Clark*, 19 Pick., 220. So the possession of a promissory note by the maker. *Bank v. Harris*, 7 Wash., 139; *Madison Square Bk. v. Pierce*, 137 N. Y., 444.

For citation of other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 200.

SEC. 3060-a120. When persons secondarily liable on—discharged.
A person secondarily liable on the instrument is discharged:

1. By an act which discharges the instrument.
2. By the intentional cancellation of his signature by the holder.
3. By the discharge of a prior party.
4. By the valid tender of payment made by a prior party.
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.
6. By an agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved. [29 G. A., ch. 130, § 120.]

(3) *Other states*: *Shutts v. Fingar*, 100 N. Y., 539; *Couch v. Waring*, 9 Conn., 261; *Gennis v. Weighley*, 114 Pa. St., 194.

(5) *Other states*: By an express reservation of the holder's rights against the tion. *Gloucester Bk. v. Worcester*, 10 Pick., 528; *Tombeckbe Bk. v. Stratton*, 7 Wend., drawer or indorser, their rights against the maker or acceptor are reserved by implication. 429.

(6) For authorities under this head see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 201.

SEC. 3060-a121. Right of party who discharges instrument. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person, and has been paid by the drawer; and
2. Where it was made or accepted for accommodation, and has been paid by the party accommodated. [29 G. A., ch. 130, § 121.]

(2) *Iowa*: Maker is not released by extension given to the indorser or the taking of security from the indorser. *Whiting v. Western Stage Co.*, 20, 554.

For a citation of authorities to this section see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 202.

SEC. 3060-a122. Renunciation by holder. The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. [29 G. A., ch. 130, § 122.]

SEC. 3060-a123. Cancellation—unintentional—burden of proof. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority. [29 G. A., ch. 130, § 123.]

SEC. 3060-a124. Alteration of instrument—effect of. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers. But when an instrument has been materially altered and is in the hands of a holder if due course, not a party to the alteration, he may enforce payment thereon according to its original tenor. [29 G. A., ch. 130, § 124.]

Iowa: The severance of one portion of a contract, which leaves one portion in the form of a negotiable promissory note, signed by one of the parties, constitutes such a material alteration that recovery cannot be had on the note, even in the hands of a *bona fide* purchaser for value before maturity, unless the maker is chargeable with gross negligence in its execution. *Scofield v. Ford*, 56-370. Proof of material alteration since acceptance by drawee casts the burden upon the holder, of showing purchase in good faith without notice of alteration. *Smith v. Eals*, 81-235; *Conger v. Crabtree*, 88-536. See *Nat. Bk. v. Zeims*, 93-140.

Other states: See *Jeffries v. Rosenfeld* (Mass.), 61 N. E., 49, where the effect of this provision was discussed, but not decided. The burden of explaining an apparent alteration is upon the party producing the paper. *Town of Solon v. Williamsburgh Savings Bk.*, 114 N. Y., 122, 135; *Simpson v. Davis*, 119 Mass., 269; *Gettysburg Nat. Bk. v. Chisolm*, 169 Pa. St., 564.

For other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 205.

SEC. 3060-a125. What constitutes a material alteration. Any alteration which changes:

1. The date.
2. The sum payable, either for principal or interest.
3. The time or place of payment.
4. The number or the relations of the parties.
5. The medium or currency in which payment is to be made.

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration. [29 G. A., ch. 130, § 125.]

(1) *Other states:* *National Ulster Co. Bk. v. Madden*, 114 N. Y., 280; *Crawford v. West Side Bk.*, 100 N. Y., 50, 56; *Wood v. Steele*, 6 Wall., 80; *Newman v. King* (Ohio), 43 N. E., 683.

(2) *Other states:* *Gettysburg Nat. Bk. v. Chisolm*, 169 Pa. St., 564.

(3) *Other states:* *Rogers v. Vosburgh*, 87 N. Y., 208; *Weyman v. Yeomans*, 84 Ill., 403.

(5) *Other states:* *Angle v. Ins. Co.*, 92 U. S., 330.

For a citation of other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 206.

BILLS OF EXCHANGE—FORM AND INTERPRETATION.

SEC. 3060-a126. Bill of exchange defined. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer. [29 G. A., ch. 130, § 126.]

Other states: *Jarvis v. Wilson*, 46 Conn., 191.

SEC. 3060-a127. Bill not an assignment of funds in hands of drawee. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same. [29 G. A., ch. 130, § 127.]

Other states: *Harris v. Clark*, 3 N. Y., 93; *Mandeville v. Welch*, 5 Wheat, 286; *Brill v. Tuttle*, 81 N. Y., 454; *Throop Grain Cleaner Co. v. Smith*, 110 N. Y., 83.

SEC. 3060-a128. Bill addressed to more than one drawee. A bill may be addressed to two or more drawees jointly, whether they are part-

ners or not; but not to two or more drawees in the alternative or in succession. [29 G. A., ch. 130, § 128.]

SEC. 3060-a129. Inland and foreign bills of exchange. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill. [29 G. A., ch. 130, § 129.]

Other states: Commercial Bk. of Ky. v. Varnum, 49 N. Y., 269; *Life Ins. Co. v. Pendleton*, 112 U. S., 696; *Armstrong v. Am. Exch. Nat. Bk.*, 133 U. S., 433; *Phoenix Bk. v. Hussey*, 12 Pick., 483.

SEC. 3060-a130. When bill may be treated as promissory note. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument at his option either as a bill of exchange or a promissory note. [29 G. A., ch. 130, § 130.]

See section 3060-a17.

SEC. 3060-a131. Referee in case of need. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not, as he may see fit. [29 G. A., ch. 130, § 131.]

The usual form is: "In case of need, apply to Messrs. C. and D. at E." Chitty on Bills, 165.

SEC. 3060-a132. Acceptance of bills of exchange—acceptance—how made—et cetera. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money. [29 G. A., ch. 130, § 132.] [31 G. A., ch. 149.]

Iowa: A conditional acceptance cannot be held to charge an indorsee of the bill before maturity with equities arising out of original transaction between drawer and acceptor. *Merritt v. Nihart*, 11-57. Evidence tending to show either an express or implied promise of acceptance held admissible. *Smith v. Clark & Whiting*, 12-32.

Other states: This contract is regarded as a new contract. *Superior City v. Ripley*, 138 U. S., 93. The usual mode of making an acceptance is by writing the word "accepted" and subscribing the drawee's name. Byles on Bills, 190. Acceptance by telegraph may be made by the party and such an acceptance is within the terms of the statute requiring acceptances to be in writing. *North Atchison Bk. v. Garretson*, 51 Fed., 167. But to require the acceptance to be on the instrument itself would preclude the giving of an acceptance by telegraph.

SEC. 3060-a133. Holder entitled to acceptance on face of bill. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused, may treat the bill as dishonored. [29 G. A., ch. 130, § 133.]

SEC. 3060-a134. Acceptance by separate instrument. Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value. [29 G. A., ch. 130, § 134.]

SEC. 3060-a135. Promise to accept—when equivalent to acceptance. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value. [29 G. A., ch. 130, § 135.]

Other states: An absolute authority to draw is equivalent to an unconditional promise to pay. *Ruiz v. Renauld*, 100 N. Y., 256; *Merchants Bk. v. Griswold*, 72 N. Y., 472, 479. At common law an oral promise was sufficient. *Scudder v. Union Nat. Bk.*, 91 U. S., 406.

For a citation of other authorities see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 223.

SEC. 3060-a136. Time allowed drawee to accept. The drawee is allowed twenty-four hours after presentation in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as of the day of presentation. [29 G. A., ch. 130, § 136.]

SEC. 3060-a137. Liability of drawee retaining or destroying bill. Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same. [29 G. A., ch. 130, § 137.]

Other states: *Matteson v. Moulton*, 79 N. Y., 627.

SEC. 3060-a138. Acceptance of incomplete bill. A bill may be accepted before it has been signed by the drawee, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of the first presentment. [29 G. A., ch. 130, § 138.]

SEC. 3060-a139. Kinds of acceptance. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. [29 G. A., ch. 130, § 139.]

SEC. 3060-a140. What constitutes a general acceptance. An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere. [29 G. A., ch. 130, § 140.]

Other states: *Wallace v. McConnell*, 13 Pet., 136. See note to section 3060-a70.

SEC. 3060-a141. Qualified acceptance. An acceptance is qualified, which is:

1. Conditional, that is to say, which makes payment by the acceptor dependent on the fulfillment of a condition therein stated.
 2. Partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn.
 3. Local, that is to say, an acceptance to pay only at a particular place.
 4. Qualified as to time.
 5. The acceptance of some one or more of the drawees, but not of all.
- [29 G. A., ch. 130, § 141.]

(1) *Other states:* Such an acceptance does not become due until the happening of the contingency upon which the bill is accepted. *Brockway v. Allen*, 17 Wend., 40; *Newhall v. Clark*, 3 Cush., 376.

SEC. 3060-a142. Rights of parties to qualified acceptance. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subse-

quently assent thereto. When the drawer or an indorser receives notices of a qualified acceptance, he must, within a reasonable time, express his dissent to the holder, or he will be deemed to have assented thereto. [29 G. A., ch. 130, § 142.]

Other states: Walker v. N. Y. St. Bk., 9 N. Y., 582.

PRESENTMENT OF BILLS OF EXCHANGE FOR ACCEPTANCE.

SEC. 3060-a143. When presentment for acceptance must be made. Presentment of acceptance must be made:

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or
2. Where the bill expressly stipulates that it shall be presented for acceptance; or
3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable. [29 G. A., ch. 130, § 143.]

Other states: Allen v. Suydam, 17 Wend., 368. A bill payable at a fixed period from its date may be presented for acceptance at any time. *Bachelor v. Priest*, 12 Pick., 399; *Oxford Bk. v. Davis*, 4 Cush., 188.

SEC. 3060-a144. When failure to present releases drawer and indorser. Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present it for acceptance or negotiate it within a reasonable time. If he fail to do so, the drawer and all indorsers are discharged. [29 G. A., ch. 130, § 144.]

Other states: Robinson v. Ames, 20 Johns., 146; *Prescott Bk. v. Coverly*, 7 Gray, 217; *Walsh v. Dort*, 23 Wis., 334.

SEC. 3060-a145. Presentment—how made. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day and before the bill is overdue, to the drawer or some person authorized to accept or refuse acceptance on his behalf; and:

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.

2. Where the drawee is dead, presentment may be made to his personal representative.

3. Where the drawee has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee. [29 G. A., ch. 130, § 145.]

The holder may require agent to show authority. Daniel on Neg. Insts., sec. 487.

Other states: Smith v. Melton, 133 Mass., 369.

SEC. 3060-a146. On what days presentment may be made. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day. [29 G. A., ch. 130, § 146.]

SEC. 3060-a147. Presentment where time is insufficient. Where the holder of a bill drawn payable elsewhere than at the place of business

or the residence of the drawee has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers. [29 G. A., ch. 130, § 147.]

SEC. 3060-a148. Where presentment is excused. Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance, in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill.
2. Where after the exercise of reasonable diligence, presentment cannot be made.
3. Where although presentment has been irregular, acceptance has been refused on some ground. [29 G. A., ch. 130, § 148.]

Other states: Schmittler v. Simon, 101 N. Y., 554.

SEC. 3060-a149. When dishonored by non-acceptance. A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance and such an acceptance as is prescribed by this act is refused or cannot be obtained; or
2. When a presentment for acceptance is excused and the bill is not accepted. [29 G. A., ch. 130, § 149.]

SEC. 3060-a150. Duty of holder where bill is not accepted. Where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance or he loses the right of recourse against the drawer and indorsers. [29 G. A., ch. 130, § 150.]

SEC. 3060-a151. Rights of holders where bill is not accepted. When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holder and no presentment for payment is necessary. [29 G. A., ch. 130, § 151.]

SEC. 3060-a152. Protest of bills of exchange—in what cases protest necessary. Where a foreign bill, appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof, in a case of dishonor, is unnecessary. [29 G. A., ch. 130, § 152.]

Other states: Commercial Bank v. Varnum, 49 N. Y., 269, 275; *Dennistoun v. Stuart*, 17 How. (U. S.), 606; *Bank v. Hussey*, 12 Pick., 483.
See Byles on Bills, 256.

SEC. 3060-a153. Protest—how made. The protest must be annexed to the bill, or must contain a copy thereof, and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment.
2. The fact that presentment was made and the manner thereof.
3. The cause or reason for protesting the bill.
4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found. [29 G. A., ch. 130, § 153.]

Iowa: The certificate or protest is only evidence of notice when it recites that notice was given. *Sather v. Rogers*, 10-231; *Thorp v. Craig*, 10-461.

It is only evidence of the facts therein recited, and where it shows that the notice was directed to the indorser at a particular place it will not be presumed that such place was the residence of such indorser. *Bradshaw v. Hedge*, 10-402.

But a certificate of protest stating that the notary notified the indorsers is sufficient although it does not show that the residence of the several parties are at the places to which the notices were addressed. *Fuller v. Dingham*, 41-506.

It is not necessary to annex to, or set out in, the notary's certificate, the notice referred to therein, nor need the certificate, in words, formally refer to the seal. *Jones v. Berryhill*, 25-289.

If the certificate states that notices of protest properly addressed were deposited in the post-office, it will be presumed that the postage was prepaid. *Brooks v. Day*, 11-46.

When the certificate of protest states that the notary notified the proper parties in a certain manner, the credit due the certificate will generate the presumption that the mode adopted accomplished the result certified to, unless it affirmatively appear that the method adopted could not have done so; but if the notary only certifies as to the steps taken, then, to make out a *prima facie* case, it must further appear that such steps would effectuate notice. *Wamsley v. Rivers*, 34-463.

The fact that the certificate is dated at a time subsequent to that of the dishonor and protest will not render it incompetent. *Chatham Bank v. Allison*, 15-357.

The protest of a notary is not receivable without his seal, but such defect may be cured by the affixing of the seal by the notary at the trial. *Rindskoff v. Malone*, 9-540.

The certificate of a notary public as to the protest of a bill or note is not admissible against defendant in a criminal case, as he is entitled to be confronted with the witnesses against him. *State v. Reidel*, 26-430.

Other states: Signature of notary may be printed. *Bank of Cooperstown v. Woods*, 28 N. Y., 561.

(1) *Other states:* *Duckert v. Von Lilienthal*, 11 Wis., 56.

(4) *Other states:* Notarial certificate of protest is competent without further proof. *Porter v. Judson*, 1 Gray, 175; *Pierce v. Indseth*, 106 U. S., 546. And the different states of the Union are deemed foreign to each other so that the notarial certificate of protest under seal is good on mere production. *Townsley v. Sumrall*, 2 Pet., 170; *Halliday v. McDougall*, 20 Wend., 81; *Johnson v. Brown*, 154 Mass., 105, 106.

For a citation of other authorities see Crawford's Annotated Neg. Inst. Law, (2 Ed.), sec. 261.

SEC. 3060-a154. Protest—by whom made. Protest may be made by:

1. A notary public; or
2. By any reputable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses. [29 G. A., ch. 130, § 154.]

Other states: Notary must make presentment and demand in person. *Commercial Bk. v. Varnum*, 49 N. Y., 269, 275; *Ocean Nat. Bk. v. Williams*, 102 Mass., 141. Notary who is an officer of a bank may legally protest paper belonging to the bank. *Nelson v. First Nat. Bk.*, 69 Fed. 798; 16 C. C. A., 425.

SEC. 3060-a155. Protest—when to be made. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting. [29 G. A., ch. 130, § 155.]

See Byles on Bills, 257.

SEC. 3060-a156. Protest—where made. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable; and no other presentment for payment to, or demand on, the drawee is necessary. [29 G. A., ch. 130, § 156.]

See Daniel on Neg. Insts., sec. 935; and Byles on Bills, 257.

SEC. 3060-a157. Protest—both for non-acceptance and non-payment. A bill which has been protested for non-acceptance may be subsequently protested for non-payment. [29 G. A., ch. 130, § 157.]

See Daniel on Neg. Insts., sec. 1464.

SEC. 3060-a158. Protest before maturity where acceptor insolvent. Where the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers. [29 G. A., ch. 130, § 158.]

SEC. 3060-a159. Where protest dispensed with. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence. [29 G. A., ch. 130, § 159.]

SEC. 3060-a160. Protest where bill is lost, et cetera. Where a bill is lost or destroyed, or is wrongfully detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof. [29 G. A., ch. 130, § 160.]

ACCEPTANCE OF BILLS OF EXCHANGE FOR HONOR.

SEC. 3060-a161. When bill may be accepted for honor. Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security, and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest for the honor of the party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party, there may be a further acceptance by a different person for the honor of another party. [29 G. A., ch. 130, § 161.]

See Byles on Bills, 262-266.

SEC. 3060-a162. Acceptance for honor—how made. An acceptance for honor *supra* protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor. [29 G. A., ch. 130, § 162.]

SEC. 3060-a163. When deemed to be an acceptance for honor of the drawer. Where an acceptance for honor does not expressly state for whose honor it is made, it is deemed to be an acceptance for the honor of the drawer. [29 G. A., ch. 130, § 163.]

SEC. 3060-a164. Liability of acceptor for honor. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted. [29 G. A., ch. 130, § 164.]

Other states: Baring v. Clark, 19 Pick., 220.

SEC. 3060-a165. Agreement of acceptor for honor. The acceptor for honor by such acceptance engages that he will on due presentment pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have been duly presented for payment and protested for non-payment and notice of dishonor given to him. [29 G. A., ch. 130, § 165.]

SEC. 3060-a166. Maturity of bill payable after sight—accepted for honor. When a bill payable after sight is accepted for honor its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor. [29 G. A., ch. 130, § 166.]

SEC. 3060-a167. Protest of bill accepted for honor, et cetera. Where a dishonored bill has been accepted for honor *supra* protest or con-

tains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need. [29 G. A., ch. 130, § 167.]

SEC. 3060-a168. Presentment for payment to acceptor for honor—how made. Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section 104. [29 G. A., ch. 130, § 168.]

See Byles on Bills, 263.

SEC. 3060-a169. When delay in making presentment is excused. The provisions of section eighty-one apply where there is delay in making presentment to the acceptor for honor or referee in case of need. [29 G. A., ch. 130, § 169.]

SEC. 3060-a170. Dishonor of bill by acceptor for honor. When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him. [29 G. A., ch. 130, § 170.]

PAYMENT OF BILLS OF EXCHANGE FOR HONOR.

SEC. 3060-a171. Who may make payment for honor. Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn. [29 G. A., ch. 130, § 171.]

See Daniel on Neg. Insts., sec. 1254. Byles on Bills, 267-269.

SEC. 3060-a172. Payment for honor—how made. The payment for honor *supra* protest in order to operate as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it. [29 G. A., ch. 130, § 172.]

See Daniel on Neg. Insts., sec. 1258. Byles on Bills, 267. *Konig v. Bayard*, 1 Pet., 250.

SEC. 3060-a173. Declaration before payment for honor. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays. [29 G. A., ch. 130, § 173.]

SEC. 3060-a174. Preference of parties offering to pay for honor. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference. [29 G. A., ch. 130, § 174.]

SEC. 3060-a175. Effect on subsequent parties where bill is paid for honor. Where a bill has been paid for honor all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter. [29 G. A., ch. 130, § 175.]

See Daniel on Neg. Insts., sec. 1255.

SEC. 3060-a176. Where holder refuses to receive payment *supra* protest. Where the holder of a bill refuses to receive payment *supra*

protest, he loses his right of recourse against any party who would have been discharged by such payment. [29 G. A., ch. 130, § 176.]

SEC. 3060-a177. Rights of payer for honor. The payer for honor on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest. [29 G. A., ch. 130, § 177.]

BILLS IN A SET.

SEC. 3060-a178. Bills in sets constitute one bill. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill. [29 G. A., ch. 130, § 178.]

See Daniel on Neg. Insts., sec. 113. Byles on Bills, 387. *Durkin v. Cranston*, 7 Johns, 442.

SEC. 3060-a179. Rights of holders where different parts are negotiated. Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him. [29 G. A., ch. 130, § 179.]

Other states: *Walsh v. Blatchley*, 6 Wis., 422. Byles on Bills, 389.

SEC. 3060-a180. Liability of holder who indorses two or more parts of a set to different persons. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills. [29 G. A., ch. 130, § 180.]

See Byles on Bills, 389.

SEC. 3060-a181. Acceptance of bills drawn in sets. The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill. [29 G. A., ch. 130, § 181.]

Other states: *Dounes & Co. v. Church*, 13 Pet., 205; *Walsh v. Blatchley*, 6 Wis., 422.

SEC. 3060-a182. Payment by acceptor of bills drawn in sets. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon. [29 G. A., ch. 130, § 182.]

See Byles on Bills, 389.

SEC. 3060-a183. Effect of discharging one of a set. Except as herein otherwise provided where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged. [29 G. A., ch. 130, § 183.]

PROMISSORY NOTES AND CHECKS.

SEC. 3060-a184. Promissory note defined. A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another, signed by the maker engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him. [29 G. A., ch. 130, § 184.]

Other states: Curran v. Witter, 68 Wis., 16. A note payable to the order of the maker is a negotiable one. *Miller v. Weeks*, 22 Pa. St., 89.

SEC. 3060-a185. Check defined. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act [are] applicable to a bill of exchange payable on demand apply to a check. [29 G. A., ch. 130, § 185.]

[The word "are" enclosed in brackets, appears in the enrolled bill, as passed, but it does not appear in the original act as adopted in the other states.]

Iowa: N. W. Coal Co. v. Bowman, 69-152.

Other states: One of the characteristics which distinguishes a check from a bill of exchange is that a check is always drawn on a bank or banker. Harris v. Clark, 3 N. Y., 93, 115; *Bull v. Bank of Kasson*, 123 U. S., 105; *Rogers v. Durant*, 140 U. S., 298; *Ridgeley Bk. v. Patton*, 109 Ill., 484; *Harrison v. Nicollet Nat. Bk.*, 41 Minn., 489.

That a draft upon a bank not payable immediately is a bill of exchange, see *Bowen v. Newell*, 8 N. Y., 190; *Harrison v. Nicollet Nat. Bk.*, 1 Minn., 488.

For other authorities, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 321.

An ordinary bank check is classed as a *Plover Savings Bank v. Moodie*, 110 N. bill of exchange, payable on demand. W. 29; 113 N. W.—.

SEC. 3060-a186. Within what time a check must be presented. A check must be presented for payment within a reasonable time after its issue, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. [29 G. A., ch. 130, § 186.]

Other states: See Industrial Bk. of Chicago v. Bowes, 165 Ill., 70. For instances of unreasonable delay, see *Gifford v. Hardell*, 88 Wis., 538; *First Nat. Bk. v. Miller*, 43 Neb., 791; *Grange v. Reigh*, 93 Wis., 552; *Western Wheel Scraper Co. v. Sadilek*, 50 Neb., 105; *Holmes v. Roe*, 62 Mich., 199. For a discussion of the question as to whether or not the death of the drawer operates as a revocation of the authority to pay a check, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 322.

Although the specific provision as to instruments act with reference to reasonable time, making it dependent on usage, are applicable also to the presentment of checks. *Plover Savings Bank v. Moodie*, 110 N. W. 29; 113 N. W.—.

SEC. 3060-a187. Certification of check—effect of. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance. [29 G. A., ch. 130, § 187.]

Other states: Merchants Bk. v. State Bk., 10 Wall., 648; *Cooke v. State Nat. Bk.*, 52 N. Y., 96.

SEC. 3060-a188. Effect where the holder of check procures it to be certified. Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon. [29 G. A., ch. 130, § 188.]

Other states: Minot v. Russ, 156 Mass., 458; *Metropolitan Bk. v. Jones*, 137 Ill., 634; *Meridian Nat. Bk. v. First Nat. Bk. (Ind.)*, 33 N. E., 247.

SEC. 3060-a189. When check operates as an assignment. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check. [29 G. A., ch. 130, § 189.]

Other states: Bank v. Millard, 10 Wall., 152; *Bank v. Schuler*, 120 U. S., 511; *Florence Mills Co. v. Brown*, 124 U. S., 385.

For the citation of numerous other authorities supporting the rule adopted by the text, see Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 325.

The holder of an unaccepted check may bring action thereon in his own name against the bank (following earlier cases, but not referring to this section.) *Bloom v. Winthrop State Bank*, 121-101.

As against such right of action the bank may offset a note held by it against the deposit of the drawer of the check. *Ibid.*

GENERAL PROVISIONS.

SEC. 3060-a190. Short title. This act shall be known as the Negotiable Instrument[s] Law. [29 G. A., ch. 130, § 190.]

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 1.

SEC. 3060-a191. Definitions and meaning of terms. In this act, unless the context otherwise requires:

"Acceptance" means an acceptance completely [completed] by delivery or notification.

"Action" includes counter-claim and set-off.

"Bank" includes any person or association of persons carrying on the business of banking, whether incorporated or not.

"Bearer" means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print. [29 G. A., ch. 130, § 191.]

SEC. 3060-a192. Person primarily liable on instrument. The person "primarily" liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are "secondarily" liable. [29 G. A., ch. 130, § 192.]

See Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 3.

SEC. 3060-a193. Reasonable time—what constitutes. In determining what is a "reasonable time" or an "unreasonable time" regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case. [29 G. A., ch. 130, § 193.]

Iowa: Northwestern Coal Co. v. Bowman, 69-153.

The usage of trade or business with respect to the presentation of bank checks for payment is to be taken into account in determining whether such presentation

is within a reasonable time. *Plover Savings Bank v. Moodie*, 110 N. W. 29; 113 N. W.—.

SEC. 3060-a194. Time—how computed—when last day falls on holiday. When the day, or last day, for doing an act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day. [29 G. A., ch. 130, § 194.]

SEC. 3060-a195. Application of chapter. The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof. [29 G. A., ch. 130, § 195.]

SEC. 3060-a196. Law merchant—when governs. In any case not provided for in this act, the rules of the law merchant shall govern. [29 G. A., ch. 130, § 196.]

Other states: Prescott Bk. v. Coverly, 7 Gray, 217.

See note in Crawford's Annotated Neg. Inst. Law (2 Ed.), sec. 7.

[Section 197 of the act is section 3060-a, supra. As the entire section relates only to the repeal of certain sections of the code, relating to bills and notes, it was deemed best to insert it in advance of the other sections of the act.]

SEC. 3060-a198. Days of grace—demand made on. A demand made on any one of the three days following the day of maturity of the instrument, except on Sunday or a holiday, shall be as effectual as though made on the day on which demand may be made under the provisions of this act, and the provisions of this act as to notice of non-payment, non-acceptance, and as to protest shall be applicable with reference to such demand as though the demand were made in accordance with the terms of this act; but the provisions of this section shall not be construed as authorizing demand on any day after the third day from that on which the instrument falls due according to its face. [29 G. A., ch. 130, § 198.]

SEC. 3060-a199. Indemnifying bond to protect payer. That whenever a note, bond, bill of exchange, certificate of deposit, check or other evidence of indebtedness shall have been lost, stolen or destroyed, and the owner thereof desires payment to be made by the person, firm or corporation issuing the same he shall execute and deliver if demanded to such person, firm or corporation, a good and sufficient bond agreeing to indemnify and save harmless the payer thereof. [31 G. A., ch. 150, § 1.]

SEC. 3060-a200. Indemnifying bond to protect defendants. When an action is brought on a lost note, bond, bill of exchange, draft, certificate of deposit, or other evidence of indebtedness, upon demand of any defendant therein, a good and sufficient bond shall be given to indemnify and save harmless the defendants in said cause. [31 G. A., ch. 150, § 2.]

CHAPTER 4.

OF TENDER.

SECTION 3061. Offer in writing.

A tender in writing is as effectual as an actual personal tender. *Shay v. Callanan, 124-370.*

Where a sufficient tender is made to authorize the rescission of a contract such right to rescission is not lost by a failure to keep the tender good as required by the statutory provision relating to written tenders. *Wisconsin Lumber Co. v. Greene & Western Tel. Co., 127-350.*

While an offer of performance in general terms may be sufficient in equity, yet if the party making such tender specifies the exact sum offered he is bound to specify a sum sufficient to discharge the obligation of which performance is tendered. *Wood v. Howland, 127-394.*

SEC. 3062. When not accepted.

Where a party attempts to rescind a contract made by his agent, which he claims to have been without authority, he

must offer to return any money received by the agent in pursuance of such contract and such offer to return must be

made to the opposite party in person; and it is not sufficient to notify him that it is held subject to his order at another place. *National Imp. & Const. Co. v. Maiken*, 103-118.

A tender which is kept good relieves the debtor from liability to pay interest on the amount so tendered. *Metropolitan Nat. Bank v. Commercial State Bank*, 104-682.

Where one party proposes to pay to the

SEC. 3063. Receipt—objection.

The provision that the person to whom a tender is made must at the time make any objections which he may have to the money, etc., tendered, refers to the character or kind of money and not to the amount, and does not prevent him from afterwards insisting that the amount was not sufficient. *McWhirter v. Crawford*, 104-550.

other the amount of a claim, and is advised by the latter that it will not be accepted, such offer amounts to a tender, although the money is not at the time produced, if the person making the offer could and would have produced it had the other party been willing to accept. *Stecker v. Standley*, 107-694.

Tender in a law action must be kept good by deposit of the money in court. *West v. Farmers' Mut. Ins. Co.*, 117-147.

One who makes a tender may not couple it with a demand for a receipt in full for the claim. *West v. Farmers' Mut. Ins. Co.*, 117-147.

A tender by transmitting a draft for the amount is as effectual as a personal tender in currency, if no objection is made thereto. *Shay v. Callanan*, 124-370.

CHAPTER 5.

OF SURETIES.

SECTION 3064. May require creditor to sue.

In the absence of any special statute requiring a creditor to proceed against the principal debtor or any act of the creditor releasing the lien held by him

the surety is not relieved by a failure of the creditor to enforce his claim against the debtor. *Whitehouse v. American Surety Co.*, 117-328.

CHAPTER 6.

OF PRIVATE SEALS.

SECTION 3068. Abolished.

Notwithstanding the statutory provision abolishing the effect of a sealed instrument at common law, a release under seal of one joint tortfeasor is a release as to all; but parol testimony is permissible

to show that the release was of one not in fact liable, and did not constitute a satisfaction of the liability. *Ryan v. Becker*, 111 N. W. 426.

SEC. 3069. Consideration implied.

The statutory provision that contracts in writing, signed by the parties to be bound, import a consideration was enacted for the purpose of giving to instruments in writing the same effect as instruments under seal had under the common law, and not to supply proof that the contract was based upon a particular consideration. No particular consideration is presumed, and where a wife sues her husband under a contract made during coverture, which would be valid only so far as it affected her separate property, the burden is upon the wife to show that the contract was

with reference to such separate property. *Heacock v. Heacock*, 108-540.

Under the provisions of this section the burden is upon the defendant in an action on a promissory note to show that the note was without consideration. *Luke v. Koenen*, 120-103.

Where an agreement is reduced to writing, the writing of itself imports a consideration. *Cone v. Cone*, 118-458.

The provision that all contracts in writing signed by the party to be bound shall import a consideration, has no application to a case where the consideration is

recited in the instrument and it is shown that the consideration thus recited does not exist. An express consideration clear-

ly named in a written contract cannot be altered by parol. *Lane v. Richards*, 119-24.

SEC. 3070. Failure of—fraud.

While a consideration is presumed in a written contract, it is competent to show that in fact the instrument was without consideration, and parol evidence is competent for that purpose. Want or failure in whole or in part, of the consideration of a written contract may be shown as a defense, entire or partial as the case may be, except in the case of negotiable paper. *Beaty v. Carr*, 109-183.

Want or failure in whole or in part of the consideration of a written instrument may be shown as a defense, total or partial, as the case may be. *Oakland Cemetery Ass'n v. Lakins*, 126-121.

Want or failure of consideration in whole or in part may be shown by parol, but must be pleaded. *Mosnat v. Uchtyil*, 129-274.

As against the express recital of consideration in a written instrument, parol evidence is not admissible to show a different consideration from that expressed. *Ibid.*

Under the statutory provision that if

in an action on negotiable paper by a holder for value before maturity and in good faith, it appears that the instrument was procured by fraud upon the maker, the holder shall recover as against the maker no greater sum than he has paid therefor, held that a purchaser of negotiable school bonds acquiring the same after maturity and after the statutory provision had taken effect, from one who became the holder thereof before maturity in good faith and for value, and before the taking effect of the statute, was not subject to the statutory limitation as to the amount of recovery. (Reversing S. C., 132 Fed. 514.) *Gamble v. Rural Ind. School Dist.*, 146 Fed. 113.

An assignee of a note, although not a good faith holder in the usual course of business, may recover whatever his assignor would have been entitled to under a suit upon the note. *Arnd v. Aylesworth*, 111 N. W. 407.

Section applied. *Plano Mfg. Co. v. Farrel*, 110-577.

CHAPTER 7.

OF ASSIGNMENTS FOR CREDITORS.

SECTION 3071. Must be without preferences.

What valid: Where a general assignment is made, and as a part of the same transaction, and for the purpose of giving a preference, a mortgage is executed by the same party, the assignment and mortgage will both be void. *Groetzing v. Wyman*, 105-574.

Mortgages made to the creditors, not with the intention of disposing of the mortgagor's business, but in the hope of being able to continue the business, do not constitute an assignment and therefore are not necessarily fraudulent because of preferences thereby given. *Ibid.*

A debtor has a legal right to prefer some creditors to others, if he sees fit. *Steinke v. Yetzer*, 108-512.

In a particular case held chattel mortgages executed separately and prior to the time of making a general assignment and without intention at the time to make such assignment, were valid. *Diemer v. Guernsey*, 112-393.

A chattel mortgage given by an insolvent to secure one creditor in preference to others, is not rendered invalid by a failure to record it, unless the withholding it from

record was by reason of agreement, or resulted in some prejudice to other creditors. *Deland v. Miller & Cheney Bank*, 119-368.

An insolvent corporation may make payment of its debts or give property in security thereof, just as a natural person may do, and may prefer one of its creditors over another. *First Nat. Bank v. Garretson*, 107-196.

Intention: One who takes a mortgage in good faith to secure a valid indebtedness is not affected by the intention of the debtor to make an assignment. *Ibid.*; *Manton v. Sieberling*, 107-534; *Groetzing v. Wyman*, 105-574.

One who takes security from an insolvent for a debt, with knowledge of the insolvency, is not to be deprived of the advantage thus secured, unless he took such security with intent to hinder, delay or defraud other creditors. *Deland v. Miller & Cheney Bank*, 119-368.

A mortgagee who takes a mortgage without knowledge of an intent to make an assignment for the benefit of creditors is protected. *Mills v. Miller*, 109-688.

The burden is on the creditor attacking the mortgage to show that at the time it was executed there was also an intent to make a general assignment. *Ibid.*

Several mortgages are not to be taken together as constituting a general assignment where they do not include all the property of the debtor. *Ibid.*

Where a mortgage is executed in pursuance of a prior agreement to give security, and comes to the knowledge of the mortgagee before the assignee under the assignment has accepted the trust, the mortgage will be valid. *Ibid.*

Aside from the provisions of the national bankruptcy law a creditor acting in good faith can take security from his debtor even though he knows there are other creditors and that the effect of his action will be to defeat them. But under the bankrupt law knowledge of such fact will render the preference fraudulent. *Boudinot v. Hamann*, 117-22.

Partial assignments: The statutory provision as to assignment for benefit of

creditors does not prevent partial assignments with preferences or sales of mortgages of any or all of the party's property in payment or security of indebtedness. *Rothschild v. Hasbrouck*, 72 Fed. 813.

Conditions: As an assignment would be subject to all prior valid liens, it is not invalidated by a provision that it is subject to a particular lien described, and such a provision does not estop the assignee from asserting the fraudulent character of the lien thus recognized. *Ringgen Stove Co. v. Bowers*, 109-175.

What law governs: In proceedings under an assignment for benefit of creditors the validity of a mortgage to a creditor executed in another state upon real estate situated in this state, will be determined by the laws of this state. *Manton v. Seiberling*, 107-534.

Effect of bankrupt law: State insolvent laws are not suspended by the enactment of the national bankrupt act. *In re Scholtz*, 106 Fed. 834.

SEC. 3072. How made—inventory—effect—recording.

The purchaser from an assignee cannot claim title to property which never passed through the hands of the assignee, and which was not intended to be covered by the instrument of assignment. *Gevers v. Farmer*, 109-468.

Where an assignment was made by one partner, and the other partner was within reach so that he might be consulted, held that the assignment did not become effectual until confirmed by such other partner. *Mills v. Miller*, 109-688.

Where the assignee took possession of notes and book accounts belonging to the debtor firm, and was garnished therefor under an attachment issued at the suit of creditors, before the assignment which had been executed by one partner only had become valid by confirmation by the other

partner, held that the garnishment took priority over the assignment. *Mills v. Miller*, 109-688.

The assignee stands in the shoes of the insolvent as to liability with reference to contracts made by him. *In re Assignment of Jenks*, 129-139.

The assignee acquires no better title to the property than the assignor had, and one who has sold goods to the insolvent, retaining title until the goods have been paid for, may by intervention in the assignment proceeding assert his title to the goods as against the assignee. *In re Assignment of Wise*, 121-359.

The inventory is not conclusive as to the property passing by the assignment. *Turrill v. McCarthy*, 114-681.

SEC. 3074. Notice. The assignee shall forthwith give notice of such assignment by publication in some newspaper in the county, which shall be continued, once each week, at least six weeks, and forthwith send a notice by mail to each creditor of whom he shall be informed, directed to his usual place of residence, requiring him to present to him within three months thereafter his claims under oath. [C., '73, § 2119; R., § 1829.] [30 G. A., ch. 2, § 8.]

SEC. 3075. Claims filed.

Where the creditor having security files his claim with the assignee, he is entitled to dividends only on that portion of his claim which is not satisfied by resorting to the security. He is subject to the equitable rule that where one creditor has security on two funds, on one of which other creditors have security, the former must first exhaust the fund on which he

has an exclusive claim before resorting to that which is subject to the claims of other creditors. Therefore, where a creditor having security on property of the insolvent received payment on his claim from the proceeds of such property, held, that he could only participate in dividends on the basis of the balance of his claim. *Doolittle v. Smith*, 104-403.

It is optional with the mortgagee whether he will enforce his lien against the property or file his claim with the assignee, but if he chooses the latter remedy he cannot thereafter foreclose his mortgage and is deemed to have waived his right to do so. *Garner v. Fry*, 104-515.

SEC. 3077. Claims contested.

Where the assignee seeks to enforce a claim belonging to the insolvent estate the debtor may set off any claim he has against the estate. *Little v. Sturgis*, 127-298.

A creditor who has filed his claim and

SEC. 3078. Priority of taxes.

The assignee for the benefit of creditors cannot complain of a tax regularly levied on the insolvent's property on the ground

SEC. 3080. Settlement.

Where an assignee does not include in his report a considerable amount of money received from the sale of goods under the assignment, and there is a discrepancy between the inventory and the property accounted for, he should not be discharged until such discrepancy in his account is adjusted. A creditor entitled to share in the distribution of the proceeds of the

SEC. 3084. Sale of property.

The order of sale should be entered of record, but a deed executed by the assignee without notice or order of court is not absolutely void, but will at least pass the naked legal title. *Bristol Sav. Bank v. Judd*, 116-26.

The assignee has the same rights and

Sale by an assignee under assignment for the benefit of creditors of goods which are subject to chattel mortgage does not defeat the lien of the mortgagee. *In re Windhorst*, 107-58.

received a dividend thereon may afterwards proceed to enforce payment of the balance against the debtor by judgment or other lawful means. *Ibid.*

that the insolvent failed to claim an offset for indebtedness. *Carpenter v. Jones County*, 130-494

estate may file exceptions to the assignee's report and be heard thereon. *In re Assignment of Mansfield*, 113-104.

The mere failure of the assignee to keep a complete and satisfactory system of accounts does not necessarily debar him from being allowed a reasonable compensation for his services. *Merritt v. Torrance*, 129-310.

remedies relating to the estate as were possessed by the assignor, and may maintain action on an attachment bond given in favor of the assignor, either by original suit or by intervention in an action already brought against the assignor. *Ringen Stove Co. v. Bowers*, 109-175.

CHAPTER 8.

OF MECHANICS' LIENS.

SECTION 3089. Who may have lien.

Under contract with owner: Material furnished for improvements on land under a contract with one who is not the owner thereof and a bare licensee, does not entitle the person furnishing the material under such contract to a lien on the land nor upon the improvements, which became the property of the owner of the land when made. *Hoag v. Hay*, 103-291.

Where a party is led to believe that one has a title or interest to which a mechanic's lien will attach, and he has no such title, but obtains it while the contract is being performed, the lien attaches thereto. *Floete v. Brown*, 104-154.

An owner of a limited estate erecting buildings on the land in pursuance of his interest therein has such an interest that a mechanic's lien may attach thereto. *Smith v. St. Paul F. & M. Ins. Co.*, 106-225.

Where premises were sold with an agreement on the part of the grantor to make improvements thereon which were subsequently made under a contract with him, held that the person making such improvements had not a mechanic's lien on the premises as against the grantee. *Des Moines Sav. Bank v. Goode*, 106-568.

An equitable title to real property held

by contract for a deed is a title to which a mechanic's lien will attach. *Sheppard v. Messenger*, 107-717.

The statutory definition of the term "owner" (see Code § 3096) extends it so as to include persons who would not ordinarily be held to come within its meaning. The term includes a vendee who acts as agent of the vendor, in a certain sense, in putting improvements on the premises. *Janes v. Osborne*, 108-409.

A property owner who contracts with the builder to furnish labor and material at reasonable prices for making certain improvements constitutes the builder his agent and authorizes him to contract for labor and material for such owner. *Minneah v. Stotts*, 130-530.

Improvements on wife's land: Where a wife knows that improvements are being placed on her property under a contract with her husband, but protests against such improvements, her property is not subject to lien therefor. *James v. Dalbey*, 107-463.

For what improvements or materials: Where a lien is claimed under a contract involving matters for which a lien is not allowed, and it is not possible to determine under the contract what amount is due for matters for which a lien may be had, no lien whatever can be established. *Peatman v. Centerville Light, H. & P. Co.*, 105-1.

SEC. 3090. Extent of lien—leasehold interest.

Consent of the landlord that the tenant shall erect a building on the leased premises does not subject the landlord to the

SEC. 3092. Filing statement.

What statement sufficient: Where materials are furnished from time to time under separate and distinct contracts, the charges therefor cannot be treated as items of a continuous open running account and as furnished under an entire contract. *Hoag v. Hay*, 103-291.

An unintentional mistake in the statement which has caused no injury to any one will not defeat a mechanic's lien. *St. Croix Lumber Co. v. Davis*, 105-27.

The fact that the statement as filed is for a greater sum than due will not defeat the right to a lien where such discrepancy is the result of an honest mistake which is not prejudicial. *Simonson Bros. Mfg. Co. v. Citizens' State Bank*, 105-264.

In the absence of any showing of bad faith it should not be held that the matter included in the statement of one or more items for which no lien can be had operates to invalidate an otherwise enforceable lien. *Palmer v. McGinness*, 127-118.

The fact that items are included in the statement for which a lien cannot properly be claimed will not defeat the right

A well, designed, sunk and completed for permanent use on the premises, is an improvement for which a mechanic's lien may be had. *Hoppes v. Baie*, 105-648.

Lumber furnished, not merely for the purposes of replacing worn out parts of a building, but for the improvement of the building, will furnish the basis for a mechanic's lien. *National L. Ins. Co. v. Ayres*, 111-200.

It is the furnishing of material for a building which entitles a party to a lien and its actual use in the construction thereof need not be shown. *Frudden Lumber Co. v. Kinnan*, 117-93.

It seems that by agreement charges for drayage may be a proper item in the account on which a lien is asked. *Page v. Grant*, 127-249.

Material furnished to supply the loss of other material which has been incorporated into the building and before the building has been accepted by the owner is properly included in the statement for a lien. *Nancolas v. Hitaffer*, 112 N. W. 382.

Subcontractor: The subcontractor must have furnished material for the particular building in order to entitle him to a lien therein, but it is not necessary that the material shall have been actually used in the building. *Hobson v. Townsend*, 126-453.

lien for material furnished. *Oregon Lumber Co. v. Beckleen*, 130-42.

to a lien unless it be shown that the claimant was knowingly attempting by false charges to subject the property to an improper burden. *Nancolas v. Hitaffer*, 112 N. W. 382.

Where the statement shows the essential facts, the lien will not be defeated by want of technical accuracy as to the time when the labor was performed or the material furnished. *Johnson v. Otto*, 105-605.

Where the statement for a mechanic's lien shows that a lien is claimed, and is sufficiently definite as to the items for which the claim is made, it will not be defeated by indefiniteness as to the dates of items of materials and labor furnished and performed. *Eggert v. Snoke*, 122-582.

If the statement as a whole is just and true, the fact that the whole or part of the bill contracted for is furnished at an agreed price for a lot of items and it so shows instead of giving the price of each one separately, will not defeat the lien. *Queal v. Stradley*, 117-748.

As against the owner the filing of an insufficient statement or the failure to file

any statement will not defeat the lien. *Hoppes v. Baie*, 105-648; *Ewing v. Stockwell*, 106-26.

The omission from the statement of credits to which the owner is entitled, if unintentional and without any purpose to defraud, will not defeat the lien. *Ewing v. Stockwell*, 106-26.

An honest mistake in making up the account will not deprive the claimant of the lien. *Green Bay Lumber Co. v. Thomas*, 106-420.

Delay of the subcontractor to file statement of his lien cannot affect his right to priority over the lien of another subcontractor whose statement is not filed and notice thereof given until after the filing of the statement of the first subcontractor. *Lindsay & Phelps Co. v. Zoekler*, 128-558.

The fact that the contractor gives an order to one subcontractor on the owner for the amount of his bill does not operate as an equitable assignment of the contractor's claim which is to be treated as a payment in determining the amount in the hand of the owner when the statement of another subcontractor is filed. *Ibid.*

Material furnished for necessary repairs while the building is still in the process of construction and not accepted by the owner is proper to be included in the statement of the lien and in determining the date of the last item for the purpose of ascertaining whether the statement is filed within the statutory period. *Nancolas v. Hitaffer*, 112 N. W. 382.

Application of payments: Change in the application of payments will not be permitted to be made between the owner and the contractor when the effect will be to prejudice the interest of the subcontractor. *Green Bay Lumber Co. v. Thomas*, 106-420.

Verification: A statement not verified does not impart notice of a claim; and

SEC. 3093. Notice by sub-contractor—lien discharged.

Liability of owner: An owner who agrees with the contractor to pay subcontractors and material men becomes personally liable to them for material used in the building. *Shorthill Co. v. Bartlett*, 131-259.

After the contractor abandons the work and compels the owner to complete the job the latter may pay for the work done out of any balance remaining due to the contractor, and the contractor cannot by giving an order on the owner create a claim against the owner upon the balance remaining out of the contract price which the owner is entitled to use in completing the contract. *Page v. Grant*, 127-249.

Where the owner makes payments to the contractor without regard to the terms of his contract and without withholding

held that a verification signed in a firm name was not sufficient. *McGillivray v. Case*, 107-17.

The verification of a statement before the deputy clerk is sufficient without the official seal of the clerk being attached where it is filed in the office of the clerk. *Wheelock v. Hull*, 124-752.

Failure to file: The filing of the statement is not essential to the creation of the mechanic's lien, but only to preserve it against purchasers or incumbrancers in good faith without notice, whose rights accrue after the expiration of the time fixed for filing the statement. *Peatman v. Centerville Light, H. & P. Co.*, 105-1.

One claiming under a mortgage executed after expiration of the time for filing statement is not chargeable with notice of the claim. *McGillivray v. Case*, 107-17.

Where the improvements were such that any person examining the building within the ninety days allowed for filing a lien would have been aware of them, held that they furnished sufficient foundation for a mechanic's lien. *National L. Ins. Co. v. Ayres*, 111-200.

Where lumber was furnished on two distinct occasions for successive improvements, held that the material man could not assert a claim for the first lot of lumber furnished under his lien for the second, which was furnished more than ninety days after the first improvement. *Ibid.*

Until something is done looking towards the establishment of the lien, an assignment of the debt does not operate as a transfer of such lien. *Kent v. Muscatine, N. & S. R. Co.*, 115-383.

A conveyance of the premises expressly subject to any claim for a mechanic's lien does not defeat the right to such lien. *Eggert v. Snoke*, 122-582.

amounts which he is authorized to withhold by the terms of the contract, he renders himself liable to persons who furnish materials for the carrying out of the contract. *Queal v. Stradley*, 117-748.

Actual notice to owner: Where the owner has knowledge of the claims of a subcontractor, he should hold back from the principal contractor enough to pay the subcontractor's claim. *Simonson Bros. Mfg. Co. v. Citizens' State Bank*, 105-264.

The absconding of the principal contractor will not prevent the subcontractor from enforcing his claims against the property. A personal judgment against the principal contractor is not essential to the enforcement of such lien. The proceedings may properly be *in rem*, where no personal judgment is sought. *Ibid.*

Where the owner knew that the subcontractor was furnishing the material and knew that his bill therefor had not been paid, held, that the owner could not by settlement with the contractor cut off the rights of the subcontractor, especially where the payment was made in disregard of the terms of the contract. *Green Bay Lumber Co. v. Thomas*, 106-154.

But a subcontractor is not entitled to enforce his lien so far as payment has been made by the owner upon the strength of his statements and agreements. Under such circumstances the subcontractor is estopped from insisting upon repayment of the amount so paid. *Ibid.*

Where a subcontractor perfects his lien within the time required by law, and the owner has knowledge that the subcontractor is furnishing material for which he has not been paid, the owner is not justified in paying other subcontractors until the time has expired for the filing of liens. *Green Bay Lumber Co. v. Adams*, 107-672.

Payments made to the contractor in accordance with the terms of the contract will not constitute a defense against the claims of a subcontractor if the owner was aware of the existence of the subcontractor's claims at the time of making such payment. *Chicago Lumber Co. v. Garmer*, 132-282.

Whether knowledge of the architect will constitute notice to the owner of the existence of subcontractor's claims depends upon the terms of the contract. *Ibid.*

The owner knowing that a subcontractor or materialman is furnishing material and labor for the building which is necessary for its completion, is bound to withhold payments from the contractors until the claims for material and labor are determined. But if the subcontractor fails to preserve the right to a lien and accepts an order on the owner, he abandons his claim against the property so far as it is necessary to satisfy the claims of other lien holders. *Wheelock v. Hull*, 124-752.

The owner is not justified in paying the principal contractor even in strict accordance with the terms of the contract, if he has knowledge that subcontractors are furnishing material for the building which has not been paid for. *Page v. Grant*, 127-249.

The owner cannot with knowledge that material or labor has been furnished by a sub-contractor make settlement with the contractor and pay out reserve funds held in his hands to meet other claims for which no lien has been filed. *Nancolas v. Hitaffer*, 112 N. W. 382.

The owner cannot use such reserve funds in completing the building after it has collapsed on account of his own fault with reference to the plans and specifica-

tions so as not to defeat the claims of a sub-contractor for material and labor furnished before such collapse. *Ibid.*

If the owner after due notice still holds in his hands money enough out of the contract price to complete the building and pay the claim of the subcontractor he cannot disregard such claim and pay to the contractor the amount due him under his contract. *Frudden Lumber Co. v. Kinnan*, 117-93.

Where the owner is fully informed of the nature of the sub-contractor's claim, by the bringing of suit, and is still indebted to the principal contractor beyond the amount of the subcontractor's claim, the failure of the subcontractor to file a claim is immaterial. *Johnson v. Des Moines, I. F. & N. R. Co.*, 129-281.

Owner's estopped: Where the owner had stated to the subcontractor before the furnishing of material that nothing was to be paid to the contractor on the building until its completion, held that the owner was thereby estopped, in an action by the subcontractor to enforce his lien, to say that the contract was otherwise than as he had stated as to payments. *Rath v. Orr*, 119-511.

Service of notice: An objection that the notice is not such as contemplated by the statute does not raise a question as to the service of such notice. *Page v. Grant*, 127-249.

Priority: It is not necessary for the subcontractor to file a statement of his lien in order to preserve his claim as against an order given by the contractor to another subcontractor upon the owner. *Lindsey & Phelps Co. v. Zoekler*, 128-558.

For what material: The burden is upon the subcontractor before he can avail himself of the benefits of the provisions in his favor to show that the labor or material furnished by him was actually for the improvement against which the lien is claimed. And if as to that matter he is deceived by the contractor without the fault of the owner, he is not entitled to a lien as against the owner. *Hobson v. Townsend*, 126-453.

A subcontractor has a lien for material furnished for a building although as a matter of fact it is not used in the construction of such building but for another structure. *Page v. Grant*, 127-249.

The subcontractor's lien attaches to money due the contractor for extras, although the amount provided for under the contract as originally made has been fully paid. *Shope v. Mitchell*, 116-636.

The subcontractor's lien may properly cover material supplied to the contractor to supply other material lost or destroyed during the construction of the building. *Nancolas v. Hitaffer*, 112, N. W. 382.

Waiver of lien: The giving to a subcon-

tractor of an order for the amount of his claim, which is received by him, and the acceptance of such order by the drawee, amounting to only a recognition of a statement of the amount due, held not to deprive a subcontractor of his right to a lien. *Beach v. Wakefield*, 107-567.

Terms of contract: The subcontractor is bound to know the terms of the contract

between the principal contractor and the owner, whether they are written or oral, and if the owner complies with the terms of such contract in good faith, and without knowledge or notice, which would require him to make inquiries as to the claims of the subcontractor, he will not be required to make a second payment. *Iowa Stone Co. v. Crissman*, 112-122

SEC. 3094. Sub-contractor's claim after thirty days.

A subcontractor failing to file his claim for a lien until after the expiration of thirty days is entitled only to such lien as to the amount unpaid on the contract when his statement is filed, without regard to the knowledge on the part of the owner before paying the contractor that material and labor have been furnished by the sub-

contractor. *Empire Portland Cement Co. v. Payne*, 128-730.

A subcontractor's claim, though not filed within the time specified by statute, takes priority over the claims of another subcontractor subsequently filed. *Lindsay & Phelps Co. v. Zoekler*, 128-558.

SEC. 3095. Priority.

Lien covers entire property: The right to a mechanic's lien for work done upon a railroad dates from the beginning of the improvement, and is against the whole road. *Beach v. Wakefield*, 107-567.

A railroad depot may be an integral part of the construction of the road. *Ibid.*

Leasehold interest: A lessee taking his lease after the time when a statement should be filed and when no statement is already filed, and without actual notice of the mechanic's lien, has priority thereto, and the assignee of such lessee is entitled to the same priority, even though at the time of taking the assignment he has notice of the lien. *Floete v. Brown*, 104-154.

Judgment under a mechanic's lien will take priority over a landlord's lien for rent, but under particular circumstances, held that by reason of a contract by which the lessor was to advance the money to pay off improvements the mechanic's lien was not effectual as against him. *Keys v. Whitlock Mfg. Co.*, 105-742.

Other subcontractors: The priority as between subcontractors is not affected by the fact that the contractor has given to one of them an order on the owner for the amount of his claim. *Lindsay & Phelps Co. v. Zoekler*, 128-558.

Mortgages and other liens: A lien takes priority over any claim under an earlier mortgage which is satisfied on the record when the lien is filed. *Sioux City Electrical Supply Co. v. Sioux City, etc., Electrical R. Co.*, 106-573.

Where, by agreement between vendor and vendee, improvements were placed on

the premises, held, that a mechanic's lien for such improvements took priority over the vendor's lien for the purchase price. *Janes v. Osborne*, 108-409.

A mechanic's lien holder does not have priority over the claims of laborers under Code § 4019, even though the mechanic's lien antedates the laborers' claim. *Haw v. Burch*, 110-234.

The provision as to priority of the subcontractor over a garnishment of the owner has no application to a materialman's claim against a public corporation under Code § 3102. *Swearingen Lumber Co. v. Washington School Township*, 125-283.

Lien upon improvements: Under prior statutes held that the holder of a mechanic's lien for material furnished for an independent building took priority as to such building over a prior mortgage on the premises on which the building was erected, provided that it should be found by the court that the building could be removed without material injury to the security of an earlier lien holder; but where no such finding was made the land must be sold and the proceeds applied first in payment of prior incumbrances. *Tower v. Moore*, 104-345.

Where the building or other improvement becomes a part of the real estate so that it may not be separately sold and removed, prior mortgages or lien holders are entitled to priority over subsequent lien holders for improvements or independent structures to the extent of such prior liens. *Leach v. Minick*, 106-437.

SEC. 3096. Definition of "owner."

The statute extends the definition of the term "owner" so as to include persons whose relation to the property is such that they would not ordinarily be held to come

within the meaning of the term. *Janes v. Osborne*, 108-409. And see notes to Code § 3089 in this Supplement.

The term "owner" within the language

of the mechanics' liens law is applicable to one having less than an absolute and unqualified title to the property. *Getchell &*

Martin Lumber & Mfg. Co. v. Peterson, 124-599.

SEC. 3098. Action to enforce lien.

It is not necessary to introduce any proof of the making and filing of the statement for lien of a subcontractor as against the contractor where the latter has admitted the filing of such statement and set out a copy thereof as a part of his pleading. The statement itself, however, is the best evidence. *Wheelock v. Hull*, 124-752.

In an action to enforce the lien of a subcontractor for an unliquidated demand, the principal contractor is a necessary party. *Ibid.*

The provision that action on a bond given in lieu of a mechanic's lien may be brought in the county where the property is situated is applicable to an action by a subcontractor against a public corporation on a bond given by the contractor to hold the public corporation harmless against claims of subcontractors. *Thompson v. Stephens*, 131-51.

SEC. 3099. Demand for bringing suit—assignment.

A mechanic's lien may be assigned prior to the filing of the statement. *Peatman v. Centerville Light, H, & P. Co.*, 105-1.

But until something is done looking to the establishment of the lien, an assignment of the debt does not transfer any lien. *Kent v. Muscatine, N. & S. R. Co.*, 115-383.

Where one furnishes money to be applied

in payment of the purchase price of the property by taking up mechanic's liens of record thereon, under an express agreement that said liens are not to be canceled by the holders thereof, but to be assigned and held for the benefit of the purchaser, he is entitled to subrogation to the claims of the mechanic's lien holders. *National L. Ins. Co. v. Ayres*, 111-200.

SEC. 3102. Public buildings or bridges—claim of subcontractor.

Where a school district in making a contract for the erection of a schoolhouse reserved the right to withhold payments from the principal contractor so long as the subcontractors were unpaid, held that as against the assignees of the contractor the district might maintain an action for distribution of the fund due the contractor among the subcontractors in proportion to their claims. *Independent Sch. Dist. v. Mardis*, 106-295.

Under such contract held that the claims which might be satisfied out of the fund were not limited to those which might be established under this section (20 G. A., ch. 179.) *Ibid.*

A claim for money borrowed from a contractor and used in payment for labor and material is not a claim to be protected under such contract. *Ibid.*

In the case of a county building the public officer to whom the claim should be submitted is the auditor and not the chairman of the building committee of the board of supervisors. *Green Bay Lumber Co. v. Thomas*, 106-420.

Under the evidence in a particular case held that a subcontractor might have relief under this statute, although, as to prior work he was given security by the assignment of certificates which he had surrendered. *Iowa Brick Co. v. Des Moines*, 111-272.

The statutory provision in behalf of subcontractors furnishing material or labor

for the construction of a public building is to be strictly construed, and the filing of an itemized statement as specified by the statute is essential to the establishment of such claim against a public corporation. *Penn v. Northern Building Co.*, 140 Fed. 973.

The statute is intended to provide for one who furnishes labor or materials to a contractor upon a public work, a remedy having some analogy to a mechanic's lien but it does not create a lien. It only provides that by taking the proper steps within due time the claimant may be substituted for the contractor and recover from the municipal corporation to the extent of the contractor's just demand, if there be found in the hands of the corporation any moneys due him. If the contractor has already been paid all that he is entitled to receive under his contract, the person furnishing labor or materials to him for the improvement has no redress against the corporation. *Modern Steel Construction Co. v. Van Buren County*, 126-606.

The subcontractor who intends to assert a claim under the statute must take notice of the terms and conditions of the principal contract. If the materials furnished are not such as called for by the contract and the contractor could not recover on account thereof, the subcontractor is in no better situation. *Ibid.*

If on account of fraud the contractor is without lawful claim against the corpora-

tion the contract which has been violated by the contractor cannot be effectual for the benefit of the subcontractor. *Ibid.*

A subcontractor furnishing material for a public building acquires no lien on the building or on the money which becomes due from the public corporation to the contractor. But such subcontractor having served notice of his claim upon the corporation may sue on the contractor's bond given to relieve the corporation from liability as to the distribution of the money due the contractor, and such action may be maintained in the county where the contract was to be performed, although the contractor and the sureties on his bond are residents of another county. *Thompson v. Stephens*, 131-51.

No liens or claims can be asserted against a school district for material and labor furnished by a subcontractor in its construction, and a bond in which the contractor obligates himself to deliver such schoolhouse free from liens or claims of any kind and to discharge any liens or claims against the building or which may be claimed against the district does not render the bondsmen liable for subcontractor's claims. *Green Bay Lumber Co. v. Independent School District*, 121-663.

This statute does not create a lien in favor of a laborer or material man upon the funds due to the principal contractor nor is any lien created on the building or improvement itself. *Whitehouse v. American Surety Co.*, 117-328.

Therefore a laborer or materialman who is protected by a bond given by the contractor to the public corporation to secure it against the claims of such persons does not release the surety on such bond by failing to pursue his remedy against the fund due the contractor in the hands of the corporation. *Ibid.*; *Read v. American Surety Co.*, 117-10.

A contractor's bond given to secure a public corporation against claims by materialmen and laborers enures to the benefit of those who furnish material and labor in carrying out such contract. *Hipwell v. National Surety Co.*, 130-656.

Subcontractors are not bound to perfect their claims against funds in the hands of the officers of the public corporation,

but may rely directly on the security afforded by the bond. *Ibid.*

An assignee of the contract takes subject to the obligation of the contractor's bond to discharge the claim for such material and labor. *Ibid.*

Garnishment of a public corporation for funds due the contractor which is effected prior to service of a notice of a claim for material furnished, is a good defense to recovery against the corporation on such claim. The claim of the materialman against the corporation is personal and is not a lien on the property. *Swearingen Lumber Co. v. Washington School Township*, 15-283.

The municipal corporation, against which a claim is made for labor performed or material furnished for the contractor is entitled to protection so far as it has relied upon the provisions of the contract made for its benefit and acted in accordance therewith. Until a claim is filed the corporation owes no duty to the subcontractors and the provisions of the mechanics lien law for the benefit of such persons are not applicable. *Green Bay Lumber Co. v. Independent School Dist.*, 125-227.

If the corporation has in good faith paid out money on certificates of work done, the correctness of such certificates can only be impeached for fraud or mistake, and even in such case no liability of the corporation would attach in favor of the subcontractor unless it appears that the actual cost of the work was in fact less than the amount given in the certificate on which the corporation has acted. *Ibid.*

Under a provision in the contract that on abandonment of the work by the contractor the corporation may take possession of all materials on the ground and apply them to finishing the work, the corporation is not bound to pay the material man for materials furnished by him to the contractor and which have thus been appropriated. *Ibid.*

In an action by a material man to enforce a claim against a corporation to which the contractor is a party, the materialman is entitled to a judgment against the contractor for any indebtedness due. *Ibid.*

SEC. 3104. Release of claim.

A bond given by the contractor to hold the public corporation harmless from claims of subcontractors may be sued on by a subcontractor entitled to a lien in

the county in which the work is done, although the contractor and his sureties are residents of another county. *Thompson v. Stephens*, 131-51.

SEC. 3105. Liens of miners.

The lien of a miner provided for by this section is not limited to property of the operator of the mine which might be removed, or to improvements which he has

made, but extends to the premises on which the mine is situated, and which have been leased for mining purposes, to the extent at least that the value of the

property has been increased by the improvements made thereon by the mining lessee. *Mitchell v. Burwell*, 110-10.

The lessor cannot deduct from the value of such improvements, as a claim prior to that of the laborer, the amount due to such lessor for royalties. *Ibid.*

A laborer's lien does not attach to the property of the owner in favor of the employes of an operating lessee of the mine. *Caster v. McClellan*, 132-502.

CHAPTER 9.

OF LIMITED PARTNERSHIP.

SECTION 3106. Authorized.

A contract by which a person contributed a specified sum to the common stock of a business, without any right to share in the profits, nor any responsibility for the losses, but with an agreement

to have a per cent. of the sum invested payable annually and in any event, held not to constitute such a person either a general or a limited partner. *Richardson v. Carlton*, 109-515.

SEC. 3109. Publication. Upon filing the certificate and affidavit, a notice containing all the facts set out in the certificate shall be published, once each week, for [for] six weeks in two newspapers in the senatorial district in which the business is to be conducted, to be designated by the clerk of the court of the county in which such certificate is filed, proof of which publication may be made by the publishers in the same manner as original notices in ordinary actions, and filed with said clerk, which, when thus made, shall be presumptive evidence of the facts therein contained. If the required publication is not made, the partnership shall be general. [19 G. A., ch. 8; C., '73, §§ 2155-6; R., §§ 1882-3.] [30 G. A., ch. 2, § 9.]

CHAPTER 10.

OF WAREHOUSEMEN, CARRIERS, HOTEL KEEPERS, LIVERY STABLE KEEPERS, AND HERDERS.

SECTION 3127. Damages.

This section refers to a wilful departure from duty by the warehouseman, and not to a mere failure to observe legal re-

quirements in attempting to enforce his lien. *Jeffries v. Snyder*, 110-359.

SEC. 3129. Repeal. Section thirty-one hundred and twenty-nine (3129) of the code is hereby repealed. [32 G. A., ch. 160, § 60.]

SEC. 3130. Unclaimed property—lien for charges.

The warehouseman is not obliged to take any steps towards selling the goods, but if he does it is imperative that he observe the statutory requirements. The pro-

cedure provided for is not a privilege, but a duty of the warehouseman in case he undertakes to sell stored property. *Jeffries v. Snyder*, 110-359.

SEC. 3131. Sale—notice. If the property remains unclaimed and the charges unpaid, the person in possession, if the probable value does not exceed one hundred dollars, shall advertise the same for fourteen days, by posting notices in five of the most public places in the city or locality where said property is held, giving such description as will indicate what is to be sold; if the goods exceed the probable value of one hundred dollars, the length of notice shall be four weeks, and there shall be a publication thereof, once each week, for the same length of time in some newspaper of

general circulation in the locality where the property is held, if there be one, and, if not, then in the next nearest newspaper published in that neighborhood, at the end of which period, if the property is still unclaimed or charges unpaid, it may be sold by him at public auction, between the hours of ten o'clock a. m. and four o'clock p. m., for the highest price the same will bring, which sale may be continued from day to day, by public announcement to that effect at the time of the adjournment, until all the property is sold; and from the proceeds thereof all charges, costs and expenses of the sale shall be paid, which sale shall be conducted after the manner of sheriff's sales, and like costs taxed for like services. [C., '73, § 2179.] [30 G. A., ch. 2, § 10.]

It is for the jury to say whether the value of the goods exceeds \$100, and if so, whether the warehouseman knew this fact, or in the exercise of reasonable care should have known it, and whether the notices required were posted according to law and actual notice was given to the owner. *Jeffries v. Snyder*, 110-359.

SEC. 3137. Liens of livery stable keepers, etc.

The agister's lien does not take priority over the lien of a prior recorded chattel mortgage, unless the mortgage has con-
sented to the agistment. *Beh v. Moore*, 124-564.

SEC. 3138. Hotel and innkeepers—liability—lien. Keepers of hotels, inns and eating houses and steamboat owners, who shall provide and keep therein a good and sufficient vault or safe for the deposit of money, jewels and other valuables, and shall provide a safe and commodious place for the baggage, clothing and other property belonging to their guests and patrons, and keep posted up in a conspicuous place in the office or other public room, and in the guests' apartments therein, printed notices, stating that such places for safe deposit are provided for the use and accommodation of the inmates thereof, shall not be liable for the loss of any money, jewels, valuables, baggage or other property not deposited with them, unless such loss shall occur through the fault or negligence of such landlord or keeper, or steamboat owner, his agent, servant or employe, but nothing herein contained shall apply to such reasonable amount of money, nor to such jewels, baggage, valuables or other property as is usual, fit and proper for any such guests to have and retain in their apartments or about their persons. Hotel, inn or eating house keepers shall have a lien upon, and may take and retain possession of, all baggage and other property belonging to or under the control of their guests, which may be in such hotel, inn or eating house, for the value of their accommodations and keep, and for all money paid for or advanced to, and for such extras and other things as shall be furnished, such guest, and such property so retained shall not be exempt from attachment or execution to the amount of the reasonable charges of such hotel, inn or eating house keeper, against such guest, and the costs of enforcing the lien thereon. [18 G. A., ch. 181.] [28 G. A., ch. 120, §§ 1, 2.]

This section gives to the innkeeper a lien, not only upon the property in fact belonging to the guest and brought by him to the hotel or inn, but likewise upon property placed therein which was under the guest's control. Therefore, held, that

the innkeeper's lien attached to sample goods carried by a traveling salesman, though the innkeeper had knowledge when receiving the salesman that the goods belonged to his employer. *Brown Shoe Co. v. Hunt*, 103-586.

CHAPTER 10-A.

OF WAREHOUSEMEN AND WAREHOUSE RECEIPTS.

SECTION 3138-a1. Persons who may issue receipts. Warehouse receipts may be issued by any warehouseman. [32 G. A., ch. 160, § 1.]

SEC. 3138-a2. Form of receipts—essential terms. Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms—

- (a) The location of the warehouse where the goods are stored,
- (b) The date of issue of the receipt,
- (c) The consecutive number of the receipt,
- (d) A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order,
- (e) The rate of storage charges,
- (f) A description of the goods or of the packages containing them,
- (g) The signature of the warehouseman, which may be made by his authorized agent,
- (h) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership, and
- (i) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient.

A warehouseman shall be liable to any person injured thereby, for all damages caused by the omission from a negotiable receipt of any of the terms herein required. [32 G. A., ch. 160, § 2.]

SEC. 3138-a3. Form of receipts—what terms may be inserted. A warehouseman may insert in a receipt, issued by him, any other terms and conditions, provided that such terms and conditions shall not—

- (a) Be contrary to the provisions of this act,
- (b) In anywise impair his obligation to exercise that degree of care in the safe-keeping of the goods entrusted to him which a reasonably careful man would exercise in regard to similar goods of his own. [32 G. A., ch. 160, § 3.]

SEC. 3138-a4. Definition of non-negotiable receipt. A receipt in which it is stated that the goods received will be delivered to the depositor, or to any other specified person, is a non-negotiable receipt. [32 G. A., ch. 160, § 4.]

SEC. 3138-a5. Definition of negotiable receipt. A receipt in which it is stated that the goods received will be delivered to the bearer, or to the order of any person named in such receipt is a negotiable receipt. No provision shall be inserted in a negotiable receipt that it is non-negotiable. Such provisions, if inserted, shall be void. [32 G. A., ch. 160, § 5.]

SEC. 3138-a6. Duplicate receipts must be so marked. When more than one negotiable receipt is issued for the same goods, the word “duplicate” shall be plainly placed upon the face of every such receipt, except the one first issued. A warehouseman shall be liable for all damage caused by his failure so to do to any one who purchased the subsequent receipt for value supposing it to be an original, even though the purchase be after the delivery of the goods by the warehouseman to the holder of the original receipt. [32 G. A., ch. 160, § 6.]

SEC. 3138-a7. Failure to mark "not negotiable." A non-negotiable receipt shall have plainly placed upon its face by the warehouseman issuing it "non-negotiable," or "not negotiable." In case of the warehouseman's failure so to do, a holder of the receipt who purchased it for value supposing it to be negotiable, may, at his option, treat such receipt as imposing upon the warehouseman the same liabilities he would have incurred had the receipt been negotiable. This section shall not apply, however, to letters, memoranda, or written acknowledgments of an informal character. [32 G. A., ch. 160, § 7.]

SEC. 3138-a8. Obligation of warehouseman to deliver. A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with—

- (a) An offer to satisfy the warehouseman's lien,
- (b) An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt, and
- (c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman.

In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal. [32 G. A., ch. 160, § 8.]

SEC. 3138-a9. Justification of warehouseman delivering. A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections, to one who is—

- (a) The person lawfully entitled to the possession of the goods, or his agent,
- (b) A person who is either himself entitled to delivery by the terms of a non-negotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper, or
- (c) A person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee. [32 G. A., ch. 160, § 9.]

SEC. 3138-a10. Warehouseman's liability for misdelivery. Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section and though he delivered the goods as authorized by said subdivisions he shall be so liable, if prior to such delivery he had either—

- (a) Been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or
- (b) Had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods. [32 G. A., ch. 160, § 10.]

SEC. 3138-a11. Negotiable receipt must be cancelled when goods delivered. Except as provided in section thirty-six (36), where a warehouseman delivers goods for which he had issued a negotiable receipt, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the receipt, he shall be liable to any one

who purchases for value in good faith such receipt, for failure to deliver goods to him, whether such purchaser acquired title to the receipt before or after the delivery of the goods by the warehouseman. [32 G. A., ch. 160, § 11.]

SEC. 3138-a12. Negotiable receipt must be cancelled or marked when part of goods delivered. Except as provided in section thirty-six (36), where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt, or to place plainly upon it a statement of what goods or packages have been delivered he shall be liable, to any one who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman. [32 G. A., ch. 160, § 12.]

SEC. 3138-a13. Altered receipts. The alteration of a receipt shall not excuse the warehouseman who issued it from any liability if such alteration was—

- (a) Immaterial,
- (b) Authorized, or
- (c) Made without fraudulent intent.

If the alteration was authorized, the warehouseman shall be liable according to the terms of the receipt as altered. If the alteration was unauthorized, but made without fraudulent intent, the warehouseman shall be liable according to the terms of the receipt, as they were before alteration. Material and fraudulent alteration of a receipt shall not excuse the warehouseman who issued it from liability to deliver, according to the terms of the receipt as originally issued, the goods for which it was issued, but shall excuse him from any other liability to the person who made the alteration and to any person who took with notice of the alteration. Any purchaser of the receipt for value without notice of the alteration shall acquire the same rights against the warehouseman which such purchaser would have acquired if the receipt had not been altered at the time of the purchase. [32 G. A., ch. 160, § 13.]

SEC. 3138-a14. Lost or destroyed receipts. Where a negotiable receipt has been lost or destroyed, a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss or destruction and upon the giving of a bond with sufficient sureties to be approved by the court to protect the warehouseman from any liability or expense, which he or any person injured by such delivery may incur by reason of the original receipt remaining outstanding. The court may also in its discretion order the payment of the warehouseman's reasonable costs and counsel fees. The delivery of the goods under an order of the court as provided in this section, shall not relieve the warehouseman from liability to a person to whom the negotiable receipt has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods. [32 G. A., ch. 160, § 14.]

SEC. 3138-a15. Effect of duplicate receipt. A receipt upon the face of which the word "duplicate" is plainly placed is a representation and warranty by the warehouseman that such receipt is an accurate copy of an original receipt properly issued and uncanceled at the date of the issue of the duplicate, but shall impose upon him no other liability. [32 G. A., ch. 160, § 15.]

SEC. 3138-a16. Warehouseman cannot set up title in himself. No title or right to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit

for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt. [32 G. A., ch. 160, § 16.]

SEC. 3138-a17. Interpleader of adverse claimants. If more than one person claims the title or possession of the goods, the warehouseman may, either as a defense to an action brought against him for non-delivery of the goods, or as an original suit, whichever is appropriate, require all known claimants to interplead. [32 G. A., ch. 160, § 17.]

SEC. 3138-a18. Warehouseman has reasonable time to determine validity of claims. If some one other than the depositor or person claiming under him has a claim to the title or possession of the goods, and the warehouseman has information of such claim, the warehouseman shall be excused from liability for refusing to deliver the goods, either to the depositor or person claiming under him or to adverse claimant, until the warehouseman has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead. [32 G. A., ch. 160, § 18.]

SEC. 3138-a19. Adverse title is no defense, except as above provided. Except as provided in the two preceding sections and in sections nine (9) and thirty-six (36), no right or title of a third person shall be a defense to an action brought by the depositor or person claiming under him against the warehouseman for failure to deliver the goods according to the terms of the receipt. [32 G. A., ch. 160, § 19.]

SEC. 3138-a20. Liability for non-existence or misdescription of goods. A warehouseman shall be liable to the holder of a receipt for damages caused by the non-existence of the goods or by the failure of the goods to correspond with the description thereof in the receipt at the time of its issue. If, however, the goods are described in a receipt merely by a statement of marks or labels upon them, or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind, or that packages containing the goods are said to contain goods of a certain kind, or by words of like purport, such statements, if true, shall not make liable the warehouseman issuing the receipt, although the goods are not of the kind which the marks or labels upon them indicate or of the kind they were said to be by the depositor. [32 G. A., ch. 160, § 20.]

SEC. 3138-a21. Liability for care of goods. A warehouseman shall be liable for any loss or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful owner of similar goods would exercise, but he shall not be liable, in the absence of an agreement to the contrary for any loss or injury to the goods which could not have been avoided by the exercise of such care. [32 G. A., ch. 160, § 21.]

SEC. 3138-a22. Goods must be kept separate. Except as provided in the following section, a warehouseman shall keep the goods so far separate from goods of other depositors, and from other goods of the same depositor for which a separate receipt has been issued, as to permit at all times the identification and re-delivery of the goods deposited. [32 G. A., ch. 160, § 22.]

SEC. 3138-a23. Fungible goods may be commingled, if warehouseman authorized. If authorized by agreement or by custom, a warehouseman may mingle fungible goods with other goods of the same kind and grade. In such case the various depositors of the mingled goods shall own the entire mass in common, and each depositor shall be entitled to such portion thereof as the amount deposited by him bears to the whole. [32 G. A., ch. 160, § 23.]

SEC. 3138-a24. Liability of warehouseman to depositors of commingled goods. The warehouseman shall be severally liable to each depositor for the care and re-delivery of his share of such mass to the same extent and under the same circumstances as if the goods had been kept separate. [32 G. A., ch. 160, § 24.]

SEC. 3138-a25. Attachment or levy upon goods for which a negotiable receipt has been issued. If goods are delivered to a warehouseman by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner, and a negotiable receipt is issued for them, they cannot thereafter, while in the possession of the warehouseman, be attached by garnishing or otherwise, or be levied upon under an execution, unless the receipt be first surrendered to the warehouseman, or its negotiation enjoined. The warehouseman shall in no case be compelled to deliver up the actual possession of the goods until the receipt is surrendered to him or impounded by the court. [32 G. A., ch. 160, § 25.]

SEC. 3138-a26. Creditors' remedies to reach negotiable receipts. A creditor whose debtor is the owner of a negotiable receipt shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such receipt or in satisfying the claim by means thereof as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process. [32 G. A., ch. 160, § 26.]

SEC. 3138-a27. What claims are included in warehouseman's lien. Subject to the provisions of section thirty (30), a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, cooping and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice, and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien. [32 G. A., ch. 160, § 27.]

SEC. 3138-a28. Against what property lien may be enforced. Subject to the provisions of section thirty (30), a warehouseman's lien may be enforced—

(a) Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted, and

(b) Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted, if such person has been so entrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid. [32 G. A., ch. 160, § 28.]

SEC. 3138-a29. How lien may be lost. A warehouseman loses his lien upon goods—

(a) By surrendering possession thereof, or

(b) By refusing to deliver the goods when a demand is made with which he is bound to comply under the provisions of this act. [32 G. A., ch. 160, § 29.]

SEC. 3138-a30. Negotiable receipt must state charges for which lien is claimed. If a negotiable receipt is issued for goods, the warehouseman shall have no lien thereon, except for charges for storage of those goods subsequent to the date of the receipt, unless the receipt expressly enumerates other charges for which a lien is claimed. In such case there shall be

a lien for the charges enumerated so far as they are within the terms of section twenty-seven (27), although the amount of the charges so enumerated is not stated in the receipt. [32 G. A., ch. 160, § 30.]

SEC. 3138-a31. Warehouseman need not deliver until lien is satisfied. A warehouseman having a lien valid against the person demanding the goods may refuse to deliver the goods to him until the lien is satisfied. [32 G. A., ch. 160, § 31.]

SEC. 3138-a32. Warehouseman's lien does not preclude other remedies. Whether a warehouseman has or has not a lien upon the goods, he is entitled to all remedies allowed by law to a creditor against his debtor, for the collection from the depositor of all charges and advances which the depositor has expressly or impliedly contracted with the warehouseman to pay. [32 G. A., ch. 160, § 32.]

SEC. 3138-a33. Satisfaction of lien by sale. A warehouseman's lien for a claim which has become due may be satisfied as follows:

The warehouseman shall give a written notice to the person on whose account the goods are held, and to any other person known by the warehouseman to claim an interest in the goods. Such notice shall be given by delivery in person or by registered letter addressed to the last known place of business or abode of the person to be notified. The notice shall contain—

(a) An itemized statement of the warehouseman's claim, showing the sum due at the time of the notice and the date or dates when it became due,

(b) A brief description of the goods against which the lien exists,

(c) A demand that the amount of the claim as stated in the notice, and of such further claim as shall accrue, shall be paid on or before a day mentioned, not less than ten days from the delivery of the notice if it is personally delivered, or from the time when the notice should reach its destination, according to the due course of post, if the notice is sent by mail, and

(d) A statement that unless the claim is paid within the time specified the goods will be advertised for sale and sold by auction at a specified time and place.

In accordance with the terms of a notice so given, a sale of the goods by auction may be had to satisfy any valid claim of the warehouseman for which he has a lien on the goods. The sale shall be had in the place where the lien was acquired, or, if such place is manifestly unsuitable for the purpose, at the nearest suitable place. After the time for the payment of the claim specified in the notice to the depositor has elapsed, an advertisement of the sale, describing the goods to be sold, and stating the name of the owner or person on whose account the goods are held, and the time and place of the sale, shall be published once a week for two consecutive weeks in a newspaper published in the place where such sale is to be held. The sale shall not be held less than fifteen days from the time of the first publication. If there is no newspaper published in such place, the advertisement shall be posted at least ten days before such sale in not less than six conspicuous places therein. From the proceeds of such sale the warehouseman shall satisfy his lien, including the reasonable charges of notice, advertisement, and sale. The balance, if any, of such proceeds shall be held by the warehouseman, and delivered on demand to the person to whom he would have been bound to deliver or justified in delivering the goods. At any time before the goods are so sold any person claiming a right of property or possession therein may pay the warehouseman the amount necessary to satisfy his lien and to pay the reasonable expenses and liabilities incurred in serving notices and advertising and preparing for the sale up to the time of such payment. The warehouseman shall deliver the goods to

the person making such payment if he is a person entitled, under the provisions of this act, to the possession of the goods on payment of charges thereon. Otherwise the warehouseman shall retain possession of the goods according to the terms of the original contract of deposit. [32 G. A., ch. 160, § 33.]

SEC. 3138-a34. Perishable and hazardous goods. If goods are of a perishable nature, or by keeping will deteriorate greatly in value, or by their odor, leakage, inflammability, or explosive nature, will be liable to injure other property, the warehouseman may give such notice to the owner, or to the person in whose name the goods are stored, as is reasonable and possible under the circumstances, to satisfy the lien upon such goods and to remove them from the warehouse, and in the event of the failure of such person to satisfy the lien and to remove the goods within the time so specified, the warehouseman may sell the goods at public or private sale without advertising. If the warehouseman, after a reasonable effort, is unable to sell such goods, he may dispose of them in a lawful manner, and shall incur no liability by reason thereof. The proceeds of any sale made under the terms of this section shall be disposed of in the same way as the proceeds of sales made under the terms of the preceding section. [32 G. A., ch. 160, § 34.]

SEC. 3138-a35. Other methods of enforcing liens. The remedy for enforcing a lien herein provided does not preclude any other remedies allowed by law for the enforcement of a lien against personal property nor bar the right to recover so much of the warehouseman's claim as shall not be paid by the proceeds of the sale of the property. [32 G. A., ch. 160, § 35.]

SEC. 3138-a36. Effect of sale. After the goods have been lawfully sold to satisfy a warehouseman's lien, or have been lawfully sold or disposed of because of their perishable or hazardous nature, the warehouseman shall not thereafter be liable for failure to deliver the goods to the depositor, or owner of the goods, or to a holder of the receipt given for the goods when they were deposited, even if such receipt be negotiable. [32 G. A., ch. 160, § 36.]

SEC. 3138-a37. Negotiation of negotiable receipts by delivery. A negotiable receipt may be negotiated by delivery—

(a) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the bearer, or

(b) Where, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the receipt has indorsed it in blank or to bearer.

Where, by the terms of a negotiable receipt, the goods are deliverable to bearer or where a negotiable receipt has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the receipt shall thereafter be negotiated only by the indorsement of such indorsee. [32 G. A., ch. 160, § 37.]

SEC. 3138-a38. Negotiation of negotiable receipts by indorsement. A negotiable receipt may be negotiated by the indorsement of the person to whose order the goods are, by the terms of the receipt, deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner. [32 G. A., ch 160, § 38.]

SEC. 3138-a39. Transfer of receipts. A receipt which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable receipt can not be

negotiated, and the indorsement of such a receipt gives the transferee no additional right. [32 G. A., ch. 160, § 39.]

SEC. 3138-a40. Who may negotiate a receipt. A negotiable receipt may be negotiated—

(a) By the owner thereof, or

(b) By any person to whom the possession or custody of the receipt has been entrusted by the owner, if, by the terms of the receipt, the warehouseman undertakes to deliver the goods to the order of the person to whom the possession or custody of the receipt has been entrusted, or if at the time of such entrusting the receipt is in such form that it may be negotiated by delivery. [32 G. A., ch. 160, § 40.]

SEC. 3138-a41. Rights of persons to whom receipt has been negotiated. A person to whom a negotiable receipt has been duly negotiated requires [acquires] thereby—

(a) Such title to the goods as the person negotiating the receipt to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the depositor or person to whose order the goods were to be delivered by the terms of the receipt had or had ability to convey to a purchaser in good faith for value, and

(b) The direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt as fully as if the warehouseman had contracted directly with him. [32 G. A., ch. 160, § 41.]

SEC. 3138-a42. Rights of persons to whom receipt has been transferred. A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor. If the receipt is non-negotiable such person also acquires the right to notify the warehouseman of the transfer to him of such receipt, and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt. Prior to the notification of the warehouseman by the transferor or transferee of a non-negotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or by a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor. [32 G. A., ch. 160, § 42.]

SEC. 3138-a43. Transfer of negotiable receipt without indorsement. Where a negotiable receipt is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the receipt, unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made. [32 G. A., ch. 160, § 43.]

SEC. 3138-a44. Warranties on sale of receipt. A person who for value negotiates or transfers a receipt by indorsement or delivery, including one who assigns for value a claim secured by a receipt, unless a contrary intention appears, warrants—

(a) That the receipt is genuine,

(b) That he has a legal right to negotiate or transfer it,

(c) That he has knowledge of no fact which would impair the validity or worth of the receipt, and

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied, if the contract of the parties had been to

transfer without a receipt the goods represented thereby. [32 G. A., ch. 160, § 44.]

SEC. 3138-a45. Indorser not a grantor. The indorsement of a receipt shall not make the indorser liable for any failure on the part of the warehouseman or previous indorsers of the receipt to fulfill their respective obligations. [32 G. A., ch. 160, § 45.]

SEC. 3138-a46. No warranty implied from accepting payment of debt. A mortgagee, pledgee or holder for security of a receipt who, in good faith, demands or receives payment of the debt for which such receipt is security, whether from a party to a draft drawn for such debt or from any other person, shall not by so doing be deemed to represent or to warrant the genuineness of such receipt or the quality or quantity of the goods therein described. [32 G. A., ch. 160, § 46.]

SEC. 3138-a47. When negotiation not impaired by fraud, mistake or duress. The validity of the negotiation of a receipt is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the receipt was induced by fraud, mistake, or duress to entrust the possession or custody of the receipt to such person, if the person to whom the receipt was negotiated, or a person to whom the receipt was subsequently negotiated, paid value therefor, without notice of the breach of duty, or fraud, mistake, or duress. [32 G. A., ch. 160, § 47.]

SEC. 3138-a48. Subsequent negotiation. Where a person having sold, mortgaged, or pledged goods which are in a warehouse and for which a negotiable receipt has been issued, or having sold, mortgaged, or pledged the negotiable receipt representing such goods, continues in possession of the negotiable receipt, the subsequent negotiation thereof by that person under any sale, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, mortgage or pledge, shall have the same effect as if the first purchaser of the goods or receipt had expressly authorized the subsequent negotiation. [32 G. A., ch. 160, § 48.]

SEC. 3138-a49. Negotiation defeats vendor's lien. Where a negotiable receipt has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such receipt has been negotiated, whether such negotiation be prior or subsequent to the notification to the warehouseman who issued such receipt of the seller's claim to a lien or right of stoppage in transitu. Nor shall the warehouseman be obliged to deliver or justified in delivering the goods to an unpaid seller unless the receipt is first surrendered for cancellation. [32 G. A., ch. 160, § 49.]

SEC. 3138-a50. Issue of receipt for goods not received. A warehouseman or any officer, agent, or servant of a warehouseman, who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of felony, and upon conviction shall be punished for each offense by imprisonment in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. [32 G. A., ch. 160, § 50.]

SEC. 3138-a51. Issue of receipt containing false statement. A warehouseman, or any officer, agent or servant of a warehouseman, who fraudulently issues or aids in fraudulently issuing a receipt for goods, knowing that it contains any false statement, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprison-

ment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [32 G. A., ch. 160, § 51.]

SEC. 3138-a52. Issue of duplicate receipts not so marked. A warehouseman, or any officer, agent or servant of a warehouseman, who issues or aids in issuing a duplicate or additional negotiable receipt for goods, knowing that a former negotiable receipt for the same goods or any part of them is outstanding and uncanceled, without plainly placing upon the face thereof the word "duplicate," except in the case of a lost or destroyed receipt after proceedings as provided for in section fourteen (14), shall be guilty of a felony, and upon conviction shall be punished for each offense by imprisonment in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or by both. [32 G. A., ch. 160, § 52.]

SEC. 3138-a53. Issue for warehouseman's goods of receipts which do not state that fact. Where there are deposited with or held by a warehouseman goods of which he is owner, either solely or jointly or in common with others, such warehouseman, or any of his officers, agents, or servants who, knowing this ownership, issues or aids in issuing a negotiable receipt for such goods which does not state such ownership, shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [32 G. A., ch. 160, § 53.]

SEC. 3138-a54. Delivery of goods without obtaining negotiable receipt. A warehouseman, or any officer, agent, or servant of a warehouseman who delivers goods out of the possession of such warehouseman, knowing that a negotiable receipt, the negotiating of which would transfer the right to the possession of such goods, is outstanding and uncanceled, without obtaining the possession of such receipt at or before the time of such delivery, shall, except in the cases provided for in sections fourteen (14) and thirty-six (36), be found guilty of a misdemeanor and on conviction shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars (1,000.00), or by both. [32 G. A., ch. 160, § 54.]

SEC. 3138-a55. Negotiation of receipt for mortgaged goods. Any person who deposits goods to which he has no title, or upon which there is a lien or mortgage, and who takes for such goods a negotiable receipt which he afterwards negotiates for value with intent to deceive and without disclosing his want of title or the existence of the lien or mortgage shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both. [32 G. A., ch. 160, § 55.]

SEC. 3138-a56. When rules of common law still applicable. In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall govern. [32 G. A., ch. 160, § 56.]

SEC. 3138-a57. Interpretation shall give effect to purpose of uniformity. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. [32 G. A., ch. 160, § 57.]

SEC. 3138-a58. Definitions. In this act, unless the context or subject-matter otherwise requires—

"Action" includes the counter claim, set-off, and suit in equity.

“Delivery” means voluntary transfer of possession from one person to another.

“Fungible goods” means goods of which any receipt is, from its nature or by mercantile custom, treated as the equivalent of any other unit.

“Goods” means chattels or merchandise in storage, or which has been or is about to be stored.

“Holder of a receipt” means a person who has both actual possession of such receipt and a right of property therein.

“Order” means an order by indorsement on the receipt.

“Owner” does not include mortgagee or pledgee.

“Person” includes a corporation or partnership or two or more persons having a joint or common interest.

To “purchase” includes to take as mortgagee or as pledgee.

“Purchaser” includes mortgagee and pledgee.

“Receipt” means a warehouse receipt.

“Value” is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a receipt is taken either in satisfaction thereof or as security therefor.

“Warehouseman” means a person lawfully engaged in the business of storing goods for profit.

A thing is done “in good faith” within the meaning of this act, when it is in fact done honestly whether it be done negligently or not. [32 G. A., ch. 160, § 58.]

SEC. 3138-a59. Act does not apply to existing receipts. The provisions of this act do not apply to receipts made and delivered prior to the taking effect of this act. [32 G. A., ch. 160, § 59.]

TITLE XVI.

OF THE DOMESTIC RELATIONS.

CHAPTER 1.

OF MARRIAGE.

SECTION 3139. Contract.

No particular form or ceremony is necessary. All that is required is that the minds of the parties meet in mutual consent; but neither the intention to marry

nor consent to such marriage can be inferred from cohabitation alone. *Brisbin v. Huntington*, 128-166.

SEC. 3145. Who may solemnize.

Although the mayor of a city may not have the authority to perform the marriage ceremony outside the limits of his jurisdiction, a marriage solemnized by him

without the consent of the parties beyond his jurisdiction is valid under Code § 3147. *State v. McKay*, 122-658.

SEC. 3146. Certificate—return—record.

The law will presume a legal marriage in the absence of other evidence where it is shown that the parties have held themselves out to the world as husband and wife and have lived and cohabited together as such. *State v. Rocker*, 130-239.

of evidence, whether direct or circumstantial. *Casley v. Mitchell*, 121-96.

A parish register is competent evidence of a marriage. *Ibid.*

When the relation is once shown to exist it will be presumed to have continued in the absence of evidence of a dissolution by death or divorce. *Ibid.*

Proof of the last marriage alone makes out a *prima facie* case as to its validity, and to overcome such *prima facie* case proof of a former marriage is required, and also evidence from which it may be concluded that it had not been dissolved by death or divorce. *In re Estate of Calton*, 129-542.

Record evidence of marriage is not necessary, and it may be proved by any kind

SEC. 3147. Forfeiture.

A marriage solemnized by one of the officers named in Code § 3145, but outside of his jurisdiction, will be void under

the provisions of this section. *State v. McKay*, 122-658.

SEC. 3150. Issue legitimized.

Only by the subsequent marriage of the parents can an illegitimate child ever become legitimate. Such recognition of an

illegitimate child as will enable him to inherit does not render him legitimate. *Brisbin v. Huntington*, 128-166.

CHAPTER 2.

OF HUSBAND AND WIFE.

SECTION 3153. Property rights of married women.

Although the family resides on premises owned by the wife and occupied as a homestead, the husband is presumed to

be the head of the family. *Burch v. Lowary*, 131-719.

SEC. 3154. Interest of either spouse in other's property.

Husband and wife cannot enter into written contracts with each other in reference to the disposition of their property unless in pursuance of and in accordance with a valid contract entered into before marriage. *Frazer v. Andrews*, 112 N. W. 92.

The contingent interest of the wife in her husband's property cannot be made the subject of contract as between them. *Sharff v. Hayes*, 132-609.

A contract by the husband to pay the wife a consideration for joining in a conveyance to cut off her dower right is invalid in view of the provisions of this section. *Miller v. Miller*, 104-186.

A contract between the wife and the husband for the payment to the wife of a share of the proceeds of property sold, on condition that she will join in the conveyance of the property for the purpose of releasing her dower interest, is not valid. *Garner v. Fry*, 104-515.

But if a portion of the proceeds is immediately given to the wife it will be valid as a gift and may be afterward properly treated as her property. *Ibid.*

Either party may elect whether he or she will join in a conveyance, but cannot use the right for purposes of speculation or oppression. *Ibid.*

A contract between husband and wife as to the interest of the husband in the wife's property on her decease, is invalid, not only as to real property, but also as to personalty. *Poole v. Burnham*, 105-620.

Such contract is invalid as to property subsequently acquired. *Ibid.*

While the wife cannot convey her contingent right of dower to her husband, she may by quitclaim to her husband's grantee cut off her contingent rights in the property. *Fowler v. Chadima*, 111 N. W. 808.

A power of attorney given by a wife to her husband, authorizing him to relinquish her right of dower in the husband's real property, is of no validity. *Sawyer v. Biggart*, 114-489.

Nor will the wife be bound by ratification of a conveyance to which her name is signed by the husband under such power of attorney. *Ibid.*

The provision that neither husband nor wife has such an interest in the property of the other that it can be the subject of contract between them is in effect a statute of descent and distribution, and an agreement of the wife upon separation to release for a consideration all interest in her husband's property is void, and will not preclude her from claiming her distributive share, although the agreement,

made in another jurisdiction, was valid and enforceable where made. *Caruth v. Caruth*, 128-121.

This provision renders any contract invalid by which the wife releases to the husband her interest in his land, but it has no application to a property interest which husband or wife may have in the land of the other based upon contracts with third persons, or derived from sources other than the marriage relation. *Baird v. Connell*, 121-278.

Separation agreements are generally regarded as invalid so far as they relate to the future; but they have often been recognized and enforced so far as they relate to maintenance or other collateral engagements. *Ibid.*

An agreement of separation will be considered as rescinded if the parties afterwards cohabit as husband and wife; but such an agreement is only thus rescinded in so far as the consideration therefor consists in the arrangement that they shall live apart; there may be other conditions based on independent considerations which are not annulled by the resumption of conjugal relations. *Ibid.*

A contract between husband and wife as to the interest which the wife shall have in the husband's property, made in consideration of the abandonment by the wife of meritorious proceedings for divorce and the resumption of marital relations, is valid. *Fisher v. Kootz*, 110-498.

An antenuptial contract by which the prospective wife's inchoate distributive share in the husband's estate is surrendered will be valid. Therefore a post-nuptial contract between the husband and wife with reference to the effect which shall be given to such antenuptial contract as to the interest which the wife shall acquire in the husband's property is valid. *Ibid.*

The courts will rigidly scrutinize a contract apparently unjust or unreasonable in its terms, and especially where it operates to deprive a wife of her interest in the husband's estate without provision for her in the event she survive him. In such a case the burden is upon the husband or those representing him to show that the contract was fairly procured in order to have it upheld. *Ibid.*

A contract between husband and wife in settlement of a suit for separate maintenance, by which she relinquishes all claims to his estate, except as provided for in such contract, is not effectual to defeat the wife's contingent right of dower in the husband's property subsequently conveyed. *Newberry v. Newberry*, 114-704.

SEC. 3155. Remedy by one against the other.

An agreement by the husband for a consideration proceeding from his wife's pa-

rents that he would reimburse the wife to the extent of the money and property

which were advanced to him by her parents, gives to the wife a valid claim against her husband in satisfaction of which he may transfer property to her free from claims of his creditors. *Clark v. Ford*, 126-460.

A wife may maintain an action against her husband on a note for money loaned by her to him out of her separate estate. *In re Estate of Deaner*, 126-701.

The time within which such an action may be maintained by the wife is governed by the general provisions of the statute of limitations. *Ibid.*

The money thus received by the husband cannot be regarded as held by him in trust in the absence of a showing of such agreement on his part. *Ibid.*

A contract by the husband and wife by which it is agreed that the wife shall have a one-half interest in all property, real and personal, thereafter coming into their possession in consideration for money

advanced to the husband from the wife's separate estate, may be enforced by her. *McElhanev v. McElhanev*, 125-279.

The legal fiction of the oneness of husband and wife has not been entirely effaced. All disabilities which the common law imposed upon husband and wife by reason of the marriage status still exist, except in so far as they have been modified or changed by express statutory enactment. *Heacock v. Heacock*, 108-540.

Therefore, held that a wife cannot sue a husband on his personal contract made during coverture. *Ibid.*

As express authority is given for a suit by the wife against her husband to recover her property, or any right growing out of the same, she might sue her husband with reference to property rights arising out of a partnership entered into between them. *Hoaglin v. Henderson*, 119-720.

SEC. 3157. Conveyance to each other valid.

A postnuptial contract with reference to the wife's inchoate distributive share of the husband's estate which she would have been entitled to but for an antenuptial contract releasing such interest, may be valid. The hands of the husband and wife are not to be tied up forever by an understanding entered into before learning fully of the mutual trust and confidence engendered by and essential to well being in the marriage relation. *Fisher v. Koontz*, 110-498.

A conveyance, transfer or lien, executed by either husband or wife to or in favor of the other, is valid as to any interest which the one may have in the

property of the other based upon contracts with third persons or derived from sources other than the marriage relation. *Baird v. Connell*, 121-278.

Conveyances between husband and wife will be valid, although the premises constitute the homestead, notwithstanding the general provisions of Code § 2974 requiring that both join in a conveyance or incumbrance of the homestead. *Beedy v. Finney*, 118-276.

The wife cannot by conveyance to her husband extinguish her contingent right of dower in his property. See notes in this supplement to Code § 3154.

SEC. 3161. Attorney in fact.

The wife cannot give the husband a power of attorney to dispose of her contingent dower interest in his property. *Sawyer v. Biggart*, 114-489.

And see notes in this supplement to Code § 3054.

SEC. 3162. Wages of wife—actions by.

In an action by a married woman for damages resulting from personal injuries, no recovery should be allowed for her loss of time in the absence of evidence that she had any business or employment apart from her husband. *Denton v. Ordway*, 108-487.

The husband is entitled to the services and earnings of his wife when she is not engaged in business on her own account, and in such case she cannot recover in her own name under implied contract for services rendered to a third person in fur-

nishing him board and lodging. *McClintic v. McClintic*, 111-615.

But she may recover for board furnished under an express contract. *Lindsey v. Lindsey*, 116-480.

Where by consent of the husband the wife keeps boarders on her own account, and receives the board money and invests the fund thus accumulated in property in her own name, such property is exempt from any claim on the part of her husband's creditors. *Ehlers v. Blumer*, 129-168.

SEC. 3164. Contracts of wife.

A husband may contribute by his labor and sagacity to the accumulation of property in the name of his wife, without

rendering such property subject to his debts. *Deere v. Bonne*, 108-281.

This provision as to suits by or against

a wife on contracts made by or with her has reference to contracts with persons other than her husband, and does not authorize a suit by a wife against the husband on a contract entered into between them during coverture, not relating to her separate property. *Heacock v. Heacock*, 108-540.

Common law rules with reference to the oneness of husband and wife still so far exist that any capacity of a married woman to contract is regarded as exceptional, and the grounds therefor must be both

alleged and proved by one seeking to recover. *Ibid.*

The wife, although not engaged in an occupation independent of her husband, may contract for furnishing board and maintain an action in her own name on such contract. *Lindsey v. Lindsey*, 116-480.

A married woman having authority in this state to acquire, own and dispose of property, and to make contracts and incur liabilities, may enter into a valid contract of partnership with her husband. *Hoaglin v. Henderson*, 119-720.

SEC. 3165. Family expenses.

A diamond shirt stud worn by the husband for personal use and adornment is an expense of the family for which the wife may be liable. *Neasham v. McNair*, 103-695.

The cost of feed for a horse used by the husband in his business and not by the family does not constitute a family expense chargeable to the wife. Generally speaking, the thing for which the expense is incurred which may be charged to the wife must be used or kept for use in the family. *Martin v. Vertres*, 130-175.

The wife does not become liable under this section for the support of her husband in an insane hospital, under the provisions of Code § 2297. *Blackhawk County v. Scott*, 111-190.

A creditor who has obtained judgment against the husband for family expenses may, in an equitable action, subject the property of the wife to the payment thereof without first recovering judgment at law against her. *Boss v. Jordan*, 118-204.

In a suit to subject the property of the wife to the payment of a judgment against her husband for family expenses, the rights of one who purchased such property after the suit may be declared subject to plaintiff's claim. *Ibid.*

A note given by the husband for family expenses is not conclusive on the wife, either as to the existence of the debt or as to the amount thereof. The husband may as against the wife extend the time of payment or change the form of indebtedness, but cannot create as binding on the wife, an indebtedness which does not exist. *McCartney & Sons Co. v. Carter*, 129-20.

Where the husband drives the wife from the home in which she has an equal right of possession with him, he impliedly obligates himself to pay for her support regardless of the cause of such expulsion. *Baker v. Oughton*, 130-35.

SEC. 3166. Removal from homestead—custody of children.

The wife is entitled to necessaries after being driven from the home by her husband, regardless of the cause of the expulsion. *Baker v. Oughton*, 130-35.

When the husband seeks to secure the

return of his wife after she has left home on the ground of alleged improper conduct, the offer of reconciliation must be unconditional. *Ibid.*

SEC. 3167. Repeal—insanity of either spouse—conveyance of property. That section three thousand one hundred and sixty-seven (3167) of the code be and the same is hereby repealed and there is hereby enacted in lieu thereof the following:

“Where either the husband or wife is insane and incapable of executing a deed or mortgage relinquishing, conveying or incumbering his or her right to the real property of the other the other may petition the district court of the county of his or her residence or the county where the real estate to be conveyed or incumbered is situated, setting forth the facts and praying for an order authorizing the applicant or some other person to execute a deed or mortgage and relinquish or incumber the interest of the insane person in said real estate.” [30 G. A., ch. 119, § 1.]

SEC. 3169. Repeal—decree. That section three thousand one hundred and sixty-nine (3169) of the code be and the same is hereby repealed and there is hereby enacted in lieu thereof the following:

"Upon the hearing of the petition the court, if satisfied that it is made in good faith by the petitioner and he is a proper person to exercise the power and make the conveyance or mortgage and it is necessary and proper, shall enter a decree authorizing the execution of the conveyance or mortgage for and in the name of such husband or wife by such person as the court may appoint." [30 G. A., ch. 119, § 2.]

CHAPTER 3.

OF DIVORCE, ANNULING MARRIAGES AND ALIMONY.

SECTION 3171. Jurisdiction.

Where a decree of divorce was rendered on a notice by publication which gave the name of defendant with a spelling not the same, nor indicating the same pronunciation as that of defendant's true name, held, that there was no presumption in favor of the validity of such decree. *Hubner v. Reichhoff*, 103-368.

Mere length of time during which a person has lived in a particular locality is not controlling in determining the length of residence. Intention is the controlling consideration. *Sylvester v. Sylvester*, 109-401.

The general rule that the domicile of the husband is the domicile of the wife does not apply in proceedings for divorce. *Ibid.*

A decree procured by one not in good faith a resident of this state is of no validity. *Roe v. McCaughan*, 113-274.

A proceeding for divorce so far as it affects the marital status of the parties is *quasi in rem* so that the decree is valid on service by publication. But as to alimony and the costs such a proceeding is *in personam* and not binding on the defendant who has not appeared nor been served with process in the state and has no property therein. *Rea v. Rea*, 123-241; *Johnson v. Matthews*, 124-255.

A decree of divorce fraudulently obtained as a result of an action brought in a state of which the plaintiff is a non-resident and against a non-resident defendant not served within the jurisdiction and not appearing, is void and subject to collateral attack in any court wherein such pretended adjudication is pleaded. *Bee-man v. Kitzman*, 124-86.

SEC. 3173. Verification—evidence—hearing.

The court should be prompt to denounce collusion between parties in an action to secure a decree of divorce, but in a particular case held that the evidence did not show such collusion as to authorize the court to refuse to hear a case submitted on petition and cross-petition. *Blinn v. Blinn*, 113-83.

The testimony of the complaining party with reference to the grounds of divorce must be corroborated by other evidence. *Shors v. Shors*, 133-22.

Where the husband procured a decree of divorce from his wife by fraud, held that after his death the wife might maintain an action to set the decree aside in order to be entitled as his widow to draw

a pension from the federal government. *Lawrence v. Nelson*, 113-277.

In a case involving property rights, the presumption arising from a pretended marriage will not be sufficient to overthrow the presumption of the continuing validity of a former marriage, in the absence of any other evidence of a divorce. *Goodwin v. Goodwin*, 113-319.

A divorce will not be presumed in order to sustain the validity of a subsequent marriage where the evidence affirmatively shows no record of such proceeding in the county in which it should have been instituted, and no grounds therefor. *In re Estate of Colton*, 129-542.

SEC. 3174. Causes.

Adultery. A husband cannot have a divorce on account of the adultery of the wife with a third person who has such connection at the instigation of the husband for the purpose of securing evidence with a view to a divorce. *May v. May*, 108-1.

Under the evidence in a particular case,

held that although the husband had declared his preference for the society of another woman to that of his wife, there was no evidence of illicit relations such as to sustain a divorce on the ground of adultery. *Craig v. Craig*, 129-192.

As to sufficiency of evidence in particular cases to establish adultery see *Biser v. Biser*, 110-248; *Wells v. Wells*, 116-59.

Desertion: Four elements are essential to constitute such desertion as will be sufficient ground for a divorce: (1), the cessation of the marriage relation; (2), the intent to desert; (3), the continuance of the desertion during the statutory period; and (4), the absence of consent or misconduct of the deserted party. Separation does not constitute desertion unless accompanied with the intent to cease to live together as husband and wife, and on the part of the spouse charged with desertion such intent must be shown to have been wrongful, *i. e.*, in disregard of the marital obligations. *Kupa v. Kupa*, 132-191.

The husband cannot accept the departure of his wife from the home as a desertion and demand a divorce on that ground when he refuses to invite her to return, makes no effort to induce her to resume her place in his house and rejects her overtures for reconciliation. Even though she be originally in fault in leaving him, he cannot shut the door against her return and then make her continued absence the ground of a charge of desertion. *McElhaney v. McElhaney*, 125-333.

A cessation of intercourse alone will not authorize a divorce. There must be an abandonment of all marital duties and complete separation to constitute desertion under the statute. *Pfannebecker v. Pfannebecker*, 133-425.

Under the evidence in a particular case held that desertion as a ground of divorce in an action by the wife against her husband was sufficiently established. *Walker v. Walker*, 127-77.

Habitual drunkenness: Occasional acts of intoxication are not sufficient to make one an habitual drunkard. There must be an involuntary tendency to become intoxicated as often as the temptation is presented, which comes from a fixed habit acquired from frequent and excessive indulgence. *Biser v. Biser*, 110-248.

Inhuman treatment: Divorce will only be granted on statutory grounds; and cruel and inhuman treatment will be a sufficient ground only where it is such as to endanger life. Whether a particular act or course of mistreatment is cruel and inhuman, and if so whether it is such as to endanger life, must be determined from the facts of each case, such as the temperament, disposition and mental and physical condition of the complaining party. *Blair v. Blair*, 106-269.

There may be cruel and inhuman treatment which will be a ground for divorce, although the life of the wife has not been imperiled by physical acts of violence. *Berry v. Berry*, 115-543.

Inhuman treatment which would warrant a divorce must be such as to endanger life, and it must be treatment which has not been provoked or caused by the fault of the complaining party. *Shors v. Shors*, 133-22.

Cruelty provoked by the wrongful acts or unreasonable conduct of the wife will not entitle her to a divorce. *May v. May*, 108-1.

A divorce on the ground of cruel and inhuman treatment may be granted to the wife on account of conduct of the husband such as would tend to break down her nervous system and permanently impair her health. *Shook v. Shook*, 114-592.

Unfounded charges by the husband against the wife of lewdness, unchastity and adultery may constitute such inhuman treatment as to endanger the life, although no physical injury be inflicted. Treatment which affects the mind to such a degree as to destroy health or endanger life is a cause for divorce. *Shors v. Shors*, 133-22.

Repeated false assertions by a husband in the presence of his family and to others that his wife is unchaste are calculated to impair her health and endanger life and may justify a divorce. *Turner v. Turner*, 122-113.

Accusations of infidelity by the wife against the husband do not in themselves constitute such cruel and inhuman treatment as to be likely to impair the health of the husband, and do not therefore constitute grounds for divorce. *Pfannebecker v. Pfannebecker*, 133-425.

Statements by the husband to the wife that he has lost his affection for her and prefers another woman to her may constitute such cruel and inhuman treatment as to authorize a divorce. *Craig v. Craig*, 129-192.

Where the evidence discloses a long continued course of ill treatment, even though with slight physical violence which would be likely to impair health and imperil the life of the wife, she is entitled to a divorce. *Hullinger v. Hullinger*, 133-269.

Incompatibility of temper is no ground for divorce; and while the courts cannot compel husband and wife to live together, they can make it so difficult to obtain a divorce as to encourage another effort at observance of the matrimonial vows. *Olson v. Olson*, 130-353.

As to sufficiency of evidence in particular cases to show such cruel and inhuman treatment as to authorize the granting of a divorce see *Schaffer v. Schaffer*, 106-492; *Sylvester v. Sylvester*, 109-401; *Wells v. Wells*, 116-59; *Luick v. Luick*, 132-302.

Condonation: The wife, by continuing to live and cohabit with the husband condones any previous acts of his which

would have entitled her to a divorce. *May v. May*, 108-1.

A condonation based on the condition of future good conduct is destroyed as a ground of defense if the improper conduct which has been condoned is subsequently repeated. *Shors v. Shors*, 133-22.

Condonation is always conditional on the fact that the party forgiven will thereafter abstain from the commission of like

offenses, and when the condition is broken the original cause of complaint revives. *Craig v. Craig*, 129-192.

Contract to procure: A contract having for its object the securing of the dissolution of the marriage contract as to one of the parties is against public policy and void, and one who renders services under such a contract cannot recover under *quantum meruit*. *Barngrover v. Pettigrew*, 128-533.

SEC. 3177. Maintenance during litigation.

The statute does not expressly or by implication provide that temporary alimony shall be allowed only after answer. *Hamilton v. Hamilton*, 129-628.

The appearance of the defendant to object to the granting of temporary alimony constitutes an appearance to the action giving the court jurisdiction. *Ibid.*

After a trial on the merits and a judgment denying plaintiff a divorce, the court has no power to make an allowance to plaintiff of temporary alimony. *Wald v. Wald*, 124-183.

An allowance of suit money for appeal to the supreme court should be made on application to that court, and not by the district court after the case has been appealed. *Shors v. Shors*, 133-22.

The defendant should not be deprived of his right to defend the action because of his failure to comply with an order for the payment of temporary alimony, where there is no other showing than that on which the allowance of temporary alimony was made. *Hancock v. Hancock*, 109 N. W. 1009.

The rules as to allowance of suit money are the same in a proceeding for separate maintenance as in a suit for divorce. *Ibid.*

An attorney's lien does not attach to an allowance for suit money. *Hubbard v. Ellithorpe*, 112 N. W. 796.

SEC. 3180. Alimony—custody of children—changes.

Allowance of alimony: The court is not limited to a fixed allowance or proportion of the estate of the defendant which shall be given to the injured party as permanent alimony or for separate maintenance; such sum should be allowed by the court as is just in the light of all the facts before it. *Goldie v. Goldie*, 123-175.

An alternative decree giving to the successful plaintiff an option of receiving a lump sum less the aggregate of the sum paid by way of annual payments, on failure or refusal of the defendant to make the annual payments provided for, is not necessarily erroneous. *Ibid.*

Under our practice the property rights of the husband and wife in the property owned by each are ascertained in a divorce proceeding, and final distribution is made in order that the parties may forever remain independent of each other, and in making the allowance of alimony the court must estimate the property of both parties and adjudicate the claims that each has against the other. But the interests of either in the property of the other depending not on the marriage relation, but on contracts with third persons, or acquisition from sources other than the marriage relation are not necessarily involved. *Baird v. Connell*, 121-278.

Where the evidence was found not sufficient to sustain a decree for divorce, held that an allowance to the husband of plaintiff of alimony to the extent of one-third of the property of the wife was erroneous. *McDonald v. McDonald*, 117-307.

Provisions as to alimony in particular cases sustained. *Casey v. Casey*, 116-655; *Halley v. Halley*, 130-683; *Luick v. Luick*, 132-302.

Separate maintenance: A suit for separate maintenance cannot be sustained except for a cause which would warrant a decree of divorce. *Shors v. Shors*, 133-22.

Attorney's fees: In a decree for a divorce allowing the recovery of a specific sum against the defendant by way of alimony, the defendant appealing may be required in the supreme court on affirmance of decree to pay an additional sum by way of attorney's fees in the supreme court. *Goldie v. Goldie*, 123-175.

In an action for divorce by the wife in which alimony is allowed to her, the money or property thus given is subject to the lien of her attorney for fees. *Hubbard v. Ellithorpe*, 112 N. W. 796.

In such case the wife cannot defeat the lien of her attorneys on an allegation of their negligence in not securing larger allowance in her favor, without showing such negligence on their part as would

release from her primary liability to them for the payment of their fees. *Ibid.*

Custody and support of children: Where the wife, suing for divorce and alimony, was denied divorce but given the custody of a child and an allowance for its support, held that such allowance was without authority, as there appeared to be no reason why the child should not remain with and receive support from the father. *Garrett v. Garrett*, 114-439.

Where the wife, suing for divorce, is given the custody of the children it is not improper to award such alimony as will enable her to properly clothe, maintain and educate them. *Walker v. Walker*, 127-77.

In determining the reasonableness of a decree providing that the divorced husband may have the custody of the child only at stated periods, and with their consent, it is proper to take into account their dislike for the father. *Hullinger v. Hullinger*, 133-269.

Effect of decree: A divorce and decree of alimony against the father does not terminate his obligation as a parent to further contribute to the support of his child. *Foote v. De Poy*, 126-366.

Subsequent change: A decree requiring the defendant to contribute to the support of the minor children, the custody of whom is awarded to the plaintiff, may be modified so as to require a larger payment on a showing of increased financial ability of the defendant and increased necessities in support of the children on the part of the plaintiff. *Ostheimer v. Ostheimer*, 125-523.

The original decree is conclusive upon the parties as to their then circumstances, and the power to make changes in the decree is not a power to grant a new trial, or retry the same case, but only to adapt the decree to the newer circumstances of the parties. *Ferguson v. Ferguson*, 111-158.

The original decree is conclusive upon the parties upon the facts and circumstances then existing or which might have been proved. Fraud and false swearing in procuring the original decree is not sufficient ground for modification thereof, there being no evidence of change in the condi-

tions or circumstances affecting the parties, unless the fraud be such as to require the setting aside of the original decree on that ground. *Graves v. Graves*, 132-199.

An order respecting the custody of children made in a decree of divorce is conclusive until it is subsequently made to appear that by reason of some changed circumstances or conditions the enforcement of the order would result in positive wrong or injustice. *Crockett v. Crockett*, 132-388.

Setting aside decree: Where it appears that the testimony on which a decree for alimony in a proceeding for divorce is rendered on service by publication was false and untrue it should be set aside. *Klaes v. Klaes*, 103-689.

And held, that an attorney who was to receive a share of the judgment in such a case for his services was not an innocent purchaser, of property awarded to the plaintiff in such a decree except to the extent to which he had actually made advances of money for expenses. *Ibid.*

Enforcement: The wife, suing for divorce, may resort to proper proceedings to subject to the payment of her alimony property of the husband in which she has inchoate right of dower and to prevent a conveyance by him in fraud of her rights. *Walker v. Walker*, 127-77.

Defendant a non-resident: Where alimony has been granted in a suit for a divorce against a non-resident an *ex parte* divorce fraudulently obtained by such non-resident in another jurisdiction will not bar the alimony awarded. *Goldie v. Goldie*, 123-175.

On service by publication: While a decree for alimony in a divorce proceeding where service is by publication only is not binding on defendant as a personal judgment, it may be enforced as to his property within the state. *Rea v. Rea*, 123-241.

As to a non-resident served by publication and not appearing a judgment for alimony and costs is without validity. *Johnson v. Matthews*, 124-255.

Such a void judgment cannot be vitalized by an order confirming it in a proceeding to subject property of the defendant to the satisfaction thereof. *Ibid.*

SEC. 3181. Forfeiture of rights. When a divorce is decreed the guilty party forfeits all rights acquired by marriage. In every case in which a divorce is decreed, neither party shall marry again within a year from the date of the filing of said decree unless permission to do so is granted by the court in such decree; *provided*, however, that nothing herein contained shall prevent the persons divorced from re-marrying each other. Any person marrying contrary to the provisions of this act shall be deemed guilty of a misdemeanor and punished accordingly. [C., '73, § 2230; C., '51, § 1486.] [32 G. A., ch. 161.]

The guilty party forfeits all rights acquired by marriage, and this applies to the contingent dower interest in land conveyed

either before or after divorce. *Pollock v. Milburn*, 112-528.

CHAPTER 4.

OF MINORS.

SECTION 3188. Majority.

A male becomes an adult at the age of twenty-one years, but the meaning of the term adult is to be determined by the laws of the country with reference to which that term is used. *Banco De Sonora v. Bankers' Mut. Casualty Co.*, 124-576.

Although a minor attains his majority

by marriage, nevertheless in a prosecution for sale of liquor to a minor, proof that he had not attained the age of majority is sufficient *prima facie* to establish such unlawful sale, without proof that he had not attained majority by marriage. *State v. Mulhern*, 130-46.

SEC. 3189. Contracts—disaffirmance.

A minor may relieve himself from legal liability under his contract by a timely disaffirmance and a return or offer to return of the consideration received, and such disaffirmance relieves him from liability upon a note given by him in connection with such contract, even in the hands of an innocent purchaser. *Seeley v. Seeley-Howe-LeVan Co.*, 128-294.

Such disaffirmance does not, however, release the obligation of the surety on such contract. *Ibid.*

The minor may disaffirm before he attains the age of majority, but he is only required by statute to restore the money or property which he has received by virtue of the contract, which remains within his control after attaining majority. *Beickler v. Guenther*, 121-419.

Where a minor elects to disaffirm a contract for the purchase of land he is entitled to recover the purchase price less the amount owing on the contract, with interest from the time of payment to the time of trial. *Ibid.*

There is a secondary liability of a minor for necessities furnished to him, such as physicians' services, notwithstanding the primary liability of his parents therefor. *Andrews v. Chicago G. W. R. Co.*, 129-162.

A minor is only permitted to contract for necessities because otherwise he might suffer for want of them, and he is not bound by the terms of an express contract for necessities, but only for their reasonable value. Therefore the minor may disaffirm an unexecuted contract for necessities. *Wallin v. Highland Park Co.*, 127-131.

A minor cannot be held liable for breach of promise, but may be held for seduction. *Wise v. Schloesser*, 111-16.

Although a minor cannot make a valid contract of marriage, nevertheless a promise of marriage by the defendant, a minor, may be shown in an action to recover damages for seduction. *Hawk v. Harris*, 112-543.

SEC. 3190. Misrepresentations—engaging in business.

If a minor engages in business as a merchant, and parties subsequently assume that he is of full age and deal with him in that belief, no inquiry or representation being made as to his minority, he becomes absolutely liable for the debts contracted in such business, and he may be adjudged a bankrupt on his own petition, though

still an infant. *In re Brice*, 93 Fed. 942.

Occasional transaction of business which is usually transacted by an adult does not constitute the engaging in business contemplated by the statute as estopping a minor from disaffirmance of his contracts. *Beickler v. Guenther*, 121-419.

CHAPTER 5.

OF THE GUARDIANSHIP OF PERSONS AND PROPERTY.

SECTION 3192. Natural guardian.

Natural guardian: Parents are the natural guardians of their minor children, and as such may accept the delivery of deeds made to them where the deeds are beneficial in their nature. *Hall v. Cardell*, 111-206.

On the death of the parents, the grandfather or grandmother when next of kin succeeds to the natural guardianship and cannot be deprived of the rights incident thereto by a deed of adoption approved in an *ex parte* proceeding by the clerk of

court on application of a collateral relative. *Holmes v. Derrig*, 127-625.

An acceptance by a collateral relative of the custody of the child in pursuance of the request of the deceased parent and a reasonable observance of the duty assumed by such acceptance are circumstances of much weight as between claimants otherwise equal in right as to the custody of the child, but are not in all circumstances controlling factors in the situation. *Ibid.*

A judgment rendered against a minor without appointment of or defense by a guardian is not void, but at most irregular. *Reints v. Engle*, 130-726. And see notes to § 3482.

Custody of child: The parent's right to the custody of the child, while recognized and allowed strong weight, is not absolute, and will not be enforced against the serious interest of the child. The child's vital welfare, present and future, is not sacrificed to the parent's claim. *Hadley v. Forrest*, 112-125.

The right of the parent to the custody of his child should be denied with much hesitancy, and only upon satisfactory proof of a legal surrender thereof or unequivocal showing that the interest of the child demands such interposition by the court. *Dunkin v. Seifert*, 123-64.

The fact that one who has had the custody of a child is better able to give it the comforts and luxuries of life than the father who is surrendering or abandoning his legal right will not be a controlling consideration as against the claim of the father for its custody. *Ibid.*

While the best interest of the child should always be accepted as a matter of controlling importance in determining the right to its custody, yet this question is a relative one and can never be wholly divorced from the question of the rights and interests of the parents or those standing in *loco parentis*. The affection of the child for one who has had its custody will not necessarily outweigh other considerations in determining the right to future custody. *Miller v. Miller*, 123-165.

The parent may lawfully be deprived of the custody of his minor child and still be liable for its support. *Guthrie County v. Conrad*, 133-171.

One who takes and raises a child to which he has no relationship and which he does not adopt does not become liable for medical services rendered to such child without his request. *Holmes v. McKim*, 109-245.

Agreement as to custody: When a parent has voluntarily parted with the custody of his child, and seeks to recover it from those who have had such custody by his consent, the welfare or wishes of the child will be consulted and, other

things being equal, this consideration will be controlling. *McDonald v. Stitt*, 118-199.

Where a mother had turned her child over at two years of age, to be disposed of to any proper person who would take it, and the child had been taken and kept for several years by one who had the right to believe that the parent would assert no further claims to the child, held that in an action by the mother against such person to recover possession, the interest of the child would be considered, and, under the facts in the particular case, held that the action of the lower court in denying the custody to the mother would be sustained. *Ibid.*

The mother, equally with the father, is entitled to exercise the authority of disciplining the child, and may delegate this authority to another. Therefore held that a child of eight years of age had no right of action against an aunt for corporal punishment administered under authority given to the aunt by the mother. *Rowe v. Rugg*, 117-606.

A parent may confer upon some other person the legal right to the custody of a minor child, but such an arrangement contemplating permanent custody will not be binding unless this is the intention of the parent. *Miller v. Miller*, 123-165.

The parent does not permanently forfeit his right to regain the custody of his child by an arrangement under which the child is to live with and be cared for by another for an annual consideration. The rights of the parent are not to be interfered with except under imperative necessity, for the welfare of the child, growing out of gross misconduct of the parent. *Van Auken v. Wieman*, 128-476.

Habeas corpus: In a *habeas corpus* proceeding brought by one claiming to be the guardian against one claiming to be the parent by adoption, the court may enquire not only into the legality of the adoption, but also to the best interests of the child. But the custody of the adopted parent when found to be legal, will not be interfered with unless the best interests of the child require it. *Smiley v. McIntosh*, 129-337.

The issues in a *habeas corpus* proceeding for the custody of a child are not triable *de novo* on appeal, and if there is evidence to support the finding of the trial court, the supreme court will not reverse. *Dunkin v. Seifert*, 123-64.

Services: Clothing furnished by the father to a minor child remains the property of the father, and he may recover for injury thereto. He may also recover for any loss of services or for medical attendance occasioned directly by the wrongful acts of another with reference to the child. *Shoemaker v. Jackson*, 128-488.

Emancipation: The father's emancipa-

tion of his minor son may be in writing or parol, and may be proven by circumstantial evidence or implied from conduct. The mere fact that the son continues to make his home with the father and to assist him is not controlling in determining the question of emancipation. *Bristol v. Chicago & N. W. R. Co.*, 128-479.

Emancipation means the voluntary freeing of the child so that he may manage and control his own time and affairs. *Guthrie County v. Conrad*, 133-171.

Where a son during infancy was allowed to manage his business in his own name, and to pay over his earnings to his mother, there was sufficient evidence of

an emancipation by the father. *Jacobs v. Jacobs*, 130-10.

A mutual understanding between parent and child is sufficient to constitute emancipation, and such understanding may arise by implication from the acts and conduct of the parties. *Kubic v. Zemke*, 105-269.

If, however, the parent still claims the right to the child's services during minority, whether he exercises the right to have them or not, there is no such emancipation as to free the parent from the obligation the law creates to pay the necessary support furnished to the child by a third party. *Ibid.*

SEC. 3193. Surviving parent guardian of the person.

The right of the guardian to the custody of the ward may be interfered with by the court in the interests of the ward at least to the extent of making some other temporary disposition of such custody than that which would result from the fact of appointment alone. *Smith v. Haas*, 132-493.

The appointment of another guardian on the tender of resignation of an existing guardian amounts to an acceptance of such resignation, and the failure of the guardian appointed to qualify does not restore the previous guardianship. *Smiley v. McIntosh*, 129-337.

SEC. 3197. Bond and oath.

A court of equity has jurisdiction to set aside a settlement and release of the guardian and his sureties on account of fraud in procuring the settlement. *Witt v. Day*, 112-110.

Under the circumstances of a particular

case held that the bondsmen in making settlement with the ward after attaining majority, had not exercised the good faith required, and that the settlement should be set aside. *Ibid.*

SEC. 3198. Removal—new bond.

In a proceeding to determine the right of a guardian to the custody of the ward, the court may remove such guardian as

an unfit person, and substitute another in his place. *Smith v. Haas*, 132-493.

SEC. 3200. Duties.

Powers: The guardian cannot excuse an unauthorized act on the ground that it was under the advice of a judge given orally outside of court. *In re Guardianship of Kimble*, 127-665.

The signing of a contract by the guardian for the ward under the direction of the probate court makes the contract as binding and conclusive with reference to the ward as though the ward had been an adult and executed such contract in person. *In re Harker's Estate*, 113-584.

A guardian cannot loan the money of his ward, lease his land or invest his funds without an order of court. Such transactions are invalid, or at least voidable, until approved. *Easton v. Somerville*, 111-164.

Without direction of court, the guardian has no authority to loan his ward's money, and should keep the money and property of the ward separate from his own, and make investment thereof under the court's

direction, as guardian only, and not in his own name. *McIntire v. Bailey*, 133-418.

While guardians are authorized to employ counsel for their wards, such employment must be under order of court entered on the record. *In re Manning Estate*, 111 N. W. 409.

On death of ward: After the death of the ward, the guardian still holds funds in his hands for the ward's administrator, and not for his heirs, and cannot be examined as garnishee by judgment creditors of such heirs. *Pugh v. Jones*, 112 N. W. 225.

Allowance for support: While in general a parent, or one standing in *loco parentis* to the ward, is not entitled to an allowance out of the ward's estate for support of the child, yet there may be circumstances under which such allowance is proper. *In re Carter*, 120-215.

While application for such allowance should be made to the probate court before

any indebtedness therefor is contracted, yet, even though such application is not made until after the support has been furnished, if the claim therefor is reasonable and just, it may be allowed and payment ordered, the propriety of the allowance being passed upon when it is asked, and when such allowance is made the action of the probate court will be presumed to be correct, and will be sustained unless fraud is shown. *Ibid.*

But in a particular case held that the circumstances showed fraud and collusion on the part of the guardian in securing an allowance to the parent for the guardian's own personal advantage. *Ibid.*

Settlement: The court cannot in a guardianship proceeding settle the estate of the deceased ward, nor determine who is entitled to the proceeds of such estate, the heirs of the deceased ward not being parties to the proceeding. Nor is it competent to compel the heirs to become parties to a settlement of the guardianship. *In re Guardianship of Lindsay*, 132-119.

It is no defense to a guardian in a proceeding to require a settlement of his deceased ward's estate that by agreement of heirs or other persons having an interest in the estate the guardian is entitled to the proceeds of such estate. *Ibid.*

A settlement between the guardian and the ward made out of court should be closely scanned, and approval thereof should be withheld where it is made to appear that such settlement is clearly against the interest of the ward. *In re Guardianship of Holscher*, 94 N. W. 486.

One who accepts the trust incident to guardianship should be held responsible for a fair and faithful exercise of his trust. *Ibid.*

The burden is upon the guardian claiming a settlement with the ward after becoming of age out of court to establish the fact of such settlement. *Robb's Estate v. Robb*, 111 N. W. 803.

The fact that the guardian has in a voluntary petition in bankruptcy stated indebtedness to his ward as among his liabilities does not estop him when called upon to account as guardian from denying the correctness of such statement with the explanation that the discharge of liability prior to bankruptcy had been questioned by the ward so as to give rise to an obligation of contingent liability. *Ibid.*

Under the facts of a particular case held that there was such admission by the

guardian of receipt of money of the ward as to render him liable to account therefor. *In re Gray*, 120-144.

Under the provisions of the statute the guardian is not relieved from liability for loss of funds invested, unless he acts under the direction of the court in making such investment. *Van Rees v. Witzenburg*, 112-30.

Settlements by a guardian with his ward out of court are not favored, and one who relies on such settlement must clearly show that he made full disclosure of everything, and that the ward knew and understood that he was making a full and final settlement. Every reasonable intendment is to be made in favor of the ward. *Ibid.*

In the absence of any actual accounting or settlement, the guardian is not discharged by a written release from the ward, and a discharge pursuant to such release is not an adjudication. Such discharge may be set aside without proof of actual fraud. *Ellis v. Soper*, 111-631.

While the mother as guardian may not be bound in all events to support the child out of her own means, in the absence of an allowance by the court from the property of the ward in her hands, nevertheless, where she has ample means she should not be allowed to encroach on the estate of the child, though she may set off the support of her child as against a claim for an accounting for interest. *Ibid.*

Defense by: Although the defense for a minor child is made in the trial court by a guardian *ad litem*, the court has authority to appoint a general guardian and direct that he prosecute the appeal in behalf of the minor. *In re Estate of Strang*, 131-583.

Claims against ward: One who has acquired a lien on the property of the ward by attachment proceedings is not by the subsequent appointment of a guardian compelled to look to the probate court for the enforcement of his rights. *Hawks v. Harris*, 112-543.

Action by guardian: A guardian suing to set aside a conveyance made by his ward has the burden of proving the ward's legal incapacity. But where the transaction complained of has taken place between persons standing in confidential relations, it will be closely scanned and the burden is on the party claiming the advantage of such transaction to show *bona fides*. *Reese v. Shutte*, 133-681.

SEC. 3201. Breach of bond—new guardian.

A failure to account to the ward when he reaches his majority is a breach of obligation under the guardian's bond, and a right of action then accrues to the ward, and the statute of limitation begins to run. The running of the statute cannot be post-

poned by failure of the ward to make demand for an accounting. *Ackerman v. Hilpert*, 108-247.

Where a guardian makes final report and his liability is adjudicated, such adjudication is binding on his sureties, and

they are not entitled to relief on the ground that the guardian, under mistake as to his duties and liabilities, has made a

report showing a greater liability than that actually existing. *Steiner v. Lenz*, 110-49.

SEC. 3203. Account.

The accounting contemplated by the statute is not for the purpose of adjudicating the correctness of the accounts, but to indicate to the court and those interested, the condition of the estate, its liabilities and resources, the propriety of orders for which application may be made and generally the care given and required to best serve the interests of the ward. Such reports are *ex parte* and when approved are not to be given greater affect than *prima facie* evidence of the accuracy of the ac-

count as stated. *In re Guardianship of Kimble*, 127-665.

The report of the guardian should show that funds of the ward invested by direction of the court have been invested in his name as guardian and not in his own name, and the requirement as to annual reports should be construed as mandatory, although any reasonable explanation for failure to comply may be accepted by the court, provided the delay in making report is not unreasonable. *McIntire v. Bailey*, 133-418.

SEC. 3204. Penalty.

On the failure of the guardian to comply with the statutory requirements as to investment of his ward's funds and report thereof he should be removed, even though his bond is sufficient and the estate has not suffered loss. *McIntire v. Bailey*, 133-418.

It may be a sufficient ground for removal that a feeling of hostility between the guardian and his ward has arisen and such a situation exists that the guardian cannot properly represent the interests of the ward. *Ibid.*

SEC. 3205. Compensation.

Where the guardian does not do his full duty in notifying his ward of their right to moneys in his hands, and wrongfully mingles the trust fund with his own, he may be charged with interest thereon at six per cent., with annual rents. *Blakeney v. Wyland*, 115-607.

A guardian should be allowed reasonable attorney's fees actually paid out in

defending a claim against his ward's estate. *In re Guardianship of Kimble*, 127-665.

A guardian who has had an allowance for the care of a ward, cannot after the ward's death recover from the estate additional compensation for the same services. *Gibson v. Wild*, 124-152.

SEC. 3206. Property sold.

Where notice has been served upon the ward and guardian *ad litem* appointed to act in his behalf an order for the sale of the property is binding. *In re Guardianship of Kimble*, 127-665.

In such case it is the duty of the guardian *ad litem* to make defense for the ward and, in submitting the case to the court to raise every question involving the rights of the person under disability. *Ibid.*

SEC. 3219. Guardians of drunkards, spendthrifts and lunatics.

The proceeding for the appointment of a guardian is an adversary proceeding and not a proceeding *in rem*. The petitioner is plaintiff, and the person against whom the proceeding is instituted is defendant. A jury trial may be had, and an appeal is authorized. *Brown v. Lambe*, 119-404.

Jurisdiction in guardianship cases is not made to depend upon a strict construction of the word "inhabitant," as found in the statute. The proceeding may be instituted as to one living or being at the time within the state, regardless of his legal residence. *Ibid.*

Where the court had acquired jurisdiction in a guardianship proceeding by reason of the domicile within the county of the insane ward, there is no right during the continuance of the insanity of the

ward to have the jurisdiction of the guardianship transferred to another county. *McIntire v. Bailey*, 133-418.

It seems that a person is of unsound mind when so weak and infirm mentally as not to be capable of exercising the judgment necessarily required in the management of his ordinary affairs. *Garretson v. Hubbard*, 110-7.

Where the person for whom it is sought to have a guardian of property appointed is not shown to be incapable of intelligently managing his property, the fact that it appears that he is a sexual pervert and may commit wrongs such as to render him liable to respond in damages will not be ground for appointing a guardian. *Schick v. Stuhr*, 120-396.

In determining the question as to

whether a guardian should be appointed for a person of unsound mind, the ultimate question as to the extent of the capacity of the one for whom guardianship is sought is for the jurv. *McGibbons v. McGibbons*, 119-140.

Where it was made a condition by a divorced wife of the dismissal of a proceeding brought by her against her former husband to have a guardian appointed for him on the ground of insanity that he should settle property on their child, held that such settlement was invalid whether he was in fact insane or was by duress compelled in escaping an unwarranted proceeding for the appointment of a guardian to make a settlement. *Footte v. De Poy*, 126-366.

Under the facts in a particular case held

SEC. 3221. Repeal—order of court—power of guardian.
[30 G. A., ch. 80, § 22.]

SEC. 3225. Real estate sold—allowance to family. Whenever the sale or mortgage of the real estate of such ward is necessary for his support or for the support of his family or the payment of his debts, or will be for the interest of the estate or his children, the guardian may sell or mortgage the same under like proceedings as required by law to authorize the sale of real estate by the guardian of the minor. The court shall, if necessary, set off to the wife and minor children of the insane person, or to either, sufficient of his property, of such kind as it shall deem appropriate, to support them during the period such person is insane. [26 G. A., ch. 54; 22 G. A., ch. 70; C., '73, § 2276; R., § 1453.] [29 G. A., ch. 131, § 1.]

SEC. 3227. When estate is insolvent.

Any control which the probate court acquires over property of the ward by the appointment of the guardian is subject to

an attachment on such property already levied in another proceeding. *Hawk v. Harris*, 112-543.

CHAPTER 6.

OF MASTER AND APPRENTICE.

SECTION 3229. Indenture.

The parents of a minor have no right to bind him out as an apprentice save during

the years of minority. *Walton v. Atchison, T. & F. R. Co.*, 131-423.

SEC. 3241. Complaint against apprentice.

Where the relation of master and servant continues after the majority of the apprentice, the question as to rightful discharge of the servant by the master is not determined by the statutory provisions relating to apprenticeship. *Walton v. Atchison, T. & S. F. R. Co.*, 131-423.

The parents of a minor have no right to

bind him out as an apprentice save during the years of minority. *Ibid.*

Where the relationship of master and servant continues after majority of the apprentice, the master has the right to discharge for breach of conditions in the contract of apprenticeship. *Ibid.*

SEC. 3246. Binding out by order of court.

In the absence of extreme neglect of a natural and legal duty courts will always be slow in refusing recognition to the

paramount right of the parent or one who is by nature *in loco parentis*. *Holmes v. Derrig*, 127-625.

CHAPTER 7.

OF ADOPTION.

SECTION 3252. Instrument acknowledged and recorded.

A parent may confer upon some other person the legal right to the custody of a minor child although such person does not become the adopted parent; but there must be such intent on the part of the parent as well as an assumption of obligation on the part of the person to whom custody is thus given, and it will be presumed that such surrender of custody is intended to be temporary unless the contrary is made to appear by proof clear, definite and certain. *Miller v. Miller*, 123-165.

A deed of adoption approved by the clerk of the court on application of a collateral relative in an *ex parte* proceeding, is not binding as against the grandparents of the child with whom it was left on the death of its parents. *Holmes v. Derrig*, 127-625.

Where the father of a child joined in executing an instrument of adoption at a time when there was no legally appointed guardian for the child, held that such instrument of adoption was effectual although there had been a previous guardianship. The adopting parent should not be deprived of the custody of the child in a *habeas corpus* proceeding unless it appears that the best interests of the child require that its custody be given to some other person. *Smiley v. McIntosh*, 129-337.

Statutes of adoption are in derogation of the common law and are to be strictly construed. *Bresser v. Saarman*, 112-720.

The recital that the natural parent fully and voluntarily consents to the adoption of the children by husband and wife named as adopting parents is effectual. *Ibid.*

Where the acknowledgment of an in-

SEC. 3253. Effect. Upon the execution, acknowledgment and filing for record of such instrument, the rights, duties and relations between the parent and child by adoption shall be the same that exist by law between parent and child by lawful birth, and the right of inheritance from each other shall be the same as between parent and children born in lawful wedlock. [C., '73, § 2310; R., § 2603.] [29 G. A., ch. 132, § 1.]

The adoption of a child operates like the subsequent birth of a legitimate child to revoke a will previously executed. It appears to be the legislative intention to

instrument of adoption was by a justice of the peace of another state, without the genuineness of his signature being shown by an accompanying certificate, and the instrument thus defectively acknowledged was recorded, held that the recording thereof was legalized by a subsequent statute curing defects in the recording of instruments defectively acknowledged. *Ibid.*

The instrument of adoption must show the consent of the parent to the adoption and contain a statement that the child is given to the person adopting as his own child. *Hopkins v. Antrobus*, 120-21.

To render the instrument of adoption effectual, there must be substantial compliance with all the requirements of the statute on the subject. *Ibid.*

An agreement to adopt, although not executed in conformity with requirements of the statute, may constitute a binding obligation on the part of the adopting parent to confer upon the child attempted to be adopted the rights of inheritance. *Cehak v. Battles*, 133-107.

The surrender of the custody of the child by its parents to the adopting parents is a sufficient consideration to support an agreement to confer the rights of inheritance. *Ibid.*

Indexing an instrument for the adoption of a minor under the name of the adopting parents, and also that of the adopted child is sufficient. Indexing is not essential to the validity of the instrument, and the omission of the recorder to index it exactly as provided in the statute will not render it invalid. *Hilpire v. Claude*, 109-159.

place adopted children upon the same level as children of lawful birth. *Hilpire v. Claude*, 109-159.

CHAPTER 8-A.

OF THE CARE OF FRIENDLESS CHILDREN AND THE ESTABLISHMENT, REGULATION AND VISITATION OF HOMES FOR.

SECTION 3260-a. Repeal. That chapter eight (8) of title sixteen (16) of the code be and the same is hereby repealed, and the following enacted in lieu thereof. [29 G. A., ch. 133, § 1.]

SEC. 3260-b. Powers of societies. Any society legally incorporated under the laws of the state of Iowa for the purpose of receiving, caring for, placing out for adoption, or in any way improving the condition of abandoned, abused, ill-treated, friendless, or orphan children, may receive, control and dispose of such minor children under the provisions of this act; and such corporation shall be the legal guardian of the persons of all children so surrendered to it, and may exercise all the rights and authority of the parents of such children in regulating the apprenticing and adoption thereof. [29 G. A., ch. 133, § 2.]

SEC. 3260-c. Surrender of children to. Children may be surrendered to such society by the father and mother jointly; by either father or mother, when the other is dead, or hopelessly insane, an habitual drunkard, has abandoned his family, is in prison for crime, or is an inmate or keeper of a house of ill fame; by the mother alone if the child is illegitimate and in her care and custody; by any court of record or judge thereof, or any mayor, or justice of the peace in the county of the residence of such children or their parents, upon complaint made and proceedings had thereon as hereinafter provided. [29 G. A., ch. 133, § 3.]

SEC. 3260-d. Commitment. Whenever it shall be made to appear to any court, judge, mayor or justice of the peace, as above provided, that any child within its jurisdiction, by reason of orphanage, or neglect, abuse, crime, drunkenness, or gross immorality of one or both of the parents, or other persons having custody of such child, is abandoned, ill-treated, or friendless, or in circumstances tending to induce such child to lead a disolute, immoral or vicious life, then it shall be the duty of such court or magistrate to take such child away from its parents or those having control thereof, and commit it to some society incorporated for that purpose, or to some other person or guardian, as may seem to be for the best interests of such child, and the society or person so adopting shall be required to keep such child if over seven (7) years of age and under fourteen (14) years of age, in school during the school sessions of the school district in which said child is kept or in some parochial school for like period. [29 G. A., ch. 133, § 4.]

SEC. 3260-e. Written complaint—appeal. All proceedings under section four (4) of this chapter shall be by written complaint duly verified, which complaint shall state the cause of action and the relief asked. If it shall appear that such child is in the custody and control of parents, guardians, or other persons, such parents, guardians or other persons shall be served with a copy of said complaint, and such notice of the time and place of the hearing thereof as may be ordered by the court or magistrate by whom the case is to be tried; which notice and copy shall be served in the same manner as is provided in the service of original notices. An appeal may be taken to the district court from the order of a magistrate at any time within twenty (20) days thereafter, in the same manner as appeals are taken from judgments in justice courts, except that no bond shall be required to stay proceedings. [29 G. A., ch. 133, § 5.]

SEC. 3260-f. Custody of child during trial. Upon filing of proper complaint, the magistrate may, if thought best, issue a warrant directed to the sheriff or other peace officer, requiring such peace officer forthwith to take into his custody the child described in such complaint, and to retain possession of it subject to the order and direction of the court. [29 G. A., ch. 133, § 6.]

SEC. 3260-g. Religious faith. The court or magistrate in committing children, shall place them as far as practicable in the care and custody of some individual holding the same religious belief as the parents of said

child, or with some association which is controlled by persons of like religious faith as the parents of said child; and when any home or society shall dispose of the custody of any child, it shall be, as far as practicable, to some person of the same religious faith as its parents, unless the parents or former guardian otherwise consent. [29 G. A., ch. 133, § 7.]

SEC. 3260-h. Habeas corpus. Upon the hearing of any *habeas corpus* proceedings for the custody of any such child, if it appears that it has been surrendered to the home under the provisions of this chapter, such fact shall be presumptive evidence that it was done properly and that said home was entitled to the custody and guardianship thereof. [29 G. A., c. 133, § 8.]

SEC. 3260-i. Proceedings — county attorney to prosecute — court costs. Proceedings under this act may be brought by any citizen of the state, acting by himself or his attorney. It shall be the duty of the county attorney, when requested, to prepare complaints and prosecute all such cases in behalf of the complainants. Court costs shall be taxed the same as in criminal actions. [29 G. A., ch. 133, § 9.]

SEC. 3260-j. Board of control to have supervision—annual reports —financial statement. All associations or societies receiving children under this act shall be under supervision of the board of control of state institutions and shall be subject to visitation by the board of control, its members, or agents, which may require such information and statistics from such associations as the board shall deem necessary, in order to enable it to exercise proper supervision over them. Every such association shall file with the state board of control, during the month of January of each year, an annual written or printed report, which shall include a statement of the number of children cared for during the preceding year, the number of children received for the first time and the number returned from families, the number placed in homes, the number deceased, the number returned to friends, and the number placed in state institutions, the number and names and number of months of each of those attending school; also a financial statement showing the receipts and disbursements of such association. The statement of the disbursements shall show the amount expended for salaries and other expenses, specifying the same, and the amount expended for lands, buildings, and investments. And no child shall be committed to the care of any association which shall not have filed a satisfactory report for the calendar year last preceding with the state board of control, unless it be a society organized within the current year. [29 G. A., ch. 133, § 10.]

SEC. 3260-k. Jurisdiction to revoke. The district court of any county in which any society or home may be located shall have jurisdiction to revoke the powers herein granted upon a showing that any such society or person has abused the trust imposed in such society or person, or that the welfare of its wards demands that they be taken from the control of such society or person. It shall be the duty of the state board of control to institute such proceedings whenever, in its judgment, they are advisable. [29 G. A., ch. 133, § 11.]

SEC. 3260-l. Associations of other states. No association which is incorporated under the laws of any other state than the state of Iowa shall place any children in any family home within the boundaries of the state of Iowa, either with or without indentures, or for adoption, unless the said association shall have furnished the state board of control with such guarantee as it may require, including an indemnity bond in favor of the state of Iowa in the penal sum of one thousand (1,000) dollars, that no child shall be brought into the state of Iowa by such society or its agents, having any

contagious or incurable disease, or having any deformity, or being of feeble mind, or of vicious character, and that said association will promptly receive and remove from the state any child brought into the state of Iowa by its agents, which shall become a public charge within the period of five (5) years after being brought into this state. Provided, that this act shall not be construed as prohibiting any person residing in Iowa from receiving and adopting into his family any child or children from another state. [29 G. A., ch. 133, § 12.]

SEC. 3260-m. Appropriations. To provide for the expenses of the inspection herein required, there is hereby appropriated the sum of one thousand dollars (\$1,000.00) or so much thereof as may be necessary, from any funds of the state treasury not otherwise appropriated. [29 G. A., ch. 133, § 13.]

SEC. 3260-n. Expenses of inspection—appropriation to pay. That there is hereby appropriated out of any money in the state treasury not otherwise appropriated the sum of two thousand dollars annually for paying the expenses of inspecting county and private institutions in which insane persons are kept as required by sections 2727-a59 and 2727-a60 of the supplement to the code, and associations, societies and homes receiving children as contemplated by section 3260-j of the supplement to the code. The expenses specified shall be paid as provided by section 2727-a61 of the supplement to the code. At the end of each biennial period the board of control of state institutions shall cause to be transferred to the general funds of the treasury any balance of the sums hereby appropriated not required for the payment of the expenses of the period. [31 G. A., ch. 134.]

TITLE XVII.

OF THE ESTATE OF DECEDENTS.

CHAPTER 1.

OF THE PROBATE COURT.

SECTION 3261. Always open—hearing.

No provision is made for a jury trial on an application for an order as to the distribution of the estate. *Duffy v. Duffy*, 114-581.

An order in a matter of guardianship, made by consent of parties in another

county, but subsequently entered on the records of the county where the matter is pending, is valid, and is binding on the guardians and the sureties on his bond. *Steiner v. Lenz*, 110-49.

SEC. 3265. Extent of jurisdiction.

If deceased is a resident of the state at the time of his death, jurisdiction over his estate is exclusively in the district court of the county of his residence; if a non-resident of the state, then in the court of any county where there was property or estate subject to administration. In the latter case the jurisdiction of the court first assuming jurisdiction is exclusive, and in either case the jurisdiction acquired is co-extensive with the state. *McFarland v. Stewart*, 109-561.

The court first exercising jurisdiction to appoint an administrator will retain such jurisdiction to the end of the proceeding

unless want of jurisdiction appears of record. *Nash v. Sawyer*, 114-742.

In a proceeding to establish the right to a share in the estate, the amount of indebtedness of the same person to the estate may be adjudicated. *Prouty v. Matheson*, 107-259.

The probate court is given jurisdiction over the estates of minors, and the control of the guardians appointed by it have the personal charge of such estates, and in the exercise of this jurisdiction the probate court may apply equitable principles. *Mock v. Chalstrom*, 121-411.

CHAPTER 2.

OF WILLS AND LETTERS OF ADMINISTRATION.

SECTION 3270. Disposal of property by will.

Nature and operation: A valid testamentary provision is a provision made by will duly executed in substantial conformity to the law. It speaks and is intended to speak from the date of the death of the testator and not earlier. Until that time, the title, legal and equitable, of the property to which the provision relates, remains unchanged in the testator, and he may sell and convey and dispose of the same as fully and completely as if no will had been made by him. No right, title or interest of any kind in the thing devised

or bequeathed passes to the devisee or legatee until the death of the testator, and not then if it appears that he has otherwise disposed of such property during his lifetime. *Lewis v. Curnutt*, 130-423.

A conveyance deposited in the hands of a third person to be delivered to the grantee only upon the death of the grantor, may be operative without the knowledge or express or formal consent or acceptance of the grantee, even though there is a reserved power to recall such conveyance, if it is not exercised during the life of the

grantor. Such a disposition is not testamentary. *Ibid.*

The characteristic distinction between a will and a trust is that while the former becomes operative only at the death of the testator, a trust passes an interest to the trustees and beneficiary instantly upon the execution and delivery of the writing by which it is created. *Ibid.*

As a will speaks from the death of the testator with respect to the distribution of all his property, both real and personal, any provision for the conversion of real estate into money and the division thereof among specified legatees is rendered ineffectual if the testator himself converts such real property into money before his death, and the proceeds of such property are to be distributed under a residuary clause governing the distribution of personalty. Upon sale of devised real property by the testator, the proceeds of such sale still remaining in his possession at the time of his death are not to be regarded as a substitute for the property itself, unless so directed in the will. *In re Will of Miller*, 128-612.

The benefit of the rule by which real estate is equitably transmuted into personalty for the purposes of distribution can be asserted by devisees only as to such lands as the testator was seized of at the time the will became effective by his death. *Ibid.*

Specific bequests of real property are ineffectual if at the time of the death of the testator there is no real property with which to discharge or satisfy them in whole or in part. *Ibid.*

Form and interpretation: No particular form is required for a will. The main object of the court is to learn the intention of the maker. The intention being known, all artificiality of language, or looseness of construction must yield to and be governed by it. To ascertain whether the instrument was intended to create a testamentary gift, collateral evidence may be received if the terms of the writing are not clear. *In re Estate of Longer*, 108-34.

An unconditional devise of all of testator's property to his widow, with full power to sell and convey, vests in the widow a fee title, although the will contains subsequent directions as to the division of the property remaining at her death, or in case of her remarriage. *Hambel v. Hambel*, 109-459.

An instrument in a particular case in the form of a deed, granting land subject to occupancy and possession of grantor during life, with a provision that it should be of no force until after the death of the grantor, held to be a conveyance, and not an attempted will. *Saunders v. Saunders*, 115-275.

An instrument which operates to convey a present interest, although possession and enjoyment are reserved during the life of the grantor, may be effective as a conveyance, but if it passes no present interest, and is to be operative only upon the grantor's death, then it is testamentary in character and of no effect, unless executed with all the formalities of a will. *Tuttle v. Raish*, 116-331.

Therefore held that an instrument granting an interest in property, which was to vest at the grantor's death without children, and after payment of debts, funeral expenses, etc., was testamentary in character. *Ibid.*

Testamentary capacity and undue influence: The line between competency and incompetency is always drawn with uncertainty and the findings on that question in most cases are justified only as the best solution of a doubtful problem. *In re Allison's Estate*, 104-130.

A person may have an insane delusion but still be entirely sane on all other subjects, and capable of making a valid will. *Hardenburgh v. Hardenburgh*, 133-1.

Testamentary incapacity does not necessarily require that a person shall actually be insane or of unsound mind. The testator may be incapable of making a valid will on account of weakness of mind not amounting to insanity. *Manatt v. Scott*, 106-203.

It seems that a person is of unsound mind when so weak and infirm mentally as not to be capable of exercising the judgment necessarily required in the management of his ordinary affairs. *Garretson v. Hubbard*, 110-7.

Although the testator's mind be clouded, if he is capable of comprehending his property interests and of determining what disposition he desires to make of his property, and of making such disposition, he has testamentary capacity. *In re Evans' Estate*, 114-240.

A finding that testator was not of sound mind at the time of executing the will, it is sufficient to sustain the action of the court in refusing to probate the will, the jury having been properly instructed with reference to what is sufficient unsoundness of mind to warrant such a finding. *In re Will of Selleck*, 125-678.

Mere weakening of mental power will not render a person incapable of executing a will. So long as he retains mind enough to know and comprehend in a general way the natural objects of his bounty, the nature and extent of his estate, and the disposition which he is to make of it, it is not necessary that he should be competent to make contracts or transact business generally. Old age and failure of memory do not of themselves necessarily take away a testator's capacity to make a will,

nor will the exclusion of some or all of the testator's legal heirs from the benefits of the will be sufficient evidence of incapacity. *Perkins v. Perkins*, 116-253.

Undue influence, rendering the will invalid, must be such as subjects the will of the testator to that of the person exercising such influence, and makes the paper express the purpose of such person, rather than that of the testator himself. And such undue influence must be directly connected with the execution of the will, and operating at the time it was made. *Ibid.*

Neither advice nor solicitation, however earnest or insistent will vitiate a will unless it be further shown that the freedom of will of testator was in some way impaired or destroyed thereby. *In re Estate of Townsend*, 128-621.

The obligation which the testator may recognize to dispose of property in accordance with the previously expressed wishes of a deceased spouse, does not render the will invalid, as procured by undue influence. *Henderson v. Jackson*, 111 N. W. 821.

Belief in the binding obligation of such a wish does not constitute mental incapacity to execute a will. *Ibid.*

Where it appeared that the provisions in the will were dictated by relatives in attendance on the testator while sick and incapable of forming an independent judgment as to the disposition of his property, held that it should be set aside on the ground of undue influence. *In re Wiltsey's Will*, 109 N. W. 776.

It is error to instruct as to mental capacity where there is not sufficient evidence to show disability for the making of a will, although evidence of mental incapacity may be competent as bearing on the issue of undue influence. *Lingle v. Lingle*, 121-133.

Error in submitting the question of undue influence will be without prejudice where the jury makes an express finding of want of mental capacity which is supported by the evidence. *In re Will of Selleck*, 125-678.

Where the jury in answer to a special interrogatory finds against the contestant on the issue as to undue influence, errors in instructing the jury with reference to such issue will not be ground for reversal of a judgment for contestants on a verdict based on want of mental capacity. *In re Will of Wharton*, 132-714.

Where the contestants rely upon both undue influence and want of mental capacity, an error in submitting the issue as to want of mental capacity will be without prejudice where it appears by special finding of the jury that the will should be set aside on account of undue influence. *In re Wiltsey's Will*, 109 N. W. 776.

Question for jury: Where there is

testimony tending to show undue influence and that the condition of testator's mind was such that he might easily have been influenced by the persons whose undue influence is relied upon, the question as to the sufficiency of the evidence should be submitted to the jury. *In re Estate of Jones*, 130-177.

Burden of proof—presumption: It is not necessary that the original evidence in behalf of proponent show the sanity of the testator. Sanity is presumed until there is evidence to the contrary. *In re Will of Dunahugh*, 130-692.

It is not necessary in the original evidence in behalf of proponents to introduce witnesses in support of the sanity of testator. *In re Hull's Will*, 117-738.

Primarily every person is presumed to be sane until the contrary is proven, and the burden of proof of insanity rests in the first instance upon the party alleging it. And while it is true, on the other hand, that settled and general unsoundness of mind, when proved, is presumed to continue, nevertheless the court will take notice of the fact that temporary mental aberration is not uncommon, and the causes thereof are numerous, and therefore proof of want of mental capacity, immediately following a stroke of apoplexy will not be sufficient to give rise to the presumption of continued mental incapacity at a subsequent time when the will in question was executed. *Kirsher v. Kirsher*, 120-337.

It is error to instruct that if testator was afflicted with senile dementia the presumption would be that such condition continued up to the time the will was made and that the burden of proof was upon the proponents to show a lucid interval at the time of the execution of the will. Primarily every person is presumed sane until the contrary is proved and it is also true that when unsoundness of mind is proved a presumption arises in favor of its continued existence. But the jury should be instructed that they must find a continued mental unsoundness before indulging in the presumption of such condition. *In re Estate of Glass*, 127-646.

When the contestant has introduced evidence tending to show that on and prior to the date of the execution of the will the testator was suffering from a disease of the mind of a permanent and progressive nature amounting to unsoundness, the burden as to the evidence shifts to the proponent to establish the mental competency of the testator at the time of the execution of the will. *In re Estate of Jones*, 130-177.

Mental incapacity having been proven is presumed to continue until a condition of capacity is shown. *In re Will of Knox; Paxton v. Knox*, 123-24.

The presumption of want of capacity arising from the appointment of a guardian may be overcome by evidence as to the condition and acts of the testator at the time of making or revoking the will *Linkmeyer v. Brandt*, 107-750.

Evidence in a particular case considered and held not to be sufficient to overcome the presumption in favor of sanity or soundness of mind on the part of testator. *Howe v. Richards*, 112-220.

The burden of proving undue influence and that it operated upon the mind of the testator at the very time that the will was executed to such an extent that the will was the result thereof, is upon the contestant. It is not enough to show that there was an opportunity to exercise the undue influence complained of; there must be evidence that it was exercised and that it was instrumental in procuring the will. *In re Estate of Townsend*, 128-621.

There must be some showing as to the due execution of the will before contestant is put on his proofs. But this showing may be sufficiently made by the contesting witnesses. The burden of proving want of mental capacity and undue influence is upon the contestants and as a general rule does not shift. *In re Goldthorp's Estate*, 115-430.

The burden of establishing testator's mental capacity, or the existence of undue influence for the purpose of defeating the probate of a will, is throughout upon contestant, save when because of the peculiar relations between the testator and beneficiary it is incumbent on the beneficiary to explain such relations in order to overcome the presumption of undue influence arising therefrom. But the inference to be drawn from the instrument itself is never merely to cast the burden upon contestant in ascertaining its validity. *Marshall v. Hanley*, 115-318.

Evidence: Testimony as to mental condition of testator at a period long subsequent to the execution of the will is competent where it appears that the condition testified to has been continuous. *In re Will of Wharton*, 132-714.

An obituary notice in which statements are made as to the mental capacity of testator, although published under the sanction of relatives who afterwards contest the will, is not admissible for the purpose of showing mental capacity. *In re Hull's Will*, 117-738.

A witness, one of the persons unfavorably affected by a will, may testify to the unfriendliness on the part of testator before the execution of the will. *Manatt v. Scott*, 106-203.

Where incapacity and undue influence are both relied upon and there is substantial evidence of the testator's unsoundness of mind, any evidence however slight tending to sustain the issue as to undue in-

fluence should be freely admitted. *In re Estate of Glass*, 127-646.

Wills—undue influence: In determining whether the will represents the uninfluenced judgment and purpose of testator, or whether it is the result of surrounding influences brought to bear upon him, his physical condition and strength of mind as affected by illness may be taken into account. *In re Wiltsey's Will*, 109 N. W. 776.

Evidence of mental incapacity, although not sufficient to show disability to make a will, may be admissible on the issue of undue influence. *Lingle v. Lingle*, 121-133.

Proof that testator was a believer in spiritualism is not sufficient to show want of testamentary capacity. *In re Will of Dunahugh*, 130-692.

Opinion of witnesses: One who shows an acquaintance with the person whose mental capacity is in question and a familiarity with his conduct, may testify affirmatively that in his opinion such a person was of sound mind, while an opinion that such person was of unsound mind must be based on facts consisting of particular acts or conduct indicating unsoundness. *In re Hull's Will*, 117-738.

A witness who has testified as to what he has observed may express an opinion as to the mental capacity of the testator based on such facts. *In re Will of Selleck*, 125-678.

One who has seen and observed a testator on different occasions during the time it is claimed he was insane, may, after stating the facts connected therewith, be permitted to say that he thought he was not of sound mind. *Kirsher v. Kirsher*, 120-337.

It is not for a witness, though an expert, to say what will constitute mental capacity. Nor should such expert be allowed to testify as to the effect of mental capacity upon the validity of a will. *Marshall v. Hanby*, 115-318.

A subscribing witness may state his belief as to the testator's condition of mind without first showing grounds on which that belief is based. *Furlong v. Carraher*, 108-492; *Hertrick v. Hertrick*, 114-643.

Subscribing witnesses may give an opinion that the testator was of sound mind without reciting any particular facts or circumstances but other witnesses acquainted with the testator and in a situation to observe his conduct may do the same thing, and the testimony of the subscribing witnesses in this respect is to be subjected to the same tests as to those applicable to other witnesses. *In re Will of Wharton*, 132-714.

To qualify a nonexpert to give an opinion as to insanity it is only necessary that the circumstances related by the witness as

a basis for such opinion tend to indicate unsoundness of mind. *Stutsman v. Sharpless*, 125-335.

An expert should not be allowed to testify that the testator was capable of making the will in question. But he may be asked as to the testator's capacity at that time or before. *In re Estate of Glass*, 127-646.

It is not proper to ask an expert whether testator was competent to make a will, this being the ultimate fact for the jury to determine. *In re Betts' Estate*, 113-111.

A question as to actions or appearances indicating mental strength or weakness calls for a fact not an opinion. *Manatt v. Scott*, 106-203

Reasonableness of will: While the fact that the will is unreasonable or unjust may be considered in connection with evidence bearing on the condition of testator's mind, it is not alone a ground for refusing probate. *In re Trotter's Will*, 117-417.

The question whether the will is unnatural and unreasonable may be considered on the issue of testator's mental condition. *Hardenburg v. Hardenburg*, 133-1.

The inequalities of a will may be taken into consideration in determining the mental capacity of the testator or whether undue influence has been exercised, but apparent inequality or inequity in the provisions of a will does not alone warrant the presumption of mental incapacity or undue influence. These may be considered only as circumstances in connection with other facts bearing on the condition of the testator's mind. *Manatt v. Scott*, 106-203.

What is meant by unjust, unreasonable and unnatural provisions of a will is that they are not as persons in like situation and similar relationship ordinarily and usually make them. *Ibid.*

Where testatrix had preferred some of her brothers to her natural heirs, it was held material in looking into the equities of the will to know that in remembering those mentioned she forgot other brothers and sisters in needy circumstances. The fact that the will bestows property on the wealthy and overlooks the claim to bounty of those which are poor, in like relationship is a circumstance suggesting a disordered mind or the working of sinister influences. *Ibid.*

While the justness and reasonableness of the provisions of the will from a moral point of view are entitled to consideration in determining the question of the sanity of the testator, such consideration must be predicated upon facts proven by competent testimony. *In re Will of Knox; Paxton v. Knox*, 123-24.

The unreasonableness of the will is a fact which may be considered on the issue of undue influence; but it is not in itself sufficient to show undue influence. *In re Townsend's Estate*, 122-246.

The mere relation of husband and wife or advice given to the husband by the wife as to the making of the will is not sufficient to give rise to a presumption of undue influence. *Ibid.*

When a will is assailed as being unreasonable or unjust, evidence of the financial condition of those having claims on the bounty of deceased and likely to have been taken into a consideration by him, if in a normal condition of mind in executing his will, is admissible. But the rule ought not to be extended so as to include proof of mere expectancies unless of such a nature as likely to have been known and considered by him. *Stutsman v. Sharpless*, 125-335.

The financial circumstances of the testator and the devisee may be taken into account in determining whether the will is so unreasonable as to indicate a disordered mind, or the working of sinister influences. *In re Will of Wharton*, 132-714.

Declarations: To render declarations of the testator admissible on the question of undue influence, there should be independent testimony indicating that such influence has been exerted, and then such declarations are chiefly pertinent as showing the condition of mind of testator to have been such that he was susceptible to the sinister influence, and acted in response thereto. *In re Estate of Townsend*, 128-621.

On the issue of undue influence prior declarations of the testator are not admissible in evidence, nor are his age, or the character and extent of his property admissible. *In re Will of Wiltsey; Wiltsey v. Wiltsey*, 122-423.

On the question of undue influence the contents of a prior will may be shown as indicating the intention of the testator before being subjected to the undue influence relied upon. *In re Will of Selleck*, 125-678.

Testator's previous declarations are admissible in support of a will which is impeached on the ground of want of mental capacity. *In re Perkins' Estate*, 109-216.

Also it is proper to permit those contesting the will to show the amount of advancements made to them for the purpose of rebutting evidence of declarations claimed to have been made by testator on the subject tending to support the will. *Ibid.*

For the same purpose entries in deceased's books of account are admissible as tending to show the amount of advancements as bearing on his state of mind with reference to the persons to whom the advancements appear to have been made. *Ibid.*

Declarations made by testator are admissible as bearing on capacity and undue influence, even though made long after

the execution of the will, if they tend to show senile dementia which in its nature is progressive. *Manatt v. Scott*, 106-203.

Statements or declarations of testator or conduct on his part tending to throw light on his mental condition at the time the will was executed may properly be considered by the jury in connection with other facts and circumstances surrounding or attending the execution of the will. But subsequent declarations as to the wishes of testator with reference to the disposition of his property cannot be considered as tending to show revocation. *Smith v. Ryan*, 112 N. W. 8.

Where the probate of a will is contested on the ground of mental incapacity and undue influence, declarations of the proponent and beneficiary, made before the execution of the will, and with reference to the cancellation of a contract, are admissible for the purpose of showing want of mental capacity and liability to undue influences. *Lundy v. Lundy*, 118-445.

Devise in lieu of dower: Under the provisions of the Code of '73, held that the creation of a trust of testator's entire property for the purpose of raising a fund

for the widow's support and use during life was inconsistent with the dower right of the widow in the property. *Campbell v. Sankey*, 114-69.

Under the provisions of the Code of 1873 the election of the widow to take under the will as against her dower right could only be shown by record, and notice requiring such election must be given to her before any act of election would be effectual. *Byerly v. Sherman*, 126-447.

The widow's distributive right is an encumbrance upon the real estate as to which the devisees of specific portions of such estate are required to make ratable contribution, in the absence of any provision on the subject in the will. *McGuire v. Luckey*, 129-559.

Also held that the devise to a wife of a life estate in all of testator's property in the absence of any restrictive words, was not to be construed as made in lieu of dower. This rule of construction is now changed by the language of this section. *Percifield v. Aumick*, 116-383. And see notes to Code § 3376 of this supplement.

Section applied. *Newberry v. Newberry*, 114-704.

SEC. 3271. After-acquired property.

After-acquired property will pass under the terms of a will whenever the intention to so provide is clear and explicit; other-

wise it will be treated as intestate property. *Flynn v. Holman*, 119-731.

SEC. 3274. In writing—witnessed—signed.

Where subscribing witnesses are dead or beyond the jurisdiction of the court, proof of their handwriting is a compliance with the law as to proving execution, and where they are beyond the jurisdiction of the court, even though their depositions are taken and introduced, other evidence of the due execution of the will is admissible. *In re Allison's Estate*, 104-130.

Where the subscribing witnesses are dead, other evidence of the execution of the will is admissible. *Scott v. Hawk*, 105-467.

Evidence that the deceased, upon examination of the instrument and the signatures thereto, declared it before his death to be his will, may be introduced to prove execution in such a case. *Ibid.*

The making of a mark by a testator will satisfy the statutory requirement as to signature, even though the testator is able to write at the time. *Scott v. Hawk*, 107-723.

If the statute is complied with, nothing more in the execution of the will is necessary. Publication, as such, is not required. *Ibid.*

The testamentary right to dispose of property is regulated by the statute which requires the will to be witnessed in a cer-

tain way, and where it does not appear to have been so witnessed, it will not be valid although it is shown that there were other competent witnesses present at the execution. *McCarn v. Rundall*, 111-406.

If testator asks a person who is competent to be a witness to attest the will and the person thus requested, instead of attesting in the usual way as a witness, affixes a certificate of acknowledgment thereto, the will is sufficiently witnessed by him. *In re Hull's Will*, 117-738.

The attesting clause is not essential to the sufficiency of the attestation by witnesses, though it may be important in furnishing proof that the testator declared the instrument to be his act, and that the witnesses signed it in his presence. If there is an attestation clause showing the requisite facts, signed by two witnesses, this is *prima facie* sufficient, but the proof furnished by such clause is not conclusive. *Ibid.*

It is sufficient that the witness sign in the presence of testator in response to a request of a third person, made by the testator's direction, approved by some sign or act on the part of the testator, and that the signature of the witnesses is with the knowledge of the testator, and in response to such request. Indeed, it is sufficient

if the signing is in the presence of testator, with knowledge on his part that the witnesses are signing in response to a request of the third person, he making no objection. *Ibid.*

It is not essential that the witnesses attest with reference to one and the same act or declaration of the testator. *Ibid.*

The burden of proof as to due execution and attestation is on the proponents. *Ibid.*

Questions as to the sufficiency of the attestation are for the jury. *Ibid.*

It is not necessary that the will be read to or by the testator in the presence of the witnesses. *Smith v. Ryan*, 112 N. W. 8.

Where the execution of a will is denied, the burden of proof is upon the proponents to establish the genuineness of the signa-

ture by a preponderance of the evidence. *Beebe v. McFaul*, 125-514.

An instrument of conveyance which is not to take effect by way of passing the title to the property until after the grantor's death is testamentary in character, and of no validity unless executed with the formalities of a will. *Wilson v. Carter*, 132-442.

An instrument which operates to convey a present interest; although possession and enjoyment are reserved during the life of the grantor, may be effective as a conveyance, but if it passes no present interest, and is to be operative only on the grantor's death, then it is testamentary in character and of no effect unless executed with all the formalities of a will. *Tuttle v. Raish*, 116-331.

SEC. 3276. Revocation—cancellation. Wills can only be revoked in whole or in part by being canceled or destroyed by the act or direction of the testator, with the intention of so revoking them, or by the execution of subsequent wills. When done by cancellation, the revocation must be witnessed in the same manner as the making of a new will. [C. '73, §§ 2329-30; R., §§ 2320-1; C. '51, §§ 1288-9.] [30 G. A., ch. 120, § 3.]

Wills may be revoked either in whole or in part in the manner pointed out by statutory provision. Whether the revocation is entire or partial must depend on the testator's act and intent as gathered from the instrument of revocation itself. The fact that the instrument relied upon as a revocation is called the last will and testament of the testator is not conclusive. As the latter will may be construed with the earlier one so as to prevent partial intestacy the two should be thus construed together if practicable. *Fry v. Fry*, 125-424.

A later will in which the testator attempts to dispose of his entire estate works a revocation of a former will even though there is no revocation clause in the later instrument. *Schilling v. Bawek*, 112 N. W. 210.

Proof of the execution of a subsequent testamentary instrument is not sufficient of itself to establish a revocation. There must be either an express clause of revocation or an inconsistent disposition of the previously disposed property, and the burden is on the contestant to bring forward the subsequent will and demand probate thereof, supporting such demand by proof which would authorize the admission of the subsequent will to probate. *In re Will of Dunahugh*, 130-692.

The whole will is not rendered void by an attempt in an unauthorized manner to change one of its provisions. Where the alteration is not attended with the formalities required by statute, it is of no effect, and unless it is impossible to determine what the original will was, it remains

the will of the testator. *In re Hull's Will*, 117-738.

The will and the codicil should be read together, and the law does not favor revocation of the provisions of a prior will by implication only from a subsequent codicil. *Sperry v. Sperry*, 126-503.

Obliteration of a provision of a will is not to be given the effect of destroying the entire will, and the instrument will be carried out so far as its contents, at the time of execution, can be ascertained. *Richardson v. Baird*, 126-408.

It appearing that a will conceded to have been executed cannot be found after the death of the testator the presumption arises that the same was destroyed by him *animo revocandi*, and the burden is upon the party seeking to establish the will to overcome such presumption by evidence strong, positive and free from doubt. *Thomas v. Thomas*, 129-159.

The adoption of a child in the manner authorized by statute has the same effect as the subsequent birth of a legitimate child in operating to revoke a will previously executed. *Hilpire v. Claude*, 109-159.

Whether by the insertion in this section of the provision that birth of a legitimate child to the testator before his death will operate as a revocation of his will, it was intended to negative the implied revocation resulting from recognition of an illegitimate child, or to exclude the doctrine that provision made for a legitimate child subsequently born would prevent revocation resulting therefrom, *quaere*. But held that in a particular case the provision

made for a child which was subsequently born, was so inadequate and uncertain that it would not prevent the birth of such child from operating as a revocation. *Rowe v. Rowe*, 120-17.

Under the express provision of the statute that the subsequent birth of a legitimate child to the testator before his death operates as a revocation of his will, there is no occasion to apply the general rule of construction that the subsequent birth of a child produces an implied revocation only where no adequate provision therefor has been made. (But now also see 30 G. A., chapter 120.) *Fry v. Fry*, 125-424.

While a presumption of want of capac-

SEC. 3279. Posthumous children. Whenever a testator shall have a legitimate child born after the making of a last will, either in the lifetime or after the death of such testator, and shall die leaving such child so after born, unprovided for by any settlement, and neither provided for nor mentioned in such will, every such child shall succeed to, and inherit the same interest in such parent's real and personal estate as though no will had been made, and the said interest shall be taken ratably from the interests of heirs, devisees, and legatees. [30 G. A., ch. 120, § 1.]

SEC. 3279-a. Claims. All claims which it becomes necessary to satisfy, and all amounts necessary to be paid from the estate of a testator in disregard of or in opposition to the provisions of a will, shall be taken ratably from the interests of heirs, devisees, and legatees. 30 G. A., ch. 120, § 2.]

SEC. 3279-b. Repeal. Section thirty-two hundred and seventy-nine (3279) of the code is hereby repealed. [30 G. A., ch. 120, § 3.]

SEC. 3281. Heirs of devisee.

The provisions of this section apply as well to a devise to a class as to an individual, but such a statute does not apply where the devise is to a class to be determined only when the will takes effect. *In re Nicholson's Will*, 115-493.

It may be provided that in the case of the death of the devisee before the will takes effect, the property so devised shall

not go to the devisee's heirs but shall take such other direction as the testator may see fit to prescribe. *Gilbert v. Gilbert*, 127-568.

In such case as is contemplated in this section the property passes directly from the testator to the heirs of the devisee. *In re Hulett's Estate*, 121-423.

SEC. 3283. Probate—jury trial.

Jurisdiction: A proceeding for the probate of a will is one of which the federal court may take jurisdiction by removal, where the requisite amount is involved and diversity of citizenship exists, as required by the federal constitution and statutes. *Wart v. Wart*, 117 Fed. 766.

Prior will: In the proceeding for the probate of a will the validity of a prior will is not in issue. *Stutsman v. Sharpless*, 125-335.

Contest: The widow has no such interest in the estate as entitles her to contest the probate of a will. *In re Will of Falton*, 107-120.

One who would be willing to share in the property of deceased in the absence of a will may contest the probate of the

will and on his death the widow and heirs may be substituted. But if the will which is contested relates only to personal property, the substitution should be of the administrator or executor of the deceased contestant. *In re Will of Wiltsey; Wiltsey v. Wiltsey*, 122-423.

Executors not otherwise interested in the will cannot protest the probate of a codicil revoking their appointment. Such action is only allowable to one who would have a beneficial interest in the estate if there was no will. *In re Estate of Stewart*, 107-117.

Anyone interested may propound a will for probate, and notice of the taking of depositions may be given by a proponent to one who has filed objections to the will

and who is the chief legatee or beneficiary thereunder. *In re Estate of Jones*, 130-177.

The judgment of the court in an action by the guardian of an insane person to set aside a contract and conveyance between the ward and a beneficiary is conclusive on the question of the insanity of the ward in a subsequent proceeding to probate the will of such person, proposed by the same beneficiary claiming under such will, executed at the same time as the contract and conveyance previously in question. *In re Hendershott's Estate*, 111 N. W. 969.

Devises are entitled to nothing save under the probated will and cannot contest the validity of a probate. *Seery v. Murray*, 107-384.

Procedure: A written petition for the probate of a will is not necessary to give the court jurisdiction. *Ibid.*

The question of the sufficiency of the attestation, where there is a conflict in the evidence, is for the jury. *In re Hull's Will*, 117-738.

There being no controversy as to the execution of the will, the contestant is entitled to the opening and closing on the issues as to mental capacity and undue influence. *In re Will of Wharton*, 132-714.

No answer or reply on the part of proponents is required in order to raise an

issue on the objections filed to the probate of the will. *In re Estate of Jones*, 130-177.

Costs: The petitioners for the probate of a will in their own interests and to the end that as beneficiaries named in the instrument they may share in the distribution of the estate are not entitled to have the costs of the proceeding taxed against the estate if the probate of the proposed will is denied. *Beebe v. McFaul*, 125-514.

Where it appears that the proponent has acted in good faith in proposing the will for probate, he should not be charged with the costs of the contest, although probate of the will is refused. *Lingle v. Lingle*, 121-133.

There is no impropriety in attempting to uphold what is in good faith believed to be a valid will, and the costs of the contest should not be taxed to the party making such contention, but to the estate of the person whose will is contested. *Kirsher v. Kirsher*, 120-337.

The costs may properly be taxed to the proponent where the trial is simply a contest between proponent claiming the estate of deceased under the will and contestants claiming it as heirs at law and next of kin, and the probate of the will is denied. *In re Hendershott's Estate*, 111 N. W. 969.

SEC. 3284. Notice of hearing. The clerk shall give notice of the time fixed, by publishing a notice, signed by himself and addressed to all whom it may concern, in a daily or weekly newspaper printed in the county where the will is filed, once each week, for three consecutive weeks, the last publication of which shall be at least ten days before the time fixed for such hearing, and the court in its discretion may prescribe a different notice. [C., '73, § 2341; R., § 2326; C., '51, § 1294.] [30 G. A., ch. 2, § 11.]

SEC. 3287. Will—recorded—executor to have copy. After being proved and allowed, the will, together with the certificate hereinbefore required, shall be recorded in a book kept for that purpose, and the clerk shall cause the same, or an authenticated copy thereof, to be placed in the hands of the executor therein named or otherwise appointed. And whenever it shall appear that the testator died seized of real estate located in a county of this state other than that in which probate is granted, a complete transcript, properly authenticated, and of the record entry of the order of court admitting the will to probate, and if a copy of such will is not contained therein a certified copy of such will shall be attached thereto and the same shall be filed by the clerk in the office of the clerk of the district court in such other county, who shall cause the same to be entered in the probate docket, and said transcript shall be recorded in full in the book kept for the recording of wills in such county, and when so recorded such record may be read in evidence in all courts without further proof. The cost of such transcript and of the recording thereof shall be taxed against the estate of the decedent unless administration thereof is closed, in which event it shall be paid by the owner of the real estate involved. [C., '73, § 2343-4; R., §§ 2327, 2330; C., '51, §§ 1295, 1298.] [29 G. A., ch. 134, § 1.]

SEC. 3290. Vacancies.

This section does not apply to one named as executor in the will but not appointed by the court. *In re Estate of Van Vleck*, 123-89.

The court is not required to appoint the executor named. *Ibid.*

In the event of a vacancy in the position of executor the court has power to appoint a successor with all the authority of his predecessor and the person thus

appointed is entitled to receive from his predecessor all the assets of the estate held by him as executor or administrator as the case may be, including funds which the executor was authorized to hold for a special purpose. The legatees and distributees are not compelled to look to the predecessor for their shares of the estate which have come into his hands. *Ellyson v. Lord*, 124-125.

SEC. 3291. How filled.

A discretionary power to sell real estate given to the person named as executor by reason of personal trust and confidence cannot be exercised by the administrator with will annexed, but if it appears from the terms of the will that the executor as

such and not the person named as executor and thereby made a trustee is charged with the duty of such sale, held, the successor appointed by the court may exercise the power thus conferred. *Ellyson v. Lord*, 124-125.

SEC. 3293. Trustees to give bond.

While a person designated by the will as executor may be given a personal trust with reference to the disposition of the property of the testator which cannot be exercised by a substituted executor appointed by the court, if it appears that the

power given is conferred upon the executor as such, it may be exercised by a successor duly appointed. *Ellyson v. Lord*, 124-125.

A corporation may be appointed trustee for beneficiaries under the provisions of a will. *State v. Higby Co.*, 130-69.

SEC. 3295-a. Sale of real estate by foreign executors—made legal. All conveyances of real property heretofore executed by executors or trustees under foreign wills and prior to expiration of three months after the recording of a duly authenticated copy of the will, original record of appointment, qualification, and bond, as required by chapter 162, acts of the eighteenth general assembly, are hereby legalized and declared as valid and effectual in law as though the provisions of said chapter had been strictly followed, provided the proper proof of authority was a matter of record in the office of the clerk of the district court in the county where the real property is situated, at the time the conveyance was executed, or was so made a matter of record prior to the passage of this act; provided, nothing in this act shall in any manner affect pending litigation. [27 G. A., ch. 182, § 1.]

SEC. 3296. Probate conclusive—setting aside.

It is not true that whenever a will has been probated, whether with or without a contest, the order admitting it to probate can only be set aside in an equitable action. *Kirsher v. Kirsher*, 120-337.

The burden is on the party suing to have probate of the will set aside to show that the instrument was not properly executed. *Smith v. Ryan*, 112 N. W. 8.

In an action to set aside the probate of a will, the defendants having by counter-

claim or cross petition asked to have the will confirmed, the court has no jurisdiction on dismissal of the action by plaintiff to proceed with the entry of a decree confirming the will, and thus cutting off a future action to set aside the probate. *Davis v. Preston*, 129-670.

One who is not made a party to the proceedings to probate a will is not bound by the result of such proceedings. *Busse v. Schaeffer*, 128-319.

SEC. 3297. Administration granted.

The right to administer upon the estate does not give the widow such interest as to entitle her to protest the probate of a will. *In re Will of Fallon*, 107-120.

Until the will is proven, general administration of the estate of the decedent cannot be granted. *Alice E. Mining Co. v. Blanden*, 136 Fed. 252.

A foreign court acquires no jurisdiction to administer on the estate of a resident of this state. *In re Estate of Williams*, 130-553.

An administrator appointed in this state cannot by voluntary appearance in a court of another state confer jurisdiction upon the latter court to administer the estate. *Ibid.*

A court of equity may prohibit creditors residing in this state from prose-

cuting claims against the estate of a resident decedent in the courts of a foreign state. *Ibid.*

Mere non-residence alone does not disqualify one from being appointed administrator of an estate within this state. The fact of non-residence is to be considered merely in connection with the ability, character, integrity, etc., of the proposed appointee. *Foley v. Cudahy Packing Co.*, 119-246.

SEC. 3299. Special administrators.

A special administrator is without authority to enter into a compromise of a claim under a policy of life insurance *Raven v. Prudential Ins. Co.*, 129-725.

A special administrator has no authority with reference to debts due to the deceased. *Garretson v. Kinkead*, 118-383.

A special administrator cannot bring action against an administrator previously appointed for conversion of property of the deceased, but the conversion by the administrator must be reached by proceedings relative to his accounting. *Ibid.*

SEC. 3300. Inventory—preservation of property.

A special administrator has no power to submit a claim against the estate to arbitration. He has nothing to do with

the allowance of claims. *Sullivan v. Nicoulin*, 113-76.

SEC. 3301. Bond—oath.

Failure to give bond as required by statute is not jurisdictional, and the defect may be cured by the giving and approval of a bond after objection on that ground has been raised. *In re Wiltsey's Will*, 109 N. W. 776.

Both principal and sureties are estopped from denying the validity of the appointment and insisting that the court had no jurisdiction of the estate. *Nash v. Sawyer*, 114-742.

Naming a person as executor does not make him executor in fact upon the testator's death, but ordinarily gives him the right only to become such by compliance with the provisions of the statute. *Burlington Prot. Hosp. Assn. v. Gerlinger*, 111-293.

An additional bond given by order of the court is security with the original bond for the final accounting by the administrator for all funds coming into his hands during the administration, and it is immaterial whether the funds which he fails to account for were received before or after the execution of the bond. *Ellyson v. Lord*, 124-125.

The sureties are liable for interest from the date of the failure of the administrator to account and if his delinquency ex-

ceeds the amount of bond, then the sureties are liable for the principal named in the bond with interest from the date of administrator's failure to account. *Ibid.*

The sureties on the administrator's bond are liable for the proceeds of property directed to be set apart as a special fund and held in trust, until so set apart and invested, with the approval of the court. *Ibid.*

Although the court has approved the setting aside of a fund to be held by the executor as trustee for purposes designated by the will, until such funds are actually set aside so as to charge the executor therewith, the liability of sureties on his executor's bond as to the funds thus set aside is not terminated. *Ibid.*

The administrator *de bonis non* is entitled to the custody of funds which have come into the hand of the executor in pursuance of his appointment and the sureties on the bond of the executor are liable in a suit by the administrator *de bonis non*. *Ibid.*

The sufficiency of the bond cannot be questioned in a collateral proceeding. The authority of the court to appoint does not rest upon the bond. *Beresford v. American Coal Co.*, 124-34.

SEC. 3303. Letters.

Administration necessary: In general, the rights of claimants to the property of a deceased person are to be determined through an administration upon his estate, and not in a proceeding for the settlement

of the guardianship of such deceased person. *In re Guardianship of Lindsey*, 132-119.

Appointment of administrator: The validity of the appointment of an admin-

istrator can only be raised in a direct proceeding and cannot be collaterally questioned. *Seery v. Murray*, 107-384.

The court may appoint an administrator without written application. A petition is not necessary to give the court jurisdiction. *Ibid.*

Powers and liabilities: The executor cannot be said to be interested in the estate and cannot contest the probate of a codicil. *In re Estate of Stewart*, 107-117.

An administrator may not, in the absence of statutory authority, bind the estate by his contract, even when, in performing the duties of administration, expenses are necessarily incurred for services rendered or purchases made, but parties with whom the administrator deals must look to him personally for compensation, and no action therefor can be maintained against the estate, though the claim be valid. *Valley Nat. Bank v. Crosby*, 108-651.

Parties have been permitted to maintain equitable actions on contracts with the administrator directly against the estate where, because of his insolvency, or some other sufficient reason, their remedy against him is inadequate, but this is always based on a *quantum meruit*, or benefit received by the estate. *Ibid.*

An administrator cannot make a binding contract as to the fee to be paid to an attorney for prosecuting a claim for injuries causing the death of deceased. *Rickel v. Chicago, R. I. & P. R. Co.*, 112-148.

It is doubtful whether an administrator or executor, without the court's approval, has any power to submit controversies as to claims against the estate to arbitration. *Sullivan v. Nicoulin*, 113-76.

The administrator of an estate may maintain an action against decedent's grantee to set aside a conveyance, if in fraud of decedent's creditors. *Mallow v. Walker*, 115-238.

An executor may as such properly deposit funds in a bank and the estate will not become a preferred creditor of the bank for the amount of funds thus deposited. *Officer v. Officer*, 120-389.

Where the will directs the sale of land, without giving discretion to the executor, or authorizing action by his successors, it does not create a trust in the executor, and his authority with reference to the land is terminated by his ceasing to be executor. Especially is this true where the will directs the conversion of land

into money for the purpose of distribution. *Boland v. Tiernay*, 118-59.

Even though the will gives the executor a right to exercise a discretion as to the time or method of sale of the land, yet, if the power to sell is annexed to the office of executor and created to enable the executor to perform the duties imposed upon him by the will, his authority is that of executor only, and not of trustee. *Ibid.*

Where a husband was made his wife's sole legatee, and the executor had authority to carry out a contract of sale of her real property, including the homestead, held that his action as executor in completing such sale would not constitute an election to take under the will so as to preclude him from treating the consideration as proceeds of the homestead and using the same to purchase a new homestead exempt from his debts. *Milner v. Davis*, 120-231.

Those entitled to share in the distribution of an intestate's estate, in the absence of any indebtedness, may agree to a settlement and distribution without administration, and an administrator subsequently appointed cannot recover the assets from those to whom it has been distributed pursuant to the agreement. *Douglas v. Albrecht*, 130-132.

An administrator is not held personally liable where he has acted in good faith and with ordinary care and prudence in the management of an estate, and he is not liable for loss or depreciation in the value of the property in the absence of a showing of bad faith or negligence. The administrator is entitled to his expenses in caring for crops, etc., upon leased premises. *In re Estate of Ring*, 132-216.

Actions against: A judgment against an executor who has been discharged is of no validity unless against him personally. *Applegate v. Applegate*, 107-312.

An administrator who is entitled to a share in the property of the estate cannot be garnished for such share in order to subject it to the payment of a debt due by him personally. In such case equitable proceedings to subject the property to the payment of his debt may be maintained. *Cassady v. Grimmelman*, 108-695.

Even where the executor has power in the absence of an order of court to settle a controversy respecting the property of the estate in his charge, he cannot delegate such power to another. *Williamson v. Robinson*, 111 N. W. 1012.

SEC. 3304. Notice of appointment.

The fact of publication is not in itself sufficient to give rise to the presumption that the proper order or direction was

made by the clerk. *McConaughy v. Wilsey*, 115-589.

It is not necessary that there be any

recorded order of court with reference to publication of notice of the issuance of letters of administration, and an endorsement of such order on the letters, made

and signed by the clerk, is sufficient, although the order purports to be the order of the court. *Mosher v. Goodale*, 129-719.

SEC. 3305. Limitation.

After the expiration of the five years allowed for granting letters of administration, the personal estate of the decedent, if any, vests absolutely in his heirs. Therefore a mere stranger cannot after

this period procure letters of administration to be granted for the purpose of subjecting the realty to the payment of claims. *Cummings v. Lynn*, 121-344.

SEC. 3306. Foreign administration.

Funds which have been sent into the state for investment by an agent and have thus become subject to taxation, as provided in Code § 1320, continue to be tax-

able here until removed from the state in the process of administration. *In re Miller's Estate*, 116-446.

SEC. 3307. Estates of absentees. When a citizen of the state, owning property therein, absents himself therefrom and conceals his whereabouts from his family for a period of seven years, a petition may be filed in the district court of any county where such property is situated, setting forth such facts, by any person entitled to administer upon such absentee's estate if he was known to be dead, and praying for the issuance of letters of administration thereon, whereupon said court shall prescribe a notice to be given to such absentee, and order the same to be published in a newspaper published in said county, to be designated by the court, once each week, for eight weeks, proof of the publication of which, in the manner and for the time ordered, shall at the expiration of said period be filed with said petition, and thereupon, if the absentee does not appear, letters of administration upon his estate shall issue as though he were known to be dead, and the person to whom the administration is granted shall proceed and administer and dispose of his estate in the same manner that administrators are required to dispose of and administer the estates of decedents. [31 G. A., ch. 9, § 9.]

The statutory provision for administration on the estate of one who has absented himself from the state for seven years, concealing his whereabouts, is constitutional, and such administration is conclusive, although the supposed decedent is

afterwards found to be alive. Therefore, the administrator appointed in such proceeding has authority to receive insurance money under policies in favor of his estate. *New York Life Ins. Co. v. Chittenden*, 112 N. W. 96.

CHAPTER 3.

OF THE SETTLEMENT OF ESTATES.

SECTION 3310. Inventory.

While it is made the duty of the executor under the collateral inheritance law to file an inventory of real and personal property, the state treasurer has no interest to enforce the performance of this duty unless by the provisions of the will some property or interest therein passes to a collateral heir in such way as to become subject to the tax. While it is the duty of the executor to file an inventory of the personal effects of the deceased without regard to any provision of

the collateral inheritance tax law, that is not a duty in the performance of which the state treasurer has any interest. *In re Estate of Stone*, 132-136.

The administrator is entitled to take possession and control of leasehold interests of decedent and crops growing unharvested on his land at the time of his death, especially where his interest therein is a leasehold interest only. *In re Estate of Ring*, 132-216.

SEC. 3312. Exempt personal property.

The widow does not waive her right to exemptions allowed to the husband as head of the family by failure to object to their appraisement as a part of the property of the deceased. *In re Estate of Ring*, 132-216.

SEC. 3313. Life insurance—damages for death—widow deemed heir.

Insurance: Where the policy or certificate provides for the payment of the insurance money to the "legal heirs" of insured, the amount due in case of loss does not belong to the estate of the decedent, and the administrator of his estate is not entitled to recover. *Schoep v. Bankers' Alliance Ins. Co.*, 104-354.

Where the indemnity under a policy of life insurance is expressly made payable to the executors or administrators of the insured, a release given by the widow as special administrator and in her own right is ineffectual. *Rauen v. Prudential Ins. Co.*, 129-725.

In the absence of special contract or arrangement with the deceased for the payment of the proceeds of life insurance to his creditors, the widow and heirs are entitled thereto exempt from the debts of the deceased. *In re Estate of Donaldson*, 126-174.

Damages for wrongful death: The statute allowing recovery in behalf of the estate against one whose wrongful act has caused the death of the intestate does not create a new right of action, but abrogates the common-law rule by which an existing cause of action is terminated on the death of the party entitled to recover. The fact that the person entitled to participate in the distribution of the estate are non-resident aliens does not prevent the recovery of such damages by the administrator of the estate. *Romano v. Capital City Brick & Pipe Co.*, 125-591; *Rietveld v. Wabash R. Co.*, 129-249.

A man's life, health and future prospects are things having pecuniary value to him, and death by the wrongful act of another occasions a pecuniary loss of his

estate for which an action will lie in favor of his administrator. Therefore, held, that a bequest of all the testator's estate to his wife was held to cover damages which should be recovered by his administrator against one whose wrongful act has caused his death. *In re Estate of Cook*, 126-158.

The funds coming into the hands of the administrator as the result of a claim for the wrongful death of intestate are to be distributed to the heirs and next of kin free from any claim for debts, due to either resident or non-resident creditors. *In re Estate of Williams*, 130-553.

Money recovered for the death of a person leaving a father and mother, and no wife or child, immediately descends to the father and mother in equal shares, and their interest therein may, after the payment of the judgment into court, be applied in payment of a judgment against them. *Cassady v. Grimmelman*, 108-695.

The distribution of damages recovered on account of injuries causing death is to be determined by the law of the place where the injuries complained of were inflicted. *In re Estate of Coe*, 130-307.

Although Code § 2403 forbids the sale of intoxicating liquors to an habitual drunkard or to an intoxicated person, and § 2448 subjects one who makes such sales to forfeiture, the administrator of the estate of one who dies by reason of purchasing and drinking liquor sold to him in violation of these provisions cannot maintain an action against the seller of the liquor to recover for the estate damages for causing the death of the person to whom the liquor was sold. *Bissell v. Starzinger*, 112-266.

SEC. 3314. Allowance to widow and children.

The claim of the widow for allowance of support is contingent and uncertain until judicially determined, and her claim thereto abates with her death. *Zunkel v. Colson*, 109-695.

The provision of this section for allowance to a widow for a year's support is made by way of charity, and should have

a liberal construction to promote the purpose of its enactment. Such allowance should be made even though the widow has independent means, if her income is insufficient for her support without resort to the principal fund. *Busby v. Busby*, 120-536.

SEC. 3315. Discovery of assets.

An appeal will lie from an order made under a statutory provision in relation to the examination of one claimed to have in his possession the effects of the deceased, and likewise from an order granting a retrial in such a proceeding. *In re Behren's Estate*, 104-29.

One who is made defendant in a pro-

ceeding for the discovery of property, and after answering takes no further part in the proceedings, is not bound as to any rights he may have in the property by the adjudication of the probate court on an issue not involving such rights. *Milburn v. East*, 128-101.

SEC. 3317. Subjecting real estate.

Where the property of deceased does not appear to be sufficient for the payment of his debts, the court or judge may direct the administrator to file a petition in equity to secure to the estate the title of any real estate which in the event of the insufficiency of the personal property may be subjected for the payment of debts.

Such an action is to be instituted in the district court of the county in which an equitable action to subject the property of the decedent to the payment of claims against him may be brought under the general statutes relating to the place of bringing action. *Long v. Garey Inv. Co.*, 112 N. W. 550.

SEC. 3322. Sale of personal property.

With reference to the sale of property directed by the testator, the duty of the executor is simply to carry out the provisions of the will, and in respect thereto

he is subject at all times to the orders of the court. *In re Estate of Fisher*, 128-626.

SEC. 3323. Sale of real estate—application.

The order for the sale of real estate standing in the name of the deceased must be obtained in the court granting administration. *Long v. Gary Inv. Co.*, 112 N. W. 550.

The heirs not being parties to a proceeding for the allowance of claims, are not bound by such allowance. But the allowance of claims by the probate court is sufficient *prima facie* as against the heirs to authorize an order for the sale of real estate to pay such claims; and it is for the heirs questioning the validity of claims on which it is proposed to make a sale, to introduce some evidence of their invalidity, and thus overcome the *prima facie* case made by proof of allowance. *Milburn v. East*, 128-101.

In the absence of peculiar circumstances excusing delay, the application for sale should be made within the time allowed for filing and allowance of claims; but where the interest of the deceased in the real estate was not discovered, in the exercise of reasonable diligence, held that it was not error to order a sale more than three years after the appointment of the administrator. *Ibid.*

On an application for sale of real property it may be shown by way of resistance that personal property belonging to the estate is not inventoried and is in the hands of the administrator and would be

sufficient to pay the debts without resorting to the real estate. *Duffield v. Walden*, 102-676.

Although there is no showing as to the disposition of the personalty, an order for the sale of realty, although irregular, will not be void. *Cheney v. McColloch*, 104-249.

Judgment for the sale of real property on the application of the administrator to pay debts for the estate bars the widow's right to dower in the property sold. *In re Estate of Pennock*, 122-622.

Consent by the widow to the sale of real property for the payment of debts will estop her from asserting a dower right in the property thus sold. *Ibid.*

Where the real property of the deceased is sold for the payment of debts, the widow takes her one-third interest in the proceeds free from any deduction on account of taxes, repairs, or expenses. But in the absence of issue the additional one-sixth, which passes to her on that account, is subject to deduction for expenses of administration. *Wild v. Toms*, 123-747.

Sureties on the executor's bond are liable for the proceeds of the sale of real property in the hands of the executor, although no special bond has been given as required by statute. *Ellyson v. Lord*, 124-125.

SEC. 3324. Notice.

Estates of decedents—sale of property—notice: Where a creditor of the heir has attached the interest of the heir in real estate, and afterwards recovered judgment on his claim, he is entitled to notice of a proceeding by the administrator for

the sale of the property to pay decedent's debts. *Mullin v. White*, 112 N. W. 164.

Under such circumstances the judgment creditor who has received no such notice is entitled to attack the sale collaterally in a suit to subject the land to his judgment. *Ibid.*

SEC. 3326. Public or private—notice—credit.

While the administratrix has the right to sell lands of decedents to pay the debts of the estate, she cannot sell to herself

either directly or through a medium of a third person. *Walker v. Walker*, 127-77.

SEC. 3328. Bond to prevent sale.

This section has no application to an action by an heir to recover property of the estate taken by a devisee. *Seery v. Murray*, 107-384.

SEC. 3333. Possession of real property.

In the absence of heirs, the administrator has the right to take possession of the land of the deceased and receive the rents thereof, and the probate court is the proper place for an accounting for such rents. *Smith v. Smith*, 132-700.

Where an administrator in fact assumes possession and control of the real estate of the deceased, he becomes chargeable as trustee with reference thereto. *Schneider v. Schneider*, 125-1.

If the administrator, without right to do so, takes possession of real property of the deceased, he is liable individually to the heirs as trustee, but not as administrator. *In re Estate of Pennock*, 122-622.

An adjudication as to the rights of the administrator to rents and profits of real estate, acting in behalf of the heirs, is not

binding as affecting title to the property. *Milburn v. East*, 128-101.

An administrator has no claim for injuries done to the land belonging to the deceased, and cannot sue as such for trespass. *Hook v. Garfield Coal Co.*, 112-210.

In an attachment suit by a wife against her non-resident husband, her administrator on her death is not entitled to intervene. *Sammis v. Hitt*, 112-664.

If the administrator has any power to borrow money for keeping up the condition of the real property, such power is limited to cases where due notice has been given to those entitled to the estate, and the liability of the estate is limited to the benefits received. *Valley Nat. Bank v. Crosby*, 108-651.

SEC. 3334. Proceeds—account.

Without direction of the court to the charge of the real property of the deceased the administrator has nothing to do with such property, save where there is no heir present and competent to take possession

thereof, and if he does assume control of such property, his possession is that of trustee only. *In re Estate of Pennock*, 122-622.

SEC. 3336. Provisions of will.

Testator may direct the delivery of a deed after his death on the performance of specific conditions and the delivery of such deed by the executor on performance of the conditions will be sufficient to pass

title. So held where a grantee named in a deed had before the death of testator made part payment under a contract to convey. *Dettmer v. Behrens*, 106-585.

SEC. 3338. Claims—statement—notice—allowance.

The bar of the statute of limitations cannot become effectual during the interval between the death of the debtor and the time when in the ordinary course of administration the claim can be filed against the administrator for allowance. *Alice E. Mining Co. v. Blanden*, 136 Fed. 252.

While a judgment against one who is since deceased may be enforced against the real estate upon which it is a lien without filing it as a claim against the estate, yet this must be done while the judgment lien exists. *Hansen's Empire Fur Factory v. Teabout*, 104-360.

Where a claim is filed against an estate and parties jointly liable for its payment are insisting that the estate should pay the whole claim, and that their liability in no event exceeds a portion of the amount claimed, the claim of such persons as against the estate is not one which must be filed within one year. *Pratt v. Fishwild*, 121-642.

The mere withdrawal of a claim for the purpose of preparing a petition thereon does not amount to an abandonment of such claim. *Clough v. Ide*, 107-669.

The probate court has not exclusive jurisdiction of proof of claims against an estate, and judgment in an action in the district court against the administrator, prosecuted without objection, will be a prior adjudication and defeat a subsequent recovery in a probate court. *Ibid.*

In presenting a claim against an estate it is not necessary for the claimant to state its legal capacity to sue as a corporation, and denial of corporate capacity must be specific. *University of Chicago v. Emmer*, 108-500.

A remedy has sometimes been allowed against the estate on contracts made by the administrator where, by reason of his insolvency, or some other sufficient reason, a remedy against the administrator personally is inadequate, but the allowance is

limited to the value accruing to the estate. *Valley Nat. Bank v. Crosby*, 108-651.

The estate cannot be bound by the contract of the administrator with reference to the attorney fee to be paid to an attorney who prosecutes a claim in behalf of the estate against a railroad company for injuries causing the death of decedent. *Rickel v. Chicago, R. I. & P. R. Co.*, 112-148.

Services rendered by an adult daughter to her father under an arrangement involving compensation for such services may properly be the subject of a claim against his estate. *Harrison v. Harrison*, 124-525.

A bank has a valid claim against the

SEC. 3340. Denial.

The burden of proof, if the claim be unpaid, is on the estate. It is not necessary for the claimant to show attempts to collect, nor to show a *prima facie* right to recover. *Murphy v. McCarthy*, 108-38.

The burden is upon the administrator to show a satisfaction of a claim based on a written instrument purporting to bind deceased. *University of Chicago v. Emmert*, 108-500.

SEC. 3341. Hearing—trial by jury.

The county court originally exercised probate jurisdiction without jury trial, except in cases where jury trial was expressly provided for. Such jurisdiction was subsequently transferred to the circuit court and afterwards to the district court, but nothing in the acts changing the forum indicates a legislative purpose to change the mode of trial except in particular cases where jury trial is especially provided for. *Duffield v. Walden*, 102-676.

SEC. 3343. Contingent liabilities.

Where the deceased was surety on a bond in which the principal and sureties obligated themselves, and their "heirs, executors and administrators," liability on which bond did not accrue until after the period fixed for filing claims against the estate, held, that such liability could be enforced against the estate in the hands of the distributees, although no claim under

SEC. 3344. Referees.

In view of this provision for reference by a court, it is doubtful whether an administrator or executor, without the court's

SEC. 3347. Expenses of funeral—allowance to widow.

Burial expenses are not, strictly speaking, debts due from the deceased, but charges which the law, out of decency,

estate of a deceased officer for misappropriation of funds of the bank. *McEbroy v. Allfree*, 131-518.

The clerk is expressly directed to enter upon the probate calendar the allowance of claims on the approval thereof by an administrator. *Mosher v. Goodale*, 129-719.

Receipts given by the claimant to the deceased in which it is specified that the amounts received are in full for services rendered are admissible as tending to throw discredit upon the claimant's testimony as to services for which claim is made which must have antedated the receipts. *Bray v. Bray*, 128-234.

Prior to the adoption of the present Code there was no provision for pleading special defenses to a claim against the estate. *Benton County Sav. Bank v. Strand*, 106-606.

The formal rules of pleading relating to allegations and denials are not applicable to the statement and denial of claims against an estate. *Harrison v. Harrison*, 124-525.

An order of court allowing a claim is in the nature of an adjudication and a party is not entitled to have it set aside and to have a retrial as to the validity of the claim as a matter of right, but must show some ground for setting it aside. *Hendron v. Kinner*, 110-544.

The proceeding as to the allowance of a contested claim is at law. *Mosher v. Goodale*, 129-719.

the bond had been filed within the time for settling the estate. *Security F. Ins. Co. v. Hansen*, 104-264.

The limitation as to the time for filing a claim is not controlling where the claim is contingent. *Easton v. Somerville*, 111-164.

Section applied as to contingent claims. *In re Allen's Estate*, 116-697.

approval, has any power to submit claims to arbitration. *Sullivan v. Nicoulin*, 113-76.

imposes upon his estate. But such charges should be reasonable. A decent burial should comport with the social condition

of the deceased and the amount of his fortune. *Foley v. Brocksmit*, 119-457.

Claims on account of the last sickness and funeral of the deceased are not barred by failure to file within a specified time, and so long as the estate is solvent and unsettled the payment may be in-

sisted upon as against the administrator. *Wolfe v. Knapp*, 127-479.

A claim for attorney's fees rendered for the administrator is not a claim against the estate. *Clark v. Sayre*, 122-591.

SEC. 3348. Other demands—order of payment.

Charges of the last sickness and funeral are not included within the class of claims here enumerated. *Wolfe v. Knapp*, 127-479.

Until the time for filing claims has expired the court cannot know judicially that there are no claims against the estate. *Seery v. Murray*, 107-384.

The filing of a claim is equivalent to the beginning of an action under the statute of limitations. *Van Patten v. Waugh*, 122-302.

Where the claim as filed was on a promissory note of which the claimant was holder, and an amendment of the claim so as to show that the claimant was surety for the deceased on the note and had paid it, was filed, held, that as the statutory limitation against a claim by the surety against the deceased had run when the amendment was filed, there could be no recovery. *Ibid.*

Where no other provision is made by will, the debts and charges against the

estate of decedent are payable from the personal property of the estate, if it be sufficient for that purpose. *Pitkin v. Peet*, 108-480.

Under the evidence in a particular case, held that it was a question for the jury to determine whether services rendered to the deceased by a claimant were rendered by him as a member of the family of the deceased. *In re Estate of Bishop*, 130-250.

The fact that a valid claim, paid by the administrator, was not properly filed, is not ground for disallowance on the administrator's report. *In re Estate of Pennock*, 122-622.

The executor or administrator takes title to the property of the deceased as trustee for the creditors if the estate is insolvent and may assert the claims of the creditors as against an unrecorded chattel mortgage. *Blackman v. Baxter*, 125-118.

SEC. 3349. Limitation.

In general: Until the statutory period for filing claims has commenced to run by reason of giving of notice and has expired without claims being filed, the court cannot know in the settlement of the administrator's accounts that the estate is not indebted. *Ellyson v. Lord*, 124-125.

Charges of the last sickness and funeral are not barred after one year from the time after notice of the appointment of the administrator. *Wolfe v. Knapp*, 127-479.

The special limitation as to the filing of claims supersedes the general statute of limitations, and stops the running thereof as to such claims. *Alice E. Mining Co. v. Blenden*, 136 Fed. 252.

The publication of notice which starts the running of the period of limitation for the filing of claims is sufficient if made on an order of the clerk, endorsed on the letters of appointment. *Mosher v. Goodale*, 129-719.

The administrator having a claim against the estate is not excused from filing it within the statutory period. *In re Estate of Ring*, 132-216.

The burden is upon defendant to establish the bar of the claim by limitation under this section, and for that purpose the proper giving of notice must be estab-

lished. *McConaughy v. Wilsey*, 115-589.

Equitable relief: Notice by publication having been duly given, a resident of the state is bound to file his claim within the statutory period, and will not be entitled to equitable relief merely because he has not had actual notice or has put the claim into the hands of a general collecting agent who has failed to file it within the proper time. *Hawkeye Ins. Co. v. Lisker*, 122-341.

Equitable relief from the statutory limitation of time for filing claims will not be extended to one who has been negligent in presenting his claim. *Bentley v. Starr*, 123-657.

One who elects to look to the guardian for payment of a claim against a deceased ward instead of filing such claim against such ward's estate cannot have equitable relief against the bar of the statute. *Ibid.*

The mere promise of an administrator to pay a claim is not sufficient excuse for delay in not filing and serving notice thereof. But it may be sufficient, if coupled with a request of the administrator, acted upon by the claimant, that the filing of the claim be postponed. Under the evidence in a particular case, held that there was not such showing of postponement at the request of the administrator

as to justify the granting of equitable relief. *Mosher v. Goodale*, 129-719.

Where the holder of a note against deceased was induced to withhold the filing of his claim by the false and fraudulent representations of the executor that the estate was insolvent, held that equity would permit the filing of the claim notwithstanding the statutory bar had accrued, it appearing that the estate was solvent and still unsettled. *Henry v. Day*, 114-454.

Where a person having a claim against an estate, consisting of a note in the hands of a bank, directed an officer of the bank to take proper steps to have the claim presented, and was afterwards assured by such officer within the time for filing claims that the note had been properly filed, which was not true, and was thereby misled, held that he was entitled to equitable relief, although the estate had been otherwise fully settled and the personal property distributed, it appearing that there was real estate belonging to decedent against which the claim might be enforced. *Manatt v. Reynolds*, 114-688.

A claim of a municipal corporation against the estate of a deceased person must be filed within the time required by this section and the negligence of the officers of the corporation in failing to file the claim in proper time will not be a ground for equitable relief. *In re Jacobs' Estate*, 119-176.

SEC. 3353. Order of payments—dividends.

The property of the estate is bound for

the payment of debts so far as it will go. *Blackman v. Baxter*, 125-118.

SEC. 3355. Specific legacies.

Within the twelve months allowed for filing claims, the testator has no authority without order of court to pay over lega-

cies, whether general or specific. *Montgomery v. Gilbertson*, 111 N. W. 694.

Where the date of giving notice does not appear the limitation cannot be applied. *Ibid.*

The minority of the claimant is not a peculiar circumstance such as to entitle him to equitable relief against the statutory limitation. *Boyle v. Boyle*, 126-167.

Where the deceased was surety on a bond in which principal and sureties obligated themselves, and their "heirs, executors and administrators," liability on which bond did not accrue until after the period fixed for filing claims against the estate, held, that such liability could be enforced against the estate in the hands of the distributees, although no claim under the bond had been filed within the time for settling the estate. *Security F. Ins. Co. v. Hansen*, 104-264.

The limitation as to the time for filing a claim is not controlling where the claim is contingent. *Easton v. Somerville*, 111-164.

Where the date of giving notice does not appear the limitation cannot be applied. *Ibid.*

CHAPTER 4.

OF THE DESCENT AND DISTRIBUTION OF THE INTESTATE'S PROPERTY.

SECTION 3362. Personal property.

Under our law the right to a distributive share of personality in the estate of an intestate vests instantaneously in the heir upon the death of the owner and not from the time of distribution made. Distribution gives to the distributee no new title, but only ascertains the property to which title attaches. *Christe v. Chicago, R. I. & P. R. Co.*, 104-707.

After the time for administration has expired so that there are no claims of creditors on the property, the heirs of the deceased may maintain an action in their

own names for the recovery of the assets of the estate. *Ibid.*

After the expiration of time for granting administration so that claims of creditors are no longer involved, the personal property of a deceased person vests in his heirs and any settlement they have made or may make in regard to the estate will be binding upon them. *Ibid.*

The heir has an interest in the personal estate of his ancestor prior to any distribution by administration, and in the absence of indebtedness of the estate the

heirs who are entitled to share in the distribution may by agreement determine the rights to their respective shares, even as against an administrator subsequently appointed. *Douglas v. Albrecht*, 130-132.

While heirs may by mutual agreement settle the estate of a deceased person and render administration of the estate unnecessary, the guardian of the deceased cannot in a proceeding for the settlement of his guardianship take advantage of an arrangement between him and the prospective heirs of his ward by which on the death of the ward he is to become entitled to the ward's estate. *In re Guardianship of Lindsay*, 132-119.

The legal representative has the right of possession of all personal property owned by the deceased, and this cannot be limited by contracts of, or liens created by the heirs, nor can he be required by the heirs to satisfy the debts of the decedent out of one portion of the personal estate rather than another. *Foss v. Cobler*, 105-728.

Heirs are not entitled to possession of personal property until through distribution or the expiration of the period of limi-

tation for administration their interest therein has been definitely ascertained. *Ritchie v. Barnes*, 114-67.

Since the adoption of the Code of '73 the husband cannot by will dispose of the distributive share of the widow in personal property. *Poole v. Burnham*, 105-620.

In determining whether the widow is entitled to her distributive share, a contract of separation between herself and her husband releasing her interest in his property cannot be taken into account, although made in another jurisdiction where it would be valid and enforceable. *Caruth v. Caruth*, 128-121.

The personal estate of a decedent will be distributed according to the law of his domicile, irrespective of the place of administration. *In re Estate of Titterington*, 130-356.

A person cannot have two domiciles at the same time, and a domicile once gained remains until a new one is acquired. To effect a change of domicile, there must be actual residence in the new domicile with the intent that the new residence shall constitute his domicile. *Ibid.*

SEC. 3364. In kind—proceeds distributed.

Money recovered for the wrongful death of a person leaving a father or mother, and no wife or children may, when paid to the clerk in satisfaction of such judgment, be applied to the satisfaction of judgments against the father and mother. *Cassady v. Grimmelman*, 108-695.

The executor may discharge his trust as to the distribution of the estate by making division of shares of stock among those entitled to participate in the distribution. *In re Estate of Fisher*, 128-626.

SEC. 3366. Share of surviving spouse—dower.

Extent of dower right: The share of the widow cannot be increased beyond a one-third interest in the real estate of which her husband was seized during his lifetime, by reason of any advancements which he may have made to his children by a prior marriage before the marriage to the claimant. *Burgoon v. Whitney*, 121-76.

Under the statutes in force from 1853 to 1862, the widow's dower was a life interest in one-third of the real property of which the husband was seized during coverture. *Bottorff v. Lewis*, 121-27.

The widow is entitled to her one-third share of the proceeds of her deceased husband's realty, which has been sold by the administrator for the payment of debts, free from deduction for taxes, repairs and expenses. *Wild v. Toms*, 123-747.

The widow who has one-third of the estate of her husband set off to her as her property in fee simple, thereby relin-

quishes any right of homestead she may have had in the property. The right of homestead can be preserved only by electing to retain the homestead in lieu of a distributive share in fee. *Edinger v. Bain*, 125-391.

So held where the widow claims one-third of the proceeds of her husband's estate sold for the purpose of paying debts; and held that no intention to invest her share in the acquisition of a new homestead would exempt therefrom liability for her debts. *Ibid.*

A title bond or contract for a deed is sufficient to create in the vendee an equitable estate in which his wife is entitled to dower; but if by assignment of the contract on the part of the husband the rights thereunder are transferred to another, and by him to a third, who has no knowledge of the contingent rights of the wife of the original vendee, she cannot assert her dower interest as against the innocent

holder of the contract for value, although she did not join in the assignment. *Hutchinson v. Olberding*, 112 N. W. 647.

When attaches: Possession of real property adverse as against the husband does not become adverse as against the wife's right of dower until the death of the husband, if the possession is not under a judicial sale or in pursuance of a relinquishment of dower by the wife; and the statute of limitations as against the wife's right to dower under such circumstances does not commence to run until the death of the husband. *Lucas v. Whitacre*, 121-251.

The dower interest attaches when the title passes from the government, although no patent has issued. *Purcell v. Lang*, 108-198.

Relinquishment or conveyance: The widow may relinquish her dower interest by agreement, although not made by way of formal conveyance. *Wright v. Breckenridge*, 125-197.

The marital interest of one spouse in the property of the other cannot be the subject of contract between them, and a contract or conveyance executed to the wife by the husband in consideration of her release of her contingent dower interest is invalid. As a gift to the wife, such conveyance from an insolvent husband is fraudulent as to creditors. *Sharff v. Hayes*, 132-609.

By an antenuptial contract fairly entered into, the consideration being that of marriage, the wife may be deprived of her interest in her husband's property, but if the contract operates to deprive the wife of such interest without provision for her in the event she survives her husband, the burden is upon the husband or those representing him to show that the contract was fairly procured. *Fisher v. Koontz*, 110-498.

An agreement between husband and wife for future separation involving a release by the wife of her contingent dower interest in her husband's land is invalid. *Baird v. Connell*, 121-278.

While a widow may in equity sell and convey her dower interest before assignment, yet she has no power to execute a mining lease for the premises, or any portion thereof. *Hook v. Garfield Coal Co.*, 112-210.

Although a married woman cannot bind herself by release to her husband of her contingent interest in his property, yet after conveyance of property by the husband in which the wife has not joined she may by quitclaim to her husband's grantee bar her dower interest. *Fowler v. Chadima*, 111 N. W. 808.

Tenants in common: Where husband and wife are owners in common of property, a conveyance by one of them of his share does not cut off the dower interest

of the other in the share thus conveyed. *Noecker v. Wallingford*, 133-605.

Estoppel: The fact that the wife who has been abandoned by her husband knows that he has married another woman, who believes her marriage to be lawful and cares for the children of the first marriage, will not estop the first wife from claiming dower in the estate of her husband after his decease. Failure of the first wife to reveal her relationship will not defeat her rights. *Dunn v. Portsmouth Sav. Bank*, 103-538.

The widow who has joined in a conveyance of land during the lifetime of her husband cannot after his death have such conveyance set aside as fraudulent if she has received and retained the consideration for such conveyance. *Willis v. Robertson*, 121-380.

In the absence of unreasonable delay or estoppel the widow is not barred from asserting her statutory right to a share in the lands of her husband conveyed by him to an innocent purchaser and as to which she has made no relinquishment. *Beeman v. Kitzman*, 124-86.

Judicial sale: The sale of land by a sheriff under a trust deed executed by the husband alone to secure payment of his debt which was made in accordance with the authority contained in the deed, and was valid when made under the provisions of § 2906 of the Code of 1851, held to cut off the dower interest of the grantor's widow. *Pierce v. O'Neil*, 132-530.

The widow's dower right is barred by a sale of property of the deceased ordered on proper application for the payment of debts of the estate. *In re Estate of Pennock*, 122-622.

The exception in the statute as to dower in property sold at execution sale has no application as against a widow who claims under a title adverse to that of the party against whom the execution sale was made. *Sherod v. Ewell*, 104-253.

Widow causing death: Prior to the amendment of Code § 3386 by 29 G. A., chap. 135 (see Code Supplement, § 3386), it was held that under that section the widow causing the death of her husband was not thereby precluded from asserting her dower interest in his property. *In re Estate of Kuhn*, 125-449.

Specific performance: In an action for specific performance of a contract to convey made by the husband as owner, in which his wife has not joined, the purchaser asking specific performance may be allowed to retain one-third of the purchase price until it is determined whether the wife outlives the husband, and a lien for the portion of the price thus retained should be created on the property; but the purchaser should not be required to pay interest on the amount thus retained. *Bradford v. Smith*, 123-41.

SEC. 3367. Homestead.

As between the dower right and the right to occupy the homestead for life it will be presumed that the widow is claiming her dower right unless her election to take the homestead right appears, and to show such election to retain the homestead by continuance of occupancy it must appear that the premises occupied were in fact the homestead of the deceased husband. *Peebles v. Bunting*, 103-489.

Mere delay in setting apart the widow's distributive share will not show an election to retain the homestead in lieu of the distributive share where the circumstances show that the right to the distributive

share was being constantly asserted and recognized. *Wold v. Berkholtz*, 105-370.

The widow may set up the homestead character of premises in which she is entitled to a distributive share without thereby electing to accept occupancy of the homestead in lieu of dower. *In re Estate of Lund*, 107-264.

It not appearing that the distributive share set apart to the widow is so selected as to include the homestead, such distributive share is not exempt from her debts contracted prior to the setting apart thereof. *Benjamin v. Doerscher*, 105-391.

SEC. 3368. Survivor a non-resident.

This section has no application where the grantor is not shown to have been

an alien, although his wife was a non-resident alien. *Casley v. Mitchell*, 121-96.

SEC. 3369. Setting off survivor's share.

A widow may have her dower admeasured from land owned by the husband during coverture as to which she has not joined in a conveyance. *Hyatt v. O'Connell*, 130-567.

The fact that funds derived by the husband from the sale and conveyance of land by him alone have been used in the support of the wife as a member of the family will not estop her from claiming a dower interest in such land. *Ibid.*

The widow's right to recover for rents and profits derived from land thus conveyed by her husband commences with demand for assignment of dower. *Ibid.*

On the death of the widow after she has become entitled to a distributive share, her heirs may have such share set apart. *In re Proctor's Estate*, 103-232.

The wife's distributive share in real property should be charged with its proportionate share of a mortgage on the entire real estate. *Trego v. Studley*, 106-742.

Unassigned dower interest is not subject to levy under execution. *Brightman v. Morgan*, 111-481.

Where two or more distinct tracts of land are by the will given to different parties, and the widow has her dower assigned in a lump out of one of them, the person to whom such tract passes by the will has the right of contribution against the person or persons to whom the other

tract or tracts pass by the will. *Morey v. Morey*, 113-152.

The right of action of the widow to recover her dower interest in premises conveyed by her husband during the coverture, as to which she has not joined in the conveyance, does not accrue so as to set the statute of limitations running until the death of the husband. *Lucas v. White*, 120-735.

Dower may be assigned by proceedings in equity as well as at law. Such assignment may be made in an equitable action in the nature of a suit for partition. *Beeman v. Kitzman*, 124-86.

As against a grantee of the husband under a conveyance in which the wife has not joined to relinquish her dower interest, the right of the widow accrues twenty days after the death of the husband, and must be asserted within the statutory period of limitations. *Britt v. Gordon*, 132-431.

While application for admeasurement of dower must be brought within ten years from the death of the husband, this limitation does not apply to an action in equity to establish a dower right, or for protection of the distributive share. But the general statute of limitations is applicable to any such action. *Britt v. Gordon*, 132-431.

SEC. 3376. Share not affected by will—election—made by court. The survivor's share cannot be affected by any will of the spouse, unless consent thereto is given within six months after a copy thereof has been served upon the survivor by the other parties interested in the estate, and notice that such survivor is required to elect whether consent thereto will be given, which consent, when given, shall be in open court, or by a writing filed therein, which shall be entered on the proper records thereof; but if at the expiration of six months no such election has been made, it shall be

conclusively presumed that such survivor consents to the provisions of the will and elects to take thereunder. But when such surviving spouse is mentally incapable of making such election, the court on petition being filed alleging such disability, may set the matter down for hearing at such time and place as it may deem best, and direct what notice thereof shall be given; and at such hearing the court may enter an order electing for such spouse, which shall be the election under this section, of the person under such disability. [C., '73, § 2452; R., § 2435; C., '51, § 1407.] [30 G. A., ch. 121.]

Devise in lieu of dower. Under the provisions of Code of '73 the grant of a life estate to the widow without provision that such grant should be in lieu of dower was not inconsistent with her taking a dower interest in the estate and in such case no election was required. *Sutherland v. Sutherland*, 102-535; *in re Proctor's Estate*, 103-232.

Under the provisions of the Code of '73 an affirmative act on the widow's part was necessary to deprive her of her distributive share and this affirmative act was required to be evidenced in a stated manner. In the absence of some record of election the fact of election to take under the will, could not be shown. *Byerly v. Sherman*, 126-447, 102 N. W. 157.

Under the language of § 2452 of the Code of 1873, it was held that the acceptance of the provisions of a will did not bar the wife's dower right, unless the will so expressly provided, or there was some necessary inconsistency between the dower right and the provisions of the will. But such rule is changed by the language of § 3270 of the present Code. *Keifer v. Gillett*, 120-107.

Under the statutory provisions in force before the adoption of this section, held, that a provision in the will charging the estate with support of the widow during her life, was not inconsistent with her dower interest, and no election between the provisions of the will and dower was required. *Bentley v. Bentley*, 112-625. See notes to Code § 3270 in this Supplement.

A widow who has elected to take, under the provisions of a will, cannot claim a distributive share under the statute. *In re will of Wiltsey; Wiltsey v. Wiltsey*, 122-423.

A widow may take a life estate under a will, and also her distributive share under the law, unless the latter will be so incompatible with the provisions of the will as to disturb, affect, interrupt or disappoint such provisions. But when the will clearly indicates the intent that the devise to the widow shall be in lieu of her distributive share, she cannot take both, and if she elects to take under the will her declaration that she also claims her distributive share is of no consequence. *Parker v. Parker*, 129-600.

Under the facts in a particular case held

that the provisions of the will, giving a life estate to the widow, were inconsistent with her taking a dower interest. *Ibid.*

Upon renouncing the will the widow becomes entitled to one-third in value of the husband's estate, and cannot claim the additional one-sixth to which she is entitled by inheritance in the absence of direct heirs, the property having been otherwise disposed of by the will which she renounces. *Wright v. Breckenridge*, 125-197.

Election: Where the acts of the widow with reference to the property were properly referable to her position as administratrix, rather than to any claim of hers under the will, held, that they did not show an election to take under the will. *In re Proctor's Estate*, 103-232.

Where the widow fails to claim her dower right and thereby induces a claimant of the property to treat it as having full title, she is estopped from afterwards asserting her right therein. *Goldizen v. Goldizen*, 107-280.

Where the surviving husband failed during his lifetime to make any claim of a distributive share in addition to the devise made to him in the will, and his heirs likewise failed to make any such claim through him for ten years and until the property had been improved at considerable expense by those claiming it under the will, held that such heir was estopped from asserting any claim to an interest in a distributive share. *Lewis v. Sherwin*, 129-682; 104 N. W. 511.

Under the provisions of § 2452 of Code of '73, held that an election to accept under the provisions of the will might become effective without being entered of record. *Brighton v. Morgan*, 111-481.

Where no copy of the will has been served on the widow she is not called upon to elect between the provisions of the will and her statutory right of dower, and acceptance of a benefit under the will does not defeat her dower right. *Newberry v. Newberry*, 114-704.

In order to estop the widow from claiming under the statute, notwithstanding the terms of the will, there must be a strict compliance with the statutory requirements. *Warner v. Hamill*, 111 N. W. 939.

Where a life estate is given to the widow by will with the fee to her children

at her death, she takes also her statutory interest as not inconsistent with the will. *Ibid.*

If at the end of six months no election has been made it is to be conclusively presumed that the survivor elects to take under the will. But there can be no election by failure to act where no notice has been served and no consent is entered of record. *Bailey v. Hughes*, 115-304.

SEC. 3377. Election as between distributive share and occupancy of homestead.

Under the provisions of the Code of '73, held that continuous occupancy of the homestead by the widow, where she had a lease of the premises for life from the heirs, did not constitute an election to accept the homestead for life in lieu of

Where the issue is as to whether the widow has elected to take her distributive share as against the provision made for her in the will, it is not competent for a witness to testify as to the contents of the will, nor as to his understanding as to who was to take under the will. *In re Estate of Jones*, 130-177.

dower. The widow's primary right is to a distributive share, and unless she does something which deprives her of that right it will be sustained. *Robinson v. Lambertson*, 115-366. See, also, notes to Code § 2985 in this Supplement.

SEC. 3378. Descent—to children.

The provisions of 27 G. A., ch. 37, are not effectual to legalize an inheritance tax under 26 G. A., ch. 28, as to real prop-

erty descending to heirs before the curative act took effect. *Herriott v. Potter*, 115-648.

SEC. 3379. Wife and parents.

The one-sixth share which the widow takes as heir in the absence of issue, is subject to deduction on account of repairs, taxes and expenses properly paid or incurred in the administration of the estate. *Wild v. Toms*, 123-747.

Although the surviving wife or husband elects to take a homestead right in lieu of a distributive share, such election does not deprive the survivor of the right to a one-sixth interest as heir in the absence of direct disinheritance. *Hays v. Marsh*, 123-81.

The interest which the surviving wife takes beyond her dower interest in the absence of children, is taken by her as heir. *In re Estate of Kuhn*, 125-449.

The portion which would pass to the widow in the absence of direct heirs over and above her one-third dower interest cannot be claimed by her under the renunciation of a will which disposes of the entire property, for the will is effectual as to all save her one-third dower interest. *Wright v. Breckenridge*, 125-197.

SEC. 3381. Heirs of parents.

Descent cannot be claimed though a deceased non-resident alien relative any more than it can through a living relative who cannot inherit on account of being a non-resident alien. *Meier v. Lee*, 106-303.

Where property is claimed by descent under the provisions of this section through an intervening relative, such descent is mediate and not immediate. *Ibid.*

The provision that descent to collateral

heirs is to be determined by assuming that the common ancestor had outlived the intestate and died in the possession of a portion falling to his share is for the purpose only of determining the right of inheritance of such collateral heirs. Such right being ascertained, the descent is direct from decedent to such heirs. *In re Hulett's Estate*, 121-423.

SEC. 3381-a. Parents by adoption—wife. One-half of the estate of any adopted child who shall die intestate and leaving no issue, shall descend to the parents by adoption of such child, and the other half to his or her surviving spouse. If one of the parents by adoption be dead, in case there was more than one such parent, the portion which would have gone to such parent shall go to the surviving parent by adoption. If such child leave no surviving spouse, his entire estate shall go to his parents by adoption; or if he leave but one such parent then to such parent. [29 G. A., ch. 136, § 1.]

SEC. 3381-b. Heirs of parents by adoption. If the adopted parent or parents, if more than one, be dead, the portion which would have gone

to such parent or parents had they or either of them survived the intestate, shall be disposed of in the same manner as if such parent or parents had outlived the intestate and died in possession of such share, and so on through their ascending ancestors. [29 G. A., ch. 136, § 2.]

SEC. 3381-c. Natural parents. If heirs are not thus found, the portion thus uninherited shall go to the natural parents of the intestate, and in case of their death then to their heirs under the ordinary rules of descent. [29 G. A., ch. 136, § 3.]

SEC. 3383. Advancements.

An advancement is an irrevocable gift, made by a parent to a child in anticipation of such child's future share of the parental estate. It must be voluntary, and must have been made with the intent on the part of the parent that it shall be taken into account on the settlement of the estate. But where a voluntary gift from parent to child is shown, the rule is that it is presumed to be an advancement, unless paid to or for the child for his education, maintenance or support, or otherwise in the discharge of ordinary parental duties. *Bissel v. Bissell*, 120-127.

Advancements made by a testator prior to the execution of his will, even designated as such at the time made, are taken to be gifts pure and simple, and cannot be considered in the settlement of the estate under the will, unless such instrument so directs in specific terms. *In re Cumming's Estate*, 120-421.

The question of whether a gift of property to an heir is a pure gift or an advancement depends upon the intent of the donor at the time of the transfer, and this intent may be established by his declarations prior to the time of the transfer, or contemporaneous with it. *Ellis v. Newell*, 120-71.

But such declarations, like other admissions, are generally regarded as unsatisfactory evidence on account of the ease with which they may be fabricated, the impossibility of contradiction, and the consequences which the slightest mistake or failure of memory may produce. *Ibid.*

Subsequent declarations, however, not a part of the *res gestae*, are not admissible to show that the transaction was a gift, rather than an advancement. *Ibid.*

Advancements for the purpose of distribution and division are treated as part of the estate, but for no other purpose. The donee cannot be required to refund any portion thereof, nor can it be taken for debts of the estate. *Ibid.*

Book entries of advancements, when shown to have been made by an ancestor, are evidence both of the fact of the advancements and of the intention with which they are given. *Whisler v. Whisler*, 117-712.

The value of land given to a prospective heir by way of advancement is to be

reckoned as of the date of the death of the intestate owner. *Eastwood v. Crane*, 125-707.

An advancement to an heir previously given and received constitutes no consideration for a promissory note subsequently given in payment of the property received under such advancement. *Marsh v. Chown*, 104-556.

The doctrine as to advancements is applicable only in cases of intestacy. *McCormick v. Hanks*, 105-639. *In re Estate of Hall*, 132-664.

The statutory provision as to advancements has no application unless the ancestor dies wholly intestate. The doctrine of advancements rests upon the presumed desire of an ancestor to equalize his estate among his heirs. When he makes a will he thereby expresses his intention in this respect and the presumption does not apply. *Gilmore v. Jenkins*, 129-686.

Where the father purchases land, the title to which is taken in the son's name the presumption is in favor of an advancement rather than a resulting trust, until the contrary intention is shown. *Culp v. Price*, 107-133.

An execution purchaser of an heir's interest in realty does not acquire priority over the right existing against the heir to deduct advancements from such interest. *Pinckney v. Collie*, 114-441.

An acknowledgment of indebtedness with agreement and promise to pay at the death of the payee, and then to be deducted from the share of the estate of the payee coming to the debtor, is not an advancement, but an acknowledgment of indebtedness, and a devise to such payee does not constitute an extinguishment thereof. *Kinney v. Newbold*, 115-145.

By arrangement between the owner of property and a son extinguishing indebtedness of the son to his father in consideration of relinquishment by the son of all interest in his estate, the son's indebtedness may be converted into an advancement, and in such case the son will have no interest in the father's estate on his death. *Hickey v. Davidson*, 129-384.

While interest is not usually to be computed on an advancement, the arrangement for an advancement may include in-

debtedness with interest accrued at the time. *Ibid.*

An advancement to children, made before remarrying, will not give the second wife of their father a greater interest than a one-third interest in the real property of which he is seized during coverture. *Burgoon v. Whitney*, 121-76.

The right to treat an indebtedness of the heir to the ancestor as an advancement is not affected by a discharge of the heir in bankruptcy. *In re Estate of Russell*, 129-498.

The doctrine as to advancements is not applicable where the prospective heir takes

title to property of the ancestor without the knowledge of the latter. *Moore v. Scruggs*, 131-692.

If a legacy is given by a parent or one standing *in loco parentis* and the testator afterwards makes an advancement or gift of money or property of the same kind to the same beneficiary, the presumption will arise that the gift was intended in satisfaction or substitution for the prior legacy, and unless this presumption is rebutted, an ademption in full or *pro tanto*, as the gift is equal to or less than the prior benefit, will occur. *Davis v. Close*, 104-261.

SEC. 3384. Illegitimate children—inherit from mother.

An illegitimate child inherits from the mother, and the fact of the mother's death before descent cast will not prevent the child from inheriting her share of the

estate which would otherwise have descended to her. *Johnson v. Bodine*, 108-594.

SEC. 3385. From father.

The recognition required by this section is sufficient if it is extensive, though not universal. The words "general and notorious" should be construed with reference to the circumstances and surroundings of the parties. And held that the evidence in a particular case was sufficient to show such recognition as to entitle an illegitimate son to inherit. *Van Horn v. Van Horn*, 107-247.

Recognition in another state will entitle an illegitimate son to inherit from his father, although the laws of such state do not provide for such inheritance. *Ibid.*

A statute as to inheritance by illegitimates must, like other statutes in derogation of the common law, be liberally construed with a view to promote its object and assist the party in obtaining justice. *Ibid.*

The burden of proof to establish the parentage and recognition required rests upon the child claiming the right to inherit. *Watson v. Richardson*, 110-673.

Evidence in a particular case held not sufficient to establish such recognition in writing as to entitle the claimant to inherit. *Ibid.*

Declarations of the putative father are competent to show general or notorious recognition, but such evidence must be carefully scrutinized. In a particular case held that the evidence of such recognition was not sufficient. Evidence of current rumors or reports, where the putative father lived at the time of the birth of the illegitimate child, to the effect that

such child belonged to him, is admissible to show paternity. *Ibid.*

The recognition contemplated by the statute is not recognition as prospective heir, but recognition as an illegitimate child. If the conditions required by the statute exist at the time of the death of the ancestor the child is entitled to inherit under this section. It is immaterial that the recognition antedated the enactment of the statutory provision authorizing inheritance by illegitimates thus recognized. *Alston v. Alston*, 114-29.

Evidence in a particular case held sufficient to show such recognition as to entitle an illegitimate son to inherit. *Ibid.*

The right of an illegitimate child, duly recognized, may be interposed in a partition proceeding to which the legitimate heirs of the deceased are parties. *Ibid.*

Declarations in letters to an illegitimate child held to amount to such recognition as to entitle the child to inherit from the person who, by the letters, admitted himself to be her father. *Britt v. Hall*, 116-564.

In a partition proceeding held that the evidence of recognition was sufficient to entitle the illegitimate child to a share in the estate of his father. *Morgan v. Strand*, 133-299.

Evidence of recognition in particular cases held not sufficient. *Brown v. Iowa Legion of Honor*, 107-439; *Markey v. Markey*, 108-373; *McCorkendale v. McCorkendale*, 111-314; *Duffy v. Duffy*, 114-581.

SEC. 3386. Heir or beneficiary causing death or disability. No person who feloniously takes or causes or procures another so to take the life of another shall inherit from such person, or receive any interest in the estate of the decedent as surviving spouse, or take by devise or legacy from him, any portion of his estate; and no beneficiary of any policy of insurance

or certificate of membership issued by any benevolent association or organization, payable upon the death or disability of any person, who in like manner takes or causes or procures to be taken the life upon which such policy or certificate is issued, or who causes or procures a disability of such person, shall take the proceeds of such policy or certificate; but in every instance mentioned in this section, all benefits that would accrue to any such person upon the death or disability of the person whose life is thus taken or who is thus disabled shall become subject to distribution among the other heirs of such deceased person, according to the foregoing rules of descent and distribution in case of death, and in case of disability the benefits thereunder shall be paid to the disabled person. [29 G. A., ch. 135, § 1.]

Prior to the amendment of this section dower right. *In re Estate of Kuhn*, 125-449. held it did not apply to the widow's

CHAPTER 5.

OF ACCOUNTING AND MISCELLANEOUS PROVISIONS.

SECTION 3394. Report.

The oversight and direction of the settlement of estates is committed to the district court, and its discretion in determining whether the executor shall be required to make final report and close the estate, will not in general be interfered with. *Wheeler v. Long*, 128-643.

Decisions of the court as to intermediate reports are not conclusive, so as to prevent the correction of mistakes therein, when the final report is presented. *In re Estate of Smith*, 133-142.

The allowances of a claim against the estate by a special administrator in favor

of a general administrator, which is approved by the court, cannot be attacked by exception to the final report. *In re Estate of Pennock*, 122-622.

Where the executor has made use of the funds of the estate in his own business he should account for interest thereon at the rate of six per cent. per annum, with annual rests. *In re Brown's Estate*, 113-351.

The administrator may be allowed valid claims paid, although not filed against the estate. *In re Estate of Pennock*, 122-622.

SEC. 3398. Mistakes corrected.

Mistakes in settlement may be corrected at any time before final settlement, and the provisions of the next section limiting the time within which application may be made to open up accounts settled in the absence of parties in interest, held to have no application to mistake or fraud in the settlement of the administrator's intermediate accounts. *Dorris v. Miller*, 105-564.

An action in equity may be maintained to correct a final settlement in a probate proceeding which has been entered

through mistake. *Tucker v. Stewart*, 121-714.

Where the administrator, by falsely reporting the assets of the estate in his hands, induces the guardian of minors interested in the distribution of the estate to accept his note without security, and thereby procures his discharge as administrator, such fraudulent settlement may be set aside in an action in equity. *Tucker v. Stewart*, 121-714.

SEC. 3399. Settlement contested.

Where the executor uses money of the estate in acquiring property in his own name, a settlement based on a report in which he claims credit for such property as belonging to the estate should be set aside. *In re Brown's Estate*, 113-351.

The office of exceptions to executor's report is not to demand affirmative relief, but to call the attention of the court to errors of admission or commission in the

statements of the account. The report and the objections form the issues to be tried and involve no more than the correctness of the account presented by the executor as such. The individual liability of the executor is not involved. *Ibid.*

Intermediate orders are not conclusive in a final contest as to the correctness of the accounts of the administrator. *In re Mannig's Estate*, 111 N. W. 409.

If money received from the estate is in fact used for its benefit, mismanagement of the affairs of the estate will not defeat the right to recover the money so used, unless the claimant is a party to such mismanagement. *Ibid.*

Mistakes in settlements by administrators may be corrected at any time before final settlement and discharge and the correction may include the allowance of the attorney's fees to the administrator although approved on a prior *ex parte* application. *In re Estate of Sawyer*, 124-485.

Liability of an administrator for conversion of the property of deceased must be determined in proceedings relating to his accounting, and cannot be made the

subject of an action against him by a special administrator subsequently appointed. *Garretson v. Kinkead*, 118-383.

A claimant is not estopped from questioning the correctness of the report of an executor, or by the acts of attorneys representing such executor, although they may for some purposes also represent the claimant. *In re Cummings' Estate*, 120-421.

Where an order has been made for an allowance of support to the widow, and the money has been paid over in accordance with such order, the action of the court should not be questioned, even for fraud, after the lapse of two years or more. *Busby v. Busby*, 120-536.

SEC. 3400. Discharge.

The report of the executor should not be approved where it appears that he still has funds to distribute. *Lippert v. Lippert*, 110-550.

The settlement of the final accounts of an executor and his discharge, terminate his power as to real estate, which, by the provisions of the will, he is directed to convert into money. Final settlements seldom, if ever, involve the title and right

to possession of realty. *Boland v. Tiernay*, 118-59.

After an administrator has been garnished on a claim against the estate, he cannot secure a discharge without reporting such contingent liability and thus defeat the claim without rendering himself personally liable. *Geiger v. Gage*, 111 N. W. 804.

SEC. 3403. Notice of order—publication. When the court shall make an order affecting an executor or administrator, and it cannot be personally served upon him, service thereof may be made by publication of a notice, stating the substance of such order, in some newspaper published in the county where such order was made, once each week, for four weeks in succession, which publication may be proved as in case of original notice. [C., '73, §§ 2479-80; R., §§ 2474-5.] [31 G. A., ch. 9, § 10.]

SEC. 3405. Failure to account.

This section imposes a penalty which accrues to the estate immediately upon the default of the executor, and if the probate court has not exonerated the executor for

the default he cannot be heard in an action against him on his bond to set up an excuse. *Lippert v. Lippert*, 110-550.

SEC. 3415. Compensation.

The compensation provided for by statute does not cover services in making investments, passing on the value of securities, and transacting like business for deceased, but additional compensation cannot be awarded where there is no evidence offered as to the value of such additional services. *Fitzgerald v. Paisley*, 110-98.

An allowance to executors of an annual salary for services in addition to the statutory compensation will not be held to include the percentage; and such allowance will be held to apply to past as well as future services, where not otherwise specified, as it is not necessary that such salary be fixed in advance. *Anderson v. Sabin*, 132-507.

Compensation received by executors in

excess of that fixed by statute will be presumed to be for extraordinary services unless the contrary is shown. *Ibid.*

The statutory allowance of compensation is not intended as a mere bonus or retainer leaving the administrator at liberty to charge and collect the reasonable value of his services in addition thereto. If anything farther is allowed, it is only for necessary extraordinary expenses and services and on good reasons clearly shown to the court. *In re Estate of Sawyer*, 124-485.

Attorney's fees incurred by an executor in a proceeding to construe the provisions of the will may properly be allowed out of the funds of the estate, but where the purpose of the application by a devisee to

have the will construed is to have his right to a share under the will established, there is no occasion for allowing attorney's fees as against the estate. *In re Nicholson's Will*, 123-630.

The statute authorizes an allowance to an administrator for his actual, necessary and extraordinary expenses which would include attorney's fees for services rendered the administrator, but the attorney rendering such services has no claim therefor against the estate. *Clark v. Sayre*, 122-591.

An attorney is not entitled to compensation out of the estate for services rendered to an administrator in an attempt to

perpetuate himself as administrator of the estate, the effort to secure such appointment being unsuccessful. *Dorris v. Miller*, 105-564.

Generally speaking, an executor or administrator is not *prima facie* chargeable with interest during the time the law allows for collecting the estate and settling the accounts, which is usually one year after administration is taken. *Ibid.*

No liability on the part of the administrator, such as will defeat his right to compensation, attaches by reason of mere mistake of judgment as to the property which he is entitled to control. *In re Estate of Ring*, 132-216.

SEC. 3422. Notice of application for discharge.

There is no provision of statute for notice to other persons than parties interested in the estate of the application of

an executor or administrator for discharge. *Potter v. Brentlinger*, 117-536.

PART THIRD.

CODE OF CIVIL PRACTICE.

TITLE XVIII.

OF PROCEDURE IN COURTS OF ORIGINAL JURISDICTION.

CHAPTER 1.

OF PRELIMINARY PROVISIONS.

SECTION 3424. Proceedings.

Every proceeding in court is an action, and the word "action," as employed in this section has a technical meaning. *Morris v. Lowry*, 113-544.

An action is a proceeding in court. The cause of action is the fact or facts that justify it or show the right to maintain

it. It is every fact necessary to be proven if traversed in order to support the right to a judgment. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. *Box v. Chicago, R. I. & P. R. Co.*, 107-660.

SEC. 3425. Civil and special actions.

Unless particularly provided for, a jury is not usually allowed in a special proceeding. *In re Bradley*, 108-476.

An action of forcible entry and detainer is a special proceeding. *Herkimer v. Keller*, 109-680.

The proceeding under Code § 3826 to compel an attorney to account is a special proceeding. *Union Bldg. & Sav. Ass'n. v. Soderquist*, 115-695.

SEC. 3426. Forms of actions.

The fictions of the common law have been abolished and procedure for actions of right as well as other actions is prescribed by statute. *Bevering v. Smith*, 121-607.

The plaintiff is required to make a statement of the facts constituting his cause of action, and a demand for the relief to

which he considers himself entitled, and the fact that he states two inconsistent causes of action cannot be made a ground of objection to the judgment rendered if the question is not raised in proper time and manner. *Chicago & N. W. R. Co. v. DeClow*, 124 Fed. 142.

SEC. 3427. Equitable proceedings.

One who desires to recover money paid for land, on the ground of fraud or mistake, may tender a reconveyance and bring action at law. He has no occasion for relief in equity. *Watson v. Bartholomew*, 106-576.

Not every action for an accounting is cognizable in equity. *Citizens' Bank v. Whinery*, 110-390.

Where there was an agreement that the case should be tried in equity, but the record disclosed subsequent entries showing waiver of a jury, without reference to such agreement, held that it did not sufficiently appear that the case was transferred to the equity docket. *Ibid.*

An instrument absolute in form may be shown to be a mortgage in an action at

law as well as in equity, and fraud of this character relied on does not necessitate the transfer of a law action to the equity docket. *Frick v. Kabaker*, 116-494.

Although equity has general jurisdiction of the settlement of partnership affairs, yet if in a partnership settlement one partner has withheld from the settlement specific money or property the other partner may sue for his interest therein at law. *Erret v. Pritchard*, 121-496.

Parties may be tenants in common of mining property without being partners and in such case an action by one against the other for profits and proceeds is not necessarily an equitable action. *Doyle v. Burns*, 123-488.

In an action to recover for different items of indebtedness not forming part of a continuous account, it is not necessary for transfer the case to the equity side of the docket. *Mayo v. Halley*, 124-675.

The equitable action of interpleader may still be maintained although not expressly authorized by the statute save in actions of replevin. (See Code § 3487.) *Hoyt v. Gouge*, 125-603.

An application for admeasurement of dower may be made in a probate proceeding, and when so made is to be determined at law. *Brandes v. Brandes*, 129-351.

SEC. 3428. Action on note and mortgage.

A general judgment on a note does not merge the mortgage secured thereby. *Smith v. Moore*, 112-60.

SEC. 3431. Ordinary proceedings.

This section distinguishes the method of trial in ordinary and in equitable proceedings, but does not necessarily imply a jury trial in special proceedings. *In re Bradley*, 108-476.

Plaintiff who is entitled to maintain an action at common law should not be required to proceed in equity. *Van Norman v. Modern Brotherhood*, 111 N. W. 992.

SEC. 3432. Error—effect of.

Forms of action are not controlling, and one who has brought his adversary into court is entitled to any remedy which the court can afford in any form of action, if the defendant makes no objection to the procedure. *Smith v. Haas*, 132-493.

If the case when commenced is well founded and presents an issue properly triable in equity, the court will have jurisdiction, although the equitable ground of relief is removed, and the court will retain the case for final judgment. *Heath v. Halfhill*, 106-131.

An equity action changed by amendment so as to ask only for the recovery of damages at law may still be tried in equity, in the absence of a motion to transfer it to the proper forum. *Lough v. Estherville*, 122-479.

Where, after the submission of the case on equitable issues, the plaintiff is allowed to amend his petition so as to convert his action into one at law, the submission should be set aside and the case tried by ordinary proceedings. *Hartwig v. Iles*, 131-501.

The objection that an action commenced in equity is cognizable only at law cannot be raised by demurrer. *McCormick*

Har. Mach. Co. v. Markert, 107-340; *McClure v. Dee*, 115-546.

An objection to the form of proceeding cannot be first raised on appeal. *Des Moines Sav. v. Morgan Jewelry Co.*, 123-434.

The objection that a proceeding should have been in probate instead of in equity is not jurisdictional. *Easton v. Somerville*, 111-164.

Where no objection is raised to the form of action in the trial court, and the petition discloses and the evidence tends to establish a right in the plaintiff to claim a recovery of the amount sued for, the appellate court is not justified in denying relief because the remedy was not sought in the proper forum. *Blondel v. Ohlman*, 132-257.

The plaintiff is not entitled to have his action instituted in equity transferred to the law docket on the filing of an amended petition which asks recovery only at law, if the evidence has already been taken by deposition, and the opposite party would be entitled to a continuance if the action were to be tried at law. *Saunders v. Wells*, 112 N. W. 205.

SEC. 3434. How corrected by defendant.

The fact that defendant in an action at law asks an injunction by way of cross-action does not require the transfer to the

equity docket of a proceeding by motion to dissolve such injunction. *Brody v. Chittenden*, 106-340.

The action of the court in improperly overruling a motion to change the forum will be a ground for reversal. But where the issues in an action commenced in equity are such as must be tried by the court without a jury in an action at law, a refusal to sustain a motion to transfer, even though erroneous, will be error without prejudice. *McCormick Har. Mach. Co. v. Markert*, 107-340.

The plaintiff cannot, after issue joined, be taken against his will out of a forum in which his action was properly brought,

when he has done nothing to disqualify himself from proceeding therein. Therefore held that where the action was properly brought in equity to foreclose an attorney's lien, the defendant could not, after filing his answer, by releasing the lien under the provisions of Code § 322, insist on the transfer of the case to the law docket. *Crissman v. McDuff*, 114-83.

Where the action is properly brought in equity, a defendant has no right to trial by jury of a law issue presented by his answer. *Ibid.*

SEC. 3435. Equitable issues.

Where the equitable issues are such as to dispose of the entire controversy it is not error to proceed with the trial of the action as in equity. *Twogood v. Allee*, 125-59.

The fact of the pendency in the same court of an action at law involving the same subject-matter does not prevent the court in an equitable case from determining issues arising in that case. *Clinton v. Shugart*, 126-179.

In a law action issues cognizable in equity may be transferred to the equity docket, but the issues at law in such case should not be so transferred. *Johnston v. Robuck*, 104-523.

Where the trial of the issues at law will practically settle all matters in controversy such issues should be first tried. *Ibid.*

That the pleadings in an action at law set out facts which, if true, would entitle plaintiff to equitable relief is immaterial so long as such relief is not demanded. *Boyce v. Allen*, 105-249.

An issue is not equitable within the meaning of the statutory provision as to changing the forum so long as the relief

asked or the defenses interposed are not equitable. *Ibid.*

Where an equitable defense is pleaded to a law action, while that issue may be tried by the court, the right of plaintiff to a jury trial on the case he presents is not affected. *Tufts v. Norris*, 115-250.

Error in transferring the case to the equity docket when the issues are properly determinable at law will not be a ground for reversal if the judgment rendered is such as must necessarily have been rendered under the evidence had the case been allowed to remain on the law docket. *Rat-tray v. Talcott*, 124-398.

[Substitute for the paragraph in the Code notes to this section which purports to state the case of *Carey v. Gunnison*, 65-702, the following:]

If the defense of mistake, which might be interposed in an action at law, involves facts which might also be made the ground for equitable relief, then such facts may be set up in an equitable answer, and the issue arising on such answer will be triable to the court. *Carey v. Gunnison*, 65-702.

SEC. 3437. Errors waived.

Where the objection to an equitable action is as to the forum in which it is brought and not to plaintiff's right to maintain it, the failure to move to transfer to the proper docket will be a waiver, but not where the plaintiff could not maintain his action in equity because he has a plain, adequate and speedy remedy at law. Such objection may be urged even for the first time in the supreme court. *McLachlan v. Gray*, 105-259.

Defendant in an action in which equitable relief is asked may object to the maintenance of the action on the ground that no such relief can properly be given. He is not required to move for a transfer of the case to the law docket on the theory that it is improperly brought in equity, even though damages in an action at law might be recovered for the wrong done. *Cooper v. Cedar Rapids*, 112-367.

Where the relief sought in an action might be awarded either at law or in equity, by failing to ask for a transfer of the action to the equity docket, any error in the proceedings of the case on the law docket is waived. No suit is to be dismissed or abated because of an error in the kind of proceedings. *Matthews v. Lures Drug Co.*, 110-231.

Where a case is tried without objection in equity, it is properly triable *de novo* on appeal. *Clearfield Bank v. Olin*, 112-476.

No objection being made in the trial court to the forum in which the action is brought, the objection that it should have been in probate instead of in equity cannot be raised on appeal. *Filkins v. Severn*, 127-738.

SEC. 3438. Uniformity of procedure.

This section does not necessarily require a jury trial in special proceedings. *In re Bradley*, 108-476.

Proceedings in an action of forcible entry

and detainer are to be governed by the rules applicable to ordinary actions. *Herkimer v. Keller*, 109-680.

SEC. 3439. Actions on judgments. No action shall be brought upon any judgment against a defendant therein, rendered in any court of record of the state, within fifteen years after the rendition thereof, without leave of the court, for good cause shown, and on notice to the adverse party; nor on a judgment of a justice of the peace in the state within eight years after the same is rendered, unless the docket of the justice or record of such judgment is lost or destroyed; but the time during which an action on a judgment is prohibited by this section shall not be excluded in computing the statutory period of limitation for an action thereon. The provisions of this section shall apply to all judgments rendered after the taking effect of the code of 1873, and prior to the taking effect of the code of 1897, but the time within which an action may be brought on any judgment rendered during said period, which would otherwise be barred by this amendment, is hereby extended one year after the taking effect hereof. [C., '73, § 2521.] [29 G. A., ch. 137, § 1.]

Such provision in the Code of '73 did not operate to extend the statutory period of limitation on judgments rendered before that code took effect. *Wilson v. Tucker*, 105-55.

The change in the statute made by the addition of the last clause to this section in the present Code is not applicable to judgments rendered more than twenty years before the taking effect of the Code. *Cassady v. Grimmelman*, 108-695.

The change in this section as adopted in the present Code is not applicable to judgments already rendered. *Norris v. Tripp*, 111-115.

The case of *Weiser v. McDonald*, 93-772, is followed with reference to the judgment of a justice of the peace rendered before the taking effect of the Code. *Parks v. Norton*, 114-732.

Unless an action on a judgment of a justice of the peace rendered prior to the taking effect of the Code of '97 is brought within the time limited by that Code, it must have been brought within one year after the taking effect of 29 G. A., ch. 137. *Haugen v. Oldford*, 129-156.

The time during which an action may be maintained on a judgment is now limited to the five years intervening between the expiration of the fifteen years from the rendition and the twenty years therefrom when the same is barred, and this change in the statute which reduces the period of limitation as to actions on judgments is not unconstitutional as applied to judgments rendered before the amended statute took effect, as a reasonable time for bringing action on such judgments is preserved. *Wooster v. Bateman*, 126-552.

SEC. 3439-a. Repeal. All acts and parts of acts inconsistent with this act are hereby repealed. [29 G. A., ch. 137, § 2.]

SEC. 3440. Judgments not annulled in equity.

A court of equity cannot modify a judgment rendered in an action by ordinary

proceedings. *Hornish v. Ringen Stove Co.*, 116-1.

SEC. 3443. Actions survive.

This action does not create a new cause of action for an injury causing death, but only provides that the cause of action of the party who dies shall pass the administrator as assets of the estate. *Sachs v. Sioux City*, 109-224.

An action for an injury causing death may be brought by the administrator of the deceased without regard to whether the person entitled to the estate of the deceased is a non-resident alien. *Romano*

v. Capital City Brick & Pipe Co., 125-591; *Rietveld v. Wabash R. Co.*, 129-249.

The right of action for an injury causing death accrues to the estate, and the wife cannot maintain in her own name an action for injuries resulting to her from causing the death of her husband. *Major v. Burlington, C. R. & N. R. Co.*, 115-309.

The surviving husband has no right of action against one whose negligence or wrong has resulted in the instant death of

the wife. *Seney v. Chicago M. & St. P. R. Co.*, 125-290.

To support a recovery in an action for injuries causing death it must be shown that the death was caused by the wrongful act of the defendant. *Pearson v. Wilcox*, 109-123.

In an action instituted by the administrator in behalf of the estate to recover damages for injuries to the deceased causing his death, there can be no recovery on account of pain suffered during the interval between the injury and the death. *Jacobs v. Glucose Sugar Refining Co.*, 140 Fed. 766.

The right of a vendee under a contract to convey survives to his representatives. *Cone v. Cone*, 118-458.

The assignment of choses in action is

SEC. 3445. Actions by or against legal representatives—substitution.

Where on the death of plaintiff his administrator was ordered to be substituted, but the case proceeded to judgment in the name of the original plaintiff without such substitution being made, held, that afterwards by a *nunc pro tunc* entry the court could cure the defect and validate proceedings under such judgment. *Hunt v. Johnston*, 105-311.

In a contest over the probate of a will relating to personal property, the administrator or executor of a contestant should be substituted on his death. Such contest

authorized by this section, and in an action by the assignee thereof the debtor can only interpose such defenses as existed in his favor and against the assignor before notice of the assignment. See Code § 3461. *Peterson v. Ball*, 121-544.

But it is doubted whether wages to be earned under a contract to labor for an indefinite period at a specified rate of wages is assignable as to wages to be earned in the future, so as to render the employer liable to the assignee for wages so earned. *Ibid.*

The right of action for damages for breach of contract survives to the executor, and the action therefor may be maintained by him. *Iowa-Minnesota Land Co. v. Conner*, 112 N. W. 820.

SEC. 3446. Construction of code provisions.

A statute in derogation of the common law must be liberally construed with a view to promote its objects and assist the parties in obtaining justice. *Van Horn v. Van Horn*, 107-247.

Statutory provisions as to grounds for

cannot be carried on in the interest of the deceased by his widow and heirs. *In re Will of Wiltsey*, 122-423.

The sum recovered by the personal representatives of one who has through the negligence of another received injuries causing his death will be distributed according to the law of the state where the injury causing death was inflicted. *In re Estate of Coe*, 130-307.

Section applied. *Edmunds v. Illinois Cent. R. Co.*, 80 Fed. 78; *Y-Ta-Tah-Wah v. Redbock*, 105 Fed. 157.

a new trial do not necessarily include the power of the court to grant new trials, such as has been generally exercised under the common law system. *Tathwell v. Cedar Rapids*, 122-50.

CHAPTER 2.

OF LIMITATION OF ACTIONS.

SECTION 3447. Period of.

I. In general—effect: The defense of the statute of limitations is not a dishonorable one and it is not libelous to charge a debtor with having escaped the payment of his just debts by interposing such a defense. *Hollenbeck v. Hall*, 103-214.

The bar of the statute does not destroy the cause of action but merely suspends the remedy. *German American Sav. Bank v. Hanna*, 124-374.

A statute of limitations is a statute of repose. It takes away the right to maintain an action, but does not pay or cancel

the obligation of the debt. Although the action thereon is barred the indebtedness may afford sufficient consideration for a new promise to pay. *Spilde v. Johnson*, 132-484.

In equity: Equity will apply its rules as to the effect of delay and laches in analogy to the statute of limitations. *Adams v. Holden*, 111-54.

The statute of limitations is applicable to actions in equity as well as to actions at law. *Sioux City & St. P. R. Co. v. O'Brien County*, 92 N. W. 857.

In an action at law, mere delay or acquiescence will not bar the action unless prolonged for the statutory period, save where there is presented the elements of an estoppel, but in equity, laches or acquiescence may bar recovery although the delay has not been for such a length of time as that the action would be barred by the ordinary statute of limitations. *Doyle v. Burns*, 123-488.

Change of statute: While the new limit may constitutionally be made applicable to causes of action already existing, provided a reasonable time is allowed after the statute takes effect in which the action may be brought, yet the general rule of construction is that such a statute will be given a retrospective effect only where it appears that such was the intention of the legislature. *Waples v. Dubuque*, 116-167.

The period of limitation may be changed by the legislature at pleasure with reference to causes of action already existing, provided that, if they are shortened, the bar is not immediate, and a reasonable time remains in which to sue, but contract limitations such as those which are usually inserted in policies of fire insurance cannot be impaired by subsequent legislation. *Farmers' Co-op. Creamery Co. v. State Ins. Co.*, 112-608.

While it is true that the statute of limitations relates only to the remedy, and may be changed from time to time, without impairing the obligation of contracts, yet the legislature has no power to cut off the remedy, or bar a suit upon an existing cause of action instantan. A reasonable time must be given within which to prosecute an existing cause of action under the new statute. Therefore, held that the last clause of Code § 3439 before its amendment by 29 G. A., ch. 137, was not applicable to judgments rendered more than twenty years before the Code took effect, and as to which, under the section as it previously stood, and as construed in *Weiser v. McDowell*, 93-772, there was still a right to bring suit. *Cassady v. Grimmelman*, 108-695.

The reduction of the period of limitation as to an existing contract or judgment is not an impairment of the obligation of contracts if a reasonable time is preserved during which an action may be maintained, and in determining the reasonableness of time preserved the period elapsing between the enactment of the statute and its taking effect may be considered. *Wooster v. Bateman*, 126-552.

It is not competent for the legislature by a statute of limitations to take away all remedies existing upon causes of action. *Norris v. Tripp*, 111-115.

Must be pleaded: The plea of the statute of limitations can be raised only by answer, where the allegations of the peti-

tion show that the claim is not barred. *Goring v. Fitzgerald*, 105-507.

The statute of limitations cannot be relied upon under an answer interposing only a general denial. *Belken v. Iowa Falls*, 122-430.

Where the bar of the statute is not raised by demurrer, nor otherwise, it will be regarded as waived. *In re Estate of McMurray*, 107-648.

The court should not submit the statute of limitations to the jury as a defense unless it is pleaded, and a judgment for defendant founded on a verdict returned on that ground will be set aside, even though facts on which such plea might have been founded appear in the record. The statute is deemed waived if not pleaded. *McDonald v. Bice*, 113-44.

The bar of the statute of limitations must be specially pleaded and cannot be raised by motion to direct a verdict. *Borghart v. Cedar Rapids*, 126-313.

Pleading by amendment: Where the original petition states a complete cause of action, and the amendment states another, the two causes of action being so distinct that either could be established without reference to the facts alleged in the other, the two causes of action are distinct, and the one stated in the amendment will be barred if the time for suing thereon has elapsed when the amendment is filed, although the action was commenced before the bar had become complete. *Box v. Chicago, R. I. & P. R. Co.*, 107-666; *Taylor v. Taylor*, 110-207.

But an amendment to conform the pleadings to the facts may properly be made to save the cause of action which it was attempted to plead in the first instance. *Taylor v. Taylor*, 110-207.

Where a substituted petition sets up a cause of action, of the same nature, but not founded on the same facts, the cause of action is not to be deemed the same, and if the substituted petition is not filed within the statutory period, the cause of action therein pleaded is to be deemed barred. *Brooks v. Seevers*, 112-480.

A party cannot by amendment to his pleading set up a new cause of action which is barred at the time the amendment is filed, although it would not have been barred if set up in his original pleading. *Van Patten v. Waugh*, 122-302.

Therefore held that where a surety who had paid a note filed a claim against the estate of the principal on the note itself, and subsequently, after his cause of action as surety against his principal was barred, amended his claim so as to show the facts, his claim as thus amended could not be maintained. *Ibid.*

In an action brought to charge defendant as a member of a firm on an account, an amendment to the petition

charging him individually on such account, does not state a new action in such sense that it cannot be made after the period of limitation has run. *Pad-den v. Clark*, 124-94.

An amendment filed after the expiration of the statutory period of limitation may be considered if it does not set up a new cause of action, but only amplifies the grounds of specifications germane to the cause of action as originally pleaded. *Gordon v. Chicago, R. I. & P. R. Co.*, 129-747.

In case of disability: After the statute of limitations once commences to run it is not tolled by the subsequent disability of him in whose favor the cause of action exists. *Black v. Ross*, 110-112.

Therefore held that insanity of a debtor, after a cause of action against him had accrued, would not extend the statute of limitations. The provisions of Code § 3453 with reference to limitation of actions against an insane person apply only to causes of action accruing during disability. *Ibid.*

When the statutory period has commenced to run against a cause of action it will not be suspended on account of the subsequent death or insanity of the person to whom the right of action has accrued. *Roelegsen v. Pella*, 121-153.

In case of death: The running of the statute of limitations is not interrupted by the death of the creditor. In general the statute may not be suspended after it has commenced to run. At any rate, mere denial of liability will not have the effect of suspending the running of the statute. *Mereness v. First Nat. Bank*, 112-11.

The running of the statute of limitations is not affected by the death of the debtor. *Widner v. Wilcox*, 131-223.

Although there is no statutory provision that the death of the debtor shall toll the statute of limitations, the inability of the creditor to enforce his claim after the debtor's death until in the regular course of administration an executor or administrator has been appointed before whom the claim may be filed, will prevent the bar of the statute accruing during such interval. *Alice E. Mining Co. v. Blanden*, 136 Fed. 252.

Actions by married women: The statutory provisions, as to limitation of actions contain no exceptions in behalf of married women in regard to actions against their husbands. *In re Estate of Deaner*, 126-701.

Estoppel: Where a person holding a cause of action is assured by the person against whom the claim exists that the statutory limitation will not be interposed, pending negotiations for settlement, with the intention that the former shall rely on such assurance, and he does so, the person against whom the claim exists

cannot in a subsequent suit on such claim interpose the bar of the statute which has accrued during the time when the person holding the claim was reasonably relying on the assurance of the other party that no such claim would be made. *Holman v. Omaha & C. B. R. & B. Co.*, 117-268.

A defendant who by his own acts or conduct leads the plaintiff to delay the commencement of suit, though there be no express waiver of the limitation, is estopped from availing himself of the provisions of the statute by way of defense. *Goodwin v. Merchants' & Bankers' Mut. Ins. Co.*, 118-601.

Application of payments: In applying the statute of limitations to successive items of indebtedness, payments are to be credited, in the absence of any special direction or application, in the order in which the items accrue. *Marion Water Co. v. Marion*, 121-306.

When commences to run in general: Where the petition does not state the exact time of the breach, but is based upon a promise which is continuing, a demurrer that the cause of action is barred will not lie. *Rime v. Rater*, 108-61.

The limitation of action against an indebtedness to be paid in the future does not commence to run until the obligation to make payment arises. *Harrison v. Harrison*, 124-525.

In cases of fraud: The action by a creditor to subject property fraudulently conveyed by his debtor to the payment of his claim accrues when he has notice of the fraud, and he must bring his action within the statutory period from that time. *Stubblefield v. Gadd*, 112-681.

Proceedings to subject property to the satisfaction of a judgment must be brought within five years. *Applegate v. Applegate*, 107-312.

So long as the owner is non-resident the action will not become barred. *Ibid.*

An action based on fraud is barred in five years unless the running of the statute has been prevented by the fraud not being known to or ascertainable by the injured party. *Shircliffe v. Casebeer*, 122-618.

In cases of trust: The statute of limitations does not begin to run in favor of a person holding property in trust until he has actually repudiated the trust. *Zunkel v. Colson*, 109-695.

The statute of limitations does not begin to run against a trust until there has been some denial or repudiation of it by the trustee. *Smith v. Smith*, 132-700

A cause of action to recover a fund alleged to be held in trust for the plaintiff does not accrue until demand has been made or the trust repudiated. *Widner v. Wilcox*, 131-223.

Where a grantee in a conveyance which is in fact a mortgage receives full payment of the debt, he thereupon becomes a trustee, and cannot plead the statute of limitations for the purpose of securing or holding title, unless he has done some act indicating the disaffirmance of the trust. *Adams v. Holden*, 111-54.

The statute does not begin to run as against an action to establish a trust in real property until the right of the party insisting on the establishment of the trust has completely accrued. *Percival-Porter Co. v. Oaks*, 130-212.

The rule that the statute commences to run against an action for fraud from the time of the commission of such fraud does not apply to a case where the grantee takes title to property charged with a constructive trust. In such a case the statute only commences to run from the disavowal of the trust. *Newis v. Topfer*, 121-433.

Continuing actions—nuisance: Where an obstruction, placed by a city or town in its streets, is not of a character necessarily permanent, and is without authority, such obstruction is to be considered not a permanent but a continuing nuisance with reference to a property owner injured thereby. *Pettit v. Grand Junction*, 119-352.

The repeated obstruction of a street by unlawfully allowing trains to stand thereon is a continuing nuisance on the part of the railroad company, and the statute of limitations does not bar an action to restrain its continuance. *Gilcrest Co. v. Des Moines*, 128-49.

The act of the owner of a dominant estate in so draining his land as to cast surface water upon servient estate otherwise than in the course of nature, constitutes a continuing nuisance, and not a permanent nuisance, and although the injury has continued for more than five years, there may be a recovery for the damage suffered within the five-year limitation. *Jones v. Stover*, 131-119.

A tile drain constructed by a land owner discharging water on the premises of an adjoining land owner without right, is a continuing, and not a permanent nuisance, and action therefor is not barred within the statutory period after the construction of the drain. *Costello v. Pomeroy*, 120-213.

A ditch through which there is no permanent or constant flow of water and which naturally tends to fill up and disappear is not such a permanent structure that all the recoverable damages resulting from conducting water through it upon the lands of an adjoining owner accrue at the date of construction. *Geneser v. Healy*, 124-310.

The fouling of a stream by sewage constitutes a continuing nuisance, and a

person injured thereby may recover for damage suffered within the five years preceding the bringing of the action. *Vogt v. Grinnell*, 133-363.

A nuisance created by a city by polluting a neighboring stream with sewage, such stream not being the stream into which the sewer directly empties, is a continuing and not a permanent nuisance, and right of action for continuance of the nuisance may be maintained without regard to the time when the nuisance was commenced. *Bennett v. Marion*, 119-473.

The wrongful discharge of sewage upon the land of a private owner is not a permanent but only a continuing nuisance and an action may be maintained for damages resulting within five years although the sewers through which the wrong is effected have been in existence more than five years. *Vogt v. Grinnell*, 123-332.

In case of partnership: The statute of limitations as to an action by one partner against another for a share of the profits of their partnership does not commence to run until the termination of the partnership relation. *Petty v. Haas*, 122-257.

Under a contract for winding up the business of a partnership in which it is agreed that each member is to be liable to the other for such assets of the firm as he may reduce to possession, the statute of limitation does not commence to run from the time of the making of the contract, but rather from the time liability thereunder accrues. *Varnum v. Winslow*, 106-287.

Contract to pay after death: Where an indebtedness is made payable out of a person's estate, the statute does not begin to run until the death of the obligor. *Bennett v. Lutz*, 119-215.

Breach of covenant: The statute of limitations does not commence to run against a cause of action for substantial damages for breach of covenant of warranty until such damages are actually sustained. *Foshay v. Shafer*, 116-302.

The right of action for substantial damages under a covenant against encumbrances does not accrue until the encumbrance has been broken by the enforcement of the lien which constitutes the encumbrance. *McClure v. Dee*, 115-546.

On contingent liability: Where an action is based upon a contract, the maturity of which depends upon the happening of a contingency, the cause of action accrues only when the contingency happens. *Grouse v. Moody*, 130-320.

Extension of time: No cause of action accrues until the expiration of any valid extension that may be given on a note. *Iowa Loan & Trust Co. v. McMurray*, 129-65.

Postponing demand: A ward has a right to an accounting upon reaching his

majority, and cannot, by postponing the demand therefor, extend the period of limitation. *Ackerman v. Hilpert*, 108-247.

The running of the statute cannot be postponed by failure to make demand. *Bonbright v. Bonbright*, 123-305, 98 N. W. 784.

A party cannot toll the statute of limitations by delay in making his demand, when demand is a condition precedent to the right of action. *Collman v. Equitable Life Assur. Soc.*, 133-177.

The period of limitation against an action on a certificate of deposit does not commence to run until demand, and such demand need not be made within the statutory period of limitation; (overruling *Mereness v. First National Bank*, 112-11.) *Elliott v. Capital City State Bank*, 128-275.

Concealment: If the facts, which a recorded deed shows, with other facts known, are of a character to suggest fraud, persons interested must be charged with the knowledge which inquiry made with reasonable diligence would disclose. *Clark v. Van Loon*, 108-250.

The mere deception practiced by the debtor in denying liability will not constitute such concealment as to prevent the running of the statute of limitations. *Mereness v. First Nat. Bank*, 112-11.

The statute does not begin to run where the cause of action is fraudulently concealed until the facts are discovered or might have been discovered by the exercise of diligence. *Cole v. Charles City Nat. Bank*, 114-632.

In cases where concealment and ignorance of facts are relied on to suspend the running of the statute there must have been such concealment as would prevent a person exercising due diligence from discovering the facts. *Murray v. Chicago & N. W. R. Co.*, 92 Fed. 868.

Fraudulent concealment of a cause of action prevents the running of the statute of limitations. *Faust v. Hosford*, 119-79.

Where persons stand in reference to each other as principal and agent, and the agent commits an actual fraud upon the principal, mere silence upon his part amounts to a fraudulent concealment. The burden in such cases is on the defendant to show plaintiff's knowledge of the fraud. *Ibid.*

Limitation in particular cases:

Par. 1. For injuries from defects in roads or streets—notice: The provision for notice is applicable in a case where the injured party has survived more than three months after the injury, and action in behalf of his estate is subsequently brought for the same injury by his administrator. *Sachs v. Sioux City*, 109-224.

This provision is applicable where the

injury originated in the neglect of the municipality to properly construct or maintain a bridge; for a bridge is properly a part of the street. *Ibid.*

The object of the statute as to notice is to apprise the city authorities of the location of the defect and the circumstance attending the accident with such reasonable certainty as shall enable them not only to investigate the city's liability while the facts are fresh, but also to ascertain what evidence there may be of conditions then existing, and of the character of the injury while witnesses are at hand. A notice by plaintiff's attorney to defendant demanding a settlement of his claim, not containing any statement of the place or circumstances of the injury, is not sufficient. *Giles v. Shenandoah*, 111-83.

Where an action was brought within ninety days on a claim against the city for defective sidewalk, and the original notice specified the time, place and circumstances of the injury, held that this was sufficient notice to entitle the plaintiff to recover in another action brought after the expiration of six months. *Pardey v. Mechanicsville*, 112-68.

Reasonable certainty as to the place is all that is required in the notice. *Rusch v. Dubuque*, 116-402..

Notice of the accident, giving time, place and circumstances in reasonably specific terms, is sufficient. *Perry v. Clarke County*, 120-96.

While the circumstances of the injury are to be stated in the notice, the statute does not require the causes which produced the injury to be enumerated. *McCartney v. Washington*, 124-382.

Recovery by the claimant at least to the extent of the damage specified in the notice of claim is not defeated by asking in the petition to recover more than the amount claimed. *Van Camp v. Keokuk*, 130-716.

The fact that the notice includes more than is necessary under the statute and alleges more than one defect, does not render it insufficient. *Bauer v. Dubuque*, 122-500.

Where the primary proof of notice to the city is shown to have been lost, secondary evidence is admissible. *Considine v. Dubuque*, 126-283.

Notice of claim against a city for personal injuries may be served by taking acknowledgment of service upon the mayor and city solicitor. *McCartney v. Washington*, 124-382.

This provision is not applicable to cities under special charter, but a similar provision expressly applicable to such cities is found in Code § 1051. *Kenyon v. Cedar Rapids*, 124-195.

Code § 1051, containing provisions similar to those of this paragraph, held appli-

cable only to cities under special charter. *Harvey v. Clarinda*, 111-528.

The provisions of Code § 1050 as to the limitation of claims for unliquidated damages against special charter cities, held not applicable to claims existing at the time the Code took effect. *Thoeni v. Dubuque*, 115-482.

Under Code § 1051, relating specifically to cities under special charter, and containing provisions similar to those found herein, it is sufficient if the notice states the nature and cause of the injury and the defect or negligence complained of. No amendment to the notice is provided for and the statute should have a liberal construction to the end that parties having meritorious claims shall not be cut off by mere technicality as to the form of notice required. *Schnee v. Dubuque*, 122-459.

Want of notice must be pleaded: The defense that a claim for unliquidated damages has not been made within thirty days is an affirmative one, and to be available the facts constituting it must be pleaded. *Borghart v. Cedar Rapids*, 126-313.

The objection that action against a city for personal injuries received on account of defective streets is not brought within six months after the happening of the injury and that no written notice of the claim has been given is one that must be urged in the lower court, otherwise it cannot be considered on appeal. *Reed v. Muscatine*, 104-183.

It is not competent under a general denial in an action against a city to recover damages for personal injuries occasioned by a defective sidewalk, to urge for the first time on appeal the insufficiency of the notice given within sixty days from the happening of the injury. *Belken v. Iowa Falls*, 122-430.

Amended pleading: The plaintiff cannot recover under an amended petition filed more than ninety days after the injury, for injuries which are not included within the notice of claim. *Ulbrecht v. Keokuk*, 124-1, 97 N. W. 1082.

Where within sixty days an action is brought for personal injuries due to defective sidewalk, and the place of the accident is described, an amendment after the expiration of sixty days, slightly changing the description of the place of the accident, but not describing any different place than that mentioned in the original petition, is proper. *Sachra v. Manilla*, 120-562.

Dismissal of action: Where an action against a city for injuries received from a defective sidewalk is brought within three months, no previous notice of the claim need be shown. But if such action is afterwards voluntarily dismissed, a new action will be barred, unless it is within

the provisions of Code § 3455, providing that if after the commencement of an action plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall be held to be a continuance of the first. *Ceprely v. Paton*, 120-559.

In instituting the second action the burden is on plaintiff to allege and prove such diligence in prosecuting the first action as to bring the case within such provisions. *Ibid.*

The running of the statutory period is not affected by the fact of the insanity of the person injured occurring after the injury and before the bringing of the action. *Roelfsen v. Pella*, 121-153.

Par. 3. For statutory penalty: An action to recover three times the excessive charge of a common carrier, as authorized by 22 G. A., chap. 28, § 9, held, to be an action for a penalty which must be therefore brought within two years (following *Herriman v. Burlington, C. R. & N. R. Co.*, 57-187, and distinguishing *Koons v. Chicago & N. W. R. Co.*, 23-493). *Baker Wire Co. v. Chicago & N. W. R. Co.*, 106-239.

For injuries to relative rights: An action on a liquor seller's bond for damages to a wife by reason of sales to her husband is based on an injury to the relative rights of the wife, and should be brought within two years. *O'Banion v. DeGarmo*, 121-139.

An amendment made more than two years after the cause of action has accrued alleging sales in a different locality than that specified in the bond sets up a new cause of action and is barred. *Ibid.*

Par. 5. Against sheriff or other public officer: While the action against a sheriff for wrongful levy upon property is barred in three years, yet an action on an indemnifying bond given by the execution plaintiff to protect the sheriff may be brought within ten years. *Whitney v. Gammon*, 103-363.

An action against a clerk of court for omitting to index a judgment to plaintiff's damage must be brought within three years, and the time within which it may be brought is not extended under the provision of Code § 3448 with reference to actions for relief on the ground of mistake. *Lougee v. Reed*, 133-48.

Par. 6. Unwritten contracts—other actions: The right of one joint obligor to recover against the other for his share of payments made on the joint obligation is barred in five years. *Novak v. Dupont*, 112-334.

An action on an implied contract brought by a surety to recover indemnity from the principal is barred in five years after payment. *Van Patten v. Waugh*, 122-302.

The limitation as to actions on unwritten contracts and for injuries to property is applicable to a case where the owner of a party wall asks an accounting of the adjoining owner who has made use of such wall. *Pier v. Salot*, 107 N. W. 420; 111 N. W. 989.

Par. 7. On written contracts: A written agreement on the back of a certificate of assessment for street improvements, by which the property owner undertakes to pay the amount of the assessment in installments, is a written contract upon which action may be brought within ten years from the maturity of the demands called for. *Talcott v. Noel*, 107-470.

A suit to foreclose a mortgage is barred in ten years, and as the rights of mortgagor and mortgagee are reciprocal, redemption under a mortgage will be cut off in the same time. *Adams v. Holden*, 111-54.

The action to foreclose a mortgage is not barred so long as the debt secured may be enforced. *Freeburg v. Eksell*, 123-464.

The taking of a judgment for the debt does not discharge the mortgage lien. *Ibid.* A mortgage is not barred so long as the debt is unpaid and enforceable. *Iowa Loan & Trust Co. v. McMurray*, 129-65.

The rights of the mortgagee by foreclosure as against other lien holders is not barred until the statute has barred the debt secured by such mortgage. *Citizens' State Bank v. Jess*, 127-450.

It appearing that defendants had become liable on subscriptions for stock in the corporation of which plaintiff was receiver, and that on sale of their stock to third parties their liability became that of guarantors for the payment of the corporate debts of the company to the amount of their unpaid subscriptions whenever such debts should be ascertained and the corporate property exhausted, held that as defendant's liability was upon the guaranty, the statute did not commence to run as against the same until the debts of the corporation were ascertained and its property was exhausted. *Wyman v. Bowman*, 127 Fed. 257.

The guardian's principal undertaking to account for funds received by him is a contract, and an action for failure to account for funds so received is an action for breach of contract within the statute of limitations. *Blakeney v. Wyland*, 115-607.

An action in the federal court on coupons from bonds issued by a municipality is governed by the state statute, and coupons maturing more than ten years prior to the commencement of the action are barred. *Reynolds v. Lyon County*, 97 Fed., 155.

For recovery of real property—adverse possession—in general: While it will be presumed that possession of land extends to the entire tract covered by the occupant's claim of right, such presumption will not prevail as against actual adverse possession by another of a portion of the tract covered by such claim, of which possession the claimant of the entire tract has knowledge. *Libbey v. Young*, 103-258.

Adverse possession must be shown to sustain the plea of the general statute of limitations in an action to recover possession of real property. *Gill v. Candler*, 114-332.

Adverse possession cannot be predicated upon a mistake in describing the land which both parties supposed to be included in the deed. *Lougee v. Shuhart*, 127-173.

Where possession of land is taken under the belief that it is part of a tract which is purchased, which belief is not in accordance with the facts, the possession will not constitute adverse possession. *Kahl v. Schmidt*, 107-550.

From the time a railroad company is entitled to a certificate under a grant adverse possession as against it commences to run, although the legal title remains in the government. *Iowa Railroad Land Co. v. Fehring*, 126-1.

What acts sufficient: The acts of ownership relied on to constitute adverse possession, when there is no actual occupancy, must be such as are necessary to the enjoyment of the use, and to acquire the profits the land may yield in its present condition. *Stern v. Fountain*, 112-96.

Acts of ownership sufficient to constitute adverse possession of uncultivated land are such acts as are necessary to the enjoyment of its use in its present condition and to acquire the profits which such lands would yield. *Rogers v. Turpin*, 105-183.

Claim of right—color of title: Title by adverse possession can in no event be acquired by mere possession. There must be an honest claim of right or color of title. *Biglow v. Ritter*, 121-213.

Possession to be adverse under the statute of limitations must have been held in good faith by the claimant. If he knows that he has no title or claim, and his possession is merely wanton, his occupancy, no matter how long continued, will not ripen into a title. *Clark v. Sexton*, 122-310.

Possession is presumptively subordinate to the title of the true owner, and the burden is on the party claiming by adverse possession to show that such possession was hostile, which necessarily involves knowledge, either express or implied, on the part of the true owner that such possession was adverse and under

claim of right and under color of title. *McClenahan v. Stevenson*, 118-106.

If possession is originally acquired in subordination to the title of the true owner, there must be a disclaimer of the title from him, and actual hostile possession, of which he has notice, or which is so open and notorious as to raise a presumption of negligence. *Ibid.*

If one enters upon land with the owner's permission, expecting merely that the owner will give it to him in the future, such entry and possession will not constitute a hostile holding. *Ibid.*

Where the defendant has not been in possession of the property in dispute, no cause of action can be deemed to have accrued against him unless he has in some other way asserted some right thereto. *Mead v. Illinois Cent. R. Co.*, 112-291.

An adverse holding under good faith claim of title is sufficient, although there is record notice that the title is defective. *Severson v. Gremm*, 124-729; 100 N. W., 862.

A deed, though made by one having no authority to convey, is sufficient to support a claim of adverse possession, provided such possession was in good faith. *Roth v. Munzenmaier*, 118-326.

Title by adverse possession is sufficient to support an equitable action, under Code § 1440, to redeem from a tax sale prematurely made, notwithstanding the provisions of Code § 1445 that a person claiming adversely to a tax deed must show fee simple title. *Ibid.*

Possession under a tax deed which is absolutely void may nevertheless constitute sufficient color of title to serve as the basis for a claim of adverse possession. *McCash v. Penrod*, 131-631.

One may claim under color of title, though his grantor has no real or apparent title to the premises, and a conveyance from one in possession is sufficient consideration for a claim of right and color of title on the part of the grantee, even though the grantor had no title whatever. *Blankenhorn v. Lenox*, 123-67.

For the purpose of showing claim of right and color of title, a conveyance in writing need not be proven. Parol evidence of sale may be sufficient, when accompanied by possession. *Ibid.*

Title by adverse possession may be acquired as against all those who claim under a grant of land which takes effect *in praesenti*, although such possession is not adverse against the government until the issuance of a patent. *Blumer v. Iowa Railroad Land Co.*, 129-32.

Adverse possession under a tree culture claim may be sufficient to ripen into title if held in good faith, although the claimant is mistaken in his belief that the claim made by him is sufficient. Possession under such claim is adverse to all

other claims to the property, although not adverse to the government. *Ibid.*

Where plaintiff entered upon public land as a homestead claim, held that his possession after title was passed by the government under a railroad grant and his entry was canceled was adverse. *Wilbur v. Cedar Rapids & M. R. Co.*, 116-65.

Possession under a conveyance purporting to convey absolute title and taken in good faith is sufficient to support a claim of title by adverse possession, although the grantee had knowledge at the time of accepting the conveyance that there was the possibility of adverse claim to the property in the future. *Wenger v. Thompson*, 128-750.

Where one is in possession of property claiming as owner under a recorded deed, such possession constitutes notice to adverse claimants such as to support the bar of the statute of limitations. *McCarthy v. Colton*, 108 N. W. 217.

Possession by one tenant in common is presumptively for his co-tenants as well as himself and not adverse to them and the burden is on him to show that it was adverse for the required length of time to give him title as against them under the statute of limitations. He must show that the possession was with the intent to hold adversely and such intent must be indicated by acts calculated to exclude the co-tenants. *Bader v. Dyer*, 106-715.

Exclusive occupancy by one tenant in common, accompanied by acts and declarations of ownership, if known to his co-tenant, will amount to an ouster. Notice may be shown by circumstantial evidence. *Casey v. Casey*, 107-192.

The defense of adverse possession by one tenant in common against another or his grantee must be based upon a disclaimer of the common ownership, and an open assertion of title in hostility thereto. Mere continuance in possession is not sufficient, nor is it sufficient that the party claiming under adverse possession has made use of the property not inconsistent with the common interest of the other tenant or his grantee. *Garst v. Brutsche*, 129-501.

The possession of a tenant in common is not adverse to his co-tenants until he has in some unmistakable manner given to such co-tenants notice or sufficient reason to know that he claims the property adversely. *Zunkel v. Colson*, 109-695.

Possession under a sheriff's deed for the interest of one tenant in common does not constitute ouster as to a co-tenant. To constitute such ouster there must be actual notice of claim of title, followed by hostile acts under such claim. *Curtis v. Barber*, 131-400.

Possession by one tenant in common may be under such assertion of absolute, entire and exclusive ownership as to con-

stitute an ouster against his co-tenant, and cause the statute of limitations to commence to run in favor of the tenant asserting such right of possession. *Blankenhorn v. Lenox*, 123-67.

Before the statute of limitations will commence to run as between co-tenants there must be an ouster and in fact adverse possession. Ordinarily the making of a deed by one co-tenant purporting to convey the entire title will amount to an ouster. *Stern v. Selleck*, 111 N. W., 451.

A conveyance by one of several co-tenants of the entire premises constitutes an ouster of co-tenants, and continued possession under such conveyance under color of title and claim of ownership, for the period of limitation, bars the co-tenants. *Murray v. Quigley*, 119-6.

As between joint owners, continued possession by one will prevent the running of the statute of limitations in favor of the other. *Truth Lodge, etc., v. Barton*, 119-230.

One co-tenant or his grantee may work an ouster and disseisin of his co-tenants and, having held adverse possession under a claim of right or color of title for the period of the limitation, may assert full title and evoke the bar of the statute in protection thereof. For this purpose an actual ouster must be made to appear, but proof of actual physical eviction is not necessary. *Crawford v. Meis*, 123-610.

So the grantee of a life tenant may so dispute or assail the title of a remainder man as that the latter failing for the statutory period to assert his disputed title will be barred by the statute. *Ibid.*

Against remainder man: Title by adverse possession may accrue against a remainder man not yet entitled to possession, as under the statutory provision relating to actions to quiet title such remainder man has an interest which he may protect by an action. *Hubbird v. Goin*, 137 Fed. 822.

Grantor and grantee: The mere fact of retention of possession by the grantor after delivery of a conveyance and the making of improvements on the premises by such grantor, does not of itself amount to adverse possession. *Luckhart v. Luckhart*, 120-248.

A grantor remaining in possession after conveyance is presumed, in the absence of a contrary showing, to be holding in subordination to the title of his grantee. He may acquire title by adverse possession, even as against his warranty deed, but he must explicitly disclaim holding under his grantee, and openly assail his title in hostility to the title claimed under his own previous deed. *McClenahan v. Stevenson*, 118-106.

The continuance in possession by the grantor after the conveyance is not ad-

verse as to the grantee. *Garst v. Brutsche*, 129-501.

Trustee and CESTUI QUE TRUST: At law the *cestui que trust* is regarded as a tenant at will to the trustee, and until this tenancy is terminated there can be no adverse possession. *McClenahan v. Stevenson*, 118-106.

Landlord and tenant: A tenant cannot deny or dispute his landlord's title, and this rule obtains even if the tenant is in possession at the time the lease is made. One who acquires a leasehold interest in land of which he is in possession does an act which so explains his previous possession as to rebut any subsequent claim that it was adverse. *McClenahan v. Stevenson*, 118-106.

Railroad right of way: One who purchases and goes into possession of premises, subject to a railroad right of way, does not by continuance of such possession acquire a better right than his grantor had with reference to such right of way, regardless of representations made by the grantor as to extent of the right of way, such representations not being known to the railroad company. *Chicago, M. & St. P. R. Co. v. Snyder*, 120-532.

Agreed boundary: acquiescence: The fact that owners of adjoining tracts of land have for many years occupied up to a line, supposed to represent the boundary between them, and have acquiesced in such boundary, is a strong circumstance to show the correctness of such boundary line. *Corey v. Ft. Dodge*, 118-742.

The boundaries recognized by parties at the time of a conveyance and with reference to which they subsequently occupied the property adversely to each other becomes binding after the statutory period of adverse possession, and will control the description. *Dows Real Estate & Trust Co. v. Emerson*, 125-86.

Acquiescence in a certain line, with possession up to it for a period of ten years, is conclusive evidence of an agreement as to the true line, and will bind the parties concerned. *Axmeare v. Richards*, 112-657.

Where a division line between adjoining owners has been acquiesced in by them for a period of ten years, an agreement to make it the true boundary will be implied, and neither may ordinarily be heard to dispute it. *Kulas v. McHugh*, 114-188.

Occupancy to a line of trees planted upon what the parties agreed was the boundary line, held to be adverse, although it subsequently appeared that there was a mistake as to the location of the line. *Handorf v. Hoes*, 121-79.

Where for a period longer than the statute of limitations, property owners whose premises abut on opposite sides of a highway, have occupied to the boundaries of the highway, as fixed by them,

one of them cannot afterwards complain that the boundaries of the highway are not in accordance with its true location. *Buch v. Flanders*, 119-164.

If co-terminal owners have adopted another line than that of the government survey as their division line, and have occupied up to it and recognized it as such for a period of ten years, then such line is to be regarded as the boundary line. *Miller v. Mills County*, 111-654.

Where the owner of a government subdivision of land erected a fence and subsequently planted a hedge on what he claimed to be his line, and cultivated to such fence, and the adjoining proprietor likewise in cultivation recognized the fence as the boundary line, and this claim and recognition continued for ten years, held that the first party had acquired title by adverse possession to a strip of land included by his fence beyond the true boundary of the subdivision of land to which he had title. *Fullmer v. Beck*, 105-517.

Where a division line between two tracts of land has been definitely marked by the erection and maintenance of a fence, which has been recognized by the owners as the division line, and to which they have occupied and cultivated land, without objection, under a claim of ownership, for more than ten years, the line so established is the division line between such tracts. *Lawrence v. Washburn*, 119-109.

Where adjoining property owners improved their property with reference to a line run by a surveyor and continued to occupy their respective premises with reference to such line for the statutory period of limitation, held that such line had become the boundary line by adverse possession and acquiescence, and could not be disturbed on account of a subsequent survey showing that the agreed line did not correspond with the actual line. *O'Callaghan v. Whisenand*, 119-566.

The boundary line between the two premises having been established for a part of its distance by reason of acquiescence in the making of improvements, held that the boundary line would be deemed to be a straight line determined by the portion of it thus established. *Ibid.*

Occupation to a boundary line, acquiesced in by the parties as being founded on a claim of right, is adverse regardless of whether the boundary by acquiescence is the true boundary. *Klinkner v. Schmidt*, 114-695; *Rattray v. Talcott*, 124-398; *Klinkefus v. Van Meter*, 122-412; *Harndon v. Stultz*, 124-734; *Watson v. Hogan*, 130-350; *Yunker v. White*, 111 N. W. 824; *McBride v. Bair*, 112 N. W. 169.

A boundary line up to which each party has occupied for more than ten years is not to be questioned by a re-survey. The purpose of the surveyor should be to lo-

cate the line as originally located. *Bevering v. Smith*, 121-607.

Where adjoining owners treat a division fence as marking the line between their lands, and so recognize it for the statutory period of limitations, it will ordinarily be held to constitute the true boundary, and a mere agreement to have a re-survey made which does not bind either party to an acceptance of the result will not overthrow the boundary line as established by acquiescence. *Andrews v. Meredith*, 131-716.

Acquiescence in a definite line as the true boundary for the period of limitations is binding upon the parties, and is not negated by the showing of a mere oral agreement to have a survey made to ascertain and establish the true line, there being no subsequent acquiescence in the result of such survey. *Uker v. Thieman*, 132-79.

To give rise to title by adverse possession to the common boundary line it must appear that the claim of title by possession to such boundary line has continued for the statutory period or for such length of time and under such circumstances as to raise an inference that the boundary has been settled by acquiescence. *Hootman v. Hootman*, 133-632.

Neither failure of the boundary line, as determined from a survey based on the description in a plat or conveyance, to correspond with the line established by acquiescence, nor the fact that the line established by acquiescence is not a straight line, such as is called for in the description, furnishes such controlling circumstances as will defeat a claim of title based on acquiescence in a boundary line. *Laughlin v. Francis*, 129-62.

The doctrine of adverse possession as distinguished from acquiescence in a common boundary line does not apply where the party claiming title has not been in the exclusive hostile possession to the boundary line contended for, and is not shown to have had an intent to claim to such boundary line, regardless of the true boundary. *Boltz v. Colsch*, 109 N. W. 1106.

Possession to be adverse must have been uninterrupted and hostile. *Ibid.*

Where a survey is had to ascertain the line, and the line thus ascertained is treated as the correct one, under the belief that it is so, possession of such land will not be adverse of any portion of the adjoining tract which by mistake has been included within the premises. *Kahl v. Schmidt*, 107-550.

In the absence of proof of acquiescence in the boundary line indicated by a fence, one of the adjoining owners is not estopped by proof of the existence of such fence from showing the true line. *Erikson v. Slate*, 130-187.

The mere fact that there is a fence upon a line claimed by one of the parties as a boundary line between adjoining properties is not conclusive upon the question of acquiescence or adverse possession. But if it appears that the two adjoining owners have by parol fixed a line or acquiesced in it as a common boundary line, such line is conclusive, although the possession with reference thereto may not have been for the full statutory period. *Kitchen v. Chantland*, 130-618.

Where the boundary line has been in dispute, adverse possession by acquiescence does not arise. *Liddle v. Blake*, 131-165.

The doctrine of acquiescence in a common boundary does not apply where there is no showing that the fence designating such boundary as originally built was intended as a designation of the boundary line, or that the parties have ever treated it as designating such boundary. *Boltz v. Colsch*, 109 N. W. 1106.

An oral agreement creating an easement, while it may not be enforceable against a subsequent purchaser without notice, is sufficient for the foundation of a claim of right, which may ripen into good title by adverse usage. *O'Reagan v. Duggan*, 117-12.

Use of a right of way, with permission of, and without claim of right in hostility to the owner is not adverse possession. *Friday v. Henah*, 113-425.

The burden of proof as to adverse possession is on the party claiming in hostility to the title, and in case of an easement by grant, the adverse possession must consist of assertion of right as against the claim under the grant, continued for the statutory period of limitations. *Reed v. Gasser*, 130-87.

Husband and wife: It is doubtful if the husband may under any circumstances hold adversely to his wife, especially where the property is a homestead. The possession of husband and wife is the possession of the one in whom is the legal title. *Hays v. Marsh*, 123-81.

Recovery of dower: The wife's right of action for dower out of lands conveyed by her husband during coverture in which she is not joined does not accrue until the death of the husband, and until that time the statute of limitations does not commence to run as against such right. *Lucas v. Whitacre*, 121-251.

The action of a widow against the grantee of her husband for the recovery of her dower interest in land conveyed by her husband during coverture, without her joinder in the conveyance, does not accrue until the death of the husband. *Lucas v. White*, 120-735.

The possession of the grantee of the husband under a conveyance in which the wife has not joined to extinguish her dower right becomes adverse as to the

wife's dower right twenty days after the death of the husband. (See Code § 3369.) And the widow's action to assert her right to a distributive share in such property must be brought within ten years thereafter. *Britt v. Gordon*, 132-431.

The right of a widow to recover her distributive share of her husband's property does not accrue until ouster, or some denial on the part of the heirs of her husband or their grantees of her right. Mere possession on the part of such heirs or grantees is not adverse and does not give rise to a right of action. But where the widow's action is against strangers, who claim the entire title and estate under a deed from the husband under which they have been in actual possession, the widow's right of action accrues immediately upon the death of her husband, and the statute begins to run in favor of such adverse claimants. *Britt v. Gordon*, 132-431.

Against public: Public by adverse possession alone cannot be acquired against the public. The public may be estopped by its conduct, but the statute of limitations will not run against the sovereign or its agencies. The only basis for an estoppel as against the public is conduct of the officers having authority with relation to the subject-matter in standing by and permitting improvements to be made on property which belongs to the public. *Biglow v. Ritter*, 121-213.

The statute of limitations does not apply to a city so as to prevent its exercise of governmental functions; but the doctrine of acquiescence in a certain line as being the true line is applicable to municipalities as well as to private individuals. *Eldora v. Edgington*, 130-151; 106 N. W. 503.

As against the state holding title to the beds and banks of navigable rivers for the public, there can be no adverse possession. *Board of Park Commissioners v. Taylor*, 133-453.

Ordinarily the rule of adverse possession does not apply to a public corporation in the exercise of its governmental function. *Vorhes v. Ackley*, 127-658.

As to streets: The statute of limitations will not run to defeat the city in the exercise of its governmental authority with reference to streets. *Chicago, R. I. & P. R. Co. v. Council Bluffs*, 109-425

While it may be that the statute of limitations as to real property does not run against a claim of a city to premises belonging to it as a street, yet it may so deal with the property, by recognizing the rights of another as owner thereof, as to estop itself from asserting the title thereto. The exaction of public charges against the property as belonging to a private owner will constitute such estoppel. *Davenport v. Boyd*, 109-248.

The owner of a lot abutting on the

street does not acquire title by adverse possession as against the city to the strip of land between his lot line and the sidewalk, by mere occupancy. *Markham v. Anamosa*, 122-689.

While mere non-user for the statutory period will not constitute an abandonment by a city of a street duly laid out, yet, where there has been such non-user, accompanied by actual and notorious possession of the land by an individual as private property, under a claim of right, an abandonment will be presumed, and the public right in the street will be held to be extinguished. *Weber v. Iowa City*, 119-633.

One who claims the right to an alley, shown on the plat to be a public alley, and as to which there have been proceedings by the town for dedication, although irregular, and makes improvements thereon accordingly, may rely upon such possession, continued for a sufficient length of time, as giving title by adverse possession. *Blennerhasset v. Forest City*, 117-680.

Par. 8. Judgments of courts of record: In the absence of any statutory limitation in the state in which a judgment is rendered, an action on such judgment brought in this state will be barred only under the provisions of the statute of limitations in this state. *Mahoney v. State Ins. Co.*, 133-570.

The fact that the indebtedness on which a foreign judgment was rendered was barred at the time of bringing the action cannot be urged as a defense against the judgment rendered on such cause of action. *Tomlin v. Woods*, 125-367.

The rule adopted in *Weiser v. McDonnell*, 93-772, has no application to a judgment rendered before the Code of '73 went into effect. *Wilson v. Tucker*, 105-55

The act of the 29 G. A., chap. 137 (Code Supplement § 3439), reducing the period of limitation for actions on judgments rendered prior to the taking effect of the Code, is not unconstitutional, as it preserves to the holder of the judgment a reasonable time within which his action may be maintained. *Wooster v. Bateman*, 126-552.

Under the provisions of 29 G. A., chap. 137, actions on judgments rendered prior to the taking effect of the Code of 1897 must be brought within the limitation prescribed by the Code, unless brought within one year after the taking effect of that statute. *Haugen v. Oldford*, 129-156.

(In the Code notes to this section, on page 1245, second column, the reference for the case of *Auchampaugh v. Schmidt*, should be, 70-642, instead of 72-656. In the last paragraph on page 1248, second column, the word "stay" in the sixth line should be "start.")

SEC. 3447-a. Time of bringing action. That in all cases where by the death of the party to be charged, the bringing of an action against his estate shall have been delayed beyond the period provided for by statute the time within which action may be brought against his estate, is hereby extended for six months from the date of the death of said decedent. [31 G. A., ch. 151.]

SEC. 3447-b. Recovery of interest in real estate when spouse failed to join in conveyance. In all cases where the holder of the legal title to real estate situated within this state, prior to the first day of January, 1885, conveyed said real estate or any interest therein by deed, mortgage, or other conveyance, and the spouse failed to join therein, such spouse or the heirs at law, devisees, grantees, or assigns of such spouse shall be barred from recovery unless suit is brought therefor within one year after the taking effect of this act. But in case the right to such distributive share has not accrued by the death of the spouse, making such conveyance, then the one not joining is hereby authorized to file in the recorder's office of the county where the land is situated, a notice with affidavit, setting forth affiant's claim together with the facts upon which such claim rests, and the residence of such claimant; and if such notice is not filed within two years from the taking effect of this act, such claim shall be forever barred. Any action contemplated in this section may include lands situated in different counties, by giving notice thereof as provided by section thirty-five hundred and forty-four (3544) of the code. [31 G. A., ch. 152, § 1.]

SEC. 3447-c. Foreclosure of certain mortgages. No action shall be maintained to foreclose any real estate mortgage which was executed prior to January 1, 1885, unless the same is brought within one year after the taking effect of this act: provided, that this section shall not apply, in case

the record of such mortgage or any extension thereof, shall show that such debt is not yet more than ten years past due, which fact may be shown, within one year from the taking effect of this act, by the holder of the debt, noting on the margin of the record of such mortgage in the recorder's office, any extension of the debt secured, such notation to be witnessed by the recorder and entered upon the index of mortgages in the name of the mortgagor and mortgagee. [31 G. A., ch. 152, § 2.]

SEC. 3448. Fraud—mistake—trespass.

The fraud referred to in this section is such as is solely cognizable in a court of equity. *Daugherty v. Daugherty*, 116-245.

In an action to recover on account of fraud the statute begins to run from the time the fraud is discovered. *Telegraph v. Loetscher*, 127-383.

For the purpose of starting the running of the statute of limitations against an action for fraud, the recording of a deed involving the fraud complained of is sufficient to constitute notice. *McDonald v. Bayard Sav. Bank*, 123-413.

The filing of a patent from the United States to the patentee is notice to those claiming title under such patent of any fraud involved in the issuance of the patent. *Murray v. Quigley*, 119-6.

Where an action is cognizable in equity by reason of the fiduciary relations existing between the parties, this section is applicable. *Faust v. Hosford*, 119-97.

So long as it is legally impossible to say whether or not a representation as to title of property conveyed is false, the statute does not begin to run as against an equitable action to set aside the conveyance for the falsity of such representation. *Wise v. Grove*, 123-585.

The statutory provision with reference to limitation of actions on the ground of fraud and mistake is applicable to such mistake as is cognizable in courts of law as well as the basis of equitable relief. But the statute commences to run against the cause of action arising from a pure mistake at the time when the mistake might in the exercise of ordinary diligence have been discovered. *West v. Fry*, 112 N. W. 184.

The fraud referred to in this section is such as was originally cognizable in equity, but the matter of mistake is not so limited. Therefore in case of a mistake whether cognizable in equity or at law, the action does not accrue until discovery of the mistake. *Baird v. Omaha & C. B. R. & B. Co.*, 111-627.

This provision as to when a right of action based on mistake accrues has no

application to an action to recover taxes subsequently paid by a tax purchaser on property, as to which his tax title appears to have been defective by reason of mistake of the auditor. Such an action is barred in five years from the time of payment of taxes. *Lonsdale v. Carroll County*, 105-452.

As against an action for the cancellation or reformation of a deed on the ground of mistake, the limitation does not commence to run until the mistake is discovered. *Bottorff v. Lewis*, 121-76.

Where a railroad company, claiming title to land under a railroad grant from the United States, had been notified that land certified to it had been certified under a mistake as to the legal rights of the company, held that in afterwards redeeming the land from taxes it acted at its peril, and an action to recover taxes so paid, not brought within the statutory period, was barred by the statute of limitations. *Sioux City & St. P. R. Co. v. O'Brien County*, 118-582.

A cause of action to reform a conveyance on account of mistake arises immediately upon the discovery of the mistake, and if the action is not brought within the statutory period after such discovery it is barred. *Garst v. Brutsche*, 129-501.

In an action for money had and received predicated upon the wrongful payment by the county treasurer to the defendant school district of taxes collected on property situated in the plaintiff school district, the period of limitation commences to run from the time of erroneous payment and not from the time when the mistake was discovered. *Independent School District v. Independent School District*, 123-455.

The provision that actions for relief on the ground of mistake are not to be deemed to accrue until the mistake is discovered has no application to an action against a clerk of court for omitting to index a judgment. *Lougee v. Reed*, 133-48.

Section applied in case of mistake. *Cole v. Charles City Nat. Bank*, 114-632.

SEC. 3449. Open account.

An action upon open account brought within five years after the date of the

last item is not barred. *Padden v. Clark*, 124-94.

SEC. 3450. Commencement of action.

This provision is applicable also to special statutory limitations. *Smith v. Callanan*, 103-218.

The provisions of this section apply only to the general statute of limitations. A right which is given to be enforced by bringing an action within a specified period is controlled by the provisions of Code § 3514, that actions shall be commenced by serving defendant with notice. (Distinguishing *Smith v. Callanan*, 103-218; *Hawley v. Griffin*, 121-667.

The delivery of an original notice to the sheriff for service does not constitute the commencement of the action where, after it has been placed in the sheriff's hands, he is unable to make service and two terms of court are allowed to intervene without

further attempt to have service made. The intention that the notice shall be served must be continuous, and the effect of it is lost where the notice placed with the sheriff is abandoned. *Richardson v. Turner*, 110-318.

Where there is nothing in the record to disclose the service of an original notice which would interrupt the statute of limitations, and the only appearance of the defendant is the voluntary filing of an answer after the expiration of the statutory period of limitation, the date of the answer will be regarded as the time of the commencement of the action, although the petition was filed before the expiration of the period of limitation. *Dolan v. Burlington, C. R. & N. R. Co.*, 129-626.

SEC. 3451. Nonresidence.

The time during which the defendant is a non-resident of the state is not to be computed in determining the period of limitation. *Davenport v. Allen*, 120 Fed. 172.

In an action to subject property fraudulently conveyed to the payment of a judgment, non-residence will prevent the running of the statute until the property comes into the hands of a resident. *Applegate v. Applegate*, 107-312.

As against an action for partition the statute of limitations does not begin to run until there is some one within the jurisdiction of the state against whom the action might be brought. Even though the defendant had a tenant in possession of the property upon whom service might have been made, the non-residence of the owner will defeat the statute of limitations. *Stern v. Selleck*, 111 N. W. 451.

SEC. 3452. Bar in foreign jurisdiction.

An action for wrongful attachment in another state where the cause of action arose and the defendant resides, which is barred by the laws of that state, is also barred here. *Smyth v. Peters Shoe Co.*, 111-388.

Where a note executed in another state is mailed to the payee in this state, in accordance with agreement, express or implied, the cause of action on such note is one arising in that state, and if barred by the law of that state where the maker

resided and still continued to reside until the bar was completed, it is barred here although the payee of the note has resided in this state. *Tharp v. Thero*, 112-573.

A judgment by confession upon warrant of attorney rendered in another state against one who is a resident of this state may be valid although the cause of action is already barred by the laws of this state. *Cuykendall v. Doe*, 129-453.

SEC. 3453. Minors and insane persons.

This provision applies only to those who are under disability at the time the cause of action accrues. Such disability subsequently arising does not extend the statutory period. *Roelofsen v. Pella*, 121-153.

Therefore, held, that the insanity of a debtor, occurring nine years and four months after the cause of action on a

contract accrued, would not extend the limitation of action on the contract. *Black v. Ross*, 110-112.

As against a minor the period of the statute of limitations does not become complete until the expiration of a year after he obtains his majority. *Rice v. Bolton*, 126-654; 100 N. W. 634.

SEC. 3455. Failure of action.

Where plaintiff's first action was dismissed on account of his negligence in not filing the petition in time for the term designated in his notice, held, that a subsequent action brought after the expiration of the statutory period of limi-

tation but within six months from the dismissal of the first action could not be sustained. *Conley v. Dugan*, 105-205.

A plaintiff against whom judgment has been rendered after refusal to amend upon ruling against him, on demurrer to his

petition, cannot bring a new action under this section. *Gregory v. Woodworth*, 107-151.

Where the plaintiff is entitled to a continuance on account of an emergency arising in the progress of the case, but instead of asking such continuance he dismisses the action, he is negligent within the language of this section. *Pardey v. Mechanicsville*, 112-68.

This section does not apply where the cause of action stated in the second action is different from that alleged in the first, though based on the same transaction. *Whalen v. Gordon*, 95 Fed., 305.

This provision has no application to a second action on a policy of insurance brought after the expiration of the limi-

tation provided by the contract, although such action is commenced within six months of the dismissal of an action in which the plaintiff failed because it was prematurely brought. The contract provision in an insurance policy supersedes the statutory provisions. *Wilhem v. Des Moines Ins. Co.*, 103-532. And see *Harrison v. Hartford F. Ins. Co.*, 67 Fed. 298.

Where the first action is dismissed and the second brought after the expiration of the period of limitations, but within six months of the dismissal of an action in burden is on the plaintiff to allege and prove such diligence in prosecuting the first action as to bring the case within the provisions of this section. *Ceprley v. Paton*, 120-559.

SEC. 3456. Admission in writing—new promise.

The debtor cannot avoid a written admission of liability signed by him by showing that he signed the same without reading it under a misapprehension of its contents, due to statements of the attorney of the opposite party, which were not fraudulent. *Bannister v. McIntire*, 112-600.

Where a guardian in his written statement of account acknowledged the receipt of money as guardian, held that this was sufficient acknowledgment to extend the statute of limitations as to an action against him to recover the amount thus acknowledged to have been received. *Blakeney v. Wyland*, 115-607.

It is not necessary that the admission be express; it is enough if the writing clearly and unequivocally refers to the instrument in suit and clearly admits that it is not paid. *Will v. Marker*, 122-627.

An admission such as is contemplated by statute does not arise by mere implication. It must be clear, express and direct, with reference to the indebtedness admitted. Parol evidence is competent to connect the admission with the indebtedness referred to therein, but not for the purpose of giving rise to an implied promise to pay an indebtedness not therein

referred to. Therefore held that a written acknowledgment as to one of the notes secured by a mortgage did not prevent the bar of the statute subsequently becoming effectual as to another note so secured. *Finn v. Seegmiller*, 111 N. W. 314.

The extension agreement may be signed by an authorized agent. *Iowa Loan & Trust Co. v. McMurray*, 129-65.

It is not competent by parol evidence to show that a subsequent note was given for unpaid interest on the note in suit in order to remove the bar of the statute of the limitations which can only be done by an admission in writing. *Kleis v. McGrath*, 127-459.

A judgment may be revived by a written admission, or a new promise. *Spilde v. Johnson*, 132-484.

In a particular case held that reference to the claim in a letter was sufficient to constitute a written admission or a new promise. *McConaughy v. Wilsey*, 115-589.

Evidence in a particular case held sufficient to identify the instrument sued on as one acknowledged by the debtor in writing as a valid obligation. *Campbell v. Campbell*, 118-131.

SEC. 3457. Counter-claim.

A claim which is already barred but which was held by the defendant at the time plaintiff's cause of action arose may

be pleaded as a counter-claim. *Richardson v. Richardson*, 111 N. W. 934.

CHAPTER 3.

OF PARTIES TO AN ACTION.

SECTION 3459. Plaintiff—party in interest—exception.

Where a city provides salaries for police judge and marshal, so that the fees there-

of are to go into the city treasury, the city may, as the real party in interest, bring

action for the recovery of such fees in criminal cases from the county. *Des Moines v. Polk County*, 107-525.

One to whom a note is indorsed for collection may maintain an action thereon. *Lehman v. Press*, 106-389.

One to whom negotiable municipal bonds, transferable by delivery, have been delivered as agent for another, may sue thereon in his own name, being vested with the legal title, although the action is subject to any defense between the maker and the beneficial owner. *Salmon v. Rural Ind. School Dist.*, 125 Fed. 235.

A party holding the title of an instrument may sue thereon. So, where the action was brought by a foreign receiver which could not be maintained by him as such receiver, held that as an individual to whom the cause of action sued on had been assigned he could maintain such action. *Hale v. Harris*, 112-372.

The assured in a contract of fire insurance may maintain an action to recover thereunder, although it has been pledged to a mortgagee. *Smith v. Continental Ins. Co.*, 108-382.

With respect to contracts made by the cashier of a bank for its benefit, he may maintain an action without joining the bank, being the trustee of an express trust for the bank. *Leach v. Hill*, 106-171.

The trustee of an express trust may bring action without joining those for whose benefit the action is prosecuted. *Zion Church v. Parker*, 114-1.

Defect of parties appearing on the face of the petition is waived by not objecting thereto in the proper manner. *Ibid.*

The party for whose benefit a contract has been made may maintain an action thereon. *Runkle v. Kettering*, 127-6.

Where a contract is made for the benefit of a person not a party thereto, such third party may bring action thereon. Therefore, held that where one party authorized another to draw checks in his own name on a certain bank with the agreement that the first party would see that the checks were honored, the cashier of a bank receiving such checks had a right of action against the person who had agreed to see that the checks were paid. *Leach v. Hill*, 106-171.

The principle that one can sue upon the promise made to another for his benefit is confined to cases where the person for whose benefit the promise is made has the sole, exclusive interest in its performance.

SEC. 3460. Plaintiffs joined.

Several judgment creditors may join as plaintiffs in an action to set aside a fraudulent conveyance. *Gamet v. Simmons*, 103-163.

Where the claims of the insured and the person for whose benefit the policy is

Chicago, R. I. & P. R. Co. v. Ottumwa, 112-300.

The party with whom or in whose name the contract is made for the benefit of another may sue thereon in his own name without adding the descriptive words used by him in designating the capacity in which he acted in making the contract. *McKee v. Needles*, 123-195.

One who sells property to another on an agreement that its value shall be credited on the note of a third person may, on failure of the purchaser to make the credit as agreed, maintain an action against the purchaser for the value of the property. *Dorr Cattle Co. v. Jewett*, 116-93.

The holder of an unaccepted check may maintain an action thereon against the bank subject to the offset of any note or other claim held by the bank against the drawer (following earlier cases, but not referring to § 189 of the negotiable instruments act, supplement of 1902, § 3060-a.). *Bloom v. Winthrop State Bank*, 121-101.

In a contest over the probate of a will relating to personal property, the administrator or executor of a contestant should be substituted on his death. Such contest cannot be carried on in the interest of the deceased by his widow and heirs. *In re Will of Wiltsey*, 122-423.

A member of an unincorporated association cannot maintain an action in behalf of the association. *Westbrook v. Griffin*, 132-185.

An order of substitution of a trustee in bankruptcy in place of the bankrupt in an action to recover property delivered under a sale procured by fraud, does not terminate the jurisdiction of the court as to the bankrupt himself, and a judgment against him is not invalid. *Kuh, Nathan & Fisher Co. v. Glucklick*, 120-504.

While an action should be prosecuted in the name of the real party in interest, one who sues by way of substitution is subject to the burdens as well as entitled to the benefits of the action of his predecessor. *Crary v. Kurtz*, 132-105.

The executor named in a will cannot protest the probate of a codicil. *In re Estate of Stewart*, 107-117.

This section will be recognized by the federal courts in determining whether a suit is brought in the name of the proper party. *Edmunds v. Illinois Cent. R. Co.*, 80 Fed. 78.

specified to have been taken have been assigned to another, who sues for the loss, there may be a reformation of the policy without the original parties thereto being made parties to the action. *Benesh v. Mill Owners' Mut. F. Ins. Co.*, 103-465.

Where all the parties having a like interest join in the bringing of an action, the amount in controversy is the aggregate

of the amounts of the claims of the different parties so joining. *Comstock v. Eagle Grove*, 133-589.

SEC. 3461. Assignment without prejudice.

The assignment of a chose is without prejudice to any counterclaim, defense or cause of action, whether matured or not, if matured when pleaded, existing in favor of the defendant and against the assignor before notice of the assignment. *Hayes v. Clinton County*, 118-569.

Since the adoption of this statutory provision, the assignee is subject not only to defenses, but also to equitable rights of set-off existing in favor of the maker of a note as against the assignor. *De Laval Separator Co. v. Sharpless*, 111 N. W. 438.

The assignee of a cause of action held by an insolvent bank takes such claim

subject to a set-off in favor of the debtor of any deposit he may have in such bank. *Little v. Sturgis*, 127-298.

One who takes a negotiable instrument by assignment and not by negotiation in due course takes subject to the defenses available to the maker as against the assignor. *Hecker v. Boylan*, 126-162.

In an action by the assignee of a chose in action, the defendant can only interpose such defenses as existed in his favor and as against the assignor, before notice of the assignment. *Peterson v. Ball*, 121-544.

SEC. 3462. Defendants.

In an action against an insolvent corporation it is not necessary to make the receiver of the corporation a party defendant unless an attempt is made thereby to interfere with the right of the receiver to the property intrusted to his care. *State Bank v. McElroy*, 106-258.

The action of the board of a public corporation in issuing bonds cannot be annulled on *certiorari* where the holders of the bonds have not been made parties. *Brockway v. Board of Supervisors*, 133 293.

A contractor to whom bonds have been issued in payment of work is an indispensable party to a suit to restrain the further issuance of bonds to him and the collection of the taxes for the payment thereof. *Tod v. Crisman*, 123-693.

The surety is not a necessary party to a cross-petition in which the principal debtor seeks to assert his rights against a third person growing out of the transaction with reference to which he is sued. *First National Bank v. Dutcher*, 128-403.

In an action to set aside a conveyance for false representation as to title it is immaterial that a third person appearing to have some interest in the property is not made a party. *Wiese v. Grove*, 123-585.

It is not error to refuse to permit other parties to be brought in as defendants

SEC. 3463. United interest.

Tenants in common when jointly interested in the damages must join in an action of trespass. *Anderson v. Acheson*, 132-744.

Non-joinder of a necessary party plaintiff must be raised in the manner pointed

where there is no controversy presented by the pleadings the determination of which will affect their rights. *Burns v. Chicago, Ft. M. & D. M. R. Co.*, 110-385.

In an action on a non-negotiable instrument, brought by a transferee thereof, the defendant, who has therefore the opportunity to make as against the holder any defense which he could make against the original payee, is not entitled to have the payee and assignor of the instrument made a party. *Shambaugh v. Current*, 111-121.

Joinder of different parties defendant liable to the plaintiff on different causes of action is not allowable. *Iowa Lillooet Gold Mining Co. v. Bliss*, 144 Fed. 446.

A misjoinder or uniting of parties who should not be joined cannot be taken advantage of by demurrer, but must be reached by motion. *Dolan v. Hubinger*, 109-408.

If such objection is not raised by motion it is deemed waived. *Lull v. Anamosa Nat. Bank*, 110-537.

One who has conditionally paid a sum of money which is in controversy to the clerk of the court and has no further interest in its disposition, is not a necessary party to a suit with reference to the disposition of such money. *Hubbard v. Ellithorpe*, 112 N. W. 796.

SEC. 3465. Joint and several obligations.

If plaintiff maintains his action against one of several defendants he may have

judgment against that one, and the other defendants may have judgment against

judgment against that one, and the other defendants may have judgment against

plaintiff for costs. *Lull v. Anamosa Nat. Bank*, 110-537.

Notwithstanding the provisions of this section, a partnership contract not to engage in a particular business for a specified time, although signed by the members of the firm as individuals, will be binding only on the partnership, and not

on the individual members. *Streichen v. Fehleisen*, 112-612.

Action against the surety on a liquor seller's bond for civil damages caused by the sale of liquor may be maintained without making the principal a party. *Knott v. Peterson*, 125-404.

SEC. 3466. Other parties brought in.

When the determination of a controversy between the parties before the court cannot be made without the presence of other parties, they must be ordered brought in. *Farmers' Savings Bank v. Independent School Dist.*, 122-99.

A plaintiff may be required to bring in other defendants for the purpose of avoiding a multiplicity of actions against the same party. *Stroup v. Bridger*, 124-401.

Failure to bring in indispensable parties may be a sufficient ground for denying relief, although the objection is not raised in the trial court. *Tod v. Crisman*, 123-697.

One who is a proper but not a necessary party need not be brought into the litigation, and a failure to bring in such party cannot be complained of. *Busse v. Schaefer*, 128-319.

Where a party is necessary to the granting of effective relief he may be brought in, although it is not necessary for the establishment of the cause of action. *Rea v. Ferguson*, 126-704.

SEC. 3467. Suit on public bond.

Any one who has sustained an injury may sue on such bond as the real party in interest. *Home Sav. & T. Co. v. District Court*, 121-1.

An action on a bond may be maintained in the name of any person intended to be secured thereby. *Hipwell v. National Surety Co.*, 130-656.

Where a bond was executed to the chief

An action may be maintained against a surety alone without bringing in his principal. *Bannister v. McIntire*, 112-600.

In an action to recover real property it is not proper for defendant in a cross-petition setting up adverse possession by reason of occupation to a boundary line different from that recognized by plaintiff, to bring in as co-defendants other parties owning adjoining property as to whom the same question may arise. *Klinker v. Schmidt*, 106-70.

A mortgagee of personal property, sued by the mortgagor for its conversion, has the right to have subsequent mortgagees brought in. *Kohn v. Dravis*, 94 Fed.

Where one seeks protection against conflicting claims to the same debt or duty and has an opportunity by having a party brought in, to have the conflicting claim settled in one action at law, he has no right to the equitable remedy entered by bill of interpleader. *Hoyt v. Gouge*, 125-603.

financial officer of a life insurance association for the security of the funds of the association deposited by him in a bank and before action on the bond was brought he had ceased to be such officer, held that he was not a party entitled to maintain an action on such bond. *Bort v. McCutchen*, 147 Fed. 626.

SEC. 3468. Partnership.

The creditor of a partnership may bring an action against members of the partnership individually to charge them with a partnership debt without joining the firm, but to maintain such action the plaintiff must show that the alleged indebtedness existed. In such a case it would be a complete defense to show that as between

plaintiff and the alleged members of the firm the indebtedness had been finally adjudicated not to exist. *Baxter v. Rollins*, 110-310.

In an action brought against a partnership it is not proper to render judgment against a member of the firm for an individual liability. *Ogle v. Miller*, 128-474.

SEC. 3475. Actions by state.

This provision has no relation to actions by a county or other municipal corporation, and an appeal in an action in which judgment is rendered against a

county will not suspend the judgment unless a supersedeas bond is filed. *Harrison v. Stebbins*, 104-462.

SEC. 3476. Transfer—abatement.

Where a cause of action is transferred by assignment there is no occasion for dismissing the action, nor is the assignee entitled to intervene. His proper relief, if any, is to have himself substituted as plaintiff. *Bank of Commerce v. Timbrell*, 113-713.

An assignment of a cause of action after suit thereon has been instituted is not a ground for abating the action or for requiring the substitution of assignee as the party plaintiff. *Mayo v. Halley*, 124-675; *Emerson v. Miller*, 115-315; *Kringle v.*

Rhomberg, 120-472; *Citiens' State Bank v. Jess*, 127-450.

A substituted party takes up the prosecution or defense of the case at the point where the original party left it, assuming the burdens as well as receiving the benefits of the action of his predecessor. *Crary v. Kurtz*, 132-105.

A pending action is not abated by the discharge of the defendant in a bankruptcy proceeding subsequently instituted. *Wilsey v. Jewett*, 122-315.

SEC. 3480. Actions by minors.

A court acquires jurisdiction in an action brought by a minor in his own name and not by guardian or next friend and though its judgment may be erroneous because the action is not properly brought it is not void. *Parkins v. Alexander*, 105-74.

Therefore, where in an action brought

SEC. 3482. Defense by minor.

A judgment against an infant without defense by a guardian is clearly erroneous, and such error may be made the ground for granting a new trial under the provisions of Code § 4091. *Wise v. Schloesser*, 111-16.

A judgment rendered against a minor without appointment of or defense by a guardian is not void, but at most irregular. *Reints v. Engle*, 130-726.

The fact that a guardian *ad litem* appears for a minor does not render it imperative that such guardian represent the minor on appeal. The court may appoint a general guardian and authorize him to prosecute the appeal for such minor. *In re Estate of Strang*, 131-583.

An appointment of a guardian *ad litem*

by a minor in his own name before a justice of the peace judgment was rendered for the plaintiff and defendant appealed to the district court, held, that the latter court had jurisdiction to allow the substitution of a next friend as plaintiff and proceed with the case. *Ibid.*

before the court has acquired jurisdiction of the minor is not invalid. *Rice v. Bolton*, 126-654.

The appointment of such a guardian is not in itself a jurisdictional matter. *Ibid.*

The entry of judgment without such appointment in the absence of an appearance is not void, but an irregularity only. *Ibid.*

The appointment of a guardian *ad litem* for a minor defendant will ordinarily be made upon the motion of either party, and it is to be presumed that the court appoints a proper person for such purpose. The fact that the guardian appointed does not make active defense is not in itself evidence of fraud. *Harris v. Bigley*, 111 N. W. 432.

SEC. 3485. Defense of insane person—appointment of guardian.

Where the insanity of a defendant is not called to the attention of the court and a judgment is rendered against him by default, no guardian *ad litem* being appointed nor defense made, the judgment may be set aside on petition, under the provisions of Code § 4091, relating to new trial after the expiration of the term at which the judgment is rendered. *Haw-Griffin*, 121-667.

A decree against a defendant who is in fact insane may be vacated, and a new trial ordered, where no guardian *ad litem* was appointed to defend, although the fact of insanity was not made to appear

of record in the proceeding. *Hawley v. Griffin*, 121-667.

Where plaintiff in an action against an insane defendant is unsuccessful, compensation for the services of the guardian *ad litem* appointed by the court should be taxed against him as costs. *Burkhardt v. Burkhardt*, 107-369.

In a proceeding by the guardian for the sale of the ward's property in which a guardian *ad litem* has been appointed for the ward, the guardian *ad litem* should plead whatever might defeat the action of the guardian. *In re Guardianship of Kimble*, 127-665.

SEC. 3487. Interpleader.

Although an interpleader is expressly recognized only in actions of replevin, the

general statutory provision that a plaintiff may prosecute his action by equitable

proceedings in all cases where courts of equity before the adoption of the Code had jurisdiction (Code § 3427), still authorizes the action of interpleader as previously recognized in equity. *Hoyt v. Gouge*, 125-603.

CHAPTER 4.

OF PLACE OF BRINGING ACTION.

SECTION 3491. In relation to real property.

Where the court acquires jurisdiction by virtue of the location of the real property, one who is made defendant in the action and seeks to establish his title is not entitled to have the venue changed to the county of his residence. *Booth v. Bradford*, 114-562.

An action for specific performance is transitory, unless made local by statute, and may be brought in the court having jurisdiction of the property, or in one having jurisdiction of the person only, at the option of the plaintiff. *Epperly v. Ferguson*, 118-47.

An action for specific performance of a contract to convey land may be brought and prosecuted in the county where the land is situated, and the defendant is not entitled to have the venue changed to the county of his residence. *Bradford v. Smith*, 123-41.

An action for the specific performance of a contract for the sale of land and to quiet title thereto may properly be brought in the county where the land is situated. *Donaldson v. Smith*, 122-388.

A suit to set aside a deed and declare the property that of another than the grantee therein should be brought in the county where the real estate or some part of it is situated. *Long v. Garey Inv. Co.*, 112 N. W. 550.

A court having jurisdiction of an action by an administrator regarding lands in more than one county, may on dismissal as to the lands located in the county where the action is brought retain jurisdiction to grant relief as to the lands in another county. *Ibid.*

SEC. 3493. To foreclose mortgage or mechanic's lien.

Although this section requires that an action for the foreclosure of a mortgage on real property shall be brought in the county in which the property to be affected is situated, nevertheless the objection that an action to foreclose is brought in another county from that in which the property is situated is not jurisdictional, and if the defendant does not move for a transfer of the action to the proper county, he cannot afterwards urge such objection. *McDonald v. Second Nat. Bank*, 106-517.

The statute confers on the defendant a right to insist upon a foreclosure suit being

tried in the county in which the subject matter is situated, but this right may be waived by defendant. *Ibid.*

In an action to foreclose a mortgage, properly brought in the county in which the mortgaged property is situated, one who is on cross-petition of the defendant made a party to the suit is not entitled to have the venue changed to the county of his residence. Such cross-petition and the proceedings thereunder do not constitute a separate action. *Brown v. Holden*, 120-191.

SEC. 3494. Local actions. Actions for the following causes must be brought in the county where the cause, or some part thereof, arose:

1. *For fines, penalties or forfeitures.* Those for the recovery of a fine, penalty or forfeiture imposed by a statute; but when the offense for which the claim is made was committed on a water course or road which is the boundary of two counties, the action may be brought in either of them;

2. *Against public officers.* Those against a public officer or person specially appointed to execute his duties, for an act done by him in virtue or under color of his office, or against one who by his command or in his aid shall do anything touching the duties of such officer, or for neglect of official duty;

3. *On official bonds.* Those on the official bond of a public officer;

4. *Executor, administrator or guardian.* Those on the bond of an executor, administrator, or guardian may be brought in the county in which the appointment was made and such bond filed;

5. *Actions on other bonds.* And actions on all other bonds provided for or authorized by law may be brought in the county in which such bond was filed and approved. [C., '73, § 2579; R., § 2796.] [27 G. A., ch. 99, § 1.] [31 G. A., ch. 153.]

SEC. 3496. Place of contract.

To authorize suit against defendant in a county other than that of his residence on the ground that the contract on which he is sued provides for performance at a particular place, the provisions must be express and not merely by implication. *Bailey v. Birkhofer*, 123-59.

To authorize action on a contract to be brought against a non-resident of the county on the ground that performance in the county is provided for, it must appear in terms from the agreement that there was to be a performance in such county; otherwise an application for change of venue should be granted. *Moyers v. Council Bluffs Nursery Co.*, 125-677.

If the jurisdiction of the court depends on the fact that the contract sued upon is payable at a particular place, it is competent in a collateral attack upon the judgment to show that as a matter of fact the contract did not so provide. *Cooley v. Barker*, 122-440.

A bond for the payment of damages which shall be sustained by failure to perform a decree which may be subsequently rendered is not a contract to be performed at any particular place. *Prader v. National Masonic Accident Ass'n*, 107-431.

SEC. 3497. *Against common carriers.* An action may be brought against any railway corporation, the owner of stages, or other line of coaches or cars, express, canal, steamboat and other river crafts, telegraph and telephone companies, and the lessees, companies or persons operating the same, in any county through which such road or line passes or is operated. [C., '73, § 2582.] [29 G. A., ch. 138, § 1.]

SEC. 3498. Against construction companies.

The statutory provision as to venue of actions against persons engaged in the construction of railways does not authorize a suit against a sub-contractor on an oral

contract for grain purchased by him to feed his team in a county other than that of his residence. *Wilkinson v. McCarthy*, 127-292.

SEC. 3499. Against insurance companies.

These provisions as to place of bringing suit on a policy of insurance are applicable, although as an incident to the relief sought the court is asked to reform the terms of the policy. *Benesh v. Mill Owners' Mut. F. Ins. Co.*, 103-465.

An insurance company may be sued where the contract of insurance is made. *Teller v. Equitable Mut. L. Assn.*, 108-17.

The statutory provision that an action for breach of contract of insurance may be brought in the county in which the contract was made is not to be confined in its application to actions for losses under policies of insurance, but it applies also to actions relating to the consideration for a policy. *Cameron v. Mutual Life & Trust Co.*, 121-477.

SEC. 3499-a. *Action against operators of coal mines brought in county where mine is located.* An action may be brought against any corporation, company, or person, owning, leasing, operating, or maintaining a coal mine, in the county where said mine is located, on any contract, or for any tort, in any manner connected with or growing out of the construction, use, or operation of said mine. [28 G. A., ch. 121, § 1.]

SEC. 3500. Office or agency.

This section does not require that the office or agency be permanent rather than transient nor that the business carried on

be a considerable share of that done by the principal. *Locke v. Chicago Chronicle Co.*, 107-390.

The fact that the person served with notice was at the time representing the defendant company as secretary in the making of a contract and in determining the manner of execution thereof, held sufficient to show an agency such as to authorize the bringing of an action on a contract thus made within the county of such agency. *Thistle Coal Co. v. Rex Coal & Mining Co.*, 132-592.

Under this section, held that where a resident of one county sent agents into another county to sell and contract for the delivery of fruit trees, and subsequently

SEC. 3501. Place of residence.

Except as otherwise specified, personal actions are to be brought in the county where the defendants or some of them, if more than one, actually reside. *Wilkinson v. McCarthy*, 127-292.

It is not error to overrule a motion to

SEC. 3502. Residents of different counties.

While a dismissal of the action as to resident defendants entitles non-resident defendants to dismissal as to them, such non-residents must ask relief by motion, otherwise they will be bound by the adjudication. *Brown v. Iowa Legion of Honor*, 107-439.

Where the case has not been disposed of as against the resident defendant to the return of the verdict against the non-resident, the latter is not entitled to have

SEC. 3504. Change when brought in wrong county.

By answering after the overruling of an application for a change of place of trial the applicant does not waive error in overruling such motion. *Foss v. Cobler*, 105-728.

Where administration is granted in a county other than that of the residence of deceased at the time of his death, it is void. In such case motion for a change of venue is not necessary. *In re King's Estate*, 105-320.

If an action to foreclose a mortgage is brought in a county where no part of the mortgaged property is situated, it may on motion be changed to the proper county, but failure to ask for the change will be a waiver of the objection. The court is not

sent the same agent with the trees to that county for delivery, in accordance with the terms of the contract, an action relating to the contract could be brought against him in that county. *Wood v. Rice*, 118-104; *Goodrich v. Fogarty*, 130-223.

Where a party has an agency engaged in furthering his business in the county where the action is brought, one employed through such agency in carrying on the business may maintain against the principal an action in that county. *Mitchell v. Lang*, 112 N. W. 87.

tax the costs to the plaintiff on the ground that defendants are sued in the wrong county, if it appears that one of them was in fact a resident of the county of trial. *Prewitt v. Wilson*, 128-198.

the action dismissed as against himself on the ground that no relief is granted as against the resident defendant. *Lyon v. Barnes*, 133-717.

If the action is dismissed as to those who are residents of the state, or judgment is rendered in their favor, a non-resident defendant is entitled to have the cause dismissed also as to him. *Woodling v. Mitchell*, 127-262.

without jurisdiction in such case. *McDonald v. Second Nat. Bank*, 106-517.

This provision as to transfer of the case to the proper county has no application where suit is brought in one county to enjoin the enforcement of a judgment rendered in another county in violation of the provisions of Code § 4364. *Hawkeye Ins. Co. v. Huston*, 115-621.

The defendant sued in the wrong county, who procures a change of venue to the proper county, is not entitled to recover personal expenses and attorney's fees in defending the case. The allowance is largely discretionary with the court. *Moyers v. Council Bluffs Nursery Co.*, 132-98.

SEC. 3504-a. Place of bringing actions against municipal corporations. Actions against municipal corporations including cities organized under special charter in all counties where terms of the district court are held in more than one place must be brought in the county and at the place where terms of the district court are held nearest to where the cause or subject of the action originated. [32 G. A., ch. 162.]

CHAPTER 5.

OF CHANGE OF PLACE OF TRIAL.

SECTION 3505. Grounds for.

Par. 1. County a party: In an action against the county, the plaintiff has the right to change of venue to another county, and if he does not elect to have a change, he cannot challenge the jurors on the ground that they are taxpayers of the county. *Wilson v. Wapello County*, 129-77.

Par. 3. Prejudice: The judge is warranted in considering matters which are of his own knowledge and conviction in the disposition of a motion, and the denial of the change for prejudice of the judge will not be disturbed on appeal where the circumstances indicate that the denial was in the exercise of a reasonable discretion. *Petty v. Hayden*, 115-212.

Where the showing is of prejudice in the portion of the county where the transaction involved took place, it is not sufficient. *State v. Moats*, 108-13.

Where change of place of trial was asked on account of prejudice in the community arising from previous trials of another case involving the same facts, held that it could not be presumed that the verdicts rendered in the other cases were not the result of a fair consideration of

the facts by the jury, and that they indicated passion and prejudice in the community against the defendant in that case, who was the same defendant as in the case in which the application for change was made. *Croft v. Chicago, R. I. & P. R. Co.*, 109 N. W. 723.

The showing in a particular case, held not sufficient to require change of venue on account of prejudice likely to have been created by newspaper publications. *Alverson v. Anchor Mut. F. Ins. Co.*, 105-60.

In general: This section relates to civil actions, and not to special proceedings. *Union Bldg. & Sov. Assn. v. Soderquist*, 115-695.

The granting or refusing of an application for change of venue is a matter largely within the discretion of the court to which the motion is addressed, and when a showing is made which is regular in form and *prima facie* sufficient, the ruling of the trial court sustaining it is rarely, if ever, reversed on appeal. The correctness of the ruling of the trial court is not to be determined by comparative count of affidavits. *Favre v. Manderscheid*, 117-724.

SEC. 3509. When change perfected.

The making and transmission of the transcript is not the act, or one of the acts, which is necessary to perfect a change of venue. If the clerk gives a defective transcript it may be perfected within a reasonable time. *Favre v. Manderscheid*, 117-724.

When the papers transmitted are re-

ceived into the official custody of the clerk of the court to which the change is granted, and the case is entered upon the docket of that court, the court acquires jurisdiction, and an omission of the clerk to properly note such filing can be cured by order of court. *Ibid.*

SEC. 3511. Costs of change.

The court having failed to designate or point out the costs to be paid as a condition for granting the change of venue, it

must be assumed that there were no costs which the party was required to pay. *Favre v. Manderscheid*, 117-724.

CHAPTER 6.

OF THE MANNER OF COMMENCING ACTIONS.

SECTION 3514. Original notice.

The commencement of the action with regard to special statutory limitations is to be dated from the placing of the notice in the hands of the sheriff for service, the same rule being applicable as in case of the general statute of limitations under the provisions of Code § 3450. *Smith v. Callahan*, 103-218.

This provision is to be applied in determining whether an equitable action to redeem the lands of a minor or insane person within one year after the termination of the disability has been brought within proper time, and also in determining whether a proceeding by petition to set aside a judgment against a minor or in-

sane person, not represented by guardian, has been commenced within one year, as required by Code § 4094. The provision in the general statute of limitations (Code § 3450), that an action shall be deemed commenced when the notice is placed in the hands of the sheriff for service, has no application in such cases. (Distinguishing *Smith v. Callanan*, 103-318.) *Hawley v. Griffin*, 121-667.

Under Code § 3450 the placing of an original notice in the hands of the sheriff for service is a sufficient commencement of the action under the statute of limitations, but the intention that the notice shall be served must be continuous, and if the sheriff returns the notice as unserved, and two terms of court are allowed to elapse without further attempt to have service made, the action is to be deemed abandoned. *Richardson v. Turner*, 110-318.

The time fixed by statute as to notice,

SEC. 3515. Dismissal for failure to file petition.

Statutes with reference to time for filing pleadings not in express terms made mandatory are generally regarded as directory only. *Edwards Loan Co. v. Skinner*, 127-112.

Where the petition is not filed by the time fixed therefor in the original notice

SEC. 3517. How long before term.

Where notice is served on a party outside of the state, within less than twenty days before the term at which judgment

SEC. 3518. Method of service.

A judgment entered on substituted service is valid. *Hass v. Leverton*, 128-79.

The holding in *Fanning v. Krapy*, 61-417, that whoever undertakes to give notice by publication and misnames the defendant is without excuse and the notice will not confer jurisdiction, is equally pertinent to a case of substituted service. *Thornily v. Prentice*, 121-89.

In an action against a married woman the original notice may be served by leaving a copy with her husband at his place of residence in case the wife is not found

SEC. 3519. Return of personal service.

Where the affidavit of service appears to have been signed by the person making it, and the notary so writes the jurat as to make use of the signed name as a part of the jurat itself, this fact does not prevent the return being considered as duly signed and sworn to. *Blair v. Hemphill*, 111-226.

The statutory provisions with reference to service of notice recognize no smaller governmental subdivisions than counties,

filing of pleadings, etc., is to enable the parties to prepare for trial; but by consent of parties the court may have jurisdiction to try the case at the term at which the petition is filed, although proper notice of the filing of the petition has not been given. *Rummel v. Dealy*, 112-503.

A notice of a cause of action against two persons for goods sold and delivered to them will sustain a prosecution of action against one of them for goods sold and delivered to him alone. *Padden v. Clark*, 124-94.

In an action to foreclose a mortgage it is not necessary to describe the land covered by the mortgage, and therefore a mis-description in the notice of the land covered by the mortgage will not render the notice void so that the court is without jurisdiction to determine the sufficiency of the notice and to render a valid judgment. *Fleming v. Hager*, 121-205.

the defendant is entitled to have the case dismissed. *Conley v. Dugan*, 105-205.

This statutory provision does not require the dismissal of the action on the ground that the petition is not signed by the plaintiff or his attorney. *First National Bank v. Stone*, 122-558.

is entered against him, such judgment is at least premature, and should be set aside. *Streeter v. Gleason*, 120-703.

within the county, although she may have temporarily abandoned him and is not actually residing with him at the time. *Galvin v. Dailey*, 109-332.

Any one upon whom service may be made, may acknowledge such service; and thus service upon a municipal corporation being authorized to be made by service on the mayor or clerk, an acknowledgment of the service by mayor or clerk is binding on the corporation. *McCartney v. Washington*, 124-382.

and a return of service of the original notice as having been made in a particular town does not show that town to be the residence of the person upon whom service is made. *Shoemaker v. Roberts*, 103-681.

The return of the officer as to substitute service should correctly state the township, town or city where the service was made, and an error in such statement will render the notice ineffectual to confer jurisdiction. Thus, where the return was of service in

a certain township, whereas it was in fact made in a town included within that township, held that a default rendered on such service was void. *Bradley Mfg. Co. v. Burrhus*, 112 N. W. 765.

The return of an officer as to service by leaving a copy held not to be overcome by the testimony of a witness, given many years afterward, based only upon his recollection. *Galvin v. Dailey*, 109-332.

Service of notice will be presumed from recital thereof in the judgment, and the burden is on the person attacking the judgment to overcome the presumption, which will not be done by showing facts from which merely a contrary presumption may arise, such as absence of notice from the files, or of entries in the appearance docket and fee book. *Farnsley v. Stillwell*, 107-631.

Where there was a recital of service in a decree, and as against that explicit denials on the part of the party alleged to have been served of the service of any notice, strengthened by other evidence, held that the finding of the lower court that there had been no service would be sustained. *Miller v. Minneapolis & St. L. R. Co.*, 119-41.

The judgment of the court is conclusive as to whether the facts essential to jurisdiction in the particular case exist. *Applegate v. Applegate*, 107-312.

Where a return showed service on defendant's son but it did not appear that defendant was not found within the county or that a copy was left at his usual place of residence or that the son was a member of his family or over fourteen years of age, held that such return showed no service whatever, and not simply defective service. *Thompson v. Thompson*, 117-65.

Return of service "by leaving a copy of notice with Paul Thornily, over 15 years of age, his son," held not sufficient to show service upon the defendant. *Thornily v. Prentice*, 121-89.

A return of substituted service which

states that the notice was left with the defendant's wife is sufficient, without naming her. *Hass v. Leverton*, 128-79.

In a particular case held that evidence of want of service of notice in pursuance of which a judgment was rendered was sufficient to overcome the presumption of service arising from the rendition of the judgment and from entries on the appearance docket and fee book showing return of service, the original of the sheriff's return not being introduced in evidence. *Shehan v. Stuart*, 117-207.

A judgment may be collaterally attacked for want of jurisdiction when there is no notice, as, for instance, where the notice is by publication without the previous filing of an affidavit as required in such cases. But where there is a notice supported by a proper preliminary proceeding, the sufficiency of which is subject to construction and upon which the court must judge of its own jurisdiction, the judgment is good until set aside in some direct proceeding. *Priestman v. Priestman*, 103-320.

Where there is an attempted service, and the question is whether the forms of law were complied with, the case is one of defective service, and not want of service. *Longville v. May*, 115-709.

A judgment which is void for want of service may be set aside at any time. *Spencer v. Berns*, 114-126.

Where the service of notice is merely informal or defective the judgment is not subject to collateral attack. *Thornily v. Prentice*, 121-89.

If the notice is defective merely, such defect cannot be taken advantage of in an action on the judgment. *Tomlin v. Woods*, 125-367.

A non-resident who has come into this state for the purpose of attending a trial in an action to which he is a party, is privileged from the service of civil process in another action. *Murray v. Wilcox*, 122-188.

SEC. 3524. Proof of service—patients in hospital for insane.

The entry of judgment on a return purporting to be made by a deputy sheriff, and not under oath, is not conclusive that the person making such return had authority to do so, and parol evidence is admissible to show that no such service was ever made, and that the court was therefore

without jurisdiction of in entering the judgment. *Buck v. Hawley*, 129-406.

A judgment rendered upon service of notice upon an insane person without compliance with the special provisions as to service in such case is not absolutely void, but voidable. *Day v. Goodwin*, 104-374.

SEC. 3525. Superintendent may acknowledge service.

Acknowledgment of service on an insane person by the superintendent of a hospital for the insane in which such person is confined is authorized. And in a particular case, held that the acknowledgment was

sufficient although there was a variance in name, there being no question as to the identity of the person to be served. *In re Estate of Strang*, 131-583.

SEC. 3528. Service on county—presentation of claims.

Where a city provides salaries for police judge and marshal, and the fees of such officers therefor become payable to the city, and such fees in criminal cases are to be paid by the county, the filing with the county auditor of transcripts showing that such fees have been earned, is a sufficient demand against the county to enable the city to recover the fees in an action. *Des Moines v. Polk County*, 107-525.

The acceptance of a portion of a claim allowed by the board does not bar recovery of the balance if there is an absolute liability for the full amount of the claim. *Resner v. Carroll County*, 126-423.

The provision requiring notice of unliquidated demands before the institution of suit thereon applies to all demands of that character whether arising out of contract or tort. *Little v. Pottawattamie County*, 127-376.

But the failure to make demand before suit is brought may be cured by such demand subsequently made and alleged in supplemental or amended petition. *Ibid.*

No provision, similar to that of this section is found in the statute applicable to cities except in Code § 1050, which is applicable only to cities under special charter. *Kenyon v. Cedar Rapids*, 142-195.

SEC. 3529. On agent of corporation. If the action is against any corporation or person owning or operating any railway or canal, steamboat or other river craft, or any telegraph, telephone, stage, coach or car line, or against any express company, or against any foreign corporation, service may be made upon any general agent of such corporation, company or person, wherever found, or upon any station, ticket or other agent or person transacting the business thereof or selling tickets therefor in the county where the action is brought; if there is no such agent in said county, then service may be had upon any such agent or person transacting said business in any other county. If the action is against any railway corporation which has merged and consolidated its stock, property, franchises and liabilities with that of any other railway corporation, as authorized by section two thousand and thirty-six (2036) of the code, or which has sold or leased its property and franchises to any other railway corporation as authorized by section two thousand and sixty-six (2066) of the code, service of the original notice may be made upon any station, ticket or other agent of the merged, vendee or lessee corporation in the county where the action is brought; if there is no such agent in said county, then, service may be made upon such agent or person in any other county. [C., '73, § 2611; C., '51, § 1727.] [29 G. A., ch. 139, § 1.] [32 G. A., ch. 163.]

SEC. 3531. On municipal or other corporation.

If the notice is directed to a school district and served on the president thereof, it is sufficient to constitute notice to the district. *Haggard v. Independent School Dis.*, 113-486.

The mayor or clerk upon whom service may properly be made may accept such service by written acknowledgment thereof. *McCartney v. Washington*, 124-382.

Service upon the secretary of a corporation is sufficient service upon the corporation. *The Telegraph v. Lee*, 125-17.

Although the defendant in the action may be designated as a partnership, yet if

it is in fact a corporation, and is served as a corporation the court acquires jurisdiction. *Taft Co. v. Boumani*, 110-739.

Where foreign corporations are required as a condition of doing business within a state to appoint an agent upon whom service may be made within the state, service upon an agent appointed in attempted compliance with such statutory requirements will be valid, although it does not technically authorize the service of process upon him. *Green v. Equitable Mut. L. & End. Assn.*, 105-628.

SEC. 3532. On agent as to business of office or agency.

It is sufficient if the principal has an office or agency in the county in which the suit growing out of or connected with the business of that office or agency is brought and service of the notice be made upon an

agent or clerk employed in that office or agency. *Lock v. Chicago Chronicle Co.*, 107-390.

A non-resident corporation may be sued in any county in which it can be found and

service upon it may be made by serving an officer or agent. *Moffit v. Chicago Chronicle Co.*, 107-407.

To sustain a service on an agent or

SEC. 3534. By publication.

Whoever undertakes to give notice by publication and misnames the defendant is without excuse, and the notice will not confer jurisdiction. (Following *Fanning v. Krapfl*, 61-417.) *Thornily v. Prentice*, 121-89.

Where judgment is rendered by default in a divorce proceeding, on service of notice by publication which does not correctly give the name of defendant nor spell it so as to indicate the correct pronunciation, the judgment is subject to collateral attack. *Hubner v. Reickhoff*, 103-368.

The fact that in an original notice in an action to foreclose a mortgage the land covered by the mortgage is mis-described does not deprive the court of jurisdiction to proceed under such notice, and a judgment rendered in pursuance thereof is not void, so as to be subject to collateral attack. *Fleming v. Hager*, 121-205.

The filing of an affidavit is a condition precedent to the service of notice by publication, and a judgment rendered without an appearance by the defendant served only by publication when the affidavit has not been filed is void. *Priestman v. Priestman*, 103-320.

And held, that filing of the affidavit after the first publication, although before the conclusion of the publication, was not sufficient. *Ibid.*

Where the decree recites service by publication, and the appearance docket shows that an affidavit of non-residence was filed

clerk under this section it must appear that the action grew out of some matter connected with the business of such agent or clerk. *Barnabee v. Holmes*, 115-581.

with the petition and before the first publication, and there is evidence of witnessess that they saw the affidavit, etc., the judgment will be sustained, although the affidavit was not found on file after the judgment was entered. *Omaha Nat. Bank v. Squire*, 113-365.

A proceeding by a sub-contractor to enforce a mechanic's lien may be maintained as a proceeding *in rem* without asking a personal judgment against the principal contractor, where the principal contractor is a non-resident upon whom personal service cannot be obtained. *Simonson Bros. Mfg. Co. v. Citizens' State Bank*, 105-264.

The rule that a judgment without personal service against a non-resident is only good so far as it affects the property which is taken or brought under the control of the court or tribunal, is applicable also where a city attempts to enforce by personal judgment an indebtedness for special assessments on his property. *Dewey v. Des Moines*, 173 U. S. 193.

Service of notice by publication is authorized as to actions to quiet title, it being made to appear by affidavit that the defendant is a non-resident of the state. *Bales v. Williamson*, 128-127; *Ruppin v. McLachlan*, 122-343.

Notice by publication may be served on a non-resident defendant in an action to construe a will. *Dillavou v. Dillavou*, 130-405.

SEC. 3536. When complete—proof.

A published notice requiring appearance at an impossible date is no notice, and confers no jurisdiction on the court over the

party or the subject-matter. *Gaar v. Taylor*, 128-636.

SEC. 3537. Actual service.

Personal service of notice outside of the state gives the court jurisdiction to render judgment *in rem* in an attachment suit. *Clark v. Tull*, 113-143.

Personal service of notice in another state does not give the court jurisdiction to render a personal judgment. *Richardson v. Richardson*, 111 N. W. 934.

SEC. 3540. Length of publication. Such notice shall be filed in the action, and its contents, shall be published in the paper, and for the time designated, at least once each week for four successive weeks, and at the end of said time service shall be complete, and such unknown person in court at the next term thereafter. [C., '73, § 2625; R., § 2839.] [31 G. A., ch. 154.] [32 G. A., ch. 164.]

SEC. 3541. Mode of appearance—when required.

Effect of appearance: An appearance by the assignee in insolvency of a foreign corporation may by comity be recognized

and will bind the corporation although such assignee has no legal authority beyond the extent of the jurisdiction in

which he is appointed. *State Bank v. McElroy*, 106-258.

The court having jurisdiction of the subject-matter acquires jurisdiction of the case by appearance. *Applegate v. Applegate*, 107-312.

By appearance to an action, even though for a special purpose, jurisdiction to determine the case upon its merits is conferred upon the court. *Locke v. Chicago Chronicle Co.*, 107-390; *Moffit v. Chicago Chronicle Co.*, 107-407.

Appearance by motion to dismiss for want of jurisdiction, where service has been made on an alleged agent, is sufficient to give the court jurisdiction in case the motion is overruled. *Teller v. Equitable Mut. L. Assn.*, 108-17.

The appearance of a defendant in a divorce proceeding to object to the granting of temporary alimony is such appearance as to give the court jurisdiction. *Hamilton v. Hamilton*, 129-628.

A defendant may not make a special appearance to resist an interlocutory order or ruling, and then say he is not in court for the purpose of a judgment on the merits. *Blondel v. Ohlman*, 132-257.

Appearance by a non-resident defendant to plead to the jurisdiction of the court, held to constitute a waiver of objection to the jurisdiction of the federal court on removal of the case from the state court. *Louden Machinery Co. v. American Malleable Iron Co.*, 127 Fed. 1008.

Recital that defendant defaulted for want of pleading after appearing in the action is sufficient to show jurisdiction of the court. *Harrison County v. State Sav. Bank*, 127-242.

A trustee holding the legal title to mortgaged property cannot appear for the

cestui que trust so as to render a personal judgment against the latter binding. *Thornily v. Prentice*, 121-89.

The appearance which gives the court jurisdiction must have some relation to the merits of the controversy and the purpose must be to invoke some action on the part of the court having direct bearing in some way upon the question of the judgment or decree proper to be entered. The taking of a stay of execution is not such appearance as to confer jurisdiction to the entry of the original judgment. *Bank of Horton v. Knox*, 133-443.

Holidays: Judicial business may be transacted on the Fourth of July and a witness may be punished for contempt in not appearing on that day in response to a subpoena. *Chambers v. Oehler*, 107-155.

Legal holidays are also enumerated in Code § 3053 as days on which negotiable paper cannot be presented for protest. *Brennan v. Roberts*, 125-615; 101 N. W. 460.

The statutory exemption as to appearance in an action on the days specified as holidays has no application to subsequent proceedings in the case, after there has been a sufficient appearance. *Michel v. Boxholm Co-operative Creamery*, 128-706.

Sunday or any other day mentioned by this section as a holiday should not be excluded in estimating the three days within which a motion for new trial is to be filed. *German Sav. Bank v. Cady*, 114-228.

Privilege: A non-resident who has come into this state for the purpose of attending a trial in an action to which he is a party, is privileged from the service of civil process in another action. He is entitled to the same privilege as one who attends as a witness. *Murray v. Wilcox*, 122-188.

SEC. 3543. Notice of action pending.

Where, without authority of one party, a case was marked on the judge's calendar as settled, and a corresponding entry was made in the court record, but subsequently a trial notice was filed in the case and it was put on the calendar for the succeeding term, held that one who purchased real property involved in such action after the service of the trial notice was affected with notice of the pendency of the action. *Furry v. Ferguson*, 105-231.

A purchaser at execution sale under a judgment takes subject to any right subsequently established in an action already pending, to have the premises declared a homestead and exempt from sale under such judgment. *McClelland v. Bennett*, 106-74.

The primary object of the rule as to *lis pendens* is to keep the property within the power of the court until final judgment or decree shall be entered, and thus to enable the courts to give force and effect to such

judgments. In the absence of the statutory provisions, the notice involved in the pendency of the action continues until the suit is determined by final decree, or until it is suspended by a failure to make what is called a "full prosecution." An appeal from the final judgment of an inferior court continues the *lis pendens* during the pendency of the appeal. It has also been held that where there is an apparent neglect to prosecute, a reasonable excuse for the delay complained of is always available to keep the *lis pendens* alive. Full prosecution exists so long as the action is pending and the court has complete jurisdiction over the matter in controversy. Under the provisions of this section *lis pendens* commences when the petition has been filed and continues while the action is pending. *Olson v. Leibpke*, 110-594.

Lis pendens is notice to those only who attempt to acquire some interest in the subject-matter of a litigation after suit is

begun and from a party thereto. But one who has instituted such suit does not become a purchaser in such sense as to be protected against unrecorded instruments. *Noyes v. Crawford*, 118-15.

One purchasing at execution sale is bound to take notice of an action as to the title to the property pending against the owner. *Bacon v. Early*, 116-532.

One who purchases or otherwise acquires an interest from the defendant in a foreclosure proceeding, brought in the county where the land is situated, takes subject to the determination of such proceeding, and, although not made a party, has no equitable right to redeem from the foreclosure sale. *Cooney v. Coppock*, 119-486.

CHAPTER 7.

OF JOINDER OF ACTIONS.

SECTION 3545. When permitted—issues tried separately.

Causes of action may be joined where each may be prosecuted by the same kind of proceedings, by the same party, in the same right, and if suit on all may be brought and tried in the same county. *Chambers v. Oehler*, 104-278.

It is proper to join in one action claims on tort and on contract. *Devlin v. Walsh*, 108-428.

An action by a wife for damages by reason of sales of liquor to her husband cannot be joined with an action to recover penalty for sales to minors or habitual drunkards. *Carrier v. Bernstein*, 104-572.

It is not proper to join with an action on a bond to indemnify against the en-

forcement of a decree a cause of action on the decree itself. *Prader v. National Masonic Accident Assn.*, 107-431.

It is not proper in the same action to join separate causes of action against different defendants. *Iowa Lillooet Gold Mining Co. v. Bliss*, 144 Fed. 446.

Distinct causes of action may be pleaded in different counts of one petition. *Watters v. Waterloo*, 126-199.

The statement in different counts of two inconsistent causes of action does not show an election to rely upon one of them rather than another. *Continental Ins. Co. v. Clark*, 126-274.

SEC. 3548. Misjoinder waived.

The remedy for misjoinder of actions is by motion. *Citizens' State Bank v. Jess*, 127-450; *Mitchell v. McLeod*, 127-733.

By failing to appear, a defendant waives

objection to misjoinder of actions. *McDonald v. Second Nat. Bank*, 106-517; *Lull v. Anamosa Nat. Bank*, 110-537.

CHAPTER 8.

OF PLEADING.

SECTION 3551. Motions and demurrers.

The provision that motions assailing pleadings must be in writing may be waived and the opposite party will be deemed to have acquiesced therein where without objection the motion is made orally and taken down by the official stenographer. *Fischer v. Johnson*, 106-181.

Failure to object to the filing of a motion as not within the proper time may be urged in connection with the consideration of the motion on its merits, and need not be taken at the time the motion is filed. *Turley v. Griffin*, 106-161.

A motion to strike from the files another motion is wholly unnecessary. The motion

may be overruled if not properly introduced, although no specific objection to it on that ground is made. *German Sav. Bank v. Cady*, 114-228.

A receiver's final report on which his discharge is granted may be set aside on the ground that no notice of a motion for the acceptance of the final report and for discharge had been entered on the motion docket in accordance with the practice prevailing in the county with reference to noting the filing of motions upon such docket. *Williams v. Des Moines Loan & Trust Co.*, 126-22.

SEC. 3552. Subsequent pleadings.

While a party after his pleading has been held defective is entitled until noon of the next day in which to amend or plead over, yet if without objection he allows the

court to proceed before the expiration of that time without so amending or pleading over he cannot complain on appeal. *Chase v. Wright*, 116-555.

SEC. 3554. Extension of time.

When time is given until a day named for filing a pleading it should be filed be-

fore the named day. *Carver v. Seevers*, 126-669.

SEC. 3557. Pleadings defined—filing—forms abolished.

The rule that when the construction of a pleading is doubtful, after giving to the language a reasonable intendment, it should be resolved against the pleader, is not to be applied save when the attack is by motion or demurrer. The rules by which the sufficiency of pleadings is to be determined are those prescribed by this section. *Lampman v. Bruning*, 120-167.

While a motion is for some purposes to

be regarded as a pleading, yet the bar of the statute of limitations cannot be raised by a motion to direct a verdict, but must be specially pleaded. *Borghart v. Cedar Rapids*, 126-313.

Questions presented for determination by motions or demurrers are issues, the determination of which constitutes a trial. *Columbus Junction Tel. Co. v. Overholt*, 126-579.

SEC. 3558. Copy filed.

Failure to file a copy of a pleading is not a ground for vacating the judgment

afterwards rendered. *Stephens v. City Council*, 132-490.

SEC. 3559. Petition—what to contain—counts—divisions—paragraphs.

Title of action: The omission to properly entitle the petition as provided in paragraph two of this section is merely a defect of form for which the defendant is not entitled as a matter of right to have the action dismissed. *First National Bank v. Stone*, 122-558.

Statement of cause of action: Allegations in the petition which direct the attention of the court with reasonable certainty to the facts upon which the prayer for relief is based, are ordinarily held sufficient. *Conner v. Baxter*, 124-219.

A statement of facts relied upon by the plaintiff as entitling him to relief is a sufficient pleading of such facts to sustain a decree for the relief to which, as a matter of law, the plaintiff is entitled under such facts. *Atlee v. Bullard*, 123-274.

When a material fact necessary to a recovery is omitted from a petition it is said that it does not state a cause of action. *Box v. Chicago, R. I. & P. R. Co.*, 107-660.

A prayer for relief cannot take the place of a statement of facts showing the party to be entitled to relief. *In re Estate of Bruning*, 122-8.

A party is presumed to have stated the case as strongly as the facts will justify in his favor and nothing will be assumed in his favor which has not been averred or may not upon a liberal or fair interpretation be implied from his averments. *Witham v. Blood*, 124-695.

An allegation of ownership, although in

effect a mere legal conclusion, is to be treated as an allegation of fact. *Ruppin v. McLachlan*, 122-343.

The petition in an action to foreclose a mortgage covering specific personal property should state the facts entitling plaintiff to a special execution, and if it does so the court may decree a special execution to issue for any part of the property, no matter where it may be located, within the state. *King v. Nelson*, 120-606.

Allegations of contractual relations with a common carrier or telegraph company do not necessarily make the action one upon contract rather than in tort. *Cowan v. Western Union Tel. Co.*, 122-379.

On information: A statement of facts on information and belief is sufficient, in the absence of a motion attacking the pleading on this ground. *Robinson v. Ferguson*, 119-325.

Ultimate facts: The pleading should state ultimate facts and not the evidence. *Johnson v. Chicago, R. I. & P. R. Co.*, 107-1.

A paragraph in a petition which is in the nature of a statement of evidence not relevant to any issue in the case and not of ultimate and material facts may properly be stricken out on motion. *Tisdale v. Major*, 106-1.

Ultimate facts only and not evidence of them are to be stated in the petition; but, held, that allegations that the placing of a trolley pole in front of plaintiff's prem-

ises was without necessity and to annoy plaintiff and injure and depreciate the value of his property, and that it was an obstruction to the enjoyment of his property and had caused depreciation therein, were sufficient to set out a cause of action, in the absence of a motion for more specific statement. *Snyder v. Ft. Madison Street R. Co.*, 105-284.

Where statutes of another state relied on are merely evidence of ultimate facts they need not be pleaded, but can be introduced in evidence in support of the ultimate fact which is properly pleaded. *Green v. Equitable Mut. L. & End. Assn.*, 105-628.

Implied contracts: Under allegations showing implied promise to pay for services, no recovery can be had under breach of an express agreement. *Duncan v. Gray*, 108-599.

Negligence: An allegation of negligence in a mine owner in allowing the roof of an entry to be in a dangerous condition with knowledge thereof, is sustained by evidence that it had been in a dangerous condition for such length of time as that knowledge thereof would be imputed to defendant. *Blazenic v. Iowa & W. Coal Co.*, 102-706.

In an action to recover damages for injuries resulting from negligence, the plaintiff should be limited in his testimony to the specific negligence alleged. *Wirstlin v. Chicago, M. & St. P. R. Co.*, 124-170.

Statement of the specific acts or facts constituting the alleged negligence by which the injury has been occasioned is not necessary to the statement of a cause of action for such negligence, and after the period of limitation for bringing such action has expired, an amendment in an action seasonable brought may be allowed, if it simply amplifies the specifications or grounds of the alleged negligence. *Gordon v. Chicago, R. I. & P. Co.*, 129-747.

Freedom from contributory negligence: Plaintiff, in an action to recover damages for malpractice of a physician should allege freedom from contributory negligence, and, having failed to do so, the defendant may raise the objection by motion in arrest of judgment. *Decatur v. Simpson*, 115-348.

That the petition does not allege freedom of plaintiff from contributory negligence in a case where such fact should be alleged may be raised by motion in arrest of judgment. *Kleineck v. Reiger*, 107-325.

Where the wrong charged in plaintiff's petition is a wilful one, contributory negligence need not be negated. *Continental Ins. Co. v. Clark*, 126-274.

A general allegation in an action for an injury alleged to be due to defendant's negligence, that plaintiff was without fault or negligence on his part, is sufficient, unless specifically attacked. *Hobbs v. Marion*, 123-726.

Where defendant in an action for personal injuries sets up the contributory negligence of the plaintiff, the plaintiff who intends to rely upon the fact that defendant might have avoided the injury, in the exercise of reasonable care after the negligent act of the plaintiff became known to him, should allege such matter by way of reply. *Ford v. Chicago, R. I. & P. R. Co.*, 106-85.

Fraud: In alleging fraud committed by an agent it is not necessary to set up the fact of agency, nor that of ratification. The fraud in such case may be pleaded as that of the principal. *Higbee v. Trumbauer*, 112-74.

More general statements of fraud are insufficient. But where attempt is made to set out the claim of fraud, though not sufficiently specific, the defect must be reached by motion; and if not then raised, cannot afterwards be relied upon. *Seely v. Seely-Howe-Le Van Co.*, 130-626.

Waiver: Where facts are alleged by way of waiver they cannot be proven to establish the making of a contract. A contract relied upon should be pleaded and a party should not be allowed to plead it one way and prove it to be different. *Kinhead v. McCormick Har. Mach. Co.*, 106-222.

Where a passenger sued to recover damages for being put off a train on account of insufficiency of his ticket, held that if he relied on waiver of the conditions of the ticket such waiver must be pleaded. *Trezona v. Chicago G. W. R. Co.*, 107-22.

Waiver of breach of conditions in a policy of insurance must be pleaded. *McCoy v. Iowa State Ins. Co.*, 107-80.

In a motion on an insurance policy, allegation that due notice was given necessarily implies proofs of loss, and waiver of proofs must be specially pleaded. *Parsons v. A. O. U. W.*, 108-6.

While it is true that a waiver must be pleaded, it is also true that insufficiency of the pleading of the waiver, where it is apparent that a waiver is intended to be pleaded, may be waived by failure to seasonably raise the objection. *Barrett v. Des Moines Mut. H. & C. Ins. Assn.*, 120-184.

A waiver which is relied on must be pleaded. *Kinhead v. McCormick Har. Mach. Co.*, 106-222; *Murray v. Thiessen*, 114-657; *Herrstrom v. Newton & N. W. R. Co.*, 129-507.

Estoppel: Matters in estoppel to be available as such must be specially pleaded. *Spencer Co. v. Papach*, 103-513; *Kingsbury v. Chicago, M. & St. P. R. Co.*, 104-63. *Tracy Land Co. v. Polk County Land & Loan Co.*, 131-40.

Custom: A custom relied upon as affecting a contract must be pleaded. *Eller v. Loomis*, 106-276.

In an action against a master for negligence as to inspection and repair for the purpose of keeping safe the place where the servant is to work, the general custom in such business as to the duty to inspect and repair, with reference to whether it rests upon the master or the servant, may be proven without being pleaded. *Thayer v. Smoky Hollow Coal Co.*, 121-121.

Duress must be specially pleaded, and until pleaded evidence to prove it cannot properly be received over objection. *Sturman v. Sturman*, 118-620.

Payment: A pleading which contains an allegation that a given sum of money is "substantially if not wholly" paid does not allege with sufficient definiteness that such amount has been fully paid. *Hardin County v. Weels*, 108-174.

In actions for breach of contract for the payment of a specified sum of money, non-payment constitutes the breach of the contract sued for, and must be alleged. Such an allegation is put in issue by a general denial. *Hoverton v. Augustine*, 130-389.

Want of notice: Where in an action on a certificate of insurance in a mutual accident association it was alleged that plaintiff had complied with all the conditions and provisions of the articles of incorporation and by-laws of said association on his part to be kept and performed, and defendant interposed only a general denial, held, that defendant could not rely on failure of the plaintiff to prove the giving of notice as required by the articles. *Hart v. National Masonic Acc. Assn.*, 105-717.

Allegation of damage: In an action to recover damages for personal injuries, an allegation that plaintiff suffered great bodily pain, etc., is sufficient to sustain an allowance for mental pain and suffering. *Ousley v. Hampe*, 128-675.

In an action to recover damages for personal injuries an averment that by reason of the injuries alleged plaintiff has continually suffered, and still suffers pain, and believes said injuries to be permanent, is sufficient to support a recovery for future pain and suffering. *Evans v. Elwood*, 123-92.

In alleging damages in an action for personal injuries, where no recovery is sought for pain and suffering, it is not necessary to allege the particulars of the personal injuries from which the pain and suffering resulted. *Kircher v. Larchwood*, 120-578.

Under an allegation of damage to property, proof of its destruction is competent. *Monarch Mfg. Co. v. Omaha & C. B. S. R. Co.*, 127-511.

Prayer: A prayer that plaintiff have "such other relief as would be proper in the premises" does not convert a petition to recover possession of personal property, or the value thereof, into an equitable

action, but where the petition, which seemed otherwise to be based on a right to recover at law, also averred a trust arising under the facts for plaintiff's benefit, held that it sufficiently appeared that the petition was in equity. *Stokes v. Sprague*, 110-89.

A prayer that a deed be set aside for fraud, or, if it be held valid, that the contract price be recovered and a vendor's lien given, does not involve such inconsistent or contradictory relief as to be improper. *Hogueland v. Arts*, 113-634.

It is not necessary that there be a prayer for costs. *Reed v. Corrigan*, 114-638.

The jury should be specifically limited as to the amount of recovery to the specific items on which recovery is asked in an action on an account, and it is error to so instruct as that there can be a total recovery for an amount not exceeding the total claim, without regard to a finding as to the specific items. *Baker v. Oughton*, 130-35

In an equity action to enforce a lien it is proper to render a money judgment under a prayer for general relief. *American Trading & Storage Co. v. Gottstein*, 123-267.

The prayer for general relief is broad enough to authorize a judgment for the recovery of a sum of money. *Saunders v. King*, 119-291.

It is error for the court to grant relief not called for by the petition, or a judgment or decree different from that prayed for. *Bottorf v. Lewis*, 121-27.

The judgment must follow the prayer for relief and cannot be extended beyond it. *Browne v. Kiel*, 117-316.

Entire cause of action: A party cannot split up his cause of action. When he brings suit to claim a lien he must present all the facts entitling him thereto, and will not be allowed in one case to assert a mortgage lien, and when defeated with reference thereto, claim a general equitable lien in another action against the same property for the same indebtedness. *Zion Church v. Parker*, 114-1.

A party to litigation may not split up his causes of action and try his case by piecemeal. He may not present one branch of his case for the determination of the court and when unsuccessful therein begin over again and present some other matter upon which he relies, which might theretofore have been presented and determined. *Ingold v. Symonds*, 111 N. W. 802.

A continuous book account is to be treated as an entirety, and cannot without agreement of the parties be split into separate and distinct demands so as to form a basis for distinct suits. The fact that the items of the account are for goods sold at different times and on different orders does not entitle the seller to sue separately for each distinct item. *Williams-Abbott*

Elec. Co. v. Model Elec. Co., 112 N. W. 181.

Even though different items of claim might have been the subject of separate suits, yet after the right of action as to all the items has matured, they must be embodied in one suit to avoid multiplicity of actions. *Ibid.*

Issues not raised: As parties may by amendment introduce new issues, or make certain those intended, their interpretation of the pleadings, when clearly manifested, is uniformly adopted by the courts. Permitting the introduction of evidence on an issue not specifically pleaded, without objection, obviates the necessity of its formal presentation. *Fenner v. Crips*, 109-455.

Counts: The objection that the petition and an amendment thereto stating but one count allege inconsistent and contradictory causes of action must be taken before the submission of the case to the jury. *Robbins v. Basserman*, 133-318.

SEC. 3560. Amended before answer.

When plaintiff amends his petition before answer, notice of such amendment

Although in the same count of the petition is stated a cause of action for breach of warranty, and also a claim for recovery as upon rescission of the contract of sale, yet if no attack is made on account of the improper joinder of causes of action in the same count, a recovery may be sustained, if supported by the evidence, upon either ground. *Westbrook v. Reeves*, 133-655.

The plaintiff may allege two inconsistent causes of action as based on the same facts, such as a cause of action for breach of contract and another for tort in an action against a common carrier; but in the absence of any objection made in proper time and manner to such double pleading, the opposite party cannot take advantage of such inconsistency after verdict. *Chicago & N. W. R. Co. v. DeClow*, 124 Fed. 142.

must be served upon the defendant. *Ogle v. Miller*, 128-474.

SEC. 3561. Demurrer—causes of.

Capacity to sue: Failure of plaintiff suing as a corporation to allege corporate capacity may be taken advantage of by way of demurrer, but cannot be raised after judgment. *Calnan Construction Co. v. Brown*, 110-37.

Another action pending: The provision that pendency of another action between the same parties for the same cause may be a ground of demurrer, and that objections which are ground of demurrer may be taken by answer when the ground does not appear on the face of the petition, does not determine the question whether the pendency of a prior action in another state or in a foreign country is a ground of abatement. Such pendency is not as a matter of law pleadable in abatement to an action in this state. *Schmidt v. Posner*, 130-347.

Defect of parties: A question as to defect of parties is not jurisdictional, and such a defect is waived unless raised by demurrer or in other proper manner. *Fulliam v. Drake*, 105-615.

The defect of parties which will afford ground for demurrer is the non-joinder of those who should have been joined, either as plaintiffs or defendants. A misjoinder can be taken advantage of only by motion. *Dolan v. Hubinger*, 109-408.

Non-joinder of necessary parties is such defect of parties as may be raised by demurrer. *Anderson v. Acheson*, 132-744.

Misjoinder of parties or of causes of action should be raised by motion and not

by demurrer. *Citizens' State Bank v. Jess*, 127-450.

Defect in parties is not waived by a failure to make objection when the omitted parties are indispensable to the final adjudication of the rights of the parties before the courts. Such a defect of the parties may be raised for the first time on appeal. *Tod v. Crisman*, 123-693.

Insufficient statement of cause of action: When the construction of a pleading assailed by demurrer is doubtful, after giving to its language a reasonable intendment, the doubt is to be resolved against the pleader. *Stephens v. City Council*, 132-490.

To entire pleading: Where the petition contains but a single count it must upon demurrer be held good or bad as an entirety, and the demurrer should go to the sufficiency of the entire petition, and not to specified portions thereof. *Gordon v. Chicago, R. I. & P. R. Co.*, 129-747.

Sufficiency of demurrer: Although the demurrer raises an objection which should have been raised by motion, nevertheless if no question is raised as to the sufficiency of the demurrer on that ground there is no error in treating it as a motion and ruling upon it accordingly. *Frazer v. Andrews*, 112 N. W. 92.

A demurrer made to depend not upon what is alleged or revealed in the pleading demurred to, but upon a statement or recitation of facts not appearing in such pleading, is a "speaking" demurrer and

is bad. *Jeffries v. Fraternal Bankers' Reserve Soc.*, 112 N. W. 786.

The grounds of the demurrer must meet the case made by the petition. *Harris-Emery Co. v. Pitcairn*, 122-595.

What admitted by demurrer: A demurrer only admits facts which are well pleaded. *Cowell v. City Water Supply Co.*, 130-671.

A demurrer admits all facts well pleaded, but not conclusions of law or facts which are contrary to law or which are legally impossible. *Iowa Mut. Tornado Ass'n v. Gilbertson*, 129-658.

Where the demurring party stands upon his demurrer, he admits facts alleged in the pleading demurred to so far as they are well pleaded. *Jeffries v. Fraternal Bankers' Reserve Soc.*, 112 N. W. 786.

Allegations of fact as to the law of another state are confessed by demurrer. *American Trading & Storage Co. v. Gottstein*, 123-267.

Waiver: The defendant by not moving to strike an amendment to the petition,

SEC. 3562. How specific.

A demurrer is not a pruning hook and cannot be used to trim out immaterial and irrelevant matter. This must be done by motion. *In re Estate of McMurray*, 107-648.

In a special proceeding, the demurrer must specify and number the grounds of objection to the pleading. *Ibid.*

A demurrer to a petition in an action at law, stated in the terms of the fifth division of the preceding section, is not sufficient, and should be overruled. *Stokes v. Sprague*, 110-89.

SEC. 3563. Objection raised by answer—arrest of judgment.

Waiver of objections: Grounds of demurrer or motion are waived by proceeding to trial without raising such objection. *Chicago & N. W. R. Co. v. DeClow*, 124 Fed. 142.

Failure to demur or move in arrest of judgment on account of defects in the petition constitutes a waiver of such defects. *Nichols-Shepard Co. v. Ringler*, 112 N. W. 543.

A defect appearing in the petition is waived if no attack is made thereon, either by demurrer or motion in arrest. *Mitchell v. McLeod*, 127-733.

Where defendant answers he thereby waives any ground of demurrer. *Barrett v. Des Moines Mut. H. & C. Ins. Assn.*, 120-184.

Failure to demur on the ground of non-joinder of parties is a waiver of such objection. *Anderson v. Acheson*, 132-744; 110 N. W. 335.

Objection to improper joinder of causes of action is waived by answering. *Keller v. Strong*, 104-585.

after the original pleading has been held to be defective on demurrer, waives the right to claim that the amendment is merely the restatement of the petition which has been held defective. *Koboliska v. Swehla*, 107-124.

While generally speaking grounds of motion are waived by demurring, the court has never been very insistent upon technical accuracy in the use of names given to such pleadings and although a ground of demurrer is stated as a ground of motion the court may properly treat it as raising an objection proper to be raised by demurrer. *Wisconsin Lumber Co. v. Greene & Western Tel. Co.*, 127-350.

Demurrer to evidence: An objection to evidence because no cause of action is stated in the petition is not recognized in practice. It is a sort of oral demurrer for which there is no authority. *Boyer v. Commercial Building Inv. Co.*, 110-491.

As to motion to direct a verdict see notes to § 3722.

In an action at law the defects in the petition must be specifically pointed out and a general statement of the ground of demurrer is not sufficient. *Robinson, Grant*, 119-573.

In a law action the demurrer must point out the ground of objection; it is not sufficient to say that the facts stated do not constitute a cause of action or a defense. *Timken Carriage Co. v. Smith & Co.*, 123-554.

Objection as to misjoinder of causes of action should be made by motion to strike, and is waived by failure to raise the objection. *Campbell v. Spears*, 120-670.

An objection which might be raised by motion for more specific statement is waived by going to trial. *Fox v. Waterloo Nat. Bank*, 126-481.

Where a case has been tried on the theory that the pleadings are sufficient to present the question which is submitted, a party cannot on appeal for the first time take advantage of defects in such pleadings. *Alexander v. Grand Lodge A. O. U. W.*, 119-519.

The allegations of a pleading not sufficiently specific will support a judgment if not in any manner questioned. A party who has had the benefit of the correct rule of law on the theory on which the case had been tried, cannot afterwards complain of insufficiency of the pleadings. *Hobbs v. Marion*, 123-726.

After waiving any objection which might have been raised to the pleadings

a party cannot claim that they did not present the issue which is in fact tried. *Caldwell v. Drummond*, 127-134.

Where defendant is allowed to introduce, without objection, under the general issue, evidence of a defense that could be properly offered only under a special defense pleaded, plaintiff should be deemed to have waived the objection to the insufficiency of the pleading. *Beach v. Wakefield*, 107-567.

And see notes to § 3597.

Statute of frauds: When parol evidence of a contract within the statute of frauds is introduced upon the trial without objection, it cannot afterwards be objected to upon appeal. *Marr v. Burlington, C. R. & N. R. Co.*, 121-117.

Statute of limitations: The defense of the statute of limitations is an affirmative one, and is waived if not pleaded. When not pleaded such defense should not be submitted to the jury, even though supported by facts appearing in the record. *McDonald v. Bice*, 113-44.

And see notes to § 3447.

Motion in arrest of judgment: It is not every objection which might have been good if raised by demurrer that is available to the unsuccessful party on motion in arrest of judgment. The objection that inconsistent causes of action are stated in the same count of the petition cannot thus be raised. *Robbins v. Bosserman*, 133-318.

Where plaintiff in an action for personal injuries fails to allege freedom from contributory negligence, and defendant demurs to the petition on that ground and the demurrer is overruled, defendant may still raise the objection by a motion in arrest of judgment, and if the plaintiff does not offer to cure such defect by taking advantage of Code § 3760, the court may

properly sustain the motion. *Decatur v. Simpson*, 115-348.

Failure in a petition stating a cause of action for personal injuries to allege the freedom of the plaintiff from contributory negligence may be taken advantage of by motion in arrest of judgment. *Brown v. Illinois Cent. R. Co.*, 123-239.

The court should not, however, make the omission of such allegation a ground for directing a verdict for the defendant without giving the plaintiff an opportunity to amend in that respect. *Ibid.*

The objection that an action was prematurely brought may be raised by motion in arrest of judgment. *Reeves v. Lamm*, 120-283.

The objection that notice of a claim for damages against a telegraph company was not presented within sixty days, as required by statute (Code § 2164), may be first raised by motion in arrest of judgment. *Free v. Western Union Tel. Co.*, 110 N. W. 143.

A party does not by pleading over waive his right to attack the pleading of the adverse party at a subsequent time in the progress of the case, but he may raise the question of the sufficiency of the pleading by motion in arrest of judgment, or to direct a verdict. If, however, he fails to make objection this way he cannot have the ruling reviewed on appeal. *Hawkeye Loan & Brokerage Co. v. Gordon*, 115-561.

If the pleadings do not present a cause of action or defense, and the question has been properly raised in the court below, and a ruling had thereon, the question may be reviewed upon proper assignment of error in an equity case, notwithstanding the fact that the party may have pleaded over and had a trial on the merits. *Ibid.*

SEC. 3564. Demurrer to one of several causes—effect of demurrer and ruling.

The provision of 25 G. A., chap. 96, that no pleading should be held sufficient on account of the failure to demur thereto, held not to entitle a party to urge in the supreme court objections to a pleading not raised in the trial court. *Reed v. Muscatine*, 104-183; *Wood v. Dunham*, 105-701; *Lacy v. Kossuth County*, 106-16.

An objection to the petition not raised by answer or demurrer is not deemed waived under the present Code. *Pierson v. Independent School Dist.*, 106-695.

The provision of 25 G. A., chap. 96, as to the effect of a ruling on demurrer, does not change the rule of pleading that a party answering over after his demurrer to a petition has been overruled thereby waives any error in such ruling. *Buchanan v. Blackhawk Coal Works*, 119-118.

The provision as to the effect of the overruling of a demurrer was not designed

to permit a review of the ruling on the demurrer which had been overruled, where the party demurring had afterwards filed an answer, or replied, but to provide that the ruling should not have the effect of an adjudication, and to permit the party demurring unsuccessfully to question the sufficiency of the pleading in other ways during the progress of the trial, as by motion to direct a verdict, or in arrest of judgment. In such a case the party, by pleading over, waives his right to complain of the ruling on his demurrer, but does not waive his right to attack the pleading on the grounds upon which his demurrer was founded at any subsequent time in the progress of the case. *Frum v. Keeney*, 109-393.

Notwithstanding the provisions of 25 G. A., chap. 96 (now embodied in the last sentence of this section), questions not

raised in the court below will not be considered on appeal. *Hough v. Gearen*, 110-240.

Mere failure to demur to a defective petition does not prevent defendant from raising the objection in some other way. But he cannot allow the case to be tried on the theory that the petition is sufficient and then on exceptions to the giving of instructions on the issue raise the question

as to whether a cause of action is stated. *Enix v. Iowa Cent. R. Co.*, 114-508.

Where the sufficiency of a pleading is not attacked by demurrer or otherwise and the allegations thereof are established by the proof, the party relying on such pleading is entitled to succeed, although it might have been held defective had it been attacked. *Ormsby v. Graham*, 123-202.

SEC. 3565. Joinder in demurrer—answering, amending or pleading over.

By amending or pleading over after an adverse ruling on a motion or demurrer the pleader waives any error in such ruling. *Hurd v. Ladner*, 110-263; *Frick v. Kabaker*, 116-494; *McKee v. Illinois Cent. R. Co.*, 121-550; *Hunn v. Ashton*, 121-265; *Davis v. Boyer*, 122-132; *Scribner v. Taggart*, 123-321; *Redhead v. Iowa National Bank*, 123-336; *Long v. Furnas*, 130-504; *Iowa-Minnesota Land Co. v. Conner*, 112 N. W. 820.

A party going to trial after the overruling of a motion to strike, or of a demurrer, cannot urge error in such ruling on an appeal from the final judgment, unless subsequently on the trial he has presented in some way to the court his objections to the pleadings. *Puritan Mfg. Co. v. Emporium*, 130-526.

If a party, after an adverse ruling on demurrer or on motion, pleads over or secures time to plead, he by so doing waives the error in the ruling, and it has likewise been held that where the law tenders an issue without the filing of further pleadings, he who would take advantage of an order overruling a demurrer must stand upon the pleading in order to have his case reviewed; but a defendant who demurs to plaintiff's petition and after the overruling of the demurrer does not ask for further time to plead over, files no other pleading in the case and makes no further appearance, is deemed to stand on the demurrer without the record showing a formal election. If it affirmatively appears that the unsuccessful party did not waive the error under the ruling that is sufficient. *Derby v. Fie*, 106-299.

By filing an amendment to his petition after a demurrer thereto is sustained, the plaintiff waives any error in the ruling on the demurrer. But such ruling does not thereby become an adjudication in such sense that the same question cannot be raised in some other way. On the other hand the defendant by failing to object further to the allegations in the amendment which are open to the same objection previously made by demurrer does not waive his grounds of demurrer if his answer contains the same objections which by demurrer were interposed to the original

petition. *Marshall Ice Co. v. LaPlant*, 111 N. W. 1016.

By pleading over after a ruling sustaining a demurrer to his petition, plaintiff waives the error, if any, but the ruling does not constitute an adjudication, and the same question may be presented in other ways. *Geiser Mfg. Co. v. Krogman*, 111-503.

One who pleads over after an adverse ruling on a demurrer waives the error on that ruling, but such ruling does not constitute an adjudication binding in the subsequent course of the trial and the same question may be presented in other ways as by motion in arrest or to direct a verdict or by objections to evidence. *Watkins v. Iowa Cent. R. Co.*, 123-390.

One who after his pleading has been held defective on demurrer pleads over by a mere repetition of the matter before held insufficient, does not waive the ruling against him, but if he has not excepted to the ruling the only question on a subsequent motion to strike the new pleading as a mere repetition is as to whether it is in fact a repetition of the pleading held to be insufficient. But new matter cannot be attacked by a motion to strike on the ground that the allegation thereof is a mere repetition. *Ibid.*

Plaintiff appealing from judgment against him on demurrer to his petition on the ground that it does not state facts sufficient to show a cause of action, cannot complain of the sustaining of a motion complied with by him requiring him to make his petition more specific. *Sigmond v. Bebbler*, 104-431.

Where judgment has been rendered against plaintiff whose petition has been held insufficient on demurrer, and who has elected to stand on his petition and not to amend, such judgment constitutes a final adjudication. *Gregory v. Woodworth*, 107-151.

In general judgment goes against the party whose pleading is held insufficient on demurrer only when he elects to stand on his pleading, or when, having asked leave to amend, he is in default for not doing so. *Williams v. Williams*, 115-520.

SEC. 3566. Answer—what to contain—distinct defenses.

Denial: In an action for libel where plaintiff alleges the falsity of the statements, defendant may under general denial introduce evidence of their truth. *Locke v. Chicago Chronicle Co.*, 107-390; *Moffitt v. Chicago Chronicle Co.*, 107-407.

Under a general denial of a settlement, any evidence should be received which tends to show that no settlement was made. *Beach v. Wakefield*, 107-567.

Under general denial in an action for breach of contract the defendant may not only offer testimony in denial of the contract as claimed by plaintiff, but also to prove the contract which defendant claims was in fact made, and the non-performance thereof on plaintiff's part. *Tracy Land Co. v. Polk County Land & Loan Co.*, 131-40.

In an action for goods sold to defendant the defendant may under general denial prove that the goods were purchased by him for another. *Cole v. Laird*, 121-146.

Where plaintiff's claim is based on various items, each of which is expressly denied, the validity of each item is put in controversy, although the plaintiff claims in the aggregate much less than the total amount of the items specified. *Steele v. Crabtree*, 130-313.

Where plaintiff sues for breach of contract for the payment of a specified sum of money, he must allege the fact of non-payment and such fact is put in issue by a general denial. *Howerton v. Augustine*, 130-389.

In an action for specific performance based on a contract of sale made by an agent, the defendant may under general denial show want of authority to the agent to enter into such contract. *Staten v. Hammer*, 121-499.

A general or specific denial as authorized by the statute may be introduced without being objectionable as a conclusion. While conclusions may not be pleaded by way of affirmative averment, there is no such objection to a general or specific denial. *Provident Bank Stock Co. v. Schafer*, 110-440.

New matter—affirmative defenses: Where the plaintiff's petition shows on its face that the claim is not barred by the statute of limitations, the question can be raised by defendant only by an answer. *Goring v. Fitzgerald*, 105-507.

Settlement is an affirmative defense as to which the burden of proof is on the defendant. *Johnson v. Berdo*, 131-524.

A defendant, in order to avail himself of facts not appearing on the face of a contract to establish its invalidity, must plead such facts. *Richey v. Rowland*, 130-523.

Where affirmative matter is pleaded both by way of defense and as a ground for a

counterclaim, the dismissal of the counterclaim does not constitute a dismissal of the defense. *Steele v. Crabtree*, 130-313.

Confession and avoidance: While allegations by way of avoidance must be coupled with a confession of plaintiff's cause of action, it is sufficient if the confession be by implication. *Jackson v. Independent School Dist.*, 110-313.

A plea in confession and avoidance is necessary only when defendant proposes to admit the truth of a material allegation made by the plaintiff and to avoid liability thereon by affirmative proof of matters which destroy the effect of the allegations admitted. *Staten v. Hammer*, 121-499.

Special defenses: In an action for malicious prosecution, evidence of advice of counsel as rebutting malice and want of probable cause, is admissible without being specially pleaded. *McAllister v. Johnson*, 108-42.

If it is desired to rely upon facts as an affirmative defense, they should be pleaded in avoidance. *Kingsbury v. Chicago, M. & St. P. R. Co.*, 104-63.

In a suit against a municipal corporation, based on a contract for services, the defense that the contract is *ultra vires* must be specially pleaded. *Ryan v. Lone Tree*, 122-420.

And see notes under § 3629.

Inconsistent defenses: While a defendant has the right to plead the same defense as many times as he sees fit, he has the right to prove it but once, and if this right is preserved to him he cannot complain of the action of the trial court in striking out portions of his answer. *Shambaugh v. Current*, 111-121.

Where one of the divisions of an answer admits defendant's liability, plaintiff is entitled to judgment, although in other divisions of the answer defendant's liability is controverted. *Burns v. Chicago, Ft. M. & D. M. R. Co.*, 110-385.

Defendant in an action for goods sold and delivered may plead rescission and also set up a counterclaim for breach of warranty. He is not required to elect. *Thorson & Cassidy Co. v. Baker*, 107-49.

As to inconsistent defenses see Code § 3620 and notes.

Partial defense: A demurrer cannot be interposed to allegations in an answer not pleaded in themselves as a complete defense, but as material with other allegations in making out a defense. *Seaton v. Grimm*, 110-145.

Even matter in mitigation should be specially pleaded as a partial defense, and cannot be proven under a general denial. *Vierling v. Binder*, 113-337.

Counterclaim: Allegations in the answer which are in the nature of a counter-

claim will support affirmative relief to the defendant, no objection to the sufficiency of the pleading as constituting a

counterclaim having been made. *Crawford v. Fort Dodge Plaster Co.*, 125-658.

SEC. 3570. Counterclaim—how stated—what may constitute.

Nature of counterclaim—when proper: The counterclaim proper presents matter upon which an original action might have been brought in defendant's favor. *Bardes v. Hutchinson*, 113-610.

A counterclaim does not constitute a defense. *Johnson v. Nash-Wright Co.*, 121-173.

The mere fact that affirmative relief is prayed for in a counterclaim or cross bill against the plaintiff, does not justify judgment in the defendant's favor against the plaintiff on the failure of the latter to appear if the allegations of the defendant's pleading are merely defensive in character. *Stewart v. Gorham*, 122-669.

Any new matter constituting a cause of action in favor of defendant may be pleaded as a counterclaim against the demand of the plaintiff, provided such counterclaim was held by the defendant at the time the action by plaintiff was brought. *Richardson v. Richardson*, 111 N. W. 934.

A cause of action not held by the defendant at the time action is instituted against him by the plaintiff, cannot be interposed as a counterclaim. *Morrison Mfg. Co. v. Rimerman*, 127-719.

A counter demand going directly to the amount due on account of the very transaction out of which the demand arises is a right of recoupment which is often spoken of as a defense and is more than a mere counterclaim. *Medart Pulley Co. v. Dubuque Turbine & Roller Mill Co.*, 121-244.

Inasmuch as the landlord in an action for an attachment for rent cannot join other causes of action against the tenant, if the tenant sets up a counterclaim plaintiff may in reply interpose any matter of set-off which he may have as against the counterclaim. *Issly v. Grayson*, 105-685.

After trial in an equity case, and remanding the case for further proceedings, it is not proper to allow the introduction of a counterclaim which sets up a right of recovery at law, and which does not grow out of the same transaction. *Allen v. Davenport*, 115-20.

A claim for repayment of money paid for intoxicating liquors illegally sold (Code § 2423) exists from the time such payment was made, and nothing but a demand is necessary to mature it, and therefore such a claim may be introduced

by way of counterclaim, although the demand for repayment has not been made until after the bringing of the action in which the counterclaim is sought to be introduced. *Brown v. Wieland*, 116-711.

Action in representative capacity: In an action brought in a representative capacity a counterclaim against the plaintiff as an individual cannot be interposed. *Headington v. Smith*, 113-107.

Debt belonging to partnership: To be available as a counterclaim the claim must have been owed to the defendant at the time of the commencement of the action, and it is not enough that the debt belonged to a partnership of which he was a member. *Ibid.*

A claim against an estate after the death of the intestate cannot be set up as a counterclaim in an action by the administrator. *Sullivan v. Nicoulin*, 113-76.

The indebtedness of one member of a partnership cannot be set off as against an action brought by the partnership to recover partnership funds. *Hoaglin v. Henderson*, 119-720.

Failure to interpose: A counterclaim may or may not be pleaded in an action as the defendant shall elect. And held that the vendee of property, buying under a guaranty, might plead breach of the guaranty as a defense in an action for the balance of the purchase money, and afterwards in an independent action recover damages sustained by reason of the seller's breach. *Jones v. Witousek*, 114-14.

If the matter of set-off or counterclaim is presented and passed upon in the suit it is barred by the judgment, if not, defendant may make it the subject of a separate and distinct action. *Ibid.*

The fact that defendant in an attachment suit pleads and establishes a counterclaim, thus defeating recovery of judgment by plaintiff, does not show that the attachment was sued out maliciously and without probable cause. The defendant has the election not to plead the indebtedness in his favor as a set-off or counterclaim, but to make it the subject of a separate and distinct action. *Smeaton v. Cole*, 120-368.

Failure to plead an existing cause of action as a counterclaim does not operate as a cancellation or satisfaction of such cause of action. *Ferguson v. Epperly*, 127-214.

SEC. 3572. Counterclaim by co-maker or surety.

An adjudication of the principal's right to a set-off or counterclaim is conclusive

on the surety afterwards seeking the benefit thereof. *Beh v. Bay*, 127-246.

SEC. 3574. Cross-petition.

Wholly distinct and independent transactions cannot be brought into an action by cross-petition. It is only where a defendant has a cause of action affecting the

subject-matter of the main suit that a cross-petition against a co-defendant or a third person may be interposed. *Culbertson v. Salinger*, 131-307.

SEC. 3575. Demurrer to answer.

If matter pleaded as a defense is not attacked by motion or demurrer it will, if proved, defeat the plaintiff's action, al-

though had the question been raised the answer would have been held to present no defense. *Ormsby v. Graham*, 123-202.

SEC. 3576. Reply—when necessary.

A reply introducing a new cause of action should be stricken out on motion. *Hunt v. Johnston*, 105-311.

Where in an action for personal injuries defendant pleads contributory negligence of the plaintiff, the plaintiff, desiring to rely upon the fact that defendant might by reasonable care have prevented the injury to plaintiff after plaintiff's contributory negligence became apparent, should plead such fact in the reply. *Ford v. Chicago, R. I. & P. R. Co.*, 106-85.

Matter in avoidance of facts alleged in the answer should be pleaded in a reply. *Pitstick v. Osterman*, 107-189.

The allegations of an answer setting up an affirmative defense are denied by operation of law without the filing of a reply. *League v. Ehmke*, 120-464.

The averment of settlement in an answer is denied by operation of law. If, however, the plaintiff desires to impeach such settlement on account of fraud or mistake, such

matter should be set up in a reply. *Stomne v. Hanford Prod. Co.*, 108-137.

A reply should not be stricken out on motion for being inconsistent with the petition, where no inconsistency appears on the face of the reply, though such inconsistency may become apparent under the evidence. *Keairnes v. Durst*, 110-114.

Where one sets up matter of avoidance in the reply it is not necessary that he couple it with a denial. The law denies all affirmative allegations in the answer, save where a counterclaim is pleaded. *Parno v. Iowa Merchants Mut. Ins. Co.*, 114-132.

Facts recited in a reply are not to be treated as constituting a cause of action, either of themselves or in connection with matters stated in the petition, but only as avoiding the defense alleged in the answer. *Cedar Rapids Water Co. v. Cedar Rapids*, 117-250.

SEC. 3577. Statements of.

Allegations of the answer being denied by operation of law, the burden of proving the same is upon the defendant, notwith-

standing confession and avoidance pleaded in the reply. *Parsons v. A. O. U. W.*, 108-6.

SEC. 3580. Verification—when necessary.

The omission of the signature of plaintiff's attorney at the conclusion of the petition is a defect of form only, and in the absence of a showing that the defendant has been misled or prejudiced thereby, it does not necessitate the dismissal of the action on defendant's motion. *First National Bank v. Stone*, 122-558.

The signature of a pleading purporting to be signed by the party in whose behalf it is filed, may be assumed, in the absence of evidence to the contrary, to be his signature. *Frank v. Berry*, 128-223.

SEC. 3581. By corporation.

A corporation may verify its answer denying the genuineness of the corporate signature by the oath of its secretary.

Marshall Field Co. v. Oren Ruffcorn Co., 117-157.

SEC. 3583. By agent or attorney.

The provision that an affidavit of an attorney to a pleading is insufficient if it fails to show his competency to state the facts has reference to pleadings only and not to other matters which may require verification. The affidavit of an attorney

made the basis of an auxiliary proceeding will be presumed to have been made with knowledge of the facts and to have been accepted by his client in whose behalf such affidavit is made. *Carpenter v. Clements*, Judge, 122-294.

SEC. 3588. Failure to verify.

Failure to verify a petition of forcible entry and detainer will be waived if not taken advantage of in the trial court. *Herkimer v. Keeler*, 109-680.

Advantage of the failure to verify a pleading can only be taken by motion to strike. *Newburn v. Lucas*, 126-85.

SEC. 3591. Amendments not verified.

The court may permit an amendment to be filed without verification. *Thompson v. Brown*, 106-367.

Section applied. *Boos v. Dulin*, 103-331.

SEC. 3592. Pleading in slander and libel.

Extrinsic facts need not be alleged in an action for slander to show that the lan-

guage charged was spoken in a defamatory sense. *Craver v. Norton*, 114-46.

SEC. 3593. Matter in mitigation—justification.

Matters in mitigation cannot be proven unless specially pleaded. *Craver v. Norton*, 114-46; *Flam v. Lee*, 116-289.

In an action for breach of promise of marriage, want of chastity on the part of the plaintiff before or after the alleged promise is a circumstance tending to lessen damages, but must be specially pleaded by way of mitigation. Likewise seduction of plaintiff by the defendant, if relied upon, should be specially pleaded in such case by way of aggravation. *Herriman v. Layman*, 118-590.

In an action for criminal conversation that the bad character of plaintiff's wife prior to her marriage is matter in mitigation of damages only, and as such must be pleaded. *Frank v. Berry*, 128-223.

In an action by the wife for alienation of her husband's affections, the bad moral character of the plaintiff may be pleaded and shown by way of mitigation of damages. *Hardrick v. Hardrick*, 130-230.

SEC. 3594. Intervention.

In a proceeding before the board of supervisors for the remission of a mullet tax, there is no right of intervention by a mortgagee of the premises on which the tax has been levied for the determination of the question whether his mortgage is prior to the lien of the tax, nor can such question be raised in the district court on appeal from the action of the board. *David v. Hardin County*, 104-204.

It is the policy of the law to permit conflicting claims of priority growing out of a single mortgage to be settled in one action and such a result may be secured by intervention of parties interested in the property. *Cooper v. Mohler*, 104-301.

An assignee for the benefit of creditors, to whom has been transferred a right to recover on an attachment bond, may intervene in the original action for the purpose of recovering on such bond. *Ringgen Stove Co. v. Bowers*, 109-175.

An assignee of the claim on which the action is based is not entitled to intervene. He may allow the action to proceed in the name of the assignor, or may have himself substituted. *Bank of Commerce v. Timbrell*, 113-713.

Where the wife in a proceeding for divorce and alimony asked to have a conveyance of property from her husband to a third party set aside as fraudulent, and after a dismissal of the action by plaintiff was filed, and before any order of dismissal had been entered, attorneys of the wife sought to intervene, asking to have their claims for attorneys' fees enforced against the land, held that they had no such standing with reference to the controversy as to be entitled to intervene, and that at any rate the application was too late. *Keehn v. Keehn*, 115-467.

The creditor if an insolvent partnership may come into a receivership proceedings in which the distribution of assets of the firm is being determined as between the partners and have an order for the payment of his claim. *Johnson v. Johnson*, 132-457.

One who intervenes in an action may subsequently withdraw such intervention so as not to be bound by the further proceedings in the case. *Guinn v. Iowa & St. L. R. Co.*, 125-301.

SEC. 3595. Decision—no delay—costs.

The provisions of this section as to delay refer to delay of trial and not to such delay as may result from an immediate trial. If the intervenor, by his action, does

not occasion any postponement, he is not chargeable with delay resulting from the trial of his petition of intervention. *Ringgen Stove Co. v. Bowers*, 109-175.

SEC. 3597. Variance—amendments.

A variance between allegations and proof which does not mislead the opposite party is immaterial. *Harward v. Davenport*, 105-592.

Objection cannot be made to the allowing of an amendment on the ground of surprise when the evidence which may be introduced thereunder would have been admissible under the original pleading. *Thompson v. Brown*, 106-367.

As the parties by amendment may introduce new issues, or make certain those intended, their interpretation of the pleadings, when clearly manifested, is uniformly adopted by the courts. Thus, permitting the introduction of evidence on an issue not specially pleaded, without objection, obviates the necessity of its formal presentation. *Fenner v. Crips*, 109-455.

It does not constitute a fatal variance between the allegations and the proof that the plaintiff establishes more than is necessary to sustain the allegations of his petition. *Goodrich v. Fogarty*, 130-223.

Where the case goes to trial without objection on a cause of action not set up in the petition, but which is supported by evidence, the defendant cannot complain of the defect in the petition. *Shoemaker v. Turner*, 117-340.

And see notes to § 3563.

A plaintiff relying upon an express agreement must prove it and cannot recover under an implied contract. *Hunt v. Tuttle*, 125-676; *Leonard v. Leonard*, 111 N. W. 409.

Plaintiff need not file an amendment to his petition because of variance between the allegations and the proof, where the defendant is estopped to say that he was misled thereby. *Voelker v. Chicago, M. & St. P. R. Co.*, 116 Fed. 867.

Where plaintiff suing for breach of contract does not allege whether it is oral or in writing, in the absence of any attack on the pleading on that ground, recovery can be had on proof of an oral agreement. *Newburn v. Hyde*, 132-88.

SEC. 3599. Failure of proof.

Failure to prove unnecessary allegations

in the petition will not defeat recovery. See notes to § 3639.

SEC. 3600. Amendments allowed.

Right to amend: The rule is to allow amendments to pleadings, and where the amendment is offered before trial is begun and presents matter which has any reasonable relevancy to the controversy to be decided, leave to file such amendment should be granted. *Bruner v. Brotherhood of American Yeomen*, 111 N. W. 977.

The clause, "When the amendment does not change substantially the claim or defense," has reference solely to "conforming the pleadings or proceedings to the facts proved," and does not limit the portion of the section relating to the correction of a mistake in the name of the party, or a mistake in any other respect, and held that an amendment to take a cause of action out of the statute of limitations was properly allowed. *Taylor v. Taylor*, 110-207.

Statutes authorizing amendments are to be liberally construed. *Ibid.*

Under the code system of pleading no litigant should be denied relief because of an error in the mere form of the action, when he has the right to amendment to adopt that appropriate to the relief prayed. The mere method should not obscure the results to be obtained. *Cox Shoe Co. v. Adams*, 105-402.

Therefore, held, that in an action of replevin wherein it appeared that the plaintiff was entitled to equitable relief, he should be allowed to amend, asking such

relief, and have the case transferred to the proper calendar. *Ibid.*

A party may not by successive amendments present his case by piecemeal. *Ingold v. Symonds*, 111 N. W. 802.

Failure of the plaintiff in an action to recover damages for personal injuries to allege freedom from contributory negligence should not be taken advantage of by the trial court as a ground for directing a verdict for the defendant without affording the plaintiff an opportunity to amend by alleging want of contributory negligence. Such defect may be waived by the defendant. *Brown v. Ill. Cent. R. Co.*, 123-239.

Discretionary: The trial court may exercise a wide discretion in the matter of allowing amendments, in the interest of justice. *Livingston v. Heck*, 122-74.

Amendments to pleadings are allowed with great liberty, and a large discretion is vested in the trial courts in permitting them; unless some prejudice results from the filing thereof or some injustice appears, rulings with reference to such matters will not be disturbed on appeal. *Williams Shoe Co. v. Gotzian*, 130-710; *McClurg v. Brenton*, 123-368.

The exercise of discretion on the part of the court in striking out an amendment will not be reviewed unless an abuse of discretion appears. *Bay v. Monroe County*, 121-302.

While the matter of allowing amendments is discretionary, still this discretion is a legal one and should always be exercised with a view to substantial justice. *Cole v. Laird*, 121-146.

In a particular case held that the court did not abuse its discretion in allowing an amendment. *Weiland v. Ehlers*, 107-186.

Leave to file: Amendments are allowed with great liberality, and the mere fact that they are filed without leave is no ground for striking them from the files where the amendment is such an one as should have been allowed had permission been asked to file it. *West Side Lumber Co. v. Hathaway*, 115-654.

Leave to file is immaterial if the court subsequently treats the amendment as constituting a part of the pleadings. *Rice v. Bolton*, 126-654; *Berkey v. Tefelbure*, 125-76.

Within what time—pending trial: The allowance of amendments at almost any stage of the trial is the rule, and the refusal of such privilege is the exception. *Jaroszewski v. Allen*, 117-632.

An amendment pending the trial for the purpose of conforming the pleadings to the proofs is proper. *Tyler v. Bowen*, 124-452; *Johnson v. Farmers' Ins. Co.*, 125-565.

An amendment to a pleading so as to make its allegations conform to the evidence should not be denied, though not made until after the evidence is closed. *Cole v. Laird*, 121-146.

After the conclusion of the evidence and before the opening of the arguments to the jury a party may be allowed to amend his pleadings to correspond to the proofs. *Taylor v. Star Coal Co.*, 110-40.

Where an amendment to an answer tendered an entirely new and distinct issue after the case had been once tried, and was offered at the conclusion of defendant's evidence upon the second trial, no good reason appearing for not having filed it before that time, held that it was properly refused. *National Horse Importing Co. v. Novak*, 105-157.

It is not error to refuse leave to file an amendment to the petition after the close of the evidence, in which a new substantive allegation is made. *American Soda Fountain Co. v. Dean Drug Co.*, 111 N. W. 534.

Liberality in permitting amendments is the rule and the party against whom a demurrer has been sustained may amend or plead over as a matter of course at any time before the opposing party takes advantage of his default by motion for judgment. *Redhead v. Iowa Nat. Bank*, 123-336.

An issue tendered by an amended answer, setting up want of consideration in a written contract sued upon, may be con-

sidered, although the amendment is not filed until after motion is made to direct a verdict, the ruling of the court allowing such amendment not being attacked. *Beaty v. Carr*, 109-183.

New issues should not be injected by amendment after the conclusion of the arguments to the jury. *Herrstrom v. Newton & N. W. R. Co.*, 129-507.

After submission: The court will not be presumed to have taken into consideration an amendment to the pleadings filed after the case was submitted, without leave of court or notice to the opposite party. *Sturman v. Sturman*, 118-620.

A party is not entitled to file an amendment to his pleading after the case has been submitted, which substantially changes the cause of action or defense. *LeMars Bldg. & Loan Ass'n v. Burgess*, 129-422.

While amendments are allowed with great liberality yet it is quite irregular to introduce a new cause of action after the submission of a case for the purpose of conforming the pleadings to the proof and the court may properly refuse to entertain such amendment. *Boardman v. Louis Drach Const. Co.*, 123-603.

An amendment filed after verdict, raising an entirely new issue, may be stricken out on motion. *Shawyer v. Chamberlain*, 113-742.

After a final submission, either before or after reversal on appeal, there is no good reason for opening the case for the purpose of allowing the introduction of a new cause of action by way of counterclaim, not growing out of the same transaction, and which may quite as well be investigated and decided in a separate proceeding. *Allen v. Davenport*, 115-20.

Where an application was not made for leave to file an amendment to a petition for the purpose of making it conform to the evidence until several days after the verdict was rendered, held, that the action of the court in refusing to allow such amendment would not be reversed on appeal. *Ankrum v. Marshalltown*, 105-493.

Error in admitting evidence of an issue not raised by the pleadings cannot be cured by an amendment of the pleadings after the trial introducing such issue. *Cole v. Thompson*, 112 N. W. 178.

Discretion as to time: While a great liberality should be shown by the courts in allowance of amendments that are in furtherance of justice, the right to amend is not absolute and attorneys should not be encouraged to wait until the last moment before presenting their cases. If the amendment is not filed until the commencement of the trial the exercise of discretion by the trial court in striking the amendment from the files will be sustained. *Emerson v. Converse*, 106-330.

The discretion of the court in disregarding an amendment on the ground that it was filed too late will not be interfered with on appeal. *Burkhardt v. Burkhardt*, 107-369.

Amendment of pleadings after trial is begun is not always a matter of right and the ruling of the trial court in refusing leave to file such amendment will not be interfered with on appeal in the absence of a showing of the abuse of discretion. *American Life Ins. Co. v. Melcher*, 132-324.

There is no abuse of discretion in not allowing an answer to be filed after the trial has been called and the jury waived, the defensive matter averred being admissible under general denial. *Dunton v. Dawley*, 122-512.

Refusal to allow the filing of an amended pleading introducing new issues during the trial is not an abuse of discretion requiring reversal. *Allen v. North Des Moines M. E. Church*, 127-96.

The discretion of the court in denying the right to file an amendment not offered in proper time will not be interfered with on appeal. *Davis v. Boyer*, 122-132.

The trial court has large discretion in the matter of extending time for filing amendments, and where no default has actually been entered, its action in giving further time to amend will not, in general, be disturbed. *Davis v. Huber Mfg. Co.*, 119-56.

An amendment to the answer tendered at the close of the argument interposing a new defense may be rejected at the discretion of the court, no reason being made to appear why it should not have been earlier offered. *Kettering v. Eastlack*, 130-498.

New parties: To save an action from abating, plaintiff should be allowed, on request, to have proper parties substituted before the court directs a verdict for the defendant on the ground that plaintiff is not the proper party to sue. *Hook v. Garfield Coal Co.*, 112-210.

New cause of action: Where, in an action to recover for negligence, one ground of negligence is stated in the petition, and another in an amendment thereto, the cause of action stated in the amendment will be barred if barred when the amendment is filed, although not barred when the action was commenced. *Box v. Chicago, R. I. & P. R. Co.*, 107-660.

Where a substituted petition sets up a cause of action, of the same nature, but not founded on the same facts, the cause of action is not to be deemed the same, and if the substituted petition is not filed within the statutory period, the cause of action therein pleaded is to be deemed barred. *Brooks v. SeEVERS*, 112-480.

An amendment seeking to hold the defendant as a debtor on his own account

while the original petition charged him as a member of partnership, does not so change the cause of action that such amendment cannot be made after the five-year limit has expired. *Padden v. Clark*, 124-94.

The statement is an amendment of additional grounds of negligence does not constitute the interposition of a new cause of action. *Thayer v. Smoky Hollow Coal Co.*, 129-550.

An amendment to a petition in an attachment suit may set up a new ground of attachment. *Emerson v. Converse*, 106-330.

The question whether plaintiff may amend his petition setting up a different cause of action should be raised by motion to strike, and if such motion is sustained, the plaintiff should have the opportunity allowed by statute to cure the defect in his petition by further amendment. It is not proper in such case to render judgment against the plaintiff without the lapse of the statutory period allowed for further pleading. *Williams v. Williams*, 115-520.

In an action against a city for personal injuries by reason of defective sidewalk, the place where the accident occurred is material to the cause of action, but a change of the description of such place, to cure an oversight or inadvertence, does not introduce a new cause of action. *Sachra v. Manilla*, 120-562.

After action barred: If the new matter pleaded does not state a new cause of action, but merely amplifies the charges of negligence made in the petition, the amendment may be upheld, although filed after the period of limitation has run. *Gordon v. Chicago, R. I. & P. R. Co.*, 129-747.

An amendment specifying more particularly the damages flowing from the wrongs alleged in the petition may be interposed after the statutory period for maintaining the action for such injuries has run. *Anderson v. Acheson*, 132-744.

Substitute: Where a pleading has been superseded by a subsequent pleading, filed as a substitute, the former pleading cannot be used for any purpose on the trial without being introduced in evidence. *Longley v. McVey*, 109-666.

It is only when the original pleading has been superseded by a subsequent pleading that the averments of such original pleading are not to be taken against the pleader unless the pleading is introduced in evidence. *Burns v. Chicago, Ft. M. & D. M. R. Co.*, 110-385.

A pleading which has been superseded or withdrawn cannot be submitted to the jury to prove an admission contained therein unless it is introduced in evidence. *Marshall Field Co. v. Oren Ruffcorn Co.*, 117-157.

The fact that averments of a substituted petition are inconsistent with those of the previous pleading is not a ground of demurrer. *Williams v. Williams*, 115-520.

Pleadings superseded remain a part of the record, but they cannot be read or commented on in the trial unless formally introduced in evidence. *Ibid.*

An amended pleading may appear to be and be treated as a substitute. *In re Estate of McMurray*, 107-648.

Must be substantial: It is proper to strike out a pleading, even though filed as a substitute for all previous pleadings, which is in substance a mere repetition of allegations which have been held insufficient on a demurrer to a former pleading in the same case. *Hoyt v. Beach*, 104-257.

The court may properly strike out an amendment which amounts to nothing more in legal effect than a refiling of the original pleading. *McKee v. Illinois Central R. Co.*, 121-550.

An amended and substituted petition,

SEC. 3601. Errors disregarded.

The statutory provisions abolishing forms of action does not obliterate all difference between kinds of actions. A party declaring upon conversion of property cannot have recovery as upon a contract or agreement to pay. *Himmelman v. Des Moines Ins. Co.*, 132-668.

Informalities in the submission and de-

SEC. 3603. How amendment made.

An amendment is regarded as a continuation of the original pleading, and as relating back to the commencement of the suit. *Scott v. Frank*, 121-218.

An amendment is to be construed with the original pleadings. *Mock v. Charleston*, 121-411; *Brutsche v. Bowers*, 122-226.

An amended petition may be an essentially different pleading from an amend-

SEC. 3604. Interrogatories annexed to pleading.

It is not necessary to submit interrogatories which do not call for ultimate facts nor for answers which would necessarily control the verdict. *Thompson v. Brown*, 106-367.

The statutory provision requiring answers by the opposite party to interrogatories attached to the pleading are applicable to corporations as well as to individuals. The answers in such cases are to be made by the proper agent of the corporation. *Blair v. Sioux City & P. R. Co.*, 109-369.

Interrogatories may be attached to an amendment to a pleading, and it is within the sound discretion of the court to permit such amendment at any time during the trial. *Ibid.*

restating what has been previously pleaded, may be stricken out on motion. *Curl v. Foehler*, 113-597.

Entered on docket: Where an amendment is treated by all the parties as filed, and the case tried on the issues raised by such amendment, it cannot afterwards be objected that the amendment was not entered on the appearance docket. *Foley v. Cedar Rapids*, 133-64.

Change of forum: After the trial of a case as in equity, if the plaintiff is allowed to amend his petition so as to convert his demand from one of equitable cognizance to an action at law for damages, the court should set aside the submission and proceed to a trial by ordinary proceedings. *Hartwig v. Iles*, 131-501.

A party should not be allowed by amendment to convert an equitable action into one at law and have a change to the law docket after the evidence has been taken by depositions as in an equitable action. *Saunders v. Wells*, 112 N. W., 205.

termination of a case will not constitute sufficient ground for reversal on appeal where the party complaining was given full opportunity to and did present his whole case. *Pratt v. Fishwild*, 121-642.

This section is applicable to the pleadings in the case. *Lampman v. Bruning*, 120-167.

ment to a petition, and may clearly appear to be intended as a substitute. *In re Estate of McMurray*, 107-648. And see notes to Code § 3600 in this Supplement.

After the filing of a substitute petition and a subsequent withdrawal of the same, the plaintiff may file an amendment to the original petition. *Thayer v. Smoky Hollow Coal Co.*, 129-550.

It is proper to strike out interrogatories proposed in an amended petition where it is manifest that to permit them to stand would necessarily postpone the trial, and plaintiff offers no excuse for the delay in propounding them. *Thies v. Chicago & N. W. R. Co.*, 107-522.

In the absence of objection by the opposite party, it is not error to allow interrogatories to be propounded in an amendment to the pleading. *Free v. Western Union Telegraph Co.*, 110 N. W. 143.

Interrogatories attached to a pleading are not a part of the pleading, and the answers thereto cannot be considered in determining the issues of law arising on the pleadings. *Van Norman v. Modern Brotherhood*, 111 N. W. 992.

SEC. 3606. Time of responding.

While exceptions to interrogatories annexed to a pleading should be passed on before the entry of an order requiring answers thereto, circumstances may arise justifying the setting aside of the order

requiring answers, in order that exceptions to the interrogatories may be interposed. *Free v. Western Union Tel. Co.*, 110 N. W. 143.

SEC. 3609. How verified.

Where the answers to interrogatories made by the officers of a corporation in a case against the corporation show on their face that they are not made in good faith, and that, although the officers making the answers have not personal knowledge of the facts inquired about, they might have acquired such knowledge from the records and books of the corporation, accessible to

them, such answers may be stricken out and the penalty for failure to make proper answers may be enforced. *Blair v. Sioux City & P. R. Co.*, 109-369.

The pleading of a corporation may be verified by the oath of its proper officer. *Marshall Field Co. v. Oren Ruffcorn Co.*, 117-157.

SEC. 3610. Effect of failure to answer.

Failure to answer interrogatories propounded in a pleading does not authorize the summary entering of judgment. *Modern Steel Structural Co. v. Van Buren County*, 126-606.

Before rendering judgment for failure to make answers to interrogatories, an opportunity should be afforded to answer the

interrogatories by fixing a time within which such answers must be filed, either by entering such an original order, or by extending the time originally fixed, and such remedy cannot be given where the time for answering has elapsed without an order affording such reasonable time. *Fee v. Western Union Tel. Co.*, 110 N. W. 143.

SEC. 3611. Answers compelled.

Without regard to statutory provisions, the court may compel answers to interrogatories by proceedings for contempt, and on failure of the party to answer may strike his pleadings. *Free v. Western Union Tel. Co.*, 110 N. W. 143.

But where the facts sought to be elicited

are admitted by answer even though filed without leave of court, and there is nothing to show bad faith, the court should not strike the defendant's pleading for failure to answer interrogatories propounded by plaintiff, and enter judgment by default against him. *Ibid.*

SEC. 3613. Allegations as to time.

Allegations of time, when not material,

need not be proven as made. *Arrison v. Mystic Toolers*, 129-303.

SEC. 3615. Evidence under denial.

A custom relied upon as affecting a contract cannot be proven under a general denial, but must be pleaded. *Eller v. Loomis*, 106-276.

In an action for criminal conversation the defendant cannot, under general denial, prove consent or connivance of the husband to the improper relations with the wife. Such facts should be pleaded by way of special defense. *Morning v. Long*, 109-288.

The evidence which tends to negative or disprove the matters of fact alleged in the petition is proper to be admitted under a general denial. Therefore in a joint ac-

tion against an employer and an employe for a tort committed by the latter, a general denial of liability by the former is sufficient to warrant the admission that the latter was an independent contractor, for whose acts the former was not liable. *Overhouser v. American Cereal Co.*, 128-580.

A mere general denial of a claim based on a written contract raises no issue under which testimony as to the peculiar or trade meaning of the words used in the contract is admissible. *Tubbs v. Mechanics' Ins. Co.*, 131-217.

Further as to general denials see notes to § 3566.

SEC. 3618. Sham defenses—redundant matter.

The remedy for getting rid of immaterial and irrelevant matter is by motion. *In re Estate of McMurray*, 107-648.

The objection that a pleading is sham or frivolous cannot be interposed by demurrer. *Williams v. Williams*, 115-520.

SEC. 3620. Inconsistent defenses—verification.

Defendant in an action for goods sold and delivered may plead rescission and also set up a counterclaim for breach of warranty. He is not required to elect. *Thorson & Cassidy Co. v. Baker*, 107-49.

A party may interpose inconsistent defenses. Thus defendant in an action to set aside a conveyance as fraudulent may deny the sale and also allege that the sale relied upon by the plaintiff was in fraud of creditors. *Jordan v. Crickett*, 123-576.

Defendant may in different divisions of his answer plead a general denial and a confession and avoidance, and the effect of

the general denial will not be nullified by the colorable confession necessarily alleged in connection with the avoidance. *Rudd v. Dewey*, 121-454.

The doctrine of election in pleading applies only to inconsistent causes of action, and not to inconsistent defenses. *Bruner v. Brotherhood of American Yeomen*, 111 N. W. 977.

Inconsistent defenses may be pleaded and relied upon, and the defendant cannot be required to elect as between them. *Cole v. Laird*, 121-146.

SEC. 3622. What deemed admitted.

Allegations of the petition which are not denied are to be treated as true. *Kent v. Muscatine, N. & S. R. Co.*, 115-383; *Redhead v. Iowa Nat. Bank*, 127-572.

Where the parties proceed to trial without answer or other pleading to an amended petition the plaintiff cannot afterwards claim that defendant is in default as to the amendment or that its allegations should be treated as confessed. *Gregory v. Bowlsby*, 126-588.

The statements made in a pleading

which have been superseded or withdrawn do not constitute admissions presumptively true as against the pleader. *McDonald v. Nugent*, 122-651.

The rule that allegations in the petition not denied in the answer are to be deemed true has no application on an appeal from the board of review for the assessment of taxes, although such appeal is to be determined as an equitable proceeding. *City Council v. National Loan & Investment Co.*, 122-629.

SEC. 3623. Account—bill of particulars.

Although a verified bill of particulars does not in every respect meet the requirements of this section, yet, in the absence

of timely objection it may be treated as sufficient if it serves the purpose of the case. *Sitzer v. Fenzloff*, 112-491.

SEC. 3626. Conditions precedent.

The general denial of a general allegation of the performance of conditions precedent does not put such allegations in

issue. *Krause v. Modern Woodmen*, 133-199.

SEC. 3627. Action in representative capacity.

In filing a claim against an estate it is not necessary to specify in what capacity the claim is made, and denial of the capacity of plaintiff to sue must be made specific. *University of Chicago v. Emmert*, 108-500.

While a failure to allege corporate capacity is a ground of demurrer, such objection comes too late after judgment. *Calnan Const. Co. v. Brown*, 110-37.

SEC. 3628. Denial—facts must be stated.

Where the petition in an action on a policy of insurance states that plaintiff has performed every act necessary to comply with the terms of the policy, defendant cannot rely upon failure to submit to an appraiser without pleading such fact as a defense. *Smith v. Continental Ins. Co.*, 108-382.

Where corporate existence is a material allegation of fact, proof of which is necessary to sustain plaintiff's claim, the case is not governed by this section. *Taft Co. v. Bounani*, 110-739.

Where plaintiff alleges its corporate capacity, and the denial is merely want of information on the subject, this is not suf-

ficient to put in issue the corporate capacity of the plaintiff. *Iowa Sav. & L. Assn. v. Selby*, 111-402.

To put in issue defendant's corporate capacity as alleged in the petition, facts showing want of such capacity must be specially pleaded. *Stork v. Supreme Lodge K. of P.*, 113-724.

A trustee in bankruptcy, suing in the interest of creditors, need allege no more than the fact of his representative capacity to entitle him to maintain the suit, and such allegation can only be put in issue by specially pleading the facts relied upon, to show that he is not entitled to maintain such suit. *Crary v. Kurtz*, 132-105.

SEC. 3629. Matters specifically pleaded.

In an action for criminal conversation, defendant, desiring to prove the acquiescence of the husband in the relations to his wife, should set up the facts by way of special defense. If he does not do so, he cannot prove them under general denial. *Morning v. Long*, 109-288.

The defense of the statute of limitations is waived if not pleaded. *McDonald v. Bice*, 113-44.

Matter which is admissible under a general denial need not be pleaded by way

of justification. *Overhauser v. American Cereal Co.*, 128-580.

In an action for breach of contract for the payment of a specified sum of money, an allegation of non-payment is essential and the fact of payment need not be alleged as a special defense, but may be proven under a general denial. *Howerton v. Augustine*, 130-389.

Section applied. *Shawyer v. Chamberlain*, 113-742.

And see notes under § 3566.

SEC. 3630. Motion for more specific statement.

A motion to strike out defensive matter from an answer on the ground that it is immaterial and redundant cannot be supported by affidavit. *Mast v. Wells*, 110-128.

In an action against two defendants to recover compensation for keeping, caring for and feeding stock, at the request of the defendants, orally made, held that it was error to overrule a motion asking that plaintiff be required to state whose property it was he kept, cared for and fed, and at whose instance and for whose benefit he performed the labor specified. *Hurd v. Ladner*, 110-263.

Where defendant in his answer denies, either generally or specifically, the allegations of plaintiff's petition, he cannot be required by motion for more specific statement to make such denials more particular. *Providence Bank Stock Co. v. Schafer*, 110-440.

Section applied as to stating whether a contract is in writing. *Montgomery v. Downey*, 116-632.

In an action to enjoin a liquor nuisance, held that while the general allegation of unlawfully keeping and selling intoxicating liquor in violation of law, was sufficient, yet where it was made to appear by a motion, supported by affidavit, that the defendant was entitled to sell liquor under a permit, the court rightly sustained a motion to require the plaintiff to state more specifically wherein the keeping and selling by defendant was unlawful. *Abrams v. Sandholm*, 119-533.

Any error in the sustaining of a motion for more specific statement is waived by amending in response to such motion. *Hunn v. Ashton*, 121-265.

SEC. 3638. Bond—breaches of.

Judgment against sureties on a bond being for the delinquency of the principal not to exceed the amount named in the bond, interest on a principal's liability

should be added even as against the sureties from that time. *Ellyson v. Lord*, 124-125.

SEC. 3639. Amount of proof.

Unnecessary averments in a pleading need not be proven. *Kerr v. Topping*, 109-150; *Russell v. Holder*, 116-188; *Krejci v. Chicago & N. W. R. Co.*, 117-344; *Perpetual B. & L. Assn. v. United States Fid. & Guar. Co.*, 118-729; *Anderson v. Acheson*, 132-744; *Williamson v. Robinson*, 111 N. W. 1012.

A party is not required to prove more of the allegations of his pleading than necessary to entitle him to the relief demanded or any relief included in that which is demanded. *Garvik v. Burlington*,

C. R. & N. R. Co., 124-691; *Everett v. Christopher*, 125-668.

Where plaintiff seeks to recover on an implied contract and also for trespass on the same facts, he may recover on the implied contract without proving the trespass. *Harrison v. Palo Alto County*, 104-333.

Although plaintiff in an action for assault and battery alleges malice which is not necessary to be proven in such an action, he may recover without malice being shown. *Reizenstein v. Clark*, 104-287.

SEC. 3640. Denial of genuineness of signature.

Having once denied the signature under oath, defendant is not bound to renew his denial in subsequent amendments. *Renner v. Thornburg*, 111-515.

Such denial throws the burden of proof on the opposite party. *Ibid.*

In an action on a note purporting to be signed by a corporation the corporation

may deny the genuineness of its signature by alleging that its president who signed the corporate name had no authority to do so. The verification of such sworn denial by a proper officer of the corporation is sufficient to put in issue the genuineness of the corporate signature. *Marshall Field Co. v. Oren Ruffcorn Co.*, 117-157.

Where the execution of a note and mortgage is denied under oath, the burden is on the plaintiff to prove the execution. *Damman v. Vollenwieder*, 126-327.

Where the signature of a written instrument is so denied as to throw the burden of proof upon the plaintiff suing thereon, and the plaintiff wholly fails to sustain the averments of his petition, as

against such denial, it is not error to render a judgment for the defendant. *Peterson v. Ball*, 121-544.

Section applied. *Carthage Nat. Bank v. Butterbaugh*, 116-657.

[The Code note for the case of *Schulte v. Coulthurst*, near the bottom of second column on page 1394, should be changed to read as follows:]

Where a claim against an estate is based upon a note, a denial of the execution of the note puts in issue the genuineness of the signature and overcomes the presumption which ordinarily obtains in favor of the signature of a written instrument when the statutory denial is not made. *Schulte v. Coulthurst*, 94-418.

SEC. 3641. Supplemental pleading.

A continuance of the same grievance complained of in the original petition may be pleaded by way of supplemental petition for the purpose of securing additional relief. *Foote v. Burlington Gas Light Co.*, 103-576.

The true criterion for determining the propriety of a supplemental petition does not lie in ascertaining whether it states a cause of action which might be independently maintained. It may be read with the original petition and both considered as one pleading, and if its scope is limited to strengthening, developing or re-enforcing the original cause of action, or of enlarging the extent of, or changing the relief sought, then it meets the very purpose of such pleading. The new cause of action which the law will not permit to be thus pleaded is one not related to that stated in the original petition and which, under the rules of pleading, must be set up in a separate count or division. *Ibid.*

SEC. 3642. Matter in abatement.

Where a prior action is so dismissed by the plaintiff as to waive any right to recover therein such prior action cannot be relied on in abatement of a subsequent action. *Pray v. Life Indem. & Secur. Co.*, 104-114.

One of the recognized tests of determining whether the plea of another action pending is good lies in ascertaining whether the judgment, when obtained, would necessarily be *res adjudicata* of the issues of the action wherein the plea is interposed. *Valley Bank v. Shenandoah Nat. Bank*, 109-43.

Two actions for the same cause may not be maintained at the same time because the second suit is unnecessary for the enforcement of rights or the redress of wrongs, and simply annoys and harasses the defendant without cause, but the reason of the rule applies only when the plain-

Therefore, held, in an action to recover damages resulting from the maintenance of a nuisance, a claim for additional damages accruing since the commencement of the action by reason of a continuance of the nuisance might be set up in a supplemental petition. *Ibid.*

This section does not authorize the presentation of an entirely new cause of action. *Allen v. Davenport*, 115-20.

In an action against a county on an unliquidated claim the failure to make demand as required by Code § 3528 before instituting suit may be cured by a subsequent demand pleaded in a supplemental or amended petition. *Little v. Pottawattamie County*, 127-376.

A motion relating to the enforcement of a decree is not properly entitled a supplemental pleading. *Dunton v. McCook*, 120-444.

Section applied. *Christie v. Iowa Life Ins. Co.*, 111-177.

tiff in both actions is the same person, and hence the rule itself falls when this is not true. The fact that the parties do not stand in the same relation in the two suits is an insuperable obstacle to the plea. *Pratt v. Howard*, 109-504.

The fact that the action depends upon the same right or title as another action pending will not suffice to sustain a plea in abatement. The two actions must involve the same cause of action. *Watson v. Richardson*, 110-698.

The rule that the court first acquiring jurisdiction of the case will retain the same to the exclusion of any other court of concurrent jurisdiction is not applicable unless it appears that the suits are between the same parties seeking the same remedy. *State v. Clough*, 111-714.

Another action pending is a good plea in abatement where the parties are the same,

the issues identical and the interests of respective parties such as must be determined, although the parties plaintiff are not the same in the two suits. *Guinn v. Elliott*, 123-179.

The doctrine that a subsequent action may be abated on the ground of the pendency of a prior one between the same parties for the same cause does not apply where the prior action is pending in the courts of another state or in a foreign country. *Schmidt v. Posner*, 130-347.

This section does not specify what shall be a good plea in abatement. That must be determined independently of the statute. *Moffitt v. Chicago Chronicle Co.*, 107-407.

SEC. 3644. Consolidation of actions.

Two actions, one in law and the other in equity, although between the same parties, should not be consolidated. *Hodowal v. Yearous*, 103-32.

Where so far as the parties defendant are actually served with notice the actions may properly be consolidated, such consolidation will not be erroneous on account of the fact that other parties defendant are named in the two actions, who if they had been properly brought into court would have prevented the consolidation. *Bank of Montreal v. Ingerson*, 105-349.

The important inquiry as to the consolidation of actions in equity is as to the

identity of the subject-matter involved. The aim is to bring in all the parties in interest, and suits will be consolidated without special regard to the identity of parties. This is because of the power of such a court to make proper orders, according to each party exact justice. *Cox Shoe Co. v. Adams*, 105-402.

Consolidation is effected on the order of court alone, upon application of a party, or by motion. When applied for the order is discretionary, and the action of the trial court in the matter will be interfered with only on a clear showing of abuse. *Jones v. Witousek*, 114-14.

Pleas in abatement do not go to the merits of the action but rather to the procedure; and a pleading tending to show that the action has been prematurely brought is a plea in abatement, and judgment for defendant on that ground will not bar a subsequent action. Nor will a judgment for defendant on the ground that the plaintiff has not proven capacity to sue, constitute a bar to another suit. *Telegraph v. Lee*, 125-17.

An affirmative defense in the nature of a plea in abatement is denied by operation of law. *State v. Beardsley*, 108-396.

CHAPTER 9.

OF TRIAL AND JUDGMENT.

SECTION 3647. Issues.

An issue of law is raised by presenting a question for determination on demurrer

or plea. *Columbus Junction Tel. Co. v. Overholt*, 126-579.

SEC. 3649. Trial defined.

A judicial examination of an issue of law raised by a demurrer or plea is a trial. *Columbus Junction Tel. Co. v. Overholt*, 126-579.

The trial of an action as defined by statute is not completed until all the issues raised are passed on. The return of the verdict does not necessarily conclude the examination either of questions of fact or of law. *Bevering v. Smith*, 121-607.

SEC. 3650. How issues tried.

There is not in general a right to a jury trial in special proceedings. *Green v. Smith*, 111-183.

Where there is no element of accounting or other recognized ground of equitable jurisdiction, mere intricacy of the calculations necessary to determine the amount of plaintiff's recovery will not justify the court in refusing to grant a jury trial in an action at law. *Galusha v. Wendt*, 114-597.

The issues on an appeal under Code § 2450 as to the correctness of the action of the board of supervisors in canvassing a statement of consent under the mulct law are triable without a jury, and it is error to submit issues in such a proceeding to a jury, even in an advisory way. *Porter v. Butterfield*, 116-725.

SEC. 3651. Method of trial in ordinary actions.

A proceeding for admeasurement of land is triable ordinarily upon assignment of error and not *de novo*. *In re Estate of Lund*, 107-264.

SEC. 3652. In equitable actions—certificate of evidence—trial anew on appeal. In equitable actions wherein issues of fact are joined, all the evidence offered in the trial shall be taken down in writing, or the court may order the evidence, or any part thereof, to be taken in the form of depositions, or either party may, at pleasure, take his testimony, or any part thereof, by deposition. All the evidence so taken shall be certified by the judge at any time within six months after the entry of a final decree, and the evidence and certificate be made a part of the record, and go on appeal to the supreme court, which shall try the cause anew. But this section shall be so construed as to include the evidence taken in shorthand, when the reporter's notes of such evidence have been certified to by the judge and reporter within the time herein provided. [19 G. A., ch. 35, § 1; 17 G. A., ch. 145; C., '73, § 2742.] [31 G. A., ch. 155.]

Evidence taken down—filing transcript: Under the statutory provisions that in equity cases the evidence shall be taken down in writing and all the evidence so taken shall be certified by the judge and be made a part of the record and go on appeal to the supreme court, the transcript of the evidence taken in shorthand and certified by the reporter and filed, is to be deemed written evidence. But otherwise the trial judge must finally determine what the evidence in the case tried before him and the certificate of the judge to the shorthand notes is conclusive that they contain the evidence on the trial. It is immaterial whether the reporter certifies to the correctness of such notes or his transcript thereof. *Dietz v. Capital City Brick & Pipe Co.*, 103-542.

The provisions of Code of '73, § 2742, as amended, that the written evidence should be certified within the time allowed for appeal, was not affected by the provision of 26 G. A., ch. 64, by which the transcript of the shorthand reporter's notes might be transmitted to the supreme court in lieu of the clerk's transcript of such evidence. *Sloan v. Davis*, 105-97.

The notes of the stenographer are not evidence in writing within the statutory provision as to taking down the evidence in writing in an equity case. But when such notes identifying all documentary evidences are duly certified to by the trial judge the transcript thereof, including the judge's certificate, duly certified by the reporter, may become written evidence. To secure a trial *de novo*, however, a transcript of the evidence must be on file within six months from the time final decree is entered. *Smith v. Wellslager*, 105-140.

According to the law as it now stands equity actions are to be tried on written evidence and no motion for that purpose is required. To make the transcript when duly certified a part of the record for the

purpose of appeal it is necessary to file it with the clerk within six months from the time final decree was entered, and evidence not thus preserved cannot be considered on appeal, even on assignment of errors. *Ibid.*

The failure of the reporter to furnish appellant a transcript of the evidence in an equity case in time to enable him to prosecute his appeal will not be a ground for new trial if appellant has been negligent in attempting to procure such transcript. *McKinley v. McKinley*, 123-574.

Where the evidence in an equitable action is not certified and filed in the lower court within six months, there cannot be a trial *de novo* on appeal. *Kringle v. Kringle*, 123-365.

If the shorthand notes or transcript in an equity case are lost the court may order a substitution and will not be without jurisdiction to do so in a proceeding commenced within the time allowed for taking appeal although the final order for substitution is not entered until the time for the appeal in which it is desired to make use of the evidence has expired. *Ormsby v. Graham*, 123-202.

Where appellee has set out in an additional abstract portions of the evidence, which he avers to be a part of the record, he cannot raise the question whether the evidence was properly preserved in an equity case. *Sarvis v. Caster*, 116-707.

After the evidence has on appeal been stricken from the record because not properly preserved and the case has been submitted on the part of appellee, appellant is not entitled to have the evidence reinstated and the case considered as though such evidence was in record. *Citizens' Bank v. Johnson*, 107-365.

Depositions: Under § 2742 of the Code of '73 held that the court might in its discretion refuse to order the testimony to be taken by depositions. But held that

such refusal even though erroneous would not constitute prejudicial error as the party would have had a right to introduce the evidence by depositions so far as he desired. *Varnum v. Winslow*, 106-287.

Certificate of judge and reporter: To justify a trial anew of an equity case in the supreme court the evidence must be certified and filed within the time allowed for appeal, that is, six months. *Bauernfiend v. Jonas*, 104-56.

Failure to file the certificate in time cannot be cured by an order *nunc pro tunc*. *First Nat. Bank v. Redhead*, 103-421.

Where the evidence is not thus preserved the court cannot, on assignment of error, pass upon questions in the case requiring the consideration of the evidence. *Smith v. Wellslager*, 105-140.

Where the evidence has not been taken down, certified and preserved as required, a motion in the supreme court to strike the evidence set out in the abstract will be sustained. *Co-operative Bank v. Meldrum*, 128-694.

The office of the certificate of the judge is to identify the evidence and to make it of record when filed, while it is the office of the certificate of the clerk to identify and authenticate the record. *Bauernfiend v. Jonas*, 104-56.

Where the judge certified that the evidence was all the evidence offered, given or introduced upon the trial, held, that such certificate was sufficient. *Miller Brewing Co. v. Hansen*, 104-307.

A certificate that the record contains all the evidence offered and introduced on the trial it is not sufficient to enable the court to try the case *de novo*. *Cheney v. McColloch*, 104-249.

A certificate that the transcript of the evidence is a correct, true and complete transcript of all the evidence introduced, both oral and documentary, together with the objections interposed by counsel and the rulings of the court thereon, exceptions taken, etc., is not sufficient to enable the court to try the case *de novo*, because it does not show that the record contains all of the evidence which was offered upon the trial below. *Greenlee v. Home Ins. Co.*, 103-484.

Exhibits which are sufficiently identified in the stenographer's report or translation, duly certified by the judge, are sufficiently preserved. *Mason v. Des Moines*, 108-658.

Under the provisions of Code § 4118, embodied in rule 22 of the supreme court, it is not necessary to formally allege in the abstract on appeal that the evidence was certified by the trial judge and the certificate made of record. *Kirchman v. Standard Coal Co.*, 112-668.

It is not necessary to set out the certificate to the evidence in order to show that it has been properly preserved in an equity

case, it being presumed that the proper steps have been taken, unless the question is raised by a specific denial. *Burget v. Greenfield*, 120-432.

To secure a trial *de novo* the provisions of this section must be complied with. Code § 3675 as to reporting the proceedings in general does not relate to the subject. *Dwyer v. Rock*, 115-722.

It is not required that the evidence in equity cases be taken down by the official reporter, and the certificate of the transcript should be made by the reporter who reports the proceedings. *Spinney v. Halliday*, 115-420.

A statement in the abstract of record showing that the report of the evidence as filed in the trial court is certified by a person named, who is not designated or otherwise shown to have been the official reporter or a person authorized to report the evidence, is not sufficient. *Oskaloosa Nat. B. L. & I. Assn. v. Bailey*, 129-287.

A certificate of the evidence introduced on the trial of the case of "*D. M. Smith v. W. T. Brown and Nellie C. Sprague, et al.*," held not sufficient to entitle the appellant to a trial *de novo* in the case of "*D. M. Smith v. W. T. Brown and Mrs. Nellie C. Springer.*" And held that a statement of counsel in the abstract that the word "*Sprague*" was a clerical mistake for "*Springer*" could not be considered. *Smith v. Brown*, 123-114.

The amendment to this section by 31 G. A., ch. 155, directing that the section be so construed as to make sufficient the certification of the shorthand notes of the evidence within the prescribed time, is not to be construed as retroactive, so as save an appeal in which the right has been lost by failure to perfect the record under the section as it stood before such amendment. But as the amendment is remedial in character, and merely changes the procedure, it may be held applicable in perfecting a record in all cases where the time within which this might have been done had not elapsed before the law became operative. *Richardson v. Fitzgerald*, 132-253.

The amendment, although it purports to make direction only as to the construction of the section amended, is in fact a change in the law, and not a curative act. *Ibid.*

Assignments of error: Where appellant is entitled to a trial *de novo*, assignments of error relating to rulings on the introduction of evidence will not be considered. *Foy v. Armstrong*, 113-629.

In a case triable *de novo* the appellant cannot make assignments of error in the admission or rejection of evidence, and have them considered as at law. *Spinney v. Halliday*, 115-420.

In an equity case rulings on motions to strike and on demurrers will not be considered unless exception is taken and error

assigned. *Hogueland v. Arts*, 113-634; *Jackson v. SeEVERS*, 115-370.

That assignments of error are no longer necessary, even in actions tried by ordinary proceedings, see § 4136-a.

On a trial *de novo* the supreme court does not consider points of practice, unless they are in some manner brought to the attention of the trial court and exception taken to the ruling thereon. *West Side Lumber Co. v. Hathaway*, 115-654.

There can be no reversal for failing to exclude improper evidence in a trial in equity unless it appears that the evidence

proper to be considered does not support the findings of the court. To entitle the appellant to reversal in such a case for the improper admission of evidence, it must appear that the court ruled adversely to him on objections to the admission of such evidence. *Edwards v. Olin*, 121-143.

Findings of lower court: The findings of a trial judge even in an equity case when based on the testimony of witnesses appearing before him will be disturbed on appeal with reluctance. *Johnson v. Farmers' Ins. Co.*, 126-565.

And see notes to § 4139.

SEC. 3653. Abstracts in equity causes.

The costs of this abstract are not to be

taxed to the unsuccessful party. *Grapes v. Grapes*, 106-316.

SEC. 3654. Finding of facts.

A finding of facts by the court in a law case tried without a jury should not be disturbed unless so clearly against the evidence as to justify the conclusion that it was based on passion or prejudice. *Brown v. Curtis*, 111-542.

The finding of facts by the trial court must be sustained on appeal, if there is any substantial evidence to support it. The trial court has the advantage of the presence of the witnesses, and his con-

clusions will not be interfered with where they are supported by the evidence, and do not appear to have been the result of passion or prejudice. *Jenkins v. Dewey*, 122-530.

In a law action, the findings of fact by the court in a case tried without the jury are entitled to the same force as the verdict of a jury. *Bullard v. Hopkins*, 128-703.

SEC. 3655. Trial term.

Parties may consent to trial at the term at which the petition is filed, although proper notice of the filing of the petition has not been given. *Rummel v. Dealy*, 112-503.

The general provision of Code § 3655, that all causes of action, both at law and in equity, and special proceedings, except

where otherwise provided, shall be tried at the first term after legal and timely service has been made, does not prevent the continuance of an action to a subsequent term, where the business of the court requires or substantial justice will be promoted thereby. *Cox v. Burnham*, 120-43.

SEC. 3656. In equitable actions. The appearance term shall not be the trial term for equitable actions, except those brought for mandamus or divorce, to foreclose mortgages and other instruments of writing whereby a lien or charge on property is created, or to enforce mechanics' liens, or appeal cases in contested elections. [C., '73, § 2745; R., § 2856.] [30 G. A., ch. 122.] [32 G. A., ch. 165.]

SEC. 3658. Trial notice.

The provisions as to trial notice do not

apply to motions. *Manning v. Nelson*, 107-34.

SEC. 3659. Assignments of trial causes—hearing of motions and demurrers.

The rules made by the judges of court in force prior to the adoption of the present Code did not require the court to make assignments of cases for trial and it was not error for the court on request of a party to refuse to make such an assignment. *Slocum v. Brown*, 105-209.

An assignment of a cause for a particular day is not essential to its being called for trial in its regular order. The statutory provision as to assignment of causes is not mandatory. *Stewart v. Gorham*, 122-669.

SEC. 3660. Docketing appeals from justices—other appeals.

This provision applies to docketing alone, and not to failure to pay filing fee. While the clerk has the right to exact his fee before docketing the case, if he does actually put the case on the docket, the appellee cannot have it dismissed for failure of appellant to pay the fee. *Vasey v. Parker*, 118-615.

If the case properly gets upon the docket even in the absence of a transcript and without the payment of a docket fee, the appellee cannot have the appeal dismissed or the judgment or award affirmed on himself paying the fee and causing the docketing of the case. The appellant is not required to file a transcript until the case is reached for trial. *Simons v. Mason City & Ft. D. R. Co.*, 128-139.

General appearance in court having jurisdiction of the case and the parties, with agreements from time to time as to the disposition of the case, will waive an entry of the case upon the appearance docket. *Ibid.*

Where the railroad company appeals

from an assessment of damages for right of way and later the land owner also appeals, without paying a filing fee, the railroad company cannot by paying such fee have the land owner's appeal dismissed, and held, that it was proper for the court to consolidate the land owner's appeal with the company's appeal and a subsequent dismissal of the latter would leave no question for trial. *McKinnon v. Cedar Rapids & J. C. R. & L. Co.*, 126-426.

The provision as to docketing appeals in the district court held applicable to an appeal from the action of the board of review for the assessment of taxes. *Stephens v. City Council*, 132-490.

It is evident from this section that an affirmative duty is placed on the appellant to get an appeal from the action of the board of tax reviewers before the district court for determination. Notice of appeal is not alone sufficient. *Frost v. Board of Review*, 114-103. See also Code § 4559 and notes.

SEC. 3663. Causes for continuance.

The matter of granting a continuance is largely within the discretion of the trial court and to justify a reversal it must clearly appear that this discretion has been abused and that an injustice has been done thereby. *Cheney v. McColloch*, 104-249; *Hibbets v. Hibbets*, 117-177; *State v. Wilson*, 124-264.

The court may waive conditions imposed on the granting of a continuance where it is made to appear that without fault on the part of the attorney applying for such continuance, he is unable to properly present the case at the time set for trial. *American Soda Fountain Co. v. Dean Drug Co.*, 111 N. W. 534.

A motion to amend a motion for a continuance after a ruling thereon based on counsel's admission that the witnesses would testify as claimed is not in order. At any rate, the trial court is vested with a large discretion in the matter. *Goldstein v. Morgan*, 122-27.

The filing of an amendment or of a supplemental petition will not alone authorize a continuance and if the defendant desires a continuance on that ground he must set out some good reason therefor. *Foot v. Burlington Gas Light Co.*, 103-576.

The grounds alleged in a motion for continuance in a particular case held not sufficient to require a reversal of the action of the trial court in overruling the motion. *Hibbets v. Hibbets*, 117-177.

A continuance, asked for the purpose of procuring depositions which cannot be

taken during the term of the court without an express order, should be granted. *Reupke v. Stuhr & Son Grain Co.*, 126-632.

A showing as to absence of a party familiar with the facts although incompetent to testify held to be such that a refusal to grant a continuance was error. In such case, the counsel of the party is entitled to have the advice of his client. *In re Townsend's Estate*, 122-246.

Under the showing of surprise in a particular case, held that the party was entitled to a continuance in order to enable him to procure his evidence. *Flint v. Atlas Mut. Ins. Co.*, 112 N. W. 1.

It is not error to refuse a continuance on the ground of the absence of a witness desired for impeachment purposes, where at the time the motion is made it does not appear that his testimony will be required. *State v. Hayden*, 131-1.

A continuance should not be granted for the absence of a witness where no facts are presented from which it might reasonably be expected or believed that the attendance or the testimony of such witness could be procured at any subsequent time. *State v. Burns*, 124-207.

Inability to secure the attendance of a witness is not sufficient ground for a continuance where the party has not used reasonable diligence in attempting to secure the attendance of such witness. *Moffit v. Chicago Chronicle Co.*, 107-407.

SEC. 3664. Affidavits—what must show.

The affidavit must not only show diligence in attempting to secure the presence of the witness, and the materiality of the evidence sought to be obtained, but also that the witness's presence can be secured by ordinary methods at the ensuing term, and where it appeared that the witness in question had once disobeyed a subpoena, and there was no reason to think that he would come at any other time without compulsion, and also that he was a non-resident of the state, held that the show-

ing was not sufficient. *State v. McGinn*, 109-641.

Notwithstanding the evidence to procure which a continuance is sought may be cumulative, it may be that the interests of justice require the continuance to be granted. *State v. Hasty*, 121-507.

The showing in a motion for a continuance as to the absence of witnesses held not sufficient as to what it was proposed to prove by such witnesses. *State v. Penney*, 113-691.

SEC. 3665. Admission by opposite party.

The only effect of the admission as to the testimony of an absent witness for the purpose of preventing a continuance, is to authorize such admitted testimony to be read as evidence; if it is not so read it is not for the consideration of the jury. *Michel v. Boxholm Co-operative Creamery*, 128-706.

The admission that the absent witness would testify as alleged in the affidavit for continuance, does not waive objection to the incompetency of such testimony. *State v. Leuhrman*, 123-476.

SEC. 3666. Filing motion.

Where the ruling of the court on a motion for continuance is necessarily based on the sufficiency of the showing as to a complicated state of facts relating to the

diligence of the party asking for the continuance, the ruling of the trial court will not be interfered with. *Percival-Porter Co. v. Oaks*, 130-212.

SEC. 3675. Report of trial—certificate.

Where the trial judge attached to the shorthand notes a certificate to the effect that such notes were the official report of the case and that they contained, together with the documentary evidence therein referred to, all of the evidence that was offered or introduced on the trial of said case, and all objections and rulings made and exceptions taken, and made said official report in shorthand a part of the record, held, that proceedings with reference to the separation of the jury which were found in the shorthand notes were thereby made a part of the record and might be considered on appeal. *State v. Smith*, 102-656.

Prior to the adoption of this section no certificate of the reporter was necessary to enable his notes to be incorporated by reference into a skeleton bill of exceptions. *Sigler v. Murphy*, 107-128.

Where the reporter's notes are filed with the clerk and referred to in a skeleton bill of exceptions, the evidence is sufficiently made a part of the record by such bill of exceptions although the notes thus filed are not certified nor entered as filed on the clerk's record. *In re Guardianship of Holcher*, 127-369.

The bill of exceptions need only contain such matter as will enable the court to pass on the errors assigned, and this rule is not changed by the provisions of this

section by which the notes of the shorthand reporter became a substitute for the bill of exceptions. The section provides for the preparation of a full and complete bill. A partial bill may be prepared in the same manner, and if errors, assigned are based entirely on rulings on the admissibility of evidence, or its effect, it is sufficient if the evidence offered and received, together with the objections, rulings and exceptions are duly certified and filed, as therein directed. If the proceedings are in fact taken down in shorthand, and duly certified, they become a bill of exceptions, regardless of any preliminary order. *State v. Welsh*, 109-19.

Where the notes in shorthand were duly certified by the trial judge, but the reporter, after extending them, instead of copying the judge's certificate, detached it from the notes and attached it as a part of his own at the end of the transcript, held that the transcript as so prepared and certified should be treated as the evidence in the case. *Steele v. Potthast*, 109-413.

The transcript of the shorthand notes should be certified by the person who as reporter takes down the proceedings. It is not necessary that this be the official reporter, and, where the proceedings were reported by an assistant of the official reporter, held that the certificate of the official reporter to the transcript was not

sufficient. *Spinney v. Halliday*, 115-420.

Although the stenographer who reports the case is not the official reporter, and is not sworn, nevertheless, if the judge append the proper certificate to the transcript of the testimony, this is enough to preserve the evidence. *Meador v. Allen*, 110-588.

Where the shorthand notes have been duly certified by the reporter at the close of the trial and in fact filed with the clerk the evidence is properly preserved whether the notes have been formally marked "filed" or not. *In re Estate of Bruning*, 122-8.

The certification of the shorthand reporter's transcript of his evidence cannot rightfully be demanded until the reporter has had a reasonable time for transcribing his notes. *Smith v. Smith*, 132-700.

Where counsel have agreed that the reporter shall certify all shorthand notes taken upon the trial including those taken by his predecessor, counsel cannot afterwards assert that such certification is not proper. *Hofacre v. Monticello*, 128-239.

All that is necessary in a law action is that the translation of the shorthand notes be filed and in form for use when such translation becomes necessary, and this time does not ordinarily arise until the Supreme Court is compelled to resort to the translation in order to discover what the evidence really was. *Ibid.*

Where appellant denies that the evidence was properly preserved and made of record by extension of the shorthand notes into longhand, and the filing of the transcript, appellee must furnish a transcript from the clerk establishing the fact; otherwise the court cannot, on appeal, consider any question depending on the evidence. *State v. Owens*, 109-143.

By Code § 3707 exceptions to instructions may be noted by the shorthand reporter without reason therefor being given. *White v. Elgin Creamery Co.*, 108-522.

The entry by a reporter in his minutes

SEC. 3680. Challenges to panel—when and how made.

Objection to the method of drawing talesmen should be interposed before the

of the fact of the return of the verdict does not constitute a record of the receipt of the verdict with the court so as to preclude the court from sending the jury out to correct the verdict which had been offered. *State v. Novak*, 109-717.

This section of the Code works little change in the law as it formerly stood, beyond enlarging what shall be included in the report and making it mandatory upon the demand of either party. *In re Tobey's Estate*, 112-581.

The provisions of this section do not modify the requirements of Code § 3652 as to what is required in order to secure a trial *de novo* in an equity case. *Dwyer v. Rock*, 115-722; *Spinney v. Halliday*, 115-420.

The provisions of 27 G. A., chap. 9, relating to the use of the shorthand reporter's transcript of the evidence in another case, see § 245a, has no application in a subsequent case which is not a retrial of the one in which the evidence was given, nor in which the transcript is not offered for the purpose of impeachment. *Walker v. Walker*, 117-609.

Where there is evident mistake in the shorthand report of the testimony of a witness, it may be corrected by changing the record so that it will show what the witness in fact said. Such corrections should be in the trial court, and may be made on motion, supported by affidavits. *Campbell v. Campbell*, 118-131.

It is not error for the court to have the stenographer read over the shorthand notes of a portion of the evidence in the presence of the jury for the purpose of enabling the court to determine whether portions thereof should be stricken out. *State v. Fielding*, 112 N. W. 539.

It is the duty of the reporter to attend the court as directed by the judge and he may recover his compensation for such attendance without regard to the services actually performed. *Ferguson v. Pottawattamie County*, 126-108.

jury is selected. *State v. Minor*, 106-642.

SEC. 3684. When made—determination.

A party who accepts the jury and goes to trial without objection cannot afterwards be heard to complain either of the

character of the jury or of the time of the trial. *Frank v. Davenport*, 105-588.

SEC. 3685. Peremptory.

Jurors may be interrogated on *voir dire* as to matters which may be important to the party in enabling him to intelligently exercise his peremptory challenge. *Simons v. Mason City & Ft. D. R. Co.*, 128-139.

It is not improper to allow a party for

the purpose of exercising intelligently his peremptory challenges in an action for personal injuries to enquire with respect to the connection of the jurors with employers' casualty insurance companies. *Brusseau v. Lower Brick Co.*, 133-245.

Where the defendant in a criminal case, being entitled to ten peremptory challenges, when called upon to exercise his eighth challenge, stated by counsel that one peremptory challenge was waived, and the prosecution thereupon waived a peremptory challenge, held that the defendant was still entitled to exercise the right of

two further peremptory challenges, and that it was error to refuse to allow him to do so. A waiver of one peremptory challenge is not a waiver of all further right of peremptory challenge as to persons already called as jurors. *State v. Hunter*, 118-686.

SEC. 3688. Challenges for cause.

Error in overruling a challenge for cause will not be deemed prejudicial where it does not appear in the record that the juror could not have been dismissed peremptorily. *Haggard v. Andrew*, 107-417.

The general statement that the party challenges a juror for cause is too indefinite. *Ibid.*

Where it does not appear that the party complaining of the overruling of his challenge to a juror exhausted his peremptory challenges, the ruling will be considered to have been without prejudice. *Harris v. Moore*, 112 N. W. 163.

To take advantage of the disqualification of a juror after verdict, it is incumbent on the party complaining to show affirmatively that neither he nor his counsel had knowledge thereof before the juror was sworn. *State v. Bussamus*, 108-11; *State v. Moats*, 108-13.

The fact that a juror is the client of an attorney engaged in the cause which is made the ground of challenge under this section, is not a ground of challenge in a criminal case under Code § 5360. *State v. Carter*, 121-136.

In an examination of jurors relative to their competency, questions may be asked as to facts the existence of which would not be ground for challenge. *Foley v. Cudahy Packing Co.*, 119-246.

The fact that one called as a juror has formed an opinion in the case by reading

in the newspapers, accounts of the facts involved, does not disqualify him if it appears from his answers to the questions that he can render a fair and impartial verdict on the evidence. *Croft v. Chicago, R. I. & P. R. Co.*, 109 N. W. 723.

The determination of the competency of a juror is largely within the discretion of the trial judge. *In re Goldthorp's Estate*, 115-430.

Questions as to the competency of jurors are to be determined by the court in the exercise of a sound discretion, and where the court might reasonably find from the answers of the juror touching his qualifications that he had no feeling of any kind that would prevent him from rendering a fair and impartial verdict, held that the challenge was overruled. *Dale v. Colfax Consolidated Coal Co.*, 131-67.

The challenge on the ground that the juror shows such a state of mind as will preclude him from rendering a just verdict involves a conclusion upon a fact question, and the decision of the court, in the exercise of reasonable discretion in the matter, will not be interfered with on appeal. *Wilson v. Wapello County*, 129-77.

When the action is against the county, the fact that jurors are residents and taxpayers of the county will not disqualify them. The plaintiff in such an action has the right to a change of place of trial. *Ibid.*

SEC. 3700. Procedure after jury is sworn—order of evidence.

The question as to who has the right to open and close is properly a matter of practice, and will not be reviewed unless it appears that an injustice has been done by the trial court in its ruling on the matter. *Oxtoby v. Henley*, 112-697.

The defendant introducing an affirmative defense has the burden of establishing it. *Ibid.*

The order of argument and the conduct

thereof, while prescribed by statute in a general way, are nevertheless peculiarly within the sound discretion of the court, and in the absence of a showing of clear abuse of discretion and of ground for believing that prejudice resulted, no reversal should be had on account of failure to follow the statute. *Breiner v. Nugent*, 111 N. W. 446.

SEC. 3701. Argument—opening and closing.

Under the language of this section, differing from that of the corresponding section of the Code of '73, the right to open and close is to be determined after the introduction of the evidence. *Schoonover v. Osborne*, 117-427.

The right to open and close depends

upon the burden under the issues, as appearing by the evidence, and not necessarily as determined by the pleading. *Shaffer v. Des Moines Coal & Hay Co*, 122-233.

The defendant cannot by mere ingenuity in pleading, as for instance by putting his answer in the form of an affirmative

allegation rather than a specific denial, deprive the plaintiff of the right to open and close, if the substantial effect of the pleading is to controvert the truth of the essential averments of the petition. *Farmer v. Norton*, 129-88.

But the question as to who has the burden is one of procedure, and the ruling of the court with reference thereto will not be interfered with on appeal unless an abuse of discretion is shown, which has been prejudicial to the appellant. Prejudice is not to be presumed from an error in such a ruling, but must be made to appear. *Ibid.*

SEC. 3705. Instructions—to be in writing.

In writing: A direction to the jury not to consider certain evidence except for a specific purpose need not be in writing. *State v. Hogan*, 115-455.

The requirement that instructions must be in writing relates to the statement of the facts and the law governing the case as given to the jury when the case is ready for final submission. It is not necessary to reduce to writing admonitions given to the jury by the court during the course of the trial to the effect that they are to disregard evidence which has been improperly admitted. *State v. Smith*, 132-645; *Krause v. Redman*, 112 N. W. 91.

Remarks made by the court in the presence of the jury with reference to the sufficiency of evidence, may constitute error as fully as though embodied in an instruction. *Coldren v. Le Gore*, 118-212.

What the court says by way of ruling on an objection need not be reduced to writing. *Frick v. Kabaker*, 116-494.

No distinction between instructions is to be made on the ground that some of them are in typewriting and others are written. *Kinyon v. Chicago & N. W. R. Co.*, 118-349.

Jurors are apt to attach great importance to statements with reference to the testimony made by the court during the trial of the case, and such statements frequently have the same weight and are as potent in influence as though embodied in a written instruction. *In re Will of Knox*, 123-24.

Signing: It is not required in a civil case that the judge shall sign the instructions, and even in cases where the statute provides for their being signed, such requirement is directory only. *Halley v. Tichenor*, 120-164.

Duty to instruct: Without regard to any requests for instructions by either party, the court should give to the jury the law of the case, and a failure to do so will be reversible error. *Overhauser v. American Cereal Co.*, 128-580.

A party is entitled to instructions correctly covering the theory of the case presented by the pleadings and the evidence

The absence of the judge from the court room beyond the hearing of the proceedings, even during the arguments in the case, when not shown affirmatively to have been without prejudice, is in itself error alone sufficient to warrant a reversal of the judgment. *State v. Carnagy*, 106-483.

But objection on this ground may be waived by consent in advance, even in a criminal case. *State v. Hammer*, 116-284.

See also notes to Code § 3755 in this supplement.

upon which it was tried, and if the court fails to so instruct there is reversible error. *Burroughs v. Butler-Ryan Co.*, 121-215.

It is error to submit the concrete facts tending to support the theory of one of the parties and fail to present in a similar way the concrete facts supporting the theory of the other. *Christy v. Des Moines City R. Co.*, 126-428; *McBride v. Des Moines City R. Co.*, 109 N. W. 618.

It is not to be presumed that the jurors are familiar with the principles of the law and may be left to apply them without instruction by the court. *Snyder v. Fidler*, 125-378.

Propositions relating simply to matters to be considered in weighing evidence which would occur to every sensible and reasonable man without instruction need not be stated to the jury. *Stanley v. Cedar Rapids & M. C. R. Co.*, 119-520.

While words and terms in ordinary use need not be defined in instructions, yet in all cases where words or terms are used in a legal or technical sense differing from that which the common use of the words imports, it is proper and in many cases necessary to give definitive or explanatory instructions. *Overhauser v. American Cereal Co.*, 128-580.

General directions: An instruction directing the jury in their deliberations not to refer to, discuss or consider anything in connection with the case except the evidence received, and to exclude all extraneous matters, statements and suggestions, is proper. *State v. Butts*, 107-653.

Instructions should be asked: Error in an instruction given may be ground for reversal, even though the appellant has not asked an instruction on the subject in proper form. It is only where the instruction given is complained of as not being sufficiently specific that the party complaining must show that more specific instructions were asked by him. *State v. Goering*, 106-636.

Where the instruction is correct as given, though not as explicit as might be desired,

error cannot be predicated thereon in the absence of a request for more specific instructions. *State v. House*, 108-68; *State v. Atkins*, 122-161; *Hill v. Glenwood*, 124-479.

Where the instructions are good as far as they go, it is not error to fail to instruct on other matters as to which no instructions are asked. *Keyes v. Cedar Falls*, 107-509.

A party cannot complain of failure of the court to give instructions as to a specific question in the absence of request for an instruction on the subject. *Murphy v. Hiltibridle*, 132-114.

Where an instruction is right as far as it goes, and the complaining party has not asked additional instructions, he cannot complain of the failure to extend the instruction to cover particular matters involved in the evidence. *Williams v. Mineral City Park Association*, 128-32.

In the absence of a request, failure to give instructions relating to burden of proof is not erroneous. *Harvey v. Clarinda*, 111-528.

In the absence of a request for instructions, it is not error for the court to fail to instruct with reference to preponderance of the evidence. *Osborne v. Ringland*, 122-329.

The jury may be depended upon without instructions to apply the ordinary rules as to the weight and credit to be given to the testimony of witnesses, and in the absence of any request for special instructions on the subject or any state of affairs rendering it peculiarly important that such instructions be given, the judgment will not be reversed on appeal for failure to give such instructions. *State v. Duffy*, 124-705.

A party does not waive objection to insufficiency of the evidence to sustain an issue by asking an instruction relating to that issue. *Boyer v. Commercial Bldg. Inv. Co.*, 110-491.

Where evidence has been erroneously admitted and is afterwards withdrawn, the complaining party may properly ask an instruction that the jury shall not consider the evidence thus withdrawn, but, failing to do so, it does not necessarily constitute error to fail to give such an instruction. *State v. McKnight*, 119-79.

Where evidence, in its general nature inadmissible, is admitted and received for a special purpose, the court, on the request of a party, should instruct the jury as to the purpose for which the evidence may be considered, but it is not error to fail to give such an instruction where none is asked. *Bennett v. Marion*, 119-473; *Kircher v. Larchwood*, 120-578.

Where evidence is properly admitted only for a specific purpose, and is not to be considered for another purpose, an instruction allowing the jury to consider it

for the improper purpose will be prejudicial error, although no instruction as to the purpose for which it may properly be used is asked. *Lundvick v. Westchester Fire Ins. Co.*, 128-376.

As a rule instructions offered by counsel are not so framed that the court is justified in giving them literally as asked, but if the main thought sought to be expressed contains a pertinent legal principle, which is not already fully covered by other instructions given, the court should embody it in proper words in its own charge. *Kinyon v. Chicago & N. W. R. Co.*, 118-349.

The court may adopt the language of counsel embodied in requests for instructions, but it is a better practice to embody such requests so far as proper in its own charge. *State v. Busse*, 127-318, 100 N. W. 536.

Refusal of proper instructions: It is error to refuse a correct instruction as to material matter not covered by the instructions given. *Botkin v. Cassady*, 106-334.

It is not error to refuse instructions asked where the subject is properly covered by instructions given by the court. *Belken v. Iowa Falls*, 122-430.

Error of which party cannot complain: A party cannot complain of an instruction given which in substance and effect follows an instruction asked by him, even though erroneous. *Bonnot Co. v. Newman*, 109-580.

When an issue is clearly recognized by a party as being involved in the trial, and he not only makes no objection thereto, but affirmatively consents or requests that it be passed upon, he cannot be heard afterward to complain of the action of the court in submitting such issue to the jury. *Fenner v. Crips*, 109-455.

A party cannot complain of an instruction of the court in submitting to the jury an issue on which such party has himself asked instructions. *Benton County Sav. Bank v. Boddicker*, 117-407.

A party cannot complain of an instruction which in the respect complained of does not go beyond instructions which he himself has asked. *Padelford v. Eagle Grove*, 117-616.

The appellant cannot complain of language in the instructions taken from those asked by him. *Bryce v. Burlington, C. R. & N. R. Co.*, 128-483.

A party cannot complain of the submission to the jury of an issue on which the case has been tried and as to which the party has himself asked instructions. *Seibert v. Germania Fire Ins. Co.*, 132-58.

A party cannot on appeal complain that an issue was erroneously submitted to the jury, on the ground that there was no evidence to support it, when he has himself

asked instructions with reference to such issue. *Spicer v. Webster City*, 118-561.

Duty to state the issues: While the issues in the case should be clearly defined by the court, it is not necessary that they be grouped and stated in separate paragraphs of the charge devoted to that purpose alone. It is enough if the instructions as a whole point out the entire issues of the case. *Meyer v. Boepple Button Co.*, 112-51.

In stating the issues the court should confine itself to a concise statement of the material issues; but although the allegations of the pleadings are unnecessarily set out, yet if the court by a subsequent brief statement of the matters which the jury is to consider calls attention to the material issues there is no prejudicial error. *Schaefer v. Anchor Mutual Fire Ins. Co.*, 133-206.

The danger of confusing the jury by a too extended and literal recitation of all the matters with which counsel frequently burden their pleadings is to be discouraged and avoided. *Shebek v. National Cracker Co.*, 120-414.

An instruction which eliminates a defense of the statute of limitations relied upon by the defendant, and permits the jury to find a verdict for plaintiff without reference to that question, is erroneous. *Faust v. Hosford*, 119-97.

The court should instruct with reference to plaintiff's theory of the case if under that theory he is entitled to recover on proof of the essential facts. *Kempe v. Bennett*, 111 N. W. 926.

The failure of the court to submit an issue raised by the answer is prejudicial error. *Steele v. Crabtree*, 130-313.

Where a case has been tried without objection on the theory that an issue has been raised by a pleading not properly filed, the court may properly submit such issue to the jury. *Marengo Savings Bank v. Kent*, 112 N. W. 767.

It is error in stating the issues to charge the jury that plaintiff is required to establish all the material allegations of his petition. Such an instruction leaves it to the jury to determine for themselves what allegations of the petition are material, and imposes upon the plaintiff the burden of proving allegations which, while they may be material, are not necessarily essential to the plaintiff's right of recovery. *Williams v. Iowa Central R. Co.*, 121-270.

Failure to state one of the issues in the opening statement will not constitute prejudicial error where such issue is subsequently submitted for the determination of the jury. *German Savings Bank v. Fritz*, 109 N. W. 1008.

Error in stating the issues so as to include an issue not proper for submission to the jury may be cured by subsequent specific instructions to the jury as to the

issues to be determined. *Bryce v. Burlington, C. R. & N. R. Co.*, 128-483; *McGovern v. Interurban R. Co.*, 111 N. W. 412.

Error in stating the claims of the plaintiff may be cured by subsequent instructions expressly stating that damages are not to be allowed on account of one of the claims of the plaintiff included in the general statement of the issues. *Hollingsworth v. Fort Dodge*, 125-627.

While it may be error in some cases to instruct that the burden is upon the plaintiff to establish all the material allegations of his petition, yet if in other instructions the jury is told what plaintiff is required to show in order to make out a case the error may be cured. *German Ins. Co. v. Chicago & N. W. R. Co.*, 128-386.

Error relating to an issue which is subsequently withdrawn from the jury will not be ground for reversal. *Howard v. Lamont*, 124-348.

Reference to pleadings: The court should determine, from an examination of the pleadings, what the issues are, and so state them to the jury as to be readily comprehended. The setting out the pleadings in lieu of such statement will not be tolerated unless manifestly without prejudice. *Swanson v. Allen*, 108-414.

While it has been held erroneous to refer the jury to the pleadings for the issues, it has never been held that the trial court might not set forth the issues in the manner in which they are stated in the pleadings. *Ft. Madison v. Moore*, 109-476.

It is erroneous to copy into the instructions at length the pleadings in the case when they present issues which it is not proper to submit to the jury. In such case the court should state in its own language the real issues which are submitted to the jury. *West v. Averill Groc. Co.*, 109-488.

Where the court failed in stating the issues to mention some of the grounds of negligence alleged and relied on by plaintiff, held that there was error which was not cured by reference to the particulars of negligence charged in the petition. *Hart v. Cedar Rapids & M. C. R. Co.*, 109-631.

Where the petition was very short and simple, and charged the negligence for which the plaintiff sought to recover in such unambiguous language that the court could not well make the cause of action more intelligible or shorter by an independent statement, held that it was not error to recite the pleading in the instructions. *Graybill v. Chicago, M. & St. P. R. Co.*, 112-738.

An instruction in a particular case, which, while not a copy of the pleadings substantially followed the pleadings without pointing out definitely the questions to be determined by the jury, held erroneous. *Erb v. German-American Ins. Co.*, 112-357.

The court should state the issues to the jury without copying the pleadings in full, but as a rule the supreme court will not reverse for such improper practice, if in other parts of the charge the real issues are distinctly stated so that no prejudice has resulted. *Welch v. Union Cent. L. Ins. Co.*, 117-394.

Even when the parties consent that the court may refer the jury to the pleadings for the statement of the issues in a case, it is of doubtful propriety for the court to compel the jury to search out and determine the issue they are to decide. *Trumble v. Happy*, 114-624.

It is not proper for the court, in stating the issues, to use copies of the pleadings and read them in *haec verba* to the jury, but a party who has consented to such a course of proceeding cannot be heard to complain thereof. *De Wulf v. Dix*, 110-553.

It is not improper for the court to make use of the pleadings in stating the issues where the parties have mutually consented thereto. *Oxford Junction Savings Bank v. Cook*, 111 N. W. 805.

Where the pleadings are clear and concise and state the exact issues, and counsel agree that the court may make use of them in stating the issues to the jury, there is no error in doing so. *Dean v. Carpenter*, 111 N. W. 815.

While it is not good practice to copy the pleadings into the instructions in stating the issues, such form of statement will not constitute prejudicial error where there is nothing in the case to cause such form of statement to result in confusion to the jury. *German Ins. Co. v. Chicago & N. W. R. Co.*, 128-386.

It is not reversible error to substantially copy the pleadings in stating the issues if the court in other portions of the charge clearly states the exact matters in dispute. *Livingston v. Stevens*, 122-62.

Amount of recovery: In an action on account consisting of several items, it is error to instruct that if plaintiff is entitled to recover he should be allowed a sum not in excess of the aggregate amount claimed, as such instruction permits the jury to disallow some items and award more than is claimed on others. *Miller v. Armstrong*, 123-86; *Baker v. Oughton*, 130-35.

While the jury should be limited in an action for personal injuries to a recovery of an amount not exceeding the amount claimed in the petition, it may constitute error to so instruct as to indicate to the jury that a verdict for the entire amount claimed would be improper. *McGovern v. Interurban R. Co.*, 111 N. W. 412.

Issues not presented: It is error to instruct on issues not presented by the pleadings even though evidence has been introduced without objection which presents other issues. *Eller v. Loomis*, 106-276.

It is erroneous to instruct on an issue not raised by the pleadings, and on which no evidence has been introduced. *Duncan v. Gray*, 108-599; *Blackman v. Kessler*, 110-140; *Anderson v. Roberts*, 112-749.

It is error to instruct on matters not within the issues, and in respect of which there has been no attempt to make proof. *Albertson v. Lewis*, 132-243.

The instructions must be pertinent, to the issues and the evidence. *Armstrong v. Mutual Life Ins. Co.*, 121-362.

It is improper to submit to the jury in an action for personal injuries resulting from negligence, charges of negligence which are not made in the pleadings. *Beard v. Guild*, 107-476.

It is error to instruct with reference to an issue not raised by the pleadings. Therefore, held that where plaintiff sued a railroad company for injury caused to him as a passenger by defendant's negligence, it was error to submit the question whether he could recover against the railroad company as a trespasser for gross negligence. *Fitzgibbon v. Chicago & N. W. R. Co.*, 108-614.

An instruction on the theory that an issue is in the case which is not in fact tendered by the pleadings nor otherwise properly presented, is ground for new trial. *Hydinger v. Chicago, B. & Q. R. Co.*, 126-222.

It is error to submit to the finding of the jury matters which are conceded, or concerning which there is no controversy in the evidence. *Williams v. Iowa Central R. Co.*, 121-270; *Garvick v. Burlington, C. R. & N. R. Co.*, 124-691.

It is not error to fail to submit to the jury a question as to which the evidence is undisputed. *Mitchell v. Union Terminal R. Co.*, 122-237.

It is not error to fail to submit to the jury an issue which has been withdrawn. *German Ins. Co. v. Chicago & N. W. R. Co.*, 128-386.

An instruction which is correct as an abstract proposition will be presumed to have been given upon proper occasion. *State v. Wilson*, 124-264.

Error without prejudice: The submission to the jury of an issue which should have been decided as a matter of law is error without prejudice where the finding of the jury is such as the court should have made. *Mace v. Boedker*, 127-721.

Error in submitting to the jury the issue as to undue influence in the execution of a will is without prejudice where there is an express finding supported by the evidence that the testator lacked mental capacity to make the will. *In re Will of Sellack*, 125-678.

Instructions not supported by evidence: It is error to submit to the jury a material issue of fact concerning which there is no evidence. *Podhaisky v. Cedar Rapids*, 106-

543; *State v. Swallum*, 111-37; *Olmstead v. Foy*, 112-349; *Erb v. German-American Ins. Co.*, 112-357; *Anderson v. Roberts*, 112-749; *in re Will of Knox*, 123-24; *Belcher v. Ballou*, 124-507; *State v. Smith*, 129-709.

It is clearly erroneous and presumptively prejudicial to submit an issue upon which there is no evidence. *Fothergill v. Fothergill*, 129-93; *State v. Fuller*, 125-212.

The appropriateness of instructions cannot be determined by the pleadings alone; reference must be had also to the testimony introduced, and to the issues actually contested upon the trial. *Struebing v. Stevenson*, 129-25.

An issue in respect to which there is no evidence or upon which a recovery could not be had in any event, should not be submitted to the jury. *Hanley v. Fort Dodge Light & Power Co.*, 133-326.

An instruction submitting a question to the jury upon which there is no evidence may be so carefully guarded in language that no prejudice can have resulted from giving it. *Camp v. Chicago G. W. R. Co.*, 124-238.

The court is not bound to submit to the jury every issue raised by the pleadings, but should submit only such issues as are for the determination of the jury under the evidence. *Lush v. Parkersburg*, 127-701.

It is not error to fail to submit to the jury an issue as to which there is no evidence. *Frank v. Berry*, 128-223; *Struebing v. Stevenson*, 129-25; *Brusseau v. Lower Brick Co.*, 133-245.

In an action to recover damages for personal injuries, it is error to direct the jury that they may allow damages for nursing where no evidence of the expense of nursing has been introduced. *Lamb v. Cedar Rapids*, 108-629.

Where under the evidence the plaintiff is entitled to recover on only one of two grounds of action set up in his petition, it is error in stating the issues to a jury to recognize the other ground of recovery. *Tuffree v. Steward*, 109-600.

It is error to submit to the jury for determination allegations of negligence as to which there is no evidence. Even though the evidence as to one of the grounds of negligence alleged is conclusive it will not be error without prejudice to submit other grounds as to which there is no evidence, for the jury may rest their findings on the ground not supported by the evidence. *Stevens v. Citizens' Gas & Elec. Co.*, 132-597.

It is not error to refuse to caution the jury to ignore a matter not referred to in the pleading nor involved in the proof. An instruction to the jury limiting its consideration to the evidence introduced is generally sufficient in that case. *Cronk v. Wabash R. Co.*, 123-349.

Where by agreement of parties instructions were orally given, held, that it was not error to read the answer in the case, although it was claimed that there was no evidence in support thereof, it appearing that the court later in the charge called attention specially to the issues which had support of the testimony. *Frank v. Daventryport*, 105-588.

Construction of instruments: It is for the court to give the jury the meaning of a written contract upon the various hypotheses presented by the evidence. *Clement v. Drybread*, 108-701.

In an action for malicious prosecution it is error to leave it to the jury to determine from the pleadings in the former case what was alleged therein as the complaint against the defendant in that case. *Erb v. German-American Ins. Co.*, 112-357.

Where the terms used in the contract are plain and unambiguous, omission to define such terms, in the absence of proper request, is not error. *Ware Cattle Co. v. Anderson*, 107-231.

Where the intent and meaning of a written contract is plain and clear from an ordinary interpretation of the language used the contract is to be construed by the court. *Schultz v. Ford*, 133-402.

The construction and interpretation of contracts is a question for the court and not for the jury. *Tubbs v. Mechanics' Ins. Co.*, 131-217.

Where an agreement is fully proved, and is not ambiguous in terms, the court should declare its meaning and define the rights and obligations of the parties created thereby. *Johnson v. Carter*, 120-355.

As to questions of fact: It is erroneous to single out a portion of the evidence relied upon by plaintiff and say that such evidence will not justify a recovery. *Crowell v. McGoon*, 106-266.

It is not error to say to the jury that "evidence has been introduced tending to show" certain facts as to which there has in fact been some evidence introduced. *State v. Baughman*, 111-71.

An instruction which does not assume anything as to the disputed facts, but simply directs the jury as to the effect of certain facts if found, is not objectionable as an instruction upon the facts. *Owen v. Christensen*, 106-394.

Where the issue in an action for personal injuries received by a servant in his employment was as to whether the injured person had assumed the risk of certain defects in the machinery, held that it was proper to make the defense dependent upon the proof of certain specific facts exactly as the evidence tended to show them, which were relied upon as evidence to show assumption of risk. *Shebeck v. National Cracker Co.*, 120-414.

Instructions must always be based on evidence, and when the jury is told that

if they find certain things, then such and such a result must follow, there is no reason for saying that such an instruction is misleading because the words "from the evidence" or "as shown by the evidence" are omitted. *Stanley v. Cedar Rapids & M. C. R. Co.*, 119-526.

It is not proper to instruct the jury that certain facts, if found, would conclusively establish contributory negligence; the question of contributory negligence is for the determination of the jury. *Schulte v. Chicago, M. & St. P. R. Co.*, 124-191.

Where certain facts are relied on as tending to prove an ultimate fact which is for the jury, the court may say that such facts are properly to be considered in determining the ultimate fact, but it should not charge as matter of law that any one or more of them, if found, would establish the ultimate fact. *Clark v. Shannon & Mott Co.*, 117-645.

If as to a state of facts reasonable minds might reach different conclusions as to the ultimate fact established, the question as to the ultimate fact is for the jury. *Payne v. Fraternal Acc. Assn.*, 119-342.

Where the facts are undisputed and the inferences which may be drawn therefrom are such as that reasonable minds cannot differ with respect thereto, the trial court is justified in instructing the jury as to the effect of the testimony on a given point. *Hughes v. Iowa Cent. R. Co.*, 128-207.

Where there is a conflict in the evidence it is erroneous for the court to instruct the jury as to the facts. *Eller v. Loomis*, 106-276; *Selley v. American Lubricator Co.*, 119-591; *Brayton v. Boomer*, 131-28.

It is not prejudicial error for the court to assume a fact about which there is no dispute. *State v. Cunningham*, 111-233; *State v. Evans*, 122-174; *Miller v. Armstrong*, 123-86; *State v. Sparegrove*, 112 N. W. 83.

It is not error to instruct the jury that by preponderance of evidence is meant that greater and superior testimony which reasonably satisfies the minds of the jurors; but the use of such a form of expression is not to be commended. *Ball v. Marquis*, 122-665.

Under the practice in this state the court is restricted to a mere statement of the law without suggestion of opinion upon the facts, and the charge of the court should be entirely free from any suggestion as to the weight of the evidence. Reference to any particular fact or kind of evidence as being strong or entitled to great weight is error. *State v. Crofford*, 121-395.

Therefore, held that it was error to instruct the jury with reference to circumstantial evidence that "men may commit a perjury but a fact cannot" was erroneous. *Ibid.*

Where the evidence is in conflict the weight to be given to it is for the jury. *Hardrick v. Hardrick*, 130-230.

It is error for the court to single out a class of witnesses or of testimony and give the jury an opportunity to magnify its or their importance. *Simons v. Mason City & Ft. D. R. Co.*, 128-139.

It is not proper to instruct the jury with reference to an admission of the defendant in a criminal case that it is entitled to great weight. *State v. Willing*, 129-72.

The court alone determines the competency of witnesses, but their credibility and the weight which shall be given to their testimony is the exclusive province of the jury. *Madden v. Saylor Coal Co.*, 133-699.

It is error for the trial judge to neutralize the effect of evidence by statements from the bench bearing on its credibility. *Ball v. Skinner*, 111 N. W. 1022.

The court may instruct the jury that testimony with regard to verbal statements should be received with great caution. *Ellis v. Republic Oil Co.*, 133-11.

It is error to throw discredit upon the testimony of experts testifying with reference to facts within their knowledge by observation. *Madden v. Saylor Coal Co.*, 133-699.

The court may properly instruct that expert testimony as to handwriting is of slight value as against the positive and unequivocal testimony of credible witnesses speaking of their personal knowledge. *Ayrhart v. Wilhelmy*, 112 N. W. 782.

While it is not error to instruct the jury that expert evidence as to genuineness of signatures is entitled to less consideration than the positive evidence of credible witnesses speaking from personal knowledge, yet the court should not instruct the jury in general with reference to expert evidence that the jurors are not to substitute for their own conclusions upon the evidence the opinions of expert witnesses. Expert testimony is to be given consideration like all other testimony which the court allows to go to the jury, and accorded such weight as, in view of all the evidence of every kind and nature and its reasonableness and the apparent candor and competency of the witness, fairness demands. *Ball v. Skinner*, 111 N. W. 1022.

It is improper for the court to emphasize the circumstances from which negligence may be inferred and omit any reference to other circumstances shown by the evidence tending to support the opposite inference. *Christy v. Des Moines City R. Co.* 126-428, *McBride v. Des Moines City R. Co.* 109 N. W. 618.

Construed together: Words in instructions are not to be considered with reference to their technical accuracy, but relatively, and that meaning is to be credited

to them which such a consideration shows to have been intended. *In re Allison's Estate*, 104-130.

It is not usually safe in a complicated case to attempt to give all the law on all the branches of the case, and all questions which may be involved, in one statement. The different questions involved may be discussed in separate instructions which will be construed together. *Phinney v. Illinois Cent. R. Co.*, 122-488; *State v. Sheets*, 127-73; *Mitchell v. Pinckney*, 127-696; *State v. Mitchell*, 130-697; *Bremer v. Nugent*, 111 N. W. 446.

No one instruction may contain all the law applicable to the entire case, and for this reason all should be considered together in passing upon the issues, but this does not obviate the rule that one instruction may contain the law as applied to some hypothesis or given state of facts. *Swanson v. Allen*, 108-419.

Instructions should be taken together in determining whether error has been committed in giving any one of them. *Templin v. Boone*, 127-91; *Jensen v. Damm*, 127-555; *German Ins. Co. v. Chicago & N. W. R. Co.*, 128-386; *Huggard v. Glucose Sugar Ref. Co.*, 132-724.

Instructions should be construed together and if, when so construed, they announce correct principles, a verdict based thereon will not be disturbed, although considered singly they might be held erroneous. *Faust v. Hosford*, 119-97.

The fact that one instruction standing alone might be misleading will not require reversal if the instruction is sufficient when read with other instructions relating to the same subject. *Whittlesey v. Burlington, C. R. & N. R. Co.*, 121-597.

Conflicting: Contradictory and conflicting instructions are almost uniformly held to be erroneous, except in cases where the court can say there was no prejudice. *Ford v. Chicago, R. I. & P. R.*, 106-85.

It is error to give instructions which are in conflict. *Gibson v. Burlington, C. R. & N. R. Co.*, 107-596; *Loomis v. Des Moines News Co.*, 110-515.

The giving of conflicting instructions is error, if they are calculated to confuse the jury, and present matters for determination which should not have been considered. *Beaver v. Porter*, 129-41.

Where the court in explaining circumstances entitling the plaintiff to recover for negligence omits one of the grounds of negligence presented under the issues as set forth in the instructions stating the issues, there is such prejudicial conflict in the instructions as to require a reversal. *Christy v. Des Moines City R. Co.*, 126-428.

Although the law on a particular question is correctly stated in one instruction, yet, if in another instruction the direction as to whether the jury shall find a verdict is made to depend on facts which do not

include nor relate to such question, the instructions are in conflict and erroneous. *Quinn v. Chicago, R. I. & P. R. Co.*, 107-710.

In such case the latter instruction would tend, by giving undue prominence to one question, to withdraw the attention of the jury from the other question, and to nullify the effect of the former instruction. *Ibid.*

When conflicting instructions are given, one of which announces a correct, and the other an incorrect rule, the case must be reversed, for there is no means of knowing which one the jury followed. *Kerr v. Topping*, 109-150.

Where an instruction can properly be so read as to be consistent with the other instructions, it will be assumed on appeal that it was given such construction by the jury. *State v. Seery*, 129-259.

Prejudicial error in the giving of one instruction is not cured by stating the correct rule in another. *Rudd v. Dewey*, 121-454; *Mayer v. Smoky Hollow Coal Co.*, 121-121.

Misleading: An instruction in an action to recover for personal injuries on account of negligence which makes the right to recover depend upon a collateral fact, omitting the necessary element of negligence on the part of defendant, and the want of contributory negligence on the part of plaintiff, is erroneous. *Meyer v. Boepple Button Co.*, 112-51.

Where instructions are in conflict or misleading the judgment is based on a clerical error in one of the instructions. *Rich v. Moore*, 114-80.

In a particular case held that an instruction relating to fraud should not have been confused by introducing into it reference to want of consideration. *Frick v. Kabaker*, 116-494.

Complicated instructions with reference to technical matters which are not readily brought within the comprehension of the jury should not be given. *Williams v. Iowa Central R. Co.*, 121-270.

Withdrawal: Where after the case was submitted to the jury by the judge who tried it, he ceased to hold the term of court, and turned the business of the court over to another judge of the same district, and at the time of doing so directed the succeeding judge to withdraw from the jury certain instructions which he had concluded were erroneous, and the second judge did so, held that the proceeding did not constitute error requiring a reversal. *Renner v. Thornburg*, 111-515.

Mere verbal errors: A mere clerical error, or error occurring by inadvertence in the giving of an instruction may constitute prejudicial error, where it appears that it was such as to be likely to mislead the jury. *Atkins v. Ellis*, 118-76.

Mere clerical omissions or verbal inaccuracies are not sufficient to constitute reversible error where it appears that no prejudice could have resulted to the complaining party. *Young v. People's Gas. & Elec. Co.*, 128-290; *Russell v. Ft. Dodge*, 126-308; *State v. Sheets*, 127-73.

The inadvertent use of the word "defendant" where "plaintiff" was intended held not such error as to require reversal where it appears from the language of the instructions that the jury could not have been misled. *Reupke v. Stuhr & Son Grain Co.*, 126-632.

The use of the pronoun "his" instead of "her" in framing an instruction which was evidently a slip of the pen and not calculated to mislead a juror of average mental capacity, was held not to be ground for reversal. *State v. Steen*, 125-307.

Curing error as to evidence: Error in the admission of evidence may be cured by an instruction explicitly advising the jury not to consider such evidence. *Keyes v. Cedar Falls*, 107-509; *Osborne v. Ringland*, 122-329; *State v. Scroggs*, 123-649; *Coinc v. Chicago & N. W. R. C.*, 123-458.

Error in the admission of evidence may usually be cured by striking such evidence from the record on motion at the close of all the evidence. *Gray v. Central Minn. Immigration Co.*, 127-560.

Error in overruling a motion to strike evidence may be cured by instructing the jury not to consider the evidence which should thus have been stricken out. *Winkler v. Hawkes*, 126-474.

Where evidence has been admitted on the promise of counsel to make it relevant by

SEC. 3707. Record—exceptions.

An exception taken at the time of the giving of all the instructions given is sufficiently specific. *First Nat. Bank v. Robinson*, 105-463.

This section expressly provides that exceptions to instructions may be noted by the shorthand reporter without reason for such exception being made. *White v. Elgin Creamery Co.*, 108-522.

An entry on the margin of an instruc-

SEC. 3708. Numbered—given or refused.

Where the omission to number paragraphs of the instructions does not appear to have worked to the prejudice of the unsuccessful party, it will not be a ground for reversal on appeal. *Johnson v. Sioux City*, 114-137.

The fact that the court fails to number the paragraphs of instructions is not ground for new trial. *In re Evans' Estate*, 114-240.

SEC. 3709. Exceptions after verdict.

Exceptions taken to instructions in a motion for a new trial must point out the

the subsequent introduction of other evidence, and no such connection is afterwards made, any prejudice from its admission may usually be removed by instructing the jury to disregard it. *State v. Newells*, 109 N. W. 1016.

Where a transcript of evidence on a former appeal was introduced by one party against the objection of the other, but afterwards the court, at the request of the party furnishing the transcript, directed the jury not to consider it, and the witnesses themselves were produced and examined, held that there was not such error as to require a reversal. *Bell v. Clarion*, 120-332.

The erroneous admission of evidence may be so fundamentally prejudicial that an instruction not to consider it will not sufficiently counteract the error. *Brown Land Co. v. Lehman*, 112 N. W. 185; *Flinders v. Bailey*, 133-616.

As curing misconduct of counsel: Improper argument of counsel may be so far prejudicial that the prejudice therefrom cannot be removed by an instruction directing the jury not to consider the matter referred to. *State v. Hogan*, 115-455.

A direction to disregard improper statements of counsel in argument will ordinarily be presumed sufficient to negative any presumptions of prejudice arising therefrom. *State v. Donovan*, 125-239.

Jury must follow instructions: It will be presumed that in the allowance of items of damage in an action for personal injuries, the jury followed the directions of the court. *Vedder v. Delaney*, 122-583.

tion, "Given, plaintiff excepts," signed by the judge, is sufficient when the exception is taken at the time that the instruction is given. *Clement v. Drybread*, 108-701.

Where instructions are duly excepted to when given, it is not necessary to again except with reference thereto in the motion for a new trial. *Lingle v. Lingle*, 121-133.

Section applied. *Decatur v. Simpson*, 115-348.

The provision for marking instructions as "given" is directory, and a failure to so mark them will not constitute error. *Turley v. Griffin*, 106-161.

The instructions are sufficiently identified in a skeleton bill of exceptions by referring to them as filed in a case by their numbers and as duly indorsed by the presiding judge. *Monatt v. Scott*, 106-203.

defects complained of. *State v. Williams*, 115-97; *Tyler v. Bowen*, 124-452.

Exception to instructions in a particular case taken in writing, but not at the time the instructions were read, held, not sufficiently specific. *Lacy v. Kossuth County*, 106-16.

Where by agreement of the parties leave is granted for delay in filing a motion for a new trial, it does not authorize the incorporation in such motion of exceptions to the instructions which were not taken at the proper time. *Turley v. Griffin*, 106-161.

The fact that exceptions taken to the instructions in a motion for a new trial are not sufficiently specific will not defeat a consideration of exceptions properly taken

at the time the charge is given. *Ellis v. Leonard*, 107-487.

A general assertion in a motion for a new trial that "the court having erred in determining the effect of the written lease should correct the error by setting aside the verdict," held not a sufficient exception to instructions. *American Sav. Bank v. Shaver Carriage Co.*, 111-137.

The exception in a motion for a new trial that the court erred in giving certain instructions, which are specified, but the objection to which is not pointed out, is not sufficient. *Rule v. McGregor*, 115-323.

SEC. 3710. View of premises by jury.

Premises may be viewed by the jury only for the purpose of better applying the evidence introduced in the course of the trial. *Mier v. Phillips Fuel Co.*, 130-570.

The purpose of viewing the premises is to enable the jury better to understand the testimony of the witnesses respecting the same, and more intelligently apply such

testimony to the issues before them, and not to make them silent witnesses in the case. The jury is properly instructed, therefore, if it is directed to determine the facts from the evidence and not to base its verdict in any degree upon an examination of the premises. *Guinn v. Iowa St. L. R. Co.*, 131-680.

SEC. 3717. What jury may take with them.

It is error to allow a map not introduced in evidence to go to the jury at their request to be used by them in construing the evidence. *DeWulf v. Dix*, 110-553.

It is not error to allow the jury to take the pleadings with them to the jury room, the jury being properly cautioned against making any improper use of the pleadings on the exhibit attached thereto. *Mayo v. Halley*, 124-675.

The statutory provision that the jury may take with them on retiring books of account and other papers which have been account and other papers which have been received as evidence is not mandatory; but when requested by either party, the papers and books received in evidence should be sent out with the jury, and a refusal to make an order that effect in error. *State v. Young*, 110 N. W. 292.

SEC. 3719. Further testimony to correct mistake.

Where it does not appear that the omission of evidence occurred from oversight, the action of the court in refusing to allow the introduction of further evidence will not be overruled on appeal. *Banning v. Purinton*, 105-642.

It is not error after the closing of the case to permit the introduction of evidence which is necessary in order to secure a decision on the merits and deprive the opposite party of a technical advantage acquired by evident oversight of his adversary. *Independent School Dist. v. Hewitt*, 105-663.

Where the judge indicated his intention to rule against a party on the ground that there was no evidence of a material fact, held error to refuse to receive additional evidence of witnesses then present in court to prove such fact. *Cathcart v. Rogers*, 115-30.

It is within the discretion of the court to reopen the case for the introduction of additional evidence on the part of the plaintiff even after the defendant has demurred to the evidence or moved to dismiss or moved for the direction of a verdict. *Hill v. Glenwood*, 124-479.

SEC. 3720. Additional instructions.

Held not error, after the jury had been out deliberating for more than thirty-six hours, to give an instruction to the effect that the case must be determined by some jury, that it must be determined on the same pleadings and evidence, that a disagreement would simply add to the burden of the unsuccessful party, and that it should again retire for deliberation and try

to arrive at a verdict. *Delmonico Hotel Co. v. Smith*, 112-659.

Where the jury asked the court whether they could agree to disagree, and the court answered simply "no," without explaining the effect of failure to agree, held that a new trial was properly granted. *Rogers v. Farmers' Nat. Bank*, 117-511.

SEC. 3722. Verdict—how signed and rendered.

Defective verdict: Informalities, inaccuracies and technical defects in the verdict are to be disregarded and where the unsuccessful party has treated the verdict as being rendered against him, he cannot afterwards on appeal insist that by reason of uncertainty in the form it was in fact in his favor. *Gillespie v. Ashford*, 125-729.

Correcting verdict: If in an action to recover double damages for the killing of stock it appears on inquiry of the jury that the verdict was rendered for the value of the animals only, the jury may be permitted to correct the verdict by making it for double the amount of the value found. *Campbell v. Iowa Cent. R. Co.*, 124-248.

Directing verdict: Where there is a total failure of proof as to a claim made in the petition the court should, on the request of defendant, direct a verdict for him at the close of plaintiff's evidence. *Saatoff v. Scott*, 103-201.

Where the evidence in favor of the party having the burden of proof on an issue is in no way contradicted or its credibility affected by impeachment, the court may assume the fact relied upon to be proven, and need not submit the question to the jury. *Johnson v. Buffalo Center State Bank*, 112 N. W. 165.

A verdict should be directed for the defendant where the evidence for the plaintiff is as consistent with the conclusion which does not involve defendant's liability as it is with the conclusion supporting such liability. *Neal v. Chicago, R. I. & P. R. Co.*, 129-5.

A motion to direct a verdict should be sustained when it clearly appears to the trial judge that it would be his duty to set aside a verdict in favor of the party on whom the burden of proof rests. *Cherry v. Des Moines Leader*, 114-298.

Where the evidence is such that it would be error to direct a verdict in favor of a party, it will be error for the trial court to set aside a verdict in favor of such party on the ground of insufficiency of the evidence. *Hensley v. Davidson Bros. Co.*, 112 N. W. 227.

It is not proper to direct a verdict for defendant on account of the failure of plaintiff to allege and prove some essential fact of his cause of action as to which no issue has been raised. *Knapp v. Brotherhood*, 128-566.

Failure to allege a necessary fact in the petition is not sufficient ground for refusing to direct a verdict for the plaintiff, if leave to amend is granted and the proper allegation is made. *Jones v. Shelby County*, 124-551.

A motion to direct a verdict simply challenges the sufficiency of the record to make out a case as against a defendant who has

been compelled to submit to a trial and the overruling of such motion made by one who has been refused a right to be heard on a cross petition does not constitute error which may be reviewed on appeal. *Bussell v. Ft. Dodge*, 126-308.

Where evidence has actually been received and then erroneously stricken out, the supreme court may on appeal consider such evidence as should have been allowed to go to the jury in passing upon the correctness of the action of the court in directing a verdict. *Campbell v. Park*, 128-181.

In applying the rule as to taking the case from the jury and directing a verdict, the trial court cannot pass upon the question as to whether or not the preponderating weight of the evidence is in favor of or against a party, nor upon the weight of the evidence or the credibility of the witnesses; all these matters are for the consideration of the jury. *McLeod v. Chicago & N. W. R. Co.*, 104-139.

The court cannot on a motion to direct a verdict determine as to the weight of the evidence, nor pass upon the credibility of the witnesses. It must take the evidence most favorable to the plaintiff, and if that makes a case for the jury he is entitled to have it passed upon by them. *Scott v. St. Louis, K. & N. W. R. Co.*, 112-54.

Where there is a real conflict of evidence the case is for the jury, and the court is not authorized to determine whether the preponderance is in favor of one or the other, nor to pass upon the credibility of the witness. *In re Betts' Estate*, 113-111.

To sustain a ruling of the trial court in directing a verdict, the facts essential to show a valid cause of action must be so apparent from the evidence that reasonable men could not differ as to the facts which it establishes. *Morey v. Laird*, 108-670.

On a motion to direct a verdict the party against whom it is asked is entitled to the most favorable construction which the facts will bear. The making of such a motion amounts to an admission of all matters which the testimony tends to prove. *Dege-lau v. Wright*, 114-52.

On a motion to direct a verdict, the opposite party is entitled to have taken as established every fact which his evidence fairly tended to prove. *Hartman v. Chicago G. W. R. Co.*, 132-582.

The fact that the court has at the conclusion of plaintiff's evidence refused to sustain a motion to direct a verdict in defendant's favor is not conclusive as to the right to do so at the conclusion of all the evidence. *In re Stufflebeam's Will*, 112 N. W. 815.

A party who has asked for a directed verdict and on the overruling of his motion has rested his case cannot complain that

the court should have submitted the issues to the jury and not directed a verdict for the opposite party. A request for a directed verdict is an election to treat the case as presenting a question of law only and is a waiver of a verdict on the facts. *Gray v. Central Minn. Immigration Co.*, 127-560.

Where each party moves for a verdict at the conclusion of the evidence and there is not sufficient evidence to justify the court in directing a verdict for the party in whose favor judgment is entered, the case will be reversed on appeal. As to whether the party securing judgment in such case has thereby waived the right of submission of the case to a jury, *quaere*. *First Nat. Bank v. Mt. Pleasant Milling Co.*, 103-518.

The fact that each party asks the court to direct the verdict in his favor does not constitute a waiver by either of the right to have the case submitted to the jury in

SEC. 3724. Sealed verdict.

Where a sealed verdict is returned, in pursuance of an agreement, it is not error for the court to refuse to poll the jury and allow a juror to dissent from the verdict in which he concurred at the time it was sealed. *Dunbauld v. Thompson*, 109-199.

After a sealed verdict has been returned,

SEC. 3726. Special defined.

A special verdict must present the ultimate facts as established by the evidence. The fact to be found must be one inhering in and necessary to determine in arriving at the general verdict, and the method or elements considered in reaching the ultimate facts cannot be called for by special interrogatories. *Read v. State Ins. Co.*, 103-307.

SEC. 3727. Findings.

Ultimate facts: Findings in answer to special interrogatories should relate to ultimate facts inhering in the verdict, deciding issues more or less important, necessary to be passed upon in making up the general verdict. Where the fact is absolutely essential to recovery, a finding negating its existence will be conclusive without more, but when the interrogatories do not include all the issues essential to reach a legal conclusion, then it becomes of the utmost importance to know what extrinsic matters, if any, may be resorted to in aid of these findings. Every reasonable presumption is to be indulged in favor of the general verdict. All the essential facts inhere therein, when the contrary is not made to appear from the special findings. Therefore the evidence may not be resorted to in aid of the special findings as against the general verdict. *Schulte v. Chicago, M. & St. P. R. Co.*, 114-89.

the event that his motion is not sustained. *German Sav. Bank v. Bates Addition Imp. Co.*, 111-432.

A motion to direct a verdict is not provided for in the Code. It is in effect a demurrer to evidence, and not to be resorted to for the purpose of reaching defects in the pleadings. *Howerton v. Augustine*, 130-389.

For the purpose of a motion to direct a verdict, the ruling of the court in connection with the introduction of the evidence are the law of the case. *Hamilton v. Schlitz Brewing Co.*, 129-172.

In an action to recover the statutory penalty for selling intoxicating liquor to a minor, the sale being conceded and the undisputed testimony being that the person to whom the sale was made was in fact a minor, held, that a verdict for the plaintiff might be directed by the court. *Fielding v. La Grange*, 104-530.

the court may recall the jurors to correct a manifest error in form, or supply an omission of some matter necessary to the verdict as found, and thus complete it. *Oxford Junction Sav. Bank v. Cook*, 111 N. W. 805.

A special verdict covers all the issues in the case, and is a substitute for a general verdict, while answers to interrogatories do not supersede the necessity for a general verdict. *Morbey v. Chicago & N. W. R. Co.*, 116-84.

While it is the better practice not to submit interrogatories which do not call for ultimate facts, nevertheless submission of interrogatories as to matters which are relevant may be error without prejudice. *Nodle v. Hawthorn*, 107-280.

Where an issue is submitted a party has the right to have the jury answer interrogatories for the purpose of ascertaining the grounds upon which a verdict is rendered. *Trumble v. Happy*, 114-624.

Interrogatories not requiring ultimate facts for answers may properly be refused. *Ibid.*

Special interrogatories calling for ultimate facts material to the issues in the case should be propounded to the jury when properly requested. *In re Townsend's Estate*, 122-246.

Special interrogatories calling for ultimate facts inhering in and necessarily to be determined in reaching a verdict, should

be submitted if requested. *Decatur v. Simpson*, 115-348.

Findings of fact in answer to interrogatories do not dispense with a general verdict. *Morbey v. Chicago & N. W. R. Co.*, 116-84.

The question submitted to the jury for answer should be controlling and call for the ultimate facts necessary to be determined in finding a general verdict. In a particular case held that the court properly refused to submit interrogatories which could not be categorically answered. *Ibid.*

Interrogatories which do not call for ultimate facts determinative of the case may properly be refused. *Wilder v. Great Western Cereal Co.*, 130-263.

It is not error to refuse interrogatories which do not call for ultimate or controlling facts nor for facts of such importance that a finding thereon against the weight of the testimony would necessarily indicate passion or prejudice. *Kuehl v. Chicago, M. & St. P. R. Co.*, 126-638.

It is not proper to submit special findings as to facts which bear only remotely upon the real question in issue. *Goldstein v. St. Paul F. & M. Ins. Co.*, 124-143.

It is not error to submit for special finding the question whether at the place of accident to a railroad train the ties were old and rotten, although the question whether there was an accident is in issue. *Cronk v. Wabash R. Co.*, 123-349.

It is not error to submit an interrogatory in an action for personal injuries calling for a finding of the jury as to whether the plaintiff could, in the exercise of ordinary care and diligence, have seen the danger from which the injury resulted. *Buchholtz v. Radcliffe*, 129-27.

In an action against a railroad company to recover for stock killed by reason of getting upon the right of way through a defective fence, held that the court was not required to submit to the jury a special interrogatory with reference to the manner in which the stock got through the fence. *Saar v. Chicago, B. & K. C. R. Co.*, 119-60.

Special interrogatories not determinative of the case, but relating solely to the extent of the injury complained of may properly be refused. *Heinmiller v. Winston*, 131-32.

Requests for findings which call for answers upon evidential rather than ultimate facts should not be submitted. *Haney-Campbell Co. v. Preston Creamery Co.*, 119-188.

Special interrogatories should not be submitted which are likely to mislead the jury into the belief that the matter inquired about is controlling. *Boddy v. Henry*, 126-31.

Where separate and distinct claims are involved in the same action, special interrogatories bearing directly on the determination of any one of the issues should

be submitted although answers thereto would not be determinative of the entire case. *Brown Land Co. v. Lehman*, 112 N. W. 185.

Calling for conclusions: An interrogatory should not be submitted for a finding which is in the nature of a conclusion of law derived from several facts. *Boddy v. Henry*, 126-31.

It is not reversible error to submit an interrogatory calling for an answer by way of a conclusion, where the general verdict necessarily covers the special finding. There is a manifest distinction between holding that the trial court may refuse to submit such question, and holding that there was prejudicial error in submitting it. *Taylor v. Wabash R. Co.*, 112-157.

Special interrogatories ambiguous in their nature and calling for conclusions of the jury based upon the findings of several facts, need not be submitted. Nor is it necessary to submit questions calling for an answer as to matters practically undisputed or which would not affect the general verdict. *Morrow v. National Masonic Acc. Assn.*, 125-633.

Not as to the ultimate issue: It is not error to refuse to submit a special interrogatory calling for an answer as to the mental capacity of a testator where that is the very question to be determined by the general verdict. *Conway v. Murphy*, 112 N. W. 764.

Form: A special interrogatory should be couched in simple and direct language calling if possible for a categorical answer. Repetition of the same question in different language necessarily tends to confusion and should be avoided. *Hanousek v. Marshalltown*, 130-550.

Special interrogatories which are in the nature of a cross-examination of the jury should be refused. *Greenlee v. Mosnat*, 126-330.

Compound questions should not be submitted for special findings. *Jones v. Shelby County*, 124-551.

A compound interrogatory, calling for findings on several distinct propositions, should not be submitted. *Brier v. Davis*, 122-59.

The interrogatory should call for the ultimate facts upon which the right of recovery depends. *Ibid.*

It is not error for the court to divide a special interrogatory asked. *Pratt v. Chicago, R. I. & P. R. Co.*, 107-287.

Special interrogatories which call for a finding of the jury as to ultimate and important facts bearing upon the issues may be proper, though calling for answers somewhat in the nature of conclusions. *Ibid.*

Time: The mere formal opening of the address to the jury by counsel for plaintiff does not preclude the court from suspending the argument and allowing the counsel

for defendant to request the submission of special interrogatories to the jury. *Wilson v. Wapello County*, 129-77.

Error without prejudice: Refusal of interrogatories asked will constitute error without prejudice where it appears from answers to other interrogatories taken in connection with the court's charge that there could have been no finding under the evidence favorable to the party complaining. *Livingston v. Stevens*, 122-62.

Failure to answer: Where an interrogatory is such that in form it would not have been error to refuse to submit it, the failure of the jury to answer it is not a ground for a new trial. *Correll v. Cedar Rapids*, 110-333.

Where a special interrogatory remains unanswered it must be presumed in support of the general verdict that the jury

found such facts as were necessary to sustain it. Failure to answer does not amount to failure to find the facts inquired about. *Huss v. Chicago G. W. R. Co.*, 113-343.

Failure to answer an interrogatory is not a good ground for a motion to render judgment notwithstanding the general verdict. *Connell v. Keokuk Elec. R. & P. Co.*, 131-622.

Failure to answer interrogatories is not a ground of reversal where the counsel for the unsuccessful party has not taken steps at the proper time to require answers to be made. *Mayo v. Halley*, 124-675.

Where a special interrogatory remains unanswered it must be presumed in favor of the general verdict that the jury found such facts as were necessary to sustain it. *Hass v. Chicago G. W. R. Co.*, 113-343.

SEC. 3728. Findings inconsistent with general verdict.

To warrant a judgment upon special findings against the general verdict such findings must be absolutely inconsistent therewith. *Crynes v. Independence*, 115-448.

On motion for a judgment as against a general verdict based on special findings every issue raised by the pleadings and not eliminated by the instructions will be presumed to have been found for the party in whose favor the general verdict is returned, and it will be presumed that such findings are supported by sufficient evidence; but the special findings cannot be added to or supported by the evidence and must be given effect only so far as they necessarily negative the findings which might otherwise be assumed in support of the general verdict. Therefore, in an action to recover damages for personal injuries, held that as the special findings did not negative all the allegations of negligence in plaintiff's petition, which were by the court submitted to the jury, and on which the jury might have predicated its general verdict in plaintiff's favor, a judgment for defendant based on the special findings was erroneous. *Conwell v. Tri-City R. Co.*, 112 N. W. 546.

Where the special finding is in the nature of a conclusion of law, rather than a conclusion of fact, it may be disregarded by the court. *Fishbaugh v. Spunaugle*, 118-337.

Although there is apparent inconsistency between special findings and the general verdict, yet if, upon taking them as a whole, such inconsistency is not necessarily to be implied, the general verdict must stand. The question is not to be deter-

mined by singling out some one special finding for consideration, but all must be considered together in the light of the pleadings, and the findings will, if possible, be so construed as to support the verdict. *Ibid.*

The general verdict is controlling as to any issue of fact properly submitted to the jury, not covered by the special findings. *Connell v. Keokuk Elec. R. & P. Co.*, 131-622.

A special finding as to an immaterial matter will not defeat the general verdict. *Burk v. Walsh*, 118-397.

An answer to a special interrogatory, decisive of an important, though not determinative fact in issue, when without support of the evidence, but in conflict with it, constitutes a showing of passion and prejudice on the part of the jury such as to call for a new trial, but a special finding not supported by the evidence, but not in conflict with it, when not essential to the verdict, will not furnish ground for interference by the court. *Spicer v. Webster City*, 118-561.

If the findings, though inconsistent with the general verdict, are not sufficient to sustain judgment for the party against whom the general verdict is rendered, then the court cannot render judgment for the unsuccessful party, but may set aside the general verdict because inconsistent with the special findings. *Schulte v. Chicago M. & St. P. R. Co.*, 124-191.

Judgment on special findings, notwithstanding the verdict, must rest on facts found by the jury, rather than those which it is thought might or ought to have been found. *Schulte v. Chicago, M. & St. P. R. Co.*, 114-89.

SEC. 3734. Reference—by consent.

It may be mutually agreed by the parties to the reference that each shall become responsible for one half of the fees of the

referee and reporter. *Cole v. Gates Lumber Co.*, 131-189.

An order sending a case to a referee

cannot be questioned on appeal where no objection to the order was made at the time. *West v. Fry*, 112 N. W. 184.

Error in ordering a reference is waived if the court offers to set aside the reference and the party afterwards complaining ob-

jects to such proposed action. *Stroup v. Bridger*, 124-401.

If the report of the referee is set aside as a whole, the court has no right to try the issues of fact without setting aside the order of reference. *Ibid.*

SEC. 3735. Reference—without consent.

The cases involving accounts in which reference may be made without consent of parties are those of mutual accounts, such as were formerly cognizable in equity. *Tufts v. Norris*, 115-250.

An account consisting substantially of successive entries of amounts of money loaned does not constitute a mutual ac-

count justifying a compulsory reference in an action to recover the total amount due. *Frick v. Kabaker*, 116-494.

There is no right to a compulsory reference where the items of indebtedness sued upon do not constitute portions of a continuous account. *Mayo v. Halley*, 124-675.

SEC. 3738. Powers of referee.

A referee can not treat as valid and give consideration to pleadings not filed with

the clerk and entered on the appearance docket. *Johnson v. Berdo*, 131-524.

SEC. 3740. Report—judgment.

An order setting aside the referee's report is in effect the granting of a new trial, and in such matters the court has a discretion, and its action will not be reversed on appeal unless it appears that the discretion has been abused. *Van Wagenen v. Parsons*, 106-263.

While the findings of a referee are not conclusive on the supreme court in an appeal from the decree based on such report, yet they are entitled to consideration. *McCormick Har. Mach. Co., v. Powder*, 123-17.

The exception to the report of the referee

should point out wherein it is claimed that the report is erroneous. *Kossuth County State Bank v. Richardson*, 132-370.

No exception being taken to the finding of fact made by a referee, it must be assumed that such finding is correct, and it will not be presumed, in order to sustain a judgment of the court inconsistent with the finding of facts made by the referee, that other evidence as to the facts was introduced on the hearing. *Weitnauer v. Weitnauer*, 117-578.

SEC. 3746. Procedure.

After the time has expired within which reports are to be made, the referee ceases

to have authority to act and is without jurisdiction. *Manning v. Nelson*, 107-34.

SEC. 3749. Exceptions—how taken.

Exceptions necessary: A party should except to special findings with which he is not content even though the court renders judgment in his favor; otherwise on appeal such findings will be held conclusive as to him. *Aldrich v. Paine*, 106-461.

An exception to the judgment itself is not necessary where exception has been duly taken to the conclusion of law upon which the judgment is found. *Clement v. Drybread*, 108-701.

In order to secure a review of the action of the trial court it must appear not only that there was a valid exception to the trial court's ruling, but also that the court's attention was called to the matter by a proper objection excepting to the judgment. *Gillespie v. Ashford*, 125-729.

In the original proceeding by *certiorari* to test the validity of the action of a court in entering judgment, it is not necessary that the taking of exception to such judgment be shown. *Coffey v. Gamble*, 117-545.

Time for taking: An exception must be entered at the time the decision is made, unless it be on motion or demurrer, and cannot be preserved by means of a subsequent motion unless there is ground for having a *nunc pro tunc* entry of the exception made. *Young v. Rann*, 111-253.

Time for filing: In the absence of express agreement or consent the judge has no power to sign a bill of exceptions after the final adjournment of the term, and if consent is given the bill must be filed within the time agreed upon or it will not be considered. *Hershey v. Nyenhuis*, 103-195.

Where at the time of overruling a motion for a new trial which was at a term subsequent to that of the trial of the case, time for filing bill of exceptions was fixed and the bill was filed within that time, held that it was sufficient. *National Horse Imp. Co. v. Novak*, 105-157.

Where it appears that the bill of exceptions was signed and filed after the time fixed by the court therefor had expired, a motion to strike it from the record in the supreme court will be sustained. *Hopkins Fine Stock Co. v. Reid*, 106-78.

The filing of an amendment to the abstract for the purpose of making the abstract correspond to the record does not stop the appellee from claiming that the bill of exceptions was not filed within the proper time and cannot be considered. *Hershey v. Nyenhuis*, 103-195.

Shorthand report: This section simply declares that when the shorthand notes are duly certified and filed a formal bill of exceptions shall not be required, but the perfection of the record within the time limit must be made in one way or the other, and either the bill of exceptions or the report must be on file within such time in order to preserve the evidence as a part or the record. *In re Tobey's Estate*, 112-581.

Evidence taken down in shorthand after being transcribed may when duly certified by the trial judge become a part of the record without the certificate of the official reporter. *Philbrick v. University Place*, 106-352.

The translation of the stenographer's notes should be certified by the reporter who reports the proceedings, and not necessarily by the official reporter. *Spinney v. Halliday*, 115-420.

SEC. 3750. Form—grounds.

An exception "to the giving of each and every of said instructions" is sufficient to

Prior to the adoption of Code § 3675 the certificate of the reporter to his notes was not essential in connection with their incorporation by reference into a skeleton bill of exceptions. *Sigler v. Murphy*, 107-128.

A skeleton bill incorporating the shorthand notes by reference is sufficient. It is not necessary that the clerk be directed to copy into the bill the original notes, but a recital that they were filed and that all the evidence, objections and exceptions having been extended and transcribed in longhand and certified and filed in due time after such trial by such shorthand reporter, are as follows, to-wit, etc., is sufficient. The clerk in extending the skeleton bill is expected to copy the transcript made by the reporter, which will be sufficiently identified if properly entitled and duly certified and filed in the case. *Manatt v. Scott*, 106-203.

The instructions are sufficiently identified by referring to them as filed in the case by their numbers and as duly endorsed by the presiding judge. *Ibid.*

The evidence may be preserved by a skeleton bill of exceptions, signed by the judge, and filed in due time, wherein the reporter's shorthand notes, duly certified by the judge and reporter, and filed, are made a part of the bill by unmistakable reference. *Shaulis v. Buxton*, 109-355.

SEC. 3752. Writings identified—skeleton bill.

The shorthand reporter's notes filed with the clerk become a part of a bill of exceptions by reference although not certified by

constitute an exception to each instruction given. *Ellis v. Leonard*, 107-487.

the reporter and not entered on the clerks record as filed. *In re Guardianship of Holcher*, 127-369, and see notes to § 3675.

SEC. 3753. Signing.

In criminal cases a bill of exceptions signed by bystanders in a case where such form of bill of exceptions is proper may be filed within the time allowed by the court for filing a bill of exceptions. *State v. Taylor*, 103-22.

Bystanders cannot certify a bill of exceptions unless the judge has refused to do so, and the bill which they sign must show affirmatively that the judge has refused to indorse the correctness of its statements. *Chew v. O'Hara*, 110-81.

The embodiment of affidavits in a bill of exceptions does not make them competent evidence of a fact which should appear by the recitals of the bill of exceptions itself, such as the misconduct of an attorney which occurred, if at all, in the presence or within the knowledge of the court. *State v. Burton*, 103-28.

When a bill of exceptions is signed and filed it becomes a part of the record. It is not competent for the judge to change or modify it by a contradictory written statement or certificate filed with the papers of the case. *State v. Smith*, 107-480.

The fact that the statutory directions as to the drawing of jurors were not followed must be shown by bill of exceptions, and not by affidavit, it being presumed that the drawing was in the presence of the court, as required by the statute. *Moss v. Appanoose County*, 109-671.

As to embodying the shorthand report of the evidence in a skeleton bill, see notes to Code § 3749 in this supplement.

SEC. 3754. Must be on material point.

Where the errors are such that in view of the entire record the supreme court can fairly say that no actual prejudice has resulted to appellant, a reversal should not be ordered. *In re Bradley*, 117-472.

Where material and competent testimony is ruled out, prejudice will be presumed, in the absence of a showing in the record of something which the court can say serves to cure the error. *Lundy v. Lundy*, 118-445.

Where, after evidence has been admitted over objection, the witness is allowed, without objection, to give substantially the same evidence as that objected to, and the opposite party enters upon the same field of inquiry, the latter

cannot be heard to complain. *Hamilton v. Mendota Coal Co*, 120-147.

Where evidence, though erroneously admitted, is afterwards by the direction of the court withdrawn from the consideration of the jury, and the complaining party makes no request to have the jury specially instructed to disregard such evidence, the error may be deemed cured where the matter referred to in the evidence has no vital relation to the essential elements of the action. *State v. McKnight*, 119-79.

And see notes to § 3705.

That errors not prejudicial will not be ground for reversal on appeal, see notes to Code § 4139 in this supplement.

SEC. 3755. New trial—grounds for.**I. IN GENERAL.**

Discretion: The court interferes with reluctance with the trial court when a new trial is granted. Much latitude is allowed for the exercise of discretion, but it is a legal discretion that should control, and where the precise ground on which the court based its action appears, the supreme court has no hesitation in determining whether such discretion has been abused. *Turley v. Griffin*, 106-161, *Snyder v. Thompson*, 112 N. W. 239.

The supreme court does not hesitate to review an order granting a new trial where the record discloses the situation as fully in all respects as it was presented to the trial court. *Busse v. Schaeffer*, 128-319.

The action of a trial court in granting or refusing a new trial is largely one of discretion, and in the absence of an abuse of discretion the supreme court will not interfere. *Van Wagenen v. Parsons*, 106-263.

Where a motion for a new trial presents several grounds but it does not appear on what one or more of these grounds the granting of a new trial is based, it must appear, in order to warrant interference on appeal that there was an unjust exercise of discretion as to all of the grounds. *Ibid.*

A large discretion is vested in the trial court in granting a new trial, and the supreme court is slow to reverse where a new trial is granted. *Mally v. Mally*, 114-309.

A motion for new trial is addressed to the sound discretion of the court, and the sustaining of such motion will not be interfered with on appeal except in case of abuse of discretion. *Marr v. Burlington, C. R. & N. R. Co.*, 121-117; *Hunter v. Porter*, 124-351; *Chambers v. Hass*, 125-484; *Armstrong v. Stewart*, 130-162.

Trial courts are necessarily vested with a large discretion in the matter of granting

new trials, and the supreme court is more reluctant in interfering when a new trial is granted, than when it is denied. *Werthman v. Mason City & Ft. D. R. Co.*, 128-135.

The supreme court interferes reluctantly with the action of the lower court in rulings on motions for a new trial, and especially where a new trial has been granted, but the trial judge may not substitute his judgment of the credibility of the witness in place of the judgment which the jury has exercised. *Tathwell v. Cedar Rapids*, 122-50.

Motion: In order to obtain a new trial the aggrieved party must apply therefor. A new trial will not be granted to him under a motion for judgment notwithstanding the verdict. *Hooker v. Chittenden*, 106-321.

The purpose of a motion for a new trial is to bring before the court errors which without it would not be called to its attention, and the filing of a motion of this kind on certain grounds stated does not waive errors with reference to other matters to which the court's attention has been previously directed and as to which exceptions have been saved. *Stewart v. Equitable Mut. L. Assn.*, 110-528.

Effect: A new trial as authorized by this section involves a re-examination of the issue of fact or some part or portion thereof, and differs from an examination of all the issues involved in the action. Therefore the ruling on such an application does not bar a subsequent application for a new trial within a year after judgment in an action for the recovery of real property as authorized by Code § 4205. *Bevering v. Smith*, 121-607.

Several grounds: Where a motion for new trial, based on several grounds, is sustained generally, the party complaining on appeal must show that none of the grounds were good in order to justify a

reversal. *Hydinger v. Chicago, B. & Q. R. Co.*, 126-222.

Matters not of record: In determining a motion for new trial the judge is not justified in taking into account matters which have come to his knowledge outside of the record; but it will not be presumed that the court has considered any matters which cannot be properly considered. *Miller v. Miller*, 123-165.

Change of theory: A party is not entitled to a new trial on another and materially different theory from that on which the case was presented. *Thyssen v. Davenport Ice & Cold Storage Co.*, 112 N. W. 177.

Counter-claim: A new trial of the issues raised in a counter-claim alone may sometimes be granted. *Schmidt v. Posner*, 130-347.

Waiver: Where motion for judgment on the special findings is sustained, a motion for new trial is thereby waived, but if both the motion for judgment and for motion for new trial are overruled, the unsuccessful party may appeal as to each of such rulings. *Schulte v. Chicago M. & St. P. R. Co.* 124-191.

In contempt proceedings: The statutory provisions as to new trial in civil cases are sufficiently comprehensive to include new trial in contempt proceedings and are applicable to them. *State v. Stevenson*, 104-50.

II. GROUNDS.

(a.) Misconduct of court or jury.

Misconduct of judge: A trial court should not as a rule interfere with the examination of witnesses when the examination is being fairly conducted, except to rule upon objections and motions, but it is not required to remain silent when unwilling witnesses persist in such a course as will conceal the truth and make the trial a travesty on justice. *State v. Spiers*, 103-711.

It is not improper to say to a jury, especially where a case is on trial for the third time after two disagreements, that it is very important that a verdict should be arrived at, and send them out for further consideration, although they have already been out for quite a long time, and to ask them to make an earnest effort to arrive at a verdict. *State v. Olds*, 106-110.

Remarks made by the court in ruling on objections interposed by a party, held not to be objectionable as prejudicing the case of such party. *Crowell v. McGoon*, 106-266.

Remarks of the court in the presence and hearing of the jury relating to the sufficiency of the evidence may be ground for a new trial. *In re Will of Knox; Paxton v. Knox*, 123-24.

Absence from court room: In the absence of affirmative showing of want of

prejudice the absence of the judge from the court room beyond the hearing of the proceedings during the arguments of counsel is error sufficient to warrant reversal. *State v. Carnagy*, 106-483.

Absence of the judge from the court room during the arguments to the jury will not be a ground for a new trial where it appears that no prejudice resulted. *Allen v. Ames & College R. Co.*, 106-602.

By consent in advance, objection to absence of the judge during argument may be waived, even in a criminal case. *State v. Hammer*, 116-284.

In civil cases absence of the judge from the court room during the argument to the jury will be presumed to have been with consent of the parties, and where this is the case, his absence is not alone ground for reversal. *Gorham v. Sioux City Stock Yards Co.*, 118-749.

Misconduct of jury does not require the granting of a new trial unless it may be said to have influenced the result. A large discretion in passing upon such question is necessarily lodged in the trial court. *State v. Baughman*, 111-71.

Quotient verdict: Where the jurors after determining to render a verdict for plaintiff, and while considering the amount of the verdict, set down each the amount he was willing to allow, and these amounts were added up and the aggregate divided by twelve, which the jurors did not then agree to adopt but proceeded further to consider, and then subsequently agreed on as the proper amount, held that this conduct was not such as to vitiate the verdict. *Owen v. Christensen*, 106-394.

A quotient verdict is a ground for a new trial. *Ward v. Marshalltown L. P. & R. Co.*, 132-578.

Where the jury returns a verdict, even though at the time the amount of the verdict is arrived at there is no express agreement to be bound by the result reached, if there is a fair inference from all that is said, that there was a tacit understanding among the jurors that they would abide the result, this is sufficient to avoid the verdict. Nor is it necessary that every member of the jury be a party to the agreement. It is enough to vitiate the verdict if the greater number so agree. A verdict reached by adding together the estimates of the various jurors, and a subsequent assent to it is not alone sufficient to purge it of illegality, although such an illegal verdict may be repudiated and a valid one found as the result of due deliberation. *Sylvester v. Casey*, 110-256.

Where there is a conflict in the statements of the jurors as to whether there was any previous agreement to be bound by the result reached, by adding together the amounts voted for, the supreme court will not interfere with the holding of the trial court as to the legality of the verdict. *Hoover v. Mapleton*, 110-571.

In the absence of an agreement that the jurors shall be bound to the amount of verdict determined by adding together the estimates of the individual jurors and dividing the total by twelve, such a proceeding does not vitiate the verdict. *McElhone v. Wilkinson*, 121-429.

Drinking intoxicating liquors: Under some circumstances the taking of intoxicating liquors by jurors from a witness might be such misconduct as to necessitate a new trial, but the mere indulgence in this social custom without anything more will not warrant the inference of wrong doing. *State v. Minor*, 106-642.

Where, during the progress of a trial, but before final submission of the case, a juror indulges in the use of intoxicating liquors, the verdict should not be disturbed unless prejudice is shown, and the fact alone that liquor was taken is not enough to vitiate the verdict. On the other hand, the rule is established that prejudice will be presumed if the liquor has been drunk after the jury had retired to consider the case. If the liquor is taken after the jury has reached a conclusion, and put the verdict in form the verdict will not thereby be affected. *State v. Reilly*, 108-735.

The fact that a juror has drunk intoxicating liquor in moderate quantity when not on duty is not a ground for a new trial. *State v. Smith*, 132-645.

The admission of a juror that while he was serving as a member of the jury he took a dose of quinine and whiskey for a severe cold will not alone justify the setting aside of the verdict. *Gorham v. Sioux City Stock Yards Co.*, 118-749.

Improper statements and conversations: Remarks made by a juror derogatory to a witness but sustained by evidence in the case, do not constitute misconduct of a juror. *State v. Copeland*, 106-102.

Improper statements made by some jurors to others while they are deliberating will not authorize a new trial unless it appears that prejudice resulted from the statements or that they were of a character to cause prejudice and the presumption of prejudice has not been overcome. *State v. Olds*, 106-110.

The action of a juror during the progress of the trial in indicating his conviction at the time as to what his final conclusion will be, does not necessarily require the setting aside of the verdict. *State v. Baughman*, 111-71.

Statements by a juror to his fellows while in the jury room as to facts within his personal knowledge relating to the subject-matter of the suit will constitute prejudicial error, requiring a new trial. *Wilberding v. Dubuque*, 111-484.

A new trial should be granted where it appears that jurors while deliberating upon the case stated their personal knowledge of facts relevant to the issues, and that

outsiders discussed the case in the presence of the jurors in such manner as to create prejudice. *Hydinger v. Chicago, B. & Q. R. Co.*, 126-222.

The mere fact that a juror during a recess of the court was present at a conversation between outsiders relating to the merits of the case will not require the setting aside of the verdict, no prejudice appearing, and no impropriety of conduct on the part of the juror being shown. *Montgomery v. Hanson*, 122-222.

Affidavits of jurors tending to show that in their deliberations members of the jury stated facts heard outside of court which were discussed while the verdict was being considered, held not sufficient ground for setting aside the verdict, it not appearing that the result was influenced by such discussion. *Ibid.*

If extrinsic or irrelevant matter is introduced into the deliberations of the jury, in such a manner as to raise any reasonable question whether it did not influence the verdict, the court may properly set it aside; but a casual remark or statement made by a juror to his associates derogatory to one of the contesting parties ought not to be so regarded in the absence of any showing that heed was given to such statement or that the verdict was influenced thereby. *Ayrhart v. Wilhelmy*, 112 N. W. 782.

While due regard for the propriety of conduct dictates that the jurors and parties should avoid familiar intercourse pending the trial and disposition of the case, yet casual and public intercourse does not necessarily indicate such misconduct as to require the setting aside of the verdict. *Ibid.*

Disqualification of juror: To take advantage of the disqualification of a juror after verdict, it is incumbent on the party complaining to show affirmatively that neither he nor his counsel had knowledge thereof before the juror was sworn. *State v. Bussamus*, 108-11; *State v. Moats*, 108-13.

Taking improper papers: It is error for the jury to have a map brought before them which has not been introduced in evidence and use it in construing the evidence. *De Wulf v. Dix*, 110-553.

Unauthorized view of premises: The fact that a juror during an intermission of the trial observes the premises with relation to the condition of which there is a controversy, does not necessarily constitute misconduct. *Caldwell v. Nashua*, 122-179.

The action of members of the jury in going on their own motion to view premises to which the testimony relates will not necessarily constitute such misconduct as to require a new trial. So held where it appeared that no reference to the results of the jurors' observations were made

in the jury room, and each testified that what he saw had nothing to do with his verdict. *State v. Crouch*, 130-478.

How misconduct shown: It is not competent to show by affidavits what transpires by way of misconduct of the jury in the presence of the court or judge unless the judge refuses to certify to the facts as they are claimed to be by the party desiring the certificate. *State v. Olds*, 106-110.

Affidavits of jurors are admissible to show a statement by one of the jurors to another of a fact not shown in evidence calculated to exercise some influence on the result. *Douglass v. Agne*, 125-67.

The statute provides that the showing in support of a motion for a new trial based on the misconduct of the jurors shall be by affidavits. *Harrison v. Ayrshire* 123-528.

(b.) *Misconduct of opposite party or attorney.*

Misconduct of counsel: Remarks of counsel made as of his own knowledge in connection with the testimony of a witness may constitute misconduct. *Goldthorp v. Goldthorp*, 106-722.

Counsel are not to be closely limited in their opening statements and misconception on their part as to the competency of evidence should not be ground for a new trial, unless so gross or made under such circumstances as that prejudice may be inferred. *State v. Todd*, 110-631.

The question of granting a new trial on account of misconduct of counsel is left very largely to the good sense of the trial court, and the supreme court will not interfere on appeal unless it appears likely that a different result would have been reached but for such misconduct. *Hannestad v. Chicago, M. & St. P. R. Co.*, 132-232.

Misconduct of counsel may be such as to require the granting of a new trial on appeal. *See v. Wabash R. Co.*, 123-443.

The setting aside of a verdict on account of counsel in the trial is left largely to the discretion of the trial court. *Wissler v. Atlantic*, 123-11.

It is not misconduct on the part of counsel to offer testimony which he believes to be admissible, and to preserve a record of such offer, and the exception thereto. If the offer is made in good faith, it does not constitute misconduct such as to authorize a new trial, although the evidence thus offered is not admissible. *Hammer v. Janowitz*, 131-20.

It does not constitute misconduct for counsel in opening the case to state an intention to prove matters as to which evidence is subsequently rejected when offered, such statement not being unreasonable in itself, and made in good faith. But counsel should not in the argument to

the jury, after the evidence has been introduced, comment upon objections made to the introduction of evidence which have not been sustained by the court, on the theory that such objections amounted to a practical admission that the facts as to which the evidence was excluded were true and would have been proven had the objection not been made. *Potter v. Cave*, 123-98.

In argument: The supreme court will not interfere with the discretion of the trial court in refusing to grant a new trial on account of alleged misconduct of counsel in argument, unless it is made to affirmatively appear that such discretion has been abused to the prejudice of the appellant. *In re Will of Wharton*, 132-714.

Error of counsel in stating a proposition of law to the jury to which attention is not called at the time cannot be taken advantage of on a motion for a new trial. *Bray v. Bray*, 128-234.

When counsel are guilty of misconduct in arguing a case to the jury, whether in the presence of the judge or in his absence, there ought to be at least an attempt made to correct the error at the time, and when this is not done, the supreme court will not, in a civil case, disturb the ruling of the trial court on the motion for new trial based on such misconduct, unless prejudice clearly appears. *Gorham v. Sioux City Stock Yards Co.*, 118-749.

An objection on account of misconduct of counsel in addressing the jury is addressed primarily to the sound discretion of the trial judge, and his ruling will not be interfered with on appeal in the absence of a showing of the abuse of such discretion. *Brusseau v. Lower Brick Co.*, 133-245.

It is not to be presumed that the jury has been influenced by statements of the counsel which the court has directed not to be considered, and where the misconduct of counsel is not flagrant, the direction of the court is sufficient to negative the inference of prejudice. *State v. Donovan*, 125-239.

Persistence on the part of counsel in referring to matters not proper for the consideration of the jury after being warned by the court to desist, is sufficient ground for granting a new trial. *Belcher v. Ballou*, 124-507.

Where counsel is promptly stopped by the court in pursuing an improper line of argument, and it does not appear that he acted wilfully or in disregard of the admonition of the court in that respect, there is no occasion for granting a new trial on that ground. *Bettis v. Chicago, R. I. & P. R. Co.*, 131-46.

Statements of the county attorney in a criminal prosecution that defendant was not only charged with crime, but was guilty of it and that there were witnesses

(referring to defendant's wife who was incompetent to testify against him) that he was not at home as claimed at the time the crime was committed, held not to be such as to call for a new trial. *State v. Millmeier*, 102-692.

Statements of counsel made by way of inference from matters appearing of record do not generally constitute misconduct requiring a new trial. *State v. Thomas*, 109 N. W. 900.

Objections on account of misconduct of counsel in argument should be made at the time and not withheld until the conclusion of the argument. *Ibid.*

Affidavits of jurors are admissible to show that statements of counsel relied upon as constituting misconduct had no influence on the action of the jurors. *Ibid.*

The judge who hears the case is better able to determine whether misconduct of counsel in argument was prejudicial than the supreme court on appeal. *Ibid.*

Counsel should omit all appeals to the jury calculated to arouse prejudice against a party on account of his character, wealth, etc. *Rietveld v. Wabash R. Co.*, 129-249.

Reference in argument to the fact that the plaintiff suing for injuries received while working in defendant's mine probably had not a bank account held not error as tending to create sympathy with plaintiff as a poor man against the defendant corporation, it appearing that the argument was not made for that purpose, but for the purpose of explaining why plaintiff, after the injury, returned to his work sooner than he should have done, resulting in an aggravation of his injury. *Cook v. Smith-Lowe Co.*, 109 N. W. 798.

The improper conduct of counsel for plaintiff in an action against a corporation in calling attention to the fact that the defendant is a corporation, operating extensive lines of railway, earning large sums of money, and inferentially, at least, able to pay any amount, however large, that the jury may see fit to award as damages, may constitute such misconduct as to require the granting of a new trial. *Sullivan v. Chicago, R. I. & P. R. Co.*, 119-464.

It does not always follow that the direction by a court to disregard certain improper matters, to which attention has been called by counsel during the trial, has the effect to cure the error involved therein. *Ibid.*

An argument though outside the record, if made in response to a similar argument by opposing counsel, does not necessarily require reversal. *Goldstein v. Morgan*, 122-27.

Objection: While misconduct of counsel may be so flagrant that no action of the court can be presumed to have been sufficient to remove the prejudice and therefore

no objection would have been sufficient, yet if the misconduct might have been prevented or the resulting prejudice removed by action of the trial court, there should not be a reversal on account of misconduct unless proper objection appears to have been made and proper relief asked. *Gregory v. Wabash R. Co.*, 126-230.

Alleged misconduct of counsel in argument not made to appear by the bill of exceptions cannot be considered. *Kinney v. McFaul*, 122-452.

Where no exception to argument of counsel is taken at the time affording the trial court opportunity to obviate the effect of misconduct in such argument, a reversal will not be ordered on appeal unless prejudice clearly appears. *Streeter v. Marshalltown*, 123-449.

The entry of an objection or exception to argument of counsel not calling upon the court for any ruling is not sufficient to preserve a question as to misconduct of counsel in such argument. *Renshaw v. Dignan*, 128-722.

Remarks of counsel made in running comment during the trial, as well as those made in argument, may be ground for a new trial if improper and prejudicial, and in such case it is not necessary to show objections made to every question asked or statement made. *Welch v. Union Cent. L. Ins. Co.*, 117-394.

How shown: Charges of the misconduct of an attorney as a ground for reversal on appeal will not be considered unless shown by the bill of exceptions where it appears that such misconduct, if it occurred at all, was in the presence or within the knowledge of the court. Such fact cannot be shown by affidavits, even though they are embodied in the bill of exceptions, but must appear from the recitals of the bill of exceptions itself. *State v. Watson*, 102-651; *State v. Burton*, 103-28; *Frank v. Davenport*, 105-588; *De Wulf v. Dix*, 110-553; *State v. Keenan*, 111-286.

It may be that when the misconduct is in the absence of the trial judge and therefore not within his knowledge, it may be shown by affidavits, but in such a case counter affidavits also are admissible. *Faulk v. Iowa County*, 103-442.

A mere exception at the end of an argument is not enough to raise the question whether counsel has in the argument complied with the direction of the court as to the course to be pursued in such argument. *Klos v. Zahorik*, 113-161.

Prejudice must appear: The action of the trial court in overruling a motion for new trial, based on misconduct of counsel, will be interfered with only where its discretion appears to have been abused. *State v. Newhouse*, 115-173.

Prejudice cured: Where objection was made to a statement of counsel in the opening of the case as to matters which could

not properly be shown in evidence and the objection was sustained, and the jury was instructed not to consider anything except the evidence received on the trial, held that no prejudicial error was shown. *Taylor v. Pacific Mut. L. Ins. Co.*, 110-621.

While it is not proper to base an argument on facts not shown to have existed, error in doing so is cured by prompt action of the court in requiring the withdrawal of such remarks. *Mackerall v. Omaha & St. L. R. Co.*, 111-547.

(c.) *Accident or surprise.*

When a party is taken by surprise by evidence admitted against him he should apply for a continuance, and not having done so, cannot ask for a new trial on that ground. *Patton v. Sanborn*, 133-650.

The party who is taken by surprise by the introduction of evidence by his adversary should ask for a continuance, and on failing to do so is not entitled to relief by a motion for new trial as against a verdict. *DeMers v. Rohan*, 126-488.

(d.) *Excessive or deficient verdict.*

Excessive verdict: It is the well established rule in this state that the trial court, when of opinion that a verdict for an excessive amount has been returned, may give the successful party the option to accept judgment for the amount which the court believes to be just or to submit to a new trial. *Baxter v. Cedar Rapids*, 103-599.

But the fact that the court requires the successful party to elect between such remission and a new trial does not show that the court finds the verdict to have been the result of passion or prejudice. *Ibid.*

It is error to reduce a verdict and render judgment for the reduced amount in favor of the successful party without giving him an option to accept that amount or submit to a new trial. *Barber v. Maden*, 126-402.

If the trial court finds the verdict to be excessive, it may order a new trial in case the successful party refuses to accept a reduction fixed by the court, but cannot, without giving the option of a new trial, reduce the amount for which judgment shall be rendered. *Stanley v. Core*, 119-417.

The defendant cannot complain that the court in reducing the amount of the verdict as against him did not give to the plaintiff the option of accepting a new trial instead of submitting to the reduction of the verdict. *Shockley v. Tucker*, 127-456.

The fact that a verdict is reduced by the trial court does not indicate that it was the result of passion and prejudice. *Knowlton v. Des Moines Edison Light Co.*, 117-451.

The inadequacy of the verdict as to the damages awarded may be such as to justify the granting of a new trial. The court has a large discretion in determining

whether a new trial should be granted on this ground. *Ward v. Marshalltown L. P. & R. Co.*, 132-598.

The court may set aside a verdict when manifestly inconsistent with the evidence in that it is for an inadequate amount of damage, as well as where it is excessive. *Tathwell v. Cedar Rapids*, 122-50.

The statutory provisions relating to new trial do not necessarily cover the whole ground, nor prevent the exercise by the trial court of the powers in this respect which have generally been exercised under the common law system. *Ibid.*

The provision that a new trial may be granted if a verdict is not sustained by sufficient evidence justifies the setting aside of a verdict on account of inadequacy of the damages allowed. *Ibid.*

If the verdict for the plaintiff in an action for personal injuries is compensatory and substantial and the trial court has declined to grant a new trial, the supreme court will not interfere on appeal. *Palmer v. Cedar Rapids & Marion City R. Co.*, 124-424.

Passion and prejudice: Where the amount of plaintiff's recovery is not limited by the instructions, it cannot be said from the size of the verdict alone that it is the result of passion or prejudice. *Connors v. Chingren*, 111-437.

The mere fact that the verdict is for an amount which the court finds to be excessive does not in itself show such passion and prejudice as to require the entire setting aside of the verdict. *Doran v. Cedar Rapids & M. C. R. Co.*, 117-442.

In a particular case held that the verdict was not the result of an intelligent and honest exercise of discretion by the jury, and that it was the result of passion or prejudice, and judgment based thereon was reversed. *Eastman v. Miller*, 113-404.

(e.) *Verdict against the evidence or the law.*

Verdict against the evidence: Where the evidence is conflicting, it is the province of the jury to pass upon the conflict and the courts will not interfere with the verdict. *Inghram v. National Union*, 103-395.

In such case the conflict must be resolved in favor of the party against whom the motion for a new trial is made, and if there is not sufficient evidence to sustain a verdict for that party the motion should be sustained, otherwise it should be overruled. *Ibid.*

The function of the court with reference to the evidence is not fully and completely discharged when it determines the admissibility of the different items of evidence offered. It may still look into the whole case to see whether these items of evidence together constitute any substantial proof of the facts sought to be established.

Brooks v. Brotherhood of American Yeomen, 115-588.

The jury is to determine the facts and if there is any substantial support in the evidence for its finding, a new trial will not be granted. *Johnson v. Chicago, St. P., M. & O. R. Co.*, 123-224.

The insufficiency of evidence to support the verdict should be raised by motion for a new trial and if not so raised cannot be urged on appeal. *Schulte v. Chicago, M. & St. P. R. Co.*, 124-191.

The court has the inherent right to set aside a verdict and grant a new trial; but when such action is taken without a motion being made the grounds therefor should be made to appear of record. *Hensley v. Davidson Bros. Co.*, 112 N. W. 227.

A verdict should not be set aside and a new trial granted for insufficiency of the evidence after the supreme court has held on appeal that substantially the same evidence submitted on a former trial should have been submitted to the jury for a verdict. *Ibid.*

The finding of the trial court that a new trial should be granted because the verdict does not correspond to the evidence and conform to the instructions, may be sustained, although the evidence was properly submitted to the jury. *Werthman v. Mason City & Ft. D. R. Co.*, 128-135.

(f.) *Newly discovered evidence.*

Discretion of court: Considerable discretion is vested in the lower court in passing upon an application for a new trial on the ground of newly discovered evidence; and the supreme court will not interfere with the exercise of that discretion unless it appears to have been abused. *Trimble v. Tantlinger*, 104-665.

While the granting of new trial on the ground of newly discovered evidence is a matter resting in the discretion of the trial court, yet this is a legal discretion and for an abuse thereof, the action of the court in refusing a new trial may be reversed. *State v. Lowell*, 123-427.

The granting of a new trial on the ground of newly discovered evidence is largely discretionary with the trial court, and its ruling granting such new trial and holding the showing of diligence to be sufficient, will be upheld on appeal unless an abuse of discretion is shown. *Woerdhoff v. Muekel*, 131-300.

Where the newly discovered evidence, as shown by the affidavit, might or might not be of controlling weight as affecting the result, the action of the lower court in granting a new trial on that ground will not be interfered with. *Bullard v. Bullard*, 112-423.

Must be material: Newly discovered evidence which, had it been introduced could not have affected the result, is not ground for a new trial. *Buchholtz v. Radcliffe*, 129-27.

Where it does not appear that the newly discovered evidence would bear on the issue in the case as tried, it will not be error to refuse to grant a new trial on account of such newly discovered evidence. *Carlson v. Hall*, 124-121.

Cumulative evidence: A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative. *Dunbauld v. Thompson*, 109-199; *Hemmer v. Burger*, 127-614; *Renshaw v. Dignan*, 128-722; *Hanousek v. Marshalltown*, 130-550.

Evidence tending merely to strengthen the proof as to any one or more particular facts will be cumulative, but evidence of some other fact, as to which there is no proof, but which would aid to the same general conclusion indicated by evidence which is introduced, will not be deemed cumulative. *Bullard v. Bullard*, 112-433.

While the trial court may be sustained in granting a new trial upon newly discovered testimony which is cumulative in character, yet it has a large discretion in such cases and ordinarily its action will not be interfered with on appeal. *Clark v. Van Vleck*, 112 N. W. 648.

Diligence: Lack of diligence to procure the newly discovered evidence for use on the trial will be a proper ground for refusing to entertain a motion for a new trial based on such newly discovered evidence. *Baxter v. Cedar Rapids*, 103-599; *Renshaw v. Dignan*, 128-722.

A new trial should not be granted for newly discovered evidence which might have been discovered by inquiry before the close of the trial. *Benjamin v. Flitton*, 106-417.

Where there is nothing to put the party on inquiry as to the evidence on which he subsequently asks for a new trial, he is not to be deemed negligent in not having discovered such evidence in time to introduce it on the trial. *Bullard v. Bullard*, 112-423.

Facts which a corporation should have known by reason of information in the possession of its officers cannot be made the ground of an application for new trial on the basis of newly discovered evidence. A new trial should not be granted when the party seeking such relief has been negligent in acquiring the information on which the relief is asked. *Robins v. Modern Woodmen*, 127-444.

Under the circumstances of a particular case held that there was not such want of diligence in discovering the new evidence as to prevent the granting of a new trial on that ground. *National Horse Importing Co. v. Novak*, 105-157.

Witness in fact used: The case must be a very strong one which will justify a new trial on the ground of newly discovered evidence where the witness was in fact used upon the trial of the case.

Marengo Savings Bank v. Kent, 112 N. W. 767.

Showing sufficient: In a particular case held that the showing as to newly discovered evidence was sufficient. *Mally v. Mally*, 114-309.

Newly discovered evidence relied on in a particular case as the ground for a new trial held to be sufficient though to some extent cumulative, being also such as counsel in the exercise of reasonable diligence had not discovered. *Schnee v. Dubuque*, 122-459.

The showing in a particular case of newly discovered evidence held sufficient to authorize a new trial, although some of the new evidence would have been cumulative in character. *Sullivan v. Chicago, R. I. & P. R. Co.*, 119-464.

When available: Application for new trial on the ground of newly discovered evidence may be made at any time either at or after the term at which the verdict sought to be set aside was rendered and

until the expiration of one year from the entry of judgment on such verdict. (See Code § 4092.) *Hunter v. Porter*, 124-351.

The giving of an erroneous instruction not duly excepted to will not, it seems, be proper grounds for granting a new trial. *Turley v. Griffin*, 106-161.

(g.) *Error of law.*

Where the court erroneously allowed the transcript of the evidence on a former trial to be introduced in evidence, and subsequently directed the jury not to consider such evidence, and allowed the party to introduce the witnesses, held, in the absence of some special showing of prejudice, the error in the admission of the transcript was cured. When an error occurs, and soon after is corrected by the action of the court, the proper administration of justice does not require, unless it may be in extreme cases, that the court shall grant a new trial because of the error. *Bell v. Clarion*, 120-332.

SEC. 3756. Application—affidavits.

By motion: A motion for a new trial may be ruled on after the entry of judgment, if the motion is made in time, and the fact of the entry of judgment is no indication that a motion for a new trial has been disposed of. *In re Estate of Bishop*, 130-250.

An amendment to a motion for a new trial may be presumed to have been considered by the court in ruling on the motion, although not made until after the original motion was submitted. *Hawk v. Mulhall*, 133-695.

When filed: In computing the three days within which the motion is to be filed, Sunday or Decoration day, or other day on which judicial business is not required to be transacted, is not to be excluded. *German Sav. Bank v. Cady*, 114-228.

Matters inherent in verdict: Affidavits of jurors cannot be considered as to matters which inhere in the verdict. *Noble v. White*, 103-352.

The affidavits of jurors showing the arguments or reasons which were urged among themselves tending to increase the amount of the recovery are not admissible; such matters inhere in the verdict. *Baxter v. Cedar Rapids*, 103-599.

Affidavits of jurors are not admissible to show what their understanding was of

the instructions. *Christ v. Webster City*, 105-119.

The question as to what the jury considered in making an allowance of damages for personal injuries inheres in the verdict itself, and affidavits of jurors are not competent to show that the jury violated the directions of the court and disregarded the evidence by taking into account items that should not have been considered. *Clark v. Van Vleck*, 112 N. W. 648.

Affidavits of jurors to show that they did not consider and give weight to evidence not properly before them for consideration are admissible. *Brown Land Co. v. Lehman*, 112 N. W. 185.

Affidavits of jurors in support of the verdict are competent. *Davis v. Huber Mfg. Co.*, 119-56.

Misconduct: Where the court refuses to sign a bill of exceptions reciting the misconduct complained of as a ground for new trial and the alleged facts are set out in a bystanders' bill of exceptions, which is controverted by affidavits, the presumption will be entertained on appeal that the court's finding against granting a new trial is correct. *State v. Steen*, 125-307.

As to affidavits as showing misconduct of jury or counsel, see notes to preceding section.

SEC. 3757. Judgment notwithstanding verdict.

Under a motion for a judgment notwithstanding the verdict, grounds cannot be considered which should properly be presented in a motion for a new trial, nor can such a motion be treated as a motion for a new trial. *Hooker v. Chittenden*, 106-321.

Where a petition shows on its face that there is no cause of action, the objection may be taken by the defendant after a verdict against him by motion as here provided. *Ary v. Chesmore*, 113-63.

Motion for judgment notwithstanding the verdict does not waive the right to

complain of errors on appeal. *Cullison v. Lindsay*, 108-124.

The sustaining of a motion for judgment

SEC. 3758. Arrest of judgment.

Although a demurrer to a petition to recover damages for personal injuries based on the failure of plaintiff to allege freedom from contributory negligence is overruled, nevertheless the same objection may be made by motion in arrest of judgment. If plaintiff does not cure the defect

SEC. 3759. Filing of motion.

The provision that a filing of either a motion for new trial or for judgment notwithstanding the verdict, or in arrest of judgment shall not be a waiver of the right to file either or both of the others does not apply to a motion for judgment

SEC. 3760. Amendment to cure defect.

After motion in arrest of judgment for defect in the pleading, the opposite party may amend by alleging the omitted fact, and such fact will be deemed to be true unless controverted. So held as to the allegation of freedom from contributory negligence in an action to recover for personal injuries. *Beard v. Guild*, 107-476; *Decatur v. Simpson*, 115-348.

The arrest of judgment on motion of the unsuccessful party is a waiver of motion for new trial. *Schulte v. Chicago, M. & St. P. R. Co.*, 124-191.

SEC. 3764. Dismissal of action.

After the announcement of the court's conclusion on a motion to direct a verdict, the plaintiff may dismiss his action. *Oppenheimer v. Elmore*, 109-196.

After the direction of a verdict it is too late to dismiss the action. *Duffie v. Glucose Sugar Refining Co.*, 141 Fed. 206.

Plaintiff cannot dismiss after the case has been submitted to the court for decision. *Carney v. Reed*, 117-508.

After submission of the case plaintiff is not entitled to a dismissal on his own motion, and a dismissal thus improperly entered may be subsequently set aside by the court and the case reinstated. *Costello v. Costello*, 112-578.

Dismissal of an action being shown it will be presumed to have been without prejudice, unless the contrary appears. *Citizens' Bank v. Whinery*, 110-390.

On failure of plaintiff to appear, the cause should be dismissed without prejudice unless there is a counterclaim on which judgment may be rendered against the plaintiff in favor of the defendant. *Stewart v. Gorham*, 122-669.

Where the dismissal of an action is by the court, without the consent of the plain-

notwithstanding the verdict is a waiver of a motion for new trial. *Schulte v. Chicago M. & St. P. R. Co.*, 124-191.

as provided in Code § 3760 the motion on that ground may be properly sustained. *Decatur v. Simpson*, 115-348.

A motion in arrest of judgment is allowable when the pleadings of the prevailing party wholly fail to state a cause of action or defense. *Lacey v. Davis*, 126-675.

on special findings and the party who has relied upon such motion for judgment and succeeds in having the general verdict set aside thereby waives the motion for a new trial. *Schulte v. Chicago, M. & St. P. R. Co.*, 124-191.

Where plaintiff suing a telegraph company for negligence in delivering a message fails to allege the notice required by Code § 2164 and does not offer to supply such allegation by amendment, judgment for the plaintiff should be arrested on motion, although the court has erroneously and against the objection of the defendant received in evidence written notice of such claim. *Heald v. Western Union Tel. Co.*, 129-326.

tiff, it is a determination of the action adversely to the plaintiff, and no subsequent action on the same cause can be maintained. If the dismissal is voluntary, then the plaintiff may maintain another action, but if the statute of limitations has already run against such action, he must not only bring it within six months after the dismissal of the first action, but must allege and prove that such dismissal was not the result of negligence on his part. See Code § 3455. *Ceprely v. Paton*, 120-559.

Dismissal of an action voluntarily by the plaintiff because of want of means to prosecute it and in the absence of material witnesses will not be ground for refusing plaintiff the right to proceed in a second action until the payment of the costs of the first. *Camp v. Chicago G. W. R. Co.*, 124-238.

An intervenor may by dismissing his petition of intervention withdraw from the case so as not to be bound by subsequent proceedings. *Guinn v. Iowa & St. L. R. Co.*, 125-301.

After dismissal as to certain defendants in a proceeding to establish a lost corner, held that the judgment was not effectual as

to the parties thus dismissed from the proceeding. *Dittmer v. Mierendorf*, 129-643.

Where an action is dismissed as to one

of the parties a judgment subsequently rendered does not constitute an estoppel as to such party. *Atlee v. Bullard*, 123-274.

SEC. 3766. Counter-claim tried.

When dismissal of the case is properly announced and brought to the court's knowledge, the case is in fact dismissed, although the court may proceed further before entering the fact of dismissal on the record. *Bardes v. Hutchison*, 113-610.

When the action is dismissed by plaintiff, defendant is not entitled to have the court proceed further, unless his answer presents a proper counterclaim. *Ibid.*

The provision as to the trial of a counterclaim notwithstanding the dismissal of the original action has no application to the dismissal by plaintiff of one count of the petition. *Houtz v. Sioux City Brass Co.*, 110 N. W. 166.

To justify a judgment in favor of the

defendant against the plaintiff, on failure of the plaintiff to appear, there must be such counterclaim or cross bill by the defendant against the plaintiff as to show in itself the essential elements of a cause of action. If the allegations in behalf of the defendant are defensive in character judgment should be rendered against the plaintiff on the merits. *Stewart v. Gorham*, 122-669.

On the dismissal of an action to set aside the probate of a will, the court has no jurisdiction to proceed to the hearing of a counterclaim on which it is asked that the will be confirmed. *Davis v. Preston*, 129-670.

SEC. 3769. Judgment—final adjudication.

Jurisdiction: A defendant served with notice outside the state, and not appearing in the action, is not bound by the adjudication. *Smith v. Moore*, 112-60.

Confusion or mistake in the name by which the defendant is designated will not necessarily be fatal to the judgment in case of actual service, but such defect will prevent constructive or substituted service being sufficient to confer jurisdiction. *Thornily v. Prentice*, 121-89.

What constitutes: Technically speaking a judgment is the decision or sentence of the court, pronounced by the court in the action or on the question before it, and may consist of a written announcement of the decision of the court, filed with the clerk, although not yet formally entered on the record. So held in a proceeding to punish for contempt in violating a temporary injunction which had been dissolved by a written decision of the court, filed with the clerk. *Coffey v. Gamble*, 117-545.

A judgment cannot be deemed as rendered so as to become a lien or support an execution until it is entered of record. The mere signature of a judgment form, and the indorsement and filing thereof by the clerk is not a judgment. *Callanan v. Votruba*, 104-672.

The oral announcement by the judge of his conclusion does not constitute a judgment. A judgment cannot be said to be entered until it is spread by the clerk upon the record book. A memorandum thereof made by the judge is for the information and guidance of the clerk, but until such entry is made there is nothing from which an appeal will lie. *Kennedy v. Citizens' Nat. Bank*, 119-123.

Final: A judgment determining the amount due may be final, although a sub-

sequent order as to the application of funds in the hands of a receiver may be necessary. *Applegate v. Applegate*, 107-312.

The fact that in an action for the foreclosure of a lien, the court has rendered an interlocutory decree for the specific enforcement of such lien does not preclude a subsequent final decree for a money judgment. *American Trading & Storage Co. v. Gottstein*, 123-267.

Presumption: Every presumption must be indulged in favor of the correctness of a judgment. *State v. Gifford*, 111-648.

As evidence: While the pleadings in a case are part of the record, a duly authenticated copy of the judgment is a specific item of evidence, admissible in itself without regard to the record in the case. *Alexander v. Grand Lodge A. O. U. W.*, 119-519.

The costs are not a part of the judgment and may be retaxed on motion without proceedings to set aside, vacate or modify the judgment. *Fisher v. Burlington, C. R. & N. R. Co.*, 104-588.

Former adjudication: Where a former adjudication is relied upon, it must appear either by the record or by extrinsic evidence that the particular matter in controversy was necessarily tried and determined in the former action. The burden is with the party relying upon a former adjudication to make it appear that the case was thus determined. *Griffith v. Fields*, 105-362.

Where in an action on a promissory note brought by a holder thereof, the maker sought to interpose as a defense damages for breach of contract in the transaction in which the note was given, and claimed that the holder was not an innocent pur-

chaser, held, that in a subsequent action by the maker of the note against the original payee for damages for breach of the contract the prior judgment in favor of the holder of the note would not constitute an adjudication unless it was shown by parol evidence that the case was decided on account of the defense to the note and not on account of the holder having been found to be an innocent purchaser. *Ibid.*

A party cannot relitigate in a second action matters which were incident to or involved in or might have been litigated in a former action. *Prouty v. Matheson*, 107-259.

Parties cannot engage in relitigation of matters which were, or might have been determined in a former action. *Murphy v. Cuddihy*, 111-645.

A judgment cannot be deemed an adjudication of the question which the court expressly does not determine, although it might have been determined. *Owen v. Higgins*, 113-735.

To be available as a former adjudication the judgment in the former suit must be for the same cause of action and between the same parties or their privies, and the former judgment must be on the merits of the case, rendered by a court having jurisdiction. *In re Dille*, 119-575.

Judgments *in personam* conclude only the immediate parties and their privies, and to be effective the bar must be mutual. *Brown v. Lambe*, 119-404.

A judgment of a court of competent jurisdiction is binding between the parties to a particular action litigated regarding the subject thereof, and on their privies, as to questions actually decided. Therefore held that a judgment on an appeal from a board of review that certain land contracts were not assessable for a particular year was *res adjudicata* as to the right to assess the same contracts for a subsequent year. *Defries v. McMeans*, 121-540.

A judgment is conclusive between the parties in a subsequent action either as a plea in bar or evidence in estoppel not only as to every question actually in issue and decided, but every question within the issues which might have been presented and decided. And it is likewise binding on privies of such parties. But in general the relation of surety and principal does not create privity in the sense in which the law of estoppel is applied. *Beh v. Bay*, 127-246.

The judgment against a plaintiff who has stood on his petition and refused to amend after ruling against him on demurrer is a final adjudication. *Gregory v. Woodworth*, 107-151.

The general rule, subject to some exceptions, is that a judgment is conclusive, not only as to all matters actually in issue, but as to those which might or should have

been alleged in the pleadings. *Fulliam v. Drake*, 105-615.

Any defense which might have been set up in a previous action will be deemed adjudicated by the judgment thereon. *Talbot v. First National Bank*, 106-361.

One of the recognized tests in determining whether the plea of another action pending is good, lies in ascertaining whether the judgment, when obtained, would necessarily be *res adjudicata* of the issues of the action wherein the plea is interposed. *Valley Bank v. Shenandoah Nat. Bank*, 109-43.

Where the very right to recover is based on precisely the same ground in both actions, the judgment in the one will be conclusive in the other. It is not essential that the causes of action be the same, but the right or title on which they rest must be identical. *Watson v. Richardson*, 110-698.

The provisions of Code § 4128 with reference to supersedeas bond indicate an intention to preserve to the prevailing litigant the fruits of his judgment, even though an appeal has been taken, and a judgment pending on appeal to the supreme court may be relied on as a prior adjudication in another case involving the same right or title. *Ibid.*

When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of a suit and requested to take upon himself the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was a real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him whether he has appeared or not as to every fact established by it. But, in general, judgment cannot be entered against a person so notified. *Citizens' Nat. Bank v. City Nat. Bank*, 111-211.

An adjudication as between a city or town and a property owner as to the existence of a street adjoining the premises of the latter, is not binding upon another property owner not made party to the action. *Long v. Wilson*, 119-267.

An adjudication in an action to recover against a bank the proceeds of certain notes and securities, does not bar a subsequent action against the bank by the plaintiff who has failed in the other action, for the embezzlement of such notes and securities by the cashier. *Lemon v. Sigourney Savings Bank*, 131-79.

A determination in a federal court as to the validity of interest coupons on county bonds as against the defense that the bonds were issued in excess of the

constitutional limitation of indebtedness is binding in an action on the bonds themselves and their coupons in the state court. *Reynolds v. Lyon County*, 121-733.

Dismissal: Voluntary dismissal of an action does not constitute an adjudication. *Brown v. Holden*, 120-191.

Where, after removal of a case from a state to the federal court at the instance of defendant plaintiff dismisses his

action without prejudice, he is not thereby barred from again prosecuting an action for the same cause in a state court. *Foley v. Cudahy Packing Co.*, 119-246.

Where a suit in equity is dismissed on its merits, such dismissal constitutes a bar to a subsequent suit presenting the same question. *Madison v. Garfield Coal Co.*, 114-56.

SEC. 3771. In abatement.

Where it does not clearly appear that the judgment was on matter in abatement only, the presumption is that it was on

the merits and conclusive on a subsequent suit on the same cause of action. *Reeves v. Lamm*, 112 N. W. 642.

SEC. 3773. Several judgment.

If plaintiff maintains his action against one of several defendants he may have judgment against that one, and the other defendants may have judgment against

plaintiff for costs. This rule is alike applicable to actions *ex contractu* and *ex delictu*. *Lull v. Anamosa Nat. Bank*, 110-537.

SEC. 3775. What relief granted.

Where there is an answer the court may grant plaintiff any relief consistent with the case made by the petition and embraced within the issue. *Stubblefield v.*

Gadd, 112-681; *Hogueland v. Arts*, 113-634.

The judgment must follow the prayer for relief and cannot be extended beyond it. *Browne v. Kiel*, 117-316.

SEC. 3777. Judgment on verdict.

So far as motion for a new trial under Code § 3755 is concerned, it is immaterial whether judgment be entered forthwith

upon the return of the verdict or be suspended until the determination of the motion. *Bevering v. Smith*, 121-607.

SEC. 3778. Where verdict is special.

When a court is called upon to rule on a motion for judgment on special verdict it should consider what the law is, and

is not bound by instructions previously given. *Connell v. Keokuk Elec. R. & P. Co.*, 131-622.

SEC. 3781. Judgment by agreement.

To make a judgment by consent or

agreement, the fact must appear of record. *Cooper v. Disbrow*, 106-550.

SEC. 3783. Court acting as jury.

The decision of the court on a question of fact in a law case tried without a jury is entitled to the same presumptions as the verdict of a jury. *Brown v. Curtis*, 111-542.

Where a law case is tried to the court without a jury its finding has the force and

effect of a verdict, and will not be interfered with unless it be the result of passion or prejudice, or so clearly against the evidence as to justify the conclusion that it was not the result of a honest and fair discretion. *Roe v. McCaughan*, 113-274.

SEC. 3784. Judgments and orders entered.

The record book, and not the judgment docket, is the evidence of the judgment, and it, or a certified copy, is alone admissible to show the judgment where no foundation is laid for introducing secondary evidence. *Baxter v. Pritchard*, 113-422.

Where an order of court is essential to sustain the action of a guardian, such order must be entered on the record of

the court. *In re Manning's Estate*, 111 N. W. 409.

Ordinarily the record is the best and only proof of a judgment. An order of court, to be of any validity, must be entered of record. *Bristol Sav. Bank v. Judd*, 116-26. See also notes to Code § 288 in this supplement.

SEC. 3786. Discharge of judgment on motion.

An action to enjoin the enforcement of a judgment on the ground that it has been discharged or satisfied, or that the debtor has been discharged in bankruptcy subsequent to the rendition of the judgment, can, under Code § 4364, be maintained only in the county where the judgment was rendered. *Brunk v. Moulton Bank*, 121-14.

If by reason of matters transpiring subsequent to the entry of a decree, the party

entitled to relief under the decree has been partially or fully satisfied, that fact may be brought to the attention of the court and determined in a proceeding relating to the enforcement of the decree. The power of the court to entertain such a proceeding is not taken away by the fact that the decree has been appealed from, and on appeal affirmed without a new decree in the supreme court or an order for remand. *Dunton v. McCook*, 120-444.

SEC. 3788. Default—when made and entered.

A judgment by default is conclusive as against collateral attack, even though the petition is vulnerable to demurrer. *Miller Brewing Co. v. Capital Ins. Co.*, 111-590.

A party may be concluded by judgment on default, even though the facts stated in the petition do not constitute a good cause of action at law, or the petition is so defective as to be vulnerable to a demurrer. Nor will the fact that the judgment is excessive in amount be available to a defendant in default. *Warthen v. Himstreet*, 112-605.

It is not proper to render judgment on sustaining a motion striking an amended petition from the files without giving plaintiff the statutory time for amending. *Williams v. Williams*, 115-520.

At any time before application for judgment on default for failure to amend or plead over a party in default may amend or plead so as to entitle himself to be heard. *Redhead v. Iowa Nat. Bank*, 123-336.

SEC. 3790. Setting aside default—terms.

Where no jurisdiction: Where a court has no jurisdiction to enter a default by reason of a misunderstanding as to appearance set aside on motion without pleading forthwith or filing affidavits of merits. *Spencer v. Berns*, 114-126.

Where the return of substituted service erroneously states the township or town in which the service was made, default entered upon such service should be set aside as rendered without jurisdiction. *Bradley Mfg. Co. v. Burrhus*, 112 N. W. 765.

An affidavit of merits is required as a condition precedent to the setting aside of a default, only when the defendant was actually in default. Such an affidavit is not necessary where the default was erroneously entered, the court being without jurisdiction. *Culbertson v. Salinger*, 122-12.

The statutory provisions as to setting aside a default are not applicable where no default whatever should have been granted. *First Nat. Bank v. Flynn*, 117-493.

Where after default the assignee in bankruptcy of the defendant applied for leave to make defense, held that the default should have been set aside in order to enable him to do so. *Ibid.*

What grounds: The courts will relieve from accident, mistake and misfortune, not brought about through neglect or inactivity, and if the failure to secure a trial on the merits is not due to such negligence

or inactivity, but to a default entered by reason of a misunderstanding as to appearance, such default should be set aside. *Barto v. Sioux City Elec. Co.*, 119-179.

Mutual mistake or misunderstanding is a good ground for setting aside a default. *Ibid.*

A mere denial of the ownership of a note on which judgment by default has been rendered, such denial being based on want of information, is sufficient to sustain an application for setting aside the default. *Tullis v. McClary*, 128-493.

While negligence of the defendant or his attorney will not be a ground for setting aside a default rendered, circumstances and conditions may be accepted as sufficient to warrant relief on account of the oversight of the attorney, although he is not wholly blameless with respect thereto; it is for the trial court to judge of the merits of the excuse in such a case and when the action is for a money demand and defend for his client was due to the misplacement of the papers in the case under circumstances to some extent excusing such oversight, held that the action of the trial court in setting aside the default would not be reversed on appeal. *Klepfer v. Keokuk*, 126-592.

In a proceeding to set aside a default rendered in an action for the recovery of damages for personal injuries against a city, held that an affidavit of the city attorney to the effect that he had made an investigation into the facts and circum-

stances of the accident complained of and therefrom believed that such accident was not caused by any negligence on the part of the city or its officers, but was due solely to the negligence of the plaintiff, was sufficient statement of a meritorious defense. *Klepfer v. Keokuk*, 126-592.

Affidavit in a particular case held not sufficient to require the setting aside of a default, as it disclosed merely carelessness and inattention to duty on the part of the party against whom the judgment was rendered. *Byrnes v. American Mut. F. Ins. Co.*, 114-738.

Affidavit of merits in connection with motion to set aside default held sufficient in a particular case. *Barto v. Sioux City Elec. Co.*, 119-179.

The party asking to have default set aside must plead issuably and also present a reasonable excuse for the default. *Martin v. Reese*, 105-694.

Discretionary: The supreme court on appeal will not interfere with the action of the trial court in refusing to set aside a default except in clear case of abuse of discretion. *Martin v. Reese*, 105-694; *Carver v. SeEVERS*, 126-669; *Cowell v. City Water Supply Co.*, 130-671.

A very large discretion is vested in the trial court in the matter of setting aside default, and its action in allowing a trial on the merits will not be interfered with

unless in a manifest case of abuse. The trial court may even rest such action upon matters within its own knowledge. *Foley v. Leisy Brg. Co.*, 116-176.

A fair trial on the merits is the object sought in all judicial proceedings, and, in the absence of negligence on the part of him who is in default, is to be encouraged and secured by the court. When the right to such trial is granted an appellate court is loathe to interfere and will do so only in case of abuse of discretion on the part of the trial court. *Stitzer v. Fenzloff*, 112-491.

To justify interference on appeal with a ruling on motion to set aside default, a much stronger showing of abuse of discretion in the trial court must be made when the default has been set aside, than where it has been denied. *Barto v. Sioux City Elec. Co.*, 119-179.

On condition: One who has complied with the conditions imposed for setting aside a default judgment cannot afterward complain of the conditions thus imposed. *Doyle v. Burns*, 123-488.

In superior courts: Provisions as to setting aside judgments by default are applicable in superior courts, although a transcript of the default judgment may have been filed in the district court. *Klepfer v. Keokuk*, 126-592.

SEC. 3791. Clerk to compute amount.

The clerk is only authorized to assess when the action is for a money demand

and the amount a mere matter of computation. *Stitzer v. Fenzloff*, 112-491.

SEC. 3792. Appearance to cross-examine witnesses.

The provision that a party in default may appear and cross-examine witnesses as to assessment of damages does not au-

thorize the party in default to interpose a motion in arrest of judgment. *Free v. Western Union Tel. Co.*, 110 N. W. 143.

SEC. 3794. Setting aside, if on notice by publication.

Where the assignee in insolvency for a foreign corporation appeared in an attachment proceeding against such corporation in this state commenced by publication only, but afterwards failed to make de-

fense, and judgment was rendered against the corporation, held that a receiver of the corporation subsequently appointed could not have default set aside under this section. *State Bank v. McElroy*, 106-258.

SEC. 3796. New trial after judgment, on publication.

A judgment rendered on service by publication may be set aside and a retrial granted on application of defendant within two years, but such judgment cannot be attacked in an independent action. *Co-operative Sav. & L. Assn. v. McIntosh*, 105-697.

The judgment on service by publication in a proper case remains valid and binding until set aside in a proper proceeding, and the application to set it aside cannot be removed to the federal courts. *Davis v. Harris*, 124 Fed. 713.

The final judgment on notice by publication cannot be attacked collaterally on the ground that security for costs was not given as required. *English v. Otis*, 125-555.

Within the time authorized by this section a defendant served by publication only, may appear and file a motion to set aside the judgment and with it an answer to the petition in the original action. *Provident Bank Stock Co. v. Schafer*, 110-440.

Under a contract to convey, contemplating the quieting of title in the vendor

such as to enable him to make a good abstract of title, it is sufficient that a decree quieting title has been rendered, although the right to a new trial on application of a non-resident served by publication only still exists. *Bates v. Williamson*, 128-127.

The provisions of this section do not apply where personal service of the notice has been made out of the state on a non-resident defendant. *Clark v. Tull*, 113-143.

The provision as to new trial on motion

of a non-resident defendant served by publication only has no application where the judgment is void for want of jurisdiction. *Gaar v. Taylor*, 128-636.

Where the defendant in a divorce proceeding served with notice by publication only, appears to ask for a new trial under this provision, he does not thereby confer on the court jurisdiction to enter a valid decree against him unless a new trial is granted. *Rea v. Rea*, 123-241.

SEC. 3797. Title to property not affected.

Something more is contemplated as within the power of the court on an application for new trial after service by publication than simply an order for the restoration of any money or property remaining in the possession of the adverse party. The court setting aside the prior judgment may also set aside and cancel any title derived under a sheriff's sale in pursuance of such judgment unless it has passed into the hands

of a purchaser in good faith. *English v. Otis*, 125-555.

The mere fact of purchasing the certificate of sale under a judgment rendered on default by publication only does not entitle such purchaser to protection against the setting aside of the judgment in a proceeding for new trial such as is authorized by the statute. *Ibid.*

SEC. 3800. Personal judgment.

A decree in a divorce proceeding on service by publication will be binding as to the

marital status of the parties, but not as to alimony or costs. *Rea v. Rea*, 123-141.

SEC. 3801. Liens of judgments.

Commencement and continuance: One who seeks to enforce payment of a judgment out of the real estate of one deceased, must do so before the lien of his judgment expires. The filing of a claim against the estate of the deceased will not preserve the right to enforce such judgment against real estate. *Hansen's Empire Fur Factory v. Teabout*, 104-360.

A judgment is not "rendered" so as to become a lien until it is entered of record. *Callanan v. Votruba*, 104-672.

Upon what property: Judgments are liens upon equitable titles. *Kelliher v. Sutton*, 115-632.

A judgment rendered against the holder of an equitable title will not be a lien against the property in such sense as to charge subsequent *bona fide* purchasers of the legal title without notice. *Block & Polak Iron Co. v. Holcomb-Brown Iron Co.*, 105-624.

While ch. 129 of Acts 17 G. A. (now embodied in this section) requiring the filing of transcripts in the federal courts in counties where the property is situated in order to make such judgments liens on such property was not valid when enacted, nevertheless, when congress in 1888 provided that federal judgments should be liens throughout the state where rendered, in the same manner and to the same extent, and under the same conditions only as if said judgments and decrees had been rendered by a court of general jurisdiction of the state, this statutory provision became effectual. *Blair v. Ostrander*, 109-204.

A judgment becomes a lien on any present interest of the judgment defendant in real estate owned by him as soon as entered of record. Such lien is not lost by the act of any creditor in taking an assignment of a prior judgment lien, although under such judgment there has been an execution sale, if his act amounts to a redemption from such sale. *People's Sav. Bank v. McCarthy*, 119-586.

A judgment plaintiff in lawful possession of land on which his judgment is a lien has not the right to apply the rents and profits derived therefrom to the satisfaction of his judgment as against the owner thereof not a judgment defendant. *Boggs v. Douglas*, 105-344.

A judgment is a lien only on the interest of the judgment defendant. *Moore v. Scruggs*, 131-692.

A judgment lien holder is not affected by a decree quieting title in a proceeding to which he is not made a party. *Jasper County v. Sparham*, 125-464.

Where the uncertainty of a contingent remainder involves, solely the question of who shall take the real estate it is not such an interest that a judgment lien attaches thereto or that execution under a judgment can be levied thereon. *Taylor v. Taylor*, 118-407.

Notice: A judgment rendered against a debtor described therein as "Sheffey" held not to constitute a lien as against the grantee of the same person described in the conveyance as "Cheffey." *Boyd v. Boyd*, 128-699.

A judgment recorded as against Wm. M. Thornily held not a lien on the property of Willis H. Thornily. *Thornily v. Prentice*, 121-89.

Failure to docket or index a judgment does not prevent its being a lien as to persons having actual knowledge. *State Savings Bank v. Shinn*, 130-365.

Redemption: While a judgment ceases to be a lien after the expiration of ten years, nevertheless the judgment creditor may thereafter, within twenty years, cause execution to be levied on the property of the defendant, and thereby acquire a lien thereon which will entitle him to redeem such property from execution sale. *Hawk-eye Ins. Co. v. Maxwell*, 119-672.

A junior judgment lienholder can recover from execution and sale under a prior judgment only as provided by statute. He has no equitable right to make redemption from such sale. *Wood v. Rankin*, 119-448.

SEC. 3802. When attach—filing transcript in another county.

To make a judgment from another county a lien, the judgment must be indexed, as here required. *State Ins. Co. v. Prestage*, 116-466.

Execution on a judgment, a transcript of which has been filed in the office of the clerk of the district court in another county, can only issue from the county where such judgment was originally rendered. *Brunk v. Moulton Bank*, 121-14.

One who acquires a judgment lien on premises, pending a foreclosure, has only the statutory right of redemption from the foreclosure sale. *Cooney v. Coppock*, 119-486.

Priority: As between the judgment liens the one which has precedence in order of time should be accorded precedence in right, unless good reason be shown for a different result. *Bennett v. First National Bank*, 128-1.

Enforcement in equity: The judgment lienholder having an adequate remedy at law by levy and sale on the property under general execution to satisfy his judgment is not entitled to maintain an action in equity to have determined the question whether his judgment is a lien on the property. *Kalona Savings Bank v. Eash*, 133-190.

Levy and sale under execution from a district court of another county may be made without the filing of a transcript, and will be effective as against those having actual notice, or notice by the recording of the sheriff's deed. *Drahos v. Kopesky*, 132-497.

CHAPTER 10.

OF JUDGMENT BY CONFESSION.

SECTION 3815. Statement.

Although judgment on confession by a warrant of attorney are not recognized in this state, such a judgment rendered in

another state where it is authorized may be enforced in this state. *Cuyendall v. Doe*, 129-453.

SEC. 3816. Judgment—execution.

When the confession of judgment is filed, the clerk should enter up a judgment thereon, and if he fails to do so the court may subsequently order judgment to be entered *nunc pro tunc* as of the date of the filing of the confession, thereby supporting an execution which has in the meantime been issued. *Doughty v. Meek*, 105-16.

A judgment entered on confession is deemed to have been entered by the court, and is entitled to the same faith and credit in another state as any other judgment. *Miller Brg. Co. v. Capital Ins. Co.*, 111-590.

SEC. 3818. After action brought.

Even though the paper is headed "an offer to compromise," if in fact it is an offer to confess judgment it should be so treated. *Benson v. Chicago & N. W. R. Co.*, 113-179.

If on appeal the amount of recovery is reduced to a less amount than that for

which a confession of judgment is offered, costs should be taxed against the successful party, although subsequently accruing interest has increased the amount for which recovery is allowed beyond the amount offered to be confessed. *Castner v. Chicago, B. & Q. R. Co.*, 112 N. W. 88.

CHAPTER 11.

OF OFFER TO COMPROMISE.

SECTION 3819. Offer of judgment.

One who is authorized to collect a claim has authority to accept a confession of judgment for such claim. *Briggs v. Yetzer*, 103-342.

The law requires that the confession concisely state the facts so as to direct the attention of third parties to the nature and character of the consideration. Such statement must be brief and need not be specific or particular. *Ibid.*

If the statement is full enough to enable third parties to investigate and judge of the good faith of the transaction and sufficiently definite for this purpose, then the object of the statute in requiring such statement has been met. *Ibid.*

The jurat of the notary showing that the statement has been subscribed and sworn to is sufficient to show that it was subscribed and sworn to by the persons signing it, without the names of such persons being stated therein. *Ibid.*

An offer to confess judgment after an action is brought may be made the presence of the plaintiff or after notice to him, and may be established by parol testimony; but it is a part of the court proceedings and when made before a justice of the peace should be entered on his docket. *Sloss v. Bailey*, 104-696.

SEC. 3820. Conditional offer.

The offer here contemplated is different from that provided for under Code § 3818 with reference to offer to confess judgment. That section contemplates an acceptance or refusal of the offer when made; but even if the offer is one of compromise in-

stead of confession of judgment, the party to whom it is made may so act during the period allowed for signifying acceptance as to bind himself by an election not to accept. *Benson v. Chicago & N. W. R. Co.*, 113-179.

CHAPTER 12.

OF RECEIVERS.

SECTION 3822. When and how appointed.

Where a corporation, organized to carry on a work of public improvement, had become insolvent and unable to prosecute the work so that a foreclosure of its franchises would follow and the value of its property would largely depreciate and the public interests be jeopardized, held, that the case was a proper one for the appointment of a receiver on the application of creditors. *Boston Inv. Co. v. Pacific Short Line Bridge Co.*, 104-311.

In such a case, held, that it was not error to order the sale of the property immediately upon the appointment and qualification of a receiver. *Ibid.*

And held, that an officer of the company who did not make his objection until after the appointment of the receiver and the sale of the property had been ordered was too late to be heard. *Ibid.*

The appointment of a receiver for a corporation limits the power of the corporation only to the extent that it is deprived of its property. *Weigen v. Council Bluffs Ins. Co.*, 104-410.

An order of court appointing the clerk

of the court as receiver, although improper, cannot be questioned in an action by the receiver to recover a debt owing to the insolvent debtor. *Metropolitan Nat. Bank v. Commercial State Bank*, 104-682.

One may be a receiver *de facto* although he has not given any bond, and the fact that where the clerk is appointed receiver he cannot properly approve a bond given by himself, will not render his acts as receiver invalid on collateral attack. *Ibid.*

The general rule seems to be that a receiver will be appointed in creditors' suits when the property is in danger of waste, almost as a matter of course. *Hirsch v. Israel*, 106-498.

A mortgagee may be entitled to the appointment of a receiver in case of levy on the mortgaged property under a claim senior to that of the mortgagee, it appearing that delay in sale of the property in due course of business would result in irreparable injury. Whether a receiver should be appointed is usually a matter within the sound judicial discretion of the court. *Valley Nat. Bank v. Claffin Co.*, 108-504

Where the only assets of a partnership consisted of property which has been used in carrying on the partnership, the purpose of which is ended, a receiver should be appointed to close up its affairs. *Taylor v. Wells*, 113-326.

A person agreed upon between the parties to a suit for dissolution of a partner-

ship as the substitute for the receiver already appointed is subject to the jurisdiction of the court and may be directed as to the distribution of the proceeds of the partnership property with reference to the payment of claims. *Johnson v. Johnson*, 132-457.

SEC. 3824. Power of.

When rights attach: The right to dispose of property is not affected by an application for the appointment of a receiver, and such right continues at least until the making of the order of appointment. *Smith v. Sioux City Nursery & Seed Co.*, 109-51.

Powers: The extent of a receiver's authority is always to be measured by the order of appointment, and such subsequent directions as may from time to time be given. The receiver must stand indifferent between the parties, though appointed on the application of one of them, and prudently preserve and protect the property entrusted to him as an officer of the court. *State Central Sav. Bank v. Fanning Ball-Bearing Chain Co.*, 118-698.

The object of the receiver's appointment should be kept in mind in adjusting his accounts, and the court will not approve of the dissipation of the property in useless expenses, not authorized by the order of appointment or subsequent direction. The tests to be applied are (1), was the act under investigation within the authority conferred by the order of court; (2), if so, was it performed with reference to the preservation of the estate as a man of ordinary sagacity and prudence would have performed it under like circumstances; (3), if without authority, was it beneficial to the estate. *Ibid.*

Subsequent instructions or orders of the court should be in writing and entered of record. *Ibid.*

A receiver may deposit the funds of the estate coming into his hands as such in a bank of good standing and repute, exercising that degree of prudence and care which is ordinarily exercised by reasonably cautious men in the transaction of their own business of like importance. *State v. Corn-ing State Savings Bank*, 128-597.

Such a deposit is not unlawful though made in a bank which is a creditor of the insolvent. *Ibid.*

A receiver has no authority to execute a negotiable instrument for the corporation of which he is receiver. *Peoria Steam Marble Works v. Hickey*, 110-276.

While the act of the receiver in buying in the property at his own sale is irregular and voidable, such a sale is not void, and cannot be collaterally attacked in the absence of fraud. *Groeltz v. Cole*, 128-340.

As a receiver is subject to the order of the court, and the property and funds

in his hands are in court, it is proper for the court to give direction to the receiver as to priority of claims. *Hart v. Nonpareil Printing & Publishing Co.*, 109-82.

In the proceedings by the state auditor under statutory provisions to wind up a banking corporation, the court may require the payment by stockholders (under their double liability as fixed by statute) of an assessment deemed reasonably sufficient to meet the liabilities of the bank, without waiting for the final distribution of the assets. *State v. Union Stock Yards State Bank*, 103-549.

If the statute makes stockholders liable to the extent of their respective shares of stock for debts due at the time of the dissolution of the corporation, a receiver appointed in an action brought to wind up the corporation may enforce this liability against the shareholders. Where the law contemplates a fund for distribution, such distribution is to be made by the receiver. *Ibid.*

Report: The setting aside of the receiver's final report after an order of discharge has been made is within the discretion of the trial court appointing the receiver. *Williams v. Des Moines Loan & Trust Co.*, 126-22.

The report may be set aside on the application of one of the creditors without requiring other creditors or the original parties to the litigation to be brought in. *Ibid.*

As party in litigation: The receiver of the property of a party to a litigation is not a necessary party to such litigation if no attempt is made thereby to interfere with the right of the receiver to the property intrusted to his care. *State Bank v. McElroy*, 106-258.

While the right of a receiver to appear in an action brought outside the state in which he was appointed is generally denied, yet he is frequently permitted to do so as a matter of comity. *Ibid.*

While it is the general rule that before suit is brought against the receiver, leave should be obtained from the court by which he was appointed, yet where the receiver has appeared and defended and invoked the affirmative judgment of the court, he cannot after an adverse decision, question the jurisdiction. *Manker v. Phoenix Loan Assn.*, 124-341.

Foreign receivers: A receiver appointed by a court of foreign jurisdiction cannot maintain suit in this state to enforce recovery of a claim due under the laws of his state against a citizen of this state. *Wyman v. Eaton*, 107-214.

A foreign receiver appointed as ancillary receiver in a proceeding in the courts of this state, and duly qualifying and giving bond as such, may maintain an action in this state. *Seymour v. Aultman*, 109-297.

While a foreign receiver will not be allowed as such, to bring action in the courts of this state, yet, if he has a right of action by assignment, and not merely by virtue of his appointment as receiver, he may maintain the action. *Hale v. Harris*, 112-372.

Costs: Fees and expenses of the receivership should be paid out of the funds in the hands of the receiver. *Harrington v. Foley*, 108-287.

The costs and expenses of the receivership are to be paid out of the property and such claims take priority over existing

liens thereon. *Gallagher v. Gingrich*, 105-237.

Where the object of receivership is to preserve the property pending a determination of the rights of the parties with reference thereto, the successful party availing himself of the fruits of litigation must take subject to the burden of costs of the receivership regardless of the litigation as between the parties; but one who attempts to establish a claim against the receivership cannot have the cost of the litigation satisfied out of the property itself, and on the other hand the receiver must look for his compensation to the portion of the fund properly brought within his jurisdiction or to the party on whose application the receivership was secured. *Frick v. Fritz*, 124-529.

An expert accountant employed by a receiver under authority of the court is subject to the direction of the receiver, and is not entitled to compensation for services performed in excess of or in opposition to the instructions of the receiver. *Grabbe v. Moffit*, 133-54.

SEC. 3825. Priority of liens—taxes. Persons having liens upon the property placed in the hands of a receiver shall, if there is a contest as to their priority, submit them to the court for determination. Provided, that when the assets of any corporation, partnership or person shall be placed in the hands of a receiver, all taxes against said corporation, partnership or person, whether levied under the laws of the state or ordinances of municipal corporations, shall be entitled to priority and be first paid in full by the receiver and claims therefor need not be filed with said receiver. [29 G. A., ch. 140, § 1.]

The receiver takes the debtor's property subject to the payment of all valid prior liens, but preferences already agreed upon at the time of the receiver's appointment, not based on existing liens, will be disregarded. *Smith v. Sioux City Nursery & Seed Co.*, 109-51.

A claim for false representations in the sale of corporate stock or for money paid in the purchase thereof by a minor on a contract which has been disaffirmed, or a

claim by an endorsee of such contract who is denied recovery thereon because of such disaffirmance, is not entitled to priority in a receivership proceedings. To sustain such priority there must be some showing that the estate has been augmented by the trust fund, or that it has been so benefited by the misappropriation of the fund that its removal will be without prejudice to creditors. *Seeley v. Seeley-Howe-LeVan Co.*, 128-294.

SEC. 3825-a. Claims entitled to priority. When the property of any person, partnership, company or corporation has been placed in the hands of a receiver for distribution, after the payment of all costs the following claims shall be entitled to priority of payment in the order named:

First. Taxes or other debts entitled to preference under the laws of the United States.

Second. Debts due or taxes assessed and levied for the benefit of the state, county or other municipal corporation in this state.

Third. Debts owing to employes for labor performed as defined by section four thousand and nineteen (4019) of the code. [31 G. A., ch. 156.]

CHAPTER 13.

OF SUMMARY PROCEEDINGS.

SECTION 3826. Judgments on motion.

This section has no application where one attorney seeks to compel another to pay over a share of the fees received by the latter under a contract between them. *Downs v. Davis*, 113-529.

The remedy under this section against an attorney is not limited to cases of bad faith; nor is the power of the court to act precluded by the fact that there is a controversy as to whether the relation of client and attorney existed when the money was received. *Union Bldg. & Loan Assn. v. Soderquist*, 115-695.

The fact that the client has a legal remedy for the recovery of the money does not affect the right of the court to entertain the proceeding. *Ibid.*

In this summary proceeding the court has the power to adjust any set-off which the attorney may have on account of fees or other charges due to him in connection with the proceeding in which he received the money in question, or as the result of any other services for which he has a lien on money of his client coming into his hands. *Ibid.*

The court may, upon proper showing render judgment summarily against the clerk for money received by him, or make such order as would protect the rights of parties to the fund. *Hornish v. Ringen Stove Co.*, 116-1.

SEC. 3830. No written pleadings.

The ground of jurisdiction is the misconduct of the officer. The court is simply called upon to enforce the plain duty of the attorney without the aid of a jury or

written pleadings, and the remedy relates exclusively to an accounting between the attorney and the client. *Downs v. Davis*, 113-529.

CHAPTER 14.

OF MOTIONS AND ORDERS.

SECTION 3834. Notice of motion.

An order in an *ex parte* proceeding can be made only after notice to the party

against whom the order is asked. *McConkie v. Landt*, 126-317.

SEC. 3842. "Order" defined.

Judges are authorized to make orders in vacation, which are defined to be directions made in writing, and when so made are

to be filed with the clerk. *In re Guardianship of Kimble*, 127-665.

SEC. 3843. May issue in vacation.

This provision authorizes the judge to direct the sheriff with reference to the issuance of a deed in pursuance of execu-

tion sale. *Hawkeye Ins. Co. v. Maxwell*, 119-672.

SEC. 3846. Filed and entered.

Orders made upon motion must be entered of record. *In re Manning's Estate*, 111 N. W. 409.

by a judge in vacation, such record is the best evidence of the order. *Bristol Sav. Bank v. Judd*, 116-26.

Where there is a record of an order made

CHAPTER 15.

OF SECURITY FOR COSTS.

SECTION 3847. When required. If a defendant, at any time before answering, shall make and file an affidavit stating that he has a good

defense in whole or in part, the plaintiff, if he is a non-resident of this state, or a private or foreign corporation, before any other proceedings in the action, must file in the clerk's office a bond, with sureties to be approved by the clerk, in an amount to be fixed by the court, for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other to which it may be carried, either to the defendant or to the officers of the court. The application for such security shall be by motion, filed with the case, and the facts supporting it must be shown by affidavits annexed thereto, which may be responded to by counter affidavits on or before the hearing of the motion, and each party shall file all his affidavits at once, and none thereafter. And a non-resident intervenor shall be required in like manner, to give a bond on motion of any party required to answer his petition of intervention. [C., '73, § 2927; R., §§ 3442, 3448.] [27 G. A., ch. 100, § 1.]

Failure to give security for costs as ordered does not preclude a non-resident defendant served with notice by publication only from applying to have the default set aside within the time allowed by the

statute therefor. *English v. Otis*, 125-555. Until amended by 27 G. A., ch. 100, § 1, the provisions of this section had no reference to a case of intervention by a non-resident. *Petty v. Hayden*, 115-212.

SEC. 3848. Dismissal for failure to furnish.

The court may extend the time given for filing bond for security for costs, and may treat a bond filed after the expiration of

the time fixed as filed in proper time, and may refuse to dismiss for the default. *Funk v. Church*, 132-1.

SEC. 3849. When plaintiff becomes non-resident. If the plaintiff or any intervenor in an action, after its institution and at any time before its final determination, becomes a non-resident of this state, he may be required to give security for costs in the manner provided in the preceding sections of this chapter. [C., '73, § 2929; R., § 3444.] [27 G. A., ch. 100, § 2.]

By 27 G. A., ch. 100, if the plaintiff after the institution of suit becomes a non-resident, he may be required to give se-

curity for costs although the defendant has already filed his answer. *Vohs v. Shorthill Co.*, 124-471.

SEC. 3851. Attorney or other officer not received.

An attorney is not competent as surety on appeal from a justice of the peace. *Valley Nat. Bank v. Garretson*, 104-655; *Hudson v. Smith*, 111-411.

The sufficiency of an administrator's

bond cannot be questioned in a collateral proceeding on the ground that it is signed by an attorney as surety. *Beresford v. American Coal Co.*, 124-34.

SEC. 3852. Judgment on bond rendered on motion.

The court has jurisdiction to render a judgment on a cost bond against the sureties although they are not parties to the action. Therefore, the sureties, though residents of another county, are not entitled on a motion for judgment against

them on the bond after judgment is rendered against the principal in the action, to have the proceeding transferred to the other county of which they are residents. *Rogers v. Weston Mut. Life Assn.*, 123-722.

CHAPTER 16.

OF COSTS.

SECTION 3853. Recoverable by successful party. Costs shall be recovered by the successful against the losing party; the losing party, however,

shall not be assessed with the cost of mileage of any witness for a distance of more than seventy miles from the place of trial, unless otherwise ordered by the court at the time of entering judgment. But where the party is successful as to a part of his demand, and fails as to part, unless the case is otherwise provided for, the court on rendering judgment may make an equitable apportionment of costs. [C., '73, § 2933; R., § 3449; C., '51, § 1811.] [32 G. A., ch. 166.]

The general rule is that costs shall be recovered by the successful party and the fact that a defense has been made in good faith and upon reasonable grounds does not relieve such defendant if unsuccessful from the payment of costs. *In re Proctor's Estate*, 103-232.

The judgment may provide for interest on costs and attorneys' fees as well as on the principal sum for which the judgment is rendered. *Hoyt v. Beach*, 104-257.

Unnecessary expenses of counsel in taking depositions made necessary by the act of the opposite party in giving notice to take depositions at different places, before such depositions were finally secured, cannot be taxed as costs. *Grapes v. Grapes*, 106-316.

The expense of making an abstract of the evidence for use in the trial court is not so taxable. *Ibid.*

Without any prayer therefor in the petition costs follow the judgment. *Mountain v. Low*, 107-403; *Reed v. Corrigan*, 114-638.

The provision of this section that costs shall be recovered by the successful against the losing party is applicable in a criminal case. *Hayes v. Clinton County*, 118-569.

Therefore in a criminal case, held that

SEC. 3854. Apportionment.

Where there was recovery by the plaintiff on his cause of action and by the defendant on his counterclaim and it appeared that the time occupied and the number of witnesses was substantially equal as to the two issues, held, that the costs should have been equally apportioned between the two parties. *White v. Ledbetter*, 104-71.

Where plaintiff brought suit to collect two distinct and separate claims, one upon a contract and the other upon a *quantum meruit* for extra work, and the sole question of fact actually litigated was the issue upon plaintiff's claim for extra work and the counterclaim of defendant for deduction therefrom of the amount due him for unfinished work, held that the costs should be apportioned. *Palmer v. McGinness*, 127-118.

While the plaintiff is successful as to several distinct and separate items of his claim and unsuccessful as to others, the case is one for the apportionment of costs. *Dorr v. Dudley*, 112 N. W. 203.

The fact that, in an action for equitable relief with reference to the conveyance of property, the plaintiff, although denied

the state was entitled to enforce as against the defendant, who is convicted, the payment of costs, and that an order made on appeal that the county pay the costs of defendant's printing, while it entitled defendant to recover the amount thus taxed against the county, did not authorize an assignment afterwards made to his attorney of the amount thus taxed, which would take priority over the claim of the state to subject such amount to the payment of the other costs in the case properly taxed to defendant. *Ibid.*

In an appeal from the action of the board of supervisors upon a petition for the construction of a ditch, costs may be taxed to the unsuccessful party, although by Code § 1941 it is required that the petitioners in such an application shall give bond to cover the costs. *In re Bradley*, 117-472.

The ordinary provision as to costs is applicable in a proceeding to probate a will where the proponent is claiming as beneficiary under the will and the heirs are contesting on the ground of testamentary incapacity and undue influence. *In re Hendershott's Estate*, 111 N. W. 969.

other relief, is given a judgment for the amount of money advanced by him under the contract, the repayment of which had been tendered by defendant, and as to which there had been no controversy, held not sufficient to require taxation of any portion of the costs to plaintiff. *Saunders v. King*, 119-291.

Where an action is properly commenced, the plaintiff is not to be held liable for all the costs although by reason of a change of circumstances pending trial a final judgment is necessarily rendered against him. *Mock v. Chalmers*, 121-411.

Defendant is not to be charged with all the costs in an action involving recovery on different items of charge when the judgment against him is wrong on one item only, and he is successful as to the others. *Krause v. Redman*, 112 N. W. 91.

An order as to apportionment of costs will not be interfered with on appeal unless it is clear that the trial court's discretion has been abused. Where there are various items of claim and counterclaim and plaintiff recovers under each count of his petition, it is not necessarily error to refuse to

tax a part of the costs against the plaintiff although the defendant has recovered on some items of counterclaim, it not appearing that any costs were incurred in sustaining the items of counterclaim which would not have been involved in the trial of the issues on the claims of the plaintiff. *Mayo v. Halley*, 124-675.

Where the intervenor was successful as to the principal issue raised by him, held that no portion of the costs should be taxed to him, although on another issue not involving any additional costs he was unsuccessful. *Jacobs v. Jacobs*, 130-10.

While the provisions of this section are applicable to the trial of appeals in con-

demnation proceedings, there is no provision for the assessment or apportionment of attorney's fees on such appeal, except as authorized by Code § 2007, which provides for the allowance of attorney's fees to the property owner appealing only when the damages awarded are at least equal to those allowed by the commissioners. *Wormely v. Mason City & Ft. D. R. Co.*, 120-684.

In a criminal case, there being but the simple issue of guilt or innocence on the part of the defendant, there is no authority for apportionment of costs between the state and the defendant. *Hayes v. Clinton County*, 118-569.

SEC. 3855. Collection.

The party against whom judgment is rendered is primarily liable for all costs to the parties entitled thereto, but the successful party has no right to enforce judgment for costs, except so far as such costs have been paid by him. *Hidy v. Hanson*, 116-8.

To entitle a claimant for costs to recover against the successful party, it is only necessary to show that such costs accrued

at the instance of such party, and cannot be collected of the other party. *Cole v. Gates Lumber Co.*, 131-189.

Where the referee and reporter in a case were selected by mutual agreement, held that each party was liable for his proportion of the compensation to such officers, and that neither was liable for the proportion taxed to the other. *Ibid.*

SEC. 3862. Clerk to tax.

A motion to retax costs may cover taxation of attorney's fees fixed by the court, for the clerk taxes these as well as other costs, although the court determines the amount. *Bankers Iowa State Bank v. Jordan*, 111-324.

The losing party may be taxed with costs for witnesses who were properly subpoenaed and attended the trial, although not called as witnesses, and it is immaterial that the attorney of the party subpoenaing such witnesses who have in fact been in

attendance subject to call has concealed from the other party the fact that such witnesses are in attendance. The concealment of the fact that such witnesses are in attendance is material only on the question whether they were subpoenaed in good faith with the purpose of calling them if necessary. *Parsons Band Cutter, etc. Co. v. Sciscoe*, 129-631.

The taxation of costs in a criminal case is conclusive as against the county. *Climie v. Appanoose County*, 125-292.

SEC. 3864. Retaxation.

A motion to retax costs may be considered without any proceedings to set aside, modify, or correct the judgment. The costs are properly no part of the judgment. *Fisher v. Burlington, C. R. & N. R. Co.*, 104-588.

A motion to retax costs covers error of the court in fixing the amount of attorney's fees to be allowed under Code § 3869 in action on written contract. *Bankers Iowa State Bank v. Jordan*, 111-324.

Error in allowance of attorney's fee on foreclosure of mortgage cannot be corrected by such motion since the right to the attorney's fee is determined by the judgment. *Perry v. Kasper*, 113-268.

It is only when a mistake has been made by the clerk in the taxation of costs that a motion to correct is essential before a review may be had on appeal. Where an attorney's fee has been taxed in the judg-

ment, the correctness of the action of the court may be reviewed without raising the question by motion to retax costs. *Ainsley v. American Mut. F. Ins. Co.*, 113-709.

Where costs are occasioned by the improper action of the court in reopening the case and receiving new evidence, the court on motion should retax the costs. *Hagerle v. Beebe*, 123-620.

Error in entering a judgment against a party for costs may be reviewed on appeal without a motion for retaxation. Such motion relates to the correctness of the taxation and not to the entry of judgment. *Guinn v. Iowa & St. L. R. Co.*, 125-301.

While an appeal is pending, the district court has no jurisdiction in an equity case to pass upon a motion to retax costs; and it cannot in any way control the costs to be taxed in the supreme court which are

incident to the appeal. *Berkey v. Thompson*, 126-394.

No doubt a party is bound to take notice of a motion to retax costs, made after final rendition of judgment, but there must be some limit to the time within which the final determination of the case with reference to the costs may be assailed in this manner, and after the costs have been fully paid and satisfied, there can no longer be any necessity for requiring the parties to be on their guard against motions of this character. After that time the court can

have jurisdiction to revise its action as to taxation of costs only upon notice to the party. *Iowa Sav. & L. Assn. v. Chase*, 118-51.

There is no provision in this section for rendering judgment against the successful party for the payment of costs which have been fully settled and satisfied by the other party. *Ibid.*

The right to recover costs is determined by the judgment, and not on motion to retax. *Fairbairn v. Dana*, 68-231.

SEC. 3869. Attorneys' fees—when taxed as costs—amount.

In an action on a written contract the court may fix the attorney's fees without taking evidence, and the clerk may tax up the amount fixed by the court with the other costs. The correctness of the taxation of the fee by the court may be raised in a motion for retaxation of costs. *Bankers Iowa State Bank v. Jordan*, 111-324.

Where several notes are sued on in the same action which might separately have been the basis of different actions, the attorney fee is to be fixed with reference to the several amounts, and not on the basis of the recovery of one lump sum. *Ibid.*

Attorney's fees may be allowed on the foreclosure of a note and mortgage, al-

though such fees have also been allowed in an action *in rem* in another state in which a portion only of the indebtedness was collected. *Smith v. Moore*, 112-60.

Where the attorney's fee is fixed and allowed by the judgment, it is not necessary to move to retax the costs in order to raise on appeal the correctness of the judgment in that respect. Such a fee is not necessarily a part of the judgment, but, as well as other costs, may be made so. *Ainsley v. American Mut. F. Ins. Co.*, 113-709.

The "return day" is the second day of the term, or default day. *Bankers Iowa State Bank v. Jordan*, 111-324.

SEC. 3875. Of reporters and clerks for transcript.

The translation of the shorthand reporter's notes, which is necessary only for the presentation of the appeal in the supreme

court, is not to be taxed as costs in the district court. *Berkey v. Thompson*, 126-394.

TITLE XIX.

OF ATTACHMENTS, GARNISHMENT, EXECUTIONS, AND SUPPLEMENTARY PROCEEDINGS.

CHAPTER 1.

OF ATTACHMENTS.

SECTION 3878. Grounds—not stated in alternative.

The statute permits amendments of the petition to show that a legal cause of attachment existed at the time the writ was issued. *Citizens' Nat. Bank v. Converse*, 105-669.

An attachment is a summary proceeding, and before a writ is issued on an application therefor; one or more of the statutory grounds must be stated and sworn to. An allegation or statement which does not substantially comply with the statutory requirements is insufficient. *Upp v. Neuhring*, 127-713.

In determining the right to sue out an attachment, the question as to the amount due on the claim has reference to the claim itself rather than balance of indebtedness as between the parties, and the attachment may be rightfully sued out, although it shall afterwards appear that plaintiff is not entitled to judgment against the defendant. *Smeaton v. Cole*, 120-368.

Malice and want of probable cause will not necessarily be inferred from a finding, as the result of a counterclaim, that nothing was actually due the plaintiff. In such a case the writ has been wrongfully issued, but this alone does not necessarily entitle the defendant to the recovery of damages on the bond. *Ibid.*

The mere fact that one who is indebted is about to leave the state is not ground

for an attachment. To furnish such ground it must appear that he was about to remove his property from the state without leaving sufficient remaining for the payment of his debts, or that he was about to remove permanently from the state and refused to pay or secure plaintiff's debts. *Tylor v. Bowen*, 124-452.

An allegation that the defendant is about to remove permanently out of the state is not sufficient to authorize the issuance of an attachment unless it is also made to appear that he has refused to pay or secure the debt due to the plaintiff. *Upp v. Neuhring*, 127-713.

The statement that the defendant is about to leave the state and defraud his creditors cannot be construed as an allegation that he is about to remove his property out of the state without leaving sufficient remaining for the payment of his debts. *Ibid.*

It is sufficient to establish fraud as to sales or conveyances of the debtor's property that they were made without intent to hinder, delay or defraud his creditors. *Meyer v. Baird*, 120-597.

A landlord, claiming that a sale by a tenant of exempt property is fraudulent cannot proceed by landlord's attachment, but only under the general provisions for attachment. *Hillman v. Brigham*, 110-220.

SEC. 3883. For debts not due—grounds.

The obligation to pay rent is created when a valid lease is entered into between the parties, and ordinarily nothing but time

is wanting to fix an absolute indebtedness. *Brown v. Cairns*, 107-727.

SEC. 3887. Action on bond.

Independently of statute: An action will lie for the wrongful and malicious institution of a civil suit where an attachment has been issued as auxiliary to the main action, and such action need not be by counterclaim on the attachment bond, nor need it be on the bond. *Carraker v. Allen*, 112-168.

The cause of action for wrongful attachment irrespective of the bond, accrues when the property is taken, or at least when it is sold under the writ. *Smyth v. Peters Shoe Co.*, 111-388.

A counterclaim for wrongfully suing out the attachment but not founded on the attachment bond cannot be interposed in

the original case. *Tyler v. Bowen*, 124-452.

But the abandonment of such a counterclaim will not prevent the interpretation of a proper counterclaim on the bond. *Ibid.*

In an action for wrongful suing out of an attachment, not brought upon the bond, plaintiff must establish both want of probable cause and malice. *Richards v. Jewett*, 118-629.

In an action for malicious prosecution in wrongfully suing out an attachment, plaintiff must not only show that the action complained of was wrongfully brought, *i. e.*, without probable cause, but also that it was malicious. The malice required may be inferred by the jury from want of probable cause, but if circumstances are proved showing reasonable ground of belief as to the existence of a cause of action, the question of malice is for the jury. *Connelly v. White*, 122-391.

Advice of counsel is not sufficient to rebut the presumption of malice from want of probable cause, if the facts are not fully and fairly presented to the counsel whose advice has been taken. *Ibid.*

Want of ground: It will not render the attachment wrongful that it is not sued out against the principal debtor who is insolvent, although there is a surety who is solvent but who is not made party to the action. *Richardson v. Probst*, 103-241.

On a question whether an attachment was wrongfully sued out on the ground that the debtor was about to dispose of his property, mortgages by the debtor subsequent to the levy but on the same day, and the fact that another creditor telegraphed to attaching plaintiff that the debtor was sure to fail, etc., were held admissible. *Citizens' Nat. Bank v. Converse*, 105-669.

The question as to reasonable cause of belief relates to the ground upon which the attachment was issued. *Ringen Stove Co. v. Bowers*, 109-175.

If the ground of the attachment is true in point of fact, or if the attaching plaintiff had reasonable grounds for believing the fact to be true, there can be no recovery of damages on the attachment bond. *Lord, Owen & Co. v. Wood*, 120-303.

The mere finding that plaintiff is not entitled to judgment for any amount, by reason of the interposition of a counterclaim by the defendant, does not show that the suing out of the attachment was malicious and without probable cause. *Smeaton v. Cole*, 120-368.

Right to recover: Where two writs of attachment were sued out by different creditors against the same debtor, held that release of liability of one creditor would not discharge the other. *Miller v. Beck*, 108-575.

Assignment of claim on bond: The statutory provision that a claim for wrongful attachment may be interposed in the

attachment proceeding does not authorize the defendant in an action on a judgment, to set up by way of counterclaim a claim which he has acquired by assignment after the bringing of the action, for damages suffered by his assignor by the suing out of an attachment. *Morrison Mfg. Co. v. Rimerman*, 127-719.

Measure of damages: Where sale of the property at auction was made within a few weeks after the levy of the attachment, held that evidence as to what the property sold for, the number of bidders, and the offers made at the time the goods were exposed for sale was admissible. *Citizens' Nat. Bank v. Converse*, 105-669.

The mere issuance and levy of a writ of attachment upon real estate, without other evidence of actual injury, will not sustain a recovery of substantial damages on the bond. *New Sharon Creamery Co. v. Knowlton*, 132-672.

An attachment creditor is not liable in damages in case of wrongful suing out of an attachment for the depreciation in value of real estate levied on which occurs while the attachment is in force. The mere issuing and levying of a writ of attachment on real estate cannot ordinarily cause it to depreciate in value. *Tisdale v. Major*, 106-1.

Mental suffering resulting from the wrongful and malicious suing out and levying of a writ of attachment does not afford ground for recovery of compensatory damages. *Ibid.*

A second attaching creditor who does not cause the seizure of the property (which remains in the custody of the officer under the prior attachment in pursuance of which it is sold) is not usually liable for more than interest on the surplus of the proceeds over the amount of the first attachment debt. Liability in such case is usually no more than it would have been if the sheriff in possession under the first writ had been garnished for the surplus. *Emerson v. Converse*, 106-330.

If it appears by the finding of the jury that the attachment was properly issued, error in the charge of the court with reference to the damages to be assessed in the event that attachment was wrongful, will be error without prejudice. *Crowell v. McGoan*, 106-266.

It is error to instruct the jury with reference to damages by interruption or destruction of trade due to seizure of stock of goods under attachment where it appears that the goods levied on were not of such a nature as that their seizure could materially affect the trade or interrupt the business; and where it appears that by reason of such instruction the jury has made a large allowance of exemplary damages the judgment on the verdict will be reversed. *Hooker v. Chittenden*, 106-321.

In an action for wrongful attachment not brought on the bond the plaintiff is entitled to recover at least nominal damages if the attachment was sued out maliciously and without probable cause, but he is not entitled to recover for injuries to his credit. *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127-153.

The right to recover damages for injury to credit is to be determined by the law of the state where the action is brought and not by that of the state in which the cause of action arises. *Ibid.*

In determining the damages to be recovered against an attaching creditor who has wrongfully caused a stock of goods to be levied off, which the owner was engaged in selling in pursuance of his regular business, the owner, in recovering for loss of time due to the wrongful attachment, must be limited to the value of his time in the particular business in which he was engaged. *Lord v. Wood*, 120-303.

The fact that the attachment defendant objects to the sale of attached property, under the provisions of 27 G. A., chap. 101, relating to the sale of such property when it is in danger of serious and immediate waste and decay, or when the keeping of the same will necessarily be attended with such expense as greatly to depreciate the amount of proceeds to be realized therefrom, such objection being on the ground that the attachment is unlawful, does not estop him from afterwards claiming, by way of damages for unlawful attachment, that the property has been injured by reason of depreciation in its value while held by the sheriff under his levy. *Ibid.*

The measure of damages is necessarily the same whether the action be upon the bond or on the case independent of the bond. In neither action can the plaintiff recover for injury to credit; and this rule will be applied in the courts of this state regardless of where the cause of action arose. *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127-153.

Time and money expended in securing the release of the property by the execution of a delivery bond are proper elements of damage in an action on the bond. *Tullis v. McClary*, 128-493.

SEC. 3888. Remedy for falsely suing out.

The assignee for the benefit of creditors, to whom the right of action on an attachment bond has been transferred, may inter-

SEC. 3889. Writ to sheriff.

A writ of attachment from a district or

In determining the damages under a counterclaim on the attachment bond, it appearing that the attachment was sued out for the purpose of harassing and annoying the defendant and that the claim was not made in good faith, the jury has wide discretion. *Tyler v. Bowen*, 124-452.

Attorney's fees: It is the defendant in the judgment who recovers the attorney's fees provided for in this section, and they are to be taxed in his favor as costs. The attorney cannot recover these fees in an independent suit. The defendant in the attachment has the right to satisfy the judgment for attorney's fees, and if the attorney collects such fees he is responsible to his client. *Schnitker v. Schnitker*, 109-349.

The only authority given the court to allow attorney's fees in the action on an attachment bond, is to allow a reasonable fee for the prosecution of the action on the bond in the district court. That section does not permit the court to allow an additional amount for prosecuting an appeal in the supreme court. The allowance is to be limited to the fee earned at the time final judgment is rendered. Nor is there any authority for allowance by the supreme court of a fee for the trial of the appeal in that court. *Kilmer v. Gallaher*, 120-575.

The district court, in fixing the attorney's fee, is not bound to allow such fee as the testimony may show to be reasonable, but may, guided by his own judgment, allow what is a reasonable fee after hearing the case tried. *Ibid.*

Where the action in which the attachment was procured was to recover an indebtedness which did not in fact exist, and the want of probable cause relied upon consists of that fact, fees of counsel for defending the action and establishing the absence of any cause of action are properly included in the recovery for malicious prosecution. *Connelly v. White*, 122-391.

Costs: It is not necessary in a counterclaim on a bond to ask recovery of costs. The costs of levying the writ and selling the property, which are unnecessary if the writ of attachment is wrongfully sued out, are to be taxed in such case, like the attorney's fees, by the court. *Ringgen Stove Co. v. Bowers*, 109-175.

vene in the original action, and set up a claim upon the bond. *Ringgen Stove Co. v. Bowers*, 109-175.

superior court cannot be directed to a constable. *Freeman v. Lind*, 112-39.

SEC. 3891. Property attached.

By an attachment and levy the plaintiff obtains a right to the property levied upon paramount to that of an assignee in insolvency subsequently appointed. *State Bank v. McElroy*, 106-258.

The attaching creditor of an agent cannot acquire a lien upon funds of the prin-

cipal deposited in a bank in the name of the agent, simply as a matter of convenience. *Anderson v. Taylor*, 131-485.

An officer may amend his return so as to show the facts. *Foster v. Davenport*, 109-329.

SEC. 3894. Corporation stock.

Indorsements by the officer on stubs of certificates of stock are ineffectual to constitute a levy. *Croft v. Colfax E. L. & P. Co.*, 113-455.

A notice to the proper officer of the cor-

poration may be sufficient to constitute a levy, although it constitutes also notice to the debtor and occupant of real estate. *Ibid.*

SEC. 3895. Judgments—money—things in action.

Promissory notes are property, and are capable of manual delivery, and the proper method for attaching such notes is for the officer to take them into his actual

possession. Garnishment in such case is not the only method of effecting an attachment. *Nordyke v. Charlton*, 108-414.

SEC. 3896. Property in possession of another.

Property fraudulently transferred may be levied on by an attaching creditor. The creditor is not limited to his remedy by

garnishment of the purchaser. *Jordan v. Crickett*, 123-576.

SEC. 3898. When property bound.

Where an attachment was levied on all the goods, wares, merchandise, furniture and fixtures contained in a certain building belonging to the defendant company, held, that such levy was sufficient to cover a cash register in use on the premises together with other furniture and fixtures. *National Cash Register Co. v. Broeksmit*, 103-271.

A levy on books of account does not create any lien on the indebtedness evidenced by such books. The debts due the owner of the books can be reached only by garnishment. *Cedar Rapids Pump Co. v. Miller*, 105-674.

The levy of a writ of attachment on the books of account of a debtor does not create an inchoate lien on the debate included therein. *Smith v. Sioux City Nursery & Seed Co.*, 109-51.

There is a distinction between the return of a levy and the notice of a levy. When the property is in custody under a levy, a second attachment may be levied without overt act. The officer can treat the property as seized and make his levy accordingly. *German Savings Bank v. Oatmeal Co.*, 108-380.

SEC. 3899. Real property—lien—entry on incumbrance book.

The creditor must show that his remedy at law would not be adequate before a proceeding in equity can be maintained. *Hill v. Denneny*, 106-726.

By attaching the debtor's property, a creditor abandons any equitable lien he may have thereon. *City National Bank v. Crahan*, 112 N. W. 793.

The attaching creditor takes no more than the interest of the debtor, and does not acquire priority over the equitable lien of another on the property. *Ibid.*

These provisions relating to the attachment of equitable interests in real property, were enacted for the purpose of giving constructive notice for the protection of a creditor from subsequent conveyances, and for no other purpose. Therefore the levy of an attachment on an equitable interest, which does not appear of record, does not impart constructive notice to a vendee or mortgagee of the person holding the legal title. *Byers v. McEniry*, 117-499.

SEC. 3900. Notice—return.

Where a defendant has elected to counterclaim for damages on account of wrongful suing out of an attachment, he

cannot be heard to say that there was no valid levy on account of want of notice. *Schoonover v. Osborne*, 108-453.

Notice to the person in possession, who is not the attachment defendant, is not for the benefit of the defendant but the party in possession, and if such party in possession has actual notice, and receipts for the property, he cannot object for want of the notice required by statute. *Foster v. Davenport*, 109-329.

An officer may amend his return so as to show the facts. *Ibid.*

The notice provided for is not essential

SEC. 3901. Examination of defendant.

One who institutes proceedings auxiliary to an attachment for the purpose of securing the enforcement thereof, adopts the affidavit made by his attorney as the basis of such proceeding, and the court acquires jurisdiction. *Carpenter v. Clements*, Judge, 122-294.

to the levy itself, but is for the purpose of enabling the property owner in apt time to guard any interest he may have in the property attached. Therefore held that where the levy was duly made it took priority over a mortgage executed before notice was served, the service of notice having been within a reasonable time. *Schoonover v. Osborne*, 111-140. *Stockley v. Wilde*, 122-400.

Even if there is not a sufficient verification of the application, an order made thereon is not without jurisdiction, and the party complaining must raise the defect at the proper time and in the proper manner. *Ibid.*

SEC. 3905. Mortgaged personal property.

An attachment levied on chattel property covered by mortgage, such levy being made with a view to contest the validity of the mortgage, becomes an apparent lien upon all the property seized and not merely upon sufficient of said property to satisfy the

mortgage; and if the mortgage is found to be invalid the attachment is effectual. In such case a junior mortgagee has no preference as to any part of the property necessary to pay the attachment claims. *Geiershofer v. Nupuf*, 106-374.

SEC. 3906. Indemnifying bond.

See notes under Code § 3991 in this

Supplement.

SEC. 3907. Bond to discharge.

As the release bond is for the protection of the plaintiff the object of the requirement for its approval must be to insure plaintiff security corresponding in value to that which might have been attained by the levy of the attachment. It is a condition to the acceptance of the bond by the officer without which in the absence of a waiver, the attachment is not dissolved; and without approval the bond cannot be deemed statutory, whatever its efficacy as a common law obligation. If formal approval is waived and the bond is accepted as a compliance with the statute, the sureties are bound. *Fidelity & Deposit Co. v. Bowen*, 123-356.

The surety on such bond does not become bound to indemnify the surety on a subsequent appeal bond, where the appeal bond is not given in the interest or on the procurement of the sureties on the release bond. *Ibid.*

The liability of the surety on a bond to discharge an attachment is not affected by failure of the attaching creditor to give notice of his intention to appeal from a judgment discharging the attachment as provided for in Code § 3931, if in fact the officer does not release the discharged property until the appeal has been taken. *Sheldon v. Bigelow*, 124-566.

SEC. 3909. Delivery bond.

The duty to deliver devolves upon the person giving the bond within twenty days after judgment is rendered against defendant in the original action. Even if

there is no order for condemnation of the attached property the action on the bond may be maintained. *Valley Bank v. Shenandoah Nat. Bank*, 109-43.

SEC. 3912. Sale of perishable property.

After a sale of property levied on as perishable one who intervenes in the attachment proceeding under a claim of

right to the property is limited to a recovery of the proceeds of the sale. *Paris v. Sheppard*, 125-255.

SEC. 3912-a. Repeal—perishable property—when to be sold. That section three thousand nine hundred and twelve (3912) of the code be repealed and the following enacted in lieu thereof:

When the sheriff thinks the property attached in danger of serious and immediate waste and decay, or when the keeping of the same will necessarily be attended with such expense as greatly to depreciate the amount of proceeds to be realized therefrom, or when the plaintiff makes affidavit to that effect, the sheriff may summon three persons having the qualifications of jurors to examine the same. The sheriff shall give the defendant, if within the county, three days' notice of such hearing, and he may appear before such jury and have a personal hearing. If they are of the opinion that the property requires soon to be disposed of, they shall specify in writing a day beyond which they do not deem it prudent that it should be kept in the hands of the sheriff. If such day occurs before the trial day, he shall thereupon give the same notice as for sale of goods on execution, and for the same length of time, unless the condition of the property renders a more immediate sale necessary. The sale shall be made accordingly. If the defendant gives his written consent, such sale may be made without such finding. [27 G. A., ch. 101, § 1.]

SEC. 3924. Judgment—satisfied from proceeds.

Where plaintiff moved for an order for sale of attached property or for the disposition of the proceeds of the same, which motion was denied, held that the ruling

operated to discharge the attached property and included the rights of parties thereto under the judgment. *Second Nat. Bank v. Haerling*, 106-505.

SEC. 3926. Expenses for keeping.

When the sheriff places the property in the hands of another for safe keeping, that other becomes the agent of the sheriff, and has no claim which can be taxed as costs. In such case the plaintiff in attachment is not jointly responsible with the sheriff to the person who keeps the property under the sheriff's direction for the ex-

pense incident to its care. There is no privity in such a case between the custodian and the plaintiff in attachment. *Hurd v. Ladner*, 110-263.

It would be otherwise if the property were taken into possession by the officer under a mortgage clause in a lease, and not in virtue of writ of attachment. *Ibid.*

SEC. 3928. Intervention.

An intervention under this section is in time, if applied for after the sale of the property and deposit of the proceeds with the clerk under order of the court, to abide further determination of the rights of the parties. *Petty v. Hayden*, 115-212.

The intervenor who has given a delivery bond may contest recovery on the bond on the ground that the property did not belong to the attachment defendant, and the judgment in the principal action for a sale of the property will not be an adjudication in the intervention proceedings, but the in-

tervention will not suspend the bar of limitations on the right to sue on the bond. *Valley Bank v. Shenandoah Nat. Bank*, 109-43.

One who intervenes in an attachment proceeding claiming the property, with knowledge that it has been sold as perishable and that the proceeds are in the hands of the sheriff, thereby elects not to recover the value of the property and is entitled only to the proceeds. *Paris v. Sheppard*, 125-255.

SEC. 3929. Discharge on motion.

The defendant may stand upon his motion to discharge the attachment on account of want of notice, but if he elects to counterclaim for damages on account of wrongful levy he cannot insist on failure to give notice of the levy. *Schoonover v. Osborne*, 108-453.

This section provides only for discharge of attached property on motion before the trial, and has no application where there has been a final adjudication and a sale under special execution. *Clark v. Tull*, 113-143.

SEC. 3931. Time for appeal from order of discharge.

The object of announcing intention to appeal from an order discharging the attachment is simply to require the officer to retain possession of the property until such appeal is taken, and if in fact the

possession is thus retained, failure to give notice of intention does not render the appeal ineffectual. *Sheldon v. Bigelow*, 124-566.

SEC. 3933. Liberal construction—amendments.

Although a new ground of attachment may under some circumstances be properly set up in an amendment to the petition, yet, where such amendment was not filed until

during the trial, held that the court did not abuse its discretion in striking such amendment from the files on motion. *Emerson v. Converse*, 106-330.

SEC. 3934. Sheriff—constables.

A writ of attachment, directed to a constable from a district or superior court,

is not valid. *Freeman v. Lind*, 112-39.

SEC. 3934-a. Certificate of release. When real estate or an equitable interest therein is attached, in any county, other than that in which the action is commenced, or is pending, and the action is dismissed, or the attachment is dissolved and discharged, or satisfied the clerk of the court of the county wherein such action is pending must issue a certificate directed to the clerk of the court in which the land is situated giving date of release and setting forth a true copy of the order or release and he shall be allowed as compensation for such service the sum of fifty cents, to be taxed as a part of the costs in the case. [30 G. A., ch. 123, § 1.]

SEC. 3934-b. Filed and recorded. The clerk of the court receiving such certificate shall file and record the same upon the margin of the incumbrance book at place where the original entry of attachment is found. [30 G. A., ch. 123, § 2.]

CHAPTER 2.**OF GARNISHMENT.****SECTION 3935. How effected—notice.**

Debts due an attachment debtor can be reached only by garnishment, and not by levying the writ of attachment upon the books of account in which such debts are recorded. *Cedar Rapids Pump Co. v. Miller*, 105-674; *Smith v. Sioux City Nursery & Seed Co.*, 109-51.

An assignment of a debt is good as against a garnishment. *Kuhnes v. Cahill*, 128-594.

A garnishee having notice of an assignment of a chose in action from the defendant, his creditor, to a third person, should set up that fact in defense, and not doing so he cannot rely upon judgment in the garnishment proceeding as a defense against the assignee of the chose in action. *Seymour v. Aultman*, 109-297.

Garnishment of an assignee for the benefit of creditors, who has taken possession of notes and book accounts of the debtor before the assignment has become effectual, will take priority over such assignment. *Mills v. Miller*, 109-688.

The garnishing creditor acquires no higher right to a fund sought to be reached by garnishment than had the garnishee at the time of the garnishment. Thus where a bank was garnished for funds of a depositor, held that as against the garnishing creditor it might be shown that the fund sought to be reached consisted of

money belonging to an undisclosed principal, deposited by the debtor as his agent, but in his own name. *Packer v. Crary*, 121-388.

The execution creditor cannot by garnishment get any higher or better right as against the garnishee than the execution defendant himself at that time possessed. *Streeter v. Gleason*, 120-703.

The liability of the garnishee cannot be presumed; it must be affirmatively shown. To charge him upon his own answer his liability must clearly appear, and, if there be any reasonable doubt of such liability, he should be discharged. *Ibid.*

Where a garnishee had, after the filing of one answer admitting his liability, filed a second answer in which such liability was sufficiently denied, held that it was error to render judgment against him. *Ibid.*

It is the garnishee's duty to hold the property in the condition in which it was at the time of garnishment, and failing to do so, he is guilty of conversion, and judgment may be rendered against him for the amount of the claim. *Dunning v. Bailey*, 120-729.

Where appearance on the day specified in the notice is waived, judgment should not be rendered against the garnishee

without notice to him as to the time, when and place where he may answer. *Bower v. Hansen*, 129-148.

Default may be entered against the garnishee who fails to personally appear and answer in response to notice, unless his answers have been taken by the sheriff.

SEC. 3936. Of officer, judgment debtor, executor, municipal corporation.

The assignee of a judgment cannot complain as against an officer on account of a levy on and sale of a judgment subject to the assignment on an execution against the assignor. *Baker v. Mills*, 108-490.

An administrator cannot be garnished for a portion of the property of the estate to which he is entitled personally on a claim due by him. *Cassady v. Grimmelman*, 108-695.

An administrator who has been garnished on a claim against the estate and defeats such garnishment by securing a settlement and discharge as administrator without payment or disposition of such claim renders himself individually liable. *Geiger v. Gage*, 111 N. W. 805.

SEC. 3943. Failure to appear or answer—cause shown.

A much slighter showing of diligence or excuse is needed to warrant the setting aside of a default against a garnishee than

Lingenfelter v. Iowa Telephone Co., 132-211.

A garnishee is not bound to disclose at his peril what has been done with the property in the purchase of which the indebtedness sought to be reached was created. *Bitzer v. Washburn*, 121-462.

There is no provision for the garnishment of a guardian, and his immunity continues after the death of his ward until his guardianship has been settled. *Pugh v. Jones*, 112 N. W. 225.

The municipal corporation alone can plead exemption from garnishment proceedings. *Tone v. Shankland*, 110-525.

An action under Code § 4087 to subject an equitable interest to execution may have the effect of a garnishment proceeding, but is not controlled by the provisions of this section with reference to the garnishment of a municipal corporation. *Ibid.*

in ordinary cases of default. *Bower v. Hansen*, 129-148.

SEC. 3945. Answer controverted.

The trial of the issue of fact raised by the answer of a garnishee which is con-

troverted, should be by ordinary proceedings. *Neff v. Manuel*, 121-706.

SEC. 3946. Judgment.

No judgment can properly be rendered against a garnishee until judgment has been rendered against the defendant. *Hawarden State Bank v. Hessler*, 131-691.

To charge the garnishee on his answer alone, no issue having been raised with reference thereto and no trial had, there must be in it a clear admission of a debt due to, or the possession of money or attachable property of the defendant. If the answer does not authorize a judgment under such a rule the plaintiff should take issue on the answer, so that a trial may be had and the rights of the parties determined. *Kerr v. Edington*, 106-68.

Where the answer of the garnishee is not controverted, his liability is to be determined as a matter of law from the statements of the answer alone without regard to the facts which may be brought to the attention of the court in another proceeding to which the garnishee is not a party. *Bolton v. Bailey*, 122-729.

Where a fund is deposited for the purpose of paying a judgment, the one receiving it for that purpose may be held

liable for its payment in a garnishee proceeding brought under the judgment. *Lingenfelter v. Iowa Telephone Co.*, 132-211.

Garnishment does not create a lien on the property in the hands of the garnishee, but gives the plaintiff a specific right over and above that of a mere general creditor, to the indebtedness of property, for the payment of his claim. *Bowen v. Port Huron E. & T. Co.*, 109-255.

From the time of the service of notice, the garnishee is liable to plaintiff for the value of defendant's property in his hands subject to execution, and to the amount of all debts owing by him to the defendant and a judgment against the garnishee is *prima facie* a satisfaction *pro tanto* of plaintiff's claim against the defendant, and precludes subsequent proceedings by plaintiff against the defendant to that extent without a showing that plaintiff has obtained no valuable right by virtue of the garnishment, or has released the garnishee with the defendant's consent. *Ibid.*

On dismissal of garnishment proceedings, the garnishee is relieved of any liability sought to be enforced under such proceeding. *O'Melia v. Hoffmeyer*, 119-444.

That the garnishee has never been served with notice, or that the *situs* of the debt is in another state, may be urged as

grounds for discharge of the garnishee. The right to ask for a discharge under this section cannot be tested by earlier decisions of the court under a statute not containing the provision as to discharge "for any other reason" than exemption from execution. *Greaves v. Posner*, 111-651.

SEC. 3947. Notice to defendant. Judgment against the garnishee shall not be entered until the principal defendant shall have had ten days' notice of the garnishment proceedings, to be served in the same manner as original notices. [18 G. A., ch. 58; C., '73, § 2975; R., § 3195; C., '51, § 1861.] [27 G. A., ch. 102, § 1.]

SEC. 3948. Pleading by defendant—discharge of garnishee. The defendant in the main action may, by a suitable pleading filed in the garnishment proceedings, set up facts showing that the debt or the property with which it is sought to charge the garnishee is exempt from execution, or for any other reason is not liable for plaintiff's claim, and if issue thereon be joined by the plaintiff, it shall be tried with the issues as to the garnishee's liability. If such debt or property, or any part thereof, is found to be thus exempt or not liable, the garnishee shall be discharged as to that part which is exempt or not liable. [27 G. A., ch. 103, § 1.]

SEC. 3950. Negotiable paper.

It is a general rule that the indorsee for value before maturity of a negotiable promissory note takes it free from any previous garnishment of which he did not

have notice, but the attachment may be effected by levy upon the note directly. *Nordyke v. Charlton*, 108-414.

SEC. 3953. Appeal.

Proceedings by garnishment are discharged by reversal on appeal of the judgment under which the garnishment was

issued, and are not restored by the recovery of another judgment on a new trial. *Decatur v. Simpson*, 119-488.

CHAPTER 3.

OF EXECUTIONS.

SECTION 3954. Of judgments or orders—attachments for contempt.

Where a judgment has been rendered by the court, or a confession of judgment has been filed on which the clerk should have entered judgment, the failure of the clerk may be cured by an order of the court for the entry of judgment *nunc pro tunc*, so as to support an execution which

is issued in the meantime. *Doughty v. Meek*, 105-16.

Obedience to a self-executing judgment may be coerced by attachment as for contempt. *State v. Cahill*, 131-286.

SEC. 3955. Within what time—to other counties—but one. Executions may issue at any time before the judgment is barred by the statute of limitations; and upon those in the district and supreme courts, into any county which the party ordering may direct, but only one shall be in existence at the same time. When the plaintiff in judgment shall file in any court in which a judgment has been entered an affidavit made by himself, his agent or attorney, or by the officer to whom the execution was issued, that an outstanding execution has been lost or destroyed, the clerk of such court may issue a duplicate execution as of the date of the lost execution,

which shall have the same force and effect as the original execution, and any levy made under the execution so lost shall have the same force and effect under the duplicate execution as under the original. When the lost execution shall have expired by limitation and such affidavit is filed, an execution may issue as it might if such lost execution had been duly returned. [C., '73, §§ 3025, 3027; R., §§ 3246, 3248; C., '51, § 1888.] [32 G. A., ch. 167.]

The filing of a transcript of a judgment in another county than that in which it was rendered does not make the judgment a judgment in the county where such transcript is filed, and execution can only issue from the county where the judgment was rendered. *Brunk v. Moulton Bank*, 121-14.

This section relates only to general executions, and does not render it improper for a court decreeing foreclosure of a chattel mortgage to direct a special execution into another county for the sale of a portion of the mortgaged property there situated. *King v. Nelson*, 120-606.

SEC. 3958. Entries in another county—duplicate returns. In case execution is issued to a county other than that in which judgment is rendered, and is levied upon real estate in such county, an entry thereof shall be made upon the incumbrance book of that county by the officer making it, showing the same particulars as are required in case of the attachment of real estate, which shall be bound from the time of such entry. And if real estate is sold under said execution said officer shall make return thereof in duplicate, one of which shall be appended to the execution and returned to the court from which it is issued, the other with a copy of the execution to the district court of the county in which said real estate is situated, which shall be filed by the clerk who shall make entries thereof in the sale book in the same manner as if such judgment had been rendered and execution issued from said court. [C., '73, § 3031; R., § 3249.] [28 G. A., ch. 122, § 1.]

Transcripts of judgments in a superior court cannot be first filed in the district court of another county than that in which the superior court is held, but can only

be transferred to another county after having been filed in the district court of that county. *Drahos v. Kopesky*, 132-497.

SEC. 3964. Officer to receipt for—return.

The return of the execution does not affect the validity of garnishment proceed-

ings already commenced thereunder. *Dunham v. Bentley*, 103-136.

SEC. 3965. Indorsement by officer.

Parol evidence is admissible to show

facts not appearing by the officer's return. *Weaver v. Stacy*, 105-657.

SEC. 3968. Levy—how made and indorsed.

A creditor who has secured a levy on personal property cannot subsequently release such levy and rely on other property

to the prejudice of other creditors. *Valley Nat. Bank v. Des Moines Nat. Bank*, 116-541.

SEC. 3970. What property—no lien on personalty.

Where a remainder is contingent as to who shall take the property thereunder, it is not, before becoming vested, the subject of levy and sale under execution. *Taylor v. Taylor*, 118-407.

A contingent interest in land is not subject to levy and sale under execution. *McDonald v. Bayard Sav. Bank*, 123-413.

It constitutes fraud for the judgment creditor to insist on the sale of an entire

tract of land which is reasonably capable of subdivision, for a trifling sum. An enormous disproportion between the value of the property sold and the sum to be raised is in itself ground from which the inference of fraud may be drawn. *Fortin v. Sedgwick*, 133-233.

Where a contract to convey has not become binding upon the vendee, and it is still optional with him whether or not

he will accept conveyance thereunder, the vendor remains the owner of the land, and it is subject to execution for his debts. *Sheehy v. Scott*, 128-551.

The interest of a purchaser in land under a contract to convey may be levied on under execution. *Thomassen v. De Goey*, 133-278.

SEC. 3972. Persons indebted may pay.

The attorney for the judgment defendant being entrusted by his client with funds with which to satisfy the judgment cannot pay over the money to the sheriff

as a debtor of the judgment defendant and keep alive the right of appealing from the judgment. *Plover Mercantile Co. v. Peterson*, 111 N. W. 944.

SEC. 3978. Lien—equitable proceedings—receiver.

The only method provided by statute for reaching the individual interest of a partner in satisfaction of a debt due by him is that pointed out in this section and section 3904, authorizing the levy of an at-

tachment or execution by equitable proceedings to ascertain the nature and extent of the partner's interest. *Hoaglin v. Henderson*, 119-720.

SEC. 3979. Levies upon mortgaged personal property—payment or deposit.

An attachment levied on chattel property covered by mortgage, such levy being made with a view of contesting the validity of the mortgage, becomes an apparent lien upon all the property seized and not merely upon sufficient of said property to satisfy the mortgage; and if the mortgage is found to be invalid the attachment is effectual. In such case a junior mortgagee has no preference as to any part of the property necessary to pay the attachment claim. *Geiershofer v. Nupuf*, 106-374.

The procedure here provided for by tendering the amount of the chattel mortgage is not exclusive. When it is claimed that chattel mortgages on property which is being levied on under execution are fraudulent, a judgment creditor may proceed by garnishment, when the property is in the hands of a third person, or by creditor's bill or other equitable proceedings, when the property is in the possession of the judgment defendant; and when he does proceed by creditor's bill or other action in equity, he acquires such a right to or apparent lien upon the property as will support an application for the appointment of a receiver. *Hirsch v. Israel*, 106-498.

The statute provides for paying, or tendering payment, not for an assignment or purchase of the mortgage, but the attach-

ing or execution creditor may purchase a prior mortgage, and then pay off the mortgage debt, and hold subject to his attachment or execution any surplus there may be. *Webster City Grocery Co. v. Losey*, 108-687.

The statutory provisions permitting levy on property covered by chattel mortgage under execution against the mortgagor do not require the mortgagee to take any steps for the purpose solely of shielding the mortgagor's property. It is only the mortgagee who can complain that the statutory provisions are not complied with. *Collins v. Gregg*, 109-506.

The provisions of these sections, relating to levies upon mortgaged chattels, are for the benefit of the mortgagee alone, and the mortgagor cannot take advantage of the failure of the execution creditor to comply with such provisions. *Tollerton & Stetson Co. v. Skelton*, 118-543.

In a receivership proceedings as to property which is subject to a chattel mortgage, in the absence of redemption from the mortgagee, the cost of receivership should not be taxed against the property so as to be taken out of the interest of the mortgagee who does not derive any advantage from the receivership proceeding. *Frick v. Fritz*, 124-529.

SEC. 3987. Statement of indebtedness.

No stated limit is fixed to the time within which the mortgagee is to furnish the written statement of his claim after demand is made therefor, and if the statement is furnished within a reasonable time after demand and before any sale under the levy has been made, it is sufficient. *Becken v. Keystone Mfg. Jewelry Co.*, 130-208.

If the creditor within the ten days be-

gins the necessary steps to secure the statement and make the proper payment or deposit, his right to proceed will not be lost if by no fault of his the matter is not consummated until after the expiration of that period. *Ibid.*

The omission from a statement of the amount of interest which is a matter of mere arithmetical computation, is immaterial. *Ibid.*

SEC. 3988. Contest as to validity or amount. If the right of the mortgagee to receive such or any sum is for any reason questioned by the levying creditor, he may, within ten days after levy, or after demand is made for a statement of the amount due as above provided, commence an action in equity or contest such right upon filing a bond in a penalty double the amount of such mortgage, or double the value of the property levied upon, conditioned either for the payment of any sum found due on said mortgage to the person entitled thereto, or for the value of the property levied upon; as the party ordering the levy may elect, with sureties to be approved by the clerk, and if such mortgagee is a non-resident or his residence is unknown, service may be made by publication as in other actions, but if such residence becomes known before final submission, the court may order personal service to be made. If commenced at law, the court may transfer the same to the equity side as in other cases. The court may appoint a receiver, and shall determine the amount due on the mortgage, the value of the property levied upon, and all other questions properly presented, and may continue and preserve or dismiss the lien of the levy, the costs to be taxed to the losing party as in other cases. If there are two or more mortgages, the creditor may admit the validity of one or more, and make the required deposit as to such, and contest the other, and where there are two or more such mortgages, each of which is questioned, a failure to establish the invalidity of all shall not defeat the rights of the levying creditor, but in such case the decree shall determine the priority of liens, and direct the order of payment out of the proceeds of the property which shall be sold under special execution to be awarded in said cause; but nothing in this chapter contained shall be construed to forbid or in any way affect the right of a creditor to contest in any other way the validity of any mortgage. [21 G. A., ch. 117, § 4.] [27 G. A., ch. 104, § 1.]

SEC. 3991. Indemnifying bond—notice of claim to property.

The officer is bound to levy execution on any personal property in the possession of defendant, unless he has received notice in writing, under oath, from some other person, his agent or attorney, that such property belongs to him, stating the nature of his interest therein, etc., and if the notice is insufficient, the claimant has no remedy as against the officer for the sale of the property. *Donnelly v. Mitchell*, 119-432.

A notice not signed or sworn to by the person claiming the property, or by any one authorized to act as his agent or attorney, and wholly misdescribing the interest of the claimant, held insufficient. *Ibid.*

Notice, however, is waived by the execution of an indemnifying bond, and insufficiency of notice is no defense to an action on the bond. *Ibid.*

The officer is protected from liability unless he has received notice in writing under oath from some other person that the property belongs to him, stating the nature of his interest, etc. The manner of receiving this notice is immaterial. It is enough if the officer making the levy actually receives it, but it is not sufficient to merely read the notice to the officer. It should be delivered to and receipted for by him. *Frazier v. Hill*, 123-116.

Such defect in service of the notice is not waived in an action of replevin to recover possession of the property by a third person claiming the right thereto if it is not made part of the petition. *Ibid.*

The provision that the claimant of the property levied on must give written notice of his claim thereto, has no application to a case where the defendant claims the property levied on as exempt. *Whitney v. Gammon*, 103-363.

Notice of ownership is wholly immaterial if the owner of the goods, seeking to replevy them from the possession of the officer, has no right to the goods on the ground that they are exempt from execution. *Young v. Evans*, 118-144.

Notice of ownership on the part of the execution defendant is not necessary in order to enable him to maintain an action of replevin against the officer for the recovery of property unlawfully seized. *Upp v. Neuhring*, 127-713.

The sworn notice of ownership must state the consideration for the chattel mortgage under which the plaintiff seeks to take the property from the sheriff in replevin. *McIver v. Davenport*, 110-740.

While the giving of an indemnifying bond may be a waiver of notice, a party who alleges the giving of notice cannot prove the fact by proving the execution of

the bond. Waivers must be pleaded. *Murray v. Thiessen*, 114-657.

Notice in a particular case held sufficient as to description of the property and of the party from whom plaintiff acquired it, and the consideration paid therefor. *Ibid.*

Where the sheriff acknowledges service on the back of the original, and received a copy, held that the service of the notice was sufficient. *Ibid.*

A person other than the execution defendant, suing to recover possession of the property levied on from the officer, must plead the giving of the notice, requiring an indemnity bond. *Shaw v. Tyrell*, 129-556.

Notice of ownership by the attachment defendant is not necessary to enable him to maintain an action against the officer for the unlawful seizure of property in attachment. *Upp v. Neuhring*, 127-713.

SEC. 4008. Exemptions.

One who claims the property as exempt from execution has the burden of showing the facts constituting such exemption. *Hays v. Berry*, 104-455.

The owner of three teams of horses, any one of which might be claimed as exempt, has the privilege of determining which one he shall claim as exempt, and by executing a chattel mortgage on one of them he elects not to claim that one as exempt property. Therefore such mortgage is not required, under Code § 2906, to be joined in by the wife. *Grover v. Younie*, 110-446.

A bicycle habitually used by the debtor in earning his living is exempt. *Roberts v. Parker*, 117-389.

SEC. 4009. Pension money.

Pension money paid to the guardian of an insane pensioner remains under the jurisdiction and control of the United States and is therefore exempt from taxation and from execution, under the provisions of § 4747 of the Revised Statutes of the United States. *Manning v. Spry*, 121-191.

The statute, as it now stands, operates to exempt property for which that acquired by pension money has been exchanged, but it does not exempt the increase or produce derived from the property which is exempt as procured with pension money. But where property acquired by pension money subject to an incumbrance is freed from incumbrance by

SEC. 4010. Homestead bought with pension money.

Property purchased with pension money of the husband, but at his direction conveyed to the wife and subsequently occupied by them as a homestead, is not exempt from debts of the wife contracted prior to its acquisition. *Whinery v. McLeod*, 127-11.

The notice is not for the benefit of the execution plaintiff. The purpose of such notice is to enable the sheriff to secure a proper indemnifying bond. When that purpose has been accomplished defects in the form or substance of the notice are waived. *Mitchell v. McLeod*, 127-733.

An indemnifying bond given the sheriff in an attachment suit covers the attorney's fees which the sheriff is compelled to pay in defending a suit for the conversion of the property levied upon. *Cousins v. Paxton & Gallagher Co.*, 122-465.

The execution defendant may institute proceedings to recover from the officer property unlawfully levied upon under the writ, and is not required to bring his action on the indemnifying bond. *Mitchell v. McLeod*, 127-733.

One whose business is to travel from stand to stand with a stallion, which he uses for breeding purposes at the different places to which he is taken, and who takes care of such stallion, is a laborer, and the harness and cart used by him as a means of conveyance during such trips are exempt to him as the means with which he habitually earns his living. *Krebs v. Nicholson*, 118-134.

A cream separator is a tool or instrument of a farmer within the statutory provisions as to exemption of property from levy under execution. *In re Hemstreet*, 139 Fed. 958.

the application of the proceeds of a portion of the property itself, the remainder thus freed from incumbrance continues exempt. *Smyth v. Hall*, 126-627.

A party cannot be heard to say that the avails of a homestead are exempt because of his purpose to pay the purchase price with pension money, it not appearing that any part of the pension money was invested in the homestead. *Lee v. Teeter*, 106-37.

Matured crops which have been raised on the homestead procured with pension money are not exempt from execution. (Affirming S. C., 142 Fed. 620.) *In re Sullivan*, 148 Fed. 814.

The exemption of property acquired with pension money does not inure to the benefit of the heirs of the pensioner to whom such property descends. *Beatty v. Wardell*, 130-651.

SEC. 4011. Personal earnings.

There is no indication in this section of any intention to exclude from the time during which earnings shall be exempt the period of time during which litigation to recover such earnings may be pending. *Chadwick v. Stout*, 112-167.

By inducing his creditor to bring action as assignee against one who owes a claim to the debtor, the latter waives the right to set up an exemption on the ground that the claim is for earnings. *Dowling v. Wood*, 125-244.

SEC. 4017. Failure to claim exemption.

While the owner of property cannot waive the exemption thereof by surrendering the same to the sheriff, or failing to object to its levy, the owner is not precluded from making a selection before the levy of execution, or even before the rendition of judgment, and held that where the owner of three teams, any one of which might be claimed as exempt, gave a chattel mortgage on one of them, he thereby elected not to claim that team as exempt, and therefore the mortgage was valid, although the wife did not join therein. *Grover v. Younie*, 110-446.

Failure to insist upon the exemption at the time of levy does not defeat the right

to such exemption. *In re Hemstreet*, 139 Fed. 958.

The widow becomes entitled on the death of the husband to property held by him exempt as head of the family, and does not waive her right by failing to object to the appraisal of such property as a part of the estate of her deceased husband. *In re Estate of Ring*, 132-216.

Notice by the debtor to the officer that the property was exempt from execution was not required by the provisions of Code of '73 to be under oath, nor signed by the debtor. *Glover v. Narey*, 92-286. But now see Code § 3991.

SEC. 4019. Debts owing for labor preferred.

The claims of laborers under this section have preference over mortgage liens. *In re Byrne*, 97 Fed. 762.

The provisions of Code §§ 4019, 4020 have no application to the proceeds of a sale of mortgaged personal property on foreclosure of the mortgage by advertisement and sale. *Wells v. Kelley*, 121-577.

The statute does not limit the rights of a laborer to those arising from labor performed in the betterment of property. *Goodenow v. Foster*, 108-508.

As to whether a creditor having a contract lien upon property acquired prior to the time labor is performed in or upon it has the right to insist that the labor claims be paid out of other property, which is subject to such lien, and not covered by the contract lien, *quaere*. *Hart v. Nonpareil Printing & Pub. Co.*, 109-82.

The statute does not provide that labor-

ers shall be creditors of a common debtor before being entitled to the preference here provided for. As between a mechanic's lien and the laborer's lien the laborer's is preferred, and it is immaterial that the mechanic's lien antedates the laborer's claims. *Haw v. Burch*, 110-234.

Where in an attachment proceeding a portion of the property of the debtor has been seized and laborers' claims have been filed which are liens upon such property under the statute, an intervening mortgagee of the property is not in a situation to claim on a subsequent intervention that other property of the debtor, not covered by the mortgage, has been released, and put beyond reach as to such laborers' claims, there being no allegations of collusion as between the attaching creditor and the holders of such liens. *Anundsen v. Standard Printing Co.*, 129-200.

SEC. 4020. Statement of claim—allowance.

Where labor claimants procure execution to be levied on the property of a bankrupt on judgment recovered on their claims, which executions were dissolved by the bankruptcy adjudication, and the claimants failed to present any statement of their

claims as required by the Iowa statute, held that they were not entitled to payment from the bankrupt's estate as against unsecured creditors. *In re Burton Bros. Mfg. Co.*, 134 Fed. 157.

SEC. 4022. Priority.

In attachment proceedings by a landlord against his tenant a lien of the tenant's employe on the crops for wages is

superior to that of the landlord. *Stuart v. Twining*, 112-154.

SEC. 4024. By posting or publication—compensation. Notice shall be given by posting up in at least three public places of the county, one of

which shall be at the place where the last district court was held. In addition to which, in case of the sale of real estate, or where personal property to the amount of two hundred dollars or upwards is to be sold, there shall be two weekly publications of such notice in some newspaper printed in the county, to be selected by the party causing the notice to be given, and the compensation for such publication shall be the same as is provided by law for legal notices. [C., '73, §§ 3080, 3872; R., § 3311; C., '51, § 1906.] [31 G. A., ch. 9, § 11.]

SEC. 4025. Notice to defendant—sale set aside. If the debtor is in actual occupation and possession of any part of the land levied on, the officer having the execution shall, at least twenty days previous to such sale, serve him with written notice, stating that the execution is levied on said land, and mentioning the time and place of sale, which notice shall be served in the manner provided by section three thousand five hundred eighteen (3518) of the code; and sales made without the notice required in this section may be set aside on motion made at the same or the next term thereafter. [C., '73, § 3087; R., § 3318.] [31 G. A., ch. 157.]

SEC. 4027. Penalty for selling without notice. An officer selling without the notice prescribed in sections four thousand and twenty-three (4023), four thousand and twenty-four (4024), and four thousand and twenty-six (4026) of the code, shall forfeit one hundred dollars to the defendant in execution, in addition to the actual damages sustained by either party; but the validity of the sale is not thereby affected. [C., '73, § 3081; R., § 3312; C., '51, § 1907.] [28 G. A., ch. 123, § 1.]

SEC. 4028. Time and manner of sale.

In general: A judgment creditor may cause an execution to be issued and the interest of the judgment debtor to be sold before that interest has been judicially ascertained. *Sheppard v. Messenger*, 107-717.

One who is in possession of land claiming a title thereto may maintain an injunction to prevent the sale of such land under an execution against one having no interest therein. The plaintiff in such case is not required to make out a perfect title in himself. *Moore v. Kleppish*, 104-319.

Laches on the part of creditors in bringing action to set aside an execution sale as fraudulent or irregular will bar their rights. *Hansen's Empire Fur Factory v. Teabout*, 104-360.

Evidence held insufficient to show that the purchaser at a sheriff's sale was a purchaser in trust for the debtor. *Severson v. Gremm*, 124-729.

Irregularities in the method of conducting the sale do not render the sale void and cannot be taken advantage of in a proceeding by injunction to restrain the issuance of a deed. *Thomassen v. DeGoey*, 133-278.

Caveat emptor: One who bids in the property at execution sale under full knowledge of all the material facts cannot afterwards have the sale set aside. The rule of *caveat emptor* applies to such sales, and they will not be disturbed if there be nothing more than a mistake of

law or forgetfulness on the part of the bidder. *Crawford v. Foreman*, 127-661.

A purchaser under judicial sale, even though he has received a deed, is subject as to the validity of his title to an attack on the validity of the judgment in pursuance of which the deed is executed. *English v. Otis*, 125-555.

The maxim of *caveat emptor* applies to a sale under execution and the purchaser ordinarily acquires no better title than the debtor could have conveyed at the time the lien of the judgment attached. On the other hand the purchaser is ordinarily to be protected against outstanding equities of which he had no notice, actual or constructive, before the sale. *Rippe v. Badger*, 125-725.

Thus the purchaser of the interest of one tenant in common takes such interest free from the obligation to contribute to expenses previously incurred by the cotenant of which the purchaser had no knowledge. But if he has knowledge of such previous expenditures the duty to contribute attaches to his purchaser. *Ibid.*

Sale en masse: A sale of a tract of 100 acres of land without being subdivided and offered in separate tracts is subject to be set aside on proper application. *State Bank v. Brown*, 128-665.

In general, inadequacy of the consideration alone is not sufficient evidence of fraud to justify the setting aside of an

execution sale on that ground. *Jonas v. Weires*, 111 N. W. 453.

It is not a ground for setting aside the sale that the interest of the execution debtor in the real property levied upon greatly exceeds in value the amount of the judgment, and that the property is not offered in sub-divisions. The purchaser is not required to bid upon the undivided interest of the execution debtor in a portion of the property in which he has such undivided interest. *Ibid.*

SEC. 4029. Officer may postpone.

Where property which is indivisible is bid for by a judgment creditor in the amount of his judgment, which is much less than the value of the property, the sheriff may adjourn the sale for want of

Where the property is indivisible the fact that the bid is for a small amount as compared with its value does not render the sale invalid, nor require that it be set aside on motion; a judgment creditor having a lien on property much greater in value than the amount of his judgment is not bound to bid more than his judgment in order to render the sale valid. *State Savings Bank v. Shinn*, 130-365.

bidders, but he is not bound to do so where all the proceedings are in strict conformity to the law. *State Savings Bank v. Shinn*, 130-365.

SEC. 4033. When purchaser fails to pay.

No one but the judgment holder or his attorney may proceed against a bidder at an execution sale who fails to pay the amount of his bid when demanded. If neither of these persons do so, then it is the duty of the sheriff to resell the property. At any rate, the sheriff has some discretion in the matter, and unless the judgment creditor objects may refuse a bid, or having accepted it, may, before the transaction is closed, repudiate the same, or authorize its withdrawal, or a re-sale of the property. *State Bank v. Brown*, 128-665.

One who has purchased property from the mortgagor and assumed to pay the mortgage indebtedness is not entitled to question the right of the sheriff to refuse to enforce a bid made by the mortgagee at the foreclosure sale. *Ibid.*

There may be cases where the costs should be required to be paid as a condition to the annulment of a bid, but where no additional costs are involved in a re-sale the payment of costs should not be imposed as a condition for setting aside the bid. *Ibid.*

SEC. 4034. Sales vacated.

To authorize the setting aside of a sale of real estate on which the judgment was not a lien at the time of levy it is sufficient that the fact was unknown to the purchaser. Actual knowledge is contemplated. *Rosenberger v. Hawker*, 127-521.

The existence of a homestead interest which renders property exempt from sale will be sufficient ground for setting aside the sale if the purchaser has no knowledge of the material facts on which the homestead exemption is claimed. *Ibid.*

SEC. 4036. Subjecting real estate of deceased judgment debtor.

An execution issued after the death of the judgment plaintiff is void unless there is an indorsement of the death of the plaintiff as required by statute. The failure of the defendant to complain for want of such indorsement will not be a waiver of the objection. *Dunham v. Bentley*, 103-136.

ment was rendered. *Hansen's Empire Fur Factory v. Teabout*, 104-360.

Creditors who have filed their claims against the estate cannot bring action to set aside a conveyance by the deceased as fraudulent; such action must be brought by the administrator. *Ibid.*

On the death of the judgment debtor the execution creditor is required to have his right to an execution renewed, which can only be done in the court where the judg-

A judgment creditor does not lose his lien by not filing his judgment as a claim for payment by the administrator. *Boyd v. Collins*, 70-296.

SEC. 4040. Mutual judgments—set off.

Mutual judgments, executions from which are in the hands of the same officer, may be set off, the one against the

other, except as to costs. *Schnitker v. Schnitker*, 109-349.

SEC. 4045. Redemption—by debtor—appeal or stay.

Where an execution for a partnership debt is levied on the real property of one partner, an agreement by another partner that the purchaser at execution sale shall immediately take possession of the premises and hold them during the period for redemption, is not binding on the partner whose property is sold, in the absence of express or implied authority to make such contract. *Heins v. Tamblyn*, 110-478.

The right of redemption and the right of possession in the judgment defendant are separate or independent rights, the one not being necessarily involved in the other, and the sale of the right of redemption made under an execution in another case does not entitle the purchaser at such sale of the right of redemption to the right of possession, which remains in the execution defendant, and may be transferred by him as an independent right. *Hartman Mfg. Co. v. Luse*, 121-492.

Where the very object of the appeal is to secure a right of redemption, the taking of the appeal does not waive the right. *Kilmer v. Gallaher*, 116-666.

An equitable right of redemption in the mortgagor continues until cut off by the expiration of the statutory period of redemption under a foreclosure sale, and during the period for redemption the mortgagor may maintain an action in equity to require the mortgagee to account for profits which should be applied

to the satisfaction of the mortgage debt. If the mortgagee buying in the property at the sale has taken possession without the assent of the redemptioner and received rents and profits, or has converted the property to his own use, he may be compelled to account in an equitable action for redemption. *Dolan v. Midland Blast Furnace Co.*, 126-254.

The debtor may transfer his right to redeem so as to authorize his grantee to make the same redemption which the debtor himself might have made, and such right to redeem passes by a sale under execution as effectually as by a voluntary conveyance. *Kendig v. McCall*, 133-180; *Gustafson v. Durst*, 124-203.

The debtor may, pending the period of redemption, assign his right to redeem and the assignee making redemption acquires title free from the claims of general lien holders who have been made parties to the proceeding and have failed to redeem within the time prescribed therein. This rule is applicable to a grantee taking title from a mortgagor after foreclosure and before sale. *Cooper v. Maurer*, 122-321.

A creditor to whom the real estate has been conveyed by an absolute deed for the purpose of securing a debt, is not a vendee in such sense as to be allowed to make redemption during the last three months of the year succeeding the sale. *Robertson v. Moline-Milburn-Stoddard Co.*, 106-414.

SEC. 4046. By creditors.

The provision for redeeming by one creditor from another has no application to a case where there is but one creditor. A person though holding different claims against the debtor cannot redeem from himself. *Stephens v. Mitchell*, 103-65.

Where a creditor procures an assignment of a certificate of sale and obtains a sheriff's deed thereon, he no doubt holds the property absolutely, but if he simply takes an assignment of the certificate at a time when he has no right to make redemption therefrom, and thereby extinguishes in his own interest the lien of the judgment under which the sale is made, the property remains subject to other judgment liens. *People's Sav. Bank v. McCarthy*, 119-586.

The judgment creditor, in order to acquire the right of the certificate holder by taking an assignment of the certificate, must do so within nine months from the sale, and on failure to do so his lien may be divested by a sheriff's deed. If, after the time allowed to him for making redemption, he discharges the sale by taking an assignment of the certificate, he

does not thereby acquire title to the property free from other judgment liens. *Ibid.*

A judgment creditor having no lien is not entitled to make redemption, and a junior judgment creditor failing to redeem from a sale by a senior creditor loses his right to redeem from a subsequent foreclosure sale under a mortgage which is prior to the liens of both judgments. *Francestown Sav. Bank v. Silver*, 122-685.

A lien holder whose right to redeem from execution sale has expired cannot by taking an assignment of the certificate of sale, acquire any other right as against another lien holder entitled to redeem than that which the holder of the certificate had to receive the redemption money. *Gustafson v. Durst*, 124-203.

A junior judgment creditor has no right to redeem after the expiration of the lien of his judgment. *Hansen's Empire Fur Factory v. Teabout*, 104-360.

One who has caused an execution to be levied on real property under a judgment which has ceased to be a lien thereon, is by virtue of such levy entitled to

make statutory redemption of the property from a prior foreclosure sale. *Hawkeye Ins. Co. v. Maxwell*, 119-672.

A junior judgment lien holder has no redress as against a sale of the property under a senior judgment, save by statutory redemption. He cannot allow the sale to proceed to a deed without making such redemption and afterwards exercise any right of redemption. *Wood v. Rankin*, 119-448.

Those who are made parties in an action of foreclosure are required to pro-

tect their claims either by bidding up the property to a fair value at the sale or by redemption from such sale within the prescribed period, and a lien holder who neglects to avail himself of such opportunity to enforce his lien thereby abandons any further claim to the property, and the mortgagor may convey his equity or right of redemption unburdened by the claims of any party to the suit save only the right and claim of the holder of the certificate of sale. *Witham v. Blood*, 124-695.

SEC. 4048. Senior creditor.

One holding a valid certificate of tax sale superior to the claims of the execution creditor may be made a party de-

fendant in the proceeding to foreclose. *Browne v. Kiel*, 117-316.

SEC. 4050. Terms.

Where the purchaser at execution sale, pending the time for redemption, takes the fee simple title by warranty deed from the debtor, he merges in such title his right as holder of the certificate of

purchase and also any right which he might have on account of an unsatisfied portion of his judgment. *German Bank v. Iowa Iron Works*, 123-516.

SEC. 4051. Redemptions by holder of title—where made. The terms of redemption, when made by the title holder, shall be the payment into the clerk's office of the amount of the certificate, and all sums paid by the holder thereof in effecting redemptions, added to the amount of his own lien, or the amount he has credited thereon, if less than the whole, with interest at contract rate on the certificate of sale from its date, and upon sums so paid by way of redemption from date of payment, and upon the amount credited on his own judgment from the time of said credit, in each case including costs. All redemptions made under the provisions of this chapter shall be made in the county where the sale is had. [26 G. A., ch. 65; C., '73, § 3106; R., § 3336; C., '51, § 1930.] [28 G. A., ch. 124, § 1.]

A creditor can only redeem by payment to the clerk, as provided in Code § 4056, and the acquisition of certificates of sales

or other liens does not amount to redemption. *Jack v. Cold*, 114-349.

SEC. 4056. Credit on judgment.

In case of redemption by a creditor within nine months from the date of the sale no affidavit stating the amount still unpaid and due on the redemptioner's claim, under the provisions of § 3118 of the Code of '73 was required. That section had relation to redemptions made after the expiration of nine months. *Fry v. Warfield-Howell-Watt Co.*, 105-559.

Under the provisions of the Code of '51, held that there was no requirement as to any other notice of the amount for which the creditor was willing to hold the land than the entry in the sale book, and therefore no warrant for the substitution of any other notice, though it might seem better than that fixed. *Meredith v. Peterson*, 108-551.

Under this section as it now stands redemption can only be made by payment to the clerk, and a lien holder purchasing certificates of sale or acquiring other liens does not thereby make redemption except by such payment as is here contemplated. *Jack v. Cold*, 114-349.

Under the statutes as they existed before the adoption of the present Code, a creditor who had by acquiring liens become a redemptioner at the expiration of the six months during which the debtor had the exclusive right to redeem, thereby effected redemption, and held that the effect of this redemption was not destroyed by the subsequent adoption of the Code. *Ibid.*

SEC. 4057. Contest determined.

This provision is not exclusive of the remedy by tendering the necessary amount and then asserting the right resulting from such redemption in a court by proper proceedings. The purpose of

the statute is to enable the person desiring to redeem to test his right in a summary way. *Kendig v. McCall*, 133-180.

SEC. 4061. Transfer of debtor's rights.

This provision is applicable to a conveyance of the mortgaged premises by the mortgagor after foreclosure decreed and

before sale. *Cooper v. Maurer*, 122-321. And see notes to § 4045.

SEC. 4062. Deed.

Where the purchaser understands that an entire tract of land is being sold and takes possession thereof under his deed his occupancy is adverse as to the entire tract, although it appears that under the description by metes and bounds contained in the return of the writ reciting the levy a small portion of the tract is not included. *Severson v. Gremm*, 124-729.

The holder of a sheriff's deed does not acquire an independent title, but a derivative one, immediately from the sheriff, but mediately from the debtor, and generally speaking he gets no other or greater title than the judgment debtor had. An agreement entered into between the creditor and the debtor whose right of redemption has not yet expired, that the creditor shall take title as security

for the judgment debt, although made in parol, may be enforced, as it gives rise to an implied or resulting trust. *McElroy v. Allfree*, 131-112.

The description by which property is sold under execution need not be as accurate as that required where lands are sold for taxes. Every reasonable intentment is made in favor of judicial sales in order to secure the objects which they are intended to accomplish. *McCormick v. McCormick Harv. Mach. Co.*, 120-593.

Under Code § 3842, relating to the power of a judge to direct an officer of the court in relation to the discharge of his duties, a judge may, in vacation, make an order with reference to the execution of a deed in pursuance of a sale. *Hawkeye Ins. Co. v. Maxwell*, 119-672.

SEC. 4063. Recording of deed.

Although the deed is not placed on record until more than sixty days after the expiration of the full time for redemption,

one who is not a subsequent purchaser in good faith for value cannot complain. *Hannan v. Seidentopf*, 113-658.

SEC. 4071-a. Exemption from garnishment. Wages earned outside of this state by a non-resident of this state, and payable outside of this state, shall in all cases where the garnishing creditor is a non-resident of this state, be exempt from attachment or garnishment where the cause of action arises outside of this state; and it shall be the duty of the garnishee in such cases to plead such exemption, unless the defendant shall be personally served with original notice in this state. [30 G. A., ch. 124.]

CHAPTER 4.
OF PROCEEDINGS AUXILIARY TO EXECUTION.**SECTION 4084. Compensation of officers and witnesses.**

The compensation of a receiver should be based upon the value of his services in connection with the property subject to

the receivership, and not on their value generally. *Stearns Paint Mfg. Co. v. Comstock*, 121-430.

SEC. 4087. Equitable proceedings.

These sections of the Code with reference to an equitable levy are applicable to a case where the defendant has possession

of the property, as well as to a case where it is in possession of a third person, and a receiver may be appointed in

such case. Even if the sections are not applicable in such a case a creditor has a right to bring a suit in equity, independent of statute, for the purpose of subjecting property to the payment of his judgment, and such a suit would be a sufficient basis for the appointment of a receiver. *Hirsch v. Israel*, 106-498.

The provisions of this and following sections as to subjecting equitable interests in real estate are declaratory of the common law and should be construed with reference to the established rules thereof. Therefore, held that a creditor seeking relief must first have recovered judgment which would be a lien on real estate. *Peterson v. Gittings*, 107-306.

An equitable proceeding auxiliary to execution cannot be maintained to enforce a liability which has not become perfect

in favor of the debtor as against the one sought to be charged in the proceeding. *Cushman v. Carbondale Fuel Co.*, 122-656.

A creditors' bill is not maintainable unless legal remedies have proven ineffectual, or there is an affirmative showing of insolvency. *Kalona Savings Bank v. Eash*, 133-190.

As garnishment cannot be maintained against an administrator to subject property of deceased in his hands, in which he is entitled to share personally, to the payment of a personal judgment against him, equitable proceedings to subject the property to the payment of such judgment may be maintained. *Cassady v. Grimmelman*, 108-695.

A municipal corporation may be made defendant in such proceedings. *Tone v. Shankland*, 110-525.

SEC. 4089. Lien created.

Under this section it is not necessary to serve notice of such proceedings against the judgment debtor, where the creditor had actual notice of the filing of the petition. *Shumaker v. Davidson*, 116-569.

The finding of a proceeding auxiliary to execution is not binding on one who

has no notice thereof. *Green v. Forney*, 111 N. W. 976.

The rule announced in the last annotation to this section in the Code, citing *Ware v. Purdy*, 60 N. W. 526, was changed on rehearing of said case. See S. C. 95-667.

TITLE XX.

OF PROCEDURE TO REVERSE, VACATE OR MODIFY JUDGMENTS.

CHAPTER 1.

OF PROCEEDINGS TO REVERSE, VACATE OR MODIFY JUDGMENTS IN THE TRIAL COURTS.

SECTION 4091. Judgment vacated or modified—grounds.

In general: Under these sections a proceeding to vacate a judgment because of irregularity in obtaining it must be by motion made before the second day of the next succeeding term. (See Code § 4093.) *Priestman v. Priestman*, 103-320.

In a proceeding to annul a judgment the parties to the judgment should be made parties to the proceeding. *Day v. Goodwin*, 104-374; *Fulliam v. Drake*, 105-615.

The relief herein provided for can be secured only in accordance with the statutory method, and so long as such relief is obtainable at law equity will not interfere. *Johnson v. Nash-Wright Co.*, 121-173.

The proceeding provided for is a proceeding in the original action, and not by a new action. *Ibid.*

A modification of a judgment, secured as the result of proceedings under this section, will not defeat an appeal already taken from the judgment as first rendered. *Culbertson v. Salinger*, 111-447.

An appeal from an order for a new trial made under the provisions of this and the following sections is not triable *de novo*, but on assignments of error, and if there be any conflict in the evidence, or in the inferences fairly deducible therefrom, the supreme court will assume such a state of facts, reasonably consistent with the evidence, as will support the conclusion reached. *Sitzer v. Fenzloff*, 112-491.

The provisions of this and the following sections are not recognized in the federal courts. *Manning v. German Ins. Co.*, 107 Fed. 52.

The causes for a new trial recognized in this section are in general of the nature of those errors which could have been cor-

rected by the use of a writ of error *coram vobis*. *Ibid.*

Must be after term: A motion to correct a decree already entered and made at the same term does not come within the provisions of this and the following sections. *McConnell v. Avey*, 117-282.

The provisions of this section with reference to relief against a judgment after the close of the term at which it was rendered, have no reference to a case where application to set aside a judgment or order is made during the term at which the judgment is entered. *Streeter v. Gleason*, 120-703.

And further see notes to Code § 244 in this supplement.

Discretionary: The granting of a new trial on petition is peculiarly a matter of discretion with the trial court, and in the absence of a showing of abuse the ruling will not be disturbed. *Tschohl v. Machinery Mut. Ins. Assn.*, 126-211.

The matter of granting a new trial under this section is left largely to the sound discretion of the trial court, and unless an abuse of such discretion is shown its finding will not be disturbed on appeal. *Bank of Stratton v. Dixon*, 112-621.

In criminal case: The provision with reference to petition for a new trial after judgment has no application in criminal cases. *State v. Hayden*, 131-1.

Grounds, fraud: A motion to vacate a judgment without charging fraud or illegality in obtaining it cannot be made under this section. *Manning v. Nelson*, 107-34.

Fraud in procuring a judgment by default without having obtained jurisdiction may be taken advantage of otherwise than by application for a new trial with-

in one year. *Culbertson v. Salinger*, 122-12.

Under the evidence in a particular case held that the facts did not show fraud in procurement of the original judgment such as to require the granting of a new trial. *McCormick v. McCormick*, 109-700.

Where judgment is entered on default against a party who has been induced to refrain from making defense on the assurance that judgment was sought only as against his co-defendants, he may have relief in equity, even after the expiration of the year. *Beck v. Juckett*, 111-339.

The fraud which will justify the setting aside of a judgment in a collateral proceeding must be something extrinsic and collateral to the question examined and determined in the action. Perjury or false swearing committed in procuring the judgment will not be sufficient. *Mahoney v. State Ins. Co.*, 133-570; *Dooley v. Gladiator Consol. Gold Mines & M. Co.*, 109 N. W. 864.

False swearing or perjury in behalf of the successful party is not alone a sufficient ground for setting aside or vacating a judgment; but if accompanied by any fraud extrinsic or collateral to the matter involved in the original case sufficient to justify a conclusion that but for such fraud the result would have been different, a new trial may be granted. *Graves v. Graves*, 132-199.

Fraud in pleading a statement of facts on which relief is asked may be so flagrant as to require the setting aside of a judgment by default, but a mere misstatement of facts alone will not warrant the setting aside of a judgment for fraud. *Ruppin v. McLachlan*, 122-243.

Where fraud relied upon as a ground for a new trial is not discovered within a year after the rendition of judgment, courts of equity have jurisdiction to grant a new trial or modification of the decree; but the grounds for such an application must be such as would have warranted the new trial had application been made within a year. *Graves v. Graves*, 132-199.

Proceedings against infant or insane person: A judgment against an infant without defense by a guardian is clearly erroneous, and that fact may be made the ground for granting a new trial under this section. *Wise v. Schloesser*, 111-16.

If the fact of insanity is brought to the court's attention, the mental condition of the party as well as the error in failing to require appearance by guardian, appears in the record, and the correction must be by appeal. But if the fact of insanity exists without being brought to the attention of the court, a judgment by default involves error within the meaning of the statute, which will be a

ground for setting aside the judgment. *Hawley v. Griffin*, 121-667.

A person is of unsound mind, within the provisions of this subdivision, when so weak and infirm mentally as not to be capable of exercising the judgment necessarily required in the management of his ordinary affairs. *Garretson v. Hubbard*, 110-7.

The right of an insane person to have a judgment against him set aside on petition within a year after regaining mental capacity is an absolute right which no one can waive for him, nor can such right be affected or abridged by decree or judicial proceedings. *Pollock v. Milburn*, 112-528.

A second application for new trial will not be granted when the condition of the party is practically the same as when the first application was denied. *McBride v. McClintock*, 108-326.

If the guardian *ad litem* colludes with the adverse party to suppress the facts, or is grossly negligent in interposing a defense for the infant, judgment may be set aside. But in the absence of fraud, actual or constructive, the discovery that the guardian did not introduce evidence of facts which were ascertainable on the trial is not a ground for setting aside the judgment. *Harris v. Bigley*, 111 N. W. 432.

Casualty and misfortune: A new trial will not be granted on the ground of casualty and misfortune in a case where judgment was rendered by default against a corporation, where it appears that the secretary of the corporation, upon whom service was made, was not charged with the management of its affairs, and did not take steps to have a defense made to the action. *Sioux City Vin. Mfg. Co. v. Boddy*, 108-538.

A client is only chargeable with the negligence of his attorney when that negligence may be imputed to him, that is, when by the exercise of care on his part he could have avoided the consequences of such negligence. The client has a right to rely on the attorney to inform him as to the time of the trial and as to anything required for the purpose of making a defense, and if, by reason of the negligence of the attorney in failing to give such information, and without fault on his part, he is prevented from making defense, there is such unavoidable casualty or misfortune as to entitle him to a new trial. *Peterson v. Koch*, 110-19.

An allegation of sickness of counsel at the time of a trial will not be sufficient ground for setting aside the judgment of a petition for a new trial, where it does not appear that a continuance might have not been had if the facts had been presented in proper time and found sufficient.

Tschohl v. Machinery Mut. Ins. Assn., 126-211; 101 N. W. 740.

The mere fact that a party is beyond the reach of his attorneys so that he does not receive notice of the time when the case is set for hearing, and a judgment is entered against him by default, the court having afforded counsel reasonable opportunity to secure the attendance of their client, held not to entitle such party to a new trial after judgment by default, where he had, with knowledge that the case was likely to be called for trial, omitted to advise his counsel of his whereabouts so that they could notify him as to the time when the case would be heard. *Iowa Savings & Loan Assn. v. Kent*, 109 N. W. 773.

The matter of granting a new trial under such circumstances rests peculiarly within the sound discretion of the trial court, and its action will not be interfered with on appeal save where a manifest abuse of discretion is made to appear. *Ibid.*

It is doubtful whether the misfortune incident to the reporter's failure to furnish a transcript of the evidence in an equity case in time to enable the appellant to make his appeal is such unavoidable casualty as to require the granting of a new trial in order that the evidence may be taken and preserved. At any rate negligence of appellant in attempting to procure such transcript will be a ground for denying relief. *McKinley v. McKinley*, 123-574.

Where judgment was rendered against a married woman on substituted service made by leaving a copy with her husband at his place of residence during a time when she was not actually residing with him, although her abandonment was temporary only, and it appeared that on her return he failed to notify her of the fact of such service, held that there was such casualty and misfortune as to warrant the granting of a new trial. *Galvin v. Dailey*, 109-332.

The fact that defendant's wife, with whom a copy of the original notice was left, was unable to understand the English language, will not constitute such casualty as to entitle the defendant to a new trial. *Hass v. Leverton*, 128-79.

A judgment entered on written stipulation of the parties cannot be set aside under this section on account of unavoidable casualty and misfortune. *Mains v. Des Moines Nat. Bank*, 113-395.

Newly discovered evidence: Regardless of whether application for new trial

SEC. 4092. New trial after term.

A petition in the nature of a bill of review asking a modification of an injunction previously granted does not stand denied by operation of law, as would a petition to reverse, vacate or modify the

on the ground of newly discovered evidence made after the term should be by petition or by motion, held that a petition containing all the essential allegations of a motion was sufficient. *Hunter v. Porter*, 124-351.

The granting of a new trial on petition on the ground of newly discovered evidence is peculiarly within the discretion of the trial court and will not be interfered with on appeal where an abuse of discretion does not appear. *Chambliss v. Hass*, 125-484.

A new trial on account of newly discovered evidence should not be denied on the ground that such evidence is cumulative if it tends to show a new and important fact in the case. *State v. Lowell*, 123-427.

In the absence of any showing of accident, fraud, mistake or casualty in the presentation of the evidence on the trial, there cannot be a new trial on account of newly discovered evidence. *Kringle v. Kringle*, 123-365.

Reasonable diligence must be alleged and proved in order to obtain a new trial on petition, and if the ground is newly discovered evidence the allegations of the petition should show the facts constituting reasonable diligence, but a general allegation of diligence will be sufficient as against a demurrer. If the defendant desires more specific statement of the diligence used he should move therefor. *Scott v. Hawk*, 105-467.

Application for new trial on the ground of newly discovered evidence may be made at any time either at or after the term at which the verdict sought to be set aside was rendered and until the expiration of one year from the entry of judgment on such a verdict. *Hunter v. Porter*, 124-351.

No other grounds: The specification herein of the grounds for setting aside a judgment and granting a new trial covers the whole ground of vacating or modifying judgments after the term at which they are rendered, and is applicable to the granting of such relief in courts of equity as well as in courts of law. *Ruppitt v. McLachlan*, 122-343.

It is questionable whether equity will grant relief from a judgment on any grounds excepting those enumerated in this section, although it might, upon a proper showing, entertain an application after the expiration of the year within which, by the terms of Code § 4094, proceedings at law must be commenced. *Mains v. Des Moines Nat. Bank*, 113-395.

judgment. *Denby v. Fie*, 106-299.

As to sufficiency of showing of diligence where the ground relied upon is newly discovered evidence, see notes to preceding section.

SEC. 4093. Motion to correct mistake or irregularity.

Under this section the remedy is by motion filed within a year; otherwise relief is to be sought by petition in equity. *Manning v. Nelson*, 107-34.

Motion to retax attorney's fee allowed in a judgment on foreclosure of a mortgage does not come within the provisions of this section. *Perry v. Kaspar*, 113-268.

SEC. 4094. Petition.

Where the application for a new trial is made after the time allowed for granting new trials on motion it should be by petition, but if no objection on that ground is made the form of application will be immaterial. *State v. Stevenson*, 104-50.

Proceedings for correction of a judgment on grounds enumerated under this section, are to be by petition, and the proceedings are to be commenced as those in any other original action. *Perry v. Kaspar*, 113-268.

After the expiration of the statutory period within which the party may have relief by asking a new trial, a court of equity may give such relief as the party may show himself entitled to. *Johnson v. Nash-Wright Co.*, 121-173.

The provisions of this section relating to the setting aside of judgments and granting new trials, for grounds not available or discovered during the term, has no relation to an action in equity to set aside a void judgment constituting an apparent lien on plaintiff's real property. *Iowa Sav. & Loan Assn. v. Chase*, 118-51.

While in an ordinary action it is held that a motion for new trial after the term cannot be based on grounds that have been raised by an appeal in which the appellant has been unsuccessful on account of defect in his method of procedure, this rule has no application to new trial applied for within one year after the judgment in an

action for the recovery of real property as authorized by Code § 4205. *Bevering v. Smith*, 121-607.

The pendency of an appeal from a judgment will not deprive the trial court of the right to entertain a petition for a new trial on the ground of newly discovered evidence, nor will an affirmance of appeal prevent the granting of such new trial. If the ruling on appeal is not determinative of the rights of the parties as disclosed in the proceedings for a new trial, failure to procure a continuance or stay of the appellate proceedings will not affect the right to a new trial. *Chambliss v. Hass*, 125-484.

A new trial cannot be granted on petition after the term, where the grounds relied on were known to the petitioner before the trial of the original action. *Connell v. Connell*, 119-602.

The action must be commenced within the year by service of the notice on the defendant, as provided in Code § 3514, relating to the commencement of actions, and not merely by placing the notice in the hands of the sheriff, with intent that it be immediately served, as provided by Code § 3450 with reference to the commencement of an action under the provisions of the general statute of limitations. *Hawley v. Griffin*, 121-667.

SEC. 4095. Proceedings.

The trial of a petition for new trial is to be as an ordinary action, whether the original case is at law or in equity, unless

the parties in some way assent to a trial in equity. *Markley v. Owen*, 102-492; *Scott v. Hawk*, 105-467.

SEC. 4096. Valid defense.

The proper inquiry on an application to set aside a judgment is not whether defendant had a technical defense to plaintiff's action in that form, but rather whether he could show facts reasonably indicating that he was not indebted to the plaintiff. The purpose of the statute is to avoid opening up a judgment unless it appears to be in the interests of justice to do so. *Bank of Stratton v. Dixon*, 105-148.

Before setting aside the judgment under the statutory provision for vacating a judgment and granting a new trial after the term and within one year, the party seeking relief from the judgment must make a *prima facie* showing of facts stating a defense to the cause of action on

which judgment was rendered. *Johnson v. Nash-Wright Co.*, 121-173.

The party seeking to set aside the judgment must make it appear that he was not defeated in the original action by reason of any negligence on his part or on the part of his attorney. *Ibid.*

As alleging matters constituting a defense to the action, a mere general denial of liability is not sufficient. *Ibid.*

The statute does not contemplate the introduction of a new cause of action by the plaintiff nor of a counter claim by the defendant. If a new trial is granted the defendant has the right to interpose any defense he may have had to plaintiff's cause of action, but not to interpose a

counterclaim or cross demand not set up in the original action. *Hawley v. Griffin*, 121-667.

To secure the setting aside of a judgment by default on application made after the term and within one year, the applicant must show that he has a defense to the cause of action. *Culbertson v. Salinger*, 122-12.

The showing of defense must be such a state of facts as will likely defeat the claim upon which the judgment was based. *Ibid.*

It is a sufficient reason for upholding the order refusing a new trial after term, if the applicant makes no showing of a

good defense to the cause of action. *Tschohl v. Machinery Mut. Ins. Assn.*, 126-211.

Minority of the defendant in an action for damages is no ground for defense, and although no defense was interposed in the original action by a guardian for such minor, the judgment will not be set aside at the suit of the minor without a showing of defense. *Reints v. Engle*, 130-726.

A defense to the action which would not have been available to the defendant at the time judgment was rendered cannot be interposed as a sufficient showing of defense when a new trial is asked. *Dooley v. Gladiator Consol. Gold Mines & M. Co.*, 109 N. W. 864.

CHAPTER 2.

OF PROCEDURE IN THE SUPREME COURT.

SECTION 4100. Appellate jurisdiction over judgments.

Jurisdiction: Generally speaking, appellate tribunals derive their jurisdiction over any case from the law, and the parties cannot by consent confer jurisdiction. Moreover, when the legislature prescribes the method for the exercise of the right of appeal or supervision, such method is exclusive, and the appellate court cannot modify the action of the trial court except as thus authorized. *Home Sav. & T. Co. v. District Court*, 121-1.

Where there is no other remedy for reviewing the action of the trial court, appellate tribunals may investigate the validity of the action of the lower court in a *certiorari* proceeding. *Ibid.*

From what judgments: Statutes giving the right to appeal are uniformly held to apply to such judgments only as are rendered subsequent to their enactment. *Richardson v. Fitzgerald*, 132-253.

Abstract questions: The supreme court will not entertain an appeal for the purpose of deciding merely abstract questions. *Berry v. Des Moines*, 115-44.

Right no longer existing: An injunction denied in the lower court will not be granted on appeal where the right to be protected no longer exists, although it may have existed and the injunction may have been a proper remedy at the time of the trial. *Davis v. Boyer*, 122-132.

The supreme court will refuse to entertain an appeal from a judgment which has ceased to affect the interest of the party complaining; it will refuse to consider mere abstract or moot questions. *Doubet v. Riggs*, 112 N. W. 242.

Findings of fact: The supreme court has no jurisdiction to correct the findings of fact made by the jury, and it cannot consider the sufficiency of evidence to sup-

port the verdict unless that question has been raised in the lower court. *Schulte v. Chicago, M. & St. P. R. Co.*, 124-191.

Final judgment: Where expressly or by implication the relief asked by plaintiff is denied in the judgment such judgment is against the plaintiff so that he has a right to appeal. *Floete v. Brown*, 104-154.

Where a judgment provided that it should not go into effect until five days after its date, and notice of appeal was served before the expiration of this period, held that the appeal was properly taken, as the stay, if it had any effect, only served to suspend enforcement, and did not suspend the judgment itself. *Meredith v. Peterson*, 108-551.

The action of the court in improperly overruling a motion to dismiss an appeal from a justice of the peace on the ground that there is no competent surety to the appeal bond is a final judgment with reference to the jurisdiction of the court to entertain such appeal, and therefore the order overruling the motion is appealable. *Hudson v. Smith*, 111-411.

A modification of a final judgment, secured by appellee after the appeal is taken, does not operate to merge the judgment from which the appeal is taken so as to defeat such appeal. *Culbertson v. Salinger*, 111-447.

Entry of judgment: A memorandum of a judgment, made by the judge, is for the information and guidance of the clerk in making the proper entry; until such entry is made there is nothing from which an appeal will lie. *Kennedy v. Citizens' Nat. Bank*, 119-123.

While for some purposes a judgment or decree is held to have been made when the decision is announced by the judge or

other presiding officer, or when reduced to writing and signed by the judge, yet for the purpose of appeal a judgment or decree is not rendered until entered of record as provided by statute. The abstract must show affirmatively the entry of an appealable judgment. *Martin v. Martin*, 125-73.

The transcribing of the judge's minutes of his decision into the court record by the clerk constitutes the entry of judgment. *Kuhlman v. Weiben*, 129-188.

An appeal will not lie from the judgment until that judgment has been entered of record. The memorandum of the judge on his calendar, and the abstract of the judgment entered on the judgment docket do not constitute an appealable judgment. *Hoffman-Brumer Granite Co. v. Stark*, 132-100.

In the entry of a judgment the clerk should follow the memorandum made by the judge on his calendar not only with reference to the substance thereof, but also to the date; but for the purposes of appeal, the judgment has no validity until actually entered of record, and the record should show the date of entry. If the date of entry is not thus shown, the lower court on motion, even after an attempted appeal, should correct it so as to show the actual date. *Ibid.*

And see notes to §§ 288 and 4110.

Objection to the jurisdiction of the court on the ground that there was no appealable judgment or decree, may be first suggested on rehearing, and the appellant will not be allowed to amend the record so as to show jurisdiction. *Martin v. Martin*, 125-73.

Second appeal: After the dismissal of appeal by appellant, he may within the statutory period take a second appeal. *Stutsman v. Sharpless*, 125-335.

Who may appeal: After an adjudication of bankruptcy the bankrupt may in his own name by the consent of the trustee prosecute an appeal from a judgment rendered against him in an action in which he had sought to recover damages for personal injuries. *Christy v. Des Moines City R. Co.*, 126-428.

An intervenor has the right to appeal from a judgment entry prejudicial to his interest although the judgment does not specifically refer to the intervenor. *In re Estate of Anderson*, 125-670.

An appeal will not lie from a finding of fact or law where the judgment is in favor

of the party appealing. *In re Assignment of Jenks*, 129-139.

One who is not a party to a proceeding cannot appeal from an unauthorized judgment taxing him with the costs of such proceeding. *Yockey v. Woodbury County*, 130-412.

Party not appealing: The court has no jurisdiction to consider the correctness of the action of the lower court as affecting the rights of persons who have not appealed. *Moore v. Price*, 125-353.

The rights of parties who have not appealed or been made parties to an appeal cannot be affected by the decision of the appeal. *King v. Raab*, 123-632.

Waiver: Performance of a party of a judgment which would not be affected by the appeal will not constitute waiver of the appeal. *Mountain v. Low*, 107-403.

The action of the executor in settling the claims of attorneys for the guardian *ad litem* of the proponents of the will is not a waiver of the right to an appeal from the order admitting the will to probate. *Stutsman v. Sharpless*, 125-335.

Motion for judgment *non obstante verdicto* does not waive the right to complain of errors on appeal. *Cullison v. Lindsay*, 108-124.

Voluntary payment of a judgment waives the right of appeal, and payment in redemption will be voluntary if the party by asking a restraining order might have saved his rights, pending the appeal, without making redemption. *Manning v. Poling*, 114-20.

The payment of a judgment on execution is not a waiver of the right to have restitution if the judgment is reversed on appeal. *Chambliss v. Hass*, 125-484.

Where plaintiff, after rendition of judgment in his favor, accepts the amount of the judgment, a portion of which is in dispute, such plaintiff thereby waives the right to appeal from the judgment. *Balinger v. Connecticut Mut. L. Ins. Co.*, 118-23.

The facts in a particular case held not sufficient to show waiver of the appeal by performance of the judgment. *Schoonover v. Osborne*, 108-453.

The fact that the jurisdiction of the court to enter an order has been questioned by *certiorari* does not operate as a waiver of the right to appeal from such order. *Porter v. Butterfield*, 116-725.

SEC. 4101.

In general: It is not the policy of the law to permit either party to a controversy to prolong litigation and embarrass the course of justice by prosecuting an appeal from every interlocutory ruling of

the trial court. *State v. Des Moines City R. Co.*, 109 N. W. 867.

As a general rule an appeal does not lie directly from a ruling denying a motion for verdict or from the verdict itself, or

from a ruling denying a motion in arrest. The appeal should be from the judgment. *Bussell v. Ft. Dodge*, 126-308.

Where, after the making of an order the situation of the parties is materially changed by the presentation of new issues, the fact that the parties proceed to trial on the merits will not preclude an appeal from the order thus made. *Stewart v. Pierce*, 116-733.

The right to have an intermediate ruling reviewed on appeal from final judgment is not waived by failure to appeal from such ruling although an appeal therefrom is allowable. *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 123-434.

Where an order is entered *nunc pro tunc*, the period within which an appeal may be taken from such order does not commence to run until the date of the *nunc pro tunc* entry. *In re Estate of Bishop*, 130-250.

An appeal from an intermediate order, although accompanied by the filing of a supersedeas bond, does not deprive the court of jurisdiction to proceed with the trial of the case. *First National Bank v. Dutcher*, 128-403.

An order made in probate proceedings that the executor file inventories of the real property, on application of the state treasurer, insisting that such property passing by devise was subject to collateral inheritance tax, held to be such intermediate order affecting a substantial right and involving the final decision as that an appeal therefrom might be taken by the executor. *In re Estate of Stone*, 132-136.

Appeals may be taken from final orders in special actions affecting substantial rights therein. *Porter v. Butterfield*, 116-725.

The trial of an issue raised on an application for a permit to sell intoxicating liquors is a special proceeding and the granting or refusal to grant a permit is a final order from which an appeal may be taken. *In re Application of Smith*, 126-128.

No appeal lies from an order sustaining an application for the inspection of books and papers and directing the production of such documents. *Devier v. Economic L. Assn.*, 106-682.

No appeal can be taken from an entry of judgment against a garnishee which is not effectual for the reason that no judgment has yet been rendered against the principal defendant. *Hawarden State Bank v. Hessler*, 131-691.

Ruling on motion: An appeal may be taken from a ruling on a motion for new trial notwithstanding judgment has theretofore been entered. *In re Estate of Bishop*, 130-250.

A party is not obliged to appeal directly

from a ruling on a motion, but may proceed to judgment, and present his exceptions to intermediate orders on an appeal from the final result. *Parker v. Des Moines L. Assn.*, 108-117.

Where application for leave to amend after reversal and remand for a new trial is sustained, there is no right to appeal from the order as affecting a substantial right, but such a ruling is appealable as an intermediate order involving the merits or materially affecting the final decision, if the amendment offered introduces a new and distinct cause of action. *Allen v. Dav-enport*, 115-20.

Action of the trial court in sustaining a motion to direct a verdict is an order from which an appeal may be taken. *Clark v. Van Loon*, 108-250.

An appeal lies from a ruling refusing to set aside an assignment of a cause for trial by jury, and setting it down for trial to the court. *In re Bradley*, 108-476.

Where the court sustained a motion striking out an answer as immaterial or redundant, matter which constituted a defense, held that such ruling materially affected the final decision of the case, and that an appeal therefrom was properly taken. *Mast v. Wells*, 110-128.

The sustaining of a motion to set aside default is not such an intermediate order as that an appeal may be prosecuted therefrom. *Odell v. Coquolette*, 103-435.

An order for a continuance is not appealable. *Suddeth v. Boone*, 121-258.

Ruling on demurrer: The action of the court in ruling on a demurrer is not a final judgment, and although the defeated party may appeal from such ruling as an intermediate order, he is not bound to do so, and may wait until final judgment is rendered, and even though the ruling has been waived by pleading over, the trial court may allow the party to withdraw such pleading and elect to submit to final judgment on the ruling as to the demurrer. *Farmers & Merchants State Bank v. School Township*, 118-540.

A ruling sustaining a demurrer cannot be reviewed on an appeal expressly taken from such ruling, unless an exception has been preserved. *Hews v. Stonebreaker*, 132-608.

Temporary injunction: An appeal will lie from a refusal to grant a temporary injunction. *State v. Roney*, 133-416.

Appeal will lie from the action of the court in refusing a preliminary writ of injunction. *Donnelly v. Smith*, 128-257.

An order granting a temporary injunction is appealable. *Young v. Preston*, 131-292.

In criminal cases: Under this section the action of the trial judge, under the provisions of Code § 254 as to ordering a

transcript of the shorthand notes in a criminal case at the expense of the county, is subject to review. *State v. Wright*, 111-621.

An appeal will lie from an order in a criminal case denying the defendant a transcript at the expense of the county. *State v. Steidley*, 133-31.

No appeal lies in a criminal case from the granting or refusal of an intermediate order, or from a ruling which does not in itself state a final judgment. Under Code § 5448, no appeal is authorized in a criminal case save from the final judgment. *State v. Sloan*, 131-676.

SEC. 4105. Motion to correct error.

In law actions the trial court must have had an opportunity to pass upon the matter as to which complaint is made, and the ruling when made must be excepted to and properly assigned as error. *Goldstein v. Morgan*, 122-27.

The insufficiency of evidence to support the verdict must be raised in the lower court and cannot for the first time be presented on appeal. *Schulte v. Chicago, M. & St. P. R. Co.*, 124-191.

SEC. 4106. Motion for new trial.

The fact that an exception to an instruction in a motion for a new trial is too general will not avail to defeat an exception properly taken at the time the instructions were given. *Ellis v. Leonard*, 107-487.

A motion for a new trial is not necessary to secure a review in the supreme court of exceptions that have otherwise been properly preserved. *Clement v. Drybread*, 108-701.

Errors in rulings on the admission of evidence are not waived by a failure to urge the motion for a new trial on other grounds. *Stewart v. Equitable Mut. L. Assn.*, 110-528.

The refusal of instruction asked, which

refusal is relied upon as error, may be considered on appeal although not urged before the trial court on a motion for new trial. *Schulte v. Chicago, M. & St. P. R. Co.*, 124-191.

While the motion for new trial is not necessary to enable one unsuccessful party to secure a review of any order or judgment of the trial court, it is necessary in order to enable the trial court to review the question of sufficiency of evidence to support the verdict. Such a question must be presented to the lower court and a ruling thereon secured in order to justify a review on appeal. *Schulte v. Chicago, M. & St. P. R. Co.*, 124-191.

SEC. 4108. Title of cause.

Where no prejudice appears from error in entitling the case as docketed, an error

in docketing will be immaterial. *In re Application of Dugan*, 129-241.

SEC. 4109. Process.

The supreme court has authority to enter orders to preserve the status with respect to property litigation until the determination of the appeal. *Manning v. Poling*, 114-20.

And further as to restraining orders, see notes in this supplement to Code § 4128.

SEC. 4110. Time for appealing—amount in controversy—certificate.

Time for taking: In a law action, in which nothing but a claim for money is involved, there is no final disposition of the case until the amount is ascertained and fixed. *Baird v. Omaha & C. B. R. & B. Co.*, 111-627.

The time for taking an appeal runs from the entry of the judgment of record regardless of when the judgment is orally announced or indicated by a signed decree. For some purposes the judgment may relate back, but not in respect to procedure essential to procuring a review. *Stutsman v. Sharpless*, 125-335.

There is no appealable judgment until an entry thereof is made of record, and the time for taking the appeal commences to run from the date of the entry of the judgment as recited in the record. *Graetz v. Price*, 112 N. W. 827.

The time for appeal dates from the time of the entry of the judgment as shown by the record entry thereof. *Groendyke v. Musgrave*, 123-535.

And see notes to §§ 288 and 4100.

Where the clerk enters judgment on the verdict of the jury without express direction, the time for taking appeal runs from

the date of such entry, although the attorneys subsequently ask the court to approve a different form of judgment entry. *Burlington v. Fear*, 116-299.

The fact that a party has attempted to perfect an appeal within the proper time, and by reason of the failure to take proper steps has subsequently dismissed such appeal, does not preclude the perfecting of a subsequent appeal within the time allowed. *Groendyke v. Musgrave*, 123-535.

Failure of the official reporter to furnish the appellant the transcript of the evidence in an equity action in time to file the same within six months of the entry of the decree is not a ground for new trial where it appears that the appellant was not diligent in procuring such transcript. *McKinley v. McKinley*, 123-574.

Amount in controversy: To defeat the jurisdiction it must appear from the pleadings that the case is one in which the amount in controversy does not exceed one hundred dollars. Where no amount is shown the appellant jurisdiction exists. *First Nat. Bank v. Bourdelais*, 109-497.

The amount in controversy is determined by the pleadings, and not by the judgment appealed from. *Hancock v. Hancock*, 109 N. W. 1009.

If the amount claimed is more than one hundred dollars there is a right of appeal though the judgment is for only one hundred dollars. The amount of judgment rendered does not determine the jurisdiction on appeal. *Wald v. Wald*, 124-183.

Where actions brought by different plaintiffs against the same defendant are by consent of parties or order of court consolidated and tried together, the amount in controversy is the aggregate of the claims made in the separate actions. *Comstock v. Eagle Grove*, 133-589.

Where instead of bringing separate actions all the parties having a like interest join in the bringing of one action, the amount in controversy is the aggregate of the amounts of the claim of the parties so joining. *Ibid.*

SEC. 4111. Appeal by co-parties.

Service of notice of appeal on a co-party is not required to give the supreme court jurisdiction, where the interests of such co-party are wholly separate from those of appellant, and would not be affected by the decision of the appeal. *Mason v. Des Moines*, 108-658; *Ward v. Walker*, 111-611.

A failure to serve notice of appeal upon co-parties is not jurisdictional, but the court cannot in such case consider any question the determination of which would work prejudice to the parties upon whom

Where the amount claimed by the plaintiff exceeds one hundred dollars the defendant who has resisted plaintiff's claim, and interposed a counterclaim, may appeal from a judgment in plaintiff's favor although the amount of his counterclaim does not exceed one hundred dollars. *Schultz v. Ford*, 133-402.

A remittitur filed after judgment has been entered is too late to affect the amount in controversy, so far as the right of appeal is concerned. *Kennedy v. Citizens' Nat. Bank*, 128-561.

The provisions of this section, preventing a party by remittitur from reducing the amount in controversy for the purpose of appeal to the supreme court, have no application to appeals from justices of the peace, under Code § 4547. *Rust v. Olson*, 113-571.

Where the appeal involved only the validity of certain acts of township trustees as fence viewers, determining an indefinite liability as to the maintenance of a partition fence, held that it did not appear that the amount in controversy was less than one hundred dollars, and that the appeal would lie. *Miles v. Tomlinson*, 110-322.

Certificate: Under the Code of '72 it was held that the certificate must set out the very point to be determined, without requiring the examination of the record and the proceedings. *Sloss v. Bailey*, 104-696.

While this section dispenses with many things previously required in the certificate of appeal where the amount in controversy is less than one hundred dollars, it does not dispense with the assignment of errors and other matters essential to a proper presentation of the appeal to the supreme court. *Kistner v. Conery*, 109-439.

Although the certificate attempts to recite the question to be decided, nevertheless if it in effect allows an appeal it is sufficient. *Percival v. Strathman*, 112-747.

The certificate is required to be made during the trial term. *Pollock v. Milburn*, 112-528.

notice is not served. *Clayton v. Severson*, 115-687; *Bowman v. Besley*, 122-42; *Ewart v. Ewart*, 126-219; *Oliver v. Perry*, 131-654.

Failure to serve notice of appeal upon co-parties does not deprive the court of jurisdiction, although it may constitute a reason why the appeal should not be considered. *Reed v. Cunningham*, 121-555.

Failure to serve notice of appeal on a party whose rights would be affected by a reversal of the judgment below will de-

prive the appellate court of jurisdiction. *Dillavou v. Dillavou*, 130-405.

In partition suits, where there are several parties plaintiff and defendant, and one of these appeals, notice of appeal must be served on the co-parties. But failure to give such notice is not jurisdictional and the supreme court can consider such questions in the case as do not affect the rights or interests of the other parties. *Lippold v. Lippold*, 112-134.

Where but one ruling has been made

SEC. 4113. Part of judgment or order.

An appeal from a portion of a decree in no way affects the portion not appealed

on demurrers of different defendants to plaintiff's petition, and a joint judgment has been rendered against the parties thus demurring, they may join in one notice of appeal from such judgment. *Thornburg v. Cardell*, 123-313.

Notwithstanding this provision one notice of appeal may be served in behalf of two or more parties against whom a judgment has been rendered, although they do not have a common interest. *Thornburg v. Cardell*, 123-313.

from. *State v. Fidelity L. & T. Co.*, 113-439.

SEC. 4114. Notice. An appeal is taken and perfected by the service of a notice in writing on the adverse party, his agent, or any attorney who appeared for him in the case in the court below, and also upon the clerk of the court wherein the proceedings were had, stating the appeal from the same, or from specific part thereof, defining such part. When such service cannot be made the trial court or judge on application shall direct what notice shall be sufficient. [C., '73, § 3178; R., § 3509; C., '51, § 1974.] [31 G. A., ch. 158.]

Sufficiency: A notice of appeal, advising the opposite party that appellant appeals from the "rulings and judgments" of the district court, rendered on certain specified dates, is sufficient to admit a review of the final judgment, although the date given is erroneous by reason of mistake. *Parker v. Des Moines L. Assn.*, 108-117.

The court is limited on appeal to the consideration of the judgment or order specified in the notice of appeal. *Yockey v. Woodbury County*, 130-412.

A notice of appeal "in the above cause" held to be sufficient to enable the supreme court to determine the correctness of the final judgment rendered in such case. *Augustine v. McDowell*, 120-401; *Merrill v. Timbrell*, 123-375.

A notice of appeal will be liberally construed, and if it is sufficiently definite for a reasonably certain identification of the judgment, order or decision appealed from, it is good. *In re Application of Dugan*, 129-241.

A clerical error in reciting the name of the party taking the appeal will not render the notice fatally defective where the identity of the party is made clear by the language of the notice taken as a whole. *Heinz v. Roberts*, 110 N. W. 1034.

The notice of appeal must be addressed to the person upon whom it is served in order to make the service on him effectual. *In re Estate of Anderson*, 125-670.

No particular form of notice is required, and the fact that it is headed "In the supreme court of Iowa" will not render

it insufficient although as it is to be filed with the clerk of the district court it should properly be entitled as in the district court. *Douglas v. Agne*, 125-67.

Where in an action against two defendants there has been an amendment to the petition so that the claim is against one defendant alone, a notice of appeal by such defendant against whom an individual judgment has been rendered will be sufficient. *Padden v. Clark*, 124-94.

Parties against whom a single judgment is rendered may appeal by serving one notice in behalf of each of them, although they have not a common interest. *Thornburg v. Cardell*, 123-313.

Where the abstract of the appellant states the fact of appeal in general terms but does not set out the notice, and the appellee does not make the terms of the notice appear in an amended abstract, the appellee cannot object that it does not appear that the notice was in writing nor that the appeal was from any particular order or judgment nor that the notice was served as required by law. *Dolan v. Midland Blast Furnace Co.*, 126-254.

Signature: A notice of appeal not signed by the appellant or attorneys for him is without validity and confers no jurisdiction, even though service of such notice is accepted by attorneys for appellee. *State Sav. Bank v. Ratcliffe*, 111-662.

Where the appellee in an action against a railroad company gave the title of the case, including the full name of the railroad company, held that the fact that the attorneys for the railroad company sign-

ing the notice of appeal used the initials only of the railroad company in connection with their signature would not defeat the appeal. *Rickel v. Chicago, R. I. & P. R. Co.*, 112-148.

An attorney may act for his client in giving notice of appeal, and a notice signed by appellant's attorney for and on behalf of his client is sufficient. *Hogueland v. Arts*, 113-634.

Service on attorney: Where a notice of appeal is in fact served upon an attorney who has appeared in the case below and whom the record shows to be still an attorney in the case, it is sufficient to give the supreme court jurisdiction of the appeal. *American Emigrant Co. v. Long*, 105-194.

Service on clerk: Service on the deputy clerk is sufficient. *Cullison v. Lindsay*, 108-124.

Party not served: Where a party to the record is not served with notice of appeal, the appeal cannot be prosecuted as to him, and no relief based on the reversal of the judgment against him can be granted in the appellate court. *Baxter v. Rollins*, 110-310.

Attorneys who have become interested in the judgment by agreeing to present the case upon appeal for a contingent fee are not parties in such sense as to be entitled to notice of appeal. *Harrison v. Palo Alto County*, 104-383.

In an appeal by a minor represented by

SEC. 4116. Term of submission.

The first term to which the appeal can be taken in the absence of an agreement must necessarily begin thirty days or more

SEC. 4118. Abstracts.

Form: Where the abstract was not accompanied by an index and there was no reference in plaintiff's argument showing where in the abstract the testimony or ruling referred to might be found, held, that the submission should be set aside and the cause continued for the perfection of the abstract. *State v. Abegglan*, 103-50.

Under rule 30 of the supreme court, the decree may be affirmed where the appellant does not present a proper abstract. It is improper to embody in the abstract the entire evidence, or a greater portion of it by questions and answers copied from the transcript of the evidence, setting out want matter. *Phillips v. Crips*, 108-605.

Where appellant's abstract is a complete transcript of the evidence, setting out every question and answer, the court will affirm the judgment below on that ground alone. *Hurley v. Hurley*, 117-621.

A disregard of the rule as to printing

a next friend it is not necessary that notice of appeal be served on the next friend. *Douglas v. Agne*, 125-67.

Persons interested but who are not parties to the record need not be served with notice of appeal. *In re Estate of Sawyer*, 124-485.

Securing clerk's fees: Under § 3179 of the Code of '73, held that the provision relating to security for clerk's fees was for the benefit of that officer and might be waived by him. *Varnum v. Winslow*, 106-187.

A second notice of appeal served while the case is pending in the supreme court under a previous notice is of no effect. *Newbury v. Getchell & Martin Lumber, etc., Co.*, 106-140.

Effect as to jurisdiction of lower court: After appeal from a final judgment the district court has no further right to proceed in the case. *Stillman v. Rosenberg*, 111-369.

The trial court has jurisdiction to correct the record, even after an appeal has been taken to the supreme court. *Porter v. Butterfield*, 117-725.

After an appeal the district court has no right to entertain a motion to correct an error in the proceedings. *Guinn v. Iowa & St. L. R. Co.*, 131-680.

Failure to file the case for the term specified in the notice is not ground for dismissal of the appeal. *Hoff v. Shockley*, 122-720.

after the notice of appeal has been served. *Hanson v. Hammell*, 107-171.

abstracts, consisting in the presentation of the evidence by question and answer, as contained in the transcript of the reporter's notes, is a ground for affirmance. *Cressey v. Lochner*, 109-454.

Under rule 53, the testimony of each witness should be presented in narrative form so far as practicable, and there is no occasion in the argument to repeat by condensed statement the testimony of each witness separately. *In re Wiltsey's Will*, 109 N. W. 776.

Brevity in an abstract is not only a commendable quality, so long as all material matters are presented, but it is expressly enjoined by rules 30 and 31 of the supreme court. *Howard v. Pratt*, 110-533.

An abstract is an abbreviated or condensed statement in narrative form where possible of the material parts of the record, and it is not necessary that it disclose the cross-examination of the witnesses. There-

fore, the fact that an abstract does not specifically show such cross-examination is not enough to indicate that the entire record is not before the court. *Wolf v. Des Moines Elevator Co.*, 126-659; 98 N. W. 301.

It is not necessary that the names of appellant's counsel be affixed at the end of the abstract where it appears to have been made in the usual way and the names of counsel in the case appear on the first page. *Alston v. Alston*, 114-29.

Should contain what: Jurisdictional facts, such as service of notice of appeal, must appear in the abstract. *Clayton v. Sievertsen*, 115-687.

It is unnecessary to set out the notice of appeal in full in the abstract, and an allegation of due service of notice of appeal if undenied is sufficient. *Stearns Paint Mfg. Co. v. Comstock*, 121-430.

The statement in the abstract that appellant "served due, legal and timely notice of appeal" is sufficient, without setting out the formal notice. *Oxford State Bank v. Holscher*, 115-196.

An amended abstract showing that some of the parties have not been served with notice of appeal does not raise a jurisdictional question. *Reed v. Cunningham*, 121-555.

Where the abstract contains a statement that judgment was duly entered, which statement is undenied, appellee cannot complain that the record entry is not set out in full. *Hawkeye Ins. Co. v. Huston*, 115-621.

When the abstract recites the rendition of a judgment or decree it will be presumed in the absence of a showing to the contrary that it is such a one as is appealable, but where the abstract recites just what was done and affirmatively shows no appealable judgment or decree no presumption of jurisdiction to entertain the appeal can be introduced in. *Martin v. Martin*, 125-73.

If the abstract shows that there was no appealable judgment the objection to the jurisdiction of the court may be suggested for the first time in a petition for rehearing, and the appellant will not be entitled then to present an additional abstract showing an appealable judgment, as the rehearing must be determined on the record presented on the first submission. *Ibid.*

Where it appears that the material evidence of a witness has not in any manner been preserved, the abstract presenting such evidence should be stricken from the files. *Monroe County v. Abeggler*, 129-53.

Additional abstract—when proper: Additions which the appellee thinks necessary may be made to appellant's abstract by way of amendment; but unless they are so numerous or so fundamental as to

justify a new abstract of the entire evidence, the appellee's additional abstract should only contain such additional matter as necessary to supply the omissions in the appellant's abstract. *Dale v. Colfax Consolidated Coal Co.*, 131-67.

Under particular circumstances, held that an amendment to the abstract by the appellee filed after appellee's argument would not be stricken from the files. *Hickey v. Davidson*, 129-384.

It is proper to set out in an amended abstract the report of a referee on which the decree appealed from is based. *McCormick Har. Mach. Co. v. Pouder*, 123-17.

An amendment which supplies a part of the record proper for consideration by the supreme court will not be stricken from the files on motion. *Loesche v. Goerdts*, 123-55.

While ordinarily the abstract should be complete before the adverse party is required to argue, yet it often happens that an amendment is made necessary by the presentation in argument of a question not raised in the lower court, and in such case it is the rule to permit an amendment which will show the true record on the point thus made. *Biglow v. Ritter*, 131-213.

Costs: Where the appellee without any occasion for doing so made an abstract of the evidence in the case, the abstract presented by the appellant being proper and sufficient for all purposes, held, that on motion in the supreme court the costs of the additional abstract should be taxed to appellee. *McWhirter v. Crawford*, 104-550.

An amended abstract which is proper to supply omissions in the original abstract will not be taxed to the appellee if he is the successful party. *Wilkie v. Sassen*, 123-421.

An amended abstract containing needless repetition of matter sufficiently set forth in appellant's abstract may be stricken from the files on motion, and the costs thereof taxed to the appellee. *Wissler v. Atlantic*, 123-11.

The costs of an abstract presenting matters which cannot be considered will be taxed to the party filing such abstract. *Farmers' Savings Bank v. Independent School district*, 122-99.

An abstract or amendment which unnecessarily sets out questions and answers may be properly taxed in part to the party filing it. *Deering v. Beaty*, 107-701; *Plagge v. Mensing*, 126-737; *Ostenson v. Severson*, 126-197.

Where appellee in an amended abstract set out with unnecessary particularity, and by way of question and answer, large portions of the evidence, which had been sufficiently stated in appellant's abstract, held that a portion of the costs of appellee's

amendment should be taxed to him. *In re Bradley*, 117-472; *Kirsher v. Kirsher*, 120-337.

An additional abstract presenting only an acknowledgment of a mortgage about which there was no question and which was therefor wholly unnecessary, held taxable to appellee. *Fox v. Gray*, 105-433.

Time for filing: An additional abstract will not be stricken from the files because not filed within the time fixed by rule 22 of the supreme court, if it does not appear that the submission of the case was delayed by the filing of such additional abstract, nor that prejudice has resulted from it. *Clark v. Ellsworth*, 104-422; *Frank v. Levi*, 110-267; *Sanders v. O'Callaghan*, 111-574; *Tucker v. Carlson*, 113-449; *Foley v. Cudahy Packing Co.*, 119-246.

An abstract or amendment thereto filed after the submission of the cause and without express permission of court will not be considered and will be stricken from the files on motion. *Watson v. Burroughs*, 104-745.

An abstract may be amended even after the time for filing by the addition of assignments of error, and if the appellee has had reasonable opportunity to argue such assignments he cannot have the amendment stricken out on motion because not filed in time. *Salvador v. Feeley*, 105-478.

Where an amendment to an abstract is filed within a reasonable time after the defect therein is called to the attention of the appellant, an amendment to cure the defect will not be stricken from the files. *Steckel v. Standley*, 107-694.

Under rule 31, the amended abstract should be filed ten days after the filing of appellant's abstract, but the court will not in all cases strictly enforce such rule, as it is often impracticable for the appellee to determine whether an amendment is necessary until he has received appellant's argument, and has ascertained on what portion of the record appellant relies. *Baker v. Oughton*, 130-35.

All the evidence: To enable the appellate court to review the trial court's ruling directing a verdict, the abstract must contain all the material evidence. *Kitzman v. Kitman*, 115-227.

Under rule 31 a judgment will be affirmed where appellee denies that the abstract contains all the material evidence and the transcript shows that it does not contain all the testimony, so that the court cannot determine whether or not the abstract does contain the evidence material for consideration in the determination of the appeal. *Ibid.*

Where the appellee has set out in an additional abstract portions of the evidence

which he avers to be a part of the record, he cannot raise the question whether the evidence was properly preserved in an equity case. *Sarvis v. Caster*, 116-707.

A certificate of the reporter to the effect that the abstract is a true rendering into long hand of his shorthand notes and contains all the testimony offered or introduced will not entitle the appellant to a trial *de novo*. The reporter has nothing to do with the preparation of the abstract and his certificate thereto is of no effect. *Gibbs v. Oskaloosa*, 103-734.

Where the record on appeal does not contain all the material evidence, it will be presumed that instructions and rulings upon the evidence were correct. *State v. Thompson*, 125-499.

The office of certification of the record or of a transcript is solely to settle disputes developed in printing the record. All the evidence to be considered on the appeal must be included in the abstracts. *Palmer v. Clark*, 114-558.

Presumed to contain record: Under this section the abstract is presumed to contain all the evidence, in the absence of any denial, correction or statement therein to the contrary, with sufficient completeness to enable the court to pass on every question raised. It is not necessary in an equity case in order to secure trial *de novo* that the abstract contain the statement that it is a full and correct abstract of the record or that it contains all the evidence introduced or offered. *McGillivray v. Case*, 107-17.

Under this section, embodied in rule 31, the presumption is that the steps necessary to make the evidence of record have been properly taken. *Kirchman v. Standard Coal Co.*, 112-668.

A general allegation in appellee's abstract that appellant's abstract, together with matter presented by the appellee, does not show the entire evidence, no longer makes it necessary for the court to go to the transcript. *Ibid.*

It is no longer necessary in order to secure a trial *de novo* that appellant formally allege in his abstract that it is an abstract of all the evidence, and that the evidence was preserved in the proper manner. *Alston v. Alston*, 114-29.

Under rule 31 a general denial will not raise an issue or present a dispute with reference to the correctness of appellant's abstract. *Palmer v. Clark*, 114-558.

All the evidence to be considered on the appeal must be included in the abstracts. The office of certification of the record or of a transcript is solely to settle disputes developed in printing the record, save when an original paper or document is to be inspected. *Ibid.*

The abstract of appellant, with the additional abstract of appellee, are presumed to contain all the record necessary for the determination of the questions presented on appeal. *Woerdehoff v. Muekel*, 131-300.

The record is conclusively presumed to contain everything essential to the determination of all points raised in argument on the appeal. *Hensley v. Davidson Bros. Co.*, 112 N. W. 227.

The printed abstract will be presumed to contain the record, unless denied or corrected by a subsequent abstract. *Van Rens v. Witzenburg*, 112-30.

It is not necessary to include in the abstract evidence relating to an issue not involved in the appeal. *Ibid.*

Corrections made by the appellee in his additional abstract will be taken as true where appellant's denial thereof is not confessed nor sustained by certification of the record. *Mosgrove v. Zimbleman Coal Co.*, 110-169.

Where the correctness of appellant's abstract was not denied, and it appeared from the record as presented that the amount of damages allowed to the appellant as plaintiff was too small, held, that although the instructions did not appear in the abstract, it would still be presumed that the court had before it all of the record necessary to enable it to pass on the question of the inadequacy of the damages allowed. *King v. Hart*, 110-618.

Where it does not appear that appellant's abstract contains all the evidence and appellee files an additional abstract setting out other evidence which it is claimed was omitted by appellant, and does not deny that the abstracts together contain all the evidence it will be presumed that all the evidence is before the court. *First Nat. Bank v. Robinson*, 105-463.

Denial: Under rule 31 a general denial that appellant's abstract contains all the evidence is of no effect. *Bradley v. Iowa Cent. R. Co.*, 111-562; *Raher v. Raher*, 130-743.

The appellee's denial of the appellant's abstract must be specific in order to require certification of the record. *Dolan v. Midland Blast Furnace Co.*, 126-254.

The appellee cannot by a bare denial put in issue correctness of instruments set out in the abstract. *Schneider v. Schneider*, 125-1.

The mere general denial of the correctness of appellant's abstract will not justify the filing of an amended abstract by appellee, setting out in different form the same matter which the appellant's abstract was forced to retain. To justify the examination of an amended abstract the denial of

the correctness of the matters set out in the appellant's abstract should be specific. *See v. Wabash R. Co.*, 13-443.

To entitle the appellee to have the court examine the transcript as to the correctness of appellant's abstract, the denial must specify the pages of the transcript to which reference is made, or otherwise identify the portions relied upon. *Lundvick v. National Union Fire Ins. Co.*, 128-347.

Under rule 31 the denial of the correctness of the abstract should point out as specifically as the case will permit the defects alleged to exist. In the absence of such a denial, the abstract with amendments and additions is presumed to contain the record with sufficient completeness to enable the court to pass upon every question raised. *Kossuth County State Bank v. Richardson*, 132-370.

Failure to specifically deny the appellant's abstract is not an admission that all the evidence was in fact made of record by being duly certified and filed within the statutory limit of time. *Oskaloosa Nat. B. L. & I Ass'n v. Bailey*, 129-287.

If any questions are to be presented as to the sufficiency of the steps by which the record has been preserved, the issue must be raised by specific denial, otherwise the objection is waived. *Shebeck v. National Cracker Co.*, 120-414.

Where appellant has not had the record certified, appellee's denial as to the correctness of any specific matters set up in the abstract will be deemed true. *Rule v. McGregor*, 115-323.

Under rule 31, of the supreme court, a denial of appellant's abstract by the appellee is to be taken as true unless appellant sustains his abstract by a certification of the record. And a denial by appellant of an amended abstract filed by appellee, unless confessed, must be disregarded, when not sustained by a certification of the record. *Foley v. Cudahy Packing Co.*, 119-246.

It is not necessary for appellant to set out in his abstract the certificate to the evidence in order to secure a trial *de novo* in an equity case, but unless the sufficiency of the certificate is raised by specific denial, it will be presumed that the proper steps to preserve the evidence were taken. *Burget v. Greenfield*, 120-432.

If the appellee is not satisfied with the appellant's abstract because all his material evidence is not contained therein, he should make timely objection so that the submission of the cause will not be delayed, and, if he fails to do so, his failure will be treated as a waiver and an acceptance of the abstract which has been made and filed. *Watson v. Dilts*, 124-344.

Where it does not appear that the short-hand notes have been extended into long-hand, and such transcript filed in the district court, and the attorney for the appellee denies that the evidence has been properly preserved and made of record, the appellant is required to furnish a transcript from the clerk establishing the fact. Without that the court cannot consider any question depending upon the evidence adduced. *State v. Owens*, 109-143.

Opinion of lower court: It is not im-

SEC. 4120. Dismissal or affirmance.

While the court may extend the time for filing the abstract upon application, such application must be made before the time given by statute for filing abstracts has expired. In other words, neither the supreme court nor a judge thereof can grant to the appellant the right which has once been lost to file an abstract; but while that right exists the time may be extended by the court or by one of its judges. Where there is no waiver or estoppel the appellee has the right to insist upon a dismissal or affirmance when he brings himself within the terms of the statute, even though the abstract be already filed when the motion is made. In this respect the statute is mandatory. Section 37 of the rules of the supreme court does not give to the appellant the right to delay filing of abstract until thirty days before the second term after the appeal is taken, but merely provides that if not filed thirty days before such term and further time is not given, the appellee may have the appeal dismissed or the judgment or order from which it was taken, affirmed by pursuing the method pointed out. The requirement as to time of filing abstract being statutory cannot be modified by the rules of the court. *Newbury v. Getchell & Martin Lumber, etc., Co.*, 106-140.

Notice of the application to extend the time for filing an abstract should be served on the adverse party or his attorney. *Ibid.*

Failure of appellant to file his abstract within the time required, without an extension having been secured before the expiration of the statutory period, cannot be remedied by the entry of an order *nunc pro tunc* granting an extension of time. *Ibid.*

The time for filing an abstract cannot be extended by serving a second notice of appeal. *Ibid.*

The requirement that the abstract shall be filed by the time here specified is man-

proper to include in the abstract, or an additional abstract, the written opinion of the lower court in the case. *Richardson v. Carlton*, 109-515.

On second appeal: Where a case is reversed, and a second trial had on the same evidence as that which was introduced on the first trial, the appellant is not entitled to have the abstract of the evidence presented on the first trial considered as an abstract on the second appeal. *State v. Wolf*, 118-564.

datory. Application for extension of time must be made before the period allowed has expired and upon notice to adverse party. *Hanson v. Hammil*, 107-171.

The first term contemplated is that to which the appeal might have been taken by serving the proper notice thirty days before its first day and the second term is that immediately following. *Ibid.*

The time within which appellant's abstract is required to be filed under rule 37 of the supreme court cannot be extended by an amendment attempting to bring before the court on appeal rulings and orders made subsequent to the decree appealed from. *Ruby v. Downs*, 113-574.

Under the facts of a particular case held that there was no sufficient excuse shown for failing to file an abstract within the time required by the rules, and that there had been no act of appellant, in reliance on the failure of appellee to object, which would prevent the court from affirming on a motion of appellee for failure of appellant to file his abstract within the time required. *Brown v. Farmers L. & T. Co.*, 109-440.

Where appellee has made no objection on account of delay of appellant in filing his abstract until appellant has prepared and filed his argument, the appeal will not be dismissed on appellee's motion on account of the delay in the filing of the abstract. *McDermott v. Hacker*, 109-239.

In some cases there may be a material difference between the effect of dismissing the appeal and affirming the order or judgment from which the appeal is taken, but the appellee does not have an absolute right to elect which remedy he will have. It is proper for him to ask in the alternative for one relief or the other, and when that is done the court grants that form of relief which seems to be best calculated to do justice. *Newbury v. Getchell & Martin Lumber, etc., Co.*, 106-140.

SEC. 4122. Transcript—when required.

Where the clerk certifies the transcript of the record, the fact that his fees there-

for have not been paid or secured will be deemed to have been waived and it cannot

be objected on that ground that the appeal has not been perfected. *Harrison v. Palo Alto County*, 104-383.

The provisions of this section, authorizing the translation of the original notes of the shorthand reporter when certified to by him to be sent up in lieu of a transcript was intended simply to avoid the expense of transcribing the translation of the notes of evidence, and does not by implication or otherwise repeal the requirement of Code § 3652, that all the evidence taken in equitable cases shall be certified by the judge within the time allowed for appeal. *Sloan v. Davis*, 105-97.

The provision of the rules of the sup-

SEC. 4123. What sent up.

The office of the certificate of the clerk of the lower court is only to identify the record and in an equity case there must

SEC. 4127. Perfecting record.

The trial court may, after the taking of an appeal and filing of notice of appeal, correct the record so as to show that at the time service of notice of appeal was accepted by appellee it was not signed by appellant's attorneys. *State Sav. Bank v. Ratcliffe*, 111-662.

A lost record may be substituted by proceedings in the lower court and the mere fact of the loss of the record making it impracticable to prosecute an appeal will

SEC. 4128. Stay of proceedings—supersedeas bond.

In general: Where the party has secured possession by service of the right of possession before the giving of an appeal bond he is not affected by the subsequent filing of the bond. *Hyatt v. Clever*, 104-338.

An appeal from a judgment against a county or other municipal corporation does not operate as a stay of proceedings thereon without the filing of a supersedeas bond. Such municipal corporations are not contemplated by the statutory provision that no security shall be required in actions maintained by the state. *Harrison v. Stebbins*, 104-462.

A supersedeas bond on an appeal from a decree granting an injunction will not cover damages resulting from a violation of the injunction. Such violation is to be reached by proceedings for contempt. *Cole v. Edwards*, 104-373.

The judgment appealed from remains in full force for all purposes, subject only to determination on appeal. Therefore a judgment from which an appeal has been taken may be relied on as a prior adjudication in another action involving the

reme court for waiving or modifying such rules so far as they relate to the abstract, preparation and argument of causes, has no application to a case where the record is not authenticated as required by statute. *Ibid.*

Appeal—transcript: No time is specified within which the translation of the shorthand reporter's notes shall be filed in law actions. The appellee's denial of the appellant's abstract should point out specifically the objections to the abstract in order that the appellant may have time to support it by filing a transcript. *Watson v. Dilts*, 124-344.

also be a certificate of the trial judge to the evidence in order to secure trial *de novo*. *Bauernfiend v. Jonas*, 104-56.

therefor not be ground for a new trial. This applies to the loss of the record of the evidence in an equity case. *Ormsby v. Graham*, 123-202.

If the proceeding for the substitution of the record be commenced before the expiration before the time allowed for an appeal, the final order of substitution may be made after the time for appeal has expired. *Ibid.*

same right or title. *Watson v. Richardson*, 110-698.

A defendant who has appealed from a judgment in plaintiff's favor without giving a supersedeas bond is not entitled, on petition alleging his inability to file such bond, to have plaintiff give bond to refund in case of reversal, the judgment otherwise to be stayed. *Watson v. Niles*, 112-655.

A supersedeas bond on an appeal from an order of the district court directing the secretary of the school district to certify a tax will be effectual to stay enforcement of the judgment. *Loesche v. Goerdts*, 123-55.

On an appeal from an order appointing a receiver, the supersedeas bond should be for an amount sufficient to cover the value of the property. *Home Sav. & T. Co. v. District Court*, 121-1.

In such a case the bond should contain the conditions required by Code § 4134, that the appellee should be saved harmless from the consequence of taking the appeal. *Ibid.*

Under the provisions of Code § 4133

with reference to requiring additional security on a supersedeas bond, application may be made either to the supreme court or to the court rendering the judgment from which the appeal is taken, and if on application the judge of the lower court makes an order as to additional security, such order cannot be reviewed on motion in the supreme court, nor by appeal (no appeal in such case being provided for), but the action may be reviewed by *certiorari*. *Ibid.*

Liability of sureties: Sureties on a supersedeas bond cannot avail themselves of a defense which their principal might have interposed to the affirmance of the judgment. *Jewett v. Shoemaker*, 124-561.

The surety on a supersedeas bond does not become subrogated to the claims of judgment plaintiff against prior sureties on a bond given to release an attachment, such prior sureties not having procured or requested the giving of the supersedeas bond. *Fidelity & Deposit Co. v. Bowen*, 123-356.

In the absence of some specific condition in the bond, the surety on a supersedeas bond, conditioned on the return of prop-

SEC. 4130. Execution recalled.

The supersedeas bond becomes effectual to prevent further action of the sheriff under an execution already in his hands only when the countermand from the clerk

SEC. 4134. Penalty of bond. If the judgment or order is for the payment of money, the penalty shall be in at least twice the amount of the judgment and costs. If not for the payment of money, the penalty shall be sufficient to save the appellee harmless from the consequences of taking the appeal, but in no case shall the penalty be less than one hundred dollars. [C., '73, § 3190; R., § 3531; C., '51, § 1984.] [30 G. A., ch. 125.]

SEC. 4136. Repeal—assignment of errors not required. That sections four thousand one hundred and thirty-six (4136) and four thousand one hundred and thirty-seven (4137) of the code be and they are hereby repealed, and in lieu thereof is enacted the following:

“No assignment of errors shall be required in any case at law or in equity now pending or hereafter docketed in the supreme court.” [30 G. A., ch. 126.]

Since the repeal of the statutory provisions as to the assignment of errors by 30 G. A., chap. 126, there is no occasion to apply the somewhat technical rules formerly followed by the court in determining whether errors are sufficiently assigned. Under § 54 of the rules it is not necessary that the appellant shall do more than point out the errors relied upon for a reversal, with such definiteness that the appellee and the court may ascertain without searching through the entire abstract or argument the precise errors relied upon. *Dale v. Colfax Consolidated Coal Co.*, 131-67.

erty, is not liable for waste, loss of rents or depreciation in value. *Nourse v. Weitz*, 120-708.

A court of equity has power to reform a supersedeas or other bond given in a judicial proceeding for mistake. *Ibid.*

Restraining order: An order of a judge of the supreme court restraining the enforcement of an execution pending appeal is a valid exercise of authority, although not expressly provided for by statute. *Norris v. Tripp*, 111-115.

A supersedeas bond will not continue in force a temporary writ of injunction. The continuance of the injunction pending the determination of the appeal can only be secured by a restraining order in the supreme court. *Manning v. Poling*, 114-20.

The giving of a supersedeas bond does not deprive the court of jurisdiction to proceed in the trial of the case where the appeal is from an interlocutory order. The court doubtless has in such cases inherent power to order a stay of proceedings pending a disposition of the appeal. *First National Bank v. Dutcher*, 128-403.

reaches the sheriff, and a sale by the sheriff before the receipt of the countermand is valid. *Edwards v. Olin*, 121-143.

(The following decisions were made under the statutory provisions as to assignment of errors now repealed.)

When necessary: An assignment of errors is essential on the presentation of an appeal upon certificate of the judge in a case where the amount in controversy is less than one hundred dollars. *Kistner v. Conery*, 109-439.

An equity case cannot be tried on assignment of errors, except that such assignments are necessary to enable the court to consider rulings on motions or demurrers in such cases. *Smith v. Well-slager*, 105-140.

No assignment of errors is required where the case is tried below as in equity. *Clearfield Bank v. Olin*, 112-476.

In an equity case appellant cannot make assignments of error in rulings on the admission or rejection of evidence, and have them considered as in an action at law. *Foy v. Armstrong*, 113-629; *Spinney v. Halliday*, 115-420.

On trial *de novo* the supreme court may consider questions raised by motion, demurrer or objections to evidence which affect the merits of the case, but without an assignment of errors it cannot review rulings which prevent a determination of the case on its merits. *Lessemich v. Sellers*, 119-314.

Rulings upon questions of pleading cannot be reviewed even in an equity case unless specially assigned as error. *Scribner v. Taggart*, 123-321.

What sufficient: An assignment is sufficient which mentions the particular ruling objected to in the introduction of evidence, as well as the name of the witness and the page of the abstract where the ruling is found. *Manatt v. Scott*, 106-203.

An assignment of error in the sustaining of a general demurrer to an equitable petition is sufficiently specific. *Williams v. Williams*, 115-520.

Assignment of error in sustaining or overruling a demurrer or a motion based on several grounds is not sufficient. *Sisson v. Kaper*, 105-599; *Phelps D. & P. Co. v. Samson*, 113-145; *Jamison v. Jamison*, 113-720; *Brewster v. Chicago & N. W. R. Co.*, 114-144; *Shoemaker v. Turner*, 117-340.

Where several grounds are stated in a motion for a new trial errors should be separately assigned as to the ruling with reference to each particular ground, so far as it is desired to have such rulings reviewed on appeal. *Huss v. Chicago G. W. R. Co.*, 113-343.

An assignment that "the court erred in its rulings upon the evidence, to which plaintiff excepted, as shown in this abstract, is not sufficient. Nor is an assignment sufficient that the court erred in sustaining a motion based on several distinct grounds. Nor is it sufficient to assign error in "submitting the case to the jury." *Dairy v. Iowa Cent. R. Co.*, 113-716.

Assignments that the court erred "in rendering judgment for plaintiffs and against defendants upon the evidence adduced" and "in rendering judgment for the defendants" held not sufficient. *Creager v. Johnson*, 114-249.

An assignment of error covering instructions given and refused must point out specifically the error relied upon in

the court's ruling. *Fitch v. Mason City & C. L. T. Co.*, 116-716.

An assignment that the court erred in giving of its own motion certain instructions described by numbers, "to the giving of each and every one of which instructions the defendants then and there duly excepted," is not sufficient. *Faivre v. Manderscheid*, 117-724.

Assignments of error in a particular case, set out at length, held not sufficient. The assignment must clearly and specifically point out the very error complained of, and among several points made by objections to instructions, the one or those relied upon must be separately stated. *Copeland v. Ferris*, 118-554.

An assignment of errors in ruling on objections to evidence, which does not point out what the objection was, and which collects in one assignment several different objections, is not sufficient. *Grapes v. Sheldon*, 119-112.

If the appellant desires to insist that the court erred as to each ground of a motion for a new trial he must properly assign the error as to each ground in a separate assignment. *Reeves v. Lamm*, 120-283.

A general statement that the court erred in refusing to give and in giving instructions asked and refused, is not sufficient. *Borden v. Isherwood*, 120-677.

An omnibus assignment of errors is not sufficient. *Suddeth v. Boone*, 121-258; *Mallory Com. Co. v. Elwood*, 120-632.

An assignment which does not point out the exact error complained of is not sufficient. *McMillan v. American Express Co.*, 123-236.

Assignments in particular cases held not sufficient. *Geiser Mfg. Co. v. Krogman*, 111-503; *Field v. Eastern B. & L. Assn.*, 117-185; *Goldstein v. Morgan*, 122-27.

Although two parties not having a common interest may unite in assignment of error, such assignments are to be treated as joint and several and errors thus assigned may be taken advantage of by one although not available to the other. *Thornburg v. Cardell*, 123-313.

Amendment: The assignment of errors may be cured by amendment. *Roberts v. Parker*, 117-389.

An amended assignment of errors which does not delay the submission of the cause will not be stricken from the files because not made within the time allowed for filing the assignment of errors. *Salvador v. Freeley*, 105-478.

In argument: An assignment made in connection with appellant's argument may be sufficient to bring up the ruling for review. *Hogueland v. Arts*, 113-634.

SEC. 4139. Arguments—submission—decision.

I. ARGUMENTS.

Failure to argue: Errors not argued will not be considered. *Thompson v. Brown*, 106-367.

Questions raised by an assignment of error, but which are not argued, will not be considered, nor will the mere statement of a point entitle it to consideration. *Ottumwa v. Hodge*, 112-430.

A case will not be reversed for failure to present a defense to the jury when the appellant does not consider it substantial enough to discuss it on appeal. *Bradley v. Iowa Cent. R. Co.*, 111-562.

Assignments of error argued for the first time in a reply will be disregarded. *Fink v. Des Moines*, 115-641; *Schoonover v. Osborne*, 117-427.

While elaborate argument is not essential, every person invoking the jurisdiction of the supreme court must state the grounds of his objection to the judgment or order appealed from. *McCormick Harv. Mch. Co. v. McCormick*, 128-155.

When the reasons for appellant's contention appear in the points or propositions contained in his brief, subsequent elaboration by way of argument is optional; but if the contentions of appellant are not submitted either by brief or argument, the judgment should be affirmed. *Ibid.*

Time for filing argument: Under rule 44, if appellant's argument is not filed by the time required, and no sufficient excuse is shown for the delay, the appellee may have the case submitted as of the day of default, and as thus submitted without argument for appellant, the supreme court will affirm the case. *Harrington v. Humber*, 112-90.

A slight delay in the filing of appellant's argument which could not have been materially prejudicial to appellee, will not support a motion to submit the case as of date when appellant's argument ought to have been filed, and to affirm for want of the argument. *Buehner v. Creamery Pkg. Mfg. Co.*, 124-445.

Additional abstracts and arguments will not be stricken from the files because not filed in time when the submission of the cause has not been thereby delayed. *Ft. Madison v. Moore*, 109-476.

Under rule 55 it is within the discretion of the court to consider the appellee's argument, although filed at a later time than is required by the rule. *Baker v. Oughton*, 130-35.

Where in an equity case the appellee has the opening and closing, but does not serve notice on the appellant waiving

his right to open, the appellant may treat the appellee's failure to file argument within thirty days before the hearing of a waiver of the right to open, and file his own argument ten days before the hearing, and if he does so, appellee may respond by serving a reply three days before the hearing and have the cause submitted. *Busch v. Hall*, 119-279.

Should contain what: It is unnecessary to reprint in the argument the testimony of the witnesses as shown by the abstract. *Steele v. Crabtree*, 130-313.

Under rule 54 the appellant should not set out in his argument an abstract of the testimony of each witness, but if the insufficiency of the evidence to sustain the verdict or finding is relied upon he should give the substance of the evidence in narrative form. *In re Wiltsey's Will*, 109 N. W. 776.

The arguments should not contain a statement at length of the testimony of each witness. No such statement is authorized under rule 54, which relates to the statement of facts which is to be embodied in the argument. *Vial v. Larson*, 132-208.

The court will not usually strike appellant's argument from the files on the motion of appellee on the ground that it does not strictly comply with the rules of court. *Schultz v. Ford*, 133-402.

Scandalous argument: While the supreme court has power to strike out a scandalous argument, it will exercise discretion in doing so, and, save in an extreme case, will not feel inclined to use its power in such a way as to defeat ultimate justice. *Knight v. Hawkeye L. & B. Co.*, 121-74.

Answer to reply—argument: After the filing of the reply argument for the appellant, the appellee may be allowed to make an additional argument for the purpose of pointing out in the record the testimony upon which the statements in the reply argument are based. *State v. Smith*, 124-334.

An argument filed by the appellee in reply to appellant's reply will be taxed to the appellee if it does not appear that it is in response to anything found in the appellant's reply not properly relied upon in the appellant's opening argument. *Schoonover v. Petcina*, 126-261.

There is no authority for filing in behalf of appellee an answer to appellant's reply, and such argument may be stricken upon motion, and the costs thereof taxed to the appellee. *Anundsen v. Standard Printing Co.*, 129-200.

II. WHAT QUESTION WILL BE CONSIDERED ON APPEAL.

(a.) Question not raised in court below.

New objections not considered: An objection urged for the first time in the supreme court will not be considered on appeal. *Paine v. Lettsville*, 103-481; *State v. Olds*, 106-110; *Talbot v. First Nat Bank*, 106-361; *Hough v. Gearen*, 110-240; *Easton v. Somerville*, 111-164; *Reeves v. Howard*, 118-121; *Mitchell v. Pinckney*, 127-696; *Mahaska County v. Whitsel*, 133-335; *State v. Brown*, 109 N. W. 1011; *First Nat. Bank v. City Council*, 112 N. W. 829.

A question not raised and presented to the lower court in a timely and proper manner cannot be presented to the supreme court on appeal. *Smith v. McQuiston*, 108-363; *Mallory Commission Co. v. Elwood*, 120-632.

The district court must be given an opportunity to pass upon all questions before they can be considered in the supreme court on appeal. *In re Moore's Estate*, 103-474.

A party will not be heard in an appellate court until his grievance has been presented to and acted upon by the trial court. *Cloud v. Malvin*, 108-52.

The appellate court will on its own motion, where justice to the trial court demands it, refuse to review a question raised for the first time on appeal. *Houts v. Sioux City Brass Co.*, 110 N. W. 166.

The very objection which is urged in the supreme court should have been called to the attention of the trial court to enable the appellant to take advantage of it on appeal. *Sisson v. Kaper*, 105-599.

The constitutionality of a statute cannot be for the first time raised in the supreme court. *Hass v. Leverton*, 128-79.

When parol evidence of a contract within the statute of frauds is introduced upon the trial without objection it cannot afterwards be objected to upon appeal. *Marr v. Burlington, C. R. & N. R. Co.*, 121-117.

Errors relating to the introduction of evidence not based on any ruling will not be considered. *Philbrick v. University Place*, 106-352.

A party cannot complain for the first time on appeal that after his pleading was held defective the court proceeded without allowing him until noon of the next day in which to amend or plead over. *Chase v. Wright*, 116-555.

Defect of parties not objected to on the trial cannot be first raised on appeal. *West Side Lumber Co. v. Hathaway*, 115-654.

The supreme court will not on a trial *de novo* determine a question not raised by the pleadings in the trial court. *Zion Church v. Parker*, 114-1.

A question which might have been raised in the lower court by demurrer or answer, but which has not been so raised, will not be considered on appeal, even in a case triable *de novo*. *Schoening v. Schwenk*, 112-733.

The objection that the action is prematurely brought cannot be made for the first time on appeal. *Petty v. Mutual F. Ins. Co.*, 111-358.

A party must except to special findings with which he is not content even though judgment is rendered in his favor; otherwise on appeal such special findings will be conclusive. *Aldrich v. Paine*, 106-461.

The objection that in an action against a city for injuries due to defects in a street, not brought within six months from the happening of the injury, written notice of the claim is not alleged or shown, is one which must be made in the lower court and cannot be considered for the first time on appeal. *Reed v. Muscatine*, 104-183.

Objections to pleadings: The insufficiency of a petition to entitle plaintiff to the relief granted cannot be raised for the first time on appeal. *Preston v. Peterson*, 107-244.

The objection that the petition does not state a cause of action cannot be made for the first time in the supreme court. *Iowa Stone Co. v. Crissman*, 112-122.

Where the petition states a cause of action and is not assailed in the trial court no question as to the sufficiency of its allegations can be raised on appeal. *Newburn v. Lucas*, 126-85.

The provisions of 25 G. A., chap. 96, to the effect that a pleading shall not be held sufficient on account of the failure to demur thereto (see Code § 3564) has no application to proceedings on appeal and an objection which might have been raised by demurrer in the trial court cannot for the first time be urged in the supreme court. *Reed v. Muscatine*, 104-183; *Boyd v. Watson*, 101-214; *Wood v. Dunham*, 105-701; *Lacy v. Kossuth County*, 106-16.

It is not proper to amend a pleading on appeal in the supreme court. *Ottumwa Brick & Cons. Co. v. Ainley*, 109-386.

No change of base: A party cannot on appeal take a different position than that which was taken by him on the trial of the case. *Himmelman v. Des Moines Ins. Co.*, 132-668.

The appellant cannot on appeal change the position taken by him in the trial court and insist even as matter of law on a different conclusion than that conceded by him to be correct on the trial of the case. *Board of Park Commissioners v. Taylor*, 133-453.

The appellant cannot rely on a different right in the supreme court from that

on which he relied in the lower court. *Willis v. Weeks*, 129-525.

The appellant will not be permitted to shift his ground on appeal and raise a point not presented in the trial court. *Long v. Garey Inv. Co.*, 112 N. W. 550.

A party cannot on appeal seek relief on a theory of the case not presented to the court below. *Battles v. Roberts*, 120-747.

New issues: The court may properly submit to the jury the precise issue that was presented by the pleadings, and on which the case was tried, and it cannot be contended on appeal that the case should have been submitted on a different theory than that on which it was in fact submitted, without objection, in the lower court. *Steele v. Crabtree*, 128-65.

Where the case has been tried by consent of both parties on one theory the appellant cannot complain that another theory was not considered by the trial court. *Stelpflug v. Wolfe*, 127-192.

Where error is committed in the trial in the submission of the case to the jury on the theory on which it is tried, it is not open to appellee to insist that the question as to which error was thus committed is not in fact involved in the case. *Overhouser v. American Cereal Co.*, 128-580.

An equity case will be tried on appeal on the same issues on which it was tried in the lower court. A new question cannot be raised for the first time in the supreme court. *Ormsby v. Graham*, 123-202.

New reason: If the objection relied on in the appellate court has actually been made in the trial court, appellant is not precluded from giving a reason in support thereof which was not assigned on the trial. *Cooper v. Cedar Rapids*, 112-367.

Motion for new trial: Where the trial is to the court and the controlling question is as to the sufficiency of the evidence the supreme court may consider that question on appeal although it has not been directly asked to give a new trial on account of the insufficiency of the evidence. *Alpha-Check-Rower Co. v. Bradley*, 105-537.

A motion for a new trial filed too late or a motion for a judgment notwithstanding verdict, will not be deemed a waiver of errors which might have been presented without such motion. *Hooker v. Chittenden*, 106-321.

A motion for new trial is not necessary. See notes to § 4106.

A motion to retax costs is not necessary in order to secure a review of the judgment of the lower court as to taxation of attorney's fees made in the judgment it-

self. *Ainley v. American Mut. F. Ins. Co.*, 113-709.

In criminal cases: The rule that the supreme court will not on appeal consider an objection not raised in the lower court is not applicable in criminal cases. *State v. Nine*, 105-131.

(b.) *What the record must show in order that a question may be reviewed.*

Where the evidence is not all before the supreme court it cannot determine whether the trial court did or did not err in sustaining a motion for a verdict. *Dungan v. Iowa Cent. R. Co.*, 96-161.

But in such case it is only necessary that the record show all the evidence received. It is not necessary that all the evidence offered be shown. *Goring v. Fitzgerald*, 105-507.

The error complained of must be made to appear by the record. *Carlson v. Hall*, 124-121.

The supreme court cannot take notice of any matter of record appearing in the court below not presented in the record on appeal. *McCullough v. Connelly*, 106 N. W. 756.

The supreme court cannot on appeal review the rulings of the trial court based on evidence not appearing in the record. *In re Estate of Smith*, 133-142.

Where a question related to a certain exhibit and was objected to as incompetent and immaterial, held, that a ruling sustaining the objection could not be reviewed in the absence from the record of the exhibit referred to. *Leifheit v. Schlitz Brewing Co.*, 106-451.

Where a complaint is made of the rejection of testimony, it must appear, to warrant reversal, that the rejected testimony would have been relevant and competent. *Gibson v. Burlington, C. R. & N. R. Co.*, 107-596.

Where the appellant's abstract states that upon the issue raised by the pleadings the evidence was conflicting, and this statement is not denied, the court may consider errors assigned in giving instructions with reference to such evidence. *Jerolman v. Chicago G. W. R. Co.*, 108-177.

In an action at law, where the appellate court is not asked to determine the sufficiency of the evidence to sustain a verdict or judgment, it is proper to state in the abstract what the evidence submitted tended to prove. *Shumway v. Burlington*, 108-424.

If the errors assigned are based entirely on rulings on the admissibility of evidence or its effect it is sufficient if the evidence offered and received, together with the objections, rulings and exceptions, is duly certified and filed. *State v. Welsh*, 109-19.

To pass upon the validity of a directed verdict the record need only show the evidence on the part of the person against whom the verdict is directed. *Scott v. St. Louis, K. & N. W. R. Co.*, 112-54.

That the abstract is presumed to show all the evidence, see rule 31 and notes to § 4118.

When the want of indispensable parties is apparent on the record the appellate court may on its own motion raise the question. *Tod v. Crisman*, 123-693.

III. WHAT WILL WARRANT REVERSAL.

(a.) *Presumption of regularity.*

Presumption in favor of trial court:

Where a motion for a new trial is sustained generally, the action of the court will not be reversed on appeal if any one of the grounds stated in support of the motion is sufficient to warrant the ruling. *Moore v. Horton*, 105-376.

Where a motion for a new trial is sustained on one ground thereof, but is not expressly overruled as to the other grounds, the action of the trial court will not be reversed unless it appears that the motion should not have been sustained on any of the grounds stated therein. *Holmon v. Omaha & C. B. R. Co.*, 110-485.

Where a motion for new trial is sustained on some of the grounds set up and expressly overruled upon all others, the appellee not having appealed, the court cannot consider whether the motion might not properly have been sustained on other grounds than those specified by the trial court. A different question would be presented if the court, instead of overruling the motion on all other grounds but those sustained, had made no ruling as to such grounds. *Loqm̄is v. Des Moines News Co.*, 110-515.

Every presumption is to be indulged in favor of the correctness of the rulings of the lower court which are complained of. *Carlson v. Hall*, 124-121.

In the absence of a showing to the contrary, it will always be presumed that the court has acted properly. *Cox v. Burnham*, 120-43.

Where the court overrules a motion it will be presumed that the ruling was on a ground which is tenable, although another ground which is not tenable is also urged. *German Sav. Bank v. Cady*, 114-228.

Where it does not affirmatively appear that the court overruled some of the grounds of a motion for new trial there should not be a reversal because other grounds alleged are not in themselves sufficient to sustain the action of the court in granting a new trial. To establish error in such a case it must affirmatively appear that a new trial should not have been

granted on any of the grounds stated. *Boyd v. Western Union Tel. Co.*, 117-338.

New reasons: If there is any ground appearing in the record on which the trial court's ruling can be sustained it will be affirmed, though such a ruling may have in fact been based on some other ground. *Cotton v. Southwestern Mut. L. Assn.*, 115-729.

Where a demurrer is sustained to a petition in an action for mandamus, the judgment will be affirmed if on the whole the petition fails to state a cause of action, even though the reasons indicated for the ruling by the trial court are not sufficient. *Vincent v. Ellis*, 116-609.

(b.) *Prejudicial error.*

Error without prejudice: One party is not prejudiced by a ruling that the other must prove more than the law requires to be proved under the issues. *Reed v. State Ins. Co.*, 103-307.

The sustaining of a motion to make a petition more specific will be error without prejudice where the petition, having been amended by the addition of new matter in response to such motion, is held insufficient on demurrer on the ground that it does not state facts sufficient to show cause of action. *Sigmond v. Bebbler*, 104-431.

Where under the evidence and instructions there could be no dispute as to the amount of recovery, held that error in refusing to strike out items of plaintiff's claim, as to which final recovery was not allowed, was error without prejudice. *Gwinn v. King*, 107-207.

Error in overruling a challenge for cause will not be deemed prejudicial where it does not appear in the record that the juror could not have been dismissed peremptorily. *Haggard v. Andrew*, 107-417.

Where the verdict is in accordance with the interpretation which the court should have given to a written instrument, the action of the court in leaving the interpretation to the jury will be error without prejudice. *Hasbrouck v. Western U. Tel. Co.*, 107-160.

Error in submitting to the jury an issue on which the court should have found as a matter of law in favor of the successful party, is error without prejudice. *Mace v. Boedker*, 127-721.

The erroneous admission of evidence to establish a fact which is conceded by the complaining party is without prejudice and will not justify a reversal. *State v. Wagner*, 123-271.

The withholding of rulings on objections to evidence is error without prejudice where the court subsequently sustains a motion to direct a verdict. *American*

Soda Fountain Co. v. Dean Drug Co., 111 N. W. 534.

Cumulative evidence: Error in exclusion of cumulative evidence which could add nothing to the weight of the evidence already given will be deemed to be without prejudice. *Owen v. Christensen*, 106-394.

The wrongful exclusion of cumulative evidence is not error without prejudice where there is a sharp conflict in the evidence, and the number and the character of the witnesses is important. *Crago v. Cedar Rapids*, 123-48.

An erroneous reason for a correct ruling does not furnish a ground for reversal. *State v. Crofford*, 133-478.

Prejudice must appear: A ruling as to the right to open and close, that matter being left to the discretion of the court, cannot be questioned on appeal, no affirmative prejudice appearing. *Shaffer v. Des Moines Coal & Hay Co.*, 122-233.

Prejudice is not to be presumed from an error in a ruling on a matter of procedure as to which the trial court has a discretion, and unless prejudice is shown to have resulted to the complaining party, such error will not be ground for reversal. *Farmer v. Norton*, 129-88.

Prejudice presumed: When error appears prejudice will be presumed until the contrary affirmatively appears. *Ford v. Chicago, R. I. & P. R. Co.*, 106-85.

Contradictory and conflicting instructions are almost uniformly held to be erroneous except in cases where the court can say there was no prejudice. *Ibid.*

Where an instruction given is erroneous it will be presumed to be prejudicial and to have been the ground of the verdict unless it affirmatively appears that the verdict was based on some other ground. *Strever v. Chicago & N. W. R. Co.*, 106-137.

From error in the giving of an instruction prejudice is presumed, which must be overcome by the record in order to show that the error was without prejudice. *Loughran v. Des Moines St. R. Co.*, 107-639.

Without an appeal or an assignment of error appellee may protect a judgment in his favor, if entitled thereto on the face of the record, by showing from the record that the errors of which appellant complains were without prejudice. *Voorhees v. Arnold*, 108-77.

Absence of judge from the court room and beyond hearing of the proceedings when not shown affirmatively to have been without prejudice is in itself error alone sufficient to warrant reversal of judgment. *State v. Carnagy*, 106-483.

But by affirmative consent to such absence error therein will be waived, even

in a criminal case, unless prejudice appears. *State v. Hammer*, 116-284.

Where the character of the answers expected in response to questions asked is evident, the appellant, complaining of a ruling sustaining objections to such questions, is entitled to the presumption that the evidence, if received, would have been favorable to him. *Swanson v. Allen*, 108-419.

Where the object for which the question is asked is not apparent, but it is sought thereby to establish collateral facts, the materiality of which is to be afterwards shown, counsel asking the question must state what he expects to prove and in what way the facts sought to be elicited will become material, otherwise the sustaining of an objection to his question will be error without prejudice. But where the question calls for evidence, the materiality and competency of which is plainly apparent, an error in sustaining an objection to the question will be presumed to be prejudicial. *Quinlan v. Chicago, R. I. & P. R. Co.*, 113-89.

Slight error: Where plaintiff was erroneously allowed to introduce evidence of an element of damage for which recovery should not have been permitted, but the damage thus proven was of an inconsiderable amount, and no request to have that amount remitted from the verdict was made in the lower court, held that the judgment would not be interfered with on appeal. *Frohs v. Dubuque*, 109-219.

Error of a few cents, in computing the amount of recovery, will not be ground for reversal. *Perin v. Cathcart*, 115-553.

No other result: Where no other conclusion than that embodied in the judgment appealed from could reasonably be anticipated on another trial the error complained of may be disregarded. *Schaefer v. Anchor Mutual Fire Ins. Co.*, 133-206.

The supreme court will not reverse for failure to submit a question to the jury, where no other result could have been properly reached had the question been submitted. *Haggard v. Independent Sch. Dist.*, 113-486.

Error in refusing to transfer an action from the equity to the law docket will be error without prejudice where the issues would in any event be liable without a jury. *McCormick Har. Mach. Co. v. Markert*, 107-340.

Error in transferring an action to the equity docket will be without prejudice if the same judgment must necessarily have been rendered under the evidence had no transfer been made. *Rattray v. Talcott*, 124-398.

A case will not be reversed because of the improper admission of evidence, where the result could not have been different

had such evidence been excluded. Such error is without prejudice. *In re Wiltsey's Will*, 109 N. W. 776.

Errors in the admission of evidence are without prejudice if the court subsequently reaches the conclusion that there is not sufficient evidence to sustain a finding of the fact which such evidence was introduced to establish. *Arment v. Arment*, 111 N. W. 812.

Where the vendee has sued to recover back the purchase price paid for property, held that his failure to plead and prove an offer to return would not necessitate the reversal of a judgment in his favor where it appeared that such tender, if made, would not have been accepted. *Olson v. Brison*, 129-604.

Nominal damages: A judgment will not be reversed for failure to award nominal damages when it does not appear that appellant was entitled to more. *Lippert v. Lippert*, 110-550; *Milligan v. Owen*, 123-285; *Castor v. Dufur*, 133-535.

In the absence of evidence as to the extent of substantial damages failure to assess nominal damages is not a ground of reversal. *Ryce v. Whitley*, 115-748.

Failure to award nominal damages may be a ground of complaint on appeal where the recovery of such damages would determine and adjudicate a valuable right as to real property. *Harvey v. Mason City & Ft. D. R. Co.*, 129-465.

Exemplary damages: Error in rulings on evidence with reference to exemplary damages will be error without prejudice if actual damages are not allowed. *McNally v. Arnold*, 127-437.

Error cured: Error in overruling a motion to exclude evidence will be error without prejudice where at the end of the examination all evidence of that character is excluded and the jury cautioned to disregard it. *State v. Baker*, 106-99.

While it is not proper to base an argument on facts not shown to have existed, error in doing so is cured by prompt action of the court in requiring the withdrawal of such remarks. *Mackerall v. Omaha & St. L. R. Co.*, 111-547.

Error in submitting a ground of recovery of which there is no evidence may be cured by filing an offer to remit that for which verdict should not have been rendered. *Bowsher v. Chicago, B. & Q. R. Co.*, 113-16.

Error in rejecting testimony will be without prejudice where the fact sought to be established is fully shown by the testimony of other witnesses. *State v. McPherson*, 114-492.

The admission of incompetent evidence properly objected to cannot be deemed without prejudice because other evidence of the same character was admitted with-

out objection. *Metropolitan Nat. Bank v. Commercial State Bank*, 104-682.

Prejudice in the erroneous admission of evidence is not removed by the fact that another witness afterwards gives competent testimony as to the same fact. *Bryce v. Chicago, M. & St. P. R. Co.*, 129-342.

In general, error in the admission of evidence is cured by subsequently striking it out. *Croft v. Chicago, R. I. & P. R. Co.*, 109 N. W. 723.

Where the witness has in fact testified as to a matter with reference to which an objection to his testimony is sustained, the error will be without prejudice. *Hofacre v. Monticello*, 128-239.

The overruling of a motion to strike allegations of damage from the petition will not be a ground of reversal on appeal, though erroneous, if the claim embodied in such allegations is subsequently abandoned, and instructions given exclude such claim from the consideration of the jury. *Urdangen v. Doner*, 122-533.

In general, error in receiving improper evidence may be cured by directing the jury not to consider it. *State v. Moran*, 131-645.

And see notes to § 3705.

Error cured by verdict: Where there is an express finding supported by the evidence that a will is invalid by reason of want of mental capacity of testator, a submission to the jury of the question of undue influence though erroneous will be without prejudice. *In re Will of Sellack*, 125-678.

Where by general verdict the plaintiff's cause of action is negated, error in the exclusion of evidence relating to the measure of damages is without prejudice. *German Savings Bank v. Fritz*, 109 N. W. 1008.

Where the jury finds plaintiff not to be entitled to recover anything for the injury for which suit is brought, notwithstanding proof of damage resulting therefrom, the exclusion of evidence relating to the measure of recovery, if error, is without prejudice. *Lush v. Parkersburg*, 127-701.

Error in instructions as to the measure of damages for wrongful suing out of an attachment will be without prejudice if the jury finds that the attachment was rightfully sued out. *Crowell v. McGoon*, 106-266.

Error in rejecting evidence relating to damages is without prejudice where the jury finds no cause of action. *Rosenberger v. Marsh*, 108-47.

Error in rulings on evidence bearing upon a different issue than that on which the verdict of the jury is based will not warrant a reversal. *Hunter v. Davis*, 128-216.

(c.) *Review of ruling granting or refusing new trial.*

New trial for insufficient evidence: The verdict of a jury will not be disturbed by the appellate court on the ground that it is not sustained by the testimony unless it is so manifestly against the weight of evidence as to show it to have been the result of passion or prejudice. *Ingraham v. National Union*, 103-395.

A motion for new trial for want of evidence is addressed to the sound discretion of the trial court, and its action thereon will not be interfered with unless it is manifest that such discretion has been improperly exercised, and this rule is especially applicable where the motion is sustained. *Holman v. Omaha & C. B. R. Co.*, 110-485.

The supreme court is reluctant to interfere with an order granting a new trial. A large discretion in such matters is lodged in the trial court, and its exercise of discretion will be interfered with only in a clear case of abuse. *Loomis v. Des Moines News Co.*, 110-515.

It requires a clear case to justify setting aside the ruling of a trial court granting a new trial. *Mackintosh v. Locke*, 112-252.

The supreme court will not interfere with a ruling upon a motion for new trial unless an abuse of discretion is shown, and where a new trial is ordered the abuse must be made to clearly appear. *Rodgers v. Farmers' Nat. Bank*, 117-511.

While the matter of sustaining a motion for new trial rests largely in the discretion of the trial court, yet this discretion is a legal one, and where improperly exercised will be reviewed and the ruling reversed. However, where justice has been done and the case properly decided on its merits, a new trial cannot be granted. *Stover v. Flower*, 120-514.

Where a discretion is confided to an inferior tribunal, the exercise thereof is not subject to review, save for an alleged abuse, resulting in substantial injustice. *Cox v. Burnham*, 120-43.

Where the successful party appeals from an order granting a new trial he cannot complain of errors in the instructions with reference to the measure of damages. *Thrush v. Graybill*, 128-406.

Further as to review of rulings on motions for new trial, see notes to § 3755.

(d.) *Review of findings of fact.*

Of jury: A judgment will not be reversed for want of evidence to support it unless there is such a complete lack of support in the evidence as appears by the record as to indicate that the verdict of

the jury was the result of passion or prejudice. *Lutz v. Anchor Fire Ins. Co.*, 120-136.

Under an assignment of error that the verdict is the result of passion and prejudice and not supported by the testimony, the supreme court is bound to accept as established all that the evidence properly tends to prove in appellee's favor. *Pneumatic Weigher Co. v. Burnquist*, 128-709.

The supreme court has no jurisdiction to correct the findings of fact made by the jury and it cannot consider the sufficiency of evidence to support the verdict unless that question has been raised in the lower court. *Schulte v. Chicago, M. & St. P. R. Co.*, 124-191.

In a law case the court on appeal does not determine for itself the preponderance of evidence, but the verdict will be sustained if there is any substantial evidence in its support. *Johnson v. Chicago, St. P. M. & O. R. Co.*, 123-224.

Of trial court: In a law action the finding of the trial court on a question of fact is to be given the same effect as that of the verdict of a jury. *Thistle Coal Co. v. Rex Coal & Mining Co.*, 132-592.

The finding of the court in a law case has on appeal the force of a verdict. *In re Estate of Smith*, 133-142.

The findings and judgment of the trial court upon the facts in a law action tried without a jury are to be treated on appeal as having the force and effect of a verdict of a jury, and are not to be overruled if there is any evidence on which they might reasonably or fairly be based. *Blackledge v. Davis*, 129-591.

Of referee: On an appeal from a decree based on the report of a referee the appellate court is entitled to consider the findings of such referee, although they are not conclusive. *McCormick Harvesting Machine Co. v. Pouder*, 123-17.

IV. HEARING AND DETERMINATION OF APPEAL.

(a.) *Dismissal; affirmance or reversal; remanding; final judgment.*

Jurisdiction: The supreme court may adjudicate the question of its jurisdiction as a matter of fact on a motion to dismiss. *Yockey v. Woodbury County*, 130-412.

Affirmance on motion: The affirmance of the judgment in an action for the recovery of real property entered in the supreme court on motion by reason of the failure of the appellant to properly prosecute his appeal is not a bar to the granting of a new trial in such an action under the provisions of Code § 4205. Such an affirmance adds nothing to the judgment

from which the appeal has been taken. *Bevering v. Smith*, 121-607.

Where the appellant presents neither points, propositions nor argument in support of his appeal, the judgment will be affirmed on appellee's motion. *McCormick Harv. Mach. Co. v. McCormick*, 128-155.

Affirmance by operation of law: In case of equal division of the judges the decision of the lower court is affirmed by operation of law. *Chicago, M. & St. P. R. Co. v. Davenport*, 127-677; *Chicago & N. W. R. Co. v. Cedar Rapids*, 127-678.

Examination of record: On appeal from the action of the court in directing a verdict the correctness of such action must be determined by an examination of the entire evidence material to the issue involved. *Watson v. Dilts*, 124-344.

Remittitur: The supreme court may affirm on condition that the successful party remit a portion of the judgment, giving to the appellant the option of accepting such remittitur or having a new trial. *Hunter v. Davis*, 128-216.

Where it appears that a judgment erroneously included a specific sum, the court may affirm the judgment on condition that the appellee remit the amount erroneously included. *Govern v. Russ*, 125-188.

Where the verdict is excessive the court may order an affirmance upon condition that the appellant file a remittitur of the portion of the judgment over and above the amount which the court finds to be supported by the evidence. *Struble v. Burlington, C. R. & N. R. Co.*, 128-158.

It is not error to refuse a new trial on one count, the plaintiff pending the motion for new trial having remitted the amount of recovery on such count. *McElhone v. Wilkinson*, 121-429.

Remand: Where a decree is affirmed and no order is made for remanding the case to the lower court, the affirmance is simply a ratification of what has been done in the lower court and leaves the parties in precisely the same situation in the lower court as though no appeal had been taken, and subsequent proceedings with reference to the enforcement of the decree may be had in the lower court without regard to the fact of such appeal. *Dunton v. McCook*, 120-444.

Decision binding on second appeal: The rule of law announced by the supreme court on one appeal is to be followed by the lower court on the second trial of the case and will be recognized as the law of the case on a second appeal. *McFall v. Iowa Cent. R. Co.*, 104-47.

It would be manifestly unjust to reverse the lower court for following the express direction of the supreme court given on the former appeal in the same case. The

holding of the court on one appeal is the law of the case for a subsequent trial of the same case in the lower court. *Hendershott v. Western Union Tel. Co.*, 114-415.

Where the court on appeal has determined that the evidence in an action for negligence should have been submitted to the jury, it is error in the trial court on a second trial to set aside the verdict on the ground that such evidence is not sufficient to support the verdict. *Hensley v. Davidson Bros. Co.*, 112 N. W. 227.

The decision on appeal becomes the law of the case and should be followed on a retrial and on a subsequent appeal, unless the facts on the subsequent trial are materially different. *Russ v. American Cereal Co.*, 121-639.

On an appeal from the second trial of a case in which the first trial has been reviewed by the supreme court, the decision on the former appeal must be taken as the law of the case upon the propositions considered on such appeal. *Vogt v. Grinnell*, 133-363.

Effect of reversal: The reversal of a judgment annuls garnishment proceedings instituted under such judgment, and the recovery of another judgment on a new trial will not restore the effect of such garnishment. *Decatur v. Simpson*, 119-488.

Final judgment: Where the facts are found by the trial court and the conclusion reached is the result of an erroneous application of the rules of law to such facts, the supreme court may properly direct the lower court to enter judgment on the facts found without a retrial of the case. *Rew v. Independent School District*, 125-28.

Opinion: The language in an opinion must be limited by the subject to which it is applied. *Giershofer v. Nupuf*, 106-374.

(d.) *Trial of equity cases de novo.*

What triable de novo: Where the action was properly one at law, but has been treated in the lower court as if in equity, it will be so treated on appeal. *Harrison v. Palo Alto County*, 104-383.

An action commenced in equity and tried in the lower court without objection as an equitable action is triable *de novo* on appeal. *Des Moines Sav. Bank v. Morgan Jewelry Co.*, 123-434.

A proceeding for admeasurement of dower is triable ordinarily upon assignment of error and not *de novo*. *In re Estate of Lund*, 107-264.

Exceptions to rulings on the admission and exclusion of evidence, even though assigned as error, will not be considered on a trial of an equity case *de novo*. *Varnum v. Winslow*, 106-287.

Finding of lower court: Even in an equity case triable *de novo* it is not improper to give some weight to the fact that the trial court had before it the witnesses, and that it is in a better position than the appellate court to determine the credibility and effect of their testimony. *Berry v. Berry*, 115-543; *Mosher v. Goodale*, 129-719; *Smartwood v. Chance*, 131-714; *Baily v. Sioux City*, 133-276; *Sargeant v. Owen*, 111 N. W. 980; *Hubbard v. West*, 112 N. W. 180.

Even in a case triable *de novo* the findings of the trial judge on the testimony of the witnesses before him will be disturbed with reluctance. *Johnson v. Farmers' Ins. Co.*, 126-565.

Where a case is tried on oral evidence the trial court stands in a better position than the supreme court to arrive at the truth of the disputed facts and its findings will be disturbed with reluctance, although the case is triable *de novo*. *Wilkie v. Sassen*, 123-421.

In view of the fact that the trial court has heard the evidence as given, and has had opportunities to observe the effect of the evidence, it should exercise greater freedom in granting new trials for insufficiency of the evidence than will be exercised by the supreme court on appeal, and the supreme court will not interfere with the discretion of the lower court in such cases unless it appears that there has been a clear case of abuse of legal discretion. *Brooks v. Brotherhood of American Yeomen*, 115-588.

What abstract must show in trials *de novo*. Where the abstract of the appellant does not show that the record is such that the case can be tried *de novo* and the case is submitted in that form and appellee insists that the appeal should be dismissed, the appellant cannot subsequently cure the defects in his abstract and secure a trial *de novo* by an amendment. *Watson v. Burroughs*, 104-745.

The fact that the abstract does not appear to contain all the evidence may justify an affirmance of the judgment of the lower court, but not a dismissal of the appeal. *First Nat. Bank v. Robinson*, 105-463.

Failure of an abstract to show that it contains evidence offered, but not received, as well as that offered and introduced, may be cured by amendment when the defect is pointed out. *Steckel v. Standely*, 107-694.

After the evidence has on appeal been stricken from the record because not properly preserved and the case has been sub-

mitted on the part of appellee, appellant is not entitled to have the evidence reinstated and the case considered as though such evidence was in the record. *Citizens' Bank v. Johnson*, 107-365.

The submission of the case on an agreed statement of facts does not render unnecessary the preservation and certification of the evidence in an equity case, it appearing that evidence in addition to the statement of facts was introduced, and the agreed statement of facts itself being a matter of evidence must be thus preserved and certified. *Co-Operative Bank v. Meldrum* 128-694.

Remanding case: Even in an equity case triable *de novo* the supreme court may remand the case to the lower court for further proceedings to ascertain the amount for which decree shall be rendered. *Haggerty v. Brower*, 105-395.

Where in an equity case evidence offered by one party is excluded on the objection of the other, and on appeal the exclusion of such evidence is held to have been erroneous, the case may be remanded in order to enable the party who was successful below to introduce evidence to meet that offered by his opponent, which he would have had an opportunity to offer had his objection been overruled. *Shetler v. Stewart*, 133-320.

Even in an equity case the appellee after a reversal may be entitled to a remand of the case to the lower court to enable him to introduce evidence which under the erroneous theory on which the case was tried was not admissible. But a remand of the case for new trial will be granted only in furtherance of justice, and the showing therefor must be such as ordinarily would entitle a party to a new trial. *Chicago, M. & St. P. R. Co. v. Hemingway*, 111 N. W. 987.

Where a decree enjoining the maintenance of a business as constituting a nuisance is reversed because the business is not under the evidence *per se* a nuisance, the case should be remanded for further testimony in order that proper conditions may be prescribed as to the conduct of the business. *Hughes v. Scheurman Bros.*, 112 N. W. 198.

Although the trial court loses jurisdiction on an appeal in an equity case which it does not again acquire unless the case is remanded by the supreme court, it still has the chancery power inherent in a court of equity to change or modify its orders relating solely to enforcement of such decree. *Swan v. Harvey*, 123-192.

SEC. 4140. Judgment against sureties on stay bond.

On affirmance, judgment may be entered in the supreme court against the sureties on the supersedeas bond without notice to

them of the motion for such judgment. *Jewett v. Shoemaker*, 124-561.

The sureties may, however, appear and

interpose any defense they might have to the rendition of judgment. *Ibid.*

The entry of such judgment to which appearances and objection has been made

by the sureties is conclusive in a subsequent action by them to restrain the enforcement of the bond. *Ibid.*

SEC. 4142. Costs taxed. The supreme court must provide by rule for taxing as costs all printing authorized upon the trial of appeals. The court shall also tax the costs of any translation of the shorthand notes filed as provided in this chapter, and also any translation of the shorthand notes which has been made of record in the court below, upon the certificate of the clerk of such court as to the amount of such costs. [26 G. A., ch. 64.] [27 G. A., ch. 105, § 1.]

The trial court has no jurisdiction to make any rule as to the taxation of costs of printing or fees of the clerk or other costs incident to a proceeding in the supreme court. *Berkey v. Thompson*, 126-394; 102 N. W. 134.

The translation of the shorthand reporter's notes which is required for no other purpose than the presentation of the ap-

peal should not be taxed in the district court. It is subject to taxation only in the supreme court. *Ibid.*

The costs in a *certiorari* proceeding are to be taxed in analogy to those on appeal as provided in rule 97. *Coffey v. Gamble*, 94 N. W. 936.

As to costs of abstracts see notes to § 4118.

SEC. 4145. Restitution of property.

The voluntary payment of money to redeem property, sold under a decree which is afterwards reversed, will not entitle the successful party to recover the money thus paid. *Weaver v. Stacy*, 105-657.

The amount paid in satisfaction of execution under a judgment may be recovered on a reversal of the judgment. *Manning v. Poling*, 114-20.

The restoration required by this section is not limited to property sold, but if money of the judgment defendant is obtained by reason of such judgment, as through a redemption of the property sold, he is entitled to its return upon reversal. *Schoonover v. Osborne*, 117-427.

An execution issued upon a judgment from which an appeal is taken, and all proceedings had thereunder, are depend-

ent for their validity upon the judgment being sustained. If property has been taken under such execution, and the judgment is thereafter reversed, restitution must be made. *Decatur v. Simpson*, 119-488.

The reversal of a judgment releases a garnishment thereunder, and subsequent recovery of judgment on a new trial will not support or restore the garnishment proceeding. *Ibid.*

One who enforces a judgment which is afterwards reversed on appeal, may be required to make restitution to the injured party, and the fact that the judgment has been involuntarily paid on execution is not a waiver of such right to have restitution made. *Chambliss v. Hass*, 125-484.

SEC. 4146. Title not affected.

This section has no application where the judgment does not affect the present condition, possession or title of real property acquired by the party under the pro-

ceeding appealed from. *Central Trust Co. v. Hubinger*, 87 Fed. 3; *Hubinger v. Central Trust Co.*, 94 Fed. 788.

SEC. 4148. Petition for rehearing.

An opinion which has been suspended or withdrawn by the granting of a rehearing, cannot properly be quoted as an official pronouncement of the court. *Sioux City & St. P. R. Co. v. O'Brien County*, 118-582.

The case is to be disposed of on rehearing on the record as it was on the first submission. *Coe College v. Cedar Rapids*, 120-541.

The rehearing must be determined on the record as presented on the original submission, and if an objection to the jurisdiction of the court is first suggested on the rehearing the original record cannot be amended for the purpose of showing jurisdiction. *Martin v. Martin*, 125-73.

A new case cannot be made on a petition for rehearing, nor can matters then

be insisted upon which were not presented in the original case. *Long v. Garey Inv. Co.*, 112 N. W. 550.

Parties will not be permitted upon an application for a rehearing to shift their grounds of action or defense. *Cook v. Marshall County*, 93-372.

While in civil cases the supreme court will not grant a rehearing on account of matters not urged in the original presentation of the case, this rule does not apply in criminal cases, and a reversal may be ordered on grounds presented for the first

time on rehearing. *State v. Phillips*, 119-652.

A notice of the petition for rehearing has no effect to suspend the decision, and the filing of the petition itself has no such effect, unless so ordered by the court or one of the judges upon its presentation. *State v. Cahill*, 131-286.

Pending a petition for rehearing a *procedendo* to the district court will not, as a rule, be issued. *Berkey v. Thompson*, 126-394.

SEC. 4150. Death of party—continuance.

While the substitution of proper parties may be made when asked, the death of a party does not prevent the determination of the appeal, and it is not necessary that

there be a substitution where death occurs between the submission and the decision of the appeal. *Williams v. Williams*, 115-520.

SEC. 4151. Dismissal of appeal.

Where the controversy involved the right to the possession of a farm, which right if it ever existed had terminated, held that

the appeal should be dismissed. *Moller v. Gottsch*, 107-238.

CHAPTER 3.

OF CERTIORARI.

SECTION 4154. When writ may issue.

When will lie: The action of *certiorari* has several offices, among which is that of supplying defects of justice in cases obviously entitled to redress and yet unprovided for by the ordinary forms of proceedings. It is especially applicable in cases where inferior boards, officers or tribunals, exceed their authority and no method of appeal has been provided by statute. *Bremer County v. Walstead*, 130-164.

The writ of *certiorari* is never used to correct mere error, but only to test the jurisdiction of an inferior tribunal. *Butterfield v. Treichler*, 113-328.

The writ of *certiorari* cannot be properly granted when the error complained of can be fully and speedily corrected by appeal. *Oyster v. Bank*, 107-39.

Certiorari will lie where the lower court has exceeded its jurisdiction, and in such a case equity has no jurisdiction to interfere by injunction. *Vete v. Bington*, 132-487.

A writ of *certiorari* will not be granted for the annulling of the action of an inferior tribunal, unless it be shown that such action was prejudicial to the plaintiff. *Blodgett v. McVey*, 131-552.

If the trial court has no jurisdiction or has acted illegally, its rulings may be corrected upon *certiorari*, although the question of jurisdiction might be raised by appeal. *Berkey v. Thompson*, 126-394.

A complaining party may not select one merely erroneous ruling out of many and have it reviewed in the supreme court by *certiorari*, but where the action of the lower court embraces several distinct questions upon some of which it has no jurisdiction to act and upon which it acts illegally, such rulings may be reviewed by *certiorari*. *Berkey v. Thompson*, 126-394.

The writ of *certiorari* is not available to correct mere irregularities or errors in the proceedings of the lower court, but where the action complained of is in excess of the jurisdiction of the court, an appeal is not an adequate, plain and speedy remedy, and *certiorari* will lie. *United States Standard Voting Mach. Co. v. Hobson*, 132-38.

Therefore, held that the action of the court in restraining the use of a voting machine at a public election, being in excess of the equitable powers of the court, should be annulled in *certiorari*. *Ibid*.

A writ of *certiorari* should not be granted when the error complained of in the action of the inferior tribunal can be fully and speedily corrected by appeal. *Eels v. Bailie*, 118-519.

Where a party who had procured judgment in a justice's court, from which an appeal by the opposite party had been taken to the district court, notwithstanding a remittitur which reduced the amount of the judgment to less than \$25, appeared in the district court and moved to dismiss for want of jurisdiction of the appeal, and his motion was overruled, held that he could not by *certiorari* question the correctness of such ruling. *Ibid.*

When a new jurisdiction is created by statute, and the court or officer exercising it proceeds in a summary mode, or in a course different from the common law, and a remedy for the revision of its exercise is not given by the statute creating it, *certiorari* from a court having the general superintendence and control over inferior jurisdictions will lie for its revision. *Home Sav. & T. Co. v. District Court*, 121-1.

Certiorari is the proper remedy where a council or the officers of a municipal corporation acting judicially are without authority, or are otherwise acting illegally. *Moore v. City Council*, 119-423.

The board of review for equalization of taxes, having acquired jurisdiction to proceed in a particular case as to the correctness of the assessment, its action cannot be declared invalid in *certiorari* proceedings on the ground that there was not evidence before it justifying an increased assessment. *Ferguson v. Board of Review*, 119-338.

Where the court acts without jurisdiction in entering a judgment or order, the aggrieved party is not limited to his remedy by appeal, but may have the judgment or order annulled in a proceeding by *certiorari*. But if the court has jurisdiction an appeal is a plain, speedy and adequate remedy. *Young v. Preston*, 131-292.

When a want of power is urged in a municipal corporation to vacate a street, a court of equity may pass upon the question, but when the power is conceded and the manner of its exercise is sought to be controlled, the remedy is at law through proceedings by *certiorari*. *McLachlan v. Gray*, 105-259.

Where the board of supervisors has jurisdiction to establish a public highway, its action cannot be reviewed in a *cer-*

tiorari proceeding. *Brockway v. Board of Supervisors*, 133-293.

Certiorari is the proper remedy by which to test the legality of the proceedings of a board of supervisors in changing the location of a courthouse. *Way v. Fox*, 109-340.

The action of *certiorari* will not lie to correct a mere irregularity in the procedure of boards of directors with reference to consolidation of school districts. *Molyneaux v. Molyneaux*, 130-100.

If the court improperly proceeds after a dismissal, there being no counterclaim properly pleaded, the error of the court may be corrected by *certiorari*. *Bardes v. Hutchinson*, 113-610.

Contempt: A proceeding by *certiorari* is available, and is the only remedy in behalf of one found guilty of a contempt. *Wells v. District Court*, 126-340.

Not waiver of appeal: *Certiorari* and appeal are not necessarily inconsistent remedies, and the fact that the party brings *certiorari* to test the jurisdiction of the court to enter an order does not constitute a waiver of the right to appeal from such order. *Porter v. Butterfield*, 116-725.

Who may bring action: A citizen and taxpayer as such is not entitled to maintain *certiorari* to test the validity of a city ordinance, where it does not appear that he has any right affected by the ordinance not common to all residents, citizens and taxpayers. *Collins v. Keokuk*, 108-28.

A tax payer cannot maintain an action in his own name to determine the validity of the action of the lower court, when his only interest is in the expense to the taxpayers involved in such action. *Polk County v. District Court*, 133-710.

One who has no individual interest in a proceeding in a court cannot prosecute an action by *certiorari* to review such proceeding. *Wilson v. Remley*, 106-583.

The right to an office cannot be determined in a proceeding by *certiorari* on the part of one not in possession to annul the action of an appointing board in selecting another person to such office. *Daniels v. Newbold*, 125-193.

Return: The return is conclusive as to all matters relating to the procedure which is questioned in the petition and writ. *Carpenter v. Clements*, Judge, 122-294.

Waiver: The right to question the validity of a judgment on the ground that the court is without jurisdiction of the subject-matter is not waived by taking exceptions to the judgments. *Davis v. Preston*, 129-670.

SEC. 4158. Service and return.

It is not provided that notice be given to the party in whose favor the judgment

was entered which is questioned on *certiorari* for want of jurisdiction. Such

party has an opportunity to appear and be heard by counsel if he sees fit. *Davis v. Preston*, 129-670.

Persons interested in upholding the proceedings assailed are entitled to be heard. *Tod v. Crisman*, 123-693.

SEC. 4160. Trial—judgment.

Costs: It is discretionary with the court to tax the costs in *certiorari* to the person instituting the proceeding, which is held to have been instituted without jurisdiction. *Coffey v. Gamble*, 94 N. W. 936.

A board or officer not interested in the controversy, but merely acting in a judicial capacity, will not be mulcted in costs in a *certiorari* proceeding, unless affirmatively shown to have acted in bad faith. *Ibid.*

SEC. 4162. Limitation.

Where the motion to set aside an order and judgment of the district court is still pending in that court undisposed of, the supreme court will not entertain a proceeding by *certiorari* to review its action. *Lloyd v. Spurrier*, 103-744.

An action of *certiorari* to determine the validity of a special assessment may be brought within one year after the levy of the assessment, although the resolution ordering the improvement for which the

assessment is made was passed more than a year before the bringing of the action. *Polk v. McCarthy*, 104-567.

In a proceeding to determine the liability of a land owner to construct a partition fence, held that any claim on his part that the land was a public common was one which should have been interposed by proceedings under *certiorari* within one year. *Miles v. Tomlinson*, 110-322.

TITLE XXI.

OF PROCEDURE IN PARTICULAR CASES.

CHAPTER 1.

OF ACTIONS OF REPLEVIN.

SECTION 4163. Where brought—petition.

Petition: It is not required under the present Code, as it was under the Code of '51, that the petition shall allege that the defendant wrongfully detains the property in controversy. *Kennedy v. Roberts*, 105-521.

The requirements of the statute as to what the petition shall contain are not jurisdictional. *Ibid.*

The allegation in an action for replevin of a note that it was "of no value except as a matter of evidence to the plaintiff and for that purpose and that only is of the value of five hundred dollars," held to be sufficient allegation of the actual or apparent value as required by statute. *Ibid.*

Even though plaintiff was not entitled to the possession of the property when the action was commenced, he may have the right to have his interest in the property determined. *Harward v. Davenport*, 105-592.

Under allegation of absolute and unqualified ownership, plaintiff may prove ownership subject to chattel mortgages. *Ibid.*

What must be shown: Plaintiff must recover on the strength of his own title, and any evidence which tends to show that he did not obtain title to the property or to some part thereof, is admissible. *Gevers v. Farmer*, 109-468.

Where plaintiff alleges that he is the absolute and unqualified owner of the property he must prove such allegation as made, and proof of his right to hold it in trust or under a mortgage will not support his action. *Ibid.*

Plaintiff must recover on the strength of his own title, and if he seeks to recover possession of property levied on under writ of execution, on the ground that it is ex-

empt from execution, he must establish that fact. *Hillman v. Brigham*, 110-220.

An action of replevin is to determine the present possession of the property. *Hillman v. Brigham*, 117-70.

A landlord who has a lien upon a tenant's personal property, but whose right to possession thereof has not accrued, cannot recover possession by replevin. *Ibid.*

A mortgagee of personal property seeking to recover possession under his mortgage must show that the mortgage covers the property which he seeks to recover. *Martin v. Lesan*, 129-573.

Where plaintiff in an action of replevin claims solely as absolute owner, he cannot support his right to possession on evidence that he is entitled to such possession under a chattel mortgage. *Powers v. Benson*, 120-428.

Property seized as an attachment proceeding in which sufficient grounds for attachment are not alleged may be recovered by the owner from the officer as unlawfully detained. *Upp v. Neuhring*, 127-713.

As between the owner and the officer, notice of ownership, under Code § 3906, is immaterial.

Possession of defendant: Possession in the defendant at the time suit is brought is essential to the maintenance of the action. *Woodling v. Mitchell*, 127-262.

Where it appears from the allegations of the plaintiff's petition that the property, recovery of which is sought, has passed from the control and possession of the defendant, the petition does not show good cause of action. *Woodling v. Mitchell*, 127-262.

Notice of ownership: Under Code § 3991 an officer is authorized to levy on property under an execution, unless notice of ownership by a third person has been

served upon him by delivery of the original, and if such service is defective, such defect may be taken advantage of to defeat an action by the third person to recover the property from the sheriff in replevin. *Frazier v. Hill*, 125-116.

In an action of replevin brought by an execution defendant to recover property wrongfully levied on under the writ, the notice of ownership provided for in Code § 3991 is immaterial. *Mitchell v. McLeod*, 127-733.

A person other than the execution defendant suing to recover possession of property from an officer on the ground that the levy was unlawful, must show the notice of ownership provided for by Code § 3991, with reference to the giving of an indemnity bond. *Shaw v. Tyrell*, 129-556.

The owner of goods cannot replevy them from an officer holding them under execution against such owner, without setting up and establishing some facts showing the goods to be exempt from such levy, and where such ground of exemption is not shown, the fact that the owner claiming the goods has not given notice to the

officer of a claim to the goods, under the provisions of Code § 3991, providing for indemnifying bond in case such notice is given, is wholly immaterial. *Young v. Evans*, 118-144.

Transfer to equity: If, after plaintiff has brought an action in replevin, it develops that he can only obtain the relief to which he is entitled in chancery and that the issues are properly triable there, he may amend his petition and have the action transferred to the equity calendar. *Cox Shoe Mfg. Co. v. Adams*, 105-402.

Instructions: In an action to recover possession of certain described machines, of which plaintiff claimed to be the owner, and the defendant an agent for their sale on commission, while the defendant claimed to be the owner by purchase, the contention being as to the nature of the contract, held that an instruction correct as to the issues with reference to some of the machines, was not prejudicially erroneous, though as to others there could be no recovery because of their sale to an innocent purchaser. *DeLaval Separator Co. v. Sharpless*, 129-114.

SEC. 4164. Ordinary proceedings—no joinder or counter-claim.

In an action of replevin to get possession of property under a chattel mortgage, defendant may by way of cross action ask an injunction restraining the proceeding under the mortgage as to any property not subject thereto. *Brody v. Chittenden*, 106-340.

A counterclaim cannot be interposed in a replevin suit. *Sylvester v. Ammons*, 126-140.

Although in replevin no set-off or counterclaim can be interposed, yet one who has been held liable on a replevin bond having at the same time a claim against the person who has been held to be the owner of the property, who is insolvent, may maintain an equitable action to enjoin the enforcement of the judgment on the bond so far as it is off-set by the existing indebtedness. And this right of equitable set-off is available also as against the assignee of the judgment. *DeLaval Separator Co. v. Sharpless*, 111 N. W. 438.

SEC. 4166. New parties.

Where an intervenor seeks to establish his right to possession of the property taken by the plaintiff, and accepts a judgment for its return, he cannot afterwards

Defendant is not allowed in an action of replevin to introduce by way of counterclaim any general demand he may have for damages for trespass committed by animals, possession of which plaintiff seeks to recover in the action. *Holaman v. Marsh*, 116-483.

The issue in replevin is always which of the parties is entitled to possession at the commencement of the action, and in an action of replevin by the mortgagee to recover possession of the mortgaged property, the mortgagor may set up want of consideration for the mortgage to defeat the action. *Slyvester v. Ammons*, 126-140.

An injunction in aid of the proceeding by replevin may be proper. *Brody v. Chittenden*, 106-340.

Section applied. *Wedgewood v. Parr*, 112-514.

SEC. 4167. Bond.

Any error in the ruling of the court as to the sufficiency of the replevin bond will be immaterial where the plaintiff establishes his right to recover. *Kennedy v. Roberts*, 105-521.

sue in damages on the replevin bond for injury to the property. *Newton v. Round*, 109-286.

In an action on a replevin bond the sureties are liable under a judgment rendered for the money value of the property, should the plaintiff elect to take such judgment. *Gerlaugh v. Ryan*, 127-226.

SEC. 4172. Delivery bond.

The sureties on the delivery bond are released from liability if the plaintiff elects to take a judgment for the money value of the property. Such election waives the delivery of the goods. *Gerlaugh v. Ryan*, 127-226.

The sureties on the delivery bond are not liable if the defendant appears and

defends the action and judgment is rendered in his favor for the possession of the property, although an incidental judgment for costs in regard to an application for continuance is entered against him. *American Soda Fountain Co. v. Dean Drug Co.*, 111 N. W. 534.

SEC. 4175. Assessment of value and damages — right of possession.

An election to take a money judgment for the value of the property at the time of taking precludes the recovery of dam-

ages for the subsequent use of the property. *Colean Imp. Co. v. Strong*, 126-598.

SEC. 4176. Judgment.

Where an intervenor, asserting right to the property, takes judgment for its return to him, he cannot afterwards recover on the bond for damages to the property. *Newton v. Round*, 109-286.

Where the plaintiff elects to take judgment for the money value of the property, he cannot recover damages for expenses in preparing to defend the case. He is entitled only to the value of the property and legal interest. *Becker v. Staab*, 114-319.

The fact that the judgment is for the return of the property or its value, without statement of the value of defendant's right therein, will not render the judgment void. *Frazier v. Hill*, 123-116.

In an action on a replevin bond the sureties are liable under a judgment rendered for the money value of the property, should the plaintiff elect to take such judgment. *Gerlaugh v. Ryan*, 127-226.

SEC. 4178. Plaintiff's option.

Where a party claiming possession of the property by intervention elects to take judgment for its return, he cannot afterwards recover on the bond for damages to the property. *Newton v. Round*, 109-286.

Where the plaintiff in a replevin suit elects to take a money judgment, treating the wrongful taking of his property by the defendant as a conversion, he cannot have in addition special damages for its detention. *Powers v. Benson*, 120-428.

The plaintiff electing to take a money judgment for the value of property which has been detained by the defendant does not thereby abandon his right to recover damages for the detention. (Distinguishing *Powers v. Benson*, 120-428.) *Newberry v. Gibson*, 125-575.

The party found entitled to property not in his possession is given the option to have execution for delivery of the specific property, or for its value, as determined by the jury, as of the time when judgment was rendered. Such provision does not relate to the time when the action was commenced. It is, therefore, erroneous to allow recovery of interest on the value of the property prior to the time of rendering judgment. *Bonnot v. Newman*, 109-580.

Where the plaintiff elects to take a money judgment for the value of the property in a justice's court, he may, by remitting the amount of his claim in excess of twenty-five dollars, prevent an appeal by the opposite party, under the provisions of Code § 4547. *Rust v. Olson*, 113-571.

SEC. 4179. Judgment on bond.

Two conditions precedent are essential to the entry of judgment for the value of property; failure to deliver the property, and an election to take judgment for its value. If the plaintiff elects to take a

money judgment for the value of the property, the sureties on defendant's delivery bond are released from their obligation. *Gerlaugh v. Ryan*, 127-226.

CHAPTER 2.**OF ACTIONS FOR THE RECOVERY OF REAL PROPERTY.****SECTION 4182. By ordinary proceedings.**

Adverse possession and acquiescence are defenses which may be set up in a proceed-

ing to recover possession of real property. *Ratray v. Talcott*, 124-398.

SEC. 4183. Parties.

An action to recover possession of real property will lie only on behalf of one holding legal title, with the right to immediate possession. *Marks v. McGookin*, 127-716.

But such showing cannot be defeated simply by the showing of a contract of purchase on the part of defendant, which is executory in character, and under which defendant's right of possession has not yet accrued. *Ibid.*

A mere privilege or license is only an incorporeal hereditament and will not support an action of ejectment. So held as to the ownership of a lot in a cemetery. Equity only can give a full and complete remedy as to infringement of the rights of the owner of such lot. *Anderson v. Acheson*, 132-744.

SEC. 4184. Title.

Where both parties claim under a common grantor it is only necessary to prove a title from such grantor. *Brown v. Tabor*, 103-1.

The statutory provision that in an action to recover real property plaintiff must recover on the strength of his own title, does not apply to a case where a plaintiff in possession of land under a claim of title is seeking to enjoin the sale thereof under execution against one who has no interest therein. *Moore v. Kleppish*, 104-319.

In an action to recover possession of land under an unacknowledged, unrecorded and lost deed, as against a title based on recorded instruments, proof of the deed must be clear and satisfactory. *Thorn v. Lister*, 129-223.

This provision is not applicable in actions to quiet title. *English v. Otis*, 125-555.

SEC. 4205. New trial.

A motion for new trial made during the term is not a bar to the application for a new trial within one year under this section; and the fact that the unsuccessful party has appealed from the ruling denying him a new trial on application made during the term and that the judgment has been affirmed under the rules of the supreme court for failure to present the appeal in the proper manner will not constitute such adjudication as to prevent the presentation of the same question under this section. *Bevering v. Smith*, 121-607.

The period of one year allowed for application for such new trial commences to run from the final entry of judgment. *Ibid.*

The procedure in actions of right is prescribed by statute including the right to a second trial of the issues; in such an action the propriety of a second trial is left to the discretion of the court and greater latitude is allowed to such judicial discretion than in ordinary actions. New trials may be ordered for reasons which would be insufficient under an ordinary application for a new trial. *Ibid.*

CHAPTER 3.**OF ACTION FOR FORCIBLE ENTRY OR DETENTION OF REAL PROPERTY.****SECTION 4208. Grounds.**

While originally this proceeding was criminal, it is under the statutes of this state a special action. *Herkimer v. Keller*, 109-680.

In this action title is not involved, except incidentally for the purpose of showing extent of possession where there is no apparent actual possession as to the entire premises, nor is the right of possession involved, since the remedy is limited to the actual peaceable possession of the plaintiff and the forcible entry and unlawful deten-

tion of the defendant. *Delmonico Hotel Co. v. Smith*, 112-659.

The right of possession cannot be determined in an action of forcible entry and detainer. The question involved is the fact of possession, not the right. *Cagwin v. Chicago & N. W. R. Co.*, 114-129.

In an action of forcible entry and detainer, nothing more is presented than the question as to the right of possession. *Chambers v. Irish*, 132-319.

In such action the tenant cannot be heard

to deny his landlord's title, nor can he defeat the action by pleading a pending action instituted by him to settle contract rights. *Ibid.*

The action of forcible entry and detainer is purely possessory, and may be maintained by one tenant in common against a lessee. *Willis v. Weeks*, 120-525.

SEC. 4211. Jurisdiction—transfer—appeal.

A justice of the peace may properly be given jurisdiction of an action of forcible entry and detainer. Such action does not

Before resorting to a summary remedy for the ejection of a tenant on account of non-payment of rent, in accordance with the terms of a lease, the landlord should demand the rent and afford some reasonable opportunity to the tenant to make payment. *Cole v. Johnson*, 120-667.

necessarily involve the right of possession, as distinct from the fact of possession. *Kerkimer v. Keller*, 109-680.

SEC. 4212. Petition—venue.

The provision that this action may be maintained before a justice of the peace in an adjoining township where there is none qualified to act in the township where the land is situated is applicable where in the latter township a justice of the peace has been elected, but has not qualified, nor

undertaken to act as an officer. *Herkimer v. Keller*, 109-680.

Failure to verify the petition in an action for forcible entry and detainer must be taken advantage of in the trial court, otherwise the defect is waived. *Ibid.*

SEC. 4216. Title not investigated—transfer.

This proceeding cannot be submitted for an action of right. *Herkimer v. Keller*, 109-680.

The right of one in possession after a sale on foreclosure under an alleged agree-

ment to extend the period of redemption may be determined in an action against him for forcible entry and detainer. *Potter v. Ft. Madison Loan & Trust Bldg. Assn.*, 133-367.

SEC. 4217. Possession—bar.

Where a tenant holds over after the termination of a written lease, without the assent of the landlord, the thirty days' notice in writing required by Code § 2991 to terminate a tenancy at will is not neces-

sary, and if such occupancy continues for more than thirty days, with the knowledge of the landlord, the remedy by action of forcible entry and detainer is barred. *McClelland v. Wiggins*, 109-673.

CHAPTER 4.

OF ACTION TO QUIET TITLE.

SECTION 4223. Who may bring action.

What interest will support action: One who has an equitable title only may maintain an action to quiet it. *O'Neil v. Wilcox*, 115-15.

Without the statutory provision for quieting title, a reversioner out of possession, and with no right to possession, could not maintain an action against one in possession, as a life tenant, to determine his rights in the property; but by this section such action is authorized, and it seems that the intention of the statute is that such questions must be settled within the statutory period of limitation. There can at least be no hardship in holding such to be the rule in cases where there is no disability, and where the facts upon which

apprehended litigation will rest are fully known. *Murray v. Quigley*, 119-6.

A remainderman, although not yet entitled to possession, has such interest as may be made the subject of an action to quiet title. *Hubbird v. Goin*, 137 Fed. 822.

The owner may maintain the action here contemplated for the purpose of removing a cloud upon his title, created by an apparent lien. The action is not limited to the determination of the rights of one who claims title. *Blair v. Hemphill*, 111-226.

One who trespasses upon real property in the possession of another cannot have relief in equity to enjoin the person rightfully in possession from protecting his

possession as against such trespasser. *Currier v. Jones*, 121-160.

In an action to quiet title against one holding a tax certificate, a tender made to the defendant as soon as his right to a certificate is asserted, is sufficient. *Carter v. Cemansky*, 126-506.

Adverse possession: In an action to quiet title based on a claim of adverse possession, under a deed purporting to convey absolute title, made in good faith and for an adequate consideration, the claim of plaintiff should not be disregarded on the ground that at the time of receiving the conveyance plaintiff knew of the possibility that some adverse claim might be made in the future. *Wenger v. Thompson*, 128-750.

Claim of title in good faith accompanied by actual and adverse possession for the period of limitation will support an action to quiet title. *Severson v. Gremm*, 124-729.

Adverse possession may furnish the title necessary to support an action to quiet title. *Lougee v. Shuhart*, 127-173.

Title in plaintiff: Where one asks to have title quieted in him as the owner in fee of the land in controversy, he must prove title, and, failing to do so, is not entitled to relief. *Koch v. West*, 118-468.

In a particular case held that plaintiff did not make out such title in himself as to justify the granting of a decree quieting title in him. *Smith v. Thomas*, 120-12.

Where the description of land is sufficient, without the designation of the state in which it is located, an erroneous designation in that respect will not be material. *Ibid.*

The statutory provision with reference to actions for the recovery of real property that plaintiff must recover on the strength of his own title (Code § 4184) is not applicable in actions to quiet title. But plaintiff can have no relief unless he shows such interest in the property that as against the defendant, he is entitled to have the title quieted in him. If both plaintiff and defendant claim under the same chain of title, it is unnecessary for plaintiff to do more than establish his own title as derived from the common source. *English v. Otis*, 125-555.

SEC. 4226. Demand for quitclaim—attorneys' fees.

The statutory provision imposing attorneys' fees in actions to quiet title is penal in its nature, and should be strictly construed. The request for a deed should be made of the party who is to execute the instrument. If it is in any case sufficient to make demand on an agent, it can only be when the agent is vested with power to make the deed. *Lawless v. Stamp*, 108-601.

Where the state intervenes in an action to quiet title, and asks relief against both plaintiff and defendant, claiming title, the state must recover on the strength of its own title, and not on the weakness of that of the other claimants who are in possession. *Rood v. Wallace*, 109-5.

Interest of defendant: An action to quiet title presupposes complete title in the plaintiff as against the defendant, and the action will fail if it shall be made to appear that in fact the defendant has some real interest in the property as distinguished from a mere apparent or asserted right. In such a case the court will not stop to measure the extent of the interest of defendant. *Cody v. Wiltse*, 130-139.

Therefore the vendor of land under a contract containing no provision for forfeiture on the default of the vendee in making payment cannot maintain an action to quiet his title as against the vendee on account of default in payment. *Ibid.*

One who has made a conveyance of all his alleged interest in land is not a necessary party to an action to quiet title. *Cunningham v. Cunningham*, 125-681.

In an action to quiet title, based upon a tax deed, one who does not appear to be the owner of the land and entitled to question the validity of the deed cannot set up its invalidity as a defense. *McCash v. Penrod*, 131-631.

Laches as defense: Laches may be a sufficient ground for refusing to grant relief in an action to quiet title. *Woodward v. Barr*, 128-727.

Parties—notice: A decree quieting title as against one served by publication is final unless set aside on proper showing made by defendant within the period allowed for new trial in such cases. The court is not bound to require proof of non-residence before it can proceed to a hearing. If in point of fact the defendants named are non-residents, the decree is binding upon them, although the fact of non-residence is not specifically found. *Bales v. Williamson*, 128-127.

One who is not a party to an action to quiet title is in no way affected by the decree. *Dows Real Estate & Trust Co. v. Emerson*, 125-86.

The object in exacting the payment of a fee for execution of a quitclaim deed is to cover expenses incident to delivery as well as execution of the deed, and such expenses cover the postage necessary for mailing the deed to the person demanding the same. The person of whom the deed is demanded must in order to avoid liability for costs and attorney's fees deliver the

deed to the grantee in some manner on the tender of fees provided by statute. *Shay v. Callanan*, 124-370.

Judgment for costs cannot be rendered

against defendants in an action to quiet title who are not served with notice as provided by this section. *Mock v. Chalstrom*, 121-411.

SEC. 4227. Equitable proceedings.

In an action to quiet title under a tax deed held that the evidence was sufficient to show claim of right and color of title in defendant, coupled with possession so as to justify an attack upon the tax deed and support a right to redeem. *Iowa Loan & Trust Co. v. Pond*, 128-600.

A proceeding to vacate a decree quieting title in one claiming under a tax deed against an insane owner who makes no appearance, and for whom no guardian is appointed, instituted by his heirs under Code § 3154, differs from a proceeding in

equity in the nature of a bill of review in that the former is governed by the limitations contained in the statutory provision while the latter is controlled by the ordinary rules of procedure. *Hawley v. Griffin*, 121-667.

Where an action to determine a disputed boundary line has been brought and plaintiff amends the petition so as to change it into an action to quiet title, the court may properly grant a motion to transfer the case to the equity docket for trial. *Boltz v. Colsch*, 109 N. W. 1106.

CHAPTER 5.

OF ACTIONS TO ESTABLISH DISPUTED CORNERS AND BOUNDARIES.

SECTION 4228. When allowed.

An adjudication in a proceeding to fix a common corner of four adjacent sections, and the boundary lines of such sections as affected by the location of such common corner, is not binding as to the interior dividing lines of such sections. *Muecke v. Barrett*, 104-413.

A county cannot maintain proceedings to settle boundaries of a county road crossing defendant's land. It is only the owner of the land who may maintain such proceeding. *Dickinson County v. Fouse*, 112-21.

Where the only dispute is as to the boundary line between two tracts, the court is not authorized, on the report of a commissioner, to establish a corner affecting the boundaries of other property owners not parties to the suit. *Newton v. Templeman*, 115-643.

Proceedings of this character are not triable *de novo*, and the finding of the commissioner and of the court has the force and effect of the verdict of a jury. *Ibid.*

SEC. 4236. Corners and boundaries established.

A judgment in such a proceeding to which the owner of one tract of land involved is not a party, is not binding in a

subsequent proceeding by him to establish the same corner. *Dittmer v. Mierendorf*, 129-643.

SEC. 4237. Appeal.

An appeal will not lie from an order appointing a commissioner to locate a corner

at a certain point and taxing the costs up to that time. *Oster v. Devereaux*, 115-724.

CHAPTER 6.

OF PARTITION.

SECTION 4240. By equitable proceedings—no joinder or counterclaim.

In general: One of the joint owners of a water power making improvements on the common property may, on partition,

have the improvements thus made by him set apart as his share. They do not necessarily become a portion of the common

property in such sense that the common owners are entitled thereto. *Forrest Milling Co. v. Cedar Falls Millings Co.*, 103-619.

There may be a parol voluntary partition of lands owned in comomn. *Hayes v. Marsh*, 123-81.

The rights of the widow may be shown to have been abandoned in consequence of an agreement or settlement so as to defeat her right to have such interest set off to her in a partition proceeding. *Wright v. Breckenridge*, 125-197.

In an equitable action in the nature of a suit for partition, there may be an assignment of the widow's dower. *Beeman v. Kitzman*, 124-86.

Judgments against one to whom a share of the property is set aside as the holder of a fee simple or equitable interest therein, attach to the share thus set aside. *Atlee v. Bullard*, 123-274.

A right to inherit as an illegitimate child, recognized under the provisions of Code § 3385, may be interposed as a claim in a partition proceeding to which the legitimate heirs of deceased are parties. *Alston v. Alston*, 114-29.

Parties: Judgment lienholders are necessary parties to a valid adjudication as to the partition of the premises, and such lienholder not being made party to such proceeding is not bound thereby. *Smith v. Piper*, 118-363.

Where by the provisions of a will a trust is created for the benefit of minors and the legal title vests in the trustee, he is a necessary party in an action for partition, and it is not sufficient that the minors who are beneficiaries under the trust are made parties. *Parkhill v. Doggett*, 112 N. W. 189.

Right of vendee under contract: The right of a defendant claiming an interest in the property sought to be partitioned, which is founded on a contract to convey, may be defeated by proof of circumstances which would justify the refusal of a specific performance of such contract. *Schneider v. Schneider*, 125-1.

Where one seeks to have secured to him a right in the property under contract, his action is for specific performance rather than partition. *Noecker v. Wallingford*, 133-605.

Settlement of estates: Where, in a proceeding to partition the real property of a decedent among his heirs, it was urged that it could not be determined whether the personalty would be sufficient to pay debts of the estate, but it did not appear that the facts from which that question was to be determined could not be ascertained without a continuance, held, that a motion to continue on that ground was properly overruled. *Cheney v. McCulloch*, 104-249.

The fact that the estate of a deceased owner has not been fully settled is no defense to an action for partition of his real property among those entitled to share therein. *Smith v. Smith*, 132-700.

The partition among the heirs of a deceased person of the homestead need not be delayed until the debts of the estate are paid and the estate settled. *Hild v. Hild*, 129-649.

In an action for partition among heirs, if brought before the estate has been settled, the court may postpone final decree until the estate is settled and need not dismiss the action as prematurely brought. *Shupe v. Bartlett*, 106-654.

Joinder of other causes: Where no objection has been made in the trial court to misjoinder or improper interposition of a new cause of action by counterclaim or cross-petition, such objection cannot be raised on appeal. *Kringle v. Rhomberg*, 120-472.

Where the statutory provision prohibiting joinder of any other cause of action with an action for partition is ignored and no objection to an equitable counterclaim is interposed, the court may grant such relief as equity requires. *Noecker v. Wallingford*, 133-605.

Section applied as to joinder of other causes of action. *Watson v. Richardson*, 110-698.

SEC. 4252. Confirmation.

In the final decree an additional accounting may be had as to matters affecting the proper share of the parties subsequent to the preliminary decree. *Moy v. Moy*, 111-161.

Where improvements were made in good faith, the allowance therefor is not to be limited to such as were needed to preserve the property. *Ibid.*

SEC. 4253. Partition—referees appointed.

The fact that property is not partible is not in itself a ground for denying to joint owners relief in a suit for partition. *Truth Lodge, etc., v. Barton*, 119-230.

After the referee has reported a pro-

posed partition, the court may modify the report and enter a decree such as is equitable without referring the case back to another referee. *Shaerer v. Shaerer*, 125-394.

The shares should be so set off as to be as nearly as possible of equal value under ordinary conditions as between persons

having equal interests. *Shearer v. Shearer*, 125-394.

SEC. 4256. Special allotments.

Under the facts in a particular case held that the party claiming to have made improvements, and to be entitled to an allowance therefor in case of the sale of the

property, had so far enjoyed the rents and profits on an inadequate consideration as to be precluded from having such relief. *Bergman v. Kammlade*, 109-305.

SEC. 4259. Judgment—decrees of partition to be recorded. Upon the report of the referees being approved, a decree shall be rendered confirming the partition and apportioning the costs as herein provided, entering judgment therefor. Upon the rendition of such decree the clerk shall file with the county recorder of the county a duly certified transcript of such part of the entire decree, in the case in which partition has been ordered, as may be necessary to show the volume and page where such decree is recorded, and the confirmation of the shares and interests of the parties in the property of which partition is made, and the names of the parties who are found entitled to such shares, and an accurate description of each of the shares allotted to the several owners; and such transcript shall be presented to the county auditor for transfer and recorded in the deed records of the county where the action was brought and also in the other counties in the state, if any, where any of the property so partitioned is situated; and in such case the clerk shall transmit to the county recorder of each of such other counties a duplicate of such transcript, and the same shall be there so recorded and transfer so made. Such transcript shall be indexed in the recorder's office the same as conveyances of real estate with the names of the parties so entitled to such shares as grantors, and the name of the party to whom each share is allotted as grantee. The costs of making and recording such transcript shall be taxed as part of the costs in the case. [C., '73, § 3296; R., § 3642; C., '51, § 2064.] [27 G. A., ch. 106, § 1.]

An admission of the facts alleged by the plaintiff seeking partition without other pleading will entitle plaintiff to judgment on the pleadings. *Caldwell v. Drummond*, 127-134.

The effect of a decree in partition is simply to segregate and locate the share of each of the common owners as a separate parcel of land allotted to him, and to extinguish his interest in portions thereof

allotted to others. The title by which such person holds his allotted share is the same as that by which his individual interest in the estate in common was held. The deed in partition destroys the unity of possession, and thereafter each holds his share in severalty, but the deed confers no new title or additional estate. *Foster v. Hobson*, 131-58.

SEC. 4260. Costs.

The discretion exercised by the court in the apportionment of costs in such cases will not be interfered with in the absence

of a satisfactory showing of abuse. *McGuire v. Luckey*, 129-559.

SEC. 4261. Attorneys' fees.

There is no authority for apportioning the attorney's fee here provided for. *Plant v. Fate*, 114-283.

Where there is a dispute as to the ownership of the property and both parties are represented by counsel, attorney's fees will not be taxed as provided by statute; but taxation of attorney's fees is proper where there is no controversy as to ownership or proportionate shares, and the contest raised

in the proceeding is not as to the title but as to a collateral matter. *Smith v. Smith*, 132-700.

Where the object in an action in the nature of a suit for partition brought by the widow of a deceased grantor against his grantee is to secure assignment of dower, attorney's fees will not be allowed as in an action for partition. *Beeman v. Kitzman*, 124-86.

CHAPTER 7.

OF THE FORECLOSURE OF MORTGAGES.

SECTION 4273. Of personal property—by notice and sale.

Where a chattel mortgage is executed to secure a debt past due the mortgagee has the right to foreclose it upon delivery. *Johnston v. Roebuck*, 104-523.

Where by the terms of the mortgage the mortgagee is authorized to sell at private sale he may sell the articles separately, in lots, or together, as may best suit the convenience of buyers and insure the largest returns. In such case the mortgagee is the trustee for the mortgagor and is required to act in entire good faith and conduct the sale fairly. *Ibid.*

The act of the mortgagee in taking possession of the mortgaged property before the happening of contingencies which are specified by the mortgage as conditions on which the mortgagee is to take possession will constitute a conversion and render the mortgagee liable for the value of the property. *Ibid.*

Where a chattel mortgage gave to the mortgagee the right of possession and use during the continuance of the mortgage, held, that it superseded a previous contract by which the mortgagee was holding the property as bailee for hire. *Barnhart v. Hanford*, 105-116.

A foreclosure by notice and sale in accordance with the stipulations of the mortgage will be valid notwithstanding an agreement between the parties postponing

the day of sale, unless the purchaser had actual notice of the agreement to postpone. *Gibson v. McIntire*, 110-417.

The parties may stipulate for a foreclosure without giving the statutory notice, and may waive damages resulting from the sale being conducted without such notice. *Geiser Mfg. Co. v. Krogman*, 111-503.

Where a sheriff acts in making a sale under authority given in the instrument itself, and not under statutory authority, his fees are not controlled by the provisions of Code § 4277. In such a case a reasonable compensation may be allowed. *Dowie v. Christen*, 115-364.

A landlord's lien may be satisfied out of the proceeds of the sale. *Ibid.*

The decree of foreclosure of a chattel mortgage is binding, at least as against collateral attack, even though that method of foreclosure is not authorized by the terms of the contract. *King v. Nelson*, 120-606.

The foreclosure of a chattel mortgage without judicial proceedings, but in accordance with statutory provisions does not constitute a seizure by process of court, and therefore the provisions of Code §§ 4019, 4020 do not entitle laborers to a lien on the proceeds of such foreclosure. *Wills v. Kelley*, 121-577.

SEC. 4277. Notice of sale.

The provisions of this section do not control the fees to be allowed to the sheriff for selling mortgaged chattels, in pursu-

ance of power given in the instrument itself. *Dowie v. Christen*, 115-364.

SEC. 4283. How contested.

If the mortgagor has an adequate remedy at law he cannot remove the foreclosure proceeding to the district court by injunc-

tion. *McCormick Har. Mach. Co. v. De La Mater*, 114-382.

SEC. 4285. Sale under pledge.

Foreclosure in court is one method of enforcing a pledge lien. The lien in such case merges in the judgment and there

subsists to be made effective by special execution. *Croft v. Colfax E. L. & P. Co.*, 113-455.

SEC. 4288. Separate suits on note and mortgage.

A suit may be maintained on a note in one county and, in a proper case, an action for the foreclosure of the mortgage in another. *McDonald v. Second Nat. Bank*, 106-517.

It seems that a foreclosure suit may proceed independently of the action on the note secured by the mortgage. *Smith v. Moore*, 112-60.

SEC. 4289. Judgment—sale and redemption.

The possession of a mere mortgagee is not entitled to protection as against the owner of the fee obtained under a sale made in pursuance of the foreclosure of a prior mortgage. *McDonald v. Second Nat. Bank*, 106-517.

A sale of all of the mortgaged premises, under a decree of foreclosure, for a part of the mortgage debt which is due, discharges the premises from the lien of the mortgage for the part of the debt not due, and for which the decree does not provide. But in actions for the foreclosure of mortgages for installments due, jurisdiction may be retained to provide for the collection of the installments not due. It is not proper, however, to provide that the sale for the installments due shall be subject to a lien for the installments not due. *Kilmer v. Gallagher*, 107-676.

Unless a court retains jurisdiction of a case to provide for future installments, a sale of the mortgaged premises under foreclosure passes to the purchaser all the title and interest of the mortgagor and mortgagee in and to the premises, and the purchaser takes free from the lien of unpaid installments, and it is immaterial that the unpaid installments are evidenced by separate notes and mortgages. *Wells v. Ordway*, 108-86.

Where the holder of two mortgages brings action for the foreclosure of the senior of them, without reference to the junior, and bids in the premises at a sale under such foreclosure, and the mortgagor subsequently quitclaims to a third person who redeems from the foreclosure, the lien of the junior mortgage is thereby extinguished. *Henry v. Maack*, 110 N. W. 469.

The mortgagor's grantee by quitclaim may rely upon the deed to protect himself against the lien of the junior mortgage. *Ibid.*

The holder of the junior mortgage not thus foreclosed cannot rely as against the mortgagor's grantee on a personal covenant between the mortgagor and his grantee by which the latter has undertaken to pay off such junior mortgage. *Ibid.*

There is a marked difference between redemption by judgment debtor and redemption by his grantee. It is the policy of the law to secure to the debtor, as nearly as practicable, the full value of his property sold on execution. When the grantee of the mortgagor acquires the right to redeem, and a junior lienholder fails to exercise his privilege, and is barred by lapse of time, the grantee may redeem without removing such bar, and thus perfect the title in himself. *Co-operative Sav. & L. Assn. v. Kent*, 108-146.

After foreclosure and prior to the sale, the right of the mortgagor is an equity of redemption, which may be conveyed, and the grantee will on redeeming from the sale take the title free from liens of junior creditors who are made parties to the foreclosure proceeding and have failed to exercise the right of redemption. *Cooper v. Maurer*, 122-321.

A junior judgment creditor failing to redeem from a sale under a senior judgment loses the right to subsequently make redemption from a foreclosure sale under a mortgage which has priority to both judgments. *Francestown Sav. Bank v. Silver*, 122-685.

After a decree, sale and expiration of the period of redemption in a foreclosure proceeding to which a junior mortgagee is made a party, the latter has no lien which may be enforced in a subsequent foreclosure proceeding against a purchaser of the mortgagor's right of redemption. *Witham v. Blood*, 124-695.

A lien-holder made party to the foreclosure proceeding must satisfy his lien by bidding in the property or redeeming under statutory provisions and cannot enforce his lien in the absence of such purchase on execution or redemption as against one who buys the property from the mortgagor during the redemption period. *Witham v. Blood*, 124-695.

The grantor in a conveyance which is found to be a mortgage is entitled to possession until decree of foreclosure and expiration of the statutory period of redemption. *Harrington v. Foley*, 108-287.

Where in foreclosure of a mortgage a receiver has been appointed he is entitled to his compensation out of the proceeds of the sale of the mortgaged property. *Ibid.*

The statutory right to redeem cannot be cut off by agreement of the parties, nor by the mortgagee's possession, and exists until barred by statute. When the right is sought to be exercised the mortgagee or grantee in possession will be required to account for the land and profits, and for all the proceeds of the land and other securities. *Adams v. Holden*, 111-54.

A mortgage in this state does not create an estate, but simply a lien or a charge upon the land to secure the debt, and a suit for foreclosure is barred in ten years, and as the rights of mortgagor and mortgagee are reciprocal, redemption under a mortgage will be cut off in the same time. *Ibid.*

The equitable right of redemption which exists independently of the statute may be enforced until taken away in accordance with express statutory enactment. And an equitable action may be maintained to enforce the right of redemption after

execution sale and before the expiration of the statutory period for redemption. If it can be shown in such action that the mortgagee is under obligation to account to the mortgagor for receipts from the property sufficient to extinguish the indebtedness, the mortgagor is entitled to have

SEC. 4293. Other liens.

These provisions as to applications of payments apply to the disposition of the surplus in the hands of the mortgagee

SEC. 4295. Satisfaction acknowledged.

The penalty provided in this section cannot be enforced where the satisfaction relied on is a decree rendered against an insane mortgagee, the year allowed for applying for new trial after the incapacity is removed not having expired. *Pollock v. Milburn*, 112-528.

SEC. 4297. Foreclosure of title bond.

It may be provided in a contract to convey that on failure to pay as agreed the rights of the vendee shall be forfeited. *Bigler v. Jack*, 114-667.

Where time is not made of the essence of the contract, and there are no provisions for forfeiture, a mere failure to pay will not in itself work a forfeiture. On breach by the vendee of the stipulations as to payment, the vendor may sue on the contract as at common law to cover the purchase price, or he may proceed under the statute to foreclose; but he cannot by notice effect a forfeiture. The statute relating to forfeitures has application only to those cases where the contract makes a provision for forfeiture. *Cody v. Wiltse*, 130-139.

SEC. 4299. Forfeiture—notice.

The provision that a land contract shall not be forfeited or canceled unless written notice of such forfeiture be given, relates to a forfeiture of the contract and contemplates its cancellation or termination, while an action to foreclosure is based upon the recognition and continuing validity of the agreement between the parties. Therefore, notice to the vendee other than that necessary in instituting the suit, is not necessary where the proceeding is for the foreclosure of the bond for a deed. *Clifton Land Co. v. Davenport*, 130-94.

The vendor cannot effect the forfeiture of the contract on failure of the vendee to make payment of an installment of the purchase price by giving the statutory notice required in case of forfeitures, unless a forfeiture is provided for in the contract. *Cody v. Wiltse*, 130-139.

A provision as to forfeiture cannot be relied on as defeating an execution sale of

the sale set aside and the mortgage declared satisfied. *Dolan v. Midland Blast Furnace Co.*, 126-254.

The redemption from a mortgage provided for by law is redemption from foreclosure sale. *First National Bank v. Campbell*, 123-37.

after his debt is satisfied. *Citizens' Bank v. Whitney*, 110-390.

A court of equity has no power to enjoin a proceeding by a justice of the peace to enjoin the penalty provided for in this section on the ground that the mortgage is not in law and fact satisfied. *Home Sav. & T. Co. v. Hicks*, 116-114.

No notice to the vendee such as that contemplated in Code § 4299 relating to forfeiture is necessary before instituting an action to foreclose. *Clifton Land Co. v. Davenport*, 130-94.

The statutory provisions as to foreclosure of title bonds have no reference to contracts for options. An option is not a sale, nor even an agreement for a sale. It is at best but a right of election in the party receiving the same to exercise a privilege, and only when that privilege has been exercised by acceptance does it become a contract to sell. *Hopwood v. McCausland*, 120-218.

the vendee's interest, where no steps to enforce such forfeiture have been taken. *Thomassen v. De Goey*, 133-278.

One who has taken no steps to declare a forfeiture of a contract to convey cannot insist on such right of forfeiture as a defense in an action of specific performance. *Rea v. Ferguson*, 126-704.

While the acceptance of payment after a declaration of a forfeiture may constitute a waiver of such forfeiture, yet it must satisfactorily appear by the evidence that the payment was accepted under the contract, and not in satisfaction of some other obligation or indebtedness. *Sutphin v. Holbrook*, 122-272.

Before the enactment of the statutory provision requiring thirty days' written notice forfeiture, held that a forfeiture declared without notice in accordance with the terms of the contract was effectual. *Harris v. Graf*, 111 N. W. 434.

CHAPTER 8.

OF ACTION FOR NUISANCE, WASTE AND TRESPASS.

SECTION 4302. Nuisance—what constitutes—action to abate.

Under the evidence in a particular case, held, that the use which defendant was making of the river adjoining his premises was a proper one, in view of the business carried on and the conditions existing in the locality, and that defendant was not creating a nuisance. *Bennett v. National Starch Mfg. Co.*, 103-207.

In the supplemental petition the plaintiff may in the same action set up a continuance of the nuisance for the purpose of reconveying additional damages. *Footte v. Burlington Gas Light Co.*, 103-576.

Where a contract gave one party the right to construct a drain over the land of another, held that it did not confer the right to maintain a nuisance, and that, even if the plaintiff knew of the existence

of such nuisance when he bought the premises, he would not be estopped thereby from action to recover damages therefor and abate the same. *Van Fossen v. Clark*, 113-86.

A nuisance may exist so as to cause special damage to a private person where such damage is not susceptible of direct and positive proof, and in such case it is the rule that where the nuisance is shown to exist the law presumes damage for the injury to the right, and the jury is given large discretion in fixing the amount thereof. *Ibid.*

The unauthorized obstruction of a street by a railroad company allowing its trains to stand thereon, is a continuing nuisance. *Gilcrest Co. v. Des Moines*, 128-49.

CHAPTER 9.

OF ACTIONS TO TEST OFFICIAL AND CORPORATE RIGHTS.

SECTION 4313. For what causes.

A proceeding by *quo warranto* cannot be maintained for the purpose of determining the rightfulness of the exercise of power by a corporation with reference to a private trust. *State v. Higby Co.*, 130-69.

Rights granted to a corporation with reference to the use of the streets of a city for the operation of street cars are in the nature of a franchise, the validity of which may be inquired into by *quo warranto*. *State v. Des Moines City R. Co.*, 109 N. W. 867.

An action of *quo warranto* is a proper action in which to determine the legality of the incorporation of an independent school district. The remedy by appeal to the county superintendent is not exclusive. *State v. Alexander*, 129-538.

Courts of equity have no jurisdiction to determine the respective rights of claimants to a public office. An injunction will not lie to restrain a person acting as a public officer from exercising the functions pertaining to the office on the ground that he is not entitled to it. *State v. Alexander*, 107-177.

An action to test the right of defendant to hold and perform the duties of a public office may be brought. A proceeding to contest the officer's election is not exclusive. *Ibid.*

The proper remedy to determine the

right of an office is by *quo warranto*. The record of election to such office is not conclusive when attacked in such proceeding. *Daniels v. Newbold*, 125-193.

A petition for *quo warranto* to test the right of an incumbent of a county office to hold the same may be entertained, notwithstanding the provision of Code § 1198 for election contests. *Haverstock v. Aylesworth*, 113-378.

While the right of school officers to act in their assumed official capacity may be tested on behalf of the state by an action of *quo warranto*, the school township within which is located the district for which the officers assume to act, may, in an action in equity for an injunction, have the right to act determined. *School Township v. Wiggins*, 122-602.

The validity of a patent for land may be inquired into by action of *quo warranto*. *Murray v. Quigley*, 119-6.

The laches of the complaining party may be such as to defeat his action. But where relator shows the illegality of the proceedings complained of he is entitled to the relief asked unless the delay in instituting the proceeding is such that the other party will be prejudiced by the granting of the relief. *State v. Alexander*, 129-538.

SEC. 4315. By county attorney.

Although the proceedings were instituted by private parties, nevertheless the county attorney representing the public may appear therein, and it is immaterial

with reference to his action in prosecuting the proceedings that it has been thus commenced by private citizens. *State v. Des Moines City R. Co.*, 109 N. W. 867.

SEC. 4316. By private person.

A resident and taxpayer of a city may maintain an action by *quo warranto* to test the legality of the appointment of water-works trustees under the provisions of Code § 747. *State v. Barker*, 116-96.

After a proceeding in the nature of *quo warranto* has been instituted by private citizens as relators, it may be continued in that form, although the county attorney appears and is allowed to act as the representative of the public, and it is not proper in such cases to dismiss the relators

from the action. *State v. Des Moines City R. Co.*, 109 N. W. 867.

A slight interest only is necessary to sustain the proceeding as brought by private citizens representing the public. *Ibid.*

Leave to private citizens to sue in the interest of the public may be granted without notice to the defendant. *Ibid.*

The leave granted to the applicant for the right to bring the action is not subject to attack in a collateral proceeding. *State v. Alexander*, 129-538.

SEC. 4318. Costs.

In a *quo warranto* proceeding to test the validity of an election to office, if the contestant fail to establish his rights the

costs should be taxed as in a criminal proceeding wherein the prosecution fails. *Hull v. Eby*, 123-257.

SEC. 4335. Penalty for refusing to obey order.

One who refuses to comply with an order of the court in a proceeding by *quo*

warranto may be punished for contempt. *State v. Cahill*, 131-286.

CHAPTER 11.

OF ACTIONS OF MANDAMUS.

SECTION 4341. Definition. The action of mandamus is one brought to obtain an order commanding an inferior tribunal, board, corporation or person to do or not to do an act, the performance or omission of which the law enjoins as a duty resulting from an office, trust or station. Where discretion is left to the inferior tribunal or person, the mandamus can only compel it to act, but cannot control such discretion. All such actions shall be tried as equitable actions. [C., '73, § 3373; R., §§ 3761, 3763; C., '51, § 2180.] [32 G. A., ch. 168.]

Where a discretion with reference to the desired action is vested in the inferior tribunal or person, mandamus may be awarded to compel action, but not to control the discretion. *Perry v. Board of Supervisors*, 133-281.

Where the duty imposed upon a board or tribunal involves an exercise of discretion based on facts to be found by it, mandamus will not lie however erroneous the conclusion reached. *Preston v. Board of Education*, 124-355.

An action of mandamus will not lie with reference to proceedings of a board of directors of a school district in a matter which is within the discretion of such

board. *Kinzer v. Independent School District*, 129-441.

A writ of mandamus will not ordinarily issue to compel state officers or agents to do an act involving discretion or judicial determination. Therefore held that mandamus would not lie to compel state officers to satisfy a disputed claim against the state. *Wilson v. Louisiana Purchase Exposition Com.*, 133-586.

Mandamus will lie to compel the appointment to office of one who is entitled to such appointment under the soldiers' preference law, if the facts entitling him to such appointment are conceded. *Shaw v. Marshalltown*, 131-128.

But, the appointing officer or tribunal is charged with the determination of the question whether the qualifications of the applicant under the law are equal to those of the other applicants, and mandamus will not lie to review the finding as to such fact. *McBride v. City Council*, 110 N. W. 157.

Mandamus will lie to compel railroad companies to construct suitable crossings for one owning lands on both sides of the railroad track without the prior submission of the matter to a board of railroad commissioners. *Swinney v. Chicago, R. I. & P. R. Co.*, 123-219.

A school corporation for whose benefit a contract to supply water is made between the city and a water company may maintain an action of mandamus to compel specific performance thereof. *Independent School Dist. v. LeMars City Water & Light Co.*, 131-14.

This action may be maintained to compel the officers of a private corporation to issue certificates of stock or transfer them on the books of the company. *Hair v. Burnell*, 106 Fed. 280.

Mandamus is the proper action for compelling the board of supervisors to canvass

corrected election returns. *Rummel v. Dealy*, 112-503.

One who claims to be the lowest bidder for work to be done for a public corporation, under a statute providing for an award of such contract to the lowest bidder, has not such interest as to authorize him to maintain an action of mandamus to compel the awarding to him of the contract, nor is the awarding of such contract so far a ministerial act that the action of the public authorities can be controlled by such action. *Vincent v. Ellis*, 116-609.

The granting of a writ of mandamus is not a matter of right, and rests very largely within the discretion of the court. *Ibid.*

A demurrer to the petition for mandamus does not constitute an admission that the facts alleged give the court jurisdiction to review the proceeding on account of which mandamus is asked. *Preston v. Board of Education*, 124-355.

Although the statute authorizes the recovery of damages in an action of mandamus, the nature of the action is not thereby changed, and such action is not removable to the federal courts. *Mystic Milling Co. v. Chicago, M. & St. P. R. Co.*, 132 Fed. 289.

SEC. 4343. Extent of remedy.

Mandamus will not be granted in anticipation of a supposed omission of duty. Plaintiff must show that defendant is actually in default in the performance of a legal duty then due, and no threats not to perform can take the place of such

default. *Mystic Milling Co. v. Chicago, M. & St. P. R. Co.*, 131-10.

Where the right involved is a private one, there must a demand and refusal before the writ will issue. *Ibid.*

SEC. 4344. Other remedy.

An application for a writ of mandamus will not lie if the applicant has any other remedy in the ordinary course of law which is plain, speedy and adequate. *Kinzer v. Independent School District*, 129-441.

The right to appeal to the county superintendent from the action of the board of supervisors of a school district does not preclude an application for mandamus with reference to such action to determine whether the board in the matter complained of acted within the scope of its powers as defined by statute. *Ibid.*

The validity of the action of the board of supervisors in vacating a highway may be tested by *certiorari* and an action by mandamus will not lie for that purpose. *Sullivan v. Robbins*, 109-235.

An action of mandamus may be maintained by voters to compel the board of supervisors to canvass returns of election not properly certified, when the certificate is corrected by the officers making the return. *Rummel v. Dealy*, 112-503.

SEC. 4345. Who may bring action.

One of the signers of a petition to the board of supervisors, asking submission of a question to the vote of the people, may maintain mandamus to compel the

board to perform its duty in the submission of such question. *Windsor v. Polk County*, 115-738.

SEC. 4346. Petition.

A mandatory order by way of auxiliary relief may be made in the final decree although asked in an amendment and with-

out showing of a previous demand. *Davenport Gas & Elec. Co. v. Davenport*, 124-22.

CHAPTER 12.

OF INJUNCTIONS.

SECTION 4354. When allowed.

In actions at law: The provision for injunction in actions brought by ordinary proceedings does not apply where the claimant to an office is seeking to get possession thereof. *State v. Alexander*, 107-177.

Adequate remedy at law: A court of equity will not interfere by injunction where the party asking relief has a plain, speedy and adequate remedy in the ordinary course of law, nor will an injunction lie to test the validity of a criminal statute. *Ewing v. Webster City*, 103-226.

But a court of equity may enjoin an act, even though it be punishable as a crime, if it is one which would cause irreparable injury. *Ibid.*

Therefore, held, that the enforcement of an ordinance providing a penalty for buying or selling within the city limits without the commodity being weighed at the public scales, might be enjoined if it should be found to be void and would cause irreparable injury to the party complaining, without plain, speedy and adequate remedy at law. But, held, that the ordinance in question was valid and its enforcement would not be enjoined. *Ibid.*

Where a plaintiff has a plain, speedy and adequate remedy at law, he cannot have relief by injunction. *Forbes v. Carl*, 125-317.

Therefore, held, that a tenant could not, before the commencement of his term, have an injunction to restrain the landlord's threatened interference with the rights of the tenant under his lease. *Ibid.*

Use of counterfeit label: Under the provisions of Code § 5050, that every person, association or union adopting a label, trade-mark or other form of advertisement may proceed by action to enjoin the manufacture, use, display, or sale of any counterfeits or imitations thereof, held that a wholesale dealer in cigars could be enjoined from selling boxes of cigars bearing a counterfeit union label, and that good faith in making the sale, as for instance, where it was made by a clerk in violation of instructions, would constitute no defense. But held that no damages could be recovered in such action by the labor union whose label was counterfeited, unless actual damage was shown, and further, that damages by way of penalty could not be allowed, in the absence of any evidence as to the amount of such damage. *Beebe v. Tolerton & Stetson Co.*, 117-593.

To restrain trespass: A threatened tres-

pass of a continuing character may be restrained by injunction. *Halpin v. McCune*, 107-494.

An injunction will lie to prevent repeated trespasses on plaintiff's property by the domestic fowls of defendant, without proof of defendant's insolvency. *Keil v. Wright*, 112 N. W. 633.

To restrain wrongful acts as to real property: An injunction will lie to prevent the act of the tenant in violation of the covenants of his lease, whether constituting waste or not. *Kraft v. Welch*, 112-695.

The removal of a building which is an interference with real estate such as to absolutely deprive the plaintiff of the beneficial enjoyment of its present use may be restrained if such threatened removal is without lawful authority. *Lemmon v. Guthrie Center*, 113-36.

Injunction is a proper remedy to restrain injury to real property by the removal therefrom of fixtures which are a part of the realty. *State Security Bank v. Hoskins*, 130-339.

The bringing of a sidewalk to grade and the destruction of trees in a street which would be caused thereby may be enjoined, where proper action to establish the grade has not been taken by the council. The property owner is not limited to testing the validity of a tax imposed on his premises by reason of such unlawful action. *Burget v. Greenfield*, 120-432.

Possessory title will support: Where the threatened wrong is to a possessory title, it is sufficient as against a wrongdoer to allege and prove possession. *Blennerhasset v. Forest City*, 117-680.

To abate nuisance: The owner of land who is specially damaged by the establishment and maintenance of a cemetery constituting a nuisance may maintain an injunction for the abatement thereof. *Payne v. Wayland*, 131-659.

The owner of an unenclosed lot should not be enjoined from permitting the use of his lot for the playing of ball, although such use causes annoyance and damage to adjoining property owners, where it does not appear that he has encouraged nor affirmatively permitted such use of his premises to be made. *Spiker v. Eikenberry*, 110 N. W. 457.

An injunction to abate a nuisance may properly be denied where it appears that the nuisance complained of has been per-

manently abated. *Perry v. Howe Co-operative Creamery Co.*, 125-415.

The jurisdiction of a court of equity by injunction to restrain the obstruction of a public highway as a nuisance is not defeated by the fact that such obstruction constitutes a crime. The ground of equitable jurisdiction is the ability of a court of equity to give more complete and adequate relief than is obtained at law, and to prevent irreparable mischief and vexatious litigation. *Gilcrest Co. v. Des Moines*, 128-49.

Fraudulent condemnation of land: Injunction will lie to prevent a fraudulent resort to proceedings for the condemnation of lands for public purposes; but in general, objections which can be interposed in the proceeding itself cannot be made the ground of application for equitable relief against such proceedings. *LaPlant v. Marshalltown*, 111 N. W. 816.

To restrain illegal tax: A taxpayer may maintain an action to enjoin the carrying out of a resolution increasing the number of wards in a city, there being no authority to change the wards by resolution. *Cascaden v. Waterloo*, 106-673.

Equity will interfere by way of injunction to prevent the enforced collection of taxes illegally assessed, but a threatened assessment alone cannot be enjoined. *Security Savings Bank v. Carroll*, 128-230.

Where a tax is void, equity will grant relief against its enforcement. *Chicago, M. & St. P. R. Co. v. Phillips*, 111-377.

A court of equity will not enjoin the collection of a tax on account of excessive assessments fraudulently made. The remedy afforded to the taxpayer by application for relief to the board of review, under Code § 1373, is exclusive. *Crawford v. Polk County*, 112-118.

If a tax is illegal and void, its collection may be enjoined in equity, even if there be a tribunal provided for reviewing the same. It is only where the tax is irregular or erroneous that the remedy by appeal is exclusive. *Security Savings Bank v. Carroll*, 131-605.

Where a city council has no authority whatever to assess property for street improvements, the owner of property illegally assessed may enjoin the enforcement of the assessment without resorting to an appeal. *Ft. Dodge Elec. L. & P. Co. v. Ft. Dodge*, 115-568.

To restrain official action: An injunction will lie to restrain the removal of the county records from the place where the court house is legally established to a place unlawfully selected by the board of supervisors as a county seat. *Way v. Fox*, 109-340.

A court of equity will not by injunction restrain the proceeding of a justice of

the peace on the ground that he is without jurisdiction, as that objection may be interposed in the proceeding itself. *Home Sav. & T. Co. v. Hicks*, 116-114.

Right to public office: An injunction will not lie to restrain a person acting as a public officer from exercising the functions of the office on the grounds that he is not entitled to the office; but it seems that an injunction will lie in favor of the incumbent of an office to protect him in the discharge of the duties of the office against an adverse claimant until the latter shall have established his right to the office by an action at law. *State v. Alexander*, 107-177.

An injunction will not lie to restrain a person acting as a public officer from exercising the functions pertaining to the office on the ground that he is not entitled to such office. In such case the legal remedy is adequate. *District Tp. v. Myles*, 109-541.

Equity will not interfere by injunction to determine the title to an office. *Vette v. Byington*, 132-487.

The right to vote at an election is a political right which equity will not interfere to protect. *Shoemaker v. Des Moines*, 129-244.

Nor can a taxpayer resort to injunction to restrain the county officers from carrying out a contract for the purchase of voting machines which have been approved by the commission as provided for that purpose. *Ibid.*

The right to vote is a political and not a civil right, and a court of equity will not exercise its extraordinary power of injunction to protect such right. *United States Standard Voting Mch. Co. v. Hobson*, 132-38.

Sale of a business: A valid contract for the sale of a business with an agreement not to re-engage therein at a particular place for a specified period is enforceable by injunction against a vendor who is insolvent, even though the contract also contains a provision for stipulated damages. *Heinz v. Roberts*, 110 N. W. 1034.

Personal services: Equity will not undertake to decree specific performance of contracts for personal services nor in the absence of an express negative covenant will it aid the enforcement of such contract by injunction; and even where there is an express negative covenant injunction will not be granted save in those exceptional cases where by reason of the peculiar or extraordinary character of the promised services in violation of the agreement will cause injury to the other party, for which an action at law will afford no adequate remedy. *Gossard Co. v. Crosby*, 132-155.

To restrain mortgagee: It is proper in an action of replevin based on rights

claimed under a chattel mortgage for defendant to ask an injunction restraining plaintiff from enforcing any claim under such mortgage with reference to property not subject thereto. *Brody v. Chittenden*, 106-340.

Enjoining void judgment: Where a judgment is rendered without jurisdiction its enforcement may be enjoined. The injured party is not bound to prosecute his remedy by appeal. *McConkie v. Landt*, 126-317.

Right no longer existing: An injunc-

SEC. 4356. Temporary—when allowed.

To entitle plaintiff to an order of temporary injunction restraining the enforcement of a judgment, he must affirmatively show that the judgment is invalid. *Hawkeye Ins. Co. v. Huston*, 121-393.

The matter of continuing or dissolving a temporary injunction when there has

SEC. 4359. Notice in other cases.

The words "operation of a railway" mean the operation of a constructed railway, and not the construction of a railway. *Johnston v. Chicago, M. & St. P. R. Co.*, 58-537.

A temporary injunction to stop a railroad company from proceeding with its work of building its road, or the operation of a part already constructed, should not be issued without notice. *Minneapolis & St. L. R. Co. v. Chicago, M. & St. P. R. Co.*, 116-681.

SEC. 4363. Bond.

A right of action does not accrue upon a bond given for the issuance of a temporary injunction until the main action has been tried and determined. *Lacey v. Davis*, 126-675.

To sustain an action for damages on the bond it must be made to appear that the injunction was wrongful in its inception, or at least was continued owing to some wrong on the part of plaintiff. If rightfully awarded but afterwards properly dissolved because of matters done or arising subsequent to its issuance, there can be no recovery of damages. *Scott v. Frank*, 121-218.

The final decree dissolving the injunction is *res adjudicata* as to the issues decided, but the entire record, including the pleadings, may be examined to determine precisely what was decided by a decree. *Ibid.*

A preliminary injunction should not be dissolved because of the inadequacy of the bond, except on failure to comply with an order for additional security. *Wingert v. Snouffer*, 108 N. W. 1035; 111 N. W. 432.

tion will not issue to protect a right which no longer exists, although it might have existed and injunction may have been a proper remedy when applied for. *Davis v. Boyer*, 122-132.

Formal writ: The issuance of a formal writ of injunction is not necessary to bind a party who was represented in the case by attorney when the final decree was rendered. *Hawks v. Fellows*, 108-133. See, also, notes to Code § 4372 in this Supplement.

been an answer filed denying the allegations of the petition rests largely within the discretion of the trial court. *LaPlant v. Marshalltown*, 111 N. W. 816.

The judge may issue a temporary writ in vacation. *Young v. Preston*, 131-292.

A preliminary injunction restraining the city from levying an improvement assessment and issuing certificates based thereon does not stop the ordinary business of the municipality within the provision that no injunction of that character shall be granted except on reasonable notice. *Wingert v. Snouffer*, 108 N. W. 1035; 111 N. W. 432.

The dissolution of an injunction against the exercise of a technical right which defendant had no desire or intention to exercise gives rise to no cause of action upon the bond. But if it involves a substantial right and is the sole relief sought, there may be recovery on the bond, although the damages are nominal. *Weierhauser v. Cole*, 132-14.

Where in a suit for an injunction defendant admits the allegations of the petition and pleads a counterclaim, and upon trial judgment is entered for plaintiff which is stayed by defendant, whereupon the injunction is dissolved, the order dissolving the injunction is not an adjudication that it was wrongfully issued. *Gray v. Bremer*, 122-110.

The dissolution of the temporary writ on motion of the defendant without contest and the voluntary dismissal of the main suit make out a *prima facie* case of wrongful issue of the injunction. *Williams v. Ballinger*, 125-410.

Where an injunction is the only remedy sought and the temporary injunction is

dissolved, the necessary costs and expenses of procuring the dissolution are recoverable in an action on the bond. *Ibid.*

Where an injunction is the sole relief sought, the dissolution of the temporary injunction either by interlocutory order or upon the final hearing entitles the party

enjoined to recover his attorney's fees in resisting the writ. But where the injunction sought is merely collateral or auxiliary to the principal controversy and its maintenance is not decisive of the very question at issue, attorney's fees are not recoverable. *Weierhauser v. Cole*, 132-14.

SEC. 4364. When to restrain proceedings or judgment.

Remedy by injunction to stay execution in a case pending in the supreme court should be sought in that court. *Hyatt v. Clever*, 104-338.

The district court of another county than that in which judgment is rendered cannot entertain an action to have such judgment set aside and declared void, even though the contention is that it is absolutely without validity for want of jurisdiction to render it. *Hawkeye Ins. Co. v. Huston*, 115-621.

An action to restrain the enforcement of the judgment of a justice of the peace, a transcript of which has been filed in the office of the clerk of the district court, should be brought in the county in which such transcript is filed. *Brunk v. Moulton Bank*, 121-14.

The provision that when it is sought to

enjoin proceedings on a judgment, the suit must be in the same county and court in which such judgment was rendered, applies to a proceeding in which it is sought to enjoin the enforcement of the judgment because it has been paid or otherwise satisfied, or the debtor has been discharged in bankruptcy. *Ibid.*

The provisions of this section are not applicable to a judgment of a justice of the peace, no transcript of such judgment having been filed in the district court. *Gregory v. Howell*, 118-26.

In an action to restrain the enforcement of a judgment, the presumption is in favor of the validity of the judgment, and the jurisdiction of the court rendering it, and the plaintiff must affirmatively show its invalidity. *Hawkeye Ins. Co. v. Huston*, 121-393.

SEC. 4369. Notice of application to dissolve—showing.

While the dissolution of a temporary injunction may sometimes be ordered upon the filing of an answer denying all the equities asserted in the petition, the statute provides that the motion may be made either before or after the answer, and that it may be supported by affidavits, and therefore the filing of an answer denying the equities of the bill does not necessarily result in such dissolution. And on the other hand, there may be a dissolution without the filing of such answer. *Gossard Co. v. Crosby*, 123-155.

The dissolution as well as the granting of a temporary writ is so much a matter of discretion in the trial court that a very clear case of prejudicial error must be made out in order to require a reversal on appeal. *Ibid.*

Where a motion to dissolve presents the questions involved on a trial on the merits, it is not error to refuse the motion for dissolution. *Wingert v. Snouffer*, 108 N. W. 1035; 111 N. W. 432.

SEC. 4372. Proceedings for violation.

A party who has knowledge that an order for an injunction has been granted, restraining him from the performance of some act, is bound from the time he receives such knowledge, although the formal entry of the order may not at that time have been made, nor any writ issued or served. On the other hand, one who with knowledge of the decision of the court filed with the clerk, dissolving a temporary injunction, acts in reliance on such order of dissolution, is not subject to punishment therefor. *Coffey v. Gamble*, 117-545.

An application for an order to punish for contempt in violating an injunction is properly made in the injunction case and should not be the subject of an independ-

ent action commenced in the name of the state. In such auxiliary proceeding the court may take notice of the records of prior proceedings in the case. *Ferguson v. Wheeler*, 126-111.

The remedy for violation of an injunction is a proceeding to punish for contempt, and where the party against whom an injunction was granted gave a *superse-deas* bond on appeal from the decree, held, that in a suit on the *superse-deas* bond the opposite party could not recover damages for violation of the injunction. *Cole v. Edwards*, 104-373.

As to a party, the decree is as effectual, so far as it is self-enforcing as though a formal writ had been issued and served.

This is not true in regard to a writ not self-enforcing, as one providing for the abatement of a nuisance, and process is required to authorize an officer to do acts required to accomplish the abatement. *Bartel v. Hobson*, 107-644.

In a proceeding for contempt in violating a preliminary injunction, the supreme court will assume, on *certiorari*, that the order granting the temporary injunction was rightfully made, and it may find a violation of the order, although the district judge may have found that no contempt had been committed. *Lake v. Wolfe*, 108-184; see, also, *Hawks v. Fellows*, 108-133.

It is no excuse for the violation of an

order of injunction that at the time the violation was committed the defendant had on file a motion to modify the terms of the injunction order. Such fact might be considered in mitigation as showing good faith but not in bar. *Young v. Rothrock*, 121-588.

Proceedings for the violation of an injunction to abate a liquor nuisance are governed by the provisions of Code § 2407. *Brennan v. Roberts*, 125-615; *McGlasson v. Scott*, 112-289.

In a contempt proceeding for violating a liquor injunction it is not open to the defendant to show that the injunction was erroneously granted unless it is absolutely void. *Ohlrogg v. District Court*, 126-247.

CHAPTER 14.

OF ARBITRATION.

SECTION 4386. Written agreement.

A general agent without express authority may not submit a claim of his principal to arbitration, nor does a special administrator, in the administration of the estate, have such power. *Sullivan v. Nicoulin*, 113-76.

Either party has the right to demand that the arbitrators chosen shall have the

competency of jurors, and a litigant cannot be expected to consent that his case shall be tried to his antagonist, in person or by agent. Therefore it is a good ground of objection that the arbitrator selected by one party is the agent of that party. *Goodwin v. Merchants' & Bankers' Mut. Ins. Co.*, 118-601.

SEC. 4388. Action pending.

An agreement to arbitrate the subject-matter of litigation is equivalent to an agreement to dismiss a pending suit for a

good consideration, and itself operates as a dismissal. *Goodwin v. Merchants' & Bankers' Mut. Ins. Co.*, 118-601.

SEC. 4389. Procedure.

Where the agreement for arbitration provides for two arbitrators, who may select an umpire in case of disagreement, notice to the umpire of the hearing is not essential. *Vincent v. German Ins. Co.*, 120-272.

Failure to give notice to a party of the hearing may be waived by him. *Ibid.*

Mistake of judgment on the part of the arbitrators is not ground for setting aside the award, unless such mistake be so great as to indicate partisan bias. *Ibid.*

In order to justify a court in setting aside an award, the misconduct or other ground for impeachment must be made

out by clear and satisfactory evidence. *Ibid.*

Arbitrations are favored in law, and an award, when made, will be upheld, unless the evidence clearly shows such misconduct or mistake on the part of the arbitrators as will justify the court in setting it aside. *Ibid.*

To appraise is to estimate value, and where arbitrators are selected to make an appraisal they are not required to hear evidence, although they may do so. *Ibid.*

SEC. 4390. Revocation.

An agreement to arbitrate, included in a policy of fire insurance, is revocable by either party, notwithstanding the provi-

sions of this section, and the bringing of suit constitutes such revocation. *Harrison v. Hartford F. Ins. Co.*, 112-77.

CHAPTER 15.

OF ACTIONS AGAINST BOATS OR RAFTS.

SECTION 4402. Seizure.

A lien given by a state statute for labor done in the original construction of a vessel even after she is launched is not enforceable in the federal admiralty courts as the contract is not of a maritime nature, the vessel having not yet become engaged in commerce. *The William Windom*, 73 Fed. 496.

CHAPTER 16.

OF HABEAS CORPUS.

SECTION 4417. Petition—grounds.

Although the defendant in a criminal case may be entitled to discharge on *habeas corpus* because he has not been given a speedy trial as required by the constitution, such objection cannot be made a ground for dismissal in the supreme court on appeal from a judgment of conviction. *State v. Sloan*, 131-676.

SEC. 4450. Demurrer or reply—trial.

Finding of lower court: On appeal in a *habeas corpus* proceeding, the supreme court does not try the cause anew, but will affirm the finding of the lower court if there is any evidence in its support. *Dunkin v. Seifert*, 123-64.

The finding of the trial judge as to the facts is entitled to the same presumption in its favor as the finding of facts by a jury. *Myers v. Clearman*, 125-461.

In a *habeas corpus* proceeding involving the right of custody of a child, the findings of the court have the effect of the verdict of a jury; but a finding which is clearly contrary to the evidence and without support will be disregarded. *Smiley v. McIntosh*, 129-337.

SEC. 4451. Action of grand jury—result of trial.

It is not competent in a *habeas corpus* proceeding to question the validity of a conviction on the ground that the grand jury returning the indictment on which the conviction was based was not properly

selected, the defendant having had opportunity at the proper time to raise the question as to the sufficiency of the indictment. *Busse v. Barr*, 132-463.

SEC. 4453. Plaintiff held.

In a proceeding to secure release from a commitment of an indictable offense, the judge seems not to have authority to hold

the accused to bail for trial before a justice of the peace for an offense not indictable. *Myers v. Clearman*, 125-461.

SEC. 4459. Costs.

In the proceeding by *habeas corpus* to secure a discharge from a hospital for the insane, the superintendent of the hospital, who is made defendant, should not be taxed

with the costs, but they should be taxed to the county where the commitment is had. *Hughes v. Applegate*, 123-230.

CHAPTER 17.

OF CONTEMPTS.

SECTION 4460. What punishable as.

A proceeding to punish a contempt of court may be in its nature criminal, but the statutory provision with regard to new

trial in criminal cases is not applicable in such a proceeding. *State v. Stevenson*, 104-50.

The power to punish for contempt is recognized as inherent in our courts and essential to the preservation of order in judicial proceedings and to the due administration of justice. *Field v. Thornell*, 106-7.

A witness cannot be punished for contempt for not responding to a subpoena issued from a court in which no proceeding is pending. *Chambers v. Oehler*, 107-155.

SEC. 4461. In courts of record.

Provisions regulating the procedure for the punishment of constructive contempts are not unconstitutional as depriving courts of their inherent power. *Drady v. District Court*, 126-345.

Contempt proceedings are in their nature criminal, and before a conviction is had the proof of guilt should be clear and satisfactory. So held where the charge was of attempting to influence a juror. *Wells v. District Court*, 126-340.

Evidence in a particular case held sufficient to show the person accused to have been guilty of contempt in attempting to influence the jury as to the verdict. *Drady v. District Court*, 126-345.

SEC. 4465. Notice to show cause.

Where the party in contempt advised the court that he was ready for punishment, and challenged the court to inflict such punishment, held that it was not error to proceed without giving opportunity for written explanation. *Hardin v. Silvari*, 114-157.

The person proceeded against for contempt is entitled to have the opportunity to file his explanation before the assessment of punishment and a reasonable time

The statutory definition of contempt excludes contempt at common law not included within the statute. *Drady v. District Court*, 126-345.

A contempt proceeding may be tried by any judge of the court in which the offense was committed. *Drady v. District Court*, 126-345.

The provision for the punishment of an attempt to influence a juror as contempt is applicable to such an attempt with reference to a juror of the general panel before he is drawn and sworn as one of the trial jurors in the case. *Marvin v. District Court*, 126-355.

In a proceeding to punish for contempt in attempting to influence a juror, it is erroneous to receive in evidence a transcript of the testimony before a committee of the bar association investigating the charge, the defendant being entitled to a trial under the statute on evidence introduced as in other cases. *Hunter v. District Court*, 126-357.

should be allowed for that purpose. *State v. District Court*, 124-187.

A denial by the accused of the contempt charged does not operate as a common law to purge the offense, but the court is to determine by a trial the facts put in issue by the answer. This is the express rule as to contempt in violating an injunction against the sale of intoxicating liquors. See Code § 2407. *Drady v. District Court*, 126-345.

SEC. 4466. Testimony reduced to writing.

The provision that the evidence must be taken in writing and preserved indicates that a trial is contemplated upon a denial of guilt by the defendant. *Drady v. District Court*, 126-345.

The defendant put on trial for contempt, on his denial of the charge, has a right to have the testimony taken under the issue made by his answer, as in other cases. Evidence taken against him in an investigation before a bar association is not admissible. *Hunter v. District Court*, 126-357.

Where the contemptuous conduct complained of is committed in the presence of the court, or judge, and the order punishing for contempt is based upon personal knowledge, the statement of the facts upon

which the order is founded must be entered on the record or filed or preserved. It is not sufficient that such statement is embodied in the shorthand notes of the reporter which have not been transcribed and filed. *State v. District Court*, 133-450.

Where the facts are not within the knowledge of the court or judge, an order of commitment for contempt made before the evidence is reduced to writing and filed is void. *Walker v. Kennedy*, 133-284.

Where the court proceeds upon its own knowledge a failure to preserve a record of the facts on which the court acts is sufficient ground for setting aside the conviction on certiorari. *State v. District Court*, 124-187.

SEC. 4468. Review by certiorari.

The revision by *certiorari* in a proceeding in which a punishment is inflicted for contempt involves a review of the evidence so far at least as to determine whether the act shown to be committed was sufficient at law to constitute contempt. *Wells v. District Court*, 126-340.

The costs in a *certiorari* proceeding to review an order punishing for contempt should be taxed in analogy to the taxation of costs on appeal. They may be taxed to the person instituting the proceeding if the order is annulled. *Coffey v. Gamble*, 94 N. W. 936.

CHAPTER 18.

OF CHANGING NAMES.

SECTION 4471-a. Repeal. Chapter eighteen (18) title twenty-one (XXI), of the code is hereby repealed and the following enacted in lieu thereof: [30 G. A., ch. 127, § 1.]

SEC. 4471-b. Who authorized. Any person, under no civil disabilities, who has attained his or her majority and is unmarried, if a female, desiring to change his or her name, may do so as provided in this chapter. [30 G. A., ch. 127, § 2.]

SEC. 4471-c. Statement—what to contain. Such person shall make and subscribe to a statement under oath showing that he or she is a resident of the county where such application is made and of the state of Iowa for a period of not less than one year; his or her place of residence, giving lot and block if in a city, town or village and street number and business address if any, and the section, township, range and name of civil township if not in a city or town; the different places of residence and times of such residence for the past five years; place and date of birth, and, if of foreign birth, the date of immigration to the United States; legal name and name or names by which such person is usually known and new name as changed or adopted; name of parents of such person, his or her height and color of hair and eyes; the reason or cause for change of name briefly and concisely stated, and there shall be incorporated in such statement or attached thereto a concise description of all real estate within this state the title to which is in the person making such statement. [30 G. A., ch. 127, § 3.]

SEC. 4471-d. Affidavit of freeholder. An affidavit of the [a] freeholder of the county shall be attached to such statement to the effect that affiant has personally investigated the facts set out in same and that the same are true; that the person filing such statement is an actual resident of the county and the identical person he or she is represented to be. [30 G. A., ch. 127, § 4.]

SEC. 4471-e. Statement filed and recorded. Such statement shall be presented to the clerk of the district court who shall file same if it is found to be in substantial compliance with all of the provisions of this chapter and not otherwise, and enter same of record in a book kept for that purpose and index same both under the former name and new name, and shall enter upon the back the date of filing, the book and page where recorded and serial number thereof and file same in his office. [30 G. A., ch. 127, § 5.]

SEC. 4471-f. Re-indexing real estate. When such statement shall have been filed and recorded as herein provided, the clerk shall, if the description of any real estate of that county be contained therein, deliver it to the county recorder who shall index the same, both under the former name and under the new name as changed or adopted, in the manner of

indexing transfers of real estate, and enter opposite thereto, the description of real estate as found in such statement; such indexing shall be in the index of transfers of land or town property according to the description of said real estate, or both as the case may be. The index shall also show the serial number of such statement and book and page where same is recorded in the office of the clerk of the district court, and the words, "change of name" shall be written on said index in red ink, at or opposite to the name. [30 G. A., ch. 127, § 6.]

SEC. 4471-g. Fees. The clerk shall receive a fee of one dollar (\$1.00) for his services, and shall also collect ten cents (10c.) for each separate description of real estate in the statement, which sum shall be paid to the recorder for indexing same. The clerk shall, upon demand of any party and the payment of the fee of one dollar (\$1.00), furnish a certified copy of such statement showing the serial number thereof, date of filing and the book and page of record of same; and, upon the payment of twenty-five cents (25c.) shall compare and certify to any correct copy of such statement furnished him for that purpose. [30 G. A., ch. 127, § 7.]

SEC. 4471-h. New name—when effective. Upon the expiration of thirty (30) days from the time of filing the statement herein provided for, the new name as changed or adopted therein shall become the legal name of the party filing such statement, and the surname of such new name shall become the legal surname of the wife and minor children of such person. No person shall change his or her name more than once under the provisions of this act. [30 G. A., ch. 127, § 8.]

SEC. 4471-i. Certified copy—indexing real estate in other counties. Within one year after the filing of such statement, the party changing his or her name, shall cause a certified copy thereof to be presented to the recorder of each county in Iowa where there is real estate the legal title to which is in such party, and pay such recorder ten cents (10c.) for each separate description in such county, and such recorder shall index same in the manner prescribed in this chapter and return same. [30 G. A., ch. 127, § 9.]

SEC. 4471-j. Misdemeanor. Any person failing or neglecting to comply with the provisions of the preceding section, shall be guilty of a misdemeanor and punished accordingly. [30 G. A., ch. 127, § 10.]

SEC. 4474. Publication. Previous to the time thus described for the taking effect of such change, the applicant shall cause notice thereof to be published, once each week, for four successive weeks in the newspaper directed by the court. [C., '73, § 3505; R., § 3847; C., '51, § 2259.] [30 G. A., ch. 2, § 12.]

[Sec. 4474 was repealed by chapter 127, 30 G. A., approved April 6, 1904, and the above amendment approved April 12, 1904.]

TITLE XXII.

OF JUSTICES OF THE PEACE AND THEIR COURTS.

CHAPTER 1.

OF JUSTICES OF THE PEACE AND THEIR COURTS.

SECTION 4476. Jurisdiction.

A judgment against one who is an actual resident of another county, unless founded on a contract payable in the county, is void although defendant appeared without objection. *Heath v. Halfhill*, 106-131; *Thompson v. Thompson*, 117-65; *Porter v. Welsh*, 117-144.

The residence of the parties, in the ab-

sence of any showing to the contrary, is presumed to have been such as to confer jurisdiction on the justice. *Little v. Devendorf*, 109-47.

A justice of the peace has no jurisdiction to entertain an action for an accounting or settlement of partnership affairs. *Erret v. Pritchard*, 121-496.

SEC. 4477. Amount in controversy.

No objection having been made before the justice of the peace to his jurisdiction, the court on an appeal from his judgment in an action involving more than one hundred dollars and less than three hundred dollars, is authorized to presume that the parties gave their consent to a trial before the justice. *Hopkins Fine Stock Co. v. Reid*, 106-78.

No action of the parties can authorize a justice of the peace to assume jurisdiction for a greater amount than three hundred dollars. Want of jurisdiction on this account cannot be waived by the parties, but the defect may be urged at any stage of the proceeding. *Wedgewood v. Parr*, 112-514.

In an action on two promissory notes in the aggregate exceeding the amount of \$100.00, consent in each note that the justice may have jurisdiction of an action thereon for an amount not exceeding \$100.00, does not authorize the justice to entertain jurisdiction. *Hannasch v. Hoyt*, 127-232.

The consent embodied in a promissory

note that a justice of the peace shall have jurisdiction in an action thereon does not give a justice jurisdiction of an action for breach of the contract in connection with which such note is executed. *Leathers v. Geitz*, 112 N. W. 191.

The amount claimed, not that alleged to be due or for which judgment is entered, is the criterion to determine whether the justice has jurisdiction. If the pleadings are oral, the original notice is decisive as to the amount claimed. *Evans v. Murphy*, 133-550.

Although the justice erroneously enters an order transferring the case to the district court because of interposition of a counterclaim involving more than \$100.00, such disposition of the case terminates his jurisdiction and he cannot without a new notice proceed against the party who does not appear. Mere information to the attorney of the party that the justice intends to take some further proceeding in the case will not be sufficient to give him further jurisdiction. *Schiele v. Thede*, 126-398.

SEC. 4480. In Replevin or Attachment Against Non-residents.

Where the defendant is a non-resident of the state, the plaintiff may bring the action before a justice of the peace of the township in which he resides, if he

secures service on the defendant within the county. *Jonas v. Weires*, 111 N. W. 453.

SEC. 4481. Contracts in writing. On written contracts stipulating for payment at a particular place, action may be brought in the township where the payment was agreed to be made. Provided, that should action be brought under the provisions of this section in any county other than that of the residence of the defendant and the plaintiff shall fail to appear at the time fixed for the trial in the original notice, the justice of the peace before whom said action is brought, shall, upon presentation of the copy of the original notice served upon the defendant, docket said cause and enter judgment therein against the plaintiff in favor of the defendant for all costs in the action, which costs shall include all reasonable expenses of the defendant in attending the place of trial and an attorney's fee not to exceed fifteen dollars for defendant's attorney; and should any action brought under the provisions of this section for any cause, except upon trial upon the merits, be dismissed the defendant shall recover like costs and expenses and attorney fees. [C., '73 § 3513; R., § 3855; C., '51, § 2267.] [30 G. A., ch. 128.]

Where the jurisdiction of the justice of the peace depends upon the fact that a contract is made payable at a particular place it is competent to show in a collateral attack on such judgment that the contract did not so provide. *Cooley v. Barker*, 122-440.

This provision does not authorize the suing of the defendant in a county where by implication merely he is to make payment under a contract. *Baily v. Birkhofer*, 123-59.

SEC. 4482. In adjoining township.

Where there is no justice in the proper township qualified or able to act, the suit may be commenced in any adjoining township in the same county, without making a record of the reason for not instituting the suit in the proper township. *Jonas v. Weires*, 111 N. W. 453.

Another township having a common corner with the township in which the suit

should have been instituted is an adjoining township within the language of the statute. *Ibid.*

In support of the jurisdiction it will be presumed where suit was brought in a township adjoining that in which it should have been commenced that there was the statutory reason for not bringing it in the proper township. *Ibid.*

SEC. 4484. Entries on docket.

It is not necessary that the justice enter of record a finding as to the residence of the parties. *Little v. Devendorf*, 109-47.

A recital in the record of a judgment

SEC. 4485. Parties—proceedings.

Trials in justices' courts are less formal and more speedy, as a rule, than are trials

by a justice of the peace that due and legal notice of the time of the trial was given is sufficient. *Tomlin v. Woods*, 125-367.

in courts of record. *Gates v. Knosby*, 107-239.

SEC. 4486. How commenced.

A justice of the peace acquires jurisdiction in an action of forcible entry and detainer, although no petition is filed until

the return day. *Herkimer v. Keeler*, 109-680.

SEC. 4488. Form of notice.

The fact that the notice is signed with the name of the justice affixed by a stencil or stamp and that it is filled out by the one to whom it is given for service,

does not render the judgment rendered in pursuance of such notice subject to collateral attack. *Loughren v. Bonniwell*, 125-518.

SEC. 4489. What to state.

If the pleadings are oral, the original notice is decisive as to the amount of plaintiff's claim in determining whether

it is in excess of the jurisdiction of the justice. *Evans v. Murphy*, 133-550.

SEC. 4491. Service and return.

Determination of the sufficiency of service is within the jurisdiction of the justice, and his judgment with reference

thereto, though erroneous, will not be void. *Little v. Devendorf*, 109-47.

SEC. 4496. Adjournment.

A justice of the peace will not lose jurisdiction of the case by granting a continuance for an indefinite time, by consent of parties to subsequently try the case upon new notice. *Cedar Rapids v. Rall*, 115-335.

An adjournment for more than three days without the consent of the party deprives the justice of jurisdiction. *Schiele v. Thede*, 126-398.

SEC. 4502. Change of place of trial.

The ruling on a motion to strike portions of the answer and to require it to be made more specific constitutes commencement of the trial, which terminates the right to apply for change of venue.

Columbus Junction Tel. Co. v. Overholt, 126-579.

By proceeding with the trial error in refusing change of venue is not waived. *Ibid.*

SEC. 4513. Judgment set aside.

A justice of the peace may set aside a default judgment notwithstanding a filing of the transcript of such judgment in the

district court. *Klepfer v. Keokuk*, 126-592.

SEC. 4519. Discharge of jury.

The statute does not provide for notice to a party of the issuing of a precept for a new jury where one jury has been discharged for failure to agree; but where

such precept was not issued for two days, held that the justice was without jurisdiction to try the case without further notice. *Gates v. Knosby*, 107-239.

SEC. 4522. Judgment entered.

It is not essential to the validity of the

judgment that it be signed by the justice. *Parks v. Norton*, 114-732.

SEC. 4537. Transcript filed in clerk's office.

The provision for filing a transcript of the judgment in the district court relates only to the enforcement of the judgment and does not prevent further proceedings in the court in which the judgment was rendered in respect to other matters. *Klepfer v. Keokuk*, 126-592.

The act of the justice in certifying a judgment is purely ministerial, and the fact that he was a party to the proceeding in which such judgment was rendered by his predecessor in office does not disqualify him from giving such certificate. *Hass v. Leverton*, 128-79.

SEC. 4538. Effect of transcript. The clerk shall file the transcript as soon as received, and enter a memorandum thereof and the time of filing in the judgment docket and lien index, and from such entry it shall be treated in all respects and in its enforcement as a judgment obtained in the district court. No execution shall issue from the justice's court after the filing of such transcript. [C., '73, § 3568; R., § 3910; C., '51, § 2321.] [27 G. A., ch. 107, § 1.]

With the filing of the transcript in the district court the justice loses control of his judgment and it is treated thereafter as are those of the district court; but there is nothing warranting the conclusion that the judgment of the justice is thereby canceled, or a new one rendered. *Little v. Devendorf*, 109-47.

The mere filing of a transcript from a justice of the peace does not make it a judgment of the district court. A memo-

randum thereof, with the date of filing, must be entered on the judgment docket and lien index. *State Ins. Co. v. Prestage*, 116-466.

A judgment of a justice of the peace, a transcript of which has been filed in the office of the clerk of the district court, becomes a judgment of the district court in such sense that under Code § 4364 an action to enjoin the proceedings on the judgment must be in the same county and

court in which such judgment was obtained. *Brunk v. Moulton Bank*, 121-14.

The time within which action may be brought on a judgment of a justice of

the peace transcribed to the district court is determined by the statutory provisions with reference to judgments of the district court. *Haugen v. Oldford*, 129-156.

SEC. 4544. Garnishment. Garnishment proceedings under execution shall be the same as in the district court, except, upon return of the garnishment being made to the justice who issued the execution, he shall docket a cause, fix a time, and cite the garnishee then to appear and answer. Judgment against the garnishee shall not be entered until the principal defendant shall have had five days' notice of the garnishment proceedings to be served in the same manner as original notices. [29 G. A., ch. 141, § 1.]

SEC. 4546. Appeal.

If the subject-matter of the action brought before the justice of the peace is such that he has no jurisdiction thereof, the district court acquires no jurisdiction of the case by appeal, and the appeal should be dismissed on motion. *Erret v. Pritchard*, 121-496.

Parties to an action pending in justice's

court cannot confer jurisdiction on the district court by consent to the transfer of the case to such court. But if in pursuance of such agreement the parties appear in the district court and submit the controversy to determination, the court acquires jurisdiction. *Farmers' Mut. Telephone Co. v. Howell*, 132-22.

SEC. 4547. Amount in controversy.

Where before judgment but after the hearing of the evidence the plaintiff remits a portion of his claims so as to reduce the amount thereof to less than twenty-five dollars, there is no right of appeal, although the justice of the peace erroneously enters judgment for the amount of the original claim which is in excess of twenty-five dollars. *Young v. Stuart*, 104-597.

A fictitious counterclaim, interposed solely for the purpose of giving the district court jurisdiction on appeal, may be disregarded by the latter court and the appeal may be dismissed on motion. *Chicago & N. W. R. Co. v. Weaver*, 112-101.

Where plaintiff in an action of replevin elects to take judgment for the value of

the property, he may, by remitting his claim in excess of twenty-five dollars, prevent an appeal by the opposite party. *Rust v. Olson*, 113-571.

Ordinarily the amount in controversy is determined by the pleadings or by the respective oral claims of the parties and their remittitur made before entry of judgment of all claims in excess of twenty-five dollars precludes an appeal even though the justice in fact enters judgment for more than that amount. *Henry v. Chicago, R. I. & P. R. Co.*, 127-577.

Such remittitur may be shown in the district court by way of supplying the omission of the justice to enter it of record. *Ibid.*

SEC. 4552. Form of bond.

The bond on appeal from the judgment of the justice of the peace is jurisdictional. The statute so provides. *Beresford v. American Coal Co.*, 124-34.

An appeal bond signed by the attorney of the appellant is not sufficient (see Code § 3851), and in the district court the case should be dismissed on motion of the appellee. Such bond should not be accepted. *Valley Nat. Bank v. Garretson*, 104-655.

An attorney is not competent as a surety on an appeal bond (Code § 3851), nor is a party against whom the judgment is entered competent to become such surety, the signature of the party not changing his liability as a defendant under the judgment. *Hudson v. Smith*, 111-411.

An appeal bond signed only by the appellant is of no validity and the district court acquires no jurisdiction on such appeal. The defect cannot be cured by amendment in the district court. *Minton v. Ozias*, 115-148.

It is not required that sureties upon the appeal bond make affidavit to their financial responsibility. The provision of Code § 359 for affidavits of qualification by sureties on bonds is intended for the protection of the officer, and if the bond is accepted without such affidavit the appeal is perfected, and the district court acquires jurisdiction. *Porter v. Western Union Tel. Co.*, 135-747.

A bond which names as obligee a party different than the party to the action

against whom the appeal is prosecuted, does not confer jurisdiction on the district court as to such appeal and the court has no authority to permit the filing of a new

bond after the expiration of the statutory period allowed for perfecting the appeal. *Sutton v. Bowe*, 124-58.

SEC. 4557. Mistakes corrected.

Evidence in a particular case held not sufficient to show that there was an omission or mistake necessitating the correction of the justice's docket. *First Nat. Bank v. Bourdelais*, 109-497.

Although the justice of the peace has entered judgment for more than twenty-five dollars and omitted to enter of record

a remittitur by the successful party of all in excess of that amount his omission to enter of record the remittitur may be supplied by oral evidence, and if thus supplied the appeal should be dismissed. *Henry v. Chicago, R. I. & P. R. Co.*, 127-577.

SEC. 4558. Return—when made.

The appeal is perfected by the giving of bond and certifying the papers and record to the district court. The provision for notice seems to be for the purpose of advising appellee when the case will be

brought on for trial, and failure to give such notice does not deprive the court of jurisdiction. *Durand v. Northwestern L. & Sav. Co.*, 112-296.

SEC. 4559. Affirmance—trial.

If the appellant in an appeal from a justice's court fails to cause the same to be docketed by noon of the second day of the term to which the same is returnable, appellee may procure the case to be docketed and will thereupon be entitled to have the judgment below affirmed; and the appellant in such case will not be entitled to have the default set aside without a showing of excuse. *Hodowal v. Yearous*, 103-32.

For similar provisions see Code § 3660.

Where an appeal has been taken from the judgment of a justice of the peace, the appellee may have the judgment affirmed on appellant's failure to pay the docket fee and have the case docketed; unless appellant is in default in both particulars there is no right to an affirmance. *Vasey v. Parker*, 118-615.

The clerk is not required to docket any appeal without being paid the fee which the law exacts for such services, but if he concludes to waive the fee, and places the case upon the docket for trial, the mere failure to pay the fee will not be a ground for affirmance. *Ibid.*

SEC. 4562. Trial of appeal.

If the justice of the peace has no jurisdiction of the case, the appellate court acquires none by the appeal. *Erret v. Pritchard*, 121-496.

Where a justice does not acquire jurisdiction, the district court cannot on appeal proceed to a determination of the case. *Baily v. Birkhofer*, 123-59.

By appearing before the justice of the peace the defendant does not estop himself from urging on appeal that the jus-

tice was without jurisdiction of defendant resident in another county. *Ibid.*

In an appeal to the district court from a justice of the peace an amendment may be introduced which does not set up any new demand or counterclaim. *Boos v. Dulin*, 103-331.

Where an action brought by a minor in his own name in justice court was appealed to the district court, held that the district court might properly allow the substitu-

tion of a next friend and proceed with the case. *Parkins v. Alexander*, 105-74.

The law favors trial on the merits, and all errors, irregularities and illegalities in

SEC. 4563. New demand.

In the district court the pleading may be amended, but no new cause of action or counterclaim can be introduced. *Boos v. Dulin*, 103-331.

The appellant cannot by amended plead-

SEC. 4568. Appeal from default—pleadings.

The provision as to the time of filing answer by the defendant is not mandatory, and in the discretion of the trial court the defendant may be allowed to file such

SEC. 4569. Writs of error—when allowed.

The complaint that there is not sufficient evidence to warrant the judgment rendered by a justice is not one which can be considered on writ of error. *Anthes v. Booser*, 112-511.

Only a decision erroneous in a matter of law of a similar irregularity can be

SEC. 4576. Judgment.

Where the justice of the peace had by delay lost jurisdiction to issue a precept for a new jury, held that the district court reversing on writ of error the judgment thus rendered without jurisdiction, might direct further proceedings upon proper notice. *Gates v. Knosby*, 107-239.

On writ of error the court is not authorized to sit in direct review of the proceedings before the justice. *Simmons v. Chicago, B. & Q. R. Co.*, 128-306.

Errors committed in the entry of judgment after the trial upon the merits is to be cured by appeal. *Ibid.*

Final judgment on writ of error from a justice of the peace is only to be en-

SEC. 4579. Attachment.

It is the amount of the claim and not the amount recovered, which is the test of the right to sue out a writ of attachment, and if less than five dollars is recovered, the penalty is the payment of the costs thus occasioned. It cannot be said,

SEC. 4589. Special constables.

By virtue of appointment as a special constable one may become entitled to carry

SEC. 4591. Sheriff and constables.

The sheriff receives fees for service rendered by him in a justice's court not as a constable, but as sheriff, and is bound

the trial before the justice of the peace are to be disregarded. *Edwards Loan Co. v. Skinner*, 127-112.

ings set up a different cause of action than that on which the suit before the justice of the peace was based. *Leathers v. Geilz*, 112 N. W. 191.

answer after the expiration of the time fixed by the statute. *Edwards Loan Co. v. Skinner*, 127-112.

corrected on writ of error. Jurisdiction will be presumed in support of the justice's judgment in the absence of anything made to appear in the record to the contrary. *Herald Printing Co. v. Walsh*, 127-501.

tered where the writ of error has been sustained and no further trial is necessary to a complete determination of the case. The court should not enter the identical judgment from which the writ of error is taken. *Ibid.*

The order to be entered in the district court is that which is essential to the correction of the errors in the rulings complained of which are asserted in the affidavit and established by the record and proceedings. An issue of fact as to the jurisdiction of the justice cannot be raised on writ of error. *Herald Printing Co. v. Walsh*, 127-501.

as matter of law, that because the jury finds the actual indebtedness to be less than five dollars, the attachment is therefore wrongful and the plaintiff liable to damages for suing out the attachment. *Insel v. Kennedy*, 120-234.

concealed weapons. *State v. Abrams*, 131-479.

to the county therefor as fees of his office. *Jones County v. Arnold*, 111 N. W. 973.

SEC. 4597. Fees of justice.

Where tax lists were placed in the hands of a justice of the peace for collection of the taxes included therein, held, that he took such lists as agent for col-

lection and not in his official capacity, and therefore was entitled only to the compensation agreed upon and not to his legal fees. *Peters v. Davenport*, 104-625.

SEC. 4599. In criminal cases.

To entitle the constable to fees in prosecutions before a justice of the peace which have been dismissed, the facts must be certified by the justice, verified by affi-

davit of himself or some other person cognizant of the facts. *McGuire v. Iowa County*, 133-636.

SEC. 4600. Repeal. That section forty-six hundred (4600) of the code, relative to the accounting for fees and compensation of justices of the peace and constables be and the same is hereby repealed and the following enacted in lieu thereof. [32 G. A., ch. 169, § 1.]

SEC. 4600-a. Accounting for fees—compensation. Justices of the peace and constables in townships having a population of twenty-eight thousand, shall pay into the county treasury all criminal fees collected in each year. Justices of the peace and constables in townships having a population of under twenty-eight thousand, shall pay into the county treasury all fees collected each year in excess of the following sums: In townships having a population of ten thousand and under twenty-eight thousand, justices, one thousand dollars; constables, eight hundred dollars; those having a population of four thousand and under ten; justices, eight hundred dollars; constables, six hundred dollars; in all townships having a population of under four thousand, justices six hundred dollars; constables, five hundred dollars. In townships having a population of twenty-eight thousand or more, justices of the peace and constables shall receive in full compensation for their services performed in criminal cases during the year, the following sums which shall be paid quarterly out of the county treasury. In townships having a population of thirty-five thousand or more, justices, fifteen hundred dollars; constables, twelve hundred dollars; in townships having a population of twenty-eight thousand and under thirty-five, justices, twelve hundred dollars; constables, one thousand dollars. Justices and constables in all townships having a population of twenty-eight thousand (28,000) and over shall retain such civil fees as may be allowed by the board of supervisors, not to exceed five hundred (\$500) dollars per annum, for expenses of their offices actually incurred, and shall pay into the county treasurer all the balance of the civil fees collected by them. [32 G. A., ch. 169, § 2.]

The auditing of claims of justices and constables for fees implies a hearing of examination of the account or claim with the power to adjust, allow or reject, according to the nature of the claim. *McGuire v. Iowa County*, 133-636.

Evidence as to the good faith of the constable in filing information and serving warrants is admissible. *Ibid.*

SEC. 4600-b. Annual report to board of supervisors. All justices of the peace and constables shall under oath make an annual report to the board of supervisors, upon blanks furnished by the county auditor, of all criminal fees taxed and collected during the year, which report shall also show that all criminal fees and fines collectible by law have been received, such annual report to be made on the first Monday in January, and before the annual settlement shall be made, and accompanied with the receipts of the treasurer for all money paid in to him. [32 G. A., ch. 169, § 3.]

SEC. 4600-c. **Quarterly report to county auditor.** Justices of the peace shall make, under oath, quarterly reports, upon blanks furnished by the county auditor, and shall file the same with the county auditor, which reports shall contain a true and correct transcript of all criminal proceedings which have been instituted or adjudicated in their courts, with the names of all attending witnesses and jurors and fees taxed in their favor. [32 G. A., ch. 169, § 4.]

TITLE XXIII.

OF EVIDENCE.

CHAPTER 1.

OF GENERAL PRINCIPLES OF EVIDENCE.

SECTION 4601. Witnesses—who competent.

In a criminal case a new trial should be granted where one of the witnesses for prosecution, giving material evidence, was not sworn and the omission was not discovered until after the verdict. *State v. Lugar*, 115-268.

A child of sufficient maturity and intelligence to receive correct impressions from its surroundings and to remember

and correctly narrate transactions is a competent witness, if he also comprehends the meaning and obligation of an oath. *Clark v. Finnegan*, 127-644.

And held that a child seven years of age shown by his examination to be of more than average intelligence and to understand the difference between truth and falsehood, was a competent witness. *Ibid.*

SEC. 4602. Credibility.

Conviction in a federal court of an offense not infamous cannot be shown in a state court as affecting the credibility of a witness. *Palmer v. Cedar Rapids & M. R. Co.*, 113, 442.

The intention of this section is to allow

proofs of facts as affecting credibility which at common law would have rendered the witness incompetent, and at common law a conviction did not render the witness incompetent unless it was for an infamous offense. *Ibid.*

SEC. 4604. Transaction with person since deceased.

Objection goes to competency of the witness: The statutory provision does not exclude evidence of such communications or transactions between a party to a claim against the estate of a deceased person and the deceased in his lifetime, but merely declares certain witnesses incompetent to make the proof. *Campbell v. Collins*, 133-152.

Evidence which of itself is not obnoxious to the statute is not rendered so by the fact that an inference as to what was done between the witness and deceased may be drawn therefrom. *Ibid.*

To what action applicable: This section has no application in an action not against either of the classes of persons contemplated. *McClintic v. McClintic*, 111-615.

This section does not apply to proceedings in the federal court inasmuch as there are provisions of the federal statute on the subject. *Travis v. Nederland L. Ins. Co.*, 104 Fed. 486.

Witness in behalf of administrator not incompetent: A witness in an action against an administrator called on behalf of the administrator may testify to transactions with the deceased. *Dean v. Carpenter*, 111 N. W. 815.

Who excluded as parties: A surviving partner is within both the letter and the spirit of the statute. As he cannot have the benefit of the testimony of his deceased partner as to what the conversation really was, he is not liable on the testimony of his adversary respecting such conversation. The fact that the representative of the deceased partner is not a party to the action is immaterial. *Salyers v. Monroe*, 104-74.

The fact that a witness was the secretary of plaintiff corporation, it not appearing that he had any interest in the suit, held not to disqualify him as witness to testify to personal transactions with decedent against whose estate the

claim is made. *University of Chicago v. Emmert*, 108-500.

A party defendant in an action by an heir to quiet title to inherited land, where the defense is made that the land was inherited by an illegitimate child, is not competent to testify to transactions, conversations and illicit relations with the deceased. *McCorkendale v. McCorkendale*, 111-314.

It is only a person who is connected with the proceedings by service of notice, or by consent through voluntary appearance, who can be deemed a party to the proceeding under the provisions of this section. *Hicks v. Williams*, 112-691.

While a party to the suit is precluded from testifying regardless of interest in the result, held that in a proceeding by intervention in which no relief was asked against the defendant in the original suit it was so far a distinct proceeding that the defendant, having no interest in the intervention proceeding, might testify. *Hogan v. Sullivan*, 114-456.

In an action to reform and cancel a mortgage given by a son to his father, brought after the death of the father, held that the son was an incompetent witness to an agreement with the father that he should only be required to pay interest during the father's life, and that upon his death the mortgage should be canceled. *Sauer v. Nehls*, 121-184.

In a partition suit, to which the widow is a party, relating to the property of a deceased person, the widow is incompetent to testify as to transactions or communications between herself and the deceased. *Ellis v. Newell*, 120-71.

A party is disqualified under this section, although he is merely a nominal party, or has no substantial interest in the action, but he must be in fact a party at the time of giving testimony. *Clinton Sav. Bank v. Underhill*, 115-292.

One through whom plaintiff derives an interest is disqualified. *Ibid.*

The statute excludes all parties whether interested or not, from testifying as to transactions or communications with the party deceased. *Culbertson v. Salinger*, 131-307.

The fact that the administrator of a person deceased is a party is immaterial if he is in fact an indifferent party in the suit, and the statutory provision has no application in such a case. *City National Bank v. Crahan*, 112 N. W. 793.

The statute is not limited in its exclusion of testimony to those persons whose rights may be affected by the transaction or communication referred to. *Stolenburg v. Diercks*, 117-25.

What interests disqualify: The interest which will prevent a person from tes-

tifying is such an interest in the event as would at common law disqualify the witness, and if such interest is collateral merely the competency of the witness may be restored by a release or transfer of it at any time before testifying. *Dubuque Lum. Co. v. Kimball*, 111-48.

The interest must be such as would have disqualified the witness at common law. *Hicks v. Williams*, 112-691.

One who is adversely interested in the action cannot testify as to transactions or conversations with one who is deceased. *Grimes v. Ellyson*, 130-286.

The disqualifying interest must be in the event of the case itself, and not in the question to be decided. *German American Sav. Bank v. Hanna*, 124-374.

The witness to be disqualified under this section on account of interest must have a legal, certain and immediate interest in the suit, and one who is interested only as prospective heir is not disqualified on that account. *Bird v. Jacobus*, 113-194.

The interest of the witness, to disqualify him, must be present, certain and vested. It is not sufficient that he at a former time had an interest. *Clinton Sav. Bank v. Underhill*, 115-292.

In a proceeding to establish the claim of a bank against the estate of a deceased officer of the bank for misappropriation of funds, one who was jointly liable with the deceased to the bank for such misappropriation is an interested party whose testimony as to conversations and transactions with the deceased is not admissible as against the bank. *McElroy v. Allfree*, 131-518.

Assignee: Three elements must exist in order to exclude testimony as to a personal transaction with deceased: (1) the matter must be in the nature of a personal transaction or communication; (2) the witness must be a party to the suit or interested in the event thereof; (3) the action must be against the executor, administrator, assignee, etc. And held that the appointee of a decedent as beneficiary of an insurance policy was not an assignee within the provisions of the statute. *Shumark v. Supreme Lodge K. of H.*, 110-480.

A donee is an assignee within the statutory provision prohibiting the testimony of one who claims by assignment with reference to a transaction with the deceased. *McAleer v. McNamara*, 112 N. W. 85.

Where a right asserted by a claimant against an estate depends for its existence and validity upon a transaction between the deceased and a third person, the evidence of such third person is not competent to prove such transaction. *McClanahan v. McClanahan*, 129-411.

What deemed personal transaction: Where a certificate of deposit taken in the

name of deceased was indorsed by the administrator of deceased in his individual capacity and the money drawn thereon from the bank, held, that such fund *prima facie* belonged to the estate and that the administrator was not competent to testify in a proceeding in which it was sought to subject real property to the payment of the debts of the estate, that by a personal transaction with deceased he had become the owner of the certificate of deposit, so that the proceeds thereof were not subject to the payment of the debts of deceased. *Duffield v. Walden*, 102-676.

An indorsee cannot testify in a suit against his immediate indorser who is deceased with reference to the condition of the paper when transferred, as that would be a personal transaction. *Benton County Sav. Bank v. Strand*, 106-606.

While one who has become a holder of a note may not, in the case governed by this section, testify to the personal transaction of the transfer of the instrument to the deceased, he may testify that he never transferred it to anyone else. *Walkley v. Clarke*, 107-451.

Competent testimony as to a conversation with a third person involving a statement of what has taken place between the witness and the deceased person is not prohibited by this section. *Ibid.*

Those interested in the litigation are not under this section prohibited from testifying to facts from which inferences may be drawn. *Furenes v. Eide*, 109-511.

The testimony of the payee of a note that he saw the payor, who is deceased, sign the note, is testimony as to a personal transaction. *Watters v. McGreavy*, 111-538.

A witness cannot by testimony as to a transaction of a third person with the deceased, in which the witness himself takes part, evade the rule as to testimony of personal transactions. He cannot by indirection do that which the law says may not be done. *Ibid.*

In a controversy as to whether a son was entitled to recover damages against the estate of his deceased father for failure of the father to comply with a contract to convey, held that evidence of the son with reference to the taking possession of the farm and making improvements thereon was not incompetent as relating to a personal transaction with the deceased. *Hutton v. Doxsee*, 116-13.

Testimony as to information or knowledge or the want of it is not testimony as to a personal transaction or communication. *In re Townsend's Estate*, 122-246.

It is only as to personal transactions and communications between persons who are interested and the deceased that the testimony of such interested persons is

rendered incompetent. *Jacobs v. Jacobs*, 130-10.

The rule of the statutory provision does not operate to close the mouth of a witness as to any matter of fact coming to his knowledge in any other way than through personal dealings with the deceased or communications made by the deceased to the witness in person. *Shetler v. Stewart*, 133-320.

Transactions in a particular case held not to constitute personal transactions within the provisions of Code § 4604. *Curd v. Wisser*, 120-743.

Conversations or transactions in presence of witness: A witness may testify to a conversation heard by him between deceased and another in which he took no part; such testimony does not relate to a personal transaction. *Allbright v. Hannah*, 103-98; *Mallow v. Walker*, 115-238; *Wright v. Reed*, 118-333; *Foreman v. Archer*, 130-49; *Powers v. Crandall*, 111 N. W. 1010.

Husband or wife of disqualified person: The wife of a person prohibited by this section from testifying may herself testify as to what took place in her presence. *Dettmer v. Behrens*, 106-585.

The husband or wife of a party to the action may testify to a conversation between such party and one who is then deceased, in which the witness did not participate. *Allison v. Parkinson*, 108-154; *Lucas v. McDonald*, 126-678; *McElroy v. Allfree*, 131-112.

Letters: Testimony by a witness as to the receipt of a letter from the deceased is as to a personal transaction or communication, within the terms of this section. *McCorkendale v. McCorkendale*, 111-314.

Letters by a witness to a deceased, if material and admissible as declarations of the witness, are not excluded by the terms of this section. *Howe v. Richards*, 112-220.

Where letters were relied on as a recognition of an illegitimate child, held that the testimony of the child to whom the letters were written with reference to the receipt of such letters and the signature of the writer was not excluded by the provisions of this section, inasmuch as the genuineness of the letters and not the communication involved therein was the material matter of inquiry. *Britt v. Hall*, 116-564.

Removal of prohibition: Where plaintiff sought to recover against an estate for work and labor performed for deceased under an implied contract, and the administrator testified as to the physical needs and condition of deceased at the time when such services were rendered, held, that the claimant might, under the exception of the statute, testify as to the same facts. *Ridler v. Ridler*, 103-470.

The fact that the executor testifies in his own behalf does not in itself remove the prohibition as to testimony of the opposite party. It is only removed as to communications or transactions with the deceased as to which the executor has testified. *Boardman v. Brown*, 114-678.

If when the testimony is given the witness is incompetent, and that objection is properly insisted upon, the objecting party does not waive the error by subsequently testifying concerning the same transaction. *Brandes v. Brandes*, 129-351.

The fact that the party suing on a note given to one who is deceased testifies as to how he acquired his right to the notes does not make competent the evidence of the maker of the notes as to conversations with the deceased with reference thereto. *Chapman v. Chapman*, 132-5.

The admission of a receipt, or deed, or contract, or other writing of a deceased person is not sufficient to admit the testimony of a living witness otherwise incompetent under the statute, and this rule applies to the books of account of deceased. *Whisler v. Whisler*, 117-712.

Where in an action by the administrator no evidence of a transaction with the deceased is offered, the defendant cannot by his own act in putting in evidence a letter written by him to the deceased thereby render himself competent to testify to the transactions referred to in such letter. *Ross v. Kirkwold*, 123-668.

Where a witness who is not competent to testify in direct examination as to conversations and transactions with a deceased person, is asked with reference thereto on cross-examination, he may be questioned on redirect examination with reference to the same subject-matter. *In re Will of Wharton*, 132-714.

A witness not competent to testify as to conversation with a person deceased cannot be inquired of with reference to such conversations on cross examination, not having been asked to testify with reference thereto in the examination in chief. *Stutsman v. Sharpless*, 125-335.

The fact that by a stipulation filed after the testimony of a party is given, but before the case is determined, judgment is entered as to him, does not render his testimony already given competent. The interest to disqualify such witness must be legal, certain and immediate, such as at common law would have disqualified him. *Culbertson v. Salinger*, 131-307.

How objection raised: Under this section the witness is made incompetent to testify as to such transactions or communications, and an objection to a question, calling for testimony as to such transactions or communications, that the evidence is incompetent, does not raise the question

as to the competency of the witness. *Burdick v. Raymond*, 107-228.

The objection of incompetency, without more, goes to the evidence and not to the witness, and does not raise the question whether the witness is competent to testify under this section. *McDonald v. Young*, 109-704.

The objection that the witness cannot testify as to personal transactions is not to be made when he is first sworn, but when he is asked to testify as to such transactions, and if objection is not then made it must be deemed as waived. *Chew v. Holt*, 111-362.

Objection to the competency of the witness to testify as to a conversation with a person deceased should be made when such testimony is first called for. *Davis v. Hall*, 128-647.

The objection to the witness should be made when his testimony is offered, and if the evidence is received without objection, it should not afterwards be stricken out. *Slattery v. Slattery*, 120-717.

A general objection to the competency of a witness, made at the close of his evidence, comes too late. *Ibid.*

It is not proper to receive evidence which is objected to on the ground that it relates to a personal transaction or communication and at the end of the introduction of the evidence to instruct the jury that they shall not consider so much thereof as relates to such communications and transactions. *In re Hull's Will*, 117-738.

An objection to a witness on the ground that he is incompetent without stating the specific ground is sufficient where the facts showing his incompetency to testify as to a transaction with the person deceased have been made to appear. *McAleer v. McNamara*, 112 N. W. 85.

Testimony on previous trial: The evidence of one party to a suit with reference to personal transactions with the other which is taken down in shorthand on the trial, and which would otherwise be competent on a second trial under the provisions of Code § 245-a, cannot be used on such second trial if in the meantime the opposite party has died. *Greenlee v. Mosnat*, 111 N. W. 996.

In particular cases: Section applied. *Nordman v. Meyer*, 118-508; *Huit v. Huit*, 122-338; *In re Will of Wiltsey*, 122-423; *Beechley v. Beechley*, 108 N. W. 762.

Under the evidence in a particular case, held that proof of insanity of the person with whom the conversation was held to which the witness was asked to testify was not such as to justify the exclusion of such testimony. *Percival-Porter Co. v. Oaks*, 130-212.

SEC. 4605. Depositions taken conditionally.

The provision that a person may have his own deposition taken with reference to a personal transaction with another and read in evidence where his testimony becomes incompetent by reason of the death of the other party to the transaction does not authorize the introduction in evidence on the second trial of a case of the testimony of a party given on the first trial with reference to a personal transaction

with the opposite party if in the meantime such opposite party has died. The provision of Code Supplement § 245-a for use on a second trial of testimony taken in shorthand on the first trial does not make such report of the evidence equivalent to a deposition taken on notice before the trial of the case. *Greenlee v. Mosnat*, 111 N. W. 996.

SEC. 4606. Husband or wife as witness. Neither the husband nor wife shall in any case be a witness against the other, except in a criminal prosecution for a crime committed one against the other, or in a civil action or proceeding one against the other, or in a civil action by one against a third party for alienating the affections of the other; or in any civil action brought by a judgment creditor against either the husband or the wife, to set aside a conveyance of property from one to the other on the ground of want of consideration or fraud, and to subject the same to the payment of his judgment; but in all civil and criminal cases they may be witnesses for each other. [15 G. A., ch. 33; C., '73, § 3641; R., § 3983; C., '51, § 2391.] [27 G. A., ch. 108, § 1.]

Scope of provision: The statutory provision forbidding husband or wife to be a witness against the other has no application to the question as to the admissibility of privileged communications between them. *Sexton v. Sexton*, 129-487.

Proof of marriage: Where the evidence is sufficient to make out a *prima facie* case of former marriage not dissolved by death or divorce, the question of the competency of one of the parties to the alleged marriage to testify against the other is a question for the jury. It is not essential in order to establish such disqualification that the fact of the marriage shall be proven by record evidence. *State v. Rocker*, 130-239.

Testimony as to crime prior to marriage: In a prosecution for rape committed upon a female child to whom the defendant has been united in marriage after the commission of the crime and before the trial, the female cannot testify as a witness against her husband. *State v. McKay*, 122-658.

The provisions of this section do not make the wife a competent witness in prosecution for rape committed upon her by the husband prior to the marriage. The crime is, in such case, not by the husband against the wife as such and is condoned by the subsequent marriage. *Ibid.*

A marriage though not regularly solemnized is valid under the provisions of Code § 3147, which renders the wife incompetent as a witness against her husband. *Ibid.*

After marriage has been dissolved: This section does not apply if the marriage

relation has been severed when the witness is offered. *Hitt v. Sterling-Goold Mfg. Co.*, 111-458.

The objection to the testimony of the wife against the husband as to a crime committed by him is removed if between the commission of the crime and the trial the wife has been divorced from her husband. *State v. Mathews*, 133-398.

Declarations: In an action against both husband and wife a declaration of either against interest is admissible, although it would be incompetent as against the other. *Chaslavka v. Mechalek*, 124-69.

Before grand jury: The fact that the wife is examined as a witness before the grand jury on the finding of an indictment against her husband is not a ground for setting aside the indictment. *State v. De Groate*, 122-661; *State v. Brown*, 128-24.

Fraudulent conveyance: The provisions added to this section by § 1, chap. 108, Acts 27 G. A., with reference to actions to set aside fraudulent conveyances, are not unconstitutional as being class legislation. The act applies to every person coming within the relation and circumstances provided for. *Burk v. Putnam*, 133-232.

Nor is the statute unconstitutional as requiring answers to incriminating questions. In view of the statutory provision on that subject (Code § 4612) it must be assumed that the witness is not required to answer questions which would tend to incriminate him. *Ibid.*

The statute is not retroactive. *Cedar Rapids Nat. Bank v. Lavery*, 110-575.

Declarations of the wife as to her title

to real property previously conveyed by her to her husband are not admissible for the purpose of impeaching the title of the husband. *Ibid.*

SEC. 4607 Communications between husband and wife.

Where it was claimed that a conveyance was joined in by the wife in pursuance of threats made to the husband, and by him communicated to the wife, held that the fact of such communication might be proved by the testimony of the husband. *Giddings v. Iowa Sav. Bank*, 104-676.

The provisions of this section absolutely press terms to cases where the marriage relation has ceased to exist. *Shuman v. Supreme Lodge K. of H.*, 110-480.

The provisions of this section absolutely close the mouth of husband or wife as to any communication made by one to the other during marriage. Such a communication is not merely privileged, but evidence of the parties with reference thereto is against public policy. *Hertrich v. Hert-rich*, 114-643.

SEC 4608. Communications in professional confidence. No practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any such person, who obtains such information by reason of his employment, minister of the gospel or priest of any denomination shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same is made waives the rights conferred. [C., '73, § 3643; R., §§ 3985-6; C. '51, §§ 2393-4.] [28 G. A., ch. 125, § 1.]

Privileged communications to attorney: An attorney acting as a mere scrivener in the preparations of instruments under directions given to him is not within the scope of the statutory provisions excluding the testimony of an attorney as to privileged communications. *Mueller v. Batcheler*, 131-650.

To constitute a privileged communication to an attorney there must be some element of confidence imposed or presumed to be imposed in the attorney himself. The privilege does not apply to a case where two or more persons consult an attorney for their mutual benefit. *Ibid.*

An attorney is not disqualified from testifying to statements by his client made in his presence to the court. *Foreman v. Archer*, 130-49.

An attorney should not be allowed in a criminal case to testify that the defendant consulted him with reference to a subject-matter having relation to the commission of the crime charged. *State v. Blydenburg*, 112 N. W. 634.

The statutory provision excluding evidence of an attorney as to communications made to him in the course of his employ-

ment is broad enough to exclude statements made to a county attorney with a view to a criminal prosecution. *Gabriel v. McMullin*, 127-426.

To physicians: Where the question is an action on a policy of life insurance is whether the insured consulted a physician, otherwise than as disclosed in his answers in the application, a physician may without violating the provisions of this section testify to attending insured as a physician, and prescribing for him. Such evidence has no reference to communications between the physician and patient. *Nelson v. Nederland L. Ins. Co.*, 110-600.

But the physician cannot testify as to the advice given to his patient, because this must have been based upon information derived from the patient. The statute does not permit a disclosure of information so derived, though indirectly made. *Ibid.*

This section does not prescribe any rule of professional conduct, nor prohibit a physician from disclosing otherwise the secrets of his patient. It relates only to the giving of testimony in a judicial proceeding, either by evidence directly given, or by affidavits, or otherwise. *Ibid.*

Facts learned by a physician while in the discharge of his duties as such cannot be testified to by him in view of the provisions of this section. *Finegan v. Sioux City*, 112-232.

Whenever an injured party consults a physician as physician and discloses to him his physical condition, and thus enables him to obtain information, which as an ordinary person he would not have obtained, such physician is prohibited from testifying with reference to the knowledge thus obtained, except with the consent of the injured party. So held where a physician was called by the opposite party to whom the injured person had disclosed his physical condition for the purpose of having such physician act as a witness in his behalf. *Doran v. Cedar Rapids & M. C. R. Co.*, 117-442.

Statements made by an injured railroad employe to a surgeon in the employ of the company, who visits him for the purpose of treating him for his injuries are privileged. *Keist v. Chicago G. W. R. Co.*, 110-32.

The confidential communications protected under the statute are not restricted to mere verbal statements by the patient to the physician, but include all knowledge or information acquired by the physician through his own observation or examination. *Battis v. Chicago, R. I. & P. R. Co.*, 124-623.

While the railroad company may send its own physician to examine an employe injured in the course of his employment for the purpose of determining the extent of the injury, yet if the physician thus furnished assumes to advise or administer treatment to the patient with his acquiescence he becomes the physician of the patient and communications made to him and knowledge acquired by him in that relation are privileged. *Ibid.*

Physicians who examine a person without his request, and without any understanding on the part of the person examined that they are making such examination as his physician, are not incompetent. *State v. Height*, 117-650.

Examinations and communications made in the presence of a physician, but not to him as physician, are not excluded as confidential communications. *Sutcliffe v. Iowa State Traveling Men's Assn.*, 119-220.

The expert testimony of a physician, based on hypothetical questions as to the cause of an injury to his patient, is not incompetent. *Crago v. Cedar Rapids*, 123-48.

Section applied as to communications between patient and physician. *Herries v. Waterloo*, 114-374.

Communications to a veterinary surgeon

are not privileged. *Hendershot v. Western Union Tel. Co.*, 106-529.

This section extends the privilege which at common law was recognized in regard to communications between client and attorney so as to cover communications between patient and physician, and extends to the latter communications the same complete protection, not only as to the physician, but also as to the patient, which at common law was recognized in regard to communications between attorney and client. Therefore the patient is privileged from disclosing communications made to his physician. *Burgess v. Sims Drug Co.*, 114-275.

Waiver: While the privilege may be waived, the voluntary disclosure of such communication by the patient in cross-examination will not constitute a waiver such as to authorize the introduction in evidence of the testimony of the physician with reference to such communication. *Ibid.*

Any waiver resulting from voluntary testimony of the patient with reference to the communication must be limited to the action in which such voluntary testimony is given, and will not operate on another trial of the same case. *Ibid.*

Communications from a patient to his physician are not privileged at common law. Although there is no statutory authority for waiving the prohibition, it is settled that it may be waived by the client, and after the death of the client, by his administrator. In a criminal case, involving death of a woman by abortion, committed by the defendant, testimony of a physician who attended the woman before her death is admissible. *State v. Grimmel*, 116-596.

A patient may waive the privilege in case of a communication to his physician and in cases of contests of wills where the parties are claiming rights of the estate through devise, inheritance, or in a representative capacity, those representing the estate may also waive the privilege, but in an action on a mutual benefit certificate of life insurance, communications by the deceased to his physician are not competent. *Shuman v. Supreme Lodge K. of H.*, 110-480.

Where several different physicians had treated a person for an injury received from a defective sidewalk, held, that the fact that plaintiff called one of such physicians as a witness did not waive the privilege of objecting to evidence of the other physicians as to communications relating to such injury. *Baxter v. Cedar Rapids*, 103-599.

The fact that a physician is asked to testify as to the condition in which he found an injured party when called to

attend him is not a waiver of privilege as to subsequent communication made to and observations made by such physician. *Nugent v. Cudahy Packing Co.*, 126-517.

The mere offer of testimony which is

competent and material in itself, but is excluded only because of the incompetency of the witness, does not ordinarily afford any ground for an assignment of error. *State v. Booth*, 121-710.

SEC. 4612. Criminating questions.

The objection on the part of the witness to criminating questions is not one which can be urged on behalf of the defendant

himself, and an error in ruling on such objection is not one of which the defendant can complain. *State v. Cogley*, 128-114.

SEC. 4613. Previous conviction.

The record of a conviction for a felony is admissible although an appeal for such conviction is pending. *Hackett v. Freeman*, 103-296.

Whatever may have been the rule at common law as to proof of previous conviction as affecting the credibility and not the competency of the witness, this section limits such evidence to conviction of a felony. *Palmer v. Cedar Rapids & M. R. Co.*, 113-442.

It is not proper to ask a witness on cross-examination, for the purpose of affecting his credibility, whether he has not been accused of a crime. *Germinder v. Machinery Mut. Ins. Assn.*, 120-614.

Although previous conviction may be shown for the purposes of impeachment only by the record, yet where the question was as to whether the defendant had been

absent from the state so as to obviate the bar of the statute of limitations, held that the warden of the penitentiary of another state might testify as to the defendant being in that state, although it incidentally appeared from his testimony that he was confined in the penitentiary. *State v. Moran*, 131-645.

It is not improper in questioning the witness as to previous conviction of a felony to direct his attention to the specific felony of which it is claimed he was convicted. *State v. Carter*, 121-135.

In proving the former conviction of a witness for the purpose of impeaching his credibility, it is immaterial that the record of conviction shows a middle initial which is not a part of the real name of the witness. *State v. Loser*, 132-419.

SEC. 4614. Moral character.

Inquiry as to the general reputation of the witness for truth and veracity should be restricted to the neighborhood of the present residence of the witness sought to be impeached, and to proof of reputation at a time near that of the trial. When residence has been so recently acquired that the neighbors of the witness are not likely to have ascertained his true character, and who in all probability has not worn off that established in the neighborhood of his former abode, evidence of his reputation at the latter place may be received, as it may also, when he has subsequently remained in no place long enough to become well known to his neighbors. *Schoep v. Banker's Alliance Ins. Co.*, 104-354; *McGuire v. Kenefick*, 111-147.

It is competent to ask a witness what is his occupation and where he resides, although the answers to such questions may have a tendency to disgrace the witness, affect his credibility, or weaken his evidence. *State v. Chingren*, 105-169.

Before a witness can speak as to the character or reputation of another, his knowledge must appear. The mere individual opinion of the witness is not admissible. No one will be permitted to speak affirmatively to the character or

competency of another, as distinguished from general reputation, solely from rumors or reports. *Lacy v. Kossuth County*, 106-16.

The general moral character of a witness, or his general reputation as to morals may be shown, not his character or life as known to the impeaching witness. *State v. Seevers*, 108-738.

Where the prosecutrix in a prosecution for seduction is a witness, her moral character or reputation may be shown for purposes of impeachment, but in such case the proof should be confined to her general reputation and should not be extended to cover a specific vice. Such testimony should ordinarily be confined to the time of trial. *State v. Haupt*, 126-152.

Where a witness testifying to the bad character of another witness for purposes of impeachment is cross-examined as to the names of the persons whom he has heard speak ill of such witness and names such persons, the persons named cannot be called to contradict the statements attributed to them by the impeaching witness. To allow such testimony would be to introduce a collateral issue. *Hofacre v. Monticello*, 128-239.

SEC. 4615. Whole of a writing or conversation.

The evident design of this provision is that the whole of a conversation on the same subject shall be received in order to determine the consideration and weight to be attached to that portion offered. *Walkley v. Clarke*, 107-451.

Where a part of a conversation has been introduced in evidence it is competent to prove the other portion as explaining the part introduced. *Hutton v. Dorsee*, 116-13.

An objection to an entire writing relied on as constituting an admission in a criminal case should not be sustained, although the writing contains some expressions of opinions which would not in themselves be admissible, there being no objection to the specific portion of the writing which is

deemed objectionable. *State v. Hasty*, 121-507.

A rule that if one party has proven part of a conversation the other is entitled to give the rest of it in evidence, does not warrant the admission of everything which may have been said, but only so much as was said concerning the subject-matter of the statements testified to. *State v. Louhremen*, 123-476.

Where a portion of a conversation or correspondence has been given in evidence by one party, the whole relating to the same subject may be inquired into by the other party. *Robertson v. Vasey*, 125-526.

Section applied. *State v. Hudson*, 110-663.

SEC. 4616. Writing and printing.

In case of inconsistency between the printed and the written portions of a

contract, the written portion will prevail. *Sylvester v. Ammons*, 126-140.

SEC. 4617. Understanding of parties to agreement.

The provision is only applicable to a case where the writing involved is fairly susceptible of different meanings. *Rouss v. Creglow*, 103-60.

The statutory provision that when the terms of an agreement have been intended in a different sense by the parties thereto, that sense is to prevail against either in which he had reason to suppose the other understood it, has no application where as a matter of law the language of the contract is plain and unambiguous. *Inman Mfg. Co. v. American Cereal Co.*, 133-71.

It is error to submit to the jury the question whether a written contract was understood by one of the parties in a different sense than that indicated by its plain and unequivocal language. *Capital City Carriage Co. v. Moody*, 110 N. W. 903.

Where parties do not understand the

agreement alike, it is, as against one of them, to be construed in that sense in which the other had reason to believe it was understood. *Ubbinga v. Farmers' Sav. Bank*, 108-221.

This section applies to verbal contracts as well as those in writing, and it is applicable also to cases of express contract, as well as those implied. *Lull v. Anamosa Nat. Bank*, 110-537.

Where a contract issued by a building and loan association was ambiguous in its terms, held that it would be construed in the sense in which it was evidently intended to be taken by the person to whom it was issued. *Field v. Eastern B. & L. Assn.*, 117-185.

Section applied. *Wood v. Allen*, 111-97; *Brown v. Curtis*, 111-542.

SEC. 4618. Historical and scientific works.

While the truths of the exact sciences, the established facts of history, and computations from fixed data may be proven by the works of reputable authorities, yet medicine belongs to the class known as inductive sciences, the data of which are constantly shifting with new discoveries, and as to matters of skill and knowledge in that science, the safer practice is to rely upon the testimony of living witness of the medical profession who may bring the learning and research of the books within the comprehension of the jurors. *Bixby v. Omaha & C. B. R. & B. Co.*, 105-293.

Extracts from medical works, defining and giving the probable cause, progress and symptoms of a disease are not admissible in evidence. *Stewart v. Equitable Mut. L. Assn.*, 110-528.

Medical books are not admissible in evidence. *State v. Peterson*, 110-647.

The maps or plats of the government survey in the custody of the proper officer may be certified by him, and as thus certified are admissible in evidence. *Austin v. Witcher*, 110 N. W. 910.

SEC. 4620. Handwriting.

While the standard itself cannot be established by the testimony of persons who have seen the party write, yet the party whose signature the standard is claimed to be may establish it by his own oath. *Renner v. Thornburg*, 111-515.

Where the question was whether a certain signature, purporting to be that of the wife, was genuine or was in fact the signature of the husband afterwards altered to that of the wife, held that comparison with handwriting of the husband was proper. *Coppock v. Lampkin*, 114-664.

One who has seen the person write is

competent to express an opinion as to whether the writing in question is his handwriting. *Frank v. Berry*, 128-223.

A signature to a pleading purporting to be that of the party in whose behalf it is filed may be introduced in evidence as the writing of such person in the absence of any showing that the signature was not his. *Ibid.*

Held not error to instruct that expert evidence as to handwriting is of the lowest order of evidence, or evidence of the most unsatisfactory character. *Patton v. Lund*, 114-201.

SEC. 4623. Books of account—when admissible.

Where books are not shown, by the oath of the party who kept them, to be books of original entry they are properly excluded. *Frick v. Kabaker*, 116-494.

Books of account not shown to have been made in the ordinary course of business are not admissible in establishing the items of charge. *Kossuth County State Bank v. Richardson*, 132-370.

Even where the showing necessary to entitle a party to introduce books of account in evidence has not been made, they may be admissible as showing entries in the partnership account, charging a partner with knowledge of the understanding with which funds were received. *McDer-*

mott v. Hacker, 109-239.

Books of account are admissible for the purpose of showing entries against the interest of the person in whose interest such books are kept. *Citizens' National Bank v. Wilson*, 121-156.

Such evidence may be considered, although it is contradictory to the evidence of the persons authorized to make such entries. *Ibid.*

Books of account held admissible to establish the manner in which the business was carried on as bearing on the question whether a partnership existed. *In re Myers' Estate*, 111-584.

SEC. 4625. Statute of frauds—contract in writing.

Effect of statute: The statute of frauds does not prohibit an oral contract, nor make such agreement illegal because certain formalities are not complied with. It relates only to the method by which the proof thereof may be made. *Merchant v. O'Rourke*, 111-351.

The contract is not invalidated by reason of noncompliance with the statute. The provisions of the statute relates only to the proof. *Nebraska Bridge Supply & Lumber Co. v. Conway*, 127-237.

Where a contract is one which can be evidenced only in writing, the court cannot look beyond the writing to ascertain the terms, conditions or provisions of the contract. *Allan v. Bemis*, 120-172.

The statute of frauds does not undertake to regulate the manner of executing contracts when made, nor does it have any concern with them after being executed. *Dorr Cattle Co. v. Des Moines Nat. Bank*, 127-153.

Remedy in equity: Notwithstanding the requirement that contracts within the provisions of the statute of frauds can only be proven by written evidence, a court of equity may on parol evidence reform a

contract by adding thereto provisions which have been omitted by mutual mistake and then specifically enforce the contract as thus reformed. *Butler v. Threlkeld*, 117-116.

Notwithstanding the provisions of the statute of frauds, equity may on parol evidence set aside a conveyance for the purpose of preventing the obtaining of an estate by fraud. *Willis v. Robertson*, 121-380.

A parol contract between the owner of land and another by which the latter agrees to support the former for the balance of his life in consideration that the property shall belong to the latter after the former's death is binding in equity. *Powers v. Crandall*, 111 N. W. 1010.

Lost instrument: Parol evidence is admissible to show the terms of an instrument which the law requires to be in writing, for instance, a lost antenuptial contract. *In re Devoe's Estate*, 113-4.

What sufficient memorandum: The memorandum is sufficient if signed by the agent, duly authorized, in his own name. *Nebraska Bridge Supply & Lumber Co. v. Conway*, 127-237.

A duplicate memorandum of an order by the agent to his principal to ship goods to a buyer, one copy of which is given to the buyer, is sufficient memorandum of the contract to hold the principal. *Ibid.*

How objection raised: The objection that the contract is not in writing as required by the statute of frauds must be raised by demurrer or by objection to the introduction of evidence. It is not sufficient, to justify a reversal on appeal, that the objection is raised by answer alone. *Marr v. Burlington, C. R. & N. R. Co.*, 121-117.

Par. 1. Sale of personality: Under a general denial in an action for breach of contract of sale, plaintiff must prove his contract by written evidence, or, in lieu thereof, must prove payment or delivery, so as to bring the case within the exceptions of the next section. *Thompson v. Frakes*, 112-585.

The defense available under the statute of frauds as against the enforcement of a parol contract for the sale of personal property, held not to be defeated by evidence with regard to part performance or statements recognizing the validity of the contract. *Johnson v. Holland*, 124-157.

Par. 2. In consideration of marriage: An oral contract made in consideration of marriage cannot be proven by a written contract entered into between the parties after marriage which does not show that it was executed to give effect to and make of writing the previous parol antenuptial agreement. *Frazer v. Andrews*, 112 N. W. 92.

Par. 3. Answering for debt of another: An oral promise to pay for the care of a person who is *non-compos mentis* is not a contract within the statute of frauds, even though the person making the promise is not legally liable for the support. *Harlan v. Harlan*, 102-701.

Where a lessor without waiving his lien permitted the lessee to remove property which was subject to the lien on the oral promise of a third person that the rent should be paid, held, that the promise of the third person was within the statute of frauds, and that the lessor had not lost his lien. *Griffin v. Hoag*, 105-499.

A verbal acceptance of an order drawn on a fund is not good unless it be shown that the drawer was the owner of the fund in the hands of the drawee or acceptor at the time the order is accepted, for unless the drawee have such fund his verbal promise to pay the debt of another is within the statute of frauds. *Winburn v. Fidelity L. & B. Assn.*, 110-374.

The agreement to save a stakeholder harmless from the demands of one of the parties to a wager, if he will pay the amount of the wager to the promisor, is

an original promise, and not within the statute of frauds. *Himmelman v. Pecaut*, 133-503.

Where a railroad company contracted with a boarding house keeper to pay for boarding its non-union employes, held that such contract was not to answer for the debt, default or miscarriage of another, and need not be in writing. *Marr v. Burlington, C. R. & N. R. Co.*, 121-117.

A promise to answer for the debt of another to be within the statute of frauds must be made to the person entitled to enforce the liability assumed by the promisor. A promise to the debtor to pay his debt and thereby relieve him from the payment of it himself is not within the statute. *Merchants v. O'Rourke*, 111-351.

When the promise, although in form to pay the debt of another, is founded on a new consideration which passes between the parties, and gives to the promisor a benefit which he did not enjoy before, and would not have possessed but for the promise, it will be regarded as an original undertaking to which the statute of frauds has no application. *Carraher v. Allen*, 112-168.

A direct promise to pay the debt of another, made to subserve some purpose of the promisor is not within the statute of frauds. *Williams Shoe Co. v. Gotzian*, 130-710.

Where the promise to answer for the debt of another is made to subserve promisor's own objects and purposes, and for a consideration to him, it is not within the statute of frauds. *Blake v. Robinson*, 129-196.

Whenever the main purpose of the person promising it not to answer for the debt of another, but to subserve some object of his own, the promise is not within the statute of frauds, although in form it may have the effect of extinguishing the liability of another. *Pratt v. Fishwild*, 121-642.

Par. 4. Creating interest in land: A parol sale of growing trees is an executory contract, passing no title to the purchaser. A sale of growing trees, treated as a sale of an interest in realty, would be within the provision of the statute of frauds relating to the sale of an interest in realty. *Garner v. Mahoney*, 115-356.

An agreement with reference to the interest of joint owners in a mining venture is not within the statute of frauds as to real property. *Doyle v. Burns*, 123-488.

An agreement to take the assignment of an option and assume the further obligations of the vendee to the vendor is within the statute of frauds. *Esslinger v. Pascoe*, 129-86.

The right of the owner of a dominant estate to cast surface water upon the serv-

ient estate otherwise than in the course of nature, constitutes an easement which cannot be proved by parol. *Jones v. Stover*, 131-119.

An oral contract creating a trust in land is not void. If the trustee refuses to perform, and the beneficiary is unable to prove the trust by written evidence, he must suffer, but if the contract is fully carried out it does not lie in the mouth of a third person to say that it is void, and therefore confers no rights. *McCormick Har. Mach. Co. v. Griffin*, 116-397.

An oral agreement that one in possession of property shall surrender it on an adjudication against his claim in another case is within the statute of frauds. *East Omaha Land Co. v. Hansen*, 117-96.

In such case continuance in possession by the claimant will not take the case out of the statute under the next section. *Ibid.*

Evidence in a particular case held not

SEC. 4626. Exceptions.

Labor or money to be expended: A contract for the sale of corn to be shelled, that unfit for shelling to be thrown out, is not within the exception of the statute of frauds as to cases where labor, skill or money is necessary to be expended in producing or procuring the property. In such case the work to be done is not of a kind to change either the form or character of the thing sold. *Lewis v. Evans*, 108-296.

Merely preparing a crop for the market is not labor and expenses in producing or procuring it such as to take an oral contract for the sale thereof out of the statute of fraud. *Migbell v. Dougherty*, 86-480; *Dierson v. Petersmeyer*, 109-233.

Taking possession: In order that the act of the vendee in taking possession of the property shall be such as to bring the case within the exception of the statute of frauds it must appear that the possession was taken in pursuance of the contract. *Benedict v. Bird*, 103-612.

The exception of the statute relating to the payment of the purchase price applies only to cases where "the purchase money or any portion thereof has been received by the vendor." *Ibid.*

To constitute such delivery of personal property as to take an oral contract for the sale thereof out of the statute of frauds it is necessary not only that the vendor act with purpose of vesting the right of possession in the vendee, but that the vendee accept with the intention of taking possession as owner. *Dierson v. Petersmeyer*, 109-233.

Possession taken under a contract for the transfer of an interest in real property takes such contract out of the statute of frauds. *Kitchen v. Chantland*, 130-618.

sufficient to show a contract in writing which could be the subject of an action for specific performance. *Mathes v. Bell*, 121-722.

The validity of transfers of real estate is to be determined by the law of the state where the property is situated. This rule is applicable not only to the form and manner of the conveyance or contract, but also to rights of the parties thereto and their capacity to contract. *Meylink v. Rhea*, 123-310.

Section applied as to a contract creating an interest in real property. *Gregory v. Bowsby*, 115-327.

Par. 5. Contract not to be performed within a year: Where the contract is to be performed on one side within a year and is so performed, the other party is not excused from performance, although a longer time is contemplated. *Fernald v. Gilman*, 123 Fed. 797.

If one is already in possession of land under a contract of lease, his continuance in that possession will not be sufficient to support a claim of part performance under a subsequent contract of purchase. The possession, to take the contract out of the statute of frauds, must be exclusively referable to the contract. *Hutton v. Doxsee*, 116-13.

Taking of possession, to render valid an oral contract to convey, must be with actual or implied consent of the grantor, and by virtue of the contract. *Lowery v. Lowery* 117-704.

If plaintiff relies on the testimony of defendant to establish the taking possession of real property under a contract not in writing, the burden is on him to prove that possession was taken under such contract. *Marks v. McGookin*, 127-716.

One who has been in possession as tenant cannot claim to have taken possession under a contract of purchase, unless he can show that, with the making of the alleged contract, his possession as tenant ceased and that possession thereafter was held as a purchaser under and by virtue of the contract. Nor will it be material as showing possession under the contract of purchase that the tenant made improvements. *Allan v. Bemis*, 120-172.

Under the evidence in a particular case held that there was not such payment nor taking of possession as to take a parol contract for the sale of land out of the statute of frauds. *Heddleston v. Stoner*, 128-525.

Part performance: An oral agreement to transfer real property to another in consideration that the latter will furnish support for a dependent person, is taken out

of the statute of frauds by the furnishing support as agreed and can be specifically enforced. *Harlan v. Harlan*, 102-701.

Part payment, or taking possession under an oral contract, will render the contract binding. *Walkley v. Clarke*, 107-451.

An oral agreement between husband and wife by which the husband abandons the advantage of the antenuptial contract with reference to the wife's interest in the husband's real property, in consideration of the discontinuance of a meritorious suit for divorce and the resumption of the marriage relations is valid, notwithstanding the statute of frauds. *Fisher v. Koontz*, 110-498.

A promise or agreement to make a will for the transfer of an interest in land in another's favor may be taken out of the statute of frauds by the payment of a consideration. *Bird v. Jacobus*, 113-194.

An oral contract for a gift of land in consideration of the support of the owner during his natural life, followed by possession and performance on the part of the donee, is not within the statute of frauds. *Soper v. Galloway*, 129-145.

The fact that performance is in part by the party to the contract, and in part by his heir, who after his death claims to inherit, will not defeat the contract, where such substituted performance has been accepted by the other party. *Ibid.*

Although performance is commenced under an oral contract to convey if it is subsequently abandoned before completion, the contract cannot be enforced. *Eastwood v. Crane*, 125-707.

The surrender of possession by a tenant and abandonment of his lease constitutes a sufficient part performance to take an oral contract to convey the premises out of the statute of frauds. *Yule v. Fell*, 123-662.

A tender of performance will not bring an oral contract for the conveyance of land within the exception to the statute of frauds. *Ormsby v. Graham*, 123-202.

Contracts within the statute of frauds

SEC. 4628. Party made witness.

Inasmuch as an oral contract, although within the statute of frauds, may be established by the testimony of the party, a recognition by him of the contract is sufficient to make a release from its obligation operative as a consideration for a new agreement. *Merchant v. O'Rourke*, 111-351.

SEC. 4630. Record or certified copy of instrument.

The loss of the original need not be shown in order to justify the reception of certified copies of the record. Proof by the

party on oath, or otherwise, that the original is not within his control, is sufficient. *Hall v. Cardell*, 111-206.

are not void, and if performed, or partly performed, they are to the extent of such performance taken out of the statute. *Murphy v. DeHaan*, 116-61.

Where the contract, although within the statute of frauds, is for labor to be performed, and plaintiff has partly or wholly executed the same on his part, the terms of the contract govern as to the rate of compensation. *Ibid.*

At common law payment of the consideration for a conveyance of land was not regarded as part performance of the contract such as to take an oral agreement for the conveyance of land out of the statute of frauds. But under our statute part payment of the purchase money means the receipt of the consideration on which the contract is made, or a part thereof, in whatever form such consideration may exist. *Daily v. Minnick*, 117-563.

When part payment of the consideration is relied upon alone as taking the case out of the statute of frauds, the identification of the land may also rest in parol, and it is no objection to the enforcement of the contract that there is nothing in the act performed which serves to identify the land. *Ibid.*

Therefore held that parol evidence was admissible to show an agreement with the parents of a child, that in consideration of the child being named after the other party to the agreement, the latter would give the child forty acres of land, and that subsequently a particular tract of land was agreed upon as that to which the previous contract should relate. *Ibid.*

Pleading: Where the defendant by pleading raises the objection of the statute of frauds and the plaintiff alleges facts bringing the case within an exception in the statute, the defendant does not waive his defense by failing to object to the evidence of the contract offered, before it appears whether plaintiff can establish the fact of the exception. *Benedict v. Bird*, 103-612.

To entitle the plaintiff to recover in an action on a contract which is within the statute of frauds, relying upon the testimony of defendant to establish the contract, such testimony must be sufficient in itself to sustain the right of action. *Marks v. McGookin*, 127-716.

SEC. 4633. Repeal—recording of United States and state patents. That section forty-six hundred and thirty-three (4633) of the code be repealed and the following enacted in lieu thereof:

“United States and state patents for land in the state, and duly certified copies thereof from the general land office of the United States, or the state land office, that have been or may be recorded in the recorder’s office of the county in which the land is situated shall be matters of record, and such record, and copies thereof, certified to by the recorder, may be received and read in evidence in all courts, with like effect as the record of other instruments, and other certified copies of original papers recorded in his office; and such patents and certified copies may be recorded without an acknowledgment.” [31 G. A., ch. 159.]

SEC. 4635. Copies of records and entries in public offices.

Certified copies of records in a public office are entitled to the same weight as the originals. *Traer v. State Board of Medical Examiners*, 106-559.

The statutory rule that duly certified copies of records belonging to any public office are admissible in evidence in all cases as of equal credibility with the original record, is a common law rule generally

recognized. *Austin v. Whitcher*, 110 N. W. 910.

In a particular case, held, that it was sufficiently shown that deeds and plat, the records of which were introduced in evidence did not belong to the party introducing such records and were not within his control. *Independent School Dist. v. Hewit*, 105-663.

SEC. 4638. Officer to give copies of records.

No duty is imposed upon the officer having charge of the records to make a search thereof and give a certificate of

the absence of any record of a particular fact or proceeding. *In re Estate of Colton*, 129-542; *State v. Kendig*, 133-164.

SEC. 4644. Judicial record—of state or federal court.

A judgment may be proved by the record book, or a certified transcript thereof. *Baxter v. Pritchard*, 113-422.

The absence of any record of a divorce proceeding is not to be established by a certificate of the clerk of the court, but by

testimony of the officer or other competent person, that on examination of the records no such proceeding is shown. *In re Estate of Colton*, 129-542; and see *State v. Kendig*, 133-164.

SEC. 4645. Of another state.

The method provided by the federal statute for proving judgments or records of foreign states is not exclusive and proof complying with the provisions of the state statute on the subject is sufficient. *Tomlin v. Woods*, 125-367.

The rules of evidence prescribed by the statutes of this state as to proof of a

foreign judgment will govern as to the sufficiency of the certification of such judgment. *Morrison Mfg. Co. v. Rimerman*, 127-719.

The certification by the clerk on a separate sheet of paper attached to the copy of the judgment is sufficient. *Woodworth v. McKee*, 126-714.

SEC. 4648. Presumption of regularity.

A situation will not be presumed, in the absence of proof, to defeat the acts of an officer apparently clothed with authority in discharging duties imposed upon him by statute. *Miller Brewing Co. v. Capital Ins. Co.*, 111-590.

When an inferior tribunal is authorized to determine a question of act, its finding is an adjudication which cannot be impeached collaterally. *Oliver v. Monona County*, 117-43.

A finding necessarily involved in the adjudication of an inferior tribunal will be presumed to exist, although not appearing of record, if there is no requirement that a record thereof be made. *Ibid.*

A presumption of truth attaches to the record of an officer showing the filing of a paper authorized to be filed in his office. *McConkie v. District Court*, 117-334.

To support a judgment of a justice of the peace rendered in a township adjoining

that in which the suit should properly have been commenced, it will be presumed that there was no justice of the peace competent to act in the township in which the suit should have been instituted. (See

Code § 4482.) *Jonas v. Weires*, 111 N. W. 453.

Section applied. *Thompson v. Thompson*, 117-65.

SEC. 4649. Executive acts.

A proclamation by the governor may be provided by the record thereof in the office

of the secretary of state. *McPeck v. Western U. Tel. Co.*, 107-356.

SEC. 4650. Proceedings of legislature.

There may be cases in which statutes of another state when relied upon must be pleaded, but where they are relied upon merely as evidence of ultimate facts it is

not necessary that they be pleaded directly, the pleading of the fact being sufficient. *Green v. Equitable Mut. L. & End. Assn.*, 105-628.

SEC. 4651. Printed copies of the statutes.

A book entitled "The Laws" of a state and bearing a certificate of the secretary of state that the volume was printed under his direction and that the certificate was made in conformity with the laws of the state, is competent evidence of such laws,

though having the imprint of a private publisher, as it purports to have been published by state authority. *Summitt v. United States Life Ins. Co.*, 123-681; 99 N. W. 563.

SEC. 4652. Written law—unwritten law.

The statute authorizes proof of the unwritten law of foreign countries by parol, but in the absence of such proof it will be presumed to be the same as the law of this state; and held, that proof showing the civil law to be in force in Mexico was

not sufficient to establish the meaning of the term adult in Mexico as different from the meaning under the common law, there being no proof as to the statutory law of Mexico on the subject. *Banco De Sonora v. Bankers' Mut. Gas Co.*, 124-576.

SEC. 4658. Subpoenas for witnesses.

Pendency of some proceeding in a court is necessary to warrant the issue of process

for witnesses. *Chambers v. Oehler*, 107-155.

SEC. 4661. Witness fees.

When a witness is called and sworn and has thus placed himself under and subject to the order and direction of the court, he is entitled to fees for his attendance, but where a witness is present without being subpoenaed, solely at the risk of a party, and is not sworn, the party who calls him is alone responsible for his fees. Generally speaking, a witness is one who gives evidence in a court. *Fisher v. Burlington, C. R. & N. R. Co.*, 104-588.

Witnesses who are not subpoenaed are not entitled to mileage. *Ibid.*

Costs may be taxed, on proper showing, for witnesses who attend without being subpoenaed or used on the trial, but, in the absence of proof as to the distance traveled by them in attending the trial, no mileage can be taxed. *Duree v. Chicago, M. & St. P. R. Co.*, 118-640.

Where the personal presence of a witness is necessary in a criminal case, the county is liable for his mileage from a point with-

out the state. *Climie v. Appanoose County*, 125-292.

A witness may have mileage from a point without the state within the discretion of the trial court. *Perry v. Howe Co-operative Creamery Co.*, 125-415.

The mileage of witnesses whose personal presence at the trial is necessary may be taxed although they have come from other states. *Casley v. Mitchell*, 121-96.

It is not necessary where prosecutions are dismissed that formal judgments for costs against the county be entered. Such a judgment if entered could not be enforced save by presenting claims for the fees taxed to the board of supervisors of the county for allowance and if allowance should be refused, by suing the county therefor. *McGuire v. Iowa County*, 133-636.

The taxation of witness fees in the district court in criminal cases where there is no conviction is conclusive as to the liability of the county for such fees. But

the same rule does not obtain in the justice's court, with reference to fees of justices and constables which are to be audited and paid out of the county treasury. *Ibid.*

Where the prosecution is dismissed

SEC. 4662. Fees in advance.

A witness for defendant in a criminal prosecution is not bound to attend without prepayment of fees, unless the subpoena

owing to the failure of the justice to acquire jurisdiction over the accused, a constable is not entitled to his fees for service of process, nor the justice to his fee for entering judgment. *Ibid.*

is issued under the order of the judge as provided in Code § 1298. *State v. Keenan*, 111-286.

SEC. 4668. Failure to obey subpoena—pleading taken as true.

In the absence of a showing of want of personal knowledge, a request for judgment on account of failure of the opposite party to produce books and papers as re-

quired by statute, by order of the court, should not be granted. *Devier v. Economic L. Assn.*, 106-682.

SEC. 4673. Affidavits—before whom made.

A mere jurat annexed to an official certificate is not an affidavit. *McGuire v. Iowa County*, 133-636.

The signature of the affidavit is necessary to the validity of the affidavit. *Magney v. Roberts*, 129-218.

In a proceeding before the board of medical examiners for revocation of a license, affidavits may be received as evidence.

Traer v. State Board of Medical Examiners, 106-559.

Where the affidavit of a juror in support of a motion for new trial is desired, application to an officer competent to take deposition may be made. It is not proper to call the juror as a witness on the motion for a new trial instead of procuring his affidavit. *Harrison v. Ayrshire*, 123-528.

SEC. 4675. How compelled.

A justice of the peace cannot issue a subpoena for the purpose of requiring the making of an affidavit where no proceed-

ing is pending before him. *Chambers v. Oehler*, 107-155.

SEC. 4680. Publications—how proved.

Section applied. *McConaughy v. Wilsey*, 115-589.

SEC. 4684. Depositions—when taken and by whom.

Where depositions are taken upon notice, such notice must contain the name of the

witness. *Harlan v. Richmond*, 108-161.

SEC. 4688. Not on election day or holiday, etc.

Legal holidays in Code § 3541 relate to appearance in an action and those in Code § 3053 relate to presentation and protest of negotiable paper. *Brennan v. Roberts*, 125-615; 101 N. W. 460.

The fact that depositions cannot be taken during the term of the court without express order of court is a sufficient ground

for asking a continuance. *Reupke v. Stuhr, & Son Grain Co.*, 126-632.

Where the court fixes a date for the taking of depositions of witnesses whose attendance has been anticipated but who are prevented from being present, no further notice of taking the deposition is required. *State v. Mosher*, 128-82.

SEC. 4689. On commission—notice—interrogatories.

In a proceeding for the probate of a will, the notice by the proponent as to the taking of depositions may be given to one

who has filed objections, and who is the chief legatee or devisee under the will. *In re Estate of Jones*, 130-177.

SEC. 4700. Certificate.

A party to an action may have the right to demand the production of an original instrument which his adversary seeks to

prove, notwithstanding the fact that a copy of it is attached to a deposition introduced in evidence. *Ruthven v. Clarke*, 109-25.

SEC. 4702. Taking in shorthand.

When depositions are taken in shorthand under statutory provisions, the notes may be signed by the witness, after being read over to him, and it is not necessary that

the witness sign or swear to the translation of the notes. *Slocum v. Brown*, 105-209.

SEC. 4705. Transmission.

Failure to file the deposition with the clerk within the time prescribed is not sufficient ground for rejecting it if when offered in evidence it appears that the ob-

jecting party has had sufficient notice of the filing so that no prejudice has arisen by the failure to file in time. *Ferguson v. Lederer*, 128-286.

SEC. 4707. Opened—custody.

Depositions although not used by the party taking them are a part of the record, and if removed by him without leave may

be required to be returned. *Howe v. Mutual Reserve Fund L. Assn.*, 115-338.

SEC. 4708. Unimportant deviations.

A failure to file the deposition within the time prescribed by statute is not a reason for rejecting it when offered, if the

objecting party has had sufficient notice of its filing to obviate any possible prejudice. *Ferguson v. Lederer*, 128-286.

SEC. 4712. Exceptions.

A party cannot be permitted to pick from a deposition taken at his instance those portions favorable to himself and omit the balance. He should either read all of that which is pertinent to the issues, or none. When the deposition is offered by the opposite party, such parts may be received as relate to any distinct transaction, but must include all said on the particular subject. It follows that after the deposition has been introduced by the party taking it he will not be permitted to withdraw a part, such as the cross-examination, without withdrawing the entire deposition, nor will he be allowed to withdraw the whole for the purpose of re-reading a part only. *Walkley v. Clarke*, 107-451.

Where a party offered to read parts of certain depositions, and an objection thereon on the ground that the whole deposition must be introduced was overruled, held that the error, if any, was not ground of reversal, as it appeared that the other portions of the depositions were wholly immaterial and inadmissible, and the objecting party had the opportunity of introducing the other portions of the depositions, had he desired to do so. *Alexander v. Grand Lodge A. O. U. W.*, 119-519.

Under this section secondary evidence is not to be deemed objectionable as incompetent. *Matthews v. Luers Drug Co.*, 110-231.

The objection that interrogatories are not proper cross-examination and are incompetent, irrelevant and immaterial, and that the witness had not qualified himself to express the opinions asked for in all the interrogatories, should be overruled when not made before the case is reached for trial. *Cathcart v. Rogers*, 115-30.

The general objection that no foundation has been laid for the introduction of the deposition does not make it necessary to introduce in evidence the certificate under which it was taken. *Krause v. Redman*, 112 N. W. 91.

If depositions are filed in the case during term time, a motion to suppress them is too late if not filed within three days as required by the statute. *Casley v. Mitchell*, 121-96.

Unless exceptions are taken as required by statute the objection to a deposition that the notice was insufficient cannot be considered. *Ostenson v. Severson*, 126-197.

PART FOURTH.

CODE OF CRIMINAL PROCEDURE.

TITLE XXIV.

OF CRIMES AND PUNISHMENTS.

CHAPTER 2.

OF OFFENSES AGAINST THE LIVES AND PERSONS OF INDIVIDUALS.

SECTION 4727. Murder.

Indictment: Under an indictment charging murder by drugs or poison in different counts, held that it was not error to receive evidence as to the administration of a particular poison not specifically described in either of the counts without requiring an election at the time as to which count should be relied upon. *State v. Thomas*, 109 N. W. 900.

An indictment for killing a person named is not insufficient because it appears on the introduction of the evidence that the person named was in fact an unnamed bastard, the name given it by the grand jury being a combination of the names of the parents. *State v. Cunningham*, 111-233.

Intent to kill: The unlawful administering of poison with bad motive or intent constitutes murder if death ensues, but it is immaterial whether or not there is a specific intent to kill, and an indictment charging death caused in such manner is not defective for failure to allege such specific intent to kill. *State v. Van Tassel*, 103-6.

The allegation of a specific intent to kill is unnecessary where the crime is charged to have been committed by the administration of poison. *State v. Robinson*, 126-69; *State v. Thomas*, 109 N. W. 900.

An indictment for murder, charging a wilful, deliberate and premeditated assault

with a loaded revolver, but leaving it to inference whether or not the assault was made with specific intent to kill, or the revolver was loaded and charged with specific intent to kill, is not sufficient. *State v. Linhoff*, 121-632.

Intent to kill another than the victim: Where a shot is fired at one person with such intent and deliberation and premeditation that death of the assailed caused thereby would be murder in the first degree, the unintended killing of another by such shot is murder in the same degree. *State v. Mathews*, 133-398.

In a prosecution for murder in the first degree the criminality of defendant's act in shooting another person than the one intended to be injured may be determined with reference to his conduct toward the person whom he intended to injure. *State v. Williams*, 122-115.

If the purpose of plaintiff is to injure or kill some one, it is immaterial that a mistake was made in the identity of the person actually assaulted. *State v. Dennis*, 119-688.

Intoxication: Evidence as to the intoxication of defendant should be considered as bearing upon the question as to the degree of the offense. *State v. Williams*, 122-115.

Evidence of intoxication is admissible

as bearing on the question of whether defendant was capable of forming an intent to assist another in an assault resulting in homicide. *State v. Dorland*, 103-168.

Intoxication may be shown to negative felonious intent, or for the purpose of reducing the degree of homicide, but it is not generally an excuse for an overt act. *State v. Roan*, 122-136.

Malice inferred: From the mere fact of killing, the inference of malice arises, the burden being on the prosecution to raise it to murder in the first degree, and on the defense to reduce it to manslaughter, by evidence tending to show legal excuse, justification or extenuation. *State v. Hayden*, 131-1.

Cause of death: If the injuries inflicted by the defendant contributed to produce a diseased condition, from which death resulted, the defendant is criminally responsible for the resulting death, if the acts were criminal. *State v. Wood*, 112-411.

It is not competent in a prosecution for murder to go into the question whether some particular form of surgical operation might have saved the life of deceased for whose death, caused by a wound, defendant is on trial, in the absence of evidence tending to indicate any other cause of death than that of the wound inflicted by the defendant. *State v. Seery*, 129-259.

One who by his criminal conduct aggravates the diseased condition of his victim and causes death sooner than it would otherwise have occurred is responsible for the death thus resulting. *State v. Baldes*, 133-158.

Deadly weapon: The question whether the weapon used in inflicting an injury resulting in death is a deadly weapon depends on the testimony, and is a question for the jury. *State v. Seery*, 129-259.

In the application of the rule as to the presumption arising from the use of a deadly weapon in a deadly manner, an ordinary penknife may be a deadly weapon. *State v. Roan*, 122-136.

Aiding and abetting: One may be convicted of the crime of murder in aiding and abetting the person who makes a felonious assault on another, causing death. *State v. Cobby*, 128-114.

Justification: To constitute justification for the use of force by an officer in affecting an arrest, it is not necessary to show absolute necessity. The law requires no more than that the officer, in what he does, employs no more force in affecting the arrest than to him, acting as an ordinarily prudent person, seems reasonable and apparently necessary. *State v. Phillips*, 119-652.

If the officer, using no more force than appears to him to be reasonably neces-

sary, causes the death of the person arrested, and if the arrest is for a misdemeanor, does not employ a deadly weapon in a deadly manner, but death results without the use of means intended or reasonably calculated to cause death, the death resulting may be excusable as accidental. *Ibid.*

An officer is not justified in killing one who is guilty of a misdemeanor only in order to effectuate his arrest or to prevent his escape after arrest. To this rule there are some exceptions as in case of riot, mob violence, etc. *State v. Smith*, 127-534.

In arresting or resisting the escape of one who has committed a felony the officer may oppose force to force and if there be no other reasonably apparent method for effecting the arrest or preventing the escape of the felon, the officer may, if he has performed his duties in other respects, take the life of the offender or one who is seeking to rescue him. *Ibid.*

Self-defense: Where one unlawfully attacks another, the person attacked has the right to protect himself against such attack, and to save himself from all harm, and is not bound to draw nice calculations from appearances. He may pursue his adversary until he finds himself out of danger. *State v. Linhoff*, 121-632.

An instruction that if the person attacked continued to shoot under the influence of heat of blood and passion caused by the assault he would only be guilty of manslaughter, held erroneous where it did not appear whether the shot which inflicted the fatal wound was fired before the assailant retreated. *Ibid.*

One person may ask another for assistance in ejecting from his house one who is wrongfully there, and the person thus threatened with ejection has not the right to resist proper force applied for that purpose. *State v. Roan*, 122-136.

While a person assaulted may not, under the plea of self-defense, justify the taking of human life, if it reasonably appears that he could have avoided such necessity by retreat, this principle has no application to a case where one is wrongfully assaulted and repels force by the use of like force. The extent to which he may go is to be measured by the character of the assault. *State v. Evenson*, 122-88.

There is no duty to retreat where one is assaulted with a deadly weapon on his own premises; but he may repel the attack as appears to him reasonably necessary under the circumstances. *State v. Bennett*, 128-713.

Where parties engage in mutual combat and one of them, without withdrawing, makes use of a deadly weapon in killing the other, the claim that he acted in self-

defense in so doing is not available to him. *State v. Whitnah*, 129-211.

Threats by a third person in the absence of proof of conspiracy between such person and the deceased are not admissible as tending to support the claim of self-defense. *State v. Mitchell*, 130-697.

Evidence tending to show reasonable apprehension of danger on the part of defendant relying upon self-defense, should be received. *State v. Evans*, 122-174.

In determining the reasonableness of the act of defendant in killing another in assumed self-defense, the fact that he is naturally a nervous and timid man cannot be taken into consideration. *State v. Usher*, 111 N. W. 811.

Intoxication cannot be taken into account in determining whether a person in that condition is likely to believe himself to be in danger, for reasons that might not be considered sufficient to create a reasonable apprehension of danger in the mind of a sober man. *State v. Roan*, 122-136.

Where there is evidence such as to raise a question of self-defense, the defendant is entitled to show the character of the deceased as to quarrelsomeness or violence under exceptional circumstances, similar to those existing at the time of the encounter. *State v. Hunter*, 118-680.

Where in a prosecution for murder there is evidence raising the question whether defendant acted in self-defense, and it is therefore important to determine which party made the first assault upon the other, the defendant may show not only the reputation for quarrelsomeness of the deceased, although not known to him at the time, but also specific acts of deceased showing his violent, reckless or quarrelsome disposition, immediately preceding the encounter, although such acts were not known to defendant at the time of the encounter. *State v. Beird*, 118-474.

Although in a prosecution for murder committed during an encounter, in which the defendant claims that he was acting in self-defense, the general reputation of deceased for quarrelsomeness may be shown, it is not competent to show particular conduct of deceased with reference to transactions at a remote time and at a different place. *State v. Sale*, 119-1.

Where the killing is admitted, but self-defense is relied on in justification, the previous relations of the parties may be enquired into as bearing upon the question as to who was the aggressor in the affray, and the mental attitude of the defendant when he committed the act. But this rule does not permit an inquiry into the specific details of a previous affray. *State v. Blee*, 133-725.

Where it is not claimed that the defend-

ant was acting in defense of his possession it is immaterial whether the person killed was a trespasser. *Ibid.*

It is not error to fail to instruct with regard to self-defense, where there is no evidence on which the jury can find that the defendant acted in self-defense. *State v. Seery*, 129-259.

Under the facts of a particular case, held, that defendant had not been so pressed by his assailant as to be justified in using a pocket-knife in such a way as to be likely to cause death. *State v. Copeland*, 106-102.

Burden of proving: Self-defense is not an affirmative matter to be established by defendant, but if there is any evidence tending to show the defendant to have acted in self-defense such evidence relates to the question of whether there was any crime committed, and the burden of proof is therefore upon the prosecution to make out the commission of the crime beyond a reasonable doubt, the evidence tending to show self-defense being taken into consideration. *State v. Sharp*, 127-526.

An instruction asked on behalf of the defendant to the effect that the burden is on the state to show that the defendant was not acting in self-defense should be given if not covered by the instructions given by the court, provided there is any evidence tending to show self-defense. *State v. Usher*, 126-287.

The burden is upon the state to show beyond a reasonable doubt that defendant was not acting in self-defense where evidence tending to show self-defense has been introduced. *State v. Williams*, 122-115.

Evidence: Where it appeared that the homicide had been committed by means of a blow with a singletree taken from a wagon, held that it was not improper to show the ownership of the wagon from which the singletree had been taken. *State v. Walker*, 133-489.

Where the question was as to whether the bullet causing death was fired by defendant or by the deceased with suicidal intent, held that evidence of experiments with regard to powder marks left by the firing of similar weapons at close range was admissible. *State v. Nowells*, 109 N. W. 1016.

In a prosecution for murder by poison, held that evidence of the purchase of "Rough on Rats" by defendant was not admissible, in the absence of a showing by analysis or other satisfactory proof that it was a poison. *State v. Blydenburg*, 112 N. W. 634.

In a prosecution of a husband for the murder of his wife, evidence of belief on his part that policies of insurance on the life of his wife in his favor were in force

was held to be competent as tending to show a motive. *State v. Woodard*, 132-675.

Testimony as to prior difficulties between the accused and the deceased is admissible to show their relations. *State v. Fielding*, 112 N. W. 539.

Evidence and instructions in a particular case considered. *State v. Wright*, 112-436. Corpus delicti: Evidence in a particular

case held sufficient to establish *corpus delicti* in a prosecution for murder. *State v. Novak*, 109-717.

As to whether in a particular case the court instructed the jury as to the effect of the exculpatory matter included in a confession of the defendant and tending to show that the offense was manslaughter rather than murder, the judges were divided. *State v. Busse*, 127-318.

SEC. 4728. First degree.

Indictment: Where the killing is charged to have been wilful, deliberate and premeditated, it is not essential that the indictment charge the assault to have been wilful. *State v. Dunn*, 116-219; *State v. Gray*, 116-231.

There is but one crime designated by the statute as murder. The so-called degrees do not constitute distinct crimes, but gradations of the same crime. When therefore the indictment formally charges the defendant with the crime of murder generally, the requirements of the statute in this respect are met, and the court will look to the facts set forth in the body of the indictment to ascertain the degree of the crime for which the accused may be placed on trial. *State v. Phillips*, 118-660.

An indictment which charges the inflicting of wounds by defendant upon deceased, with the specific intent to kill, and also death resulting from such wounds, and further charges that the wounds were inflicted deliberately, premeditatedly, with such intent and with malice, sufficiently charges the first degree of the offense. *Ibid.*

It is not improper to charge the assault as having been made with a deadly weapon, the particular description of which is to the grand jury unknown, although the weapon with which it is claimed the crime was committed was before the grand jury and also introduced in evidence on the trial. *State v. Sigler*, 114-408.

Where defendant is convicted of murder in the second degree, error in the instructions as to the first degree of the crime with which he was charged are immaterial. *State v. Rogers*, 129-229.

Indictment for murder in the first degree held sufficient. *State v. Wood*, 112-411.

An indictment charging that defendant committed an assault with a deadly weapon upon the deceased, and with specific intent to kill and murder the deceased, wilfully, feloniously, deliberately, premeditatedly and with malice aforethought did shoot off and discharge, etc., thereby wilfully, etc., inflicting upon the body of the

deceased a mortal wound, etc., is sufficient. *State v. McPherson*, 114-492.

Premeditation: No particular length of time of premeditation or deliberation is required, and an instruction that if "either at some time before or in the moment or instant of time immediately before" the fatal shot was fired the defendant had formed in his mind a wilful, deliberate and premeditated design or purpose of his malice aforethought to take the life of the deceased, held not to be erroneous. *Ibid.*

Premeditation and deliberation need not exist for any particular length of time before the killing. It is sufficient if there is such deliberation and premeditation immediately before the fatal injury is inflicted, though it may have existed but for an instant of time. *State v. Fuller*, 125-212.

Death resulting from an assault made with a premeditated purpose and with deadly weapons, may constitute murder in the first degree. *State v. Dennis*, 119-688.

Murder may be of the first degree, although the homicide is committed in a sudden encounter, if it appears that the defendant wilfully, deliberately and premeditatedly took advantage of the quarrel for the purpose of killing or inflicting great bodily injury on the deceased, not in self-defense or heat of blood, but with malice aforethought. *State v. Sale*, 119-1.

Proof of intentional homicide, without circumstances of mitigation or excuse, affords a presumption of malice, and therefore of murder, but such presumption is of murder in the second degree, and to sustain a conviction in the first degree there should be evidence of wilfulness, deliberation and premeditation, or some other fact such as to constitute murder in the first degree. *State v. Phillips*, 118-660.

Poison: A homicide committed by the administration of poison cannot be murder in the second degree or manslaughter, and therefore specific intent to kill is not an essential allegation in the indictment. *State v. Robinson*, 126-69.

An indictment for murder by means of felonious administration of poison need not specifically allege malice aforethought or

intent to kill. *State v. Thomas*, 109 N. W. 900.

All murder perpetrated by means of poison is in the first degree without regard to any specific intent to kill. Therefore, in such a case there is no necessity of an instruction with reference to manslaughter as an included crime. *State v. Burns*, 124-207.

There can be no state of evidence that will warrant conviction for murder in the second degree where the defendant has committed the crime by means of poison. *State v. Bertoch*, 112-195.

Evidence in particular case, held sufficient to support a conviction for murder in the first degree by the administration of poison. *State v. Robinson*, 126-69.

Lying in wait: Lying in wait means hiding in ambush or concealment. *State v. Tyler*, 122-125.

It is not error in a prosecution for murder committed by lying in wait or other wilful, deliberate, or premeditated killing, to charge as to included crimes although the evidence shows that the defendant if guilty of any crime is guilty of the crime charged. *State v. Shepherd*, 129-705.

On plea of guilty: A large discretion is vested in the trial court in fixing the punishment on a plea of guilty of murder in the first degree and the sentence imposed under such circumstances will not be interfered with in the absence of a showing of abuse of discretion. *State v. Smith*, 127-528.

While it is not provided how the determination by the court as to the punishment for murder in the first degree under a plea

of guilty is to be made, it is proper in such cases for the court to take the evidence of witnesses who have knowledge of the occurrence, and until judgment is pronounced the plea of guilty may be withdrawn and a plea of not guilty interposed. *State v. Hartman*, 122-104.

Question for jury: Every one is presumed to have intended the natural consequences flowing from his own acts, and the guilt of defendant of any particular degree of murder or of manslaughter is to be determined by the jury, and not by the court, unless some of the essential elements of the act constituting the crime of a particular degree are not proven. *State v. Wood*, 112-411.

Evidence: The charge of murder in the first degree involves the condition of the defendant's mind at the time of killing, and evidence of intoxication should be considered in determining such condition, but the mere fact that the offender drank liquor shortly before committing the crime will not constitute such evidence of intoxication as to require the question of its effect upon the mental condition to be submitted to the jury. *State v. Busse*, 127-318.

Evidence that defendant went into an affray by previous agreement with another for the purpose of rendering assistance and stood by while the fatal blow was inflicted, held, to tend to show deliberation, premeditation and malice. *State v. Jackson*, 103-702.

The evidence in a particular case held sufficient to sustain a verdict of murder in the first degree. *State v. Lucas*, 122-141.

SEC. 4729. Second degree.

To constitute murder in the second degree, no premeditation or deliberation is essential, and if, as the result of hatred and ill will, engendered by language of the deceased and his manifestation of hostility, and not as the result of heat of blood, the defendant formed even for a moment before the striking of the fatal blow an intention to kill or inflict great bodily injury, then the offense may constitute that degree of the crime. *State v. Sale*, 119-1.

One who is charged with a crime is nevertheless entitled to the protection of the law, and if, as a reasonable man, in view of the display of force against him, which he has reason to believe is made use of with the intention of inflicting personal violence rather than making an arrest, he resists such force and causes death he is not guilty of murder in the first degree. The crime will be murder in the second degree or manslaughter, according as malice may or may not be found to

characterize this act. Even a legal arrest, attempted in such a violent and menacing whether with or without warrant, may be manner that, if death result to the officer in the heat of the struggle thus incited, the killing will not be murder in the first degree. *State v. Phillips*, 118-660.

Intent to kill is not essential to constitute murder in the second degree. *State v. Seery*, 129-259.

Specific intent to kill is not essential at common law to constitute murder, nor is it essential under the statute to constitute murder in the second degree. An unlawful killing, with malice, express or implied, is murder in the second degree, even though unaccompanied by a specific intent to kill. *State v. Baldes*, 133-158.

An indictment for murder, in which it is alleged that defendant with a deadly weapon wilfully, deliberately and feloniously and of his malice aforethought, inflicted upon the deceased a mortal wound

of which he then and there died, states all the elements necessary to constitute murder in the second degree. *State v. Whitnah*, 129-211.

Where, in a prosecution for murder, it clearly appears that death was due to an

attempt to procure an abortion, evidence of an unsuccessful attempt on the part of the female to get drugs for the same purpose, is not admissible. *State v. Gunn*, 106-120.

SEC. 4746. Proceedings on affirmance.

When a sentence of death imposed in the trial court in a criminal case is affirmed by the supreme court, by an announcement in proper form of an equal

division under Code § 195, the governor is authorized to issue a warrant of execution if the time fixed by the trial court has expired. *Busse v. Barr*, 132-463.

SEC. 4750-a. Advise, counsel, encourage, advocate or incite murder—penalty. Whoever shall within this state advise, counsel, encourage, advocate or incite the unlawful killing within or without the state of any human being where no such killing takes place shall be punished by imprisonment in the state penitentiary for not more than twenty years. [29 G. A., ch. 143, § 1.]

SEC. 4750-b. Kidnapping for ransom—penalty. That whoever kidnaps, takes or carries away any person, or decoys or entices such person away from any place in this state for the purpose of or with the intention of receiving or securing from any one any money, property or thing of value as a ransom, reward or price for the return of the person so kidnapped, taken, carried, decoyed or enticed away, as aforesaid, or whoever shall imprison, detain or hold any person at any place in this state for the purpose or with the intent of receiving or securing from any one money, property or thing of value as a ransom, reward or price for the return, liberation or surrender of the person so imprisoned, detained or held, shall be deemed to be guilty of the crime of kidnapping for the purpose of ransom, and upon conviction thereof shall be imprisoned in the penitentiary during life, or for any fixed term of years not less than ten years. [29 G. A., ch. 142, § 1.]

One who detains another in order to extort money from him or from another person as the price of liberation, is guilty of the offense of kidnapping, and the sub-

sequent release without the payment of money is immaterial. *State v. Leuth*, 128-189.

SEC. 4750-c. Other statutes not affected. This act shall not be held or deemed to repeal or affect in any manner sections four thousand seven hundred and sixty (4760), four thousand seven hundred and sixty-one (4761) and four thousand seven hundred and sixty-five (4765) of the code. [29 G. A., ch. 142, § 2.]

SEC. 4751. Manslaughter.

Manslaughter is the killing of another without malice either express or implied, either unlawfully upon a sudden quarrel or unintentionally while the slayer is in the unlawful commission of some act not amounting to a felony. *State v. Walker*, 133-489.

Neither motive or intent is necessarily an element of the crime of manslaughter, and where it appeared that defendant had gone into an affray for the purpose of assisting another, held, sufficient to show defendant's guilt. *State v. Jackson*, 103-702.

Homicide includes manslaughter: It means a killing of one man by another,

whether lawful or unlawful. *Tomlinson v. Monroe County*, 112 N. W. 100.

The mere presence of passion or heat of blood will not in itself reduce a homicide to manslaughter, unless such passion or heat of blood is upon reasonable provocation. *State v. Hunter*, 118-686.

There may be a conviction for manslaughter in causing the death of another through gross negligence and recklessness under an indictment for murder which does not contain any specific allegations with reference to negligence or recklessness. *State v. Moore*, 129-514.

Express intent is not a necessary element in the crime of manslaughter. Negligence and reckless indifference to the lives and safety of others will supply the intent. Every sane person is presumed to intend the natural and necessary consequences of his voluntary act. *Ibid.*

Under evidence in a prosecution for murder, tending to show that defendant negligently and recklessly rode down the deceased in the street, an ordinance of the city limiting the speed at which persons might ride or drive upon the streets of the city was held properly admissible in

SEC. 4753. Robbery.

Robbery is larceny committed by violence from the person of one put in fear and the ownership of the property taken must be alleged and proven as in larceny. *State v. Wasson*, 126-320.

To warrant a conviction for robbery it should appear that an assault was committed, and that such assault was made with the intent to violently and feloniously and by putting in fear steal from the person of the prosecuting witness. It is not necessary to specifically define what is intended by the word assault. *State v. Atkins*, 122-161.

SEC. 4754. With aggravation.

The circumstances of aggravation which by statute warrant the imposition of more

SEC. 4756. Rape.

What constitutes: Under a charge of rape in the usual form, evidence is admissible to show that the prosecutrix was feeble-minded. Such evidence bears upon the question of consent and it is not necessary that the indictment be framed under the special provisions of Code § 4758 with reference to the crime as committed against a person of feeble mind. *State v. McDonough*, 104-6.

If there is no evidence of penetration the issue as to whether defendant is guilty of rape ought not to be submitted to the jury, but evidence that in case of a girl of tender years the defendant did his utmost to accomplish his purpose, together with evidence concerning injury to the victim, may be sufficient to warrant a submission of the issue to the jury. *State v. Carnagy*, 106-483.

The statute has eliminated the necessity of proving emission in prosecutions for rape, and it is accordingly held that proof of emission is not essential in a prosecution for sodomy or for incest. *State v. Judd*, 132-296.

The crime of forcible defilement differs from the crime of rape in that in the

evidence as a fact or circumstances to be considered in determining whether the defendant acted negligently. *Ibid.*

The fact that the defendant was a nervous, timid man, does not tend to show that he was not guilty of manslaughter in taking the life of the person killed without reason to believe that there was a necessity for self-defense. *State v. Usher*, 111 N. W. 811.

One may be guilty as accessory before the fact of the crime of manslaughter. *State v. Gray*, 116-231.

An instruction defining this offense as "larceny of property from the person of the owner, accompanied by violence or putting in fear," is not erroneous. *State v. Osborne*, 116-479.

Where there is evidence tending to show an assault with intent to rob, the jury should be instructed in relation to such included crime. *State v. Duffy*, 124-705.

A sentence of seventeen years in the penitentiary held not excessive in view of proof of the crime under aggravating circumstances. *State v. Brafford*, 121-115.

severe punishment need not be stated in the indictment. *State v. Poe*, 123-118.

former any defilement of the person is sufficient. *State v. Hromadko*, 123-665.

Age of consent: Proof of consent is immaterial where the unlawful connection is had with a female under the age of consent. *State v. Buller*, 104-1.

Inasmuch as connection with a female child under the age of consent is here made to constitute the crime of rape, regardless of any consent on the part of the child, the attempt to have such connection will constitute an assault with intent to commit rape, even though there was no resistance whatever and the defendant expected to accomplish his purpose without opposition. *State v. Carnagy*, 106-483.

A female under the age of consent as fixed by statute cannot consent to sexual intercourse nor can she assent to an assault for that purpose. *State v. Sherman*, 106-684.

Carnal knowledge of a female child under the age of fifteen years constitutes rape. *State v. Trusty*, 122-82.

The indictment may charge in one count carnal knowledge of a female child under the age of consent, and in another count carnal knowledge of the same female as

an idiot or imbecile within the provision of Code § 4758, without being open to the objection of duplicity, and as the two counts relate to the same transaction the state cannot be required at the beginning of the trial to elect upon which count it will proceed. *State v. Trusty*, 122-82.

In a prosecution for rape committed by having intercourse with a female under the age of consent, it is not necessary to instruct the jury that defendant cannot be convicted unless the jury is satisfied beyond a reasonable doubt that he intended to have intercourse with the prosecutrix notwithstanding any and all the resistance she might make. *State v. Johnson*, 133-38.

In a prosecution for rape, committed by having connection with a female under the age of consent, there being no evidence that the act was without the consent of the female, it is not necessary to instruct as to another included crime than that of assault with intent to commit rape. *State v. King*, 117-484.

In such a prosecution, evidence as to the condition of the hymen of the female six weeks after the alleged offense is not inadmissible, remoteness of time being for the consideration of the jury in determining the value of the testimony. *Ibid.*

In such a prosecution proof of other similar acts committed between the parties is admissible. But the prosecution should be required to elect for which act conviction is sought. *Ibid.*

Under an indictment charging rape on a female under the age of consent "by force and against her will" there can not be a conviction for assault and battery. *State v. Sheets*, 127-73.

Nor under such an indictment could there be a conviction for an assault with intent to inflict great bodily injury where there is no evidence of any intent to commit other injury than that involved in rape. *Ibid.*

If the absence of evidence of force in the perpetration of the crime of rape on a female under the age of consent, save as incident to the act charged, it is not error to fail to state as to assault and battery. *State v. Stevens*, 133-684.

In an indictment for rape committed by having carnal knowledge of a female under the age of consent allegations of force are mere matters of aggravation and are to be treated as surplusage. *State v. Scroggs*, 123-649.

Although the indictment charges the act to have been committed with force and arms the defendant may be convicted of the crime of having connection with a female under the age of consent without resistance. *State v. Anderson*, 125-501.

Under an indictment charging assault "by force and against her will" on a fe-

male child under the age of consent there may be conviction without proof that the act was against the consent of the prosecutrix. *State v. Sheets*, 127-73.

Where the charge of carnally knowing a female under the age of consent, evidence tending to show want of resistance or previous intercourse with others is wholly immaterial. *State v. Bricker*, 112 N. W. 645.

In a prosecution for rape in having carnal connection with a female under age of consent, the prosecutrix is a competent witness as to her own age. *State v. Scrogg*, 123-649.

Election: Where the relations of the parties are so intimate and continuous that the crime cannot be fixed upon as happening at any one time, rather than at another, during such relationship, the state cannot be required to elect further than is necessary to identify the transaction as distinct from others. But where there are separate and distinct periods during any one of which the crime might have been committed, an election should be required. Each act of connection constitutes an independent and distinct offense. *State v. Norris*, 122-154.

Included crime: One who is guilty of the crime of rape may be convicted under an indictment for incest if the relationship of the parties brings the case within the statutory provision as to the latter crime. *State v. Rennick*, 127-294.

Where there is evidence tending to show want of consent on the part of the female, the court should instruct with reference to assault with intent to commit rape, assault and battery and simple assault, these offenses being necessarily included within the charge of rape. *State v. Trusty*, 118-498.

Under an indictment charging an assault with force and violence upon a female with intent to ravish and carnally know her by force and against her will, it is not proper to instruct with reference to assault and battery as an included crime. *State v. Miller*, 124-429.

But where the defendant is convicted of assault with intent to commit rape an erroneous instruction as to assault and battery as an included crime will not be considered prejudicial. *Ibid.*

Where the indictment charges the act to have been committed with force and violence such as to constitute a battery, the jury should be instructed as to assault and battery as an included crime. *State v. Egbert*, 125-443.

In a prosecution for rape under an indictment charging acts which would constitute an assault and battery, it is error to fail to charge with reference to such an included offense, although the jury has been instructed with reference to an assault. *State v. Barkley*, 129-484.

It is not error to fail to instruct as to assault and battery as an included crime in that of rape, where the indictment does not allege more than a mere assault with intent, and the completion of the criminal act. *State v. Johnson*, 133-38.

Previous jeopardy: An acquittal under an indictment charging rape is a bar to a subsequent proceeding under an indictment charging incest with the same female in a transaction which might have been proven under the prosecution for rape although the state seeks to prove in the second prosecution a different transaction from that on which it relied in the first prosecution. *State v. Price*, 127-301.

Condonation: The crime of rape committed on a female child is condoned by a subsequent marriage between the parties, and after such marriage the wife is incompetent under the provisions of Code § 4606 to testify with reference thereto in the criminal prosecution of her husband. *State v. McKay*, 122-658.

Continuance: Pregnancy of the prosecuting witness is no ground for a continuance. *State v. Carpenter*, 124-5; 98 N. W. 775.

Instructions: It is not necessarily reversible error to refuse an instruction embodying the general statement that an accusation of the crime is easily made, hard to prove, and harder to be defended against by the party accused though ever so innocent. *State v. Trusty*, 122-82.

Evidence: Proof of guilt in a prosecution for rape necessarily includes guilt of the offense of assault with intent to commit rape, and a conviction for the latter will not be reversed on the ground that the evidence showed that if defendant was guilty of any offense he was guilty of the offense charged. Where the conviction depends principally upon the testimony of prosecutrix, the jury may be warranted in discrediting so much thereof as showed the complete commission of the offense, and yet in believing such portion as tended to show the commission of an assault. *State v. Barkley*, 129-484.

Where it appears by competent evidence that defendant, at the time of the alleged commission of the offense, was afflicted with a venereal disease, and that the prosecutrix was soon after afflicted with the same disease, it is proper to show, in behalf of defendant, that the prosecutrix had, before the time of the commission of the alleged crime, had sexual intercourse with others than the defendant, by whom the disease with which she was found to be afflicted might have been communicated to her. *State v. Height*, 117-650.

While a charge of rape is easily made by a designing person, and difficult to refute, and such a charge should be scanned with great care where the direct evidence of the alleged assault comes from the lips of the prosecutrix alone, yet, on the other

hand, where the evidence corroborating that of the prosecutrix, the verdict of the jury will be sustained. *State v. Snider*, 119-15.

When the issue is as to criminal intimacy between persons of opposite sex, evidence of prior acts of indecent familiarity is competent as showing an antecedent probability. *State v. Trusty*, 122-82.

Admission of evidence of the relations existing between defendant and prosecutrix extending over several years is not error. *State v. Norris*, 127-683.

The prosecuting witness may testify as to other and prior assaults upon her by the defendant. *State v. Carpenter*, 124-5.

Previous conduct of defendant tending to show a lascivious disposition on his part toward the prosecutrix is admissible. *State v. Crouch*, 130-478.

Proof of other similar acts of defendant with reference to the complainant as tending to show the disposition and intent of the accused in the particular act with which he is charged, is admissible. *State v. Johnson*, 133-38.

The pregnancy of the prosecutrix being apparent at the time of the trial, defendant should be allowed to show that this condition was the result of intercourse with other men than the defendant, for the purpose of counteracting any sympathy with the prosecutrix which might otherwise be aroused for reason of her condition. *State v. Bebb*, 125-494.

Evidence in a particular case in a prosecution for rape held sufficient to show penetration. *State v. Andrews*, 130-609.

The evidence in a particular case held sufficient to sustain a conviction. *State v. Carpenter*, 124-5.

Evidence in a particular case held sufficient to sustain a conviction of rape in having connection with a child eight years of age. *State v. Steffens*, 116-227.

Testimony for the defendant that by reason of a physical injury he was unable to have sexual intercourse, held not conclusive as to the commission of the offense charged. *Carvik v. Burlington, C. R. & N. R. Co.*, 131-415.

The probability of conception following the ravishment is a question for the jury and cannot be conclusively determined by the testimony of experts. *State v. Carpenter*, 124-5.

The rejection of expert evidence as to the possibility of having carnal connection under certain circumstances, held, to be error without prejudice where the conviction was only for assault with intent to commit rape. *State v. Taylor*, 103-22.

It is not competent for medical experts to testify that the crime of rape cannot be committed upon an ordinary mature female. Such evidence is in usurpation of the functions of the jury, and the matter inquired about is not the subject of expert evidence. *State v. Peterson*, 110-647.

It is for the jury to determine whether in view of the age and mental condition of the prosecutrix she offered that resistance to the assault which precluded the idea of consent. *Ibid.*

Where the prosecuting witness is reluctant to give testimony questions leading in character may properly be admitted. *State v. Waters*, 132-481.

Complaint: Complaints made at the time by the prosecutrix relating to her condition and not to the details of the assault may be shown. *State v. Baker*, 106-99.

The complaint of the injured female is not admissible solely because a part of the *res gestae* as a fact tending to corroborate the evidence of the witness. Lapse of time is not, therefore, the sole test in determining the admissibility of proof of such complaint, but the inference arising against the truth of the charge from silence is a matter for the consideration of the jury in determining the weight to be attached to it. *State v. Peterson*, 110-647.

It is permissible for the state to give in evidence complaints made by the prosecutrix to the effect that defendant assaulted or ravished her, and such testimony is not objectionable as constituting a narrative of facts. The exact particulars stated by her cannot be narrated, but the fact regarding which complaint is made may be stated. *Ibid.*

The education and mental ability of the prosecutrix, whose complaints are proven, may be shown, and she may be allowed to testify as to exhibiting the clothing she had on at the time of the ravishment, such clothing being produced at the trial and introduced in evidence. *Ibid.*

The jurors' attention may be directed to the fact that a failure of prosecutrix to make complaint is a circumstance tending to discredit her story. *State v. Wolf*, 112-458.

Complaint by the prosecutrix may be so long delayed as to rob it of credibility to such an extent that the court will be warranted in disregarding it, but as a rule the inference arising against the truth of a charge of this character from mere silence on the part of the female is not presumption of law, but a matter of fact for the consideration of the jury. *State v. Snider*, 119-15.

Failure to make complaint does not render the testimony of prosecutrix inadmissible, but is a circumstance for the jury to consider as affecting the credit to be given to it. *State v. Wolf*, 118-564.

If the injured female does not testify, by reason of death, imbecility, or some other cause, the fact of complaint or want of complaint cannot be shown. Such fact does not constitute a defense to the prosecution, nor tend to rebut the hypothesis of guilt. *Ibid.*

While fear of threatened violence, and want of suitable opportunity, may be shown

as excuses to the prosecutrix for failing to make complaint as to the outrage, and should go to the jury as affecting the credibility of the testimony of prosecutrix, yet the courts have uniformly recognized delay without a reasonable excuse as a circumstance to which the jury should give great weight and serious consideration. *Ibid.*

Absence of complaint on the part of the female is not conclusive as against her evidence of the commission of the injury. But the jury may consider that fact with the other facts and circumstances surrounding and connected with the transaction, including the age and general experience of the female complainant. *Garvik v. Burlington, C. R. & N. R. Co.*, 131-415.

Failure of the prosecutrix to make complaint affects only the credibility of her testimony and circumstances of excuse may be shown to the jury as negating any inference to be drawn from want of complaint. *State v. Icenbice*, 126-16.

While a detailing of the occurrence by the prosecutrix is not admissible, her statement as to the fact of intercourse may be shown. *State v. Barkley*, 129-484.

The fact of complaint may be shown and the prosecutrix may testify as to recognition of the defendant as the person committing the crime, but the unsworn statement of the prosecutrix is not competent evidence. *State v. Hoover*, 111 N. W. 323.

It is not proper to show all the details of the complaint of prosecutrix unless constituting a part of the *res gestae*; but it is proper to show that she named the party and enough of her complaint may be detailed to show of what act she complained. Where the prosecutrix is a very young child, the rule excluding details of the evidence is not applied with the same strictness as where she is an adult, or has reached such an age as to have an understanding of the nature of the act. *State v. Andrews*, 130-609.

The rule admitting complaints of prosecutrix in a prosecution for rape has no application in a bastardy proceeding. *State v. Lowell*, 123-427.

The declaration of the prosecutrix not made as a part of the *res gestae* with reference to the identity of the defendant when brought before her for identification and not in his presence cannot be shown. The complaints of the prosecutrix may constitute a corroboration of her testimony that the crime has been committed but do not constitute the corroborating evidence required by statute. *State v. Egbert*, 125-443.

Character of prosecutrix: In prosecutions for rape the character of the prosecutrix must be proved by evidence of general reputation; particular acts or spe-

cific facts are not admissible. *State v. McDonough*, 104-6.

Limitation of action: It is necessary that the state show affirmatively that the alleged offense was committed within eighteen months, which is the statutory period for commencing prosecution for this offense. *State v. Kunhi*, 119-461.

And held that evidence showing that at a certain time the defendant and the complaining witness were both suffering from a venereal disease, there being no evidence as to how long such condition may have existed, were not sufficient to show that the crime was committed within the statutory period prior to the finding of the indictment. *Ibid.*

Punishment: In a particular case held

SEC. 4757. Compelling to marry or be defiled.

In forcible defilement there must be the same kind of taking as in abduction and the actual defilement is substituted for the intent to do wrong required in abduction. *State v. Hromadko*, 123-665.

that a sentence of twenty-five years' imprisonment was excessive, and the sentence was reduced to eight years. *State v. Peterson*, 110-647.

The crime of having criminal connection with a girl under the age of consent committed by a man of mature years is one of peculiar depravity, and a severe sentence will not be interfered with on appeal. *State v. Johnson*, 133-38.

In a prosecution for rape, committed on a female under the age of consent, held that in view of the evidence tending to show the actual consent of the prosecutrix, who was of about the same age as the defendant, the sentence to fifteen years imprisonment in the penitentiary was excessive. *State v. Spears*, 130-294.

The indictment must allege the taking of the person of the female to have been unlawful and against her will. *Ibid.*

As to corroboration, see Code § 5488 and notes.

SEC. 4758. Carnal knowledge of imbecile or insensible female.

It is not necessary, where carnal connection with an imbecile or idiot is charged, to allege force and violence, and such an allegation may be treated as surplusage. *State v. Austin*, 109-118.

An allegation in the indictment that the female was of such imbecility of mind as to prevent actual resistance renders the charge of rape one within the provisions of the section relating to carnal knowledge of a female of imbecile mind, and does not constitute a charge of the crime of having carnal knowledge of a female under the age of consent. *State v. Crouch*, 130-478.

It is proper in such an indictment to

allege an assault, and the implied allegation of force will be treated as surplusage. *Ibid.*

Although imbecility of the prosecutrix is thus alleged, she is not thereby disqualified as a witness; but her qualification is to be tested by the court in the usual manner, and the discretion of the court in receiving her testimony is subject to review only in case of gross abuse. *Ibid.*

Having carnal connection with a female who is an idiot or imbecile constitutes rape, although no resistance is shown. *State v. Trusty*, 122-82.

SEC. 4759. Attempt to produce miscarriage.

In a prosecution for murder in causing the death of a female in an attempt to procure an abortion, evidence that the female herself unsuccessfully attempted to procure a drug for that purpose, is not admissible. *State v. Gunn*, 106-120.

It is not necessary in an indictment for administering a drug to a pregnant woman with intent to produce miscarriage to set out the manner of administering the drug, nor the form in which the drug is administered. *State v. Moothart*, 109-130.

One may be guilty of administering a drug where he causes or procures the pregnant woman herself to take the drug with a wrongful intent. *Ibid.*

Letters of the accused to the woman may be competent as tending to show the relation of the parties as bearing upon the intent with which the defendant acted,

and for that purpose letters written after the attempt may be admissible. *Ibid.*

The production of a miscarriage is not essential to the crime, and there may be a conviction on evidence of the administering of the drug with a wrongful intent, although the quantity administered was not such as would produce the intended effect. *Ibid.*

The indictment should negative the statutory exception of cases where a miscarriage is necessary to save the life of the woman. *State v. Aiken*, 109-643.

Accordingly, the burden of proving that the case is not within the exception is upon the state, and there should not be a conviction unless the jury are satisfied beyond a reasonable doubt that the miscarriage produced by defendant was not necessary to save the woman's life. *Ibid.*

The woman upon whom the act of abortion is perpetrated is not guilty of the crime, although it is perpetrated by her consent or procurement. But the victim may be a party to the conspiracy with intent to perpetrate the offense, and as a

conspirator her declarations may be admissible in evidence against one charged with the crime. *State v. Crofford*, 133-478.

Evidence held sufficient to support a conviction under this section. *State v. Lee*, 113-348.

SEC. 4762. Seduction.

What constitutes: Where by reason of former friendship and caresses, flattery and false assurances, the defendant induced the prosecutrix, a girl of seventeen years of age, to submit, held, that there were sufficient seductive arts to sustain a conviction. *State v. Hayes*, 105-82.

To induce intercourse by a promise to marry the prosecutrix if anything goes wrong may constitute seduction. Whether a woman of chaste character would yield her person under such circumstances and whether the act in question was voluntary and to gratify desire rather than because of such conditional promise, may be considered in connection with all the facts and circumstances shown upon the trial, but it cannot be considered as a matter of law that an unsophisticated country girl of seventeen years, when addressed by a young man five or six years her senior, would necessarily be of previous unchastity in yielding on the strength of such a promise or that she submitted as the result of passion rather than the false promise of the accused. *State v. Hughes*, 106-125.

Deception is an essential element of the crime. It consists in inducing, by any kind of deception, an unmarried woman of chaste character to part with her virtue and yield to the embraces of the deceiver. If she submits without being in some way deceived into doing so there is no seduction. Proofs of promise and inducement are competent for the purpose of determining whether there was deception, but if they were not false they could not deceive, and could not constitute seduction. It is therefore error to instruct the jury that if complainant yielded her person by reason of some promise or inducement, held out to her by the defendant, or an account of defendant's visits and attentions, the defendant may be convicted. *State v. Hamann*, 109-646.

In a particular case held that an instruction was erroneous in directing the jurors that the kind and character of the arts, promises and deception were of secondary importance, and that the manner in which the ruin of the prosecutrix was accomplished was of no importance. In such case the vital question of defendant's guilt depends upon the circumstances under which the prosecutrix yielded her person to him,

and it is of equal importance that the promises relied upon be shown to have been false and therefore deceptive. *State v. Coffman*, 112-8.

A false promise of marriage constitutes a seductive artifice. *State v. Stolley*, 121-111.

Promise of marriage constitutes sufficient fraud and artifice to support a conviction for the offense where it appears that the prosecuting witness yielded in reliance thereon. *State v. Mulholland*, 115-170.

The seductive arts may consist of the exercise of hypnotic influence of flattery. *State v. Donovan*, 128-44.

The mere fact that the seducer was known to the prosecutrix at the time of the seduction to be a married man will not necessarily negative the crime. *Ibid.*

Indictment for seducing "one Mary Roll, an unmarried person," etc., held sufficiently charged the seduction of an unmarried woman. *State v. Olson*, 108-667.

In an indictment defining seduction held that the inadvertent use of "artificial" for "artifice" was not such a mistake as to constitute prejudicial error. *State v. Hamann*, 113-367.

Prosecution: It is immaterial whether the prosecution for seduction is instituted by the female or by her father, although she may be past majority; and though the prosecution is by the father, it is not prejudicial error to refer in the instructions to the female herself as the prosecuting witness. *State v. Stolley*, 121-111.

Evidence: It appearing that about the time of the alleged seduction prosecutrix was receiving attention from another man, held, that the court properly limited the evidence of the relations of prosecutrix to such other person to the time preceding and contemporaneous with the alleged seduction and excluded evidence of subsequent relations. *State v. Abeggan*, 103-50.

It is error to permit a witness to state over defendant's objection that the neighbors and others said that they had heard that the prosecutrix was engaged to marry the defendant. *State v. Reilly*, 104-13.

Prosecutrix may properly testify as to giving birth to a child as the result of the intercourse with the defendant. *State v. Nugent*, 111 N. W. 927.

Evidence is admissible of subsequent in-

tercourse between the parties as corroborative of the testimony of the prosecutrix as to the first act. *Ibid.*

As involved in a continuous relationship, there can be but one seduction, no matter how frequently intercourse takes place after the commission of the first act. Therefore, where there is evidence of different acts constituting a continuous relationship, it is not necessary that the state be required to elect on which act it will rely. *Ibid.*

It is not improper to allow the prosecuting witness to testify that at the time of the alleged seduction she entertained an affection for the accused, and was willing to become his wife. *State v. Burns*, 119-663.

Evidence of statements made by the prosecuting witness inconsistent with her testimony as a witness are admissible not merely for impeaching purposes, but as affirmative evidence for the defendant. *State v. Dolan*, 132-196.

Evidence tending to show that defendant led the prosecutrix to believe that he desired and intended to marry her, and by such methods induced her to yield to his desire, is sufficient to show the seductive arts required. *State v. Drake*, 128-539.

Evidence in a particular case, held, not sufficient to sustain a verdict of guilty of the crime of seduction. *State v. Thomas*, 103-748.

Evidence in a particular case held sufficient to sustain a conviction for seduction. *State v. Olson*, 108-667.

Evidence in a particular case held sufficient to show that intercourse was secured by a promise of marriage. *State v. Wycoff*, 113-670.

Character of prosecutrix: If the prosecutrix testifies as a witness, her general moral character at the time of the trial may be shown for the purpose of impeachment, but the proof should not extend to a specific vice. *State v. Haupt*, 126-152.

Previous chastity: Proof of grossly indecent remarks made in the presence of prosecutrix by other men than defendant held competent, coupled with evidence as to whether such remarks caused indignation on her part, or otherwise, as bearing on the question of her previously chaste character. *State v. Bige*, 112-433.

Evidence is admissible tending to prove that the prosecutrix had before her alleged seduction uniformly associated with men of bad character. *Ibid.*

A statement by a witness not an expert, and made by way of conclusions from facts stated by her is not admissible to show that the prosecutrix was already with child

at the time of the alleged seduction. *State v. Reinheimer*, 109-624.

Evidence of the general reputation of the prosecutrix as to chastity is not admissible in behalf of the defendant. *Ibid.*

But after defendant has introduced evidence tending to show the unchastity of prosecutrix, the state may sustain her character by proof of her general reputation in the community in which she lived. *Ibid.*

Intimacy of the prosecuting witness with other men than the defendant prior to and at about the time she claims to have been seduced by the defendant is to be considered not only with reference to the paternity of the child which is claimed to have been the result of the connection with defendant, but also as bearing upon the previous chastity of the prosecutrix. *State v. Dolan*, 132-196.

Unchaste conduct after the time of the alleged seduction cannot be considered. *State v. Wycoff*, 113-670.

The fact that the woman under promise of marriage has submitted to improper liberties on the part of defendant before the accomplishment of her seduction does not show unchastity such as to defeat the prosecution. *State v. Stolley*, 121-111.

A question of chastity is one of fact. The fact that prosecuting witness consented to sexual intercourse with the defendant upon his request does not necessarily show want of chastity if there had previously been between them a prospective arrangement for marriage. *State v. Smith*, 124-334.

The general good reputation of the prosecutrix as being a moral person cannot be shown in rebuttal of evidence tending to show specific acts of unchastity. The reputation for morality which may thus be shown is a reputation for morality in the sexual relations. *State v. Hummer*, 128-505.

It is error to instruct that no particular amount or degree of lascivious and indecent conduct or conversation can be considered as conclusively showing unchastity. Lascivious conduct is not, like indecency of behavior, a matter of education and refinement. Unchaste character may exist without actual unchastity. It consists of impurity of mind with reference to the sexual relations. *Ibid.*

It is for the jury to pass upon the credibility of witnesses who testify that they had connection with the defendant before the alleged seduction, where they are contradicted by the prosecutrix. *State v. Drake*, 128-539.

It is within the discretion of the court to determine how far the prosecution may go in asking leading questions of the prosecuting witness. *State v. Drake*, 128-539.

Evidence in a particular case held sufficient to support a conviction for seduction, such evidence relating to the previ-

ous chastity of the prosecutrix. *State v. Maxwell*, 117-482.

SEC. 4764. Desertion after seduction and marriage.

This section is not unconstitutional because of want of uniformity in its application. *Morris v. Stout*, 110-659.

In a prosecution of a husband for deserting his wife to whom he has been married for the purpose of escaping a prosecution

for seduction, held that evidence relied upon to show adultery of the wife was not sufficient to require the reversal of a conviction for such desertion. *State v. Wagner*, 123-271.

SEC. 4766. Exposing child.

One to whom the custody of a child is entrusted by the parent for the purpose of having it abandoned, is guilty of the crime of abandonment, although the act

was under the direction and with the cooperation of the parent. *State v. Sparegrove*, 112 N. W. 83.

SEC. 4767. Malicious threats to extort.

This section is not limited to a case where the person accused is innocent of the crime with which he is threatened to be accused. It is the malicious threat to accuse with intent to extort money, etc., which is made criminal and the guilt or innocence of the crime specified in the threat is wholly immaterial. *State v. Debolt*, 104-105.

Proof of a specific intent in such case is necessary and such intent cannot be presumed from maliciously and feloniously threatening to accuse without just cause or excuse. *Ibid.*

An indictment for malicious threats with intent to extort by charging another with the commission of a crime is sufficient without alleging that the person so threat-

ened was not guilty of the crime threatened to be charged. *Kennedy v. Roberts*, 105-521.

It is not necessary that the act which defendant sought to compel the prosecuting witness to commit by means of threats be an act which, if consummated, would be a crime. *State v. Todd*, 110-631.

This section has no application to a United States pension examiner charged with the duty of investigating fraudulent pension claims. *In re Waite*, 81 Fed., 359.

It is not a crime to threaten to accuse one with being a disorderly person for such a threat is not with reference to an accusation of a crime. *State v. Dailey*, 127-652.

SEC. 4768. Assault with intent to murder. If any person assault another with intent to commit murder, he shall be imprisoned in the penitentiary not exceeding thirty years. [C., '73, § 3872; R., § 4214; C., '51, § 2591.] [30 G. A., ch. 129.]

To establish an assault with intent to murder, a specific intent to kill with malice aforethought must be shown. But it is enough to warrant a conviction that the evidence sustains a finding that the act done by the defendant was in contemplation of a result which might reasonably be expected to follow from the act done, involving the probable death of the person whom defendant intended to kill; and held that the sending of an infernal machine, addressed to himself at his wife's place of residence, with other circumstances indicating the expectation of defendant that his wife would open the box, with intent that she should thereby be killed, was sufficient, although, as an abstract proposition, the express company transporting the box would have no right to deliver it to the wife, and the wife would have no right to open it. *State v. Hoot*, 120-238.

The crime of assault with intent to commit murder may be charged in general

terms. Malice aforethought need not be averred. Nor is it necessary to state the instrument or means used to effectuate the purpose. And, held, that an indictment charging the assault as made with a revolver by discharging it was sufficient without alleging that the revolver was loaded. *State v. Shunka*, 116-206.

Previous threat of violence may be shown as bearing on the intent of the defendant in making use of a weapon, but it is not competent to show that the others had advised the prosecutor not to allow the defendant to come to his house for fear of violence. *State v. Thompson*, 127-440.

A specific intent may be proved by circumstantial as well as by direct and positive evidence, and where it is shown that the defendant committed the assault charged which would be unlawful unless justified, a specific intent may be inferred or presumed from the unlawful act. *State v. Bennett*, 128-713.

But it is always competent to prove facts that tend to show lack of such intent, and intoxication may be shown for that purpose. *Ibid.*

A witness may testify as to how far the accused was affected by intoxication as bearing upon the question of his intent. *State v. Cather*, 121-106.

The effect of drunkenness as tending to negative criminal intent should be explained to the jury not only with reference to the intent to murder charged in the indictment, but also as to included offenses involving a specific intent. *Ibid.*

SEC. 4769. With intent to commit rape.

In determining whether an assault was made with intent to commit rape, the controlling question is whether the assailant intended to accomplish carnal intercourse by force notwithstanding any and all resistance the assaulted female might make. *State v. Miller*, 124-429.

Under a prosecution for assault with intent to commit rape it is not error to fail to instruct as to assault and battery as an included crime, where the evidence would not justify a finding that an assault or battery was intended or committed. *State v. Snider*, 119-15.

To make out the offense of assault with intent to commit rape it must appear that defendant intended to use whatever amount of force was necessary to overcome resistance and accomplish the purpose. But the offense may be complete, even though the resistance is not overcome or the purpose accomplished. *Ibid.*

An assault with intent to have connection with a female child under the age of consent will constitute an assault with intent to commit rape, although no resistance whatever was made and defendant expected to accomplish his purpose without opposition. *State v. Carnagy*, 106-483.

A female under the age of consent cannot consent to sexual intercourse; and as actual sexual intercourse with such female child constitutes rape, so the attempt to have such intercourse constitutes assault with intent to commit rape, regardless of the consent of the female. *State v. Sherman*, 106-684.

SEC. 4770. With intent to maim, rob, steal, etc.

In a prosecution for robbery the jury should be instructed as to the included crime of assault with intent to rob if there

intoxication which has not progressed so far as to rob the assailant of his mental faculties and render him incapable of forming an intent is not a defense in a prosecution for assault with intent to kill. *State v. Yates*, 132-475.

The defendant pleading intoxication as a defense in such case has the burden of proof as to the issue. *Ibid.*

Where there is no evidence that the assault was not committed in self-defense, the court is not required to instruct on the subject. *Ibid.*

Where defendant was on trial for an assault with intent to commit rape by having connection with a girl under the age of consent, held that evidence of his conduct in the same transaction towards other girls was admissible against him. *State v. Desmond*, 109-72.

Unless the indictment charges that the assault was accompanied with force, it is not proper to instruct the jury with reference to assault and battery, as an offense included in that of assault with intent to commit rape. *Ibid.*

A written communication by the defendant before the commission of the assault with which he is charged, indicating his intent to have carnal connection with the prosecutrix is admissible as against him as bearing on his intent. *State v. Sheets*, 127-73.

Proof of impotency does not constitute a defense to a charge of assault with intent to commit rape. *State v. Bartlett*, 127-689.

Where the conviction is of assault as an included crime under a charge of assault with intent to commit rape, errors as to the admission of evidence and instructions with regard to the necessary corroboration will be immaterial as no corroboration in regard to the crime of assault is essential. *State v. Hoover*, 111 N. W. 323.

It is sufficient to charge that the defendant made an assault with intent, etc., without specifying the manner of such assault. *State v. Johnson*, 114-430.

is evidence tending to show an assault. *State v. Duffy*, 124-705.

SEC. 4771. With intent to inflict great bodily injury.

It is erroneous to charge that whoever assaults another with intent to inflict upon such person some injury of a more grave and serious character than an ordinary battery is guilty of an assault with intent to inflict a great bodily injury, for such

charge overlooks a material ingredient of the offense, to-wit: the unlawfulness of the assault. *State v. Shea*, 104-724.

A threat accompanied by words declaring an intent to do bodily injury which is not carried out although there is no ob-

stale to the execution of the threat is not conclusive as to the intent, although sufficient to support the finding of such intent. Thus a threat to kill by means of a revolver held in the hand constitutes an assertion that the revolver is loaded sufficient to justify finding to that effect. *Myers v. Clearman*, 125-461.

Under an indictment charging assault with intent to inflict great bodily injury, a verdict finding the defendant guilty of assault with intent to do great bodily injury or with intent to commit great bodily injury is sufficient. *State v. Leuhrman*, 123-476.

An indictment alleging that defendant "did unlawfully, wilfully, maliciously and with specific intent, then and there to in-

flict great bodily injury, make an assault upon one L. C., and did then and there, with specific intent to inflict a great bodily injury, strike, beat, bruise, and otherwise maltreat the said L. C." is sufficient. *State v. Cummings*, 128-522.

Under an indictment charging rape on a female under the age of consent, committed by force and against her will in the absence of evidence any intent to do violence other than to accomplish the rape, the court should not instruct as to assault with intent to do great bodily harm as an included crime. *State v. Sheets*, 127-73.

Evidence in a particular case considered with reference to the charge of this offense. *State v. Bysong*, 112-419.

SEC. 4772. With intent to commit any felony.

The indictment must specify the felony with intent to commit which the assault is made, and the court in its instructions to the jury should require the verdict to specify the specific offense of which the defend-

ant is charged. *State v. Austin*, 109-118.

Evidence in a particular case held sufficient to sustain a conviction of assault with intent to commit manslaughter. *State v. Schwab*, 112-666.

SEC. 4774. Assault and battery.

A mere threat does not constitute an assault, although it is coupled with the means, ability and intent to immediately inflict the threatened violence. *State v. Cummings*, 128-522.

To constitute a criminal assault there must be some evidence of an attempt or endeavor to do violence to the person. *Haupt v. Swenson*, 125-694.

Verbal abuse and insult constitute no defense to a charge of assault, but may properly be shown to the court for its consideration in mitigation of punishment. *State v. Leuhrman*, 123-476.

To render an assault followed by a blow more than assault and battery, the intent

to inflict great bodily injury must be shown. *Myers v. Clearman*, 125-461.

One who is assaulted is not necessarily bound to retreat even though there be time and opportunity to do so. He may in self protection repel force with force. The extent to which he may go is to be measured by the character of the assault. *State v. Evenson*, 122-88.

It is not prejudicial error to submit to the jury assault and battery as an included crime even though there could be no conviction under the indictment for such included crime if the defendant is in fact convicted of the crime charged. *State v. Sheets*, 127-73.

SEC. 4775. Carrying concealed weapons.

A confession before a justice of the peace in a prosecution for carrying concealed weapons that defendant had such weapon, accompanied with matter of explanation which would negative the crime,

does not constitute a judicial confession on which the defendant may be convicted on appeal without corroborating evidence. *State v. Abrams*, 131-479.

SEC. 4775-a. Desertion defined—penalty. Every person who shall, without good cause, wilfully neglect or refuse to maintain or provide for his wife, she being in a destitute condition, or who shall, without good cause, abandon his or her legitimate or legally adopted child or children under the age of sixteen years, leaving such child or children in a destitute condition, or shall, without good cause, wilfully neglect or refuse to provide for such child or children they being in a destitute condition, shall be deemed guilty of desertion and, upon conviction, shall be punished by imprisonment in the penitentiary for not more than one year, or by imprisonment in the county jail for not more than six months. [32 G. A., ch. 170, § 1.]

SEC. 4775-b. Husband or wife may be witness. In all prosecutions under this act, the husband or wife shall be a competent witness for the state and may testify to any relevant acts or communications between them, anything in previous statutes to the contrary notwithstanding, provided however that no husband or wife shall be called or compelled to testify against the other under this act except upon consent of such witness. [32 G. A., ch. 170, § 2.]

SEC. 4775-c. Bond given conditioned on support. If after arrest and before trial, or after conviction and before sentence, the party so arrested or convicted shall appear before the court in which the case is pending or the conviction had, and enter into a bond to the state of Iowa in a sum to be fixed by the court, which in no event shall exceed the sum of one thousand dollars, with or without sureties as may be determined by the court, conditioned that such husband will furnish said wife with a necessary and proper home, food, care and clothing, or that such parent will furnish his or her child or children with a necessary and proper home, food, care and clothing, then said court may release the defendant. Said bond shall remain in force so long as the court deems the same necessary; and whenever it shall appear to said court by affidavit or otherwise that such husband or parent is in good faith furnishing his wife, child or children with the necessary and proper home, food, care and clothing, the court may annul the said bond. [32 G. A., ch. 170, § 3.]

SEC. 4775-d. Failure of undertaking — trial — commitment — release. Upon failure of said husband or parent to comply with his undertaking he or she may be arrested by the sheriff or other officer upon a warrant issued from the court in which the case is pending or the conviction was had and the court may thereupon order a forfeiture of the undertaking and that the defendant to be tried or committed in execution of the sentence, or for good cause shown may release the defendant upon a new undertaking. [32 G. A., ch. 170, § 4.]

SEC 4775-e. Prima facie evidence of wilful desertion or neglect. Proof of the desertion of wife, child or children in destitute or necessitous circumstances or of neglect to furnish such wife, child or children necessary and proper food, clothing or shelter, shall be *prima facie* evidence that such desertion or neglect was wilful. [32 G. A., ch. 170, § 5.]

SEC. 4775-f. Repeal—acts in conflict. All acts or parts of acts in conflict herewith are hereby repealed or amended, as the case may be, so as to make this act effective. [32 G. A., ch. 170, § 6.]

CHAPTER 3.

OF OFFENSES AGAINST PROPERTY.

SECTION 4776. Burning inhabited dwelling in nighttime.

Where the burning of a building was established by direct evidence, held, that circumstantial evidence was sufficient to prove the *corpus delicti*, that is, that the building was feloniously set on fire. *State v. Millmeier*, 102-692.

If there is an actual ignition, and the fiber of the wood, or other destructible material of the house is charred and thus destroyed even in a small part, the crime is complete. *State v. Spiegel*, 111-701.

Malice is an essential element of the crime of arson. *State v. Harvey*, 130-394.

In a prosecution for arson in the burning of a building belonging to the defendant for the purpose of securing insurance thereon, the value of the building as compared with the amount of the insurance may be shown for the purpose of establishing the motive. *Ibid.*

In general a malicious act involves all

that is usually understood by the term willful, and is further marked by either hatred or ill will toward the party injured, or by such other recklessness or disregard of the rights of others as indicates a corrupt

or malevolent disposition. *State v. Wilking*, 129-72.

It is error to omit to charge that the act must have been committed with malice in order to warrant a conviction. *Ibid.*

SEC. 4780. Burning mills, locks, dams, depots, etc.

Indictment in a particular case, held, to show a crime under this section and not un-

der the section following. *State v. Spiegel*, 111-701.

SEC. 4787. Burglary.

What constitutes: The opening of a closed door and entrance therein for the purpose of larceny is burglary. *State v. Brower*, 127-687.

Under an indictment charging the defendant with breaking and entering a building, proof of breaking and entering the cellar of a building is competent. *State v. Brower*, 127-687.

It is error, in defining the crime of breaking and entering in an instruction, to omit reference to the intent to commit a public offense as an essential element of the crime. *State v. Williams*, 120-36.

The statute makes one guilty of breaking and entering as a crime only where the act is done with intent to commit a public offense. *Ibid.*

The crime of larceny is not included in that of burglary, and an instruction submitting to the jury the question whether defendant charged with burglary was guilty of larceny may properly be refused. *State v. Leonard*, 112 N. W. 784.

Presumption: The presumption may be indulged that one who enters a building unbidden during the nighttime does so with the object of stealing, although he escapes without taking anything, and in a particular case held that such presumption was not conclusively rebutted by evidence that while in the building he attempted to take personal liberties with a female sleeping therein. *State v. Worthen*, 111-267.

Indictment: It is sufficient in an indictment for burglary to allege the breaking and entering "with the intent then and there to commit a public offense, to-wit: robbery." It is not necessary to set out in detail the elements of the crime charged to have been intended. *State v. Watson*, 102-651.

Ownership of property: Proof of occupancy is sufficient to establish an allegation of ownership in a prosecution for burglary. *State v. Watson*, 102-651.

It is not essential in an indictment for the offense of breaking and entering that the name of the real owner of the building be stated. It is sufficient to state the name of the person who is in possession. *State v. Williams*, 120-36.

Consent: One who knows that the crime of burglary is contemplated against him may remain silent and permit matters to

go on for the purpose of apprehending the criminal without being held to have assented to the act. The fact that the agent of the owner has permitted a detective to take a cast of the key to the premises, from which the criminal has been able to manufacture key with which he enters will not constitute consent on the part of the owner such as to prevent a conviction of the wrongdoer. *State v. Abley*, 109-61.

Evidence: Under a charge of breaking and entering buildings with intent to commit larceny, evidence tending to show a conspiracy by the defendant and others to break and enter other buildings for that purpose is admissible. *State v. Donovan*, 125-239.

The evidence in a particular case held sufficient to show that persons who were arrested together within half an hour after the commission of the crime, having in their possession the tools with which the crime appeared to have been committed, were properly found to be joint conspirators so that the evidence of guilt on the part of one was competent as against another who was on trial. *State v. Leonard*, 112 N. W. 784.

Evidence to connect the defendant with a burglary as accomplice to the one who in fact was guilty of the breaking and entering, held sufficient in a particular case. *State v. Arthur*, 109 N. W. 1083.

Evidence in particular cases held sufficient to sustain conviction. *State v. Ryan*, 113-536; *State v. Raphael*, 123-452; *State v. McPherson*, 126-77.

Recent possession: Proof of recent possession of goods stolen from a building is not of itself *prima facie* evidence of guilt of breaking and entering the building to commit larceny. Such possession is competent evidence from which, in view of all the circumstances, the jury may find or infer guilt, but it does not in itself make a *prima facie* case for the state. *State v. Brundige*, 118-92.

Where there is evidence tending to show possession by defendant, soon after the commission of burglary, in which goods are stolen from the building, of the goods thus stolen, it is proper to instruct the jury that the fact of such possession, if unexplained, is sufficient to warrant the conclusion that the person having such possession is the person who broke and

entered the building, unless the evidence showing such possession leaves a reasonable doubt whether the defendant may not have come into possession of the goods otherwise than by breaking and entering. *State v. Swift*, 120-8.

Nor is it necessarily erroneous to charge in that connection that such evidence is sufficient to warrant the conclusion that the person having such possession was the person who broke and entered the building, "unless the evidence showing such possession leaves a reasonable doubt whether such person may not have come honestly into such possession." although it would be better not to use the word "honestly" in such connection, as it might in some cases warrant the jury in disregarding the explanation of the recent possession, if it showed that the goods were dishonestly obtained, although otherwise than in connection with the breaking and entering. *Ibid.*

It is only when the breaking and entering, and the larceny alleged to have been committed in connection therewith, are committed at the same time and by the same person, that is, where the goods were stolen by means of the breaking and entering, that any effect is to be given to the recent possession of goods stolen from a building. *State v. Williams*, 120-36.

At most, proof of recent possession of goods stolen in connection with breaking and entering gives rise to a mere presumption of guilt, which, in the absence of explanation, will justify the jury in thinking that the one in possession of the property recently stolen by means of breaking and entering broke and entered the building. It is error to instruct in such way as to make the guilt of the defendant in such case depend on his explanation of such possession, and throw upon him the burden of establishing his innocence. *Ibid.*

Where it is shown that the burglary

and the stealing of goods soon after found in the possession of defendant were a part of the same transaction, the finding of the goods in defendant's possession constitutes presumptive evidence of guilt of the burglary as well as of the larceny. *State v. Brady*, 121-561.

But it is error to charge that such circumstance gives rise to a presumption of guilt which must be overcome by the defendant to entitle him to an acquittal. *Ibid.*

It is error to instruct with reference to such presumptive evidence that defendant must show he obtained the goods "honestly and fairly" before he can be relieved from the inference of guilt attaching to such possession. *Ibid.*

Recent possession of stolen goods shown to have been taken in connection with the commission of burglary will support a conviction of the latter crime. The burden of explaining such possession is upon the defendant who was found in possession of the goods. *State v. Raphael*, 123-452.

Where it appears beyond reasonable doubt that the building in question was broken and entered by some one and that the theft of goods was accomplished at the time by means of breaking and entering, proof of recent possession unexplained is sufficient to warrant a conviction of the defendant of the crime of burglary. *State v. Donovan*, 125-239.

The recent possession of property procured by larceny from a building is competent evidence of guilt of the burglary. *State v. Brower*, 127-687.

The finding of property stolen in the commission of a burglary in a room at a hotel which was at the time exclusively in the possession of defendant constitutes presumptive evidence of the commission of the burglary by such defendant. *State v. Hanley*, 133-474.

SEC. 4790. Possession of burglar's tools. If any person be found having in his possession at any time any burglar's tools or implements, with intent to commit the crime of burglary, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding \$500.00 and imprisoned in the county jail not more than one year. The court before whom such conviction is had shall order the retention by the sheriff of such tools or implements, to be used in evidence in any court in which such person is tried for the offense herein defined, or that of burglary, and the possession of such tools or implements shall be presumptive evidence of his intent to commit burglary. [15 G. A., ch. 13.] [29 G. A., ch. 144, § 1.]

The indictment must specifically describe the tools which the defendant is charged with being in possession of with intent to

commit burglary. *State v. Erdlen*, 127-620.

SEC. 4791. Other breakings and enterings.

Where an indictment charging the breaking and entering a building in the nighttime, alleges the ownership of the building

and the larceny of goods found therein, it is sufficient, without a more particular allegation that the building was one in which

goods, merchandise or other valuable things were kept for use, sale or deposit, as specified by statute. *State v. Burns*, 109-436.

In such case evidence of actual possession, by the owner of the building, of the property stolen is sufficient proof of ownership. *Ibid.*

It is the building itself, and not any particular room thereof set apart to a special purpose the breaking and entering of which constitutes the crime. *Ibid.*

An indictment charging the breaking and entry of "the certain planing mill of"

a person named, situated, etc., is sufficient to charge the breaking and entry of a building. The term "planing mill," without modification or qualification, would properly be understood to include a building and machinery therein used in doing the work of planing mills. The fact that the indictment charges that goods, wares and valuable things were kept in such planing mill, and that defendant did break and enter the mill, would tend to support this meaning of the term. *State v. Haney*, 110-26.

SEC. 4799-a. Burglary with explosives—penalty. If any person shall break and enter any building and commit any public offense therein by the use, or with the aid, of nitroglycerin, dynamite, giant powder, gunpowder, or any other explosive material, he shall be imprisoned in the penitentiary not less than 15 years. [32 G. A., ch. 171.]

CHAPTER 4.

OF MALICIOUS MISCHIEF AND TRESPASS.

SECTION 4807. Repeal—to highways, bridges, railways, telegraph lines, etc. That section four thousand eight hundred and seven (4807) of the code, as the same appears in the code and the supplement to the code, be, and the same is, hereby repealed and re-enacted; and when re-enacted, the same shall read as follows:

"If any person maliciously injure, remove or destroy any electric railway or apparatus thereto belonging, or any bridge, rail or plank road; or place, or cause to be placed, any obstruction on any electric railway, or on any such bridge, rail or plank road; or wilfully obstruct or injure any public road or highway; or maliciously cut, burn, or in any way break down, injure or destroy any post or pole used in connection with any system of electric lighting, electric railway or telephone or telegraph system; or break down and destroy or injure and deface any electric light, telegraph or telephone instrument; or in any way cut, break or injure the wires of any apparatus thereto belonging; or shall wilfully tap, cut, injure, break, disconnect, connect, make any connection with or destroy any of the wires, mains, pipes, conduits, meters or other apparatus belonging to, or attached to, the power plant or distributing system of any electric light plant, electric motor, gas plant or water plant; or shall aid or abet any other person in so doing, he shall be imprisoned in the penitentiary not more than five years, or be fined not exceeding five hundred dollars, or imprisoned in the county jail not more than one year, or by both such fine and imprisonment, at the discretion of the court." [30 G. A., ch. 130.]

One who has made an excavation in the highway is liable for damage resulting from negligently allowing it to remain so

that the highway is in an unsafe condition. *Elzig v. Bales*, 112 N. W. 540.

SEC. 4808. Obstructing or defacing roads. If any person, without authority or permission from the board of trustees, shall in any manner obstruct, deface or injure any public road by breaking up, plowing or digging within the boundary lines thereof, he shall be fined not less than five nor more than twenty-five dollars, or be imprisoned in the county jail not

more than thirty days, at the discretion of the court. [15 G. A., ch. 17.] [29 G. A., ch. 53, § 16.]

SEC. 4810-a. Train robbery—penalty. That if any person shall stop, or attempt to stop any railway passenger train, with intent to rob any person thereon, or to rob any coach attached thereto, or to rob any mail-pouch, express safe, or box on such train; or shall wreck or attempt to wreck, derail, or attempt to derail, any such train, by any means whatever, with intent to commit such robbery; or shall obstruct or detain such train, or any locomotive, tender, coach, or car attached thereto, with such intent, or shall place upon any railway track, or under any engine, tender, coach, or car any explosive substance, with intent to obstruct, stop, detain, derail, or wreck such train, for the purpose of committing such robbery, or remove any spike, fish-plate, frog, rail, switch, tie, stringer, or appliance used on such railway with intent to obstruct, stop, detain, derail, or wreck such train for the purpose of committing such robbery; or shall enter any locomotive, tender, coach, or car attached to such train, and take or attempt to take possession thereof, for the purpose of committing such robbery; or shall rifle any coach, car, safe, box, or mail-pouch on such train; or shall with force and arms take and carry away any valuable thing whatever from such train, or from any person thereon; or shall intimidate, injure, wound, or maim any person thereon, with intent to commit such robbery, he shall, upon conviction thereof, be imprisoned in the penitentiary at hard labor, for life, or for any term not less than ten years. [28 G. A., ch. 127, § 1.]

SEC. 4811. Jumping off cars in motion.

One who is over fourteen years of age is presumed to be capable of caring for his own safety, and to be negligent in jumping off a train while in motion. *Doggett v. Chicago, B. & Q. R. Co.*, 112 N. W. 171.

SEC. 4818. Injuries to beasts.

Under this section the act of exposing a poisonous substance with intent that the same be taken by a domestic animal must be charged to have been maliciously done. *State v. Lightfoot*, 107-344.

SEC. 4821. Hunting upon cultivated or inclosed land. Any person who shall hunt with dog or gun upon the cultivated or inclosed lands of another without first obtaining permission from the owner or occupant thereof, or his agent, shall for each offense be fined not more than ten dollars and costs of prosecution, and shall stand committed until such fine and costs are paid; but no prosecution shall be commenced under this section except upon the information of the owner or occupant of such cultivated or inclosed lands, or his agent. All islands in navigable streams bordering on the state shall be deemed enclosed lands without fences where the owners or lessees thereof post in plain view notices warning others not to trespass thereon. [25 G. A., ch. 64.] [31 G. A., ch. 160.]

SEC. 4822. Malicious injury to buildings and fixtures. If any person maliciously injure, deface or destroy any building or fixture attached thereto, or wilfully and maliciously destroy, injure or secrete any goods, chattels or valuable papers of another, he shall be imprisoned in the penitentiary not more than five (5) years, or shall be imprisoned in the county jail not more than one year, or be fined not exceeding five hundred dollars, and be liable to the party injured in a sum equal to three times the value of the property so destroyed or injured. [C., '73 § 3985; R., § 4326; C., '51, § 2686.] [31 G. A., ch. 161.]

The act must be shown to be wilful and malicious and the complaining party must appear to have suffered substantial damage. *Freeman v. Strobehn*, 122-157.

SEC. 4826. To fruit or ornamental trees.

In a prosecution for malicious mischief in which it was charged that defendant had taken up and carried away fruit trees from the premises of the prosecutor, it was held that the finding of trees planted on defendant's premises by him which had been thus taken from the premises of prosecutor was evidence of the commission of the crime charged, unless the explanation offered on behalf of the defendant created in the minds of the jury a reasonable doubt as to whether such trees had been wrongfully taken from prosecutor's

premises; but held that the evidence as to the identity of the trees was not sufficient to sustain a conviction. *State v. Roscum*, 128-509.

While there must be proof that the act was maliciously done, it is not necessary to prove that defendant was actuated by specific ill will toward the owner. It is sufficient to prove that defendant intentionally injured or destroyed the property of such owner, without just cause or excuse. *Ibid.*

SEC. 4830-a. Injury to property—penalty. Any person who shall wilfully, maliciously or wantonly tear, deface, mutilate, injure or destroy in whole or in part, any newspaper, periodical, book, map, pamphlet, chart, picture or other property belonging to any public library or reading room, shall be deemed guilty of a misdemeanor and shall be fined not more than one hundred dollars, or imprisonment not more than thirty days. [30 G. A., ch. 131.]

SEC. 4830-b. Injury or destruction of sidewalks—penalty. Any person guilty of wilfully and unlawfully injuring or destroying any sidewalk made of wood, brick, stone, cement, or any other material, shall be fined not more than one hundred (100) dollars or be imprisoned in the county jail not exceeding thirty days. [31 G. A., ch. 162.]

CHAPTER 5.

OF LARCENY AND RECEIVING STOLEN GOODS.

SECTION 4831. Larceny defined.

What constitutes: Larceny as defined by statute is like that of the common law, save in the increased number of articles made the subject of larceny. There is such difference between the crimes of larceny and embezzlement as that they cannot properly be charged in different counts of the same indictment. *State v. Finnigan*, 127-287.

Felonious taking: It is not error necessitating a reversal that the court does not in the instructions defining the offense make use of the word "felonious" as qualifying the intent with which the act is done. All the instructions are to be taken together and if the intent is elsewhere sufficiently described, the defendant cannot complain. *State v. Minor*, 106-642.

Ownership: An indictment which alleges ownership of the property in a corporation without alleging the fact of its incorporation will not be fatally defective. *State v. Fogerty*, 105-32.

The taking at one time of property belonging to different persons severally and

not jointly constitutes but one offense of larceny. The fact that the indictment lays the ownership of the property in the owners jointly, instead of severally, will not be fatal. *State v. Congrove*, 109-66.

An indictment charging the larceny of goods as belonging to a store of a specified name may be supported by proof of ownership in the partnership conducting such store. *State v. Bartlett*, 128-518.

What property: One who as a trespasser goes upon the land of another and transfers bees from a tree growing thereon to a gum belonging to a third person acquires by his wrongful act no title in the bees, and a person who takes them from the premises on which they have been left by the trespasser is not guilty of larceny of the property of the trespasser. *State v. Repp*, 104-305.

The term "chattels," as here used to describe the property which is subject of larceny, includes a dog. *Hamby v. Samson*, 105-112.

Fence wire, attached to posts and form-

ing a fence, is a part of the realty, and the unlawful taking thereof is not larceny. *Murphy v. Olberding*, 107-547.

Where one of two adjoining land owners took fence wire from posts with which it constituted a division fence, and attached it to other posts, where it served the same purpose, held that there was an absence of evidence of intent to convert such as is necessary to constitute larceny. *Ibid.*

Indictment: In an indictment for larceny of money, held sufficient to describe the property as "twenty-two dollars and fifty cents in lawful money of the United States of the value of twenty-two dollars and fifty cents." *State v. Fisher*, 106-658.

It is not necessary to allege the value of certain number of dollars of money which the defendant is charged with embezzling. *State v. Alverson*, 105-153.

It is proper in an indictment for embezzlement to describe the property converted as "certain money, the same being the lawful money of the United States, in amount and of the value of" the sum specified, and under such an indictment evidence of embezzlement of bank notes is admissible. *State v. Finnegean*, 127-287.

Value: In embezzlement the value of the property must be found by the jury for the purpose of determining the punishment, the same as in larceny. *State v. Carmean*, 126-291.

An instruction as to reasonable doubt with reference to whether the value of the property exceeds twenty dollars is not necessary where the evidence shows without conflict, and it is practically conceded, that the value of the goods exceeds twenty dollars. *State v. Burton*, 103-28.

Evidence in a particular case held sufficient to sustain a conviction for larceny. *State v. Newhouse*, 115-173; *State v. Carter*, 121-135.

Evidence in a particular case held sufficient to sustain a conviction of larceny by taking the animals of the prosecutor from his pasture and shipping them to market with other cattle of the defendant. *State v. Greenland*, 125-141.

Recent possession: The claim of a purchase from strangers is one very commonly made by those found in possession of stolen property and though the evidence is undisputed yet the extreme improbability of such a transaction may be considered by the jury in passing upon the truth of the evidence. *State v. Marshall*, 105-38.

If the explanation of possession is suffi-

SEC. 4834. Larceny of logs or lumber.

The ownership of stolen logs must be alleged and proven as alleged. *State v.*

SEC. 4836. Possession as evidence.

The provision that in a prosecution for the larceny of logs, the finding of the logs

cient to raise a reasonable doubt as to whether the property was honestly obtained, the fact of such possession should not weigh against the defendant. It is error to instruct the jury that defendant's possession will be presumptive evidence of his guilt, unless he explained to the satisfaction of the jury his possession of the property, and that he came by it honestly. *State v. Miner*, 107-656.

One in possession of recently stolen property is not required to make a satisfactory explanation of his possession or to show that he came by the property honestly; but if his excuse or explanation is sufficient to raise a reasonable doubt of his guilt he is entitled to an acquittal. *State v. Bartlett*, 128-518.

Evidence of recent possession should not be admitted unless it appears that the defendant, and not someone else, was in possession of the goods stolen. *State v. Wackernagel*, 118-12.

It is error to charge the jury that possession of the stolen goods is *prima facie* evidence of the defendant's guilt of the stealing of such goods, and that, if such possession is established they can, upon that fact alone, return a verdict of guilty, unless some satisfactory explanation is made. The accused should not be required to satisfactorily explain his possession; the most that can be required of him in such case is that the circumstance be such as to raise a reasonable doubt whether the possession has been acquired otherwise than by the crime charged. If such reasonable doubt has been raised, he will be entitled to an acquittal, even though the explanation of the recent possession is not entirely satisfactory. *State v. Brundige*, 118-92.

It is error to instruct with reference to recent possession, where the evidence does not show such possession on the part of defendant. *State v. Williams*, 120-36.

The truthfulness of defendant's explanation of his recent possession of the stolen property is for the jury. *State v. King*, 122-1.

When the charge is of larceny from a building and it appears that the property found in defendant's possession must have been taken from the building if stolen at all, the same inference arises with reference to larceny from the building as to larceny in general. *Ibid.*

As to recent possession of stolen goods as evidence of guilt of burglary committed in connection with the stealing of such goods see notes to § 4787.

Loomis, 129-141.

in the possession of the defendant shall be presumptive evidence of guilt, does not

authorize the presumption that logs found in the possession of one who has stolen them are the property of the person whose mark they bear. The fact of actual own-

ership must be alleged and proven as in other cases of larceny. *State v. Loomis*, 129-141.

SEC. 4837. From building on fire or from the person.

Evidence in a particular case held sufficient to sustain a conviction of larceny from the person. *State v. Williams*, 118-494; *State v. Connor*, 118-490.

An indictment for such offense, describing the property as "a certain dark-colored pocketbook and its contents, consisting of

one hundred and ten dollars in current money of the United States, and of the value of one hundred and ten dollars, a more particular description of which is to this grand jury unknown," held sufficient as to the description of the money. *Ibid.*

SEC. 4840. Embezzlement by public officers.

While the punishment for embezzlement is the same as that of larceny, the two crimes are distinct and cannot be charged in separate counts of the same indictment. *State v. Finnegean*, 127-287.

An officer not provided for by law is not such "public officer" as may be punished under this section for embezzlement. *State v. Spaulding*, 102-639.

One who is not a public officer may be guilty as accessory of the crime of embezzlement committed by a public officer. *State v. Rowe*, 104-323; *In re Rowe*, 77 Fed. 161.

The last sentence of this section, which was added by chap. 67, acts 26 G. A., contemplates the crime as committed by a public officer without any of the specific acts formerly specified as essential to constitute embezzlement, and in a prosecution

under such charge it is necessary to allege demand and failure to account. Such demand must be by the person who is entitled to receive the funds demanded. *State v. McKinney*, 130-370.

Under an indictment charging embezzlement by a public officer, of money or property coming into his hands by virtue of his office, it is not necessary to allege that he has failed to account therefor upon demand. *State v. Hoffman*, 112 N. W. 103.

Under such an indictment proof of conversion is sufficient without establishing a specific demand. The particular evidence by which the conversion is made out need not be set out in the indictment. *Ibid.*

The deposit by a municipal officer of public funds in a bank is not an embezzlement thereof. *Hunt v. Hopley*, 120-695.

SEC. 4841. Embezzlement by bailee.

Something more than an ordinary conversion is necessary to be shown in order

to establish an embezzlement. *Farmer v. Norton*, 129-88.

SEC. 4842. Other embezzlement.

The voluntary doing of an act, the unexpected consequence of which even though inevitable, is to deprive another of his property, there being no intention that the act shall have such result, cannot constitute the crime of embezzlement. *State v. Carmean*, 126-291.

Mere failure of a guardian to account for funds belonging to his ward does not in itself establish the crime of embezzlement. *State v. Disbrow*, 130-19.

Not every wrongful conversion even by a bailee or trustee without legal authority to sell is an embezzlement. The conversion must be actuated by the fraudulent purpose to deprive the owner of his property in order to constitute the crime. And where a guardian without order or direction of court sold a note belonging to his ward's estate, held that he might be prosecuted for embezzlement of the funds received. *Ibid.*

Whether a guardian wrongfully converting to his own use the proceeds of the sale

of property of his ward is guilty of embezzlement, *quaere. Ibid.*

By Code § 5302 it is sufficient to allege the embezzlement or fraudulent conversion to have been of money generally without designing its particular species, and it is not necessary to specify it as being gold, silver or paper. *State v. Alverson*, 105-152.

It is sufficient to charge the embezzling of a certain number of dollars named of moneys received by defendant, etc., without other allegation of the value of such money. *Ibid.*

A prosecution for embezzlement by an agent in failing to account for money received under his agency may properly be had in the city where, under his contract, it was his duty to account. His failure or negligence or refusal to account elsewhere would not amount to conversion if, under his contract, he owed no such duty to his employer. *State v. Hengen*, 106-711.

The jurisdiction of the offense is in the

county where the employe is under obligation to account to his employer. *State v. Maxwell*, 113-369.

Where a purchase of the property of the principal by the agent is ratified by the principal, with knowledge of the facts, the agent is not guilty of embezzlement in subsequently conveying the property as his own and appropriating the proceeds. *State v. Engle*, 111-246.

With reference to the crime of embezzlement by an officer or agent of a corporation the plain purpose of the statutory provision is that such officer or agent shall be criminally liable for the fraudulent conversion of the money or property of a corporation just as agents, clerks or servants of a private person are liable for a like fraudulent conversion of the money or property of their employers. And under an indictment charging defendant as an individual with the embezzlement of money of another individual it is not sufficient to prove that defendant was the officer of a corporation and without fraudulent intent as to the owner of the money caused him to be deprived thereof by the

general course of business of the corporation transacted through an agent of such corporation who alone is guilty of any wrong in misappropriating money. *State v. Carmean*, 126-291; 102 N. W. 97.

An officer of a building and loan association may be convicted of the crime of embezzlement, although he is also guilty of a crime under the provisions of Code § 1918, relating to misconduct of officers of such an association. *State v. Ames*, 119-680.

Fraudulent intent is an essential element of the crime of embezzlement. *Ibid.*

In embezzlement the value of the property embezzled must be determined by the jury, as in larceny, for the purpose of determining the punishment for the offense. *State v. Carmean*, 126-291.

On a prosecution of an agent for the embezzlement of his principal's funds, held that the evidence was sufficient to sustain a conviction. *State v. Pingel*, 128-515.

One whose money has been embezzled by his agent may take security for the amount due to him without ratifying the embezzlement. *Ibid.*

SEC. 4845. Receiving stolen goods.

In a prosecution for receiving or buying stolen property, it is always essential to prove defendant's guilty knowledge of the manner in which the property was ob-

tained, and evidence of other similar transactions is admissible. *State v. Levich*, 128-372.

SEC. 4846. Common thief.

There is no express requirement that the previous convictions referred to in this section shall antedate the commission of the offense charged. The punishment provided is for the fourth conviction without reference to the order of time of the commission of the acts, except that the previous convictions must precede the finding of the indictment. *State v. Dale*, 110-215.

The defendant cannot be convicted under this statute on account of a petit larceny committed prior to the time that the statute went into effect, for the statute, which increases the punishment of the crimes described therein, would be *ex post facto* as to the offenses already committed. *Ibid.*

SEC. 4850. Taking goods from officer. If any person, knowingly and without authority of law, take, carry away, secrete or destroy any goods or chattels while the same are lawfully in the custody of any sheriff, coroner, marshal, constable, or other officer, and held by such officer by virtue of execution, writ of attachment or other legal process, he shall be guilty of larceny, and, when the value of the property so taken, carried away, secreted or destroyed exceeds the sum of twenty dollars, be imprisoned in the penitentiary not more than one year; and when it does not exceed twenty dollars, be fined not exceeding one hundred dollars, or imprisoned in the county jail not more than thirty days. [C., '73, § 3915; R., § 4251.] [27 G. A., ch. 110, § 1.]

SEC. 4852. Selling or concealing mortgaged property.

Notwithstanding the embodiment in this section of the word "written," in accordance with the provisions of 25 G. A., chap. 50, so as to make it criminal for the mort-

gagor to wilfully sell or dispose of any portion of the property without the written consent of the holder of the mortgage, it is competent, in a prosecution under the

statute, to show that the mortgagor, by the oral direction of the mortgagee, made a sale of the mortgaged property with the good faith, purpose and understanding

that the proceeds should be paid over to the mortgagee and credited on the indebtedness. *Kletzing v. Armstrong* 119-505.

SEC. 4852-a. Larceny—Sale of crops with landlord's lien upon. If any tenant of farm lands shall, with intent to defraud, sell, conceal, or in any manner dispose of any of the grain, or other annual products thereof upon which there is a landlord's lien for unpaid rent, without the written consent of the landlord, he shall be guilty of larceny and punished accordingly. [29 G. A., ch. 146, § 1.]

An indictment charging a tenant of farm lands with having disposed of grain which is subject to the landlord's lien does not charge a continuing offense, and if repeated acts are alleged the indictment

is bad for duplicity. *State v. Ashpole*, 127-680.

Under such statute, the indictment must specifically allege that the tenancy by defendant was of farm lands. *Ibid.*

SEC. 4852-b. Payment of rent. The payment of the rent for the lands upon which such grain or other annual products were raised at or before the time the same falls due, shall be a bar to any prosecution under section one (1) hereof, and no prosecution shall be commenced until such rent be wholly due. [29 G. A., ch. 146, § 2.]

SEC. 4852-c. Larceny of steam or steam heat. If any person wilfully and with intent to defraud, in any manner take from the wires, pipes, meters or any other apparatus of any electric motor, electric light, water, steam heating or gas plant or works, any electric current, water, steam, steam heat or gas, he shall be guilty of larceny and shall be punished accordingly. [30 G. A., ch. 132.] [32 G. A., ch. 172.]

SEC. 4852-d. Larceny of poultry in night-time—penalty. Any person guilty of larceny of domestic fowl or poultry in the night-time from any building, shed, coop or enclosed premises shall, upon conviction thereof, be punished by imprisonment in the penitentiary not exceeding two years, or by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both fine and imprisonment in the county jail, as above provided, at the discretion of the court. [30 G. A., ch. 133.]

SEC. 4852-e. Larceny by executor, administrator or guardian. If any executor, administrator or guardian, embezzles or fraudulently converts to his own use any money or property collected or received by him or coming into his possession or under his control by virtue of his said office he is guilty of larceny and the statute of limitations shall not begin to run as to such offense until the settlement of the estate or the attainment of majority by the ward, as the case may be. [31 G. A., ch. 163.]

CHAPTER 6.

OF FORGERY AND COUNTERFEITING.

SECTION 4853. Forgery defined.

The forged instrument may be written in one county and the forgery actually committed in another county where the instrument is completed. *State v. Spayde*, 110-726.

An alteration of a public record with a fraudulent purpose may constitute the

offense of forgery. Without such fraudulent purpose, it may constitute the crime defined by Code § 4910, of making false entries. *State v. Hanlin*, 110 N. W. 162.

It is forgery to falsely make or alter an instrument with intent to defraud, or to utter it as true, intending it to be forged,

although it is not stamped, as required by federal statutes, and therefore the provision of the federal statutes that an unstamped instrument is not admissible in evidence has no application to a prosecution for forgery. *State v. Shields*, 112-27.

It is unnecessary in charging forgery, unless predicated upon the endorsements, that endorsements on the forged instrument be alleged or proven. But to charge the uttering of a forged instrument, the indictment should allege the endorsements so far as they affect the person to whom the instrument purports to be payable, and the proof in this respect must correspond with the allegations. *State v. Waterbury*, 133-135.

If the instrument is not on the face of it such an instrument as is the subject of forgery, that fact must be shown by extrinsic allegations and evidence, and it is sufficient to set out the purport of the in-

strument so as to indicate that it is an instrument in writing purporting to be the act of another by which a pecuniary demand or obligation is, or purports to be, created, etc. *State v. Burling*, 102-681.

In a prosecution for forgery, other similar forgeries may be shown to prove the intent, but other instruments claimed to have been forged cannot be introduced in evidence for this purpose, unless the fact that they are forgeries is established. *State v. Prins*, 113-72.

In a prosecution for forgery in altering a check, held that the admission of the defendant that he had added something to the check might be proven as against him. *State v. Spiker*, 131-194.

Evidence in a particular case held sufficient to sustain a conviction for forgery where the defense was that the defendant had authority to sign his principal's name as agent. *State v. Rivers*, 124-17.

SEC. 4854. Uttering forged instrument.

The words "knowingly" or "well-knowing" in the indictment are uniformly held to supply the place of a positive averment that the defendant knew the facts subse-

quently stated. An intent to defraud may be inferred from knowingly passing an instrument as true which is known to be false. *State v. Waterbury*, 133-135.

CHAPTER 6-A.

OF PUNISHMENT ON CONVICTION THREE OR MORE TIMES OF CERTAIN OFFENSES, AND MAKING CERTAIN EVIDENCE COMPETENT PROOF OF FORMER CONVICTIONS.

SECTION 4871-a. Penalty for third conviction of felony. Whenever any person has been twice convicted of either of the crimes of burglary, robbery, forgery, counterfeiting, larceny where the value of the property stolen exceeded twenty dollars, or of breaking and entering with intent to commit a public offense any dwelling house, office, shop, store, warehouse, railroad car, boat, vessel, or building, in which goods, merchandise, or valuable things, were kept for use, sale or deposit, or has been convicted of two or more of said crimes, and shall thereafter be convicted of any one of such crimes, committed after such conviction, he shall be imprisoned in the penitentiary for any term not less than fifteen years, provided such former judgments shall be referred to in the indictment, stating the court, date and place of rendition. [27 G. A., ch. 109, § 1.]

Under this statute, held that the records of former judgments of conviction of a person of the same name were not sufficient without other evidence tending to identify the defendant on trial as the person against whom such judgments were entered. *State v. Smith*, 129-709.

The fact of the prior convictions is to be taken as a part of the offense charged, at least to the extent of aggravating it and authorizing an increased punishment. *Ibid.*

The statutory provision (27 G. A., chap. 109) imposing a more severe penalty for larceny where the defendant has been twice previously convicted of the same crime is not unconstitutional although the increased punishment may be imposed on account of convictions prior to the taking effect of the act. *State v. Jones*, 128 Fed. 626.

Also held that it was immaterial that the evidence showed three prior convictions instead of two. *Ibid.*

SEC. 4871-b. Penalty for fourth conviction of petty larceny. Any person over the age of eighteen years who has been three times convicted of larceny where the value of the property stolen did not exceed twenty dollars, upon being convicted the fourth time of said offense shall be imprisoned in the penitentiary not exceeding three years, provided such former judgments shall be referred to in the indictment, stating the court, date and place of rendition. [27 G. A., ch. 109, § 2.]

SEC. 4871-c. Evidence admitted. On the trial of any of said offenses named in this act a duly authenticated copy of the record of the former judgment in any court wherein said conviction was had, for either of said crimes against the party indicted, shall be *prima facie* evidence of such former conviction and may be used in evidence against said party. [27 G. A., ch. 109, § 3.]

SEC. 4871-d. Duties of jury and judge. Upon any trial when the indictment refers to former convictions of the defendant, the jury, if it finds the defendant guilty, and the court, if the defendant is convicted on a plea of guilty, must also find and determine specially whether the defendant had previously been convicted of either of the crimes referred to in the indictment and the number of times so convicted. [27 G. A., ch. 109, § 4.]

CHAPTER 7.

OF OFFENSES AGAINST PUBLIC JUSTICE.

SECTION 4872. Perjury.

The time of the commission of the offense of perjury need not be specifically stated in the indictment, nor proven as alleged, where the charge is not based on the record or other writing under oath, and the statement asserted to have been false might have been made on either the date alleged or that proven, and would have constituted perjury if made at either time. *State v. Perry*, 117-463.

In an indictment for perjury it is sufficient to set forth the substance of the controversy or matter in respect to which the offense was committed. (Code § 5296.) *Ibid.*

False swearing in a proceeding on information before a justice of the peace may be punishable as perjury, although the information on which the proceeding is based is not sufficiently specific in charging the crime. Such a proceeding, though voidable, will not be entirely void. *Ibid.*

The corroboration of the evidence of one witness required to establish the falsity of the testimony given may be furnished by facts and circumstances as well as by direct and positive testimony. *State v. Clough*, 111-714.

The fact that the action in which the false testimony is given might be abated on account of the pendency of a former action in another jurisdiction will not defeat the prosecution for perjury. *Ibid.*

A false affidavit for a cost bond may be material so as to constitute perjury. *Ibid.*

The certificate of the clerk to such affidavit, on proof of the handwriting of the signature thereto, is competent and sufficient *prima facie* evidence of the jurat and that he performed the duties of clerk. *Ibid.*

The indictment must negative that which is false in the alleged testimony of the defendant, contradicting the matter alleged to have been falsely sworn to in express and specific terms. *State v. Gallaughter*, 123-378.

The indictment need not charge the precise date on which the crime was committed. It is sufficient if the time alleged is prior to the finding of the indictment. *State v. John*, 124-230.

If the court had jurisdiction of the general subject and of the person, and the accused proceeds to a hearing on the information without objection, he is in no position to say that perjury cannot be assigned on false testimony given by him on the hearing, because the allegations of the information were insufficient to constitute a crime. If the defect relates to the allegations in the particular case, the court having jurisdiction of the general class of cases to which the particular one belongs, the defect may be waived, and the proceedings are merely voidable, and not void. This is particularly true in those

jurisdictions where, as here, an information is amendable. *State v. Brown*, 128-24.

If the matter sworn to is in any way conducive to the point in issue, or a guide to the court or jury, though it be circumstantial, it is nevertheless perjury. If it be circumstantially material, it is the subject of perjury. *Ibid.*

SEC. 4873. Subornation.

It is not necessary in an indictment for procuring another to commit perjury to set out the method or means employed. *State v. Porter*, 105-677.

Under an indictment for perjury, the

The materiality of the testimony is a question of law, for the court. *Ibid.*

Instructions as to the sufficiency of corroborating testimony in support of the charge of perjury held not prejudicially erroneous. *State v. Booth*, 121-710.

As to sufficiency of indictment (following *State v. Schill*, 27 Iowa 263) see *State v. Booth*, 121-710.

accused cannot be convicted of subornation of perjury, and proof of subornation of perjury will not constitute a justification for a publication charging perjury. *State v. Lomack*, 130-79.

SEC. 4882. Attempt to corrupt jurors, etc.

While in an indictment to bribe a juror it must appear that the person charged had knowledge that the person whom he attempted to influence was a juror, yet it is not essential that this fact appear by direct averment. *State v. Dankwardt*, 107-704.

Where a person uses to a juror such language as "See that the right is done, it will not be to your loss," with intent to improperly influence the juror, such act may be criminal if the words are spoken with the intent to improperly influence the juror. *Ibid.*

SEC. 4889. Compounding felonies.

If the inseparable part of the consideration for a contract is the compounding of a felony, the whole contract is void. *Shaulis v. Buxton*, 109-355.

An agreement or understanding not to prosecute need not be the sole consideration for a contract in composition of a felony in order to render it void. It is sufficient if the contract is made upon an agreement, express or implied, to compound or conceal the offense, or not to

prosecute the same. Although the contract may have been based in part upon other valuable considerations, still, if there was such an agreement or understanding as the law forbids, combined and co-operating with that consideration, and operating as a part of the inducement for the making of the contract, then it is void and cannot be enforced. *Rosenbaum v. Levitt*, 109-292.

SEC. 4896. Assisting prisoner to escape from officer.

The crime of rescuing a prisoner is made a felony, and the officer has the right to use a deadly weapon in preventing such

rescue if that is the only reasonably apparent method of accomplishing the result. *State v. Smith*, 127-534.

SEC. 4897. Prison breach—escape.

To constitute a breaking of prison under this section it is necessary that there be some force used, and where it appeared that the prisoner had, while being employed with other prisoners outside of

the prison walls, escaped by concealing himself from the guards, held that the crime was not committed. *State v. King*, 114-413.

SEC. 4897-a. Repeal—Prison breach—penalty. That section forty-eight hundred and ninety-seven (4897) of the code be, and the same is hereby repealed, and the following enacted in lieu thereof:

If any person confined in a penitentiary for any less period than for life, breaks such prison and escapes therefrom; or while employed on work for the state in places and buildings owned or leased by it outside of the penitentiary enclosures, or while on public roads or other ways going to or returning from such places of employment, escapes from custody, he shall be imprisoned in such penitentiary for a term not to exceed five years, to commence from and after the expiration of the original term of his imprisonment. [29 G. A., ch. 147, § 1.]

SEC. 4897-b. To be paid from general fund. That all costs and fees hereafter incurred in prosecutions for violations of section four thousand eight hundred ninety-seven (4897) of the code, being for breaking and escaping from the penitentiary, shall be paid out of the state treasury from the general fund, in any case where the prosecution fails, or where such fees and costs cannot be made from the person liable to pay the same, the facts being certified by the clerk of the district court and verified by the county attorney of the county. [28 G. A., ch. 128, § 1.]

SEC. 4897-c. Amount certified to auditor of state. The clerk of the district court, in which the case is prosecuted or tried, shall, under his seal of office, certify to the state auditor a statement of the amount of fees or costs incurred in each case, and such statement shall be approved by the presiding judge in writing appended thereto or endorsed thereon. Should the cause be appealed to the supreme court, the costs there incurred shall be certified to the state auditor by the clerk of that court, but no fees, in such case, for the clerk of either the district or supreme courts shall be included or paid from the state treasury. [28 G. A., ch. 128, § 2.]

SEC. 4897-d. Auditor to issue warrant. On such certificate being filed in the office of the state auditor the auditor shall issue his warrant on the state treasurer for the amount thereof, payable to the clerk of the district or supreme court, as the case may be, and the clerk shall pay the same to the persons entitled thereto. [28 G. A., ch. 128, § 3.]

SEC. 4899. Resisting execution of process.

The indictment for resisting an officer in serving process must allege that the defendant "knowingly" did the act complained of. It is not sufficient that the act be charged as unlawfully or wilfully done. *State v. Perry*, 109-353.

It is sufficient in the indictment to iden-

tify the process, the service of which is alleged to have been resisted and where the process thus described is a search warrant, the affidavit and warrant corresponding with such description are admissible in evidence. *State v. Moore*, 125-749.

SEC. 4905. Misdemeanors in general.

Where by the charter of a city acting under special charter it was provided that no member of the city council should vote upon any question in which he was directly or indirectly interested, held that the action of members of the council in voting to increase their own salary was a misdemeanor under this section. *State v. Shea*, 106-735.

Where a statute prohibits the doing of an act but provides no special penalty, the doing of such act constitutes in itself a misdemeanor. *State v. York*, 131-635.

Where a statute designates conduct as constituting a misdemeanor, such conduct is negligence *per se*. *Woolf v. Nauman Co.*, 128-261.

SEC. 4906. Punishment.

The violation of the rules adopted by the state board of health being made a misdemeanor by Code § 2573, is punish-

able under the provisions of this section. *Pierce v. Doolittle*, 130-333.

SEC. 4910. Making false entries in regard to fees.

The offense of making false entries by an officer in relation to his office does not necessarily involve a fraudulent purpose. *State v. Hanlin*, 110 N. W. 162.

It is immaterial that the books in which the alterations are made are not books specifically prescribed by the state to be

kept by the officer, if they have in fact been kept by him for the purpose of making settlement with reference to his office. *Ibid.*

Such statutory provision is applicable not only to the clerk of a district court, but to his deputy. *Ibid.*

SEC. 4913-a. Penalty. That any person, not authorized by law, who shall bring or pass or cause to be brought into any penitentiary, reformatory

or industrial school of the state, or the grounds thereof, or into any enclosure, building, quarry, farm, garden, or other place used in connection with any such institution in which prisoners or other inmates are required or permitted to be, any opium, morphine, cocaine or other narcotic or any intoxicating liquor, or any firearm, weapon or explosive of any kind, or any rope, ladder or other instrument or device for use in making or attempting an escape, shall be punished by imprisonment in the penitentiary for a term not exceeding five years. The bringing or passing of any rope, ladder or other instrument or device adapted for use in making an escape, into any of the places designated in this act shall be presumptive evidence that they were so brought or passed for such use. An attempt to do any of the acts prohibited shall be subject to the same punishment as to the completed act. [30 G. A., ch. 134.]

CHAPTER 8.

OF OFFENSES AGAINST THE RIGHTS OF SUFFRAGE.

SECTION 4919-a. Illegal voting—penalty. Whenever any political party shall hold a primary election for the purpose of nominating a candidate for any public office or for the purpose of selecting delegates to any convention of such party, it shall be unlawful for any person not a qualified elector, or any qualified elector not at the time a member in good faith of such political party, to vote at such primary election. Any person violating the provisions of this section, and any person knowingly procuring, aiding or abetting such violation, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not to exceed one hundred dollars or be imprisoned in the county jail not to exceed thirty days. [27 G. A., ch. 111, § 1.]

SEC. 4919-b. Prima facie evidence. It shall be *prima facie* evidence of the violation of the preceding section for any person who has participated in any primary election of one political party, to vote at a primary election held by another political party, to select candidates to be voted for at the same election; or to select delegates to any convention of the party holding such primary election. [27 G. A., ch. 111, § 2.]

SEC. 4919-c. Authority to administer oaths. Any judge of such primary election shall have power to administer oaths to, and to examine under oath, any person offering to vote at such election, touching his qualifications to participate in such primary election, and it shall be the duty of such judge of election to so examine or cause to be examined any person challenged as to his right to vote. Any person testifying falsely as to any material matter, touching his qualifications to participate in such primary election, shall be deemed guilty of perjury and punished accordingly. [27 G. A., ch. 111, § 3.]

SEC. 4919-d. What excepted. Nothing in this act shall be construed to apply to conventions held under the caucus system. [27 G. A., ch. 111, § 4.]

SEC. 4921. Residence in state.

To constitute wilfulness in voting where not qualified, there must be something more than the intentional act of voting without legal qualification; and advice of counsel or persons qualified to give advice in such matters may be shown as negativ-

ing the wilful intention to illegally vote. But proof of casting a ballot where the elector is as a matter of law not entitled to vote is *prima facie* evidence of guilt. *State v. Savre*, 129-122.

SEC. 4928. Illegally receiving or rejecting votes.

An election officer will not be criminally liable for refusing to receive the ballot of an elector unless the elector, being qualified by compliance with the law to vote, tenders his ballot within the time within which it is the duty of the election officer to receive ballots. *State v. Clark*, 102-685.

The refusing of a ballot by the election officer may be wilful if it is purposely and deliberately done, without regard to whether the officer had just grounds for believing the ballot to be lawful. *Ibid.*

CHAPTER 9.**OF OFFENSES AGAINST CHASTITY, MORALITY AND DECENCY.****SECTION 4932. Adultery.**

What constitutes—who may prosecute: Under the statutory definition adultery consists in the sexual connection between a man and a woman of whom one is lawfully married to a third person. *State v. Hasty*, 121-507.

The crime of adultery is an offense against the innocent spouse of the person guilty of it and against the state, for which a divorce and subsequent marriage of the guilty parties do not atone, nor constitute a bar to prosecution. The statute does not necessarily limit the prosecution to cases in which complaint is made by the person who is the husband or wife of the guilty spouse at the time the complaint is made, but the phrase "husband or wife" refers to the relation existing at the time the offense is committed. *State v. Smith*, 108-440.

The state is not required to confine its evidence to the commission of the crime charged on the dates specified in the indictment, but may show that it was committed at any time within eighteen months preceding the finding of the indictment. If defendant is entitled to have the state elect as to which one of several alleged acts is relied on, he must ask that the state be required to make such election before the case is submitted to the jury. *Ibid.*

Adultery is an offense against the state as well as against the innocent spouse and there may be, therefore, a criminal conspiracy to commit adultery where the combination is not confined to the immediate parties to the intended crime. *State v. Clemenson*, 123-524.

The requirement that the prosecution must be commenced on the complaint of the husband or wife pertains to the procedure only. Such complaint is not an element of the offense. *Ibid.*

Consent of the female is not essential to constitute the crime of adultery. *Ibid.*

The wife's agency in the prosecution of her husband for adultery need not be shown beyond reasonable doubt. It con-

stitutes no part or element of the offense. *State v. Athey*, 133-382.

After the prosecution has been properly commenced on the complaint of the wife, she has no power to recall or dismiss the charge so as to defeat the prosecution. *Ibid.*

The fact of prosecution by the wronged spouse need not be proven beyond a reasonable doubt. *State v. Harmann*, 112 N. W. 632.

The court is to determine whether such prosecution was instituted by the spouse as required by statute. *Ibid.*

The fact of the prosecution being commenced by the injured spouse need not be alleged in the indictment. *Ibid.*

Where it appeared that the husband appeared before the grand jury and testified with reference to the charge against defendant of adultery with the wife of the informer, such appearance, being in response to a subpoena, does not furnish proof that the prosecution was commenced by the husband. *State v. Loftus*, 128-529.

A husband who has after the commission of the alleged crime secured a divorce from his wife with whom the adultery is charged to have been committed cannot be the prosecutor. *Ibid.*

A married man can be prosecuted for adultery only at the instance of his wife and not at the instance of the husband of the woman with whom the adultery was committed. *Sloan v. Davis*, 105-97.

Evidence: The crime of adultery is not to be inferred from the mutual disposition of the parties to have sexual intercourse when coupled with no other proof save that of the opportunity to indulge therein. While the offense may be established by circumstantial evidence, and the disposition of the parties toward each other and opportunity are important circumstances, yet the circumstances must be such as will lead the guarded discretion of a reasonable man to the conclusion that the of-

fense has been in fact committed. *State v. Thompson*, 133-741.

While no amount of abuse or misconduct on the part of the wife could serve as a defense or excuse for the crime of adultery on the part of the husband, the fact that the husband has been driven from his home by the violence of his wife's conduct or temper may furnish an explanation of his living apart from her, and therefore may be shown in evidence for that purpose. *State v. Koller*, 129-111.

Where the wife is an active agent of the prosecution and gives testimony against her husband, proof of an attempt upon her part to deprive him of the attendance of witnesses would have a legitimate bearing upon the weight to be given to her evidence. *Ibid.*

While direct proof of the act of intercourse is not required in a prosecution for adultery, it is necessary that the circumstances shown be inconsistent with innocent conduct. *State v. Chaney*, 110-199.

For the purpose of showing adulterous disposition subsequent acts of sexual intercourse between parties may be shown. *State v. More*, 115-178.

The birth of a child, by the woman with whom the adultery is charged to have been committed by defendant and the admission of paternity of such child by him are admissible where they indicate conception as having taken place about the time of the alleged criminal relation. *State v. Hasty*, 121-507.

Evidence in a particular case including testimony tending to show that the defendant procured a monument to be erected on the grave of the woman with whom he was charged to have committed adultery, designating her as his wife, held sufficient to warrant the conviction. *State v. Hasty*, 121-507.

SEC. 4933. Bigamy.

It is not necessary to allege in the indictment the cohabitation as continuing. And where the marriage has been contracted in another state, it is not the continuation of the cohabitation within this state which is important, but the fact that

It is error to receive in evidence notes addressed to the wife with whom the adultery is alleged to have been committed without anything to connect defendant with the sending of such notes. *State v. Loftus*, 128-529.

Evidence in a particular case held to sufficiently show the identity of the woman referred to in the evidence and the woman named in the indictment. *State v. Higgins*, 121-19.

Correspondence between the parties, showing their disposition toward each other, is admissible in a prosecution for adultery. *State v. Butts*, 107-653.

In a particular case held that the evidence was not sufficient to sustain a conviction for the offense. *State v. Wiltsey*, 103-54.

Evidence in a particular case held sufficient to sustain a conviction. *State v. Schaedler*, 116-488.

Election: Where there has been a continuous adulterous relationship, the state should not be required to elect the particular occasion on which the adultery relied on was committed, and confine its evidence to that occasion. *State v. Higgins*, 121-19.

Adultery is not a continuing offense, and the state should be required to elect on which of two or more transactions relied upon it will ask a conviction. *State v. Loftus*, 128-529.

Where the particular criminal act for which a conviction alone may be had is sufficiently identified by the evidence, and evidence of other criminal relations between the same parties has been received only for the purpose of corroboration, it is not error to refuse to require the state to make an election. *State v. Hasty*, 121-507.

in this state cohabitation continues which was commenced in another state under the bigamous marriage. The length of time is immaterial. *State v. Steupper*, 117-591.

SEC. 4934. Exceptions.

A subsequent marriage by the faithful spouse after desertion by the other for

the statutory period will be presumed to be valid. *State v. Rocker*, 130-239.

SEC. 4936. Incest. If any man marry his father's sister, mother's sister, father's widow, wife's mother, daughter, wife's daughter, son's widow, sister, son's daughter, daughter's daughter, son's son's widow, daughter's sons' widow, brother's daughter or sister's daughter; or if any woman marry her father's brother, mother's brother, mother's husband, husband's father, son, husband's son, daughter's husband, brother, son's son, daughter's son, son's daughter's husband, daughter's daughter's husband, brother's son or sister's son; or if any person, being within the de-

degrees of consanguinity or affinity in which marriages are prohibited by this section, carnally know each other, they shall be guilty of incest, and imprisoned in the penitentiary not exceeding twenty-five years nor less than one year. [C., '73, § 4030; R., §§ 4337-9.] [31 G. A., ch. 164.]

A conviction may be had of the crime of incest although the facts show that the act would not constitute rape. *State v. Kouhns*, 103-720.

The provision (Code § 5488) requiring corroboration of the evidence of prosecutrix in a prosecution for rape or seduction does not in terms refer to incest and is not applicable thereto. *Ibid.*

The female is not an accomplice in such sense as that corroboration of her testimony is necessary under Code § 5489. *Ibid.*

If the same transaction may constitute either incest or rape provided the essential features of those crimes are established, an acquittal under an indictment charging rape is a bar to a prosecution for incest committed in a transaction which might have been proven under the indictment for rape although the state seeks in the second prosecution to show a different transaction from that relied upon in the first prosecution. *State v. Price*, 127-301.

An indictment for incest which charges carnal knowledge on the part of the accused only, is sufficient without also charging such carnal knowledge on the part of the other party to the connection. *State v. Kimble*, 104-19.

It is sufficient in the indictment to use

SEC. 4937-a. Sodomy. Whoever shall have carnal copulation in any opening of the body except sexual parts, with another human being, or shall have carnal copulation with a beast, shall be deemed guilty of sodomy. [29 G. A., ch. 148, § 1.]

The statutory definition of sodomy is broader than that of the common law. *State v. McGruder*, 125-741.

It is sufficient in the indictment to al-

lege the offense in the language of the statute. Carnal copulation may be sufficiently shown without proof of the emission of the semen. *Ibid.*

the language of the statute and it is unnecessary to allege knowledge of the relationship. *State v. Rennick*, 127-294.

It is not competent to receive evidence tending to show a conspiracy between the prosecutrix and a third person to bring about the criminal relation with which the defendant is charged. *Ibid.*

Though the criminal act is accomplished by force so as to constitute rape, the wrongdoer may nevertheless be convicted of incest if the relationship is shown. *Ibid.*

Knowledge of the relationship is not included in the definition of the crime of incest, and need not be alleged in the indictment nor affirmatively proven. *State v. Judd*, 132-296.

The charge in the indictment that the act was felonious does not render such proof necessary. *Ibid.*

The relationship between the parties may be established by proof of general repute or admissions. *Ibid.*

Proof of penetration is sufficient to constitute carnal knowledge without proof of emission. The fact of penetration may be inferred from circumstances. *Ibid.*

Evidence of undue intimacy or of intercourse prior to the transaction charged as the basis of the prosecution is admissible. *Ibid.*

SEC. 4938. Lewdness—indecent exposure.

It is not necessary that the indictment should name the person to whom the defendant exposed his person. A defendant might properly be convicted of this offense although no person witnessed the indecent act, as for instance where a case might be made out on a confession corroborated by circumstances. *State v. Bauguess*, 106-107.

The phrase "an indecent exposure of the person," has a well settled and commonly accepted signification, and means the exposure of such parts of the person as modesty or a sense of self-respect requires to be kept usually covered, and it is not necessary in an indictment for the offense to more particularly describe the part of

the body exposed. The language of the Code not only names but describes the offense and it is sufficient to charge it in the language of the statute. *Ibid.*

It is not necessary to allege in the indictment that the exposure was made in the actual sight of any person. An indictment following the language of the statute is sufficient. *State v. Martin*, 125-715.

The exposure becomes indecent only when indulged in at a time and place where as a reasonable person one knows or ought to know that his act is open to the observation of others. *Ibid.*

Where the indictment alleges the exposure to have been in the presence of a

female, it is not necessary to allege that it was without the consent of such female. *Ibid.*

Where, in a prosecution for lewdness the issue presented by the evidence is

only as to the commission of the acts charged, and the question of intent is not involved, it is error to allow evidence of other lewd acts to be introduced. *State v. Vance*, 119-685.

SEC. 4938-a. Lewd, immoral and lascivious acts with children—penalty. Any person over eighteen years of age who shall wilfully commit any lewd, immoral or lascivious act upon or with the body or any part or member thereof, of a child of the age of thirteen years, or under, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, or of such child, shall be punished by imprisonment in the penitentiary not more than three (3) years, or by imprisonment in the county jail not more than six months, or by fine not exceeding five hundred dollars (\$500.00). [32 G. A., ch. 173.]

SEC. 4939. Keeping house of ill fame.

A covered wagon used for purposes of prostitution which is moved about from place to place is a house of ill fame, within the meaning of this section. (Following *State v. Mullin*, 35-207, holding that a boat on the Mississippi river was a house of ill fame.) *State v. Chauvet*, 111-687.

Proof of a single act of prostitution in a house is not sufficient to support a conviction for keeping a house of ill fame, but the crime may be established by proof of facts and circumstances from which the inference of guilt is so strong as to exclude reasonable doubt. *State v. Steen*, 125-307; 101 N. W. 96.

Proof of the general reputation for prostitution of women who are kept and harbored in the house is to be considered as tending to show that the keeper of the house had notice of their real character and of the nature of business they were engaged in. *Ibid.*

To authorize a conviction for keeping a house of ill fame it is not necessary to show that the defendant kept such house for the purpose of gain. *State v. Porter*, 130-690.

SEC. 4942. Enticing to house of ill fame.

An indictment for abduction under this section is not rendered defective by describing the female abducted as "a virtuous female" instead of as "a female

before reputed virtuous" in the language of the statute. If the female is not in fact virtuous her reputation is immaterial. *State v. Dickerhoff*, 127-404.

SEC. 4943. Prostitution.

The provisions of this section with reference to resorting to or occupying a house of ill fame for the purpose of prostitution or lewdness, was not intended to reach and punish a single act of lewdness committed by a person in his own house. (Explaining *State v. Russell*, 95-406.) *State v. Irwin*, 117-469.

One may be convicted of being found in a house of ill fame leading a life of prostitution and lewdness without proof of actual sexual intercourse. *State v. Shaw*, 125-422.

SEC. 4944. Evidence.

This provision is not unconstitutional. *State v. Wilson*, 124-264.

It is erroneous to instruct that a "house resorted to for the purpose of prostitution and lewdness" is a house visited by persons of both sexes for the purpose of having sexual intercourse or some other lewd

purpose and that lewdness is unlawful indulgence of the animal desire. *Ibid.*

Evidence as to reputation for want of chastity of the keeper of a house of ill fame prior to the findings of the indictment is admissible. *State v. Beebe*, 115-128.

SEC. 4946-a. Repeal. That section forty-nine hundred and forty-six (4946) of the code be and the same is hereby repealed, and the following enacted as a substitute therefor. [28 G. A., ch. 129, § 1.]

SEC. 4946-b. Bodies for medical purposes—how distributed. Every coroner, undertaker, superintendent or managing officer of any public asylum, hospital, poorhouse, or penitentiary in this state, shall deliver the bodies of uninterred deceased persons in his charge suitable for scientific purposes with the consent of the friends or relatives, if known, and without such consent if not known, to medical colleges or schools within the state, for the purpose of scientific medical study, unless the deceased person expressed a desire during his last illness that his body should be buried or cremated; such bodies shall be equitably distributed among the medical colleges and schools in the state under such rules and regulations as may be adopted by the state board of health, and the number so distributed shall be in proportion to the number of students matriculated at each medical college or school. The expense of such distribution shall be paid by the medical college or school receiving the bodies. If there shall be more bodies than are required by the medical colleges or schools of the state, the same may be delivered to physicians in the state, under such rules and regulations as may be adopted by the state board of health. [28 G. A., ch. 129, § 2.]

SEC. 4946-c. Duties of various officers. It shall be the duty of every such coroner, undertaker, superintendent or managing officer of a public asylum, hospital, poorhouse or penitentiary, as soon as any such body shall come into his custody, or as soon as any person shall die, whose body, under the provisions hereof, should be delivered to a medical college or school, to at once notify the secretary of the state board of health by telegram of the fact, and to hold such body unburied for forty-eight hours thereafter, and to deliver the body to such medical college or school as the secretary of the state board of health may direct. If, however, such body is subsequently claimed by any relative or friend, it shall be at once, by the person or persons having the same in charge, or by the medical college or school to which it has been delivered, surrendered to such relative or friend for burial. [28 G. A., ch. 129, § 3.]

SEC. 4946-d. Body held subject to claim. Every medical college or school, or person receiving the body of any deceased person under the provisions hereof, shall hold the same for the period of sixty days, subject to the claim of relatives or friends. [28 G. A., ch. 129, § 4.]

SEC. 4946-e. Penalties. Any coroner, undertaker, superintendent or managing officer of any public asylum, hospital, poorhouse or penitentiary within this state into whose hands the body of a deceased person shall come, which should be delivered to a medical college or school under the provisions hereof, who shall wilfully neglect or refuse to notify the secretary of the state board of health of the existence of such body, or refuse to deliver the same to a medical college or school upon the direction of the secretary of the state board of health, as herein provided, shall be guilty of a misdemeanor, and upon conviction thereof be fined any sum not exceeding fifty dollars; and any person who shall receive or deliver any body or remains knowing that any of the provisions of this act have been violated, shall be imprisoned in the penitentiary not more than two years, or fined not exceeding twenty-five hundred dollars, or both. [28 G. A., ch. 129, § 5.]

SEC. 4962. Keeping gambling houses.

To a conviction of keeping a gambling house proof of participation in the play is not essential. *State v. White*, 123-425.

SEC. 4964. Gaming and betting.

The offense of gambling may be punished under city ordinance not inconsistent with the statutory provisions on the subject. *Blodgett v. McVey*, 131-552.

To support a conviction for gambling defendant must be shown to have joined in the game or to have participated in

the betting or wagering of money or other property of value. *State v. White*, 123-425.

SEC. 4965. Gaming contracts void.

Where the question was whether, in purchases of grain made on the board of trade by plaintiff as the agent of defendant, it was intended that no delivery of the grain should be made, held, that evidence of the defendant's intention was admissible although such intention would not be controlling. *Counselman v. Reichart*, 103-430.

In such case, held, that in view of the generally known fact that business on the board of trade is conducted on a plan of

non-delivery of produce but as a speculation in margins or differences, the intention of the parties might be determined by evidence outside of the correspondence by telegraph under which the purchases were made. *Ibid.*

A note given in settlement of a balance growing out of dealings in options is void. *People's Sav. Bank v. Gifford*, 108-277.

The stake holder is not *in pari delicto* with the parties to the unlawful wager. *Himmelman v. Pecaut*, 133-503.

SEC. 4967. Dealing in options—bucket shops.

Aside from statutory provisions, an executory contract for the sale of property is void where delivery of the property is neither made nor contemplated, and where settlement is to be made by payment of

the difference between the contract price and the market price of the property at the time fixed for settlement. *People's Sav. Bank v. Gifford*, 108-277.

SEC. 4969. Cruelty to animals. That section forty-nine hundred and sixty-nine (4969) of the code, be and the same is hereby amended so as to read as follows:

"If any person torture, torment, deprive of necessary sustenance, mutilate, overdrive, overload, drive when overloaded, cruelly beat or cruelly kill any animal, or unnecessarily fail to provide the same with proper food, drink, shelter or protection from the weather, or drive or work the same when unfit for labor, or cruelly abandon the same, or carry the same or cause the same to be cruelly carried on any vehicle or otherwise or shall commit any other act or omission by which unjustifiable pain, distress, suffering or death is caused or permitted to any animal or animals whether the acts or omissions herein contemplated be committed either maliciously, wilfully or negligently and if any person shall knowingly permit such act or omission or shall cause or procure the same to be done he shall be imprisoned in the county jail not exceeding thirty (30) days, or be fined not exceeding one hundred (100) dollars." [32 G. A., ch. 174.]

One who does an act in violation of this section is guilty of a wrong and is liable for injuries resulting to any one therefrom, so far as such injuries are the nat-

ural and proximate consequence of such act, and even though the precise result which followed may not have been anticipated. *Osborne v. Van Dyke*, 113-557.

SEC. 4975-a. Docking—unlawful. It shall be unlawful for any person or persons to dock the tail of any colt or horse of any age within the state of Iowa, or to procure the same to be done therein. [30 G. A., ch. 135, § 1.]

SEC. 4975-b. Penalty. Any person or persons violating any of the provisions of this act shall be deemed guilty of a misdemeanor; and upon conviction thereof, shall be punished by a fine not to exceed one hundred dollars, or by imprisonment in the county jail not to exceed thirty days. [30 G. A., ch. 135, § 2.]

SEC. 4975-c. Soliciting for the purpose of prostitution—penalty. That any person who shall ask, request, or solicit another to have carnal knowledge with any female for a consideration or otherwise, shall be punished by imprisonment in the penitentiary not exceeding five years, or

imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or both such fine and jail imprisonment. [31 G. A., ch. 165.]

SEC. 4975-d. Bucket shop and bucket shopping defined. That a bucket shop, within the meaning of this act, is defined to be an office, store or other place wherein the proprietor or keeper thereof, or other person or agent, either in his or its own behalf, or as the agent or correspondent of any other person, corporation, association or co-partnership within or without the state, conducts the business of making, or offering to make, contracts, agreements, trades or transactions respecting the purchase or sale, or purchase and sale, of any stocks, grain, provisions, or other commodity, or personal property, wherein both parties thereto, or said proprietor or keeper, contemplate or intend that such contracts, agreements, trades or transactions shall be, or may be closed, adjusted or settled according to, or upon the basis of, the public market quotations of prices made on any board of trade or exchange, upon which the commodities or securities referred to in such contracts, agreements, trades or transactions are dealt in, and without a *bona fide* transaction on such board of trade or exchange; or wherein both parties, or such keeper or proprietor shall contemplate or intend that such contracts, agreements, trades or transactions shall be, or may be, deemed closed or terminated when the public market quotations of prices made on such board of trade, or exchange, for the articles or securities named in such contracts, agreements, trades or transactions, shall reach a certain figure; and also any office, store or other place where the keeper, person or agent, or proprietor thereof, either in his or its own behalf, or as an agent, as aforesaid, therein makes or offers to make, with others, contracts, trades or transactions for the purchase or sale of any such commodity, wherein the parties thereto do not contemplate the actual or *bona fide* receipt or delivery of such property, but do contemplate a settlement thereof based upon differences in the price at which said property is, or is claimed to be, bought and sold. The said crime shall be complete against any proprietor, person, agent, or keeper thus offering to make any such contracts, trades or transactions, whether such offer is accepted or not. It is the intention of this act to prevent, punish and prohibit, within this state, the business now engaged in and conducted in places commonly known and designated as "bucket shops," and also to include the practice now commonly known as bucket shopping by any person or persons, agent, corporations, associations or co-partnerships, who or which ostensibly carry on the business or occupation of commission merchants or brokers in grain, provisions, cotton, coffee, petroleum, stocks, bonds or other commodities whatsoever. [32 G. A., ch. 175, § 1.]

SEC. 4975-e. Unlawful to keep or maintain bucket shop—penalty. It shall be unlawful, and the same is hereby made a felony, for any corporation, association, co-partnership, person, or persons, or agent to keep or cause to be kept, within this state, any such bucket shop; and any corporation, person or persons, or agents whether acting individually or as a member, or as an officer, agent or employe of any corporation, association or co-partnership, who shall keep, maintain, or assist in the keeping and maintaining of any such bucket shop within this state, shall, upon conviction thereof, be fined in a sum not to exceed one thousand dollars or be imprisoned in the penitentiary not exceeding two years; and any person or persons who shall be guilty of a second offense under this statute, in addition to the penalty above prescribed, may, upon conviction, be both fined and imprisoned in the discretion of the court, and if a corporation, it shall be liable to forfeiture of all its rights and privileges as such; and the

continuance of such establishment after the first conviction shall be deemed a second offense. [32 G. A., ch. 175, § 2.]

SEC. 4975-f. Accessory defined—penalty. Any corporation, association, co-partnership, person or persons or agents who shall communicate, receive, exhibit, or display in any manner any statements of quotations of the prices of any property mentioned in section one (1) hereof, with a view to any transactions in this act prohibited, shall be deemed an accessory, and upon conviction thereof, shall be fined and punished the same as the principal, and as provided in section two (2) of this act. [32 G. A., ch. 175, § 3.]

SEC. 4975-g. Statement of purchases or sales furnished on demand. It shall be the duty of every commission merchant, co-partnership, association, corporation, person or persons, or agent or broker in this state engaged in the business of buying or selling or of buying and selling stocks, grain, provisions or other commodities or personal property for any person, principal, customer or purchaser to furnish upon demand to any customer or principal for whom such commission merchant, broker, co-partnership, corporation, association, person, or persons, or agent has executed any order for the actual purchase or sale of the commodities hereinbefore mentioned, either for immediate or future delivery, a written statement containing the names of the parties from whom such property was bought, or to whom it shall have been sold, as the case may be, the time, when, the place where, and the price at which, the same was either bought or sold; and in case such commission merchant, broker, person or persons, or agent, co-partnership, corporation or association shall refuse promptly to furnish such statement upon reasonable demand, the fact of such refusal shall be *prima facie* evidence that such property was not sold or bought in a legitimate manner, but was bought in violation hereof. [32 G. A., ch. 175, § 4.]

SEC. 4975-h. Existing statutes not affected. Nothing herein shall be so construed as to change, modify or repeal present and existing laws relating to the subject-matter hereof. [32 G. A., ch. 175, § 5.]

CHAPTER 10.

OF OFFENSES AGAINST PUBLIC HEALTH.

SECTION 4976. Sale of poison without label.

Violation of the statutory provision as to labeling poisons sold constitutes negligence rendering the vendor liable for damages proximately resulting from such violation. *Burk v Creamery Pkg. Mfg.Co.*, 126-730.

SEC. 4989. Sale of impure or skimmed milk — skimmed-milk cheese—labeling. If any person shall sell, exchange, or expose for sale or exchange, or deliver or bring to another, for domestic or potable use, or to be converted into any product of human food, any unclean, impure, unhealthy, adulterated, unwholesome or skimmed milk, or milk from which has been held back what is commonly known as strippings, or milk taken from an animal having disease, sickness, ulcers, abscess or running sore, or which has been taken from an animal within fifteen days before or five days after parturition, or if any person shall purchase, to be converted into any product of human food, any unclean, impure, unhealthful, adulterated or unwholesome milk or cream, or shall manufacture any such milk or cream into any product of human food; or if any person, having cows for the purpose of producing milk or cream for sale, shall stable them in an

unhealthy place or crowded manner, or shall knowingly feed them food which produces impure, unwholesome milk, or shall feed them distilled glucose or brewery waste in any state of fermentation, or upon any substance in a state of putrefaction or rotteness or of an unhealthy nature, or shall sell or offer for sale cream which has been taken from milk the sale of which has been prohibited, or who shall sell or offer for sale, as cream, an article which shall contain less than the amount of butter fat as prescribed in this chapter; or if any person shall sell or offer for sale any cheese manufactured from skimmed milk, or from milk that is partly skimmed, without the same being plainly branded, stamped or marked on the side or top of both cheese and package, in a durable manner, in the English language, the words "skimmed-milk cheese," the letters of the words to be not less than one inch in height and one-half inch in width, he shall be fined not less than twenty-five nor more than one hundred dollars, and be liable for double damages to the person or persons upon whom such fraud shall be committed; but the provisions of this section shall not apply to skimmed milk when sold as such and in the manner and subject to the regulations prescribed in this chapter. [24 G. A., ch. 50, § 1; 19 G. A., ch. 170, § 4; C., '73, § 4042.] [31 G. A., ch. 167, § 1.]

It is an offense under this section to add water and boracic acid to milk, although without intent to defraud. *State v. Schlenker*, 112-642.

SEC. 4989-a. Skimmed milk to be pasteurized. That every owner, manager or operator of a creamery shall before delivering to any person any skimmed milk cause the same to be pasteurized at a temperature of at least one hundred and eighty-five (185) degrees Fahrenheit. [31 G. A., ch. 168, § 1.]

SEC. 4989-b. Penalty. Whoever violates the provisions of this act shall, upon conviction, be liable to a fine of not less than twenty-five dollars nor more than one hundred dollars. [31 G. A., ch. 168, § 2.]

SEC. 4990. What deemed adulterated or impure milk. For the purposes of this chapter, the addition of water or any other substance or thing to cream or whole milk or skimmed milk or partially skimmed milk is hereby declared an adulteration, and milk which is obtained from animals fed upon waste as defined in this chapter, or upon any substance of an unhealthy nature, is hereby declared to be impure and unwholesome, and milk which is proved by any reliable method of test or analysis to contain less than twelve and one-half per cent. of milk solids to the hundred pounds of milk, or than three pounds of butter fat to one hundred pounds of milk, shall be regarded as skimmed or partially skimmed milk, and every article not containing fifteen per cent. or more of butter fat shall not be regarded as cream. [24 G. A., ch. 50, § 2.] [31 G. A., ch. 167, § 2.]

This section is not unconstitutional as applied to the sale of milk adulterated by the addition of water and boracic acid, even though such adulteration is known to the purchaser. *State v. Schlenker*, 112-642.

SEC. 4999-a1. Water closets or privies. Every manufacturing establishment, work shop or hotel in which five or more persons are employed, shall be provided with a sufficient number of water closets, earth closets or privies for the reasonable use of the persons employed therein, which shall be properly screened and ventilated and kept at all times in a clean condition; and if women or girls are employed in such establishment, the water closets, earth closets or privies used by them shall have separate approaches and be separate and apart from those used by the men. [29 G. A., ch. 149, § 1.]

SEC. 4999-a2. Duties of parties in charge. It shall be the duty of the owner, agent, superintendent or other person having charge of any manufacturing or other establishment where machinery is used, to furnish and supply or cause to be furnished and supplied therein, belt shifters or other safe mechanical contrivances for the purpose of throwing belts on and off pulleys, and, wherever possible, machinery therein shall be provided with loose pulleys; all saws, planers, cogs, gearing, belting, shafting, set-screws and machinery of every description therein shall be properly guarded. No person under sixteen years of age, and no female under eighteen years of age shall be permitted or directed to clean machinery while in motion. Children under sixteen years of age shall not be permitted to operate or assist in operating dangerous machinery of any kind. [29 G. A., ch. 149, § 2.]

The obligation of the employer to properly guard dangerous machinery is not dependent upon notice by the commissioners of the bureau of labor, and failure to observe the statutory requirements is negligence *per se*. *Wolf v. Nauman Co.*, 128-261.

The doctrine of assumption of risk is not to be invoked to defeat recovery by employes of immature years for whose protection the statute is specially designed. *Ibid.*

An employer who fails to guard dangerous machinery is liable to an employe for negligence in not providing him a safe place to work. *Calloway v. Agar Packing Co.*, 129-1.

The statutory provision that the owner or person in charge of a manufacturing

or other establishment where machinery is used shall not allow persons under a specified age to assist in cleaning machinery while in motion renders a violation of such provisions negligence *per se*. And a person under the prescribed age is not presumed to have assumed the risk of the incident danger, or to have been guilty of contributory negligence in attempting to perform the duty. *Bromberg v. Evans Laundry Co.*, 111 N. W. 417.

Negligence of an employer in failing to comply with the requirements of this act does not preclude him from showing assumption of risk or contributory negligence on the part of the employe such as to defeat his recovery. *Sutton v. Des Moines Bakery Co.*, 112 N. W. 836.

SEC. 4999-a3. Written notice of defect. In all cases where the property, works, machinery or appliances of an employer are defective or out of repair and the employe has knowledge thereof, and has given written notice to the employer, or to any person authorized to receive and accept such notice, or to any person in the service of the employer and entrusted by him with the duty of seeing that the property, works, machinery or appliances are in proper condition, of the particular defect or want of repair or when the employer or such other person has been notified in writing of such defect or want of repair by any person whose duty it is under the rules of the employer or the laws of the state to inspect such works, machinery or appliances, or any person who is subject to the risk incident to such defect or want of repair; no employe after such notice, shall by reason of remaining in the employment with such knowledge, be deemed to have assumed the risk incident to the danger arising from such defect or want of repair. [32 G. A., ch. 181.]

SEC. 4999-a4. Blowers and pipes. All persons, companies or corporations operating any factory or work shop where emery wheels or emery belts of any description, or tumbling barrels used for rumbling or polishing castings, are used, shall provide the same with blowers and pipes of sufficient capacity, placed in such a manner as to protect the person or persons using same from the particles of dust produced or caused thereby, and to carry away said particles of dust arising from or thrown off such wheels, belts or tumbling barrels while in operation, directly to the outside of the building, or to some receptacle place[d] so as to receive or confine such particles or dust; provided, however, that grinding machines upon which water is used at the point of grinding contact, and small

emery wheels which are used temporarily for tool grinding, are not included within the provisions of this section, and the shops employing not more than one man at such work may, in the discretion of the commissioner of the bureau of labor of the state, be exempt from the provisions hereof. [29 G. A., ch. 149, § 3.]

SEC. 4999-a5. Enforcement—penalty. It shall be the duty of the commissioner of the bureau of labor of the state, and the mayor, and chief of police of every city or town, to enforce the provisions of the foregoing sections. Any person, whether acting for himself or for another or for a copartnership, joint stock company or corporation, having charge or management of any manufacturing establishment, work shop or hotel, who shall fail to comply with the provisions of said sections, within ninety days after being notified in writing to do so, by any one of said officers whose duty it may be to enforce the provisions of said sections, shall be punished by a fine not exceeding one hundred dollars or by imprisonment in the county jail not exceeding thirty days. [29 G. A., ch. 149, § 4.]

SEC. 4999-a6. Protection against fire—means of escape. The owners, proprietors and lessees of all buildings, structures or enclosures of three or more stories in height, now constructed or hereafter to be erected, shall provide for and equip said buildings and structures with such protection against fire and means of escape from such buildings as shall hereafter be set forth in this bill. [30 G. A., ch. 136, § 1.]

SEC. 4999-a7. Buildings and enclosures—how classified. The buildings, structures and enclosures contemplated in this act shall be classified as follows:

First. Hotels, office buildings or lodging rooms of three or more stories in height.

Second. Tenements or boarding houses, of three or more stories in height, occupied by one or more families or aggregating twenty (20) persons or more; provided that a mansard roof or attic, when used for sleeping rooms, shall be counted as one story.

Third. Buildings used as opera houses, theaters or public halls, of a seating capacity exceeding three hundred (300).

Fourth. Seminaries and colleges public school buildings hospitals and asylums of three or more stories in height.

Fifth. Manufactories, warehouses and buildings of all character of three or more stories in height, not specified in the foregoing sections.

Sixth. Hotels and other buildings which are of strictly fireproof construction. [30 G. A., ch. 136, § 2.]

SEC. 4999-a8. Fire escapes and stairways. Each twenty-five hundred (2500) superficial feet of area, or fractional part thereof, covered by buildings or structures specified under classification one, of section 2, of this act, shall be provided with one ladder fire escape of steel or wrought iron construction, attached to the outer wall thereof, and provided with platforms of steel or wrought iron construction of such size and dimensions and such proximity to one or more windows of each story above the first with all doors leading thereto of half glass locked in such manner as to render access to such ladder from each story easy and safe, and with red lights to designate location of escapes said ladder to start about five feet from the ground and extend above the roof, or a drop ladder may be hung at the second story in such a manner that it can be easily lowered in case of necessity, provided, however, that where such buildings shall be occupied by more than twenty (20) persons, the said building shall as a substitute for one ladder be provided with one stairway of steel or wrought iron construction with above described platforms, accessible from each story with

a drop or counterbalance stairway from the second story balcony to the ground, or a stationary stairway may be carried down to within five feet from the ground. Buildings under classification 2 of section 2 of this act shall be provided for in the same manner as those under the head of classification 1. Buildings under classification 3, of section 2, of this act shall be provided with at least one of the above described outside stairways, or such a number of exits or such a number of above described stairways as may be determined by the chief of fire department, or the mayor of each city or town where no such chief of fire department exists. Each twenty-five hundred (2,500) superficial feet of area or fractional part thereof covered by buildings, structures or enclosures under classification 4 of section 2 of this act, shall be provided for in the same manner as those under the head of classification 3. Each twenty-five hundred (2,500) superficial feet of area or fractional part thereof covered by buildings, structures or enclosures under classification 5, section 2, of this act shall be provided with at least one above described outside stairway, provided, however, that if there be living or sleeping quarters for more than twenty-five (25) persons in such building, then there shall be at least two of the above described outside stairways. Each five thousand (5,000) superficial feet of area, or fractional part thereof covered by buildings under classification 6, section 2 of this act, shall be provided with at least one above described ladder, and platforms at each story, if not more than twenty (20) persons be employed in the same. If more than twenty (20) persons be employed, then there shall be at least two of the above described ladders, and platforms attached, or one such stairway, and platforms of sufficient size at each story, and if more than forty (40) persons be employed in said building, then there shall be at least two, or such number of the above described outside stairways as the chief of fire department, or the mayor of any city or town where no such chief of fire department exists, may from time to time determine. Each six thousand (6,000) superficial area or fractional part thereof covered by buildings specified in classification seventh [sixth] of this act, shall be provided with one steel or wrought iron ladder fire escape with platform constructed, located and attached to such building in the manner herein provided. [30 G. A., ch. 136, § 3.]

SEC. 4999-a9. Signs. In buildings under all above classification [s] signs indicating location of fire escapes shall be posted at all entrances to elevators, stairway landings and in all rooms. [30 G. A., ch. 136, § 4.]

SEC. 4999-a10. Enforcement—penalty. It is hereby made the duty of commissioner of the bureau of labor statistics, the chief of fire department, or the mayor of each city or town where no such chief of fire department exists, or the chairman of the board of supervisors, in case such building is not within the corporate limits of any city or town, to adopt uniform specifications for fire escapes hereinbefore provided, and keep such specifications on file in their respective offices, and to serve or cause to be served a written notice in behalf of the state of Iowa upon the owner or owners, or their agents or lessees, of buildings within this state not provided with fire escapes in accordance with the provisions of this act, commanding such owner, owners, or agents or either of them, to place or cause to be placed upon said buildings, such fire escape or fire escapes as are provided in this act within sixty days after service of such notice, pursuant to the specifications established. Any such owner, owners' agents, trustees and lessees or either or any of them so served with notice as aforesaid, who shall not within sixty days after the service of said notice upon him or them, place or cause to be placed such fire escape or fire escapes upon such buildings as required by this act and the terms of said

notice, shall be subject to a fine not less than fifty (\$50) dollars, and not more than one hundred (\$100) dollars, and shall be subject to a further fine of twenty-five (\$25) dollars for each additional week of neglect to comply with such notice. [30 G. A., ch. 136, § 5.]

SEC. 4999-a11. Inspection. All fire escapes erected under the provisions of this act shall be subject to inspection and approval or rejection in writing, by the person named in section 4 of this act who has caused such written notice to be served [30 G. A., ch. 136, § 6.]

SEC. 4999-a12. Repeal—saving clause. Nothing in this act shall in any manner affect pending litigation. That sections four thousand nine hundred and ninety-nine-e (4999-e), four thousand nine hundred and ninety-nine-f (4999-f), four thousand nine hundred and ninety-nine-g (4999-g), four thousand nine hundred and ninety-nine-h (4999-h), four thousand nine hundred and ninety-nine-i (4999-i), four thousand nine hundred and ninety-nine-j (4999-j) of the supplement of the code are hereby repealed. [30 G. A., ch. 136, § 7.]

SEC. 4999-a13. Use of dangerous fluids forbidden. That it shall be unlawful for any person to establish or operate any dye works, pantorium, or cleaning works, in which gasoline, benzine, naphtha, or other explosive or dangerous fluids are used for the purpose of cleaning or renovating wearing apparel or other fabrics, in any building any part of which is used as a residence or lodging-house. [28 G. A., ch. 130, § 1.]

SEC. 4999-a14. Penalty. Any person convicted of violating the provisions of the foregoing section shall be fined in a sum not exceeding fifty (50) nor less than ten (10) dollars. [28 G. A., ch. 130, § 2.]

CHAPTER 10-A.

OF PURE FOODS.

SECTION 4999-a15. State food and dairy commissioner. The state dairy commissioner shall, by this act, become the state food and dairy commissioner, and shall, on and after taking effect of this act, have all the powers, compensations and allowances, and shall be charged with all the duties now imposed by law upon the state dairy commissioner. [31 G. A., ch. 166, § 1.]

SEC. 4999-a16. Duties—seal—assistants—compensation and expenses. In addition to his powers and duties as provided in section 1 hereof, the commissioner shall be charged with the duty of carrying into effect the provisions of this act and shall have an official seal. He may, with the approval of the executive council, appoint such assistants as he may deem necessary, who may exercise the powers now provided by law in the case of milk inspectors, together with those conferred by this act. They shall be paid not to exceed five dollars a day when on duty, besides their actual and necessary traveling expenses when traveling under orders. Their accounts shall be itemized and sworn to, and, when approved by the commissioner and the executive council, shall be paid by warrant of the auditor upon the treasurer out of the sum hereinafter appropriated for carrying out the provisions of this act. The commissioner shall receive five hundred dollars annually in addition to the salary now received by the state dairy commissioner. [31 G. A., ch. 166, § 2.]

SEC. 4999-a17. Chemist. The commissioner shall, with the approval of the executive council, appoint a chemist, who shall be the official chemist

under this act, who shall devote his whole time to the duties of such office. He shall receive a salary of two thousand dollars per year, to be paid in the same manner as the salaries of other state officers. He shall make all the examinations necessary in enforcing the provisions of this act, and shall be furnished necessary laboratory, apparatus, supplies and chemicals, to be paid for in the same manner as the accounts of assistants. [31 G. A., ch. 166, § 3.]

SEC. 4999-a18. Rules and regulations. The commissioner shall, with the approval of the executive council, make all necessary rules and regulations for carrying out the provisions of this act, under which the commissioner shall procure from time to time or whenever he has occasion to believe any of its provisions are being violated, or cause to be procured, for examination chemically, microscopically or otherwise, samples of food shipped into this state or offered for sale in this state. The chemist making the examination shall certify the results of his work to the commissioner. [31 G. A., ch. 166, § 4.]

SEC. 4999-a19. County attorney—duties. If it shall appear from any such examination that any of the provisions of this act have been violated, the commissioner shall at once certify the facts to the proper county attorney, with a copy of the results of the analysis, duly authenticated by the analyst under oath. It shall be the duty of every county attorney to whom the commissioner or his assistants shall report any violation of this act, to cause proceedings to be commenced and prosecuted without delay for the fines and penalties in such case provided. An attorney may be appointed by the governor when he deems advisable to prosecute such cases, but in no case except where the county attorney has first refused to act. [31 G. A., ch. 166, § 5.]

SEC. 4999-a20. Manufacture and sale of adulterated foods prohibited. No person, firm or corporation, by himself, officer, servant or agent, or as the officer, servant, or agent of any other person, firm or corporation, shall manufacture or introduce into the state, or solicit or take orders for delivery, or sell, exchange, deliver or have in his possession with the intent to sell, exchange or expose or offer for sale or exchange, any article of food which is adulterated or misbranded, within the meaning of this act. Provided, that none of the penalties set forth in this act shall be imposed upon any common carrier for introducing into the state, or having in its possession, any adulterated or misbranded articles of food, where the same were received by said carrier for transportation in the ordinary course of its business and without actual knowledge of the adulteration or misbranding thereof. Provided, that any manufacturer, wholesaler or jobber may keep goods specifically set apart in his stock for sale in other states, which might otherwise be in violation of the provisions of this act. [31 G. A., ch. 166, § 6.]

SEC. 4999-a21. Terms defined. The word "commissioner," whenever used in this act, shall be taken to mean the state food and dairy commissioner herein provided for. The word "food," as herein used, shall include all articles used for food, drink, confectionery or condiment, by man or domestic animals, whether simple, mixed or compound. The term "Misbranded" as used herein shall apply to all articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food product which is falsely branded as to the state, territory, or country in which it is manufactured or produced, or which bears any statement of the weight or measure unless the same be

a correct statement of the net weight or measure of the contents. [31 G. A., ch. 166, § 7.] [32 G. A., ch. 177, § 1.]

SEC. 4999-a22. Adulteration defined. For the purpose of this act an article of food shall be deemed to be adulterated:

First. If any substance or substances has or have been mixed and packed with it so as to reduce or lower or injuriously affect its quality, strength or purity.

Second. If any substance or substances has or have been substituted wholly or in part for the article.

Third. If any valuable constituent of the article has been wholly or in part abstracted.

Fourth. If it be an imitation of, or offered for sale, under the specific name of another article, or if it does not conform to the standards established by law.

Fifth. If it be mixed, colored, powdered or stained, in a manner whereby damage or inferiority is concealed.

Sixth. If it contains any added poisonous ingredient, or any ingredient which may render such article injurious to health, or if it contains saccharine or formaldehyde.

Seventh. If it be labeled or branded so as to deceive, or mislead the purchaser, or purport to be a foreign product when not so.

Eighth. If it consist of the whole or any part of a diseased, filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter; provided, that an article of food which does not contain any added poisonous or deleterious ingredient shall not be deemed to be adulterated in the following cases:

1. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food under their own distinctive names and not included in definition fourth of this section; provided, that candies and chocolates shall be deemed to be adulterated if they contain terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health; provided, that vinegar shall be deemed to be adulterated if it contains any added coloring matter; provided, that in case of baking powders, each can or package shall be plainly labeled so as to show the name of each and every ingredient contained therein.

2. In the case of articles labeled, branded, or tagged, so as to plainly indicate that they are mixtures, compounds, combinations, imitations, or blends, provided that the same shall be labeled, branded or tagged, so as to show the exact character and the name and quantity or proportion of each constituent thereof; and provided further, that nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or imitation. [31 G. A., ch. 166, § 8.] [32 G. A., ch. 177, § 2.] [32 G. A., ch. 178, § 2.]

SEC. 4999-a23. Repeal—labels. Chapter one hundred and sixty-six (166), laws of the thirty-first general assembly, is hereby amended by striking out all of section nine (9) and inserting in lieu thereof the following:

“Labels required by this act shall be distinctly printed in the English language in legible type no smaller than eight point heavy gothic caps and shall give, in continuous list with no intervening printed or descriptive

matter, the true and correct names of all the constituents of such mixture, compound, combination, imitation or blend, and if artificially colored or preserved, the name of each and every such added substance shall be plainly stated on the label. Such label shall be placed upon the outside of the package and shall contain the name and address of the manufacturer, packer or dealer. There shall be such a contrast between the color of the label and the color of ink used in printing the label as heretofore provided, that the label shall be easily and plainly legible." [32 G. A., ch. 178, § 1.]

SEC. 4999-a24. Samples. Any person who manufactures or exposes for sale, or delivers to a purchaser any article of food, shall furnish, within business hours, and upon payment or tender of the selling price, a sample of such food to any person duly authorized by the commissioner to receive the same, and who shall apply to such vendor, or person delivering to a purchaser, such article of food for such sample for such use in sufficient quantity for the analysis of any such article or articles in his possession. In the presence of such person and an agent of the commissioner, if so desired by either party, said sample shall be divided into three parts, and each part shall be sealed with the seal of the commissioner. One part shall be left with the dealer, one delivered to the commissioner, and one deposited with the county attorney for the county in which the sample is taken. The having in possession by any person who manufactures or exposes for sale, any adulterated or misbranded food, within the meaning of this act, shall be *prima facie* evidence of having in possession with intent to sell in violation of its provisions. [31 G. A., ch. 166, § 10.]

SEC. 4999-a25. Penalty. Any person, firm or corporation, or agent thereof, who refuses to comply, on demand, with any of the requirements of this act, or who shall violate any of its provisions, or who shall obstruct or hinder the commissioner, or any of his assistants, in the discharge of any duty imposed by this act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars. [31 G. A., ch. 166 §11.]

SEC. 4999-a26. Bulletins. The commissioner shall, from time to time, with the approval of the executive council, issue a printed bulletin, showing the results of inspections, analyses, and prosecutions undertaken under this act, together with such general information as may be deemed suitable. Such bulletins shall be printed in such numbers as may be directed by the executive council, and shall be issued to the newspapers of the state and to all interested persons. [31 G. A., ch. 166 §12.]

SEC. 4999-a27. Appropriation. For the purpose of enabling the commissioner to enforce the provisions of this act, for the compensation and expenses of assistants and experts, for necessary traveling and miscellaneous expenses, and for all other expenses herein provided, the sum of fifteen thousand dollars (\$15,000) annually, or so much thereof as may be necessary, is hereby appropriated from the treasury not otherwise appropriated. [31 G. A., ch. 166, § 13.] [32 G. A., ch. 179.]

SEC. 4999-a28. What exempt. All goods purchased or received by either wholesale or retail dealers of this state prior to July first, nineteen hundred and six (1906), shall be exempt from the provisions of this act to July first, nineteen hundred and seven (1907); except that canned corn so purchased or received shall be exempt from the provisions of this act to January first, nineteen hundred and eight (1908). [31 G. A., ch. 166, § 14.] [32 G. A., ch. 180.]

SEC. 4999-a29. Notice—how served on defendant corporation. Upon the prosecution of a corporation for violations of the provisions of

this act, or of section four thousand nine hundred and eighty-nine (4989) of the code, and information filed before a justice of the peace having jurisdiction, the said justice of the peace shall forthwith issue notice to the corporation which shall substantially notify the defendant of the charges contained in the information and that it must forthwith appear and answer the same, which notice may be served by any peace officer in any county of the state on any officer or agent of the defendant corporation by reading the same to him and leaving with him a copy thereof; said notice shall be returned to the justice of the peace without delay with proper return of its service, and from and after two days from the time of making such service the defendant corporation shall be considered to be in court, and all further proceedings shall be the same as against an individual defendant. [31 G. A., ch. 166, § 15.]

SEC. 4999-a30. Repeal. Sections four thousand nine hundred and eighty-two (4982), four thousand nine hundred and eighty-four (4984), four thousand nine hundred and eighty-seven (4987), four thousand nine hundred and ninety-three (4993), four thousand nine hundred and ninety-four (4994), four thousand nine hundred and ninety-five (4995), four thousand nine hundred and ninety-six (4996), four thousand nine hundred and ninety-seven (4997) and four thousand nine hundred and ninety-eight (4998) of the code, and sections four thousand nine hundred and eighty-four "a" (4984-a), and four thousand nine hundred and eighty-four "b" (4984-b), as they appear in the supplement to the code, are hereby repealed. [31 G. A., ch. 166 § 17.]

SEC. 4999-a31. Food standards. For the purposes of this act, the following standards are hereby established:

Flavoring Extracts.

1. *Flavoring extract.* A flavoring extract is a solution in ethyl alcohol of proper strength of the sapid and odorous principles derived from an aromatic plant, or parts of the plant, with or without its coloring matter, and conforms in name to the plant used in its preparation.
2. *Almond extract.* Almond extract is the flavoring extract prepared from oil of bitter almonds, free from hydrocyanic acid, and contains not less than one (1) per cent. by volume of oil of bitter almonds.
3. *Anise extract.* Anise extract is the flavoring extract prepared from oil of anise, and contains not less than three (3) per cent. by volume of oil of anise.
4. *Celery seed extract.* Celery seed extract is the flavoring extract prepared from celery seed or the oil of celery seed, or both, and contains not less than three-tenths (0.3) per cent. by volume of oil of celery seed.
5. *Cassia extract.* Cassia extract is the flavoring extract prepared from oil of cassia and contains not less than two (2) per cent. by volume of oil of cassia.
6. *Cinnamon extract.* Cinnamon extract is the flavoring extract prepared from oil of cinnamon, and contains not less than two (2) per cent. by volume of oil of cinnamon.
7. *Clove extract.* Clove extract is the flavoring extract prepared from oil of cloves, and contains not less than two (2) per cent. by volume of oil of cloves.
8. *Ginger extract.* Ginger extract is the flavoring extract prepared from ginger and contains in each one hundred (100) cubic centimeters, the alcohol-soluble matters from not less than twenty (20) grams of ginger.

9. *Lemon extract.* Lemon extract is the flavoring extract prepared from oil of lemon, or from lemon peel, or both, and contains not less than five (5) per cent. by volume of oil of lemon.

10. *Terpeneless extract of lemon.* Terpeneless extract of lemon is the flavoring extract prepared by shaking oil of lemon with dilute alcohol, or by dissolving terpeneless oil of lemon in dilute alcohol, and contains not less than two-tenths (0.2) per cent. by weight of citral derived from oil of lemon.

11. *Nutmeg extract.* Nutmeg extract is the flavoring extract prepared from oil of nutmeg, and contains not less than two (2) per cent. by volume of oil of nutmeg.

12. *Orange extract.* Orange extract is the flavoring extract prepared from oil of orange, or from orange peel, or both, and contains not less than five (5) per cent. by volume of oil of orange.

13. *Terpeneless extract of orange.* Terpeneless extract of orange is the flavoring extract prepared by shaking oil of orange with dilute alcohol, or by dissolving terpeneless oil of orange in dilute alcohol, and corresponds in flavoring strength to orange extract.

14. *Peppermint extract.* Peppermint extract is the flavoring extract prepared from oil of peppermint, or from peppermint, or both, and contains not less than three (3) per cent. by volume of oil of peppermint.

15. *Rose extract.* Rose extract is the flavoring extract prepared from attar of roses, with or without red rose petals, and contains not less than four-tenths (0.4) per cent. by volume of attar of roses.

16. *Savory extract.* Savory extract is the flavoring extract prepared from oil of savory, or from savory, or both, and contains not less than thirty-five hundredths (0.35) per cent. by volume of oil of savory.

17. *Spearmint extract.* Spearmint extract is the flavoring extract prepared from oil of spearmint, or from spearmint, or both, and contains not less than three (3) per cent. by volume of oil of spearmint.

18. *Star anise extract.* Star anise extract is the flavoring extract prepared from oil of star anise, and contains not less than three (3) per cent. by volume of oil of star anise.

19. *Sweet basil extract.* Sweet basil extract is the flavoring extract prepared from oil of sweet basil, or from sweet basil, or both, and contains not less than one-tenth (0.1) per cent. by volume of oil of sweet basil.

20. *Sweet marjoram extract.* Sweet marjoram extract, marjoram extract, is the flavoring extract prepared from the oil of marjoram, or from marjoram, or both, and contains not less than one (1) per cent. by volume of oil of marjoram.

21. *Thyme extract.* Thyme extract is the flavoring extract prepared from oil of thyme, or from thyme, or both, and contains not less than two-tenths (0.2) per cent. by volume of oil of thyme.

22. *Tonka extract.* Tonka extract is the flavoring extract prepared from tonka bean, with or without sugar or glycerin, and contains not less than one-tenth (0.1) per cent. by weight of coumarin extracted from the tonka bean, together with a corresponding proportion of the other soluble matters thereof.

23. *Vanilla extract.* Vanilla extract is the flavoring extract prepared from vanilla bean, with or without sugar or glycerin, and contains in one hundred (100) cubic centimeters the soluble matters from not less than ten (10) grams of the vanilla bean, and contains not less than thirty (30) per cent. by volume of absolute ethyl alcohol.

24. *Wintergreen extract.* Wintergreen extract is the flavoring extract prepared from oil of wintergreen, and contains not less than three (3) per cent. by volume of oil of wintergreen.

Vinegar.

1. *Cider, apple vinegar.* Vinegar, cider vinegar, apple vinegar, is the product made by the alcoholic and subsequent acetous fermentations of the juice of apples, is laevorotatory, and contains not less than four (4) grams of acetic acid, not less than one and six-tenths (1.6) grams of apple solids, of which not more than fifty (50) per cent. are reducing sugars, and not less than twenty-five hundredths (0.25) gram of apple ash from one hundred (100) cubic centimeters (20°C.), and the water-soluble ash from one hundred (100) cubic centimeters (20°C.) of the vinegar contains not less than ten (10) milligrams of phosphoric acid (P_2O_5) and requires not less than thirty (30) cubic centimeters of decinormal acid to neutralize its alkalinity.

2. *Wine, grape vinegar.* Wine vinegar, grape vinegar, is the product made by the alcoholic and subsequent acetous fermentations of the juice of grapes and contains, in one hundred cubic centimeters (20°C.), not less than four (4) grams of acetic acid, not less than one (1.0) gram of grape solids, and not less than thirteen hundredths (0.13) gram of grape ash.

3. *Malt vinegar.* Malt vinegar is the product made by the alcoholic and subsequent acetous fermentations, without distillation, of an infusion of barley malt or cereals whose starch has been converted by malt, is dextro-rotary, and contains, in one hundred cubic centimeters (20°C), not less than four (4) grams of acetic acid, not less than two (2) grams of solids, and not less than two-tenths (0.2) gram of ash; and the water-soluble ash from one hundred (100) cubic centimeters (20°C.) of the vinegar contains not less than nine (9) milligrams of phosphoric acid (P_2O_5), and requires not less than four (4) cubic centimeters of decinormal acid to neutralize its alkalinity.

4. *Sugar vinegar.* Sugar vinegar is the product made by the alcoholic and subsequent acetous fermentations of solutions of sugar, syrup, molasses, or refiners' syrup, and contains, in one hundred (100) cubic centimeters (20°C.), not less than four (4) grams of acetic acid.

5. *Glucose vinegar.* Glucose vinegar is the product made by the alcoholic and subsequent acetous fermentations of solutions of starch sugar or glucose, is dextro-rotary, and contains, in one hundred (100) cubic centimeters (20°C.), not less than four (4) grams of acetic acid.

6. *Spirit, distilled or grain vinegar.* Spirit vinegar, distilled vinegar, grain vinegar, is the product made by the acetous fermentations of dilute distilled alcohol, and contains, in one hundred (100) cubic centimeters (20°C.), not less than four (4) grams of acetic acid.

Butter.

1. *Butter.* Butter shall contain not less than eighty (80) per cent. by weight of butterfat. [32 G. A., ch. 178, § 3.]

CHAPTER 10-B.

OF PURE DRUGS.

SECTION 4999-a32. **Manufacture or sale of adulterated drugs prohibited.** No person, firm or corporation, by himself, officer, servant or agent, or as the officer, servant or agent of any other person, firm or corporation, shall manufacture or introduce into the state or solicit orders.

for delivery, or sell, exchange, deliver, or have in his possession with the intent to sell, exchange or expose, or offer for sale or exchange, any drug which is adulterated or misbranded within the meaning of this act. Provided, that none of the penalties set forth in this act shall be imposed upon any common carrier for introducing into the state, or having in its possession, any adulterated or misbranded drugs, where the same were received by said carrier for transportation in the ordinary course of its business and without actual knowledge of the adulteration or misbranding thereof. [32 G. A., ch. 176, § 1.]

SEC. 4999-a33. Drug defined. The term "drug", as used in this act, shall include all medicines and preparations recognized in the United States Pharmacopœia or National Formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation or prevention of disease of either man or other animals, or for the destruction of parasites. [32 G. A., ch. 176, § 2.]

SEC. 4999-a34. Adulteration defined. For the purposes of this act, a drug shall be deemed to be adulterated:

First. If, when a drug is sold under or by a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality or purity as determined by the test laid down in the United States Pharmacopœia or National Formulary official at the time of investigation: Provided, that no drug defined in the United States Pharmacopœia or National Formulary shall be deemed to be adulterated under this provision if the standard of strength, quality or purity be plainly stated upon the bottle, box or other container thereof although the standard may differ from that determined by the test laid down in the United States Pharmacopœia or National Formulary.

Second. If its strength or purity fall below the professed standard or quality under which it is sold. [32 G. A., ch. 176, § 3.]

SEC. 4999-a35. Misbranded defined. The term "misbranded", as herein used, shall apply to all drugs the package or label of which shall bear any statement, design or device regarding such article or the ingredients or substances contained therein, which shall be false or misleading in any particular and to any drug which is falsely branded as to state, country or territory in which it is manufactured or produced. For the purposes of this act, a drug shall also be deemed to be misbranded:

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if the package shall fail to bear a statement on the label showing the name and the exact quantity or proportion of any alcohol, morphine, opium, heroin, chloroform, cannabic indica, chloral hydrate, acetanilide, or any derivative or preparation of any such substances contained therein. The statement herein required shall be plainly printed upon the outside wrapper and also upon a label affixed to the package in type "eight point caps"; provided, that in case the size of the package will not permit the use of eight point caps, the size of the type may be reduced proportionately. There shall be such a contrast between the color of the label and the color of the ink used in printing the label heretofore required, that the printing thereon shall be easily and plainly legible. [32 G. A., ch. 176, § 4.]

SEC. 4999-a36. Drugs or preparations containing wood or denatured alcohol—sale prohibited. No person, firm or corporation shall

sell, offer, or expose for sale, or have in his possession, any preparation or product intended for use of man or domestic animals, either for internal or external use, or for cosmetic purposes, or for inhalation, or for perfumes, which contains methyl (wood) alcohol, crude or refined, or denatured alcohol. [32 G. A., ch. 176, § 5.]

SEC. 4999-a37. Bulletins. The pharmacy commissioners shall, from time to time, with the approval of the executive council, issue a printed bulletin, showing the results of inspections, analyses and prosecutions undertaken under this act, together with such general information as may be deemed suitable. Such bulletins shall be printed in such numbers as may be directed by the executive council, and shall be issued to the newspapers of this state and to all interested persons. [32 G. A., ch. 176, § 6.]

SEC. 4999-a38. Enforcement. It is hereby made the duty of the pharmacy commissioners to enforce the provisions of this act. [32 G. A., ch. 176, § 7.]

SEC. 4999-a39. Penalty. Any person, firm or corporation, or agent thereof, who refuses to comply, on demand, with any of the requirements of this act, or who shall violate any of its provisions, or who shall obstruct or hinder the said pharmacy commissioners, in the discharge of any duty imposed by this act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars. [32 G. A., ch. 176, § 8.]

SEC. 4999-a40. What exempt—prima facie evidence. All goods purchased or received by either wholesale or retail dealers of this state prior to July first, nineteen hundred and seven (1907) shall be exempt from the provisions of this act to April first, nineteen hundred and nine (1909). The having in possession by any person who manufactures or exposes for sale, any adulterated or misbranded drug, within the meaning of this act, shall be *prima facie* evidence of having in possession with intent to sell in violation of its provisions: Provided, that any manufacturer, wholesaler or jobber may keep goods specifically set apart in his stock for sale in other states, which might otherwise be in violation of the provisions of this act. [32 G. A., ch. 176, § 9.]

SEC. 4999-a41. Repeal. Sections four thousand nine hundred and eighty-three (4983), four thousand nine hundred and eighty-five (4985), four thousand nine hundred and eighty-six (4986) and four thousand nine hundred and eighty-eight (4988) of the code are hereby repealed. [32 G. A., ch. 176, § 10.]

SEC. 4999-a42. Depositing samples on porches, lawns, etc., prohibited. That it shall be unlawful for any person, firm, company or corporation, either in person or by agent, to deposit any sample of any drugs or medicine upon any porch, lawn, in any vehicle or any other place where such drugs or medicine might be picked up by children or other persons. [32 G. A., ch. 182, § 1.]

SEC. 4999-a43. Misdemeanor. Any person, firm, company, corporation, or agent thereof violating the provisions of this act, shall be guilty of a misdemeanor. [32 G. A., ch. 182, § 2.]

CHAPTER 11.

OF OFFENSES AGAINST PUBLIC POLICY.

SECTION 5000. Lotteries and lottery tickets.

A contract in furtherance of a lottery scheme is invalid. *Chancy Park Land Co. v. Hart*, 104-592.

But where the purchasers of lots, buying under a contract by which the lots purchased were to be distributed among them

as they might agree, entered into an arrangement by which such lots were distributed by chance, held, that the transaction was not a lottery and that the sale was valid. *Ibid.*

SEC. 5002. Allowing minors in billiard rooms, saloons, etc.

It is immaterial whether the minor indulges in any game whatever if he is permitted to enter and remain in the billiard

hall. The term "billiard hall" includes a hall in which pool is played. *State v. Johnson*, 108-245.

SEC. 5006. Sale of cigarettes.

The statute prohibiting the manufacture or sale of cigarettes within the state is void in so far as it applies to the sale of cigarettes imported into the state and sold in the original packages. *McGregor v. Cone*, 104-465.

The original package is the bundle put up for transportation or commercial handling, and where such a package was broken open and its contents, consisting of small

packages containing ten each, were exposed and sold, held, that the seller was punishable. *Ibid.*

The mulct tax on the business of selling cigarettes is levied to meet the burdens imposed upon the general public by what is thought to be the result upon the human race and particularly upon children of the use of cigarettes. *Hodge v. Muscatine County*, 121-482.

SEC. 5007. Tax on sale.

By reference in the section providing for a mulct tax on the business of selling cigarettes, to the statutory provisions as to a mulct tax on the sale of liquors, provisions of the latter are incorporated into the former section. *Hodge v. Muscatine County*, 121-482.

This statutory provision is not unconstitutional by reason of the fact that no notice of the assessment and levy of the tax is required to be given to the person engaged in the business or the owner of the property wherein the same is conducted. *Ibid.*

As the property owner may apply to the board of supervisors for remission of the tax if erroneous under the provisions of Code § 2441 relating to the mulct tax on the sale of intoxicating liquors which is applicable under the section relating to the sale of cigarettes, notice to the property owner of the imposition of the tax which becomes a lien on his property is not essential to its validity. *Hodge v. Muscatine County*, 196 U. S. 276.

This section has no application to sale in original packages of interstate commerce; but small packages, containing ten cigarettes each, transported in bulk to a

consignee, though not inclosed in any larger package, do not constitute original packages within the proper meaning of that term. *Cook v. Marshall County*, 119-384.

This section is not unconstitutional, on the ground that, although it relates to some extent to the imposition of a mulct tax, it is included in the criminal code, nor on the ground that it is a statute not of uniform operation. *Ibid.*

This section is not unconstitutional on the ground that it is not germane to and included within the title of that portion of the Code relating to the punishment of crime. *Ibid.*

The statutory provision imposing a tax on cigarette dealer is not unconstitutional as denying equal protection of the laws to retail dealers because it does not apply to jobbers and wholesalers doing an interstate business. *Cook v. Marshall County*, 196 U. S. 261; *Hodge v. Muscatine County*, 196 U. S. 276.

The transportation of packages of cigarettes of ten each in bulk does not come within the protection of the rule as to shipment of original packages under interstate commerce. *Ibid.*

SEC. 5008. Infringement of civil rights.

The evil sought to be remedied by the provisions prohibiting the denial of civil rights is unjust or groundless discrimination between individuals where the public generally is invited to be served or enter-

tained. *Humburd v. Crawford*, 128-743.

Whether a boarding house keeper holds himself out to serve meals to the public generally is not to be determined from advertisements or signs alone, but also from

the manner of conducting the business.
Ibid.

If such person serves meals only in pursuance of previous arrangements, and

therefore to particular individuals rather than to any one who may apply, the civil rights provisions are not applicable to him. *Ibid.*

SEC. 5016-a. Repeal—not to be dealt in. That section five thousand and sixteen (5016) of the code is hereby repealed and the followign enacted as a substitute therefor:

No person shall buy, sell, deal in or give away, or offer to buy, sell or deal in any swine that have died of any disease, or that have been killed on account of any disease. [27 G. A., ch. 113, § 1.]

SEC. 5028-a. Misdemeanor. If any person shall publicly mutilate, insult, trample upon, or defile, by act, any flag, standard, color, or ensign of the United States, he shall be guilty of a misdemeanor. [28 G. A., ch. 131, § 1.]

SEC. 5028-b. Unfair discrimination—what constitutes. Any person, firm, company, association or corporation, foreign or domestic, doing business in the state of Iowa, and engaged in the production, manufacture or distribution of petroleum or any of its products, that shall intentionally for the purpose of destroying the business of a competitor in any locality, and creating a monopoly discriminate between different sections, communities or cities of this state, by selling such commodity at a lower rate in one section, community or city than is charged for such commodity by said party in another section, community or city, after making due allowance, for the difference if any, in the grade or quality and in the actual cost of transportation from the point of production, if a raw product, or from the point of manufacture, if a manufactured product, shall be deemed guilty of unfair discrimination, which is hereby prohibited and declared to be unlawful. [31 G. A., ch. 169, § 1.]

SEC. 5028-c. Penalty. Any person, firm, company, association or corporation violating any of the provisions of the preceding section, and any officer, agent or receiver of any firm, company, association or corporation, or any member of the same, or any individual, found guilty of a violation thereof, shall be fined not less than five hundred dollars (\$500) nor more than five thousand dollars (\$5,000), or be imprisoned in the county jail not to exceed one year, or suffer both penalties. [31 G. A., ch. 169, § 2.]

SEC. 5028-d. Contracts or agreements. All contracts or agreements made in violation of any of the provisions of the two preceding sections shall be void. [31 G. A., ch. 169, § 3.]

SEC. 5028-e. Enforcement. It shall be the duty of the county attorneys, in their counties, and the attorney-general, to enforce the provisions of the preceding sections of this act by appropriate actions in courts of competent jurisdiction. [31 G. A., ch. 169, § 4.]

SEC. 5028-f. Complaint—to whom made. If complaint shall be made to the secretary of state that any corporation authorized to do business in this state is guilty of unfair discrimination, within the terms of this act, it shall be the duty of the secretary of state to refer the matter to the attorney-general who may, if the facts justify it in his judgment, institute proceedings in the courts against such corporation. [31 G. A., ch. 169, § 5.]

SEC. 5028-g. Revocation of permit. If any corporation, foreign or domestic, authorized to do business in this state, is found guilty of unfair discrimination, within the terms of this act, it shall be the duty of the secretary of state to immediately revoke the permit of such corporation to do business in this state. [31 G. A., ch. 169, § 6.]

SEC. 5028-b. Corporation to be enjoined—when. If after revocation of its permit such corporation, or any other corporation not having a permit and found guilty of having violated any of the provisions of this act, shall continue or attempt to do business in this state, it shall be the duty of the attorney-general, by a proper suit in the name of the state of Iowa, to enjoin such corporation from transacting all business of every kind and character in said state of Iowa. [31 G. A., ch. 169, § 7.]

SEC. 5028-i. Cumulative remedies. Nothing in this act shall be construed as repealing any other act, or part of act, but the remedies herein provided shall be cumulative to all other remedies provided by law. [31 G. A., ch. 169, § 8.]

SEC. 5028-j. Certificate of inspection. That the importation of registered cattle or cattle eligible to registry for breeding and dairy purposes into this state is hereby prohibited, except when such cattle are accompanied with a certificate from an inspector whose competency and reliability are certified to by the authority charged with the control of domestic animals in the state from whence the cattle came, certifying that said cattle have been examined and subjected to the tuberculine test within sixty days next preceding the date of such importation, and are free from disease. [31 G. A., ch. 170, § 1.]

SEC. 5028-k. Detention and inspection—quarantine. In lieu of an inspection certificate as required in the preceding section, cattle may be detained at suitable stock yards or other inclosure within this state nearest to the state line, on the railroad or highway over which they were shipped, driven or hauled, and there examined at the expense of the owner, or may be shipped or driven to their destination under quarantine, there to remain in quarantine until properly examined at the expense of the owner, and released by the state veterinary surgeon. Such expense shall be a lien upon the cattle. [31 G. A., ch. 170, § 2.]

SEC. 5028-l. Penalty. Any person, firm, company, corporation or agent thereof, violating any of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined for each offense not more than one hundred dollars, or be imprisoned in the county jail not more than thirty days, or both fine[d] and imprisoned, at the discretion of the court. Such person, firm, company, corporation or agent shall be liable for the full amount of damages that may result from the violation of this act. Action may be brought in any county in which said cattle are sold, offered for sale or delivered to a purchaser, or in which they may be detained in transit. [31 G. A., ch. 170, § 3.]

SEC. 5028-m. Enforcement. It shall be the duty of the state veterinary surgeon to enforce the provisions of this act. [31 G. A., ch. 170, § 4.]

SEC. 5028-n. Accepting or giving tips or gratuities. It shall be unlawful for any agent, representative or employe, officer or any agent of a private corporation, or a public officer, acting in behalf of a principal in any business transaction, to receive, for his own use, directly or indirectly, any gift, commission, discount, bonus or gratuity connected with, relating to or growing out of such business transaction; and it shall be likewise unlawful for any person, whether acting in his own behalf or in behalf of any co-partnership, association or corporation, to offer, promise or give directly or indirectly any such gift, commission, discount, bonus or gratuity. Any person violating the provisions of this act or any of them shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than twenty-five dollars (\$25), nor more than five hundred dollars (\$500), or by imprisonment in the county jail for not

more than one year, or by both such fine and imprisonment. [32 G. A., ch. 183, § 1.]

SEC. 5028-o. Testimony—immunity from prosecution. No person shall be excused from attending, testifying or producing books, papers, contracts, agreements and documents before any court in obedience to the subpoena of any court having jurisdiction of the misdemeanor on the ground or for the reason that the testimony or evidence, documentary, or otherwise, required of him, may tend to incriminate him or subject him to a penalty or forfeiture. But no person shall be liable to any criminal prosecution, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before said court or in obedience to its subpoena or in any such case or proceeding, provided, that no person so testifying or producing any such books, papers, contracts, agreements or documents shall be exempted from prosecution and punishment for perjury committed in so testifying. Provided, this act shall not apply to those cases in which the principals, being the contracting parties, have knowledge of and consent to the payment of a commission to an agent or representative. [32 G. A., ch. 183, § 2.] [32 G. A., ch. 184.]

SEC. 5028-p. What prohibited. No person shall use, sell, offer for sale or keep for sale within this state any toy pistols, toy revolvers, caps containing dynamite, blank cartridges for toy revolvers or toy pistols, or firecrackers more than five inches in length and more than three-fourths of an inch in diameter; provided caps containing dynamite may be used, kept for sale or sold when needed for mining purposes, or for danger signals, or for other necessary uses. [32 G. A., ch. 185.]

SEC. 5028-q. Penalty. Any person violating the provisions of this act shall be fined not exceeding one hundred (\$100.00) dollars. or be imprisoned in the county jail not exceeding thirty (30) days. [32 G. A., ch. 185, § 2.]

SEC. 5028-r. When effective. This act shall be in full force and effect from and after January 1, 1908. [32 G. A., ch. 185, § 3.]

SEC. 5028-s. What prohibited. That no bills, posters, or other matter used to advertise the sales of intoxicating liquors or tobacco shall be distributed posted painted or maintained within four hundred feet of premises occupied by a public school or used for school purposes, provided however that nothing in this act contained shall apply to advertisements in newspapers of regular publication, distributed to subscribers or purchasers thereof. [30 G. A., ch. 137, § 1.]

SEC. 5028-t. Penalty. Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding thirty days. [30 G. A., ch. 137, § 2.]

CHAPTER 12.

OF OFFENSES AGAINST THE PUBLIC PEACE.

SECTION 5033. Exciting disturbance.

The disturbance of the peace contemplated by the statutory provision as to exciting disturbance in public places, relates to a disturbance of the tranquility enjoyed by citizens of a municipality or community where good order reigns among

its members. The enjoyment of such tranquility is a natural right among all persons in a political society, and any intentional violation of that right is a breach of the peace. *Neola v. Reichart*, 131-492.

The fact that such breach of the peace is punishable by statute does not prevent its being punished under a city ordinance not inconsistent with the statutory provisions. *Ibid.*

SEC. 5034. Using blasphemous or obscene language. If any person publicly use blasphemous or obscene language, to the disturbance of the public peace and quiet, he shall be imprisoned in the county jail not exceeding thirty days, or be fined not exceeding one hundred dollars. [28 G. A., ch. 132, § 1.]

SEC. 5038-a. Boxing contest—sparring exhibition—penalty. Whoever engages in any boxing contest or sparring exhibition with or without gloves for a prize, reward, or anything of value, at which an admission fee is charged or received, either directly or indirectly, and whoever knowingly aids, abets, or assists in any such boxing contest or sparring exhibition, and any owner or lessee of any ground, lot, building, hall, or structure of any kind knowingly permitting the same to be used for such boxing contest or sparring exhibition, shall be fined not exceeding three hundred dollars, or imprisonment in the county jail not exceeding ninety days. [28 G. A., ch. 133, § 1.]

SEC. 5040. Breach of Sabbath.

A subscription for payment of an indebtedness of a church is a matter of charity, and the fact that it is made on Sunday will not constitute a defense. *First M. E. Church v. Donnell*, 110-5.

The fact that an accident causing injury to a miner occurs in connection with work on Sunday is immaterial as to the right of the miner to recover for negligence of the mine owner. *Taylor v. Star Coal Co.*, 110-40.

The doing of an act which is a violation of the Sunday law will not constitute a violation of law under the terms of an accident insurance policy, where the risk is the same on Sunday as it would have been on a secular day. *Matthes v. Imperial Acc. Assn.*, 110-222.

A ministerial act done on Sunday, such as giving notice, will not be invalid, unless specially prohibited. *State v. Ryan*, 113-536.

SEC. 5040-a. Ball games and other sports prohibited until 3 p. m. That it shall be unlawful to engage in ball games, horse racing, or sports or entertainments that will interfere with the proper observance of the day which is set apart as Memorial Day, prior to the hour of three o'clock p. m. of said day. Any violation of this act shall be punishable by a fine of not less than five (\$5.00) dollars or more than one hundred (\$100) dollars, or by imprisonment in the county jail not to exceed 30 days in the discretion of the court. [32 G. A., ch. 186.]

CHAPTER 13.

OF CHEATING BY FALSE PRETENSES, GROSS FRAUDS AND CONSPIRACY.

SECTION 5041. False pretenses.

There is a distinction between larceny and obtaining property by false pretenses; if the false pretenses induce the owner to part with his property, intending to transfer both title and possession, the crime is cheating by false pretenses; but if by fraud, trick, or false pretense, an owner is induced to part simply with the possession of his property, without inten-

tion to pass title, and the party receiving it takes with intent to fraudulently convert to his own use, the crime is larceny. *State v. Loser*, 132-419.

A pretense such as will furnish a ground for conviction of the crime of cheating by false pretenses must be a representation as to an existing fact or past event, and not a mere promise to do something in the future

or representation as to something to take place in the future. But a promise to do something in the future may be so connected with a statement as to an existing fact as that the statement of fact becomes the effective cause of the promise, and in such cases the two may be considered together in determining the character of the pretense. *State v. Hollingsworth*, 132-471.

The state need not prove all the representations and statements alleged in the indictment, and the fact that some of them are inconsistent with others is no reason for sustaining a demurrer to the indictment. *Ibid.*

If a soliciting agent for insurance, by intentional false representations as to an application for insurance claimed to have been secured by him, obtains from the company a portion of the commission to which he would be entitled on procuring such insurance, he may be convicted of obtaining money under false pretenses. *State v. Seligman*, 127-415.

In a prosecution for such act other similar transactions on the part of the defendant may be shown as bearing upon the question of fraudulent intent. *Ibid.*

The crime of cheating does not apply to real property. *State v. Eno*, 131-619.

To secure by false pretenses the signature to a deed in which the name of the grantee is left blank may constitute a crime under this section. *State v. Tripp*, 113-698.

Allegations of an indictment in a particular case, held to sufficiently negative the truth of the pretenses alleged and to sufficiently charge that defendant made the representations, knowing them to be false. *Ibid.*

In charging the offense of obtaining a signature to a promissory note by means of false and fraudulent representations, it is not necessary to charge that the representations were made with the specific intent to defraud the person from whom the note was obtained. It is sufficient that the form of the indictment in that respect follows the statute. *State v. Hazen*, 104-16.

The indictment may allege several false pretenses and proof of one of them is sufficient to warrant conviction. *State v. Chingren*, 105-169.

An indictment charging that defendant obtained the signature of a person named to a written instrument commonly called a bank check, the false making of which would be punished as forgery, "for the sum of thirty-five dollars," and that the person named did then and there draw and sign said bank check and deliver the same, etc., is sufficient. *State v. Carter*, 112-15.

The indictment sufficiently charges that the person defrauded relied on the false representations in alleging that he would not have signed the check nor delivered it to the defendant had it not been for the

representations so falsely and fraudulently made. *Ibid.*

It is immaterial that some of the statements and representations alleged are in the alternative. *Ibid.*

Evidence of similar pretenses made about the same time and in about the same neighborhood to other persons may be shown, but unless there is evidence that such other pretenses were false the evidence with reference thereto should be stricken out on motion. *Ibid.*

To make out the offense it must be shown that the pretense was of a past event or existing fact, that it was false, calculated to deceive, and was believed and relied on by the party defrauded. But it is not necessary that the false pretenses be the sole inducement to the act procured to be done. *Ibid.*

Obtaining money as a charitable gift by false pretenses is an offense under this section. *Ibid.*

It does not render the indictment insufficient that different and even inconsistent means of perpetrating the fraud are alleged to have been used. A false promise in addition to the false representation may be stated. *State v. Tripp*, 113-698.

It is not essential that all the false pretenses charged in the indictment be proved in order to warrant a conviction. *State v. Dexter*, 115-678.

The indictment must allege the ownership of the property obtained by the false pretenses charged. *State v. Jackson*, 128-543.

The jury must be satisfied beyond a reasonable doubt that the defendant obtained complete control and absolute possession of the property charged to have been obtained by false pretenses within the county in which he is indicted. *Ibid.*

If the prosecutor knew of the falsity of the alleged statements before parting with the possession of his property, no crime is committed. *Ibid.*

It is error to charge that if the false pretenses relied upon are frivolous and not calculated to deceive an ordinarily prudent man under like circumstances, then no crime is committed. *Ibid.*

The amount of money received not being material, a variance between the charge and the proof as to the amount received is not material. *State v. Gibson*, 132-53.

While in a prosecution for obtaining the signature of a person to a written instrument, the false making of which would be punished as forgery, it is necessary to prove the delivery of the instrument, such proof is not essential in a prosecution for conspiracy in fraudulently combining to obtain such signature. *State v. Soper*, 118-1.

The venue of the offense of cheating by false pretenses is where the false pretenses are made and acted upon by the person to

whom they are made. The fact of mailing a communication containing such false pretenses in another county does not fix the venue of the offense in the county where such communication is mailed. *State v. Gibson*, 132-53.

Under a charge of receiving money procured by false pretenses, it is sufficient to

prove that the defendant received from the person defrauded a check on which he procured money. *Ibid.*

Proof of other false pretenses made about the same time by the defendant to the prosecutor is admissible as bearing upon defendant's evil motive and intent. *Ibid.*

SEC. 5044. False weights and measures.

The offense described in this section is not a continuing one. Each act of false weighing is a distinct offense, unless it is but one of a series of acts forming a part of a single transaction. The defendant therefore in a prosecution under this section has the right to require an election on the part of the state, where the evidence tends to show different transactions. *State v. Jamison*, 110-337.

An indictment under this section is not sufficient which charges defendant with

unlawfully and fraudulently keeping false weights, and with knowingly buying cattle weighed therewith. The indictment must charge that the defendant used the weights. *Ibid.*

In a prosecution for using false weights, evidence that the defendant's scales were inaccurate at other times than on the occasion referred to in the indictment is admissible as tending somewhat to show guilty knowledge. *Ibid.*

SEC. 5050. Labor union labels—injunction.

Under the provisions of this section held that a wholesale dealer in cigars could be enjoined from selling boxes of cigars bearing a counterfeit union label, and that good faith in making the sale, as, for instance, where it was made by a clerk in violation of instructions, would constitute no defense. But held that no damages

could be recovered in such action by the labor union whose label was counterfeited, unless actual damage was shown, and further, that damages by way of penalty could not be allowed, in the absence of any evidence as to the amount of such damage. *Beebe v. Tolerton & Stetson Co.*, 117-593.

SEC. 5052. Unlawful use or sale of bottles, boxes, etc., of another. Persons engaged in the manufacture, bottling or selling of soda water, mineral or aerated waters, cider, milk, cream or other lawful beverages in bottles, boxes, casks, kegs or barrels, with their names or other marks of ownership stamped or marked thereon, may file in the office of the recorder of the county in which such articles are manufactured, bottled or sold a description of the name or marks so used by them, and cause notice thereof to be given by three consecutive publications in a weekly newspaper printed in the English language in said county. It shall thereupon be unlawful for any person, without the written consent of the owner, to fill such bottles, boxes, casks, kegs or barrels so marked or stamped, for the purpose of sale, or to sell, dispose of, buy or traffic in or wantonly destroy the same, whether filled or not, and any violation of this section shall be a misdemeanor, and any person convicted thereof shall be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding thirty days. The using by any other person than the rightful owner, without written permission, of any such cask, barrel, keg, bottle or box, as prohibited in this section, or the possession thereof by any junk dealer, or dealer in such casks, barrels, kegs, bottles or boxes, the same being marked or stamped and registered as herein required, shall be *prima facie* evidence that such use, and the sale or possession, is unlawful, and search warrants may be procured for the discovery and seizure of such bottles, boxes, casks, kegs or barrels, as in other criminal cases. [25 G. A., ch. 79.] [29 G. A., ch. 151, § 1.]

SEC. 5058. Conspiracy to prosecute.

In a prosecution for conspiracy, held that evidence of acts of co-conspirators in

the county where the prosecution was had, and also in other countries where it ap-

peared that the same fraudulent scheme was attempted, was admissible. *State v. McIntosh*, 109-209.

Also, held, that evidence of declarations

SEC. 5059. Conspiracy in general.

Conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means. The mere knowledge, acquiescence or approval of an act without co-operation or agreement to co-operate is not enough to constitute the crime of conspiracy to do such act. The combination must contemplate the accomplishment of the purpose by the united energy of the persons accused of such conspiracy, or active participation must be shown. *State v. King*, 104-727.

There may be a conspiracy to commit adultery where the combination is not confined to the parties to the intended crime. *State v. Clemenson*, 125-524.

Where the act charged as the basis of the conspiracy is not criminal, such as the obtaining of real property by false pretences, which under statutory provisions relating to such crime does not constitute a criminal offense, there can be no conviction for conspiracy. *State v. Eno*, 131-619.

While the woman upon whom an abortion is performed is not guilty of the crime, yet if she conspires with others to perform the act, she is a co-conspirator, and her declarations in promotion of the common enterprise are admissible in evidence against another conspirator on trial for the commission of the substantive crime. *State v. Crofford*, 133-478.

While the acquittal of one of two or more persons charged with the joint commission of a crime of conspiracy may bar the prosecution of others charged with the same conspiracy, it does not follow that an acquittal of one of the persons charged with a substantive crime committed by means of a conspiracy will bar a prosecution of those charged with the same substantive offense. The conspiracy to commit a crime, and the crime itself, are distinct offenses, and the acquittal of one is not a bar to the prosecution of the other. The acts and declarations of one shown to have been engaged in a conspiracy to commit a substantive crime are admissible in evidence on the trial of the other defendant, notwithstanding the person whose declarations are sought to be proven has been previously acquitted. *Ibid.*

The gist of the offense of conspiracy is the wicked and unlawful agreement, and where the agreement is to perpetrate a crime known to the common law or defined

by one conspirator, in the presence of the others, though made after the alleged conspiracy was ended, was competent. *Ibid.*

by statute in unmistakable terms all that is necessary is to designate the offense without describing the overt act accomplished in pursuance of the conspiracy. *State v. Clemenson*, 123-524.

Therefore held, that in an indictment for conspiracy to commit adultery it was not necessary to allege that the woman with whom carnal connection was to be had by one of the parties to the conspiracy was known to be a married woman. If knowledge of such fact was essential to the criminality of the act it would be implied as necessarily included in the allegation that the combination was to perpetrate that particular crime. But without proof of such knowledge there should not be a conviction. *Ibid.*

In a prosecution for conspiring to commit a felony, the felony being the act of designedly and by false pretenses, and by privy or false tokens, and with intent to defraud, obtaining the signature of any person to a written instrument, the false making of which would be punishable as forgery, (Code § 5041,) it is not necessary to allege that the instrument was actually delivered. It is not necessary in an indictment for conspiracy to commit a crime to describe the crime intended to be committed with the accuracy or detail essential in charging the commission of the crime itself. *State v. Soper*, 118-1.

Where the conspiracy is charged to have consisted in an agreement to do an act not in itself criminal by illegal means, then the illegal means must be described, but where the offense consists in a conspiracy to commit a crime, the means by which such crime is to be committed need not be alleged. *Ibid.*

The purpose for which evidence is allowed to be introduced of acts by defendant in pursuance of the conspiracy, is to show the existence of the conspiracy itself. Therefore where the conspiracy charged involves false representations, it is competent to prove such representations made to persons not named in the indictment, as tending to show that the representations relied on were intentionally and wilfully made in carrying out the general plan involved in the conspiracy charged. *Ibid.*

For the purpose of thus showing the intent of the conspirators' acts done or representations made outside of the limits of the county in which the crime is charged to have been committed may be shown. *Ibid.*

So long as defendants were acting in pursuance of the unlawful combination, though subsequently to the making of it, and therefore after the completion of the crime of conspiracy, the acts and representations of each may be shown as against the others. *Ibid.*

An indictment for conspiracy is not bad for duplicity in charging that defendants conspired to injure the property of another and also obtain the property by false pretenses. *State v. Loser*, 132-419.

Where the gist of the crime charged is a conspiracy to commit unlawful acts, the indictment need not allege the overt acts. A conspiracy to injure the property rights of another is punishable in the state where the conspiracy is entered into, although the overt acts in carrying out the conspiracy are committed in another state, where such acts were not in themselves criminal. *Ibid.*

Under an indictment charging a conspiracy to cheat by false pretenses, it is erroneous to instruct that the procuring possession of property by such false pretenses constitutes the crime charged, irrespective of the intent of the owner of the property to pass title thereto. *Ibid.*

Under a charge of conspiracy to cheat by false pretenses, there cannot be a conviction on proof of conspiracy to commit larceny; but the fact that the overt act proven is larceny will not require an acquittal, since the overt act is not the gist of the crime, but is provable only as showing the intent. *Ibid.*

SEC. 5060. Pools and trusts.

These provisions may render a contract entered into for the purpose of preventing competition or to fix prices, contrary to

All or any two or more of the acts described by statute as constituting conspiracy may be charged conjunctively in one indictment, and there is no objection to charging one or more of the intents referred to by the statute in one count and others in another, if the same act of conspiracy is referred to in each. Therefore, even though the intent stated in the second count of an indictment is different from that stated in the first, it does not follow that the indictment is bad for duplicity. By particular words, the offense charged in the second count may be so alleged as to constitute a different form only of the same charge of conspiracy contained in the first count. *State v. Caine*, 111 N. W. 443.

An indictment for conspiracy is not bad for duplicity in charging that defendants conspired to injure the property of another and also obtain the property by false pretenses. *State v. Loser*, 132-419.

An actual agreement to enter into a conspiracy need not be proven by direct evidence in order to warrant a conviction. A *prima facie* case is made out by proof of the acts and declarations of the defendant himself, and when such *prima facie* case is made, evidence of acts and declarations of co-conspirators, though not in the presence of each other, if in the carrying out of the common purpose may be shown. *State v. Caine*, 111 N. W. 443.

public policy and void. *Willson v. Morse*, 117-581.

SEC. 5062. Penalty. Any corporation, company, firm or association violating any of the provisions of the two preceding sections shall be fined not less than five hundred nor more than five thousand dollars, and any president, manager, director, officer, agent or receiver of any corporation, company, firm or association, or any member of any corporation, company, firm or association, or any individual, found guilty of a violation thereof, shall be fined not less than five hundred nor more than five thousand dollars, or be imprisoned in the county jail not to exceed one year, or both. [32 G. A., ch. 187.]

SEC. 5077-a1. Misreading or manipulation of milk or cream tests. It shall be unlawful for the owner, manager, agent or employe of a cheese factory, creamery, or condensed milk factory to falsely manipulate or under-read or over-read the Babcock test or any other contrivance used for determining the quality of milk or cream, or to make any false determination of the said Babcock test or otherwise. [31 G. A., ch. 171, § 1.]

SEC. 5077-a2. Penalty. Whosoever shall violate any of the provisions of this act shall, upon conviction thereof, be fined not less than twenty-five dollars nor more than one hundred dollars. [31 G. A., ch. 171, § 2.]

SEC. 5077-a3. Grain combinations prohibited. That it shall be unlawful for any person, company, partnership, association, or corporation owning or operating any grain elevator or engaged in the business of buying, selling, handling, consigning, or transporting grain, to enter into any agreement, contract, or combination with any other grain dealer, or grain dealers, partnership, company, corporation, or association of grain dealers, whether within or without the state, engaged in like business, for the fixing of prices to be paid for grain by different dealers or buyers; or to divide between said dealers the aggregate or net proceeds of the earnings of such dealers and buyers, or any portion thereof; or to form, enter into, maintain, or contribute money or anything of value to any trust, pool, combination, or association of persons of whatsoever character or name, which has for any of its objects the prevention of full and free competition among buyers, sellers, or dealers in grain; or to do or permit to be done by his or their authority any act or thing whereby the free action of competition in the buying or selling of grain is restrained or prevented. [32 G. A., ch. 188, § 1.]

SEC. 5077-a4. Liability for damages. That in case any person, company, partnership, corporation or association, trust, pool or combination of whatsoever name shall do, cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, such person, partnership, company, association, corporation, trust, pool or combination shall be liable to the person, partnership, company, association or corporation injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable attorney's fee to be fixed by the court in every case of recovery and to be taxed as part of the costs in the case, and the property of any person who may be a member of any such trust, pool, combination, corporation or association, violating the provisions of this act, shall be liable for the full amount of such judgment. [32 G. A., ch. 188, § 2.]

SEC. 5077-a5. Penalty—duty of grand jury. That any person, partnership, company, association or corporation subject to the provisions of this act, or any person, trust, combination, pool or association, or any director, officer, lessee, receiver, trustee, employe, clerk, agent or any person acting for or employed by them or either of them, who shall violate any of the provisions of section 1 of this act, or who shall aid and abet in such violation, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined any sum not less than five hundred dollars, (\$500) and not exceeding two thousand dollars (\$2000) or imprisoned in the county jail for a period not exceeding six months, or both, at the discretion of the court. It shall be the duty of the grand jury to inquire into and ascertain if there exists any pool, trust, combination or violation of any provision in this act, in their respective counties. [32 G. A., ch. 188, § 3.]

SEC. 5077-a6. Statements required. Every lot in bulk, barrel, bag, pail, parcel or package of concentrated commercial feeding-stuffs as defined in section three (3) of this act; and every parcel, package or lot of agricultural seeds as defined in section nine (9) of this act, and containing one pound or more, offered or exposed for sale in the state of Iowa for use within this state, shall have affixed thereto, in a conspicuous place on the outside thereof, distinctly printed in the English language in legible type not smaller than eight point heavy gothic caps, or plainly written a statement certifying:

1. In case of concentrated commercial feeding-stuffs:

First. The number of net pounds of feeding-stuffs in the package.

2. In the case of agricultural seeds:

Second. The name, brand or trade-mark under which the article is sold.

Third. The name and address of the manufacturer, importer, dealer or agent.

Fourth. The place of manufacture.

Fifth. Except in the case of condimental stock food; patented, proprietary or trade-marked stock and poultry foods, claimed to possess medicinal or nutritive properties, or both, the chemical analysis of the feeding-stuffs, stating the percentages of crude protein, crude fat, and crude fiber, allowing one per cent. of nitrogen to equal six and twenty-five one hundredths per cent. of protein, all three constituents to be determined by the latest methods adopted by the Association of Official Agricultural Chemists of the United States.

2. In the case of agricultural seeds:

First. Name of the seed.

Second. Full name and address of the seedsman, importer, dealer or agent.

Third. A statement of the purity of the seed contained, specifying the kind and percentage of the impurities as defined in sections eleven (11) and twelve (12) hereof, provided that said seeds are below the standards fixed in this act.

Fourth. Locality where said seed was grown, when known. [32 G. A., ch. 189, § 1.]

SEC. 5077-a7. Additional statement or label. Every barrel, bag, pail, parcel or package of concentrated commercial feeding-stuffs as defined in section three (3) of this act, and every feed intended for domestic animals that is compounded from two or more substances, in addition to the requirements of section one (1), shall have affixed thereto, in a conspicuous place on the outside thereof, a statement in the manner and form prescribed in section one (1), giving the true and correct names of all the ingredients of which it is composed. Except condimental stock food; patented, proprietary or [or] trade-marked stock or poultry foods, claimed to possess medicinal or nutritive properties, or both; and these shall be labeled or branded so as not to deceive or mislead the purchaser in any way, and the contents of any such package shall not be substituted in whole or in part for any other contents. Any statement, design or device upon the label or package regarding the substances contained therein, shall be true and correct, and any claim made for the feeding, condimental, tonic or medicinal value, shall not be false or misleading in any particular. The name and percentage of any deleterious or poisonous ingredient or ingredients, shall be plainly stated upon the outside of the package or container. The name and percentage of the diluent or dilutents, or bases, shall be plainly stated on the outside of the package or container. [32 G. A., ch. 189, § 2.]

SEC. 5077-a8. Concentrated commercial feeding-stuffs defined. The term concentrated commercial feeding-stuffs, as used in this act, shall include alfalfa meals and feeds; dried beet refuse; ground beef or fish scraps; bean meals; dried blood; brewers' grains, both wet and dry; cerealine feeds; cocoanut meals; corn feeds; corn and oat feeds; corn, oat and barley feeds; compounds under the name of corn and cob meals; corn bran; clover meal; cottonseed meal and feeds; germ feeds; distillers' grains; gluten meals; gluten feeds; hominy feeds; linseed meals; malt refuse; malt sprouts; meat meals; meat and bone meals; mixed feeds of all kinds; oil

meals of all kinds; oat feeds; oat bran; oat flour; oat middlings; oat shorts; pea meals; poultry foods; rice bran; rice meal; rice polish; rye bran; rye middlings; rye shorts; starch feeds and starch factory by-products; tankage and packing house by-products; wheat bran; wheat middlings; wheat shorts; and low grade wheat flour; and all materials of similar nature used for domestic animals; also condimental stock foods; patented proprietary or trade-marked stock or poultry feeds claimed to possess medicinal or nutritive properties or both; and all other materials intended for feeding to domestic animals. But it shall not include: hay; straw; whole seeds; un-mixed meals made from the entire grains of wheat, rye, barley, oats, Indian corn, buckwheat, and broom corn; nor wheat flours nor other flours fit for human consumption. [32 G. A., ch. 189, § 3.]

SEC. 5077-a9. Certified copy of statement and samples furnished food and dairy commissioner. Before any concentrated commercial feeding-stuffs, as defined in section three (3) of this act, is offered or exposed for sale, the importer, manufacturer, person or party who causes it to be sold or offered for sale within the state of Iowa for use within this state, for each and every feeding-stuff bearing a distinguishing name or trade-mark, shall file with the state food and dairy commissioner a certified copy of the statement named in section one (1) of this act, and shall also deposit with the said state food and dairy commissioner a sealed glass jar or bottle containing not less than one pound of the feeding-stuff to be sold or offered for sale, accompanied by an affidavit that it is a fair average sample thereof and corresponds within reasonable limits to the feeding-stuff which it represents. [32 G. A., ch. 189, § 4.]

SEC. 5077-a10. Inspection fee—license fee—tax tags. Before any manufacturer, importer, dealer or agent shall offer or expose for sale in this state any of the concentrated commercial feeding-stuffs defined in section three (3) of this act, he shall pay to the state food and dairy commissioner an inspection fee of ten cents per ton for each ton of such concentrated commercial feeding-stuffs sold or offered for sale in the state of Iowa for use within this state; except that every manufacturer, importer, dealer or agent for any condimental, patented, proprietary or trade-marked stock or poultry foods, or both, shall pay to the state food and dairy commissioner, on or before the fifteenth day of July of each year, a license fee of one hundred (\$100.00) dollars, in lieu of such inspection fee. Whenever the manufacturer or importer of such foods shall have paid the fee herein required, no other person or agent of such manufacturer or importer shall be required to pay such license fee; and shall affix to each lot shipped in bulk, and to each bag, barrel or package of such concentrated commercial feeding-stuffs, a tag, to be furnished by the said state food and dairy commissioner, stating that all charges specified in this section have been paid; provided, that the inspection fee herein required shall not apply to un-adulterated wheat, rye and buckwheat bran, nor wheat, rye and buckwheat middlings, nor to wheat, rye and buckwheat shorts manufactured in this state. The said state food and dairy commissioner is hereby empowered to prescribe the form of such tag and adopt such regulations as may be necessary for the enforcement of this act. Tags for use upon concentrated commercial feeding-stuffs shall be issued in denominations suitable for use with twenty-five, fifty and one hundred pounds net, except as herein-after provided; provided, that any dealer who sells at one time to any other person one ton or more of concentrated commercial feeding-stuffs, shall be held to have complied with the provisions of this section if he delivers to the purchaser the tax tags herein required, even though they may not be attached to the various packages. [32 G. A., ch. 189, § 5.]

SEC. 5077-a11. Samples—analysis. The state food and dairy commissioner shall cause to be made analyses of all concentrated commercial feeding-stuffs and agricultural seeds sold or offered for sale in this state. Said state food and dairy commissioner is hereby authorized, in person or by deputy, to take for analysis a sample from any lot or package of concentrated commercial feeding-stuffs in this state, not exceeding two pounds in weight; and in case of agricultural seeds, a sample not exceeding four ounces in weight; but said sample shall be drawn or taken in the presence of the party or parties in interest, or their representative, and shall be taken from a parcel, lot or number of parcels which shall not be less than five per cent of the whole lot inspected, and shall be thoroughly mixed and divided into two samples and placed in glass or metal vessels carefully sealed and a label placed on each, stating the name or brand of the feeding-stuff, agricultural seeds or material sampled, the name of the party from whose stock the sample is drawn, and the date and place of taking such sample, and said label shall be signed by the said state food and dairy commissioner, or his authorized agent; or said sample may be taken in the presence of two disinterested witnesses. One of said duplicate samples shall be left on the premises of the party whose stock was sampled and the other retained by the state food and dairy commissioner for analysis and comparison with the certified statements required by sections one (1) and four (4) of this act. The result of the analysis of the sample, together with additional information, shall be published from time to time in bulletins issued by the state food and dairy commissioner upon approval of the executive council. [32 G. A., ch. 189, § 6.]

SEC. 5077-a12. Analysis made on request of purchaser—fee. Any person purchasing any concentrated commercial feeding-stuffs or agricultural seeds in this state for his own use may submit fair samples of said feeding-stuffs or seeds to the state food and dairy commissioner, who, upon receipt of an analysis fee of fifty cents for each sample of agricultural seeds and one dollar for each sample of concentrated commercial feeding-stuff, shall cause an analysis of the same to be made. [32 G. A., ch. 189, § 7.]

SEC. 5077-a13. Wheat or rye screenings. No person shall sell in ground form wheat or rye screenings containing cockle or other poisonous or deleterious substances. [32 G. A., ch. 189, § 8.]

SEC. 5077-a14. Agricultural seeds defined. The term agricultural seeds, as used in this act, shall include the seeds of the red clover, white clover, alsike clover, alfalfa, Kentucky blue grass, timothy, brome grass, orchard grass, red top, meadow fescue, oat grass, rye grass and other grasses and forage plants, flax, rape and cereals. [32 G. A., ch. 189, § 9.]

SEC. 5077-a15. Agricultural seeds to be free from impure seeds. No person shall sell, offer or expose for sale or distribution in this state for the purpose of seeding, any of the agricultural seeds as defined in section nine (9) of this act, unless the said seeds are free from the seeds of the following weeds: wild mustard or charlock (*Brassica sinapistrum*), quack grass (*Agropyron repens*), Canada thistle (*Cnicus arvensis*), wild oats (*Avent fatua*), clover and alfalfa dodder (*Cuscuta epithimum*), field dodder (*Cuscuta arvensis*), and corn cockle (*Lychnis githago*). [32 G. A., ch. 189, § 10.]

SEC. 5077-a16. Impurities in agricultural seeds. The seeds of the following weeds shall be considered as impurities in the agricultural seeds, as defined in section nine (9) of this act, sold, offered or exposed for sale within the state for the purpose of seeding: white cockle (*Lychnis vespertina*), nightflowering catchfly (*Silene noctiflora*), curled dock (*Rumex*

crispus), smooth dock (*Rumex altissimus*), sheep sorrel (*Rumex acetosella*), yellow trefoil (*Medicago lupulina*), burr clover (*Medicago denticulata*), sweet clover (*Melilotus alba* and *officinalis*), black mustard (*Brassica nigra*), plantain, buckhorn (*Plantago lanceolata*), bracted plantain (*Plantago aristata*), bindweed (*Convolvulus sepium*), smooth crab grass (*Panicum glabrum*), common chickweed (*Stellaria media*). When such impurities or any of them are present in quantity exceeding a total of two per cent. of the weight of said agricultural seeds, the approximate percentage of each shall be plainly indicated in statement specified in section one (1) of this act. [32 G. A., ch. 189, § 11.]

SEC. 5077-a17. Other impurities. Sand, dirt, chaff and foreign substances and seeds other than those specified in sections thirteen (13) and fourteen (14) or broken seed and seed not capable of germinating, shall be considered impurities when present in agricultural seeds sold, offered or exposed for sale in this state for the purpose of seeding, and when such impurities, or any of them, are present in quantity exceeding the standards of purity and viability authorized in section sixteen (16) of this act, the name and approximate percentage of each shall be plainly indicated in the statement specified in section one (1) of this act. [32 G. A., ch. 189, § 12.]

SEC. 5077-a18. Mixed or adulterated seeds. For the purposes of this act seeds shall be deemed to be mixed or adulterated:

First. When orchard grass (*Dactylis glomerata*) seed contains ten per cent. or more by weight of meadow fescue (*Festuca elatior pratensis*) seed, or Italian rye grass (*Lolium italicum*) seed, or English rye grass (*Lolium perenne*) seed.

Second. When blue grass or Kentucky blue grass (*Poa pratensis*) seed contains five per cent. or more by weight of Canadian blue grass (*Poa compressa*) seed, red top chaff, red top (*Agrostis alba*) seed, or any other seed or foreign substance.

Third. When red clover (*Trifolium pratense*), mammoth red clover (*Trifolium pratense* var), or alfalfa (*Medicago sativa*), contains five per cent. or more by weight of yellow trefoil (*Medicago lupulina*), or sweet clover (*Melilotus alba* and *M. officinalis*) seed or burr clover (*Medicago denticulata*) seed.

Fourth. When rape (*Brassica rapa*) contains five per cent. or more of common mustard (*Brassica Sinapistrum*) or black mustard (*B. nigra*). [32 G. A., ch. 189, § 13.]

SEC. 5077-a19. Misbranded seed. For the purpose of this act, seed shall be deemed to be misbranded:

First. When meadow fescue (*Festuca elatior pratensis*), English rye grass (*Lolium perenne*) or Italian rye grass (*Lolium italicum*) is labeled or sold under the name of orchard grass (*Dactylis glomerata*) seed.

Second. When Canadian blue grass (*Poa compressa*) seed, red top (*Agrostis alba*) seed, or any other seed not blue grass seed, is sold under the name of Kentucky blue grass or blue grass (*Poa pratensis*) seed.

Third. When yellow trefoil (*Medicago lupulina*), burr clover (*Medicago denticulata*), or sweet clover (*Melilotus alba*) is sold under the name of clover, June clover, red clover (*Trifolium pratense*), medium red clover, small red clover, mammoth red clover, sapping clover, peavine clover (*T. pratense* var) or alfalfa (*Medicago sativa*) seed.

Fourth. When the seeds are not true to the name under which they are sold. [32 G. A., ch. 189, § 14.]

SEC. 5077-a20. Exemptions. The provisions concerning agricultural seeds contained in this act shall not apply to:

First. Any person or persons growing or selling seeds for food purposes only, or having such seeds in possession for sale for such purposes.

Second. Any person selling seeds direct to merchants, to be cleaned or graded before being offered for sale for the purpose of seeding. This shall not, however, exempt the seller from the restrictions of section ten (10) of this act.

Third. Seed that is held in storage for the purpose of being recleaned, and which has not been offered, exposed or held in possession of or for sale for the purpose of seeding.

Fourth. Seed marked "not absolutely clean," and held or sold for export outside the state only.

Fifth. The sale of seed that is grown, sold and delivered by any farmer on his own premises for seeding by the purchaser himself, unless the purchaser of said seeds obtains from the seller at the time of the sale thereof a certificate that the said seed is supplied to the purchaser subject to the provisions of this act.

Sixth. Mixtures of seeds for lawn or pasture purposes. This shall not, however, exempt the seller of such mixtures of seeds from the restrictions of sections ten (10) and eleven (11) of this act. [32 G. A., ch. 189, § 15.]

SEC. 5077-a21. **Standards of purity.** The following standards of purity (meaning freedom from weed seeds or other seeds) and viability are hereby fixed:

STANDARD OF PURITY AND VIABILITY OF AGRICULTURAL SEEDS.

Name of seed.	Per cent. of purity.	Per cent. of germinable seeds.
Alfalfa (<i>medicago sativa</i>)	96	80
Barley	98	90
Blue grass, Canadian (<i>poa compressa</i>)	90	45
Blue grass, Kentucky (<i>poa pratensis</i>)	80	45
Brome, awnless (<i>bromus inermis</i>)	90	75
Clover, alsike (<i>trifolium hybridum</i>)	90	75
Buckwheat	96	90
Clover, crimson (<i>trifolium incarnatum</i>)	98	85
Clover, red (<i>trifolium pratense</i>)	92	80
Clover, white (<i>trifolium repens</i>)	90	75
Corn, field (<i>zea mays</i>)	99	94
Corn, sweet	99	75
Fescue, meadow (<i>fescuta pratensis</i>)	95	85
Flax (<i>linum usitatissimum</i>)	96	89
Millet, pearl, <i>penisetum typhoideum</i>)	99	65
Millet, common (<i>setaria italica</i>)	90	85
Millet, hog (<i>panicum miliaceum</i>)	90	85
Oats (<i>avena sativa</i>)	98	90
Oat grass, tall (<i>arrhena therum avenaceum</i>)	72	70
Orchard grass (<i>dactylis glomerata</i>)	70	70
Rape (<i>brassica rapa</i>)	99	90
Redtop (<i>agrostis alba</i>)	90	70
Rye (<i>secala cereale</i>)	98	90
Rye grass, perennial (<i>lolium perenne</i>)	96	90
Rye grass, Italian (<i>lolium italicum</i>)	95	80
Sorghum (<i>andropogon sorghum</i>)	96	80
Sorghum, for fodder	90	60
Timothy (<i>phleum pratense</i>)	96	85
Wheat (<i>triticum</i>)	98	90

[32 G. A., ch. 189, § 16.]

SEC. 5077-a22. **Enforcement.** It is hereby made the duty of the state food and dairy commissioner to enforce the provisions of this act. The inspectors, assistants and chemists appointed by the state food and dairy

commissioner shall perform the same duties and have the same authority under this act as are prescribed by chapter one hundred and sixty-six (166), laws of the thirty-first general assembly, and the state food and dairy commissioner may appoint, with the approval of the executive council, such analysts and chemists as may be necessary to carry out the provisions of this act. [32 G. A., ch. 189, § 17.]

SEC. 5077-a23. Penalty. Whoever sells, offers or exposes for sale any of the seeds specified in sections thirteen (13) and fourteen (14) of this act which are mixed, adulterated or misbranded, or any agricultural seeds which do not comply with sections ten (10), eleven (11) and twelve (12) of this act, or who shall counterfeit or use a counterfeit of any of the tags prescribed by this act; or who shall prevent or attempt to prevent any inspector in the discharge of his duty from collecting samples; or who shall violate any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction, shall be fined not more than one hundred dollars and costs of prosecution. Provided, that no one shall be convicted for violation of the provisions of section ten (10) of this act if he is able to show that the weed seeds named in section ten (10), are present in quantities not more than one in ten thousand, and that due diligence has been used to find and remove said seeds. [32 G. A., ch. 189, § 18.]

SEC. 5077-a24. Appropriation—fees paid into state treasury. There is hereby appropriated, for the purpose of enforcing the provisions of this act, a sum not exceeding three thousand (\$3000) dollars annually. Such expense shall be paid by warrant of the state auditor upon bills filed by the state food and dairy commissioner with the executive council and approved by them. All fees collected under the provisions of this act shall be paid into the state treasury. [32 G. A., ch. 189, § 19.]

SEC. 5077-a25. Label required. No binder twine shall be sold, exposed or offered for sale within this state, except the same bears upon each ball a stamp or label truly stating the name of the manufacturer or importer and the number of feet to the pound in such ball: Provided that a deficiency not exceeding five per cent. in length stated on the stamp or label shall not be a violation hereof. [32 G. A., ch. 190, § 1.]

SEC. 5077-a26. Penalty. Any person, firm or corporation who violates the provisions of section one hereof shall be guilty of a misdemeanor and shall be punished by a fine not exceeding one hundred dollars (\$100). [32 G. A., ch. 190, § 2.]

SEC. 5077-a27. What exempt—burden of proof. All binder twine purchased or received by wholesale or retail dealers of this state prior to September first, nineteen hundred and seven (1907), shall be exempt from the provisions of this act until November first nineteen hundred and eight; but the burden of proof that such twine was so purchased or received shall rest on said dealers. [32 G. A., ch. 190, § 3.]

CHAPTER 14.

OF NUISANCES AND ABATEMENT THEREOF.

SECTION 5078. What deemed nuisances.

Slaughtering animals and rendering tallow in a meat market located in the heart of a city from which offensive odors are emitted constitutes a nuisance which may be enjoined in equity. *Rhoades v. Cook*, 122-336.

Discharging refuse from glucose works into a running stream, so as to pollute and corrupt the water at a point lower down the stream and in another county from that where the glucose works are situated, will constitute a nuisance at the place where the water is thus polluted and corrupted. *State v. Glucose Sugar Refin. Co.*, 117-524.

The fouling of the waters of a stream constitutes a public offense, and a city thus fouling a running stream with its sewage may be liable for nuisance to an abutting owner injured thereby. *Vogt v. Grinnell*, 133-363.

SEC. 5081. Penalty—abatement.

Where a justice of the peace had authority by statute to impose a penalty for maintaining a dam without a fishway, and in a proceeding to impose such penalty it was decided that there was no obligation to maintain a fishway, and this decision

The obstruction of a private railway crossing constitutes a nuisance, and a tenant in possession may recover damages for such obstruction. *Morrison v. Chicago & N. W. R. Co.*, 117-587.

In a civil action held error to tell the jury that any of the matters enumerated in this section, specifying them, would constitute a nuisance, there being no evidence as to the existence of some of the matters so specified. *Hollenbeck v. Marion*, 116-69.

was not appealed from, held that it constituted an adjudication which would bar a subsequent proceeding against the owner to compel the construction of such fishway. *State v. Meek*, 112-338.

CHAPTER 15.

OF LIBEL.

SECTION 5086. Definition.

The statutory definition of criminal libel is applicable in determining what language is libelous *per se* in a civil action. *Morse v. Times-Republican Printing Co.*, 124-707.

The publication of any printed false statement with reference to another which has a tendency to degrade or injure him, to render him odious or bring him into public hatred or contempt or ridicule or to injure him in his business or trade or lead to his exclusion from social privileges, is libelous *per se*. *Ibid.*

The statutory definition of criminal libel is applicable in civil actions to recover damages for such libel. *Sheibley v. Ashton*, 130-195.

A publication of libelous matter by communicating it to the person defamed is sufficient to support a criminal prosecution for libel, but not a civil action for damages. *Yousling v. Dare*, 122-539.

It is not necessary that the publication charge the commission of a crime. Charges that defendant, who was a county superintendent, violated the rules of common decency in connection with the duties of his office, was irreligious, dishonest and contributed disgraceful matter for publication, held to be libelous. *State v. Keenan*, 111-286.

Libelous matter published in regard to a candidate for a public office is not privi-

leged unless the publication is for the sole purpose of advising the electors of his character with reference to his qualifications for such office. *Ibid.*

The questions of justification and privilege are for the jury. *Ibid.*

Where the libelous matter charges dishonesty in regard to payment of debts, the prosecuting witness may testify as to his family, means and occupation as bearing on his ability to pay his debts, and tending to rebut the claim of dishonesty in not doing so. *Ibid.*

Where the libelous matter charges lewdness, held that the prosecuting witness might introduce testimony to show that there was no general talk in the community as to his being a person of lewd character. *Ibid.*

Subsequent publications of a libel are admissible for the purpose of showing motive for the first publication. *State v. Heacock*, 106-191.

Evidence is not admissible in behalf of defendant in a prosecution for libel to show the reputation of the defendant for truth and veracity. *Ibid.*

This statutory provision as to publication of a libel concerning a deceased person does not make the publisher of a libel concerning an adult deceased civilly liable to the mother of the deceased for shame,

humiliation and mental anguish suffered by her on account thereof. *Bradt v. New Nonpareil Co.*, 108-449.

In a civil action it is not proper to state to the jury all these different forms under which a libel may be committed, without regard to evidence supporting each of them. *Wallace v. Homestead Co.*, 117-348.

It is essential that the author or publisher of the libelous article be distinctly designated, and also the party of whom it was written; but it is immaterial whether the expression "of and concerning" be employed if other words of like import are used. *State v. Lomack*, 130-79.

It is not essential that the falsity of the

libelous matter be alleged, and if alleged such allegation will be treated as surplusage. *Ibid.*

Proof of the falsity of the publication is not essential to show malice. This may be inferred from the character of the accusation and the absence of a public or reasonable ground for making it. *Ibid.*

Publication of a libelous article by the pastor of a church is not privileged because authorized by its official board. *Ibid.*

Unwarranted statements made with reference to the defendant by the person as to whom the libelous publication was made will constitute no justification. *Ibid.*

SEC. 5088. Truth given in evidence.

Evidence of good faith is admissible, not as a defense in itself, but only as an element going to make up the defense of qualified privilege, and where a newspaper publisher made libelous statements with reference to a candidate for the office of district judge, and through his newspaper published such statements outside of the judicial district within which

the person referred to was a candidate, held, that he had exceeded his privilege, and that it constituted no defense. *State v. Haskins*, 109-656.

Where publication of libelous matter is shielded by no privilege, the defendant cannot exonerate himself by showing a belief on his part in the truth of the charge. *Ibid.*

SEC. 5091. Jury determine law and fact.

The "direction of the court" referred to in this section is the instruction or charge of the court to the jury. The jury is not required to determine all legal questions which may arise on the trial as to the sufficiency of the evidence, etc., but only such matters as it may consider in deliberating upon a verdict. The jury has not merely the power but also the right to determine the law which should govern the verdict, even though a decision in conflict with the charge of the court may be reached. The opinion of the court must be regarded as advisory and not conclusive

as to the duty of the jury. *State v. Heacock*, 161-191.

It is not error to instruct that if the jury can say on their oaths that they know the law better than the court does they have the right to determine the law as contrary to the instructions of the court. *Ibid.*

Although the jurors are judges of the law in a prosecution for libel, there may be a reversal for errors of law on the part of the court in giving instructions. *State v. Lomack*, 130-79.

CHAPTER 15-A.

OF HABITUAL CRIMINALS.

SECTION 5091-a. Habitual criminal—punishment. Whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other state, or by the United States, or once in this state and once at least in any other state, or by the United States, for terms of not less than three years each shall, upon conviction of a felony committed in this state after the taking effect of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the penitentiary for a term of not less than twenty-five years, provided that no greater punishment is otherwise provided by statute, in which case the law creating the greater punishment shall govern, and further provided, that if the person so convicted shall show, to the satisfaction of the court before whom such con-

viction was had, that he was released from imprisonment, upon either of said sentences, upon a pardon granted for the reason that he was innocent, such conviction and sentence shall not be considered as such under this act. [29 G. A., ch. 152, § 1.]

SEC. 5091-b. Competent and prima facie evidence. On the trial of any cause, under the provisions of this act, a duly authenticated copy of the former judgment and commitment, from any court in which such judgment and commitment was had, for either of the said crimes formerly committed by the party indicted under this act, shall be competent and *prima facie* evidence of such former judgment and commitment, and may be used in evidence upon the trial of said cause. [29 G. A., ch. 152, § 2.]

TITLE XXV.

OF CRIMINAL PROCEDURE.

CHAPTER 1.

OF PUBLIC OFFENSES.

SECTION 5092. Divisions of.

To constitute an offense under the statute it is necessary that the act be one which falls within the definition of either a felony or misdemeanor. *State v. Dailey*, 127-652.

SEC. 5096. All offenses bailable except. All defendants are bailable both before and after conviction, by sufficient surety, except for offenses punishable with death under the laws of the state when the proof is evident or the presumption great. No defendant convicted of murder in the first degree, or of the crime of treason shall be admitted to bail. [17 G. A., ch. 103, § 1; C., '73, §§ 3845, 4107; R., 4188; C., '51, § 2565.] [29 G. A., ch. 153, § 1.]

[The paragraphs in second column of notes to this section in the code under the heading, "Knowledge of falsity," belong under code § 5296. The last sentence of the code section is in conflict with § 5442.]

CHAPTER 2.

OF MAGISTRATES AND PEACE OFFICERS AND THEIR POWERS.

SECTION 5099. Peace officers.

A deputy city marshal is not a peace officer. *Twinam v. Lucas County*, 104-231.

CHAPTER 5.

OF VAGRANTS.

SECTION 5119. Who deemed.

While disorderly persons are declared to be vagrants, vagrancy is not made punishable as a crime. And to charge one with being a disorderly person does not charge him with a crime. *State v. Dailey*, 127-652.

SEC. 5134. Who deemed tramp.

All vagrants are not tramps, within the definition of Code § 5137 with reference to limitation of fees of officers in tramp cases. *Des Moines v. Polk County*, 107-525.

CHAPTER 7.

OF LOCAL JURISDICTION OF PUBLIC OFFENSES.

SECTION 5154. District court.

In every criminal case jurisdiction must be shown, and where there is a dispute in the evidence as to the venue the jury must determine that dispute, the same as it does any other issue of fact. *State v. Spayde*, 110-726.

Where there is no direct instruction as to venue in connection with the commission

of the principal crime charged, but full instruction with reference thereto in connection with the charge as to included crimes, held that there was sufficient instruction as to venue in the absence of any request for instructions on the subject. *State v. Icenbice*, 126-16.

SEC. 5157. Offense partly in county.

In prosecutions for embezzlement, the venue can always be laid in the county where the conversion actually took place. If the charge is against an agent who has failed to account, the prosecution may be in the county where it was his duty to account under his contract. *State v. Hengen*, 106-711.

In a prosecution for embezzlement the venue is in the county where the employe was under obligation to account to his employer. *State v. Maxwell*, 113-369.

When a public offense is committed partly in one county and partly in another, the court first taking jurisdiction holds it to the end, and it is erroneous for the first court to dismiss the prosecution and hold

the prisoner to await a warrant from the other county. *State v. Spayde*, 110-726.

This provision is applicable to the crime of cheating by false pretenses committed by mailing a communication in one county to a person who is in another county, and who there receives and acts upon it. *State v. Gibson*, 132-53.

Where glucose works are maintained in one county, discharging refuse matter into the water of a river so as to render it corrupt and polluted, not only at the place of such discharge, but at a point lower down the river in another county, held that the court of either county had jurisdiction in a prosecution for nuisance. *State v. Glucose Sugar Refin. Co.*, 117-524.

SEC. 5158. Near boundary of two counties.

As to a crime committed in one county but within five hundred yards of the boundary line of an adjoining county, the court which first obtains jurisdiction of the person accused should retain it to the exclusion of the court of the other county. Therefore where a party was arrested upon a warrant issued by a justice of the peace of Iowa county upon the charge of having committed a public offense in Keokuk county but within five hundred yards of the line between such counties, and he was bound over to await the action of the grand jury of Iowa county, held, that he could not subsequently be indicted by the

grand jury of Keokuk county, for the same offense and might by *habeas corpus* be released from imprisonment under such indictment. *Carter v. Barlow*, 105-78.

Under an indictment charging an offense to have been committed in the county, evidence is admissible of its commission within five hundred yards of the boundary line in an adjoining county, but an indictment averring the commission of the offense in Iowa county or in Keokuk county, within five hundred yards of the south line of Iowa county, "as nearly as the grand jury know and can state," is fatally defective. *State v. Daily*, 113-362.

CHAPTER 8.

OF THE TIME OF COMMENCING CRIMINAL ACTIONS.

SECTION 5164. What within eighteen months.

In a prosecution for adultery the state may prove the offense if committed at any time within eighteen months before the finding of the indictment, and is not lim-

ited to the time specified in the indictment. *State v. Smith*, 108-440.

The court should instruct specifically as to the necessity of showing the commis-

sion of the offense within the statutory period of limitation prior to the finding of the indictment. *State v. Kunhi*, 119-461.

The statute of limitations in criminal

SEC. 5165. Three years.

The defendant cannot complain of the action of the court in limiting the evidence to criminal acts within two years of the

cases refers to the finding of the indictment and not to the beginning of the prosecution. *State v. Disbrow*, 130-19.

finding of the indictment where the statute fixes the period of limitation at three years. *State v. Wilson*, 124-264.

SEC. 5167. Defendant out of state.

To bring a case within the provisions of this section it is sufficient to allege in an indictment that during the necessary portion of the time which has expired after the commission of the offense as charged,

defendant was a non-resident of the state and living beyond its limits. During such time defendant could not be publicly resident within the state. *State v. Soper*, 118-1.

CHAPTER 9.

OF FUGITIVES FROM JUSTICE.

SECTION 5172. Requisition from another state.

One who is charged by preliminary information with a crime which is extraditable under a treaty with a foreign country may properly be brought back for trial under such charge and tried under an in-

dictment which, though in different terms, charges the same offense as that charged in the information. *State v. Rowe*, 104-323.

CHAPTER 11.

OF ARREST.

SECTION 5194. What constitutes.

As to liability of an officer for causing death in making an arrest, the law exacts no more than that, in what he does, he employs no more force than to him, acting as an ordinarily prudent person, would seem reasonable and apparently necessary under the circumstances for the purpose

of effecting the arrest, and if death results, even in making an arrest for a misdemeanor, if he has not employed a deadly weapon in a deadly manner, the result may be excusable as accidental. *State v. Phillips*, 119-652.

SEC. 5196. Peace officer—with and without warrant.

To justify an arrest without warrant for an offense not committed in the presence of the officer, it must appear that such offense has in fact been committed, and that the officer has reasonable ground to believe that the persons arrested have

committed it. If no public offense has in fact been committed, the action of the officer in making the arrest is without authority, and he is liable for false imprisonment. *Snyder v. Thompson*, 112 N. W. 239.

SEC. 5198. Oral order of magistrate.

An oral direction to make an arrest for an offense not committed in the presence of the magistrate making such order will not protect the officer for an arrest made

without warrant, where no crime has in fact been committed. *Snyder v. Thompson*, 112 N. W. 239.

SEC. 5199. Manner.

A failure of the officer making the arrest to inform the person to be arrested of the intention to arrest him, of the cause of arrest, and of his authority to make it, will render the officer liable for damages suffered by reason of such arrest. *Stewart v. Feeley*, 118-524.

An officer who makes an arrest without warrant, and does not take the person arrested before a magistrate and make complaint before him, becomes liable for the wrongful arrest. *Ibid.*

No particular form of words is prescribed by the statute for conveying to the person being arrested information as to the intention to arrest him and the offense with which he is charged. But if private persons, acting without a warrant,

even though in good faith, and with no intention of violating the law, so act as to impress the persons whom they are assaulting with the idea that unlawful violence instead of a lawful arrest is intended, the persons to be arrested will not be presumed to have understood that an arrest was intended. *State v. Phillips*, 118-660.

If an officer makes an arrest upon insufficient information, he acts at his peril and assumes the risk of being held in damages to an innocent person thus injured. But if a felony has in fact been committed, and the officer arrests without a warrant the party actually guilty thereof, without using undue violence, he commits no wrong. *Ibid.*

SEC. 5200. When resisted.

When a prisoner is under arrest the officer may use reasonable force for the purpose of preventing boisterous and disorderly conduct by him and the disturb-

ance of persons in the vicinity by violent and abusive language. *McNally v. Arnold*, 127-437.

And see note to § 5194.

CHAPTER 12.**OF PRELIMINARY EXAMINATIONS.****SECTION 5227. Minutes of examination.**

The minutes of the evidence of a witness on preliminary examination are not admissible on the trial of the case, either as original evidence or for the purpose of impeaching the testimony of the same witness given on the trial. *State v. Reinheimer*, 109-624.

As the statute does not require the reading to or signing by the witness of the minutes of his testimony on the preliminary examination, the minutes of such tes-

timony cannot be used on the trial for purposes of impeachment. *State v. Hoffman*, 112 N. W. 103.

The testimony of a witness before the magistrate may be shown for the purpose of impeachment, but it is not necessarily substantive proof of the commission of the crime. *State v. Carpenter*, 124-5.

The examination may be taken and certified by one who is not an official reporter. *State v. Turner*, 114-426.

SEC. 5228. Certificate.

Although the minutes of the preliminary examination are not certified as provided in this section, if the grand jury acts thereon and returns proper memorandum thereof with the indictment, defendant

cannot object to the examination of the witnesses whose testimony is thus returned and whose names are endorsed on the indictment. *State v. Turner*, 114-426.

SEC. 5230. Commitment.

The grand jury may return a verdict upon the minutes of the evidence taken before the magistrate, without calling or examining the witnesses, and the mere informality of the return of the minutes of the evidence taken by the magistrate

will not affect the validity of the indictment nor prevent the calling of the witnesses for the state who are examined before such magistrate. *State v. Johnson*, 133-38.

SEC. 5237. In case not triable on indictment.

The provision that on preliminary examination the defendant may be committed for trial before a justice of the peace for an offense not indictable is not

applicable to a hearing on *habeas corpus* in which the person in custody asks to be discharged for an indictable offense. *Myers v. Clearman*, 125-461.

CHAPTER 13.**OF IMPANELING THE GRAND JURY.**

SECTION 5240. Drawing. At the term of court at which grand jurors are required to appear, the names of the twelve persons constituting the panel of the grand jury shall, on the second day of each term of court, unless otherwise ordered by the court or judge, be placed by the clerk in a box, and after thoroughly mixing the same, he shall draw therefrom seven names, and the persons so drawn shall constitute the grand jury for that term. Should any of the persons so drawn be excused or fail to attend on said second day of the court, the clerk shall draw other names until the seven grand jurors are secured. If, for any reason, the number of grand jurors required is not secured from the twelve persons so constituting such panel, the clerk shall draw from the grand jury list, provided for by section three hundred and thirty-eight of the code such number of names as the court may direct, and from the persons whose names are so drawn the panel of the grand jury for the term shall be filled, and the court shall issue a venire to secure their attendance. [21 G. A., ch. 42, § 3; C., '73, §§ 4255-6; R., §§ 4608-9; C., '51, § 2881.] [27 G. A., ch. 114, § 1.]

Failure to fill the panel on an objection to an individual grand juror being sustained, cannot be interposed as a ground for setting aside the indictment. *State v. Wheeler*, 129-100.

The impaneling of a grand jury is not rendered unlawful by the fact that it takes place in a room in the courthouse other than that usually occupied by the court and to which, for lack of sufficient accommodations, some persons are not able to gain access. *State v. Richards*, 126-497.

When one grand jury has been regularly

and properly discharged and an emergency arises later in the term requiring the services of a grand jury, the court may, instead of re-calling the discharged grand jury, call in the entire panel and select a new grand jury. *State v. Disbrow*, 130-19.

It is no objection to the grand jury as finally organized that the court excused two of the persons examined from duty before seven names had been drawn of persons who should serve as the grand jury. *State v. Johnson*, 111 N. W. 827.

SEC. 5241. Challenge to panel—motion.

The objection that two members of the grand jury were residents of the same township will be waived if not urged before pleading to the indictment unless it appears that defendant did not know of the irregularity before pleading. *State v. Kouhns*, 103-720.

The objection of defendant that his case was re-submitted to a grand jury without giving him an opportunity to challenge

the grand jurors is one which cannot be raised by motion in arrest of judgment. It should be taken by plea in abatement, or motion to set aside or quash the indictment. *State v. Brown*, 128-24.

An objection to the panel which might have been raised by the defendant, bound over to appear, cannot be taken advantage of on motion in arrest of judgment. *State v. McPherson*, 126-77.

SEC. 5243. Grounds for challenge.

The fact that a grand juror has formed or expressed an unqualified opinion is not recognized as a sufficient ground for setting aside the indictment. *State v. Baughman*, 111-71.

Where the indictment is set aside and the charge is presented to a second grand jury, the defendant may properly challenge for cause any member of the second grand jury who was a member of and par-

ticipated in the finding of the indictment by the first grand jury. *State v. Bullard*, 127-168.

An opinion as to guilt which will disqualify a trial juror will also disqualify a grand juror. *Ibid.*

Discrepancy between the real name of

a juror called and his name as appearing on the jury list, if constituting a ground of challenge, should be ascertained on the preliminary examination, and cannot be afterwards made the subject of complaint. *State v. Matheson*, 130-440.

SEC. 5246. To individual juror. If a challenge to an individual grand juror be allowed, he shall not be present at or take any part in the consideration of the charge against the defendant. If a challenge to the panel is allowed, or if by reason of challenges to individual grand jurors being allowed, or if for any cause at any time, the grand jury is reduced to a less number than seven, a new grand jury shall be impaneled to inquire into the charge against the defendant in whose behalf the challenge to the panel has been allowed, or the panel of the jury so reduced below the number required by law shall be filled as the case may be. If a challenge is allowed to the panel the names of jurors required to impanel a new jury shall be drawn from the grand jury list. If such grand jury has been reduced to a less number than seven by reason of challenges to individual jurors being allowed, or from any other cause, the additional jurors required to fill the panel shall be summoned, first, from such of the twelve jurors originally summoned which were not drawn on the grand jury as first impaneled, or excused, and if they are exhausted, the additional number required shall be drawn from the grand jury list and the court shall, when necessary, issue a venire to secure the attendance of such additional jurors. The persons so summoned shall serve only in the case, or cases, in which, by reason of challenges, or other causes, the regular panel is set aside or is insufficient in number to find an indictment. [C., '73 § 4264; R., § 4617; C., '51, § 2888.] [27 G. A., ch. 114, § 2.]

Where a grand juror has been directed on account of challenge for cause not to take part in considering the case, it will be presumed, in the absence of a showing to the contrary, that he obeyed the direction, although as foreman he has signed the endorsement on the back of the indictment. *State v. Lightfoot*, 107-344.

Where a challenge to an individual grand juror has been allowed and he does not take part in the finding of the indictment, which is concurred in by a sufficient number of grand jurors, the objection that

the place of the juror challenged has not been filled will not be a ground for setting aside the indictment. *State v. Wheeler*, 129-100.

Error in failing to fill the place of one of the grand jurors excused on challenge of the defendant is waived by going to trial on the indictment, and cannot afterwards be raised by *habeas corpus* proceedings for release from the sentence imposed as the result of a trial on such indictment. *Busse v. Barr*, 132-463.

SEC. 5252. Discharge.

It is not error to re-convene the grand jury after dismissing it for the term on

the completion of the business pending. *State v. Phillips*, 119-652.

CHAPTER 14.

OF THE DUTIES OF THE GRAND JURY.

SECTION 5254. Evidence.

Failure of the grand jury to swear a witness who testifies will not authorize the setting aside of the indictment on motion,

under Code § 5319. *State v. Easton*, 113-516.

The receiving of incompetent evidence

is not a ground for setting aside the indictment when found. *State v. DeGroat*, 122-661.

The fact that a witness testifies before

the grand jury does not preclude the state from impeaching the testimony of such witness given on the trial in behalf of the defendant. *State v. Brown*, 128-24.

SEC. 5256. Clerk. The court may appoint as clerk of the grand jury a competent person who is not a member thereof. The following oath must be administered to him: "You solemnly swear that you will faithfully and impartially perform the duties of clerk of the grand jury, that you will not reveal to any one its proceedings or the testimony given before it, and will abstain from expressing any opinion upon any question before it, to or in the presence or hearing of the grand jury or any member thereof." Such clerk shall strictly abstain from expressing an opinion upon any question before the body, either to or in the presence or hearing of it or any member thereof, and shall not be present when any vote is being taken upon the finding of an indictment, and shall receive compensation at the rate of two dollars per day for time actually and necessarily employed in the performance of the duties prescribed in this chapter. Provided, however, that in all counties having a population of fifty thousand (50,000) or more inhabitants the court may, if it deems it necessary, appoint as clerk of the grand jury a competent shorthand reporter, and such clerk shall receive such compensation as may be fixed by the court at the time of the appointment, but said compensation shall not exceed four dollars (\$4.00) per day, for each day actually and necessarily employed in the performance of the duties herein defined. [25 G. A., ch. 71; 22 G. A., ch. 38; C., '73, § 4275; R., § 4629.] [30 G. A., ch. 138.]

The clerk may be called as a witness to state what was testified to by a witness before the grand jury with a view of im-

peaching the evidence of such witness given on the trial. *State v. McPherson*, 114-492.

SEC. 5258. Minutes to be kept. The clerk of the grand jury shall take and preserve minutes of the proceedings and of the evidence given before it, except the votes of its individual members on finding an indictment. When the evidence is taken, it shall be read over to and signed by the witness. When an indictment is found, all minutes and exhibits relating thereto shall be returned therewith and filed by the clerk of the court. [25 G. A., ch. 71; 22 G. A., ch. 38; C., '73, § 4275; R., § 4629.] [28 G. A., ch. 134, § 1.]

Minutes of the evidence of a witness, signed by him, may be introduced in a civil suit by the opposite party as declarations against interest. *Steele Smith Groc. Co. v. Pottthast*, 109-413.

Where the minutes are attached to the indictment and filed with it, that is sufficient, but they are no part of the indictment, and if not filed with the indictment should be separately filed. Failure, however, to mark the minutes which were duly taken and returned, as filed will not warrant the exclusion of the testimony of the witnesses whose testimony is so returned. *State v. Doss*, 110-713.

The requirement that exhibits be returned with the indictment and filed with the clerk was evidently intended to cure a defect in the statute theretofore exist-

ing. Failure to thus return exhibits is not made a ground for setting aside the indictment. This statutory provision is directory only. *State v. O'Malley*, 132-696.

The requirement that the minutes be signed by the witnesses respectively is also merely directory. *Ibid.*

The minutes of the testimony of a witness before the grand jury read over to and signed by him may be used on the trial of the case for the purpose of impeaching his testimony. *State v. Hoffman*, 112 N. W. 103.

It is not improper for the prosecuting attorney to make use of the minutes of the evidence taken before the grand jury for the purpose of framing questions as a basis for impeachment of a witness. *State v. Woodard*, 132-675.

SEC. 5260. Member as witness.

The provisions that a grand juror may be a witness under this section precludes the notion of an absolutely impartial trial

before the grand jury. *State v. Baughman*, 111-71.

SEC. 5268. Secrecy of proceedings—exception.

Possibly the cases in which the grand jury may be required to disclose testimony given before the grand jury, as authorized by the common law, are limited to the two specified in this section. But as there is no statutory provision with reference to testimony by the clerk appointed under Code § 5256, such clerk may testify as to proceedings before the grand jury when-

ever necessary in the administration of justice, as was the rule at common law. Therefore, held, that the clerk might be required to disclose the evidence of a witness before the grand jury for the purpose of impeaching the testimony of such witness on the trial. *State v. McPherson*, 114-492.

SEC. 5272. Minutes of preliminary examination—resubmission.

The statute does not require that the substance of the evidence of the witness be preserved, but only that a brief minute thereof be made. *State v. Wrand*, 108-73.

Defendant cannot object that the transcript of the evidence taken in the preliminary examination, instead of minutes thereof, is returned with the indictment, nor that the minutes of the preliminary examination, acted on by the grand jury, were not certified as required by Code § 5228. *State v. Turner*, 114-426.

Where the grand jury finds an indictment on the evidence taken before the committing magistrate, the informality of the return of such evidence by the magistrate will not vitiate the indictment, nor prevent the examination of the witnesses for the state who were examined before such magistrate. *State v. Johnson*, 133-38.

Where a case is resubmitted to the grand jury there is no final judgment from which the state may appeal. *State v. Evans*, 111-80.

CHAPTER 15.**OF THE FINDING AND PRESENTATION OF INDICTMENT.****SECTION 5274. How found—indorsement.**

The endorsement "a true bill" must be made by the foreman, although he may not have approved the indictment or be qualified to act as grand juror in the case. And it will not be presumed from his endorsement that he disregarded an injunction of the court not to take part in considering the case. *State v. Lightfoot*, 107-344.

Where five grand jurors have concurred in the finding of the indictment, the fact that a challenge has been sustained as to one member of the panel who has not taken part in the finding of the indictment, but whose place has not been filled, is not ground for setting aside. *State v. Wheeler*, 129-100.

Although one grand jury fails to act upon a charge submitted to it, the same charge may be taken up by a subsequent grand jury and an indictment found, although no order re-submitting the case to the second grand jury is made. *State v. Brown*, 128-24.

Whether the copy of the indictment delivered to the defendant is a correct copy is a matter to be determined by the trial court when any question is raised with reference thereto. *State v. Hatlestad*, 132-188.

Further as to furnishing defendant with a copy of the indictment, see Constitution, Art. I, § 10, and notes.

SEC. 5274-a. Repeal—how found—indorsement. That section five thousand two hundred and seventy-four (5274) of the code be, and the same is hereby repealed and the following enacted in lieu thereof:

An indictment cannot be found without the concurrence of five grand jurors. Every indictment must be indorsed "A true bill" and the indorsement signed by the foreman of the grand jury. [27 G. A., ch. 115, § 1.]

SEC. 5275. Private prosecutor.

Where an indictment is not endorsed as found at the instance of a private prosecutor, costs cannot be taxed to the person at whose instance the indictment was found. *State v. McAllister*, 107-641.

The basis of the court's right to tax the costs of a criminal prosecution to an individual as prosecuting witness is the action

of the grand jury in returning the fact that an indictment is found at the instance of such person. When the grand jury fails to make a finding and endorsement of that fact, as provided for by statute, the court lacks jurisdiction to tax the costs to a person as prosecutor. *McAllister v. Johnson*, 108-42.

SEC. 5276. Names of witnesses indorsed.

The evidence of a witness before the grand jury may be proven by persons who heard such evidence, the minutes of the grand jury not being competent evidence as to the fact. *State v. Porter*, 105-677.

The minutes of the evidence need not be attached to the indictment, but if so attached and filed, that is sufficient. *State v. Doss*, 110-713.

Where the minutes of the evidence before the committing magistrate are presented to the grand jury and acted upon by them the names of the witnesses examined before the magistrate and on whose testimony the indictment is found should be endorsed on the back thereof. *State v. Hasty*, 121-507.

It is not necessary to return with the indictment documentary evidence which was before the grand jury nor is it re-

quired that such evidence be noted on the indictment. *State v. Boomer*, 103-106.

Documents which are admissible in evidence as against the defendant may be so admitted although not referred to in the minutes of the evidence or returned with the indictment. *State v. Mulhern*, 130-46.

A document may be introduced in evidence without notice although it has never been before the grand jury. *State v. Harris*, 122-78.

Where defendant has been furnished with a copy of the indictment and of the minutes of the evidence, the fact that the prosecuting attorney has been allowed to take the indictment from the files and to keep it in his possession for a time will not constitute reversible error. *State v. McClain*, 130-73.

SEC. 5277. Minutes of evidence.

This section does not preclude the use of the minutes of the evidence before the grand jury for the purpose of establishing the declarations of a witness against his interest. *Steele Smith Groc. Co. v. Pott-hast*, 109-413.

Where a copy of the indictment is de-

livered to an attorney for the defendant, there is sufficient compliance with the constitutional requirement that defendant be furnished with a copy of the indictment against him. *State v. McClain*, 130-73.

CHAPTER 16.**OF THE INDICTMENT.****SECTION 5279. Defined.**

The minutes of evidence are not a part of the indictment, but are to be separately filed. If, however, it appears that such minutes were in fact returned with the

indictment and attached to it when filed by the clerk that is sufficient. *State v. Doss* 110-713.

SEC. 5280. What must contain.

The words employed by charging the crime are not material if the charge is in ordinary and concise language and sufficiently specific. *State v. Lomack*, 130-79.

Accusations of crime must be so plain, clear and unambiguous that the accused

may not be misled to his prejudice concerning the material facts relied upon as constituting such alleged offense. *State v. McKinney*, 130-370.

The purpose of these statutory provisions as to the sufficiency of indictments is

to dispense with those technical rules of the common law which sometimes prevented the disposition of cases upon their merits, wherever the same can be done without prejudice to the rights of the parties. *State v. Fisher*, 106-658.

Therefore, held, that in an indictment for larceny of money, it was sufficient to describe the property as "twenty-two dollars and fifty cents in lawful money of the United States of the value of twenty-two dollars and fifty cents. *Ibid.*

Bank notes are commonly regarded as lawful money. Under an indictment charging embezzlement of certain money, proof of the embezzlement of bank notes of a corresponding amount is admissible. *State v. Finnegean*, 127-287.

An indictment under the statute defining the offense of procuring an abortion should negative the exception found in the statute of cases where miscarriage is necessary to save the woman's life. *State v. Aiken*, 109-643.

SEC. 5281. Form.

The statute does not require the signature of the county attorney to an indictment, and the fact that it is signed by an

SEC. 5282. Direct and certain.

The offense must be charged with such certainty and in such manner as to enable a person of common understanding to know what is intended. If the indictment is so broad and general in its terms that the accused may be put upon trial for any one of two or more distinct and independent criminal acts, it is not in compliance with the statute. *State v. McKinney*, 130-370.

Where the statute makes an act criminal when done maliciously, it is not sufficient to charge that it was done unlawfully and wilfully. *State v. Lightfoot*, 107-344.

Where the offense involves the element of knowledge, it is not sufficient that the act is charged to have been unlawfully

SEC. 5284. Must charge but one offense.

Duplicity: It is an error to allege more than one transaction in an indictment charging an offense which is not a continuing offense. *State v. Ashpole*, 127-680.

Where several acts are enumerated by the statute disjunctively as constituting an offense, they may be conjunctively alleged without duplicity. *State v. Wick*, 130-31.

Where in the second count of an indictment for conspiracy it was recited

If the facts stated do not constitute a crime, the indictment cannot be aided by intendment, or its omissions, supplied by construction. *State v. Jamison*, 110-337.

An indictment is sufficient if drawn in such manner as to enable a person of common understanding to know what is meant. *State v. Pickney*, 111-34.

In charging assault with intent to commit rape it is not necessary to specify the method or means of the assault. *State v. Turner*, 114-426.

Much of what was required in an indictment at common law is dispensed with under our statute. It is now only necessary to set out the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is meant, and, held, that in an indictment for assault with intent to commit murder it is not necessary to state the instrument or means used to effectuate the purpose. *State v. Shunka*, 116-206.

assistant to the county attorney does not render it invalid. *State v. Mathews*, 133-398.

or wilfully done. *State v. Perry*, 109-353.

Where in two counts the offense of keeping a liquor nuisance was so charged as that there might be a conviction under one count which could not be sustained under the other, held that the indictment was not sufficiently direct and certain. *State v. Schuler*, 109-111.

In an indictment for having possession of burglar's tools the defendant should be advised by the averments as to what particular tools he is charged with having in possession. *State v. Erdlen*, 127-620.

The facts constituting the crime of embezzlement must be so stated as to distinguish it from the crime of larceny. *State v. Finnegean*, 127-287.

that "the grand jury . . . with no intent or purpose of charging any offense or crime other than the offense and crime charged in count one above, but solely in order to meet the testimony, further alleges," etc., held that this recital sufficiently showed that the second count was simply a different form of charging the same conspiracy charged in the first count. *State v. Caine*, 111 N. W. 443.

The offense may be charged in different counts, differing from each other for the

purpose of meeting the evidence in the case. Thus it is not improper to charge in one count rape committed upon a child under the age of consent, and in the second count rape upon the same person, alleged to be naturally imbecile. *State v. Trusty*, 122-82.

An indictment for rape which also charges an assault as a part of that crime is not objectionable for duplicity. *State v. Peterson*, 110-647.

It does not constitute duplicity in an indictment to charge the defendant with committing a criminal act, and also with conniving at and encouraging such act. *State v. Easton*, 113-516.

In an indictment for obtaining a signature by false pretenses, different and even inconsistent means of accomplishing the object may be charged in the indictment without rendering it objectionable on the ground of duplicity. *State v. Tripp*, 113-698.

Where an indictment for using false weights under Code § 5044, which does not describe a continuing offense, alleged the use of such false weights in weighing divers cattle and hogs with intent to defraud divers citizens, held, that the in-

SEC. 5285. Time.

The fact that the evidence points to the commission of the crime at a particular date does not render an instruction erroneous, which tells the jury that the crime need not be proven to have been committed on the day alleged and that it is sufficient if it is proven to have been committed within the statutory period of limitations. *State v. Hayes*, 105-82.

If time is necessary to be considered in determining the jurisdiction of the court, it is a material ingredient of the offense, and where the jurisdiction of the court to punish the offense charged is acquired by

SEC. 5286. Name of person injured.

An erroneous allegation as to the name of the person injured will not vitiate the indictment. So, held, where the indictment charged larceny of property from a corporation but did not allege the fact of its incorporation. *State v. Fogerty*, 105-32.

Erroneously naming the person injured will not be a ground for striking out evidence which relates to the real person intended where the defendant is in no way prejudiced by the variance. *State v. Carnagy*, 106-483.

If the indictment charges an offense, and, from the facts and evidence, the court is satisfied that defendant was not misled, the giving of an unauthorized name to the person against whom the crime was committed is immaterial, and facts outside the indictment may be considered in

dictment was bad for duplicity. *State v. Jameson*, 117-312.

Election: Where one offense is charged, and the evidence tends to show more than one to have been committed within the statutory period of limitation, the accused has the right to know upon which the prosecution will rely for conviction. *State v. King*, 117-484.

In a prosecution for adultery, where the evidence tends to show continuous adulterous relation, the state should not be required to select one particular occasion and confine the evidence to that occasion. *State v. Higgins*, 121-19.

The crimes of embezzlement and larceny are essentially different in character, and cannot be charged in separate counts of an indictment. If so charged the state should be required upon motion to elect upon which count it will proceed. *State v. Finnegean*, 127-287.

Where the offense is not a continuing one, and the evidence introduced tends to show distinct transactions, the defendant has the right to require an election on the part of the state as to which transaction is relied upon. *State v. Jamison*, 110-337.

a statute, the time of the criminal act charged in the indictment must be so alleged as to show that it was committed after the statute took effect. *State v. Dale*, 110-215.

In a prosecution for adultery the state may prove the act charged as committed at any time within the statutory period of limitation. *State v. Smith*, 108-440.

In a prosecution for perjury it is not necessary to prove the specific time alleged in the indictment. *State v. John*, 124-230.

determining whether the defendant understood the specific charge intended to be made. So, held, where in an indictment for murder of an unnamed bastard the grand jury without any authority designated the bastard by a name compounded of the names of its parents. *State v. Cunningham*, 111-233.

The erroneous statement of the name of the owner of the premises where burglary is committed will not be fatal. *State v. Wrand*, 108-73.

The fact that an indictment for larceny lays the ownership of the property stolen jointly in the owners thereof, whereas it is owned by them in severalty, will not be a fatal defect. *State v. Congrove*, 109-66.

And see notes to § 5289.

SEC. 5288. Words of statute.

It is sufficient to follow the language of the statute where the statute so far individuates the offense that the offender has proper notice from the statutory terms of the particular crime charged. *State v. Porter*, 105-677; *State v. Turner*, 113-426; *State v. Kendig*, 133-164; *State v. Cummings*, 128-522.

An indictment which charges an offense in the language of the statute is sufficient in all cases where the statutory definition states the material facts constituting the unlawful act. *Sate v. Martin*, 125-715.

An indictment is sufficient if it charges the offense in the language of the statute when that shows the material facts which constitute the offense. So, held, in regard to an indictment charging indecent exposure of the person. *State v. Banguess*, 106-107.

An indictment following the statutory language in describing the offense is sufficient where the language used concretely points out with particularity the offense intended to be charged, and no further description is needed to advise the accused of the precise nature and character of the crime for the commission of which he is called to answer. But, held, that in an indictment for having in possession burglar's tools a particular description of the tools was essential. *State v. Erdlen*, 127-620.

If an act of a particular description is made criminal nothing further need be alleged in the indictment than the doing

of the specific act. Under such circumstances, it is sufficient to follow the language of the statutes in describing the act charged. *State v. Hoffman*, 112 N. W. 103.

While an indictment following the language of the statute may not be sufficient, in some cases, for the reason that the statute does not set forth all the elements necessary to constitute the offense, yet, where the acts constituting the offense are stated, and every element of the crime appears, the indictment will be sufficient. *State v. Dankwardt*, 107-704.

In an indictment for incest it is sufficient to use the language of the statute and it is not necessary to allege knowledge of the relationship. *State v. Rennick*, 127-294.

While it is generally sufficient to charge an offense in the language of the statute this is not the rule when the language does not necessarily charge the offense named. *State v. Wasson*, 126-320.

The general rule as to exceptions and provisos is that where the exception or proviso forms a portion of the description of the offense so that the ingredients thereof cannot be accurately and definitely stated, if the exception or proviso is omitted, then it is necessary that such exception or proviso be negated. But where the exception is separable from the description and is not an ingredient thereof it need not be noticed in the accusation, but is a matter of defense. *State v. Kendig*, 133-164.

SEC. 5289. What indictment must show.

In general: The general tendency is to disregard objections which go to matters of mere form and not a substantial right. *State v. Martin*, 125-715.

An indictment is properly to be construed in the sense in which the party framing it must be understood to have used it, if he intended his accusation to be consistent. *State v. Caine*, 111 N. W. 443.

It is unnecessary to charge an act as "felonious" if it is made a felony by statute; but the unnecessary use of such word does not affect the sufficiency of the indictment. It is not to be regarded as descriptive of the act in such sense that it must be proved as alleged. *State v. Judd*, 132-296.

An indictment cannot be aided by indictment. The essential facts must be set out and averred. *State v. Ashpole*, 127-680.

An indictment under a statute may be sufficient although it does not follow the exact language of the statute in describing the offense, if the words used are equivalent to those employed in the stat-

ute. *State v. Dickerhoff*, 127-404.

Section applied. *State v. Wood*, 112-411; *State v. Ryan*, 113-536.

As to following the language of the statute in charging an offense, see notes to Code § 5288 in this Supplement.

Particularity: It is not improper to charge as assault as having been made with a deadly weapon, the particular description of which is to the grand jury unknown, although the weapon with which it is claimed the crime was committed was before the grand jury and also introduced in evidence on the trial. *State v. Sigler*, 114-408.

A description of money stolen as "one hundred and ten dollars in current money of the United States, and of the value of one hundred and ten dollars, a more particular description of which is to this grand jury unknown," held sufficient. *State v. Williams*, 118-494; *State v. Connor*, 118-490.

In charging sodomy it is not necessary to set out the indecent details. *State v. McGruder*, 125-741.

The use of Roman numerals and Arabic figures and the character "&" for "and" do not affect the validity of the indictment. *State v. McPherson*, 114-492.

The use in an indictment of the term "planing mill," in charging the offense of breaking and entering a building sufficiently implies that a building was broken and entered. *State v. Haney*, 110-26.

Where the charge is seduction, the allegation that the person seduced was "an unmarried person" sufficiently charges the seduction of an unmarried woman. *State v. Olson*, 108-667.

In a particular case held that the allegation of attempt to improperly influence a juror was sufficiently charged without pleading the evidence showing that there was such improper attempt, where the means used was stated. *State v. Dankwardt*, 107-704.

Venue: Although it is sufficient in an indictment for keeping a liquor nuisance to charge the keeping of such nuisance in the county of the prosecution, yet, if the place is more particularly charged, it must be proven as charged. *State v. Schuler*, 109-111.

Where the state relies on evidence that the offense was committed within five hundred yards of the boundary line of the county, it may be averred generally that it was committed within the county, but an indictment containing the allegation that the crime was committed in "Iowa county or in Keokuk county, within five hundred yards of the south line of Iowa county, as nearly as the grand jury know and can state," is defective. *State v. Daily*, 113-362.

SEC. 5290. Immaterial matters.

In general: The indictment should not be held insufficient for any defective or imperfect allegation which does not deprive the defendant of a substantial right. *State v. Martin*, 125-715.

The indictment may contain allegations of different acts as together constituting one offense, without being open to the charge of duplicity. *State v. Wilhite*, 132-226.

An indictment is not sufficient in which an essential fact is alleged by mere inference or intendment. *State v. Gallagher*, 123-378.

Time: While it is not essential that the precise date of the offense be indicated in the indictment, it is essential that the evidence show affirmatively that the crime was committed within the statutory period for commencing prosecutions for the offense. *State v. Kunhi*, 119-461.

In a prosecution for perjury, where the charge is not based on the record or other

Time: The allegation as to time need be no more specific than the proof. An allegation that the act was committed on or about a named date is sufficient. *State v. John*, 124-230.

Degree of Crime: It is not necessary in an indictment for murder to specify the degree. The court will look to the facts charged to determine whether the offense, if committed as charged, was murder in the first or murder in the second degree. *State v. Phillips*, 118-660.

Name of person injured: Where the charge in an indictment involves injury to the person, an erroneous allegation as to the name of the person is immaterial. Therefore held that in a prosecution for seduction, the naming of the woman seduced as "Nellie _____," whereas the evidence showed her name to be "Mary Ellen _____," was immaterial. *State v. Burns*, 119-663.

In a prosecution for robbery the ownership of the property taken must be alleged and proven as in cases of larceny. *State v. Wasson*, 126-320.

In a prosecution for obtaining property by false pretenses the name of the owner should be alleged. *State v. Jackson*, 128-543; 105 N. W. 51.

Where a business is conducted by a partnership under the name not purporting to be that of the partnership, such as "The Golden Eagle Clothing Store," an indictment for the larceny of goods described as belonging to the store may be supported by proof of ownership in the partnership conducting such store. *State v. Bartlett*, 128-518.

And see notes to § 5286.

writing under oath, and the statements asserted to be false might have been made on either the date alleged or that proven, and would constitute perjury if made at either time, variance as to the date between the allegations of the indictment and the evidence is immaterial. *State v. Perry*, 117-463.

Place: An indictment for maintaining a liquor nuisance "at said building or place in said county" held sufficiently definite. *State v. Dixon*, 104-741.

An indictment is not bad for uncertainty which, in charging the maintenance of a nuisance, alleges that defendant unlawfully established, kept, etc., and continued "a certain building or place," etc., for the purpose, etc. Allegation of place is not essential in such an indictment. *State v. Dixon*, 104-741.

The words "then and there" in an indictment held to refer back to the place where the act was done as charged in the

venue, and not to the place named in connection with the description of the property. *State v. Tripp*, 113-698.

Ownership: An erroneous allegation with reference to ownership is not fatal under statutory provisions if the crime is described in other respects with sufficient certainty. *State v. Watson*, 102-651.

Variance as to name of the owner of property in a prosecution for burglary will not be fatal. *State v. Wrاند*, 108-73.

Description: Under an indictment for fraudulent banking charging the defendant with knowingly and unlawfully receiving on deposit the sum of two hundred dollars in lawful money of the United States a particular description of which was to the grand jurors unknown, held, that it was unnecessary to prove that the money received was any particular kind of money and that the words "of the United States" might be rejected as surplusage. It might be that if some particular kind of money were specifically described such as gold coin or treasury notes of a particular denomination it

would be necessary to prove the description as alleged. *State v. Boomer*, 103-106.

A departure from the language of the statute in describing the offense is immaterial if it does not tend to prejudice the substantial rights of the defendant upon the merits. *State v. Dickerhoff*, 127-404.

Surplusage: An indictment charging the publication of an alleged libel for the purpose of defaming, etc., a person named "and others", and that such publication tended to provoke the said person named "and others" to wrath, etc., is not objectionable, the words "and others" being surplusage. *State v. Heacock*, 106-191.

The word "Jr." added to the name of a person as given in the indictment adds nothing thereto, and should be regarded as surplusage. *State v. Dankwardt*, 107-704.

Words which are not descriptive of the identity of what is legally essential to the charge in the indictment may be rejected as surplusage. *State v. Judd*, 132-296.

SEC. 5296. Indictment for perjury.

The statutory provision as to what shall be sufficient indictment for perjury is to be given effect as a remedial statute, relieving the prosecution from undue technical requirements which may have been recognized in the English courts as to the allegations in such prosecutions, and it is unnecessary to specifically set out the authority of the court or persons who administered the oath. The allegation that defendant appeared as a witness on the trial at a criminal prosecution in the district court of Henry county "and was then and there duly sworn before the duly authorized clerk of said court" held sufficient. *State v. Harter*, 131-199.

The court is presumed to have authority to administer oaths to witnesses, and the act of the clerk in administering such an oath is presumed to have been taken

under the authority of the court. *Ibid.*

It is unnecessary to allege the name of the particular person who was the clerk of the court at the time the oath was administered. *Ibid.*

The indictment must negative that which is false in the alleged testimony of the defendant contradicting the matter alleged to have been falsely sworn to in express and specific terms. *State v. Gallagher*, 123-378.

The truth of the matter alleged to have been sworn to is sufficiently negated by the allegation, "Whereas in truth and in fact as defendant well knew, he did not, etc." *State v. Brown*, 128-24.

[The notes in the Code to § 5096 under the heading "Knowledge of falsity" belong under this section.]

SEC. 5299. Principal and accessory.

One may be guilty as accessory before the fact of a crime which he is not capable of committing. By aiding and abetting in the commission of a crime he renders himself principal therein under the statutory provisions. So held as to a defendant who, though not a public officer, was guilty of aiding and abetting the crime of embezzlement committed by a public officer. *State v. Rowe*, 104-323.

All persons concerned in the commission of the offense, including so-called conspirators or confederates, are guilty as principals and may be charged and held

as such. A prosecution in which persons aiding and abetting are sought to be held as co-conspirators is not a prosecution for conspiracy but for the crime committed. *State v. Smith*, 106-701.

The words "aid and abet in its commission" as used in this section manifestly have reference to some work or act of encouragement or assistance in the commission of the offense, and not to something done after the crime is committed. An accessory after the fact is not an aider and abettor. *State v. Jones*, 115-113.

One may be guilty as accessory be-

fore the fact to the crime of manslaughter. *State v. Gray*, 116-231.

The fact of defendant's presence may alone, under some circumstances, show his guilt as aiding and abetting. *State v. Dunn*, 116-219.

Under the evidence in a particular case, held that defendant was properly convicted of manslaughter, committed by aiding and abetting one who made the deadly assault. *State v. Cobby*, 128-114.

One who is present assisting or aiding and abetting may be convicted as principal. *State v. Mahoney*, 122-168.

Under an indictment charging defendant with having committed the overt criminal act, he may be convicted upon proof that his only connection therewith was that of an aider or abettor. *State v. Berger*, 121-581.

One who is present aiding and abetting is more than an accessory before the fact. He is a principal. *Ibid.*

It is not sufficient in charging the commission of a crime by aiding and abetting to allege that the defendant had knowledge of the fact that the crime was in contemplation by the party or parties who actually committed it. Something more than knowledge that the crime is contemplated or mere personal presence at the time and place where the crime is committed must be shown in order to charge one with complicity in the offense. *State v. Bartlett*, 128-518.

Where one is charged with an offense which is accessorial in its nature it is not necessary to state the method of aiding and abetting, but it is sufficient to charge him as principal by procuring the act to be done. *State v. Porter*, 105-677.

One who has aided and abetted in the commission of a crime may be charged as principal without specifically referring to the method of his connection with the crime. *State v. Denhardt*, 129-135.

SEC. 5300. Accessory after the fact.

An accessory after the fact to the commission of a crime, for instance one who has received stolen property from the thief with knowledge of the theft, is not

The guilt of one who aids or abets the commission of a crime must be determined upon the facts which show the part he took in committing it, and does not depend on the guilt of others with whom he co-operated, unless the crime is the result of a conspiracy. *State v. Phillips*, 118-660.

But where the crime is the result of conspiracy, all who participate in the conspiracy are liable for the act, although not participating in the act itself. *State v. Pasnau*, 118-501.

Unless a crime is committed in pursuance of a previous conspiracy, the actual participation of the defendant in the wrongful act is the measure of his criminal liability, and evidence of intoxication of the defendant at the time the conspiracy is claimed to have been entered into may be shown as tending to exonerate the defendant from liability for a wrongful act in which he did not actually participate. *Ibid.*

In a prosecution for a crime in which it is sought to show that the defendant was guilty as an aider or abettor, or as an accessory before the fact, proof of the actual commission of the crime by another and of his acts and declarations tending to show his guilt is admissible. *State v. Brown*, 130-57.

It is immaterial whether the defendant in such case is shown to have had actual knowledge of the commission of the crime by such third person, where it appears that the defendant instigated the crime or aided, abetted or assisted in the purpose to commit it, having a knowledge at the time of such purpose. *Ibid.*

The connection of the defendant with the commission of the crime in such a case may be established by circumstantial evidence. *Ibid.*

an accomplice, under Code § 5480, requiring corroboration of the evidence of an accomplice to sustain a conviction. *State v. Jones*, 115-113.

SEC. 5302. Indictment for embezzlement.

Under a charge in an indictment for embezzlement that defendant did receive different amounts of money, said sums amounting to a total of a certain number of dollars named, the particular descrip-

tion of said money being to the grand jury unknown, held, that the description as to the money was sufficient without other allegation of its value. *State v. Alverson*, 105-152.

CHAPTER 17.

OF PROCESS UPON AN INDICTMENT.

SECTION 5309. Process against corporation.

Where defendant was charged as a corporation with the crime of maintaining a nuisance, and appeared and pleaded as a corporation, held that the prosecution

did not have the burden of proving the fact of legal incorporation of the defendant. *State v. Glucose Sugar Refin. Co.*, 117-524.

CHAPTER 18.

OF ARRAIGNMENT OF THE DEFENDANT.

SECTION 5313. Right to counsel.

The right of defendant to the assistance of counsel is subject to statutory regulation. The power of the court to appoint may be exercised not only when the defendant is arraigned, but at a subsequent stage of the trial. And where only

one attorney has been assigned or employed, it may be found essential subsequently to designate another to assist the accused. *Korf v. Jasper County*, 132-682.

SEC. 5314. Fee for attorney defending.

The statute does not authorize the payment by the county of compensation to defendant's attorney for services rendered on appeal. *State v. Young*, 104-730.

Where one attorney is appointed to defend two persons, jointly indicted, he is entitled to the statutory fee for the defense of each. *Clark v. Osceola County*, 107-502.

An attorney selected in the lower court may follow the case to the supreme court, and is entitled to compensation if he has not received, and is not to receive it directly or indirectly from another source. But the claim for services rendered in the supreme court should be presented to the board of supervisors for allowance as other claims against the county. *State v. Behrens*, 109-58.

The statute fixes the compensation for counsel appointed to represent a defendant, and where the defendant is put on trial for manslaughter, the fee is that provided in case of homicide although the punishment which may be imposed cannot extend to life imprisonment. *Tomlinson v. Monroe County*, 112 N. W. 100.

There is no power in the district court to appoint an attorney to prosecute an appeal, but the attorney appointed in the lower court may prosecute an appeal and be allowed compensation therefor. *State v. Cater*, 109-69.

With reference to compensation to be paid to an attorney appointed to defend a criminal, it is not necessary that the county shall have been a party to the proceeding in which the appointment is made; and no appeal on the part of the county from the action of the court in making such appointment is provided for. *Korf v. Jasper County*, 132-682.

Where the counsel appointed for the defendant follow the case to the supreme court and secure a reversal of the conviction of their client, they may continue to represent him on a second trial without a new appointment, and may recover compensation from the county for such services. *Tomlinson v. Monroe County*, 112 N. W. 100.

CHAPTER 19.

OF SETTING ASIDE THE INDICTMENT.

SECTION 5319. Grounds.

The grounds specified on which a motion may be based to set aside an indict-

ment are exclusive of others not named, and therefore the fact that a member of

the grand jury finding the indictment had previously formed and expressed an unqualified opinion of defendant's guilt will not require the setting aside of the indictment. *State v. Baughman*, 111-71.

On a motion to set aside an indictment, the court will not inquire into the sufficiency of the evidence before the grand jury, nor will the indictment be set aside because it may be made to appear that an incompetent witness was called and gave testimony during the course of the investigation. Therefore held that the fact that defendant was called as a witness by the grand jury in the investigation of the charge against him was not a ground for setting aside the indictment. *State v. Shepherd*, 129-705.

The introduction of incompetent evidence before the grand jury is not a ground for setting aside the indictment. The grounds specified by the statute are exclusive of all others. The court cannot inquire into the sufficiency of the proof before the grand jury or the mode of examining the witnesses to invalidate the indictment. *State v. De Groate*, 122-661.

While the law requires grand jurors to be electors of the county, it does not require that a person must have voted or that his name be found upon the poll books, to make him eligible. Therefore a showing that the sheriff was unable to find a person of the name in the ward or city from which he was drawn, or that the county auditor could find no such name on the poll books does not show that the juror was not properly selected. *State v. Harris*, 122-78.

The indictment should be set aside on motion unless the names of the witnesses examined before the committing magistrate the minutes of whose testimony have been presented to and acted upon by the grand jury are endorsed on the indictment. *State v. Hasty*, 121-507.

But failure to endorse names of witnesses will not be a ground for setting aside, unless it appears that the evidence of the witnesses whose names are not en-

dorsed was material and this fact must be made to affirmatively appear. *Ibid.*

Failure to return exhibits introduced in evidence before the grand jury with the minutes of the evidence as required by Code § 5258 is not made a ground of setting aside the indictment. Such provision as well as that requiring the minutes of the evidence of the witnesses to be signed by them is directory only. *State v. O'Malley*, 132-696.

An indictment will not be set aside on motion on the ground that a witness testifying before the grand jury was not sworn. *State v. Easton*, 113-516.

The fact that the wife testifies before the grand jury with reference to a charge against her husband is not ground for setting aside the indictment. *State v. Brown*, 128-24.

It is not a statutory ground for setting aside an indictment that the defendant was not given an opportunity to challenge jurors. *State v. Phillips*, 119-652.

Where father and daughter were both witnesses before a grand jury on the investigation of a public charge, and the father remained with the daughter in the grand jury room, while she was being sworn, on account of her nervousness, held that there was not such improper conduct as to require the setting aside of the indictment. *State v. Wood*, 112-484.

It is not sufficient ground for setting aside an indictment that an assistant to the county attorney appointed by the court has been present with the grand jury during their investigation of the charge. *State v. Tyler*, 122-125.

If the county attorney is disqualified from acting in the prosecution, he should not appear before the grand jury. And the fact that he does so is a ground for setting aside the indictment. *State v. Rocker*, 130-239.

A motion to set aside the indictment cannot be entertained after the evidence for the prosecution has been introduced. *State v. Tyler*, 122-125.

SEC. 5321. Objections to selection of grand jury.

The provision denying to one who has been held to answer before the grand jury the right to have the indictment set aside on the ground that the grand jury was not properly selected is not unconstitutional. Failure to object at the proper time constitutes a waiver of any objection which might have been made. *Busse v Barr*, 132-463.

It is intended that as against a defendant held to answer before the finding of the indictment, all matters having relation to the organization of the grand jury

should be foreclosed, and the failure of the court to fill the place of an individual juror as to whom a challenge has been sustained, and who does not take part in the proceedings, cannot thus be raised. *State v. Wheeler*, 129-100.

A defendant who has had opportunity of challenging the panel of the grand jury cannot take advantage of any irregularity which might have been raised by subsequently moving in arrest of judgment. *State v. McPherson*, 126-77.

The inability of a grand juror to read

and write the English language may be urged by motion to set aside the indictment on behalf of a defendant not held to answer at the time the indictment was found. *State v. Greenland*, 125-141.

Such objection may be urged in a motion for new trial where the fact does not come to the knowledge of defendant or his counsel prior to the rendition of the verdict. *Ibid.*

The court may in its discretion after the conclusion of the term at which the indictment was found, refuse to continue the case for the purpose of having the grand juror brought in for examination to determine his ability to read and write. *Ibid.*

SEC. 5324. If granted.

Where a case is resubmitted to the grand jury there is no final judgment from which the state may appeal. *State v. Evans*, 111-80.

It is competent for the trial court to order the resubmission of a criminal charge to the grand jury where the indictment is clearly defective. *State v. Hanlin*, 110 N. W. 162.

SEC. 5325. If resubmitted.

When an indictment is set aside and the case resubmitted to another grand jury whether by the direction of the court or otherwise, any member of the grand jury,

The objection that a defendant, whose case was resubmitted to another grand jury than the one to which it was at first submitted, did not have opportunity to challenge the grand jurors who returned the indictment on which he was tried, must be raised by a motion to set aside the indictment, or by plea in abatement, and is not available on motion in arrest of judgment. *State v. Brown*, 128-24.

Objections to an individual grand juror that he had formed or expressed an unqualified opinion is not available by way of motion to set aside the indictment. *State v. Baughman*, 111-71.

If the accused resists a motion by the prosecuting attorney to set aside the indictment because of its indefiniteness, and to resubmit the case to the grand jury for further action, and is sustained by the court in such resistance, he cannot rely on the insufficiency of the indictment raised by such motion as a ground for reversal on appeal. *Ibid.*

SEC. 5326. Order to set aside, no bar.

This section relates to the setting aside of indictments on motion and not to indict-

who was also a member of the first and participated in the finding of the indictment, is subject to challenge for cause. *State v. Bullard*, 127-168.

ments held to be insufficient on demurrer. *State v. Fields*, 106-406.

CHAPTER 20.

OF PLEADING BY THE DEFENDANT.

SECTION 5328. Grounds of demurrer.

The objection that the indictment does not charge a crime should be raised by demurrer and not by motion to set aside the indictment. *State v. Kimble*, 104-19.

The court may on its own motion without a request from either party discharge the jury if it appears that the indictment is so defective that a conviction thereunder could not be sustained and the de-

fendant should thereupon be discharged from custody unless the court believes that a new indictment could be framed on which the defendant could be convicted. *Ibid.*

An objection to an indictment for duplicity cannot be raised for the first time on appeal. *State v. Brown*, 109 N. W. 1011.

SEC. 5331. When heard.

When a demurrer to an indictment is sustained on the ground that the indictment contains matter which is a legal de-

fense or a bar to the indictment, the judgment is final; and, held, that although the order made on the ruling was not in the

form of a judgment but in terms discharged the defendant and released his bond, it was in legal effect a final judgment. *State v. Fields*, 106-406.

SEC. 5334. Entry of plea—form—guilty.

Where the indictment contains two counts of such character that they cover two distinct offenses, and defendant pleads

Where a demurrer is sustained and the case is resubmitted there is no final judgment from which the state can appeal. *State v. Evans*, 111-80.

"guilty of the offense charged," a judgment on such plea is erroneous. *State v. Schuler*, 109-111.

SEC. 5337. Withdrawal of plea of guilty.

The plea of guilty may be withdrawn and a plea of not guilty substituted after the court has proceeded under the plea of guilty to make an inquiry into the facts for the purpose of fixing the punishment and has announced its conclusion but has postponed the pronouncing of judgment to a later day. *State v. Hortman*, 122-104.

Whether the provision for withdrawing

a plea of guilty in a criminal prosecution is applicable in a proceeding to punish for contempt in violating a liquor nuisance *quaere*; but in any event such plea cannot be withdrawn after the pronouncement of the judgment by the court although such judgment has not been entered. *Beatty v. Roberts*, 125-619.

SEC. 5338. Issues—trial—presence of defendant.

The court has no jurisdiction to try an issue of fact in a criminal case without a jury, and no authority is given to the

defendant to consent to such a trial. *State v. Rea*, 126-65; -101 N. W. 507.

SEC. 5339. Conviction or acquittal, when a bar.

Where the defendant pleads previous conviction, the state may show that the conviction relied on was void for want of jurisdiction in the court in which the conviction was had. *State v. Jamison*, 104-343.

No replication to the affirmative plea of previous conviction or acquittal is necessary. *Ibid.*

When the plea of previous conviction is not sustained by the evidence or is not sufficient in law the court may so charge the jury. *Ibid.*

Where, after the defendant was put on trial under an indictment in one county, and evidence was introduced, some of it tending to show that a crime had been committed in that county, the court dismissed the prosecution and ordered the defendant to be held for a warrant from another county for the same offense, held, that as the question of venue should have gone to the jury in the first county, the defendant could in the second county plead the proceedings in the first county as a former adjudication. *State v. Spayde*, 110-726.

While in general an acquittal in a criminal case is not a bar to a subsequent civil action founded on the same facts, yet, where the civil action is to secure a forfeiture which would have been a part of the penalty to be imposed in the criminal proceeding, and is between the same parties,

the previous acquittal is a bar. *State v. Meek*, 112-328.

As the evidence necessary to convict of the separately described crimes of gambling and keeping a gambling house is not the same, a conviction or acquittal of the one offense does not necessarily bar a prosecution for the other. *State v. White*, 123-425.

The fact that evidence of one offense may be introduced in establishing the guilt of the other does not fix the identity of the two under the plea of former conviction or acquittal. *Ibid.*

The test determining whether the accused has been in jeopardy is whether or not, if what is set out in the second indictment had been proved under the first, there could have been a conviction; and it is immaterial that in the second prosecution the state attempts to establish a different transaction than that was sought to be proven in the first. *State v. Price*, 127-301.

The acts and declarations of one charged to have committed a substantive offense by conspiracy with others are admissible as against a co-conspirator charged with the same substantive offense, although the one whose acts and declarations are thus relied on has been acquitted of a conspiracy to commit the offense. *State v. Crofford*, 133-478.

SEC. 5341. Judgment, when a bar.

The district court may order a resubmission of the case to the grand jury when the demurrer to the indictment has been sustained on the ground that the offense charged was within the exclusive juris-

diction of another county, or on the ground that the indictment contains matter which is a legal defense or bar to the indictment. *State v. Fields*, 106-406.

CHAPTER 21.

OF CHANGE OF PLACE OF TRIAL IN CRIMINAL CASES.

SECTION 5343. Application—what stated.

An application for transfer of a criminal case to another judge of the same district for trial on the ground that the judge to whom the application is addressed is prejudiced against defendant to such an extent that he cannot obtain a fair and impartial trial before him, is to be granted or refused

in the exercise of sound discretion. *State v. Heacock*, 106-191.

Affidavits in a particular case, held not to show prejudice or excitement in the county against defendant such as to require a change of venue. *State v. McDonough*, 104-6.

SEC. 5346. Additional testimony.

Affidavits in resistance to the application for change of venue need not show that

affiants are not related to the prosecutor. *State v. Icenbice*, 126-16.

SEC. 5348. Court's discretion.

The supreme court will not on appeal interfere with the discretion vested in the trial court in passing upon an application for a change of venue, unless such discretion appears to have been abused. *State v. Miner*, 107-656.

A certain discretion is reposed in the trial court passing upon applications of this kind, and the supreme court does not interfere unless such discretion appears to have been abused. In a particular case, held, that the showing was not such as to require reversal of the action of the trial court refusing a change of venue on account of prejudice of the inhabitants of the county. *State v. Williams*, 115-97.

The supreme court will not interfere with the conclusion of the trial court in ruling on an application for change of venue except where there is a clear abuse of judicial discretion, and if there is a substantial conflict for determination by the trial court on the showing made, its

action will be sustained. *State v. Icenbice*, 126-16.

Where there is a conflict between the showing made for the defendant and that for the state on an application for change of venue on the ground of hostility and prejudice throughout the county resulting from the widespread circulation of newspaper accounts of the crime, charging the defendant with its commission, the supreme court will not interfere on appeal with the exercise of discretion on the part of the trial court in determining the question. *State v. Brown*, 130-57.

The granting of a change of venue on the application of the defendant is largely within the discretion of the trial court, and this is peculiarly so where the persons making the affidavits relied upon are personally examined and cross-examined before the court. *State v. Crouch*, 130-478.

SEC. 5354. Cost of change.

As the cost of employing an additional attorney to assist in trying a case brought to a county on change of venue falls upon the county from which the change is taken, the board of supervisors of the latter county has authority to employ an additional attorney and may contract with the attorney of that county to render the services. *Bevington v. Woodbury County*, 107-424.

It is the court of the county in which the case is tried which must allow the costs necessary and consequent upon the trial, and the county to which the change is taken is primarily liable to pay the expense of providing an attorney for defendant, and of furnishing defendant a transcript for the purpose of appeal, when ordered by the trial judge. *State v. Carter*, 109-69.

CHAPTER 23.

OF CHALLENGING THE JURY.

SECTION 5360. For cause.

Objection stated: A challenge to a juror should distinctly specify the facts consti-

tuting the causes thereof. *State v. Young*, 104-730.

In a particular case, held, that the fact that the juror had read newspaper accounts of the crime for which defendant was on trial did not disqualify him. *Ibid.*

Where the challenge of the state is sustained, there being evidently but one ground of objection to the juror, and this being sufficient, the case will not be reversed on the ground that the objection is not sufficiently specific. *State v. Prins*, 113-72.

A challenge for cause which states no grounds therefor, is insufficient and may be disregarded. *State v. Wilson*, 124-264.

When made—examination: If at any time during the trial a ground of objection to a juror comes to the notice or attention of the counsel for the defendant, the objection should be made and opportunity to investigate afforded, and such objection cannot afterwards be urged as a ground for new trial. *State v. Pray*, 126-249.

Inability of a juror to read or write cannot be urged as a ground for new trial where it does not appear that the juror was interrogated as to his qualifications in this respect, although knowledge of his inability was not acquired by the defendant or his counsel prior to the conclusion of the trial. *State v. Greenland*, 125-141.

Failure to challenge a juror for cause as to his competency and to examine him or other witnesses in support of the challenges is a waiver of the right of challenge although the fact of incompetency is not known to the party until after the trial. *State v. Carpenter*, 124-5.

Discretion of court: The discretion of the trial court in rulings upon challenges for cause will not be interfered with unless a clear case of abuse of discretion is shown. The court may properly take into account the juror's conduct, demeanor, and bearing in determining whether in view of his statements in answer to questions propounded to him he is qualified to serve. *State v. Brown*, 130-57.

Error without prejudice: Prejudice is not to be presumed to the defendant from a ruling of the court excusing a juror on challenge for cause by the state nor is such prejudice to be presumed where a juror unsuccessfully challenged for cause by the defendant has subsequently been excluded on peremptory challenge. *State v. Pray*, 126-249.

The defendant is not prejudiced in having one excluded from the jury who is of even doubtful qualifications. *State v. Crouch*, 130-478.

Any possible error in excusing a juror at his own request over defendant's objection is removed if the defendant is given the opportunity to exercise an additional peremptory challenge, especially where it

does not appear that he exhausted his peremptory challenges. *State v. Fielding*, 112 N. W. 539.

Where after the overruling of a challenge to one of the trial jurors the defendant waives a peremptory challenge, he cannot afterwards complain of the overruling of his challenge for cause. *State v. Mathews*, 133-398.

It is not error of which defendant can complain that the court excuses a juror at his own request. *State v. Fielding*, 112 N. W. 539.

As to new trial on account of disqualification of juror, see notes to Code § 5424, in this Supplement.

Having formed an expressed opinion. Every one who says he has formed an opinion from what he has heard and read is not necessarily disqualified. The appearance and intelligence, or want of intelligence, of the juror as he appears before the court may be taken into account. It is the duty of the court, not of the juror, to determine whether his opinion disqualifies him. *State v. Hudson*, 110-663.

The fact that a juror has heard statements to the crime, without expressing any opinion, does not necessarily render him incompetent. *State v. Geier*, 111-706.

Although the juror admits having formed an opinion, yet, if upon the whole examination it appears that such opinion is qualified, and the juror expresses himself as able to render a just and fair verdict on the evidence, guided by the instructions of the court he is qualified. *State v. Williams*, 115-97.

As the juror's conduct, demeanor and bearing in court may properly be accorded material weight in considering the facts as to his competency disclosed by his answers, the supreme court will be reluctant to interfere with the exercise of discretion in this respect on the part of the lower court. But where the juror discloses that he has become convinced of the truth of evidence tending to show defendant's guilt, a challenge should be sustained although he shows by his answers an honest and sincere intention to determine defendant's guilt only on the evidence introduced. *State v. Crofford*, 121-395.

The mere admission of a juror on being interrogated by the court that he can decide the case fairly, should not be allowed to overcome his repeated statements that he entertains a fixed opinion as to a fact essential in determining the guilt of the defendant. *State v. John*, 124-230.

The discretion of the trial court must govern very largely in the matter of selection of a jury. The supreme court will not interfere on an appeal unless there is made to appear the positive violation of law or a clear abuse of discre-

tion. It is for the court to determine whether the examination of a proposed juror discloses his fitness and it may reject a juror if in its judgment unfitness is thus disclosed, although he in terms declares that he is free from prejudice or fixed opinion. *State v. Smith*, 124-334.

Where the juror on examination by the court unqualifiedly affirms his ability to discard any belief with reference to defendant's guilt, based on conversations with others, the action of the court in

SEC. 5361. Juror examined.

The fact that a juror is not sworn on his *voir dire* will not deprive the defendant of the right to have a new trial on showing that the juror was prejudiced

overruling the challenge will not be interfered with on appeal. *State v. Fielding*, 112 N. W. 539.

Having heard evidence on former trial: The fact that a juror heard part of the evidence in the case on a former trial will not necessarily disqualify him from serving. *State v. Prins*, 117-505.

Relation to counsel: The relation of a juror to counsel for the prosecution of client and attorney is not made a ground for challenge. *State v. Carter*, 121-135.

SEC. 5364. Peremptory challenges.

If the defendant makes no objection to the swearing of the jury after waiver of peremptory challenges on behalf of the defendant and the state, he cannot afterwards complain that all of his peremptory challenges had not been exhausted. *State v. Icenbice*, 126-16.

Where the defendant in a criminal case, being entitled to ten peremptory challenges, when called upon to exercise his eighth challenge, stated by counsel that one peremptory challenge was waived, and the prosecution thereupon waived a peremptory challenge, held that the defend-

ant was still entitled to exercise the right of two further peremptory challenges, and that it was error to refuse to allow him to do so. A waiver of one peremptory challenge is not a waiver of all further right of peremptory challenge as to persons already called as jurors. *State v. Hunter*, 118-686.

The statute gives the right of peremptory challenge absolutely, and if the right is denied, prejudice therefrom is conclusively presumed. The right to interpose peremptory challenges is not lost until the jury is sworn. *Ibid.*

SEC. 5365. Number of challenges.

Where two or more defendants are tried jointly, the number of peremptory challenges is limited to the number which a single defendant might exercise. *State v. Wolf*, 112-458.

The right of peremptory challenge is not a constitutional right; it exists only by virtue of statute. And where a de-

endant indicted for murder in the first degree is convicted only of manslaughter, and on the reversal of such conviction is again put on trial for the offense of manslaughter, he is entitled only to the number of peremptory challenges allowed in the case of an original prosecution for such offense. *State v. Smith*, 132-645.

CHAPTER 24.

OF THE TRIAL TO A JURY.

SECTION 5370. Continuances.

The provision that a continuance on the ground of the absence of a witness shall not be granted if the opposite party will admit that the witness if present would testify as stated in the affidavit for continuance, is not unconstitutional as applied to a continuance asked by the defendant, even though by the admission of the state, defendant is thereby deprived of the presence of the witness whose expected

testimony is set out in the affidavit. *State v. Wiltsey*, 103-54.

The admission that the absent witness would testify as alleged in the affidavit for continuance does not waive objection to the incompetency of such testimony. *State v. Leuhrman*, 123-476.

It is not error to refuse a continuance asked for the purpose of procuring evidence which would be available only by

way of impeachment of anticipated evidence for the other party. *State v. Athey*, 133-382.

The fact that the evidence of witnesses because of whose absence continuance is asked would be merely cumulative is not necessarily a ground for refusing a continuance. It may happen that the interests of justice will be promoted by a postponement in order to enable the defendant to secure all the witnesses who can testify in his favor as to a given fact. *State v. Hasty*, 121-507.

SEC. 5371. Provisions as to trial in civil cases.

The provisions of Code § 3709 as to taking exceptions to instructions are appli-

But in general a continuance need not be granted for the purpose of enabling the defendant to secure witnesses whose testimony will be valuable to him only by way of impeachment. Such testimony does not bear upon an issue in the case. The ruling on an application for continuance to enable a party to procure impeaching evidence is generally regarded as purely discretionary and will not be interfered with on appeal. *Ibid.*

cable to criminal cases. *State v. Williams*, 115-97.

SEC. 5372. Order of trial.

Where defendant, having been put on trial under an indictment charging murder, is convicted and such conviction is subsequently reversed and he is again put on trial for manslaughter, it is not error to read to the jury the original indictment in which the crime of murder is charged. *State v. Walker*, 133-489.

Some latitude is to be given counsel in the opening statement, and so long as they act in good faith, believing that the facts which are proposed to be proved are admissible in evidence, the supreme court will not interfere on appeal. *State v. Trusty*, 122-82.

In the opening statement the county attorney should not anticipate possible attempts of the defense to avoid liability. The statements should be confined to the evidence which the prosecution expects to introduce to sustain the indictment. *State v. Ryan*, 113-536.

Although defendant relies on insanity

as a defense, the state still has the burden of proof as to the commission of the crime, and the defendant does not have the right to open and close. *State v. Robbins*, 109-650.

The provision that when the evidence is concluded the county attorney must commence and conclude the argument does not exclude the making of the opening and the concluding arguments by an attorney employed by private parties to assist the county attorney. *State v. Novak*, 109-717.

The judge should not during the argument of the case be beyond the hearing of the proceedings. There can be no court without a judge and his presence as the presiding genius of the trial is as essential at one time as another. *State v. Carnagy*, 106-483.

Further, as to absence of judge from court room during argument as ground for new trial, see notes to Code § 5424, in this Supplement.

SEC. 5373. Evidence for state—notice. The county attorney, in offering the evidence in support of the indictment in the order prescribed in the last section, shall not be permitted to introduce any witness who was not examined before a committing magistrate or the grand jury, and the minutes of whose testimony were not presented with the indictment to the court, unless he shall have given to the defendant or his attorney of record if the defendant be not found within the county a notice in writing, stating the name, place of residence and occupation of such witness, and the substance of what he expects to prove by him on the trial, at least four days before the commencement of such trial. Whenever the county attorney desires to introduce evidence to support the indictment, of which he shall not have given said four days' notice because of insufficient time therefor since he learned said evidence could be obtained, he may move the court for leave to introduce such evidence, giving the same particulars as in the former case, and showing diligence such as is required in a motion for a continuance, supported by affidavit, whereupon, if the court sustains said motion, the defendant shall elect whether said cause shall be continued on his motion, or the witness shall then testify; and if said defendant shall not

elect to have said cause continued, the county attorney may examine said witness in the same manner and with the same effect as though four days' notice had been given defendant or his attorney as hereinbefore provided, except the county attorney, in the examination of witnesses, shall be strictly confined to the matters set out in his motion. [17 G. A., ch. 168, § 3; C., '73, § 4421; R., § 4786.] [28 G. A., ch. 135, §§ 1, 2.]

Duty to call witnesses: The state is not bound to call as witnesses all the persons examined before the grand jury, even though it appears that they were witnesses to the criminal act. *State v. Hudson*, 110-663.

Documentary or real evidence: It is not necessary to give notice of what is expected to be proved by documentary evidence, such evidence is not required to be indorsed on the indictment or returned as part of the minutes. *State v. Boomer*, 103-106.

Witnesses not examined: The statutory provision as to returning minutes of evidence with the indictment does not preclude the use of evidence other than the minutes in order to determine whether the witness was in fact examined before the grand jury or committing magistrate. *State v. Marshall*, 105-38.

Where the names of witnesses are indorsed on the indictment and minutes of their evidence returned therewith it is presumed their evidence was properly before the grand jury and to overcome such presumption it must be made to affirmatively appear not only that they did not testify before the grand jury, but also that they either did not give evidence before the committing magistrate or else that the minutes thereof made by him were not used by the grand jury. *Ibid.*

A witness may be examined as to any and all matters within his knowledge material to the case, although some particular fact as to which he testifies is not referred to in the minutes of his testimony. *State v. Seery*, 129-259.

Minutes of evidence: While the minutes of the evidence are not a part of the indictment, and should be separately filed, yet, if attached to the indictment and filed with it, this is sufficient. *State v. Doss*, 110-713.

Indorsement of names: Witnesses whose names are not endorsed on the indictment may be called to give evidence in rebuttal. *State v. Whitnah*, 129-211.

The county attorney cannot call as witnesses those who gave testimony before the committing magistrate, minutes of which were presented to the grand jury and acted upon by them, unless the names of such witnesses are endorsed on the indictment. *State v. Hasty*, 121-507.

A variance between the name of the wit-

ness as indorsed on the indictment and his true name is not a valid objection to an examination of the witness, unless defendant has been misled or prejudiced by the variation. *State v. Dale*, 109-97.

Notice: The fact that a witness states his occupation to be different from that named in the notice is not conclusive that the notice is not sufficient. *Ibid.*

Whether the state is entitled to examine the witness under the notice is a question for the court. *Ibid.*

A notice is sufficient which advises the defendant with reasonable certainty as to the person who is to be called as a witness against him. *State v. Mathews*, 133-398.

The notice in a particular case held not defective in failing to accurately describe the occupation of the witness named. *State v. McPherson*, 114-492.

Where the notice gave the name of the witness as "Lee Wood," and his occupation as that of a laborer, held, that it was sufficient where it appeared that he commonly went by that name, although his real name was Ernest Lee Wood, and he was at the time confined in the county jail. *State v. Dunn*, 116-219.

Mistake in the notice as to the name or residence of the witness will not justify a reversal unless defendant has been prejudiced thereby. *State v. Harmann*, 112 N. W. 632.

Where it affirmatively appears that the defendant has not been misled to his prejudice by any inaccuracy in the notice with reference to the name, place of residence or occupation of the witness, he is not entitled to a reversal because of defect in the notice. *State v. Anderson*, 125-501.

The fact that the matters of which the defendant was given notice appear to have occurred at another time and place from that stated in the notice is not a valid objection to the evidence. *State v. Trusty*, 122-82.

The court may allow witnesses to testify when notice that they will be introduced has been given a sufficient length of time before the commencement of the trial, even though in the meantime the prosecution may have moved for leave to introduce the evidence without such notice, and the defendant may have requested a continuance on that ground, which has been refused. *State v. Snider*, 119-15.

The violation by the county attorney of an agreement not to use any testimony save that of which defendant was given notice may constitute a ground for continuing or postponing the case, if other evidence is offered which may be properly received under statutory provisions. But on failure to ask such continuance, or postponement, the defendant cannot on appeal complain. *State v. McClain*, 130-73.

If on the case being called for trial the county attorney applies for postponement in order that he may give the necessary notice of the calling of witnesses whose names are not endorsed on the indictment, and the defendant then consents to the use of the witnesses without the giving of such notice, he cannot afterwards complain that the names of the witnesses were not en-

SEC. 5375. Separate trials.

Where the offense charged in an indictment is a misdemeanor, the matter of granting separate trials is within the discretion of the court. *State v. Jamison*, 110-337.

Where a felony is charged, each one of joint defendants is entitled to a separate trial as an absolute right, and by exercis-

SEC. 5376. Reasonable doubt.

Definition: Absolute certainty is not required and is rarely if ever possible in any case and to justify a conviction the evidence, when taken as a whole and fairly considered, must so satisfy the judgments and consciences of the jurors as to exclude every other reasonable conclusion. Certainty is seldom possible and never required, but the conclusion must be so certain as to exclude any other reasonable hypothesis. *State v. Marshall*, 105-38.

Not all the facts involved in the case, but only those essential to conviction must be established beyond a reasonable doubt, and be incompatible with any reasonable hypothesis of innocence. *State v. House*, 108-68.

It is not necessary that each essential fact in the chain of circumstances solely relied on to connect the accused with the commission of the offense, when separately considered, be found beyond reasonable doubt. Such a fact, though having little to sustain it when standing alone, may derive such support from others immediately connected therewith as to exclude all doubt of its existence. Nevertheless, if conviction depends entirely on different circumstances, arranged linkwise, connecting the defendant with the crime charged, then each and every one of these must be established beyond a reasonable doubt, for no chain can be stronger than its weakest link. *State v. Cohen*, 108-208.

dorsed. *State v. Arthur*, 109 N. W. 1083.

The notice here contemplated may be given on Sunday. *State v. Ryan*, 113-536.

The examination need not be limited to the matters stated in the notice. It is sufficient if it directs the defendant's attention to such matters and enables him to produce such other witnesses as he may desire with reference to the same subject. *State v. Boomer*, 103-106.

To authorize service on the attorney of notice of the intention to call witnesses whose names are not endorsed on the indictment, it is not essential that the accused should have gone beyond the boundaries of the county. It is sufficient that the officer, after diligent search, has failed to find him. *State v. Hasty*, 121-507.

ing this right he can avail himself of the full number of peremptory challenges provided by law, but if a separate trial is not asked, the number of peremptory challenges is limited to the number allowed where only one defendant is on trial. *State v. Wolf*, 112-458.

It is not necessary that each of the essential facts in the case, standing isolated and alone, be proven beyond a reasonable doubt, nor that it be established by independent evidence. The material circumstances, when given their respective places in the sequence of events, may strengthen and support each other to such an extent that on a consideration of the whole case the jury may be convinced beyond a reasonable doubt of defendant's guilt. *State v. Hossack*, 116-194.

The definition of reasonable doubt given in *State v. Ostrander*, 18 Iowa 435, has been too often followed to be now disregarded. *State v. Willing*, 129-72.

Presumptions: The presumption of innocence is not to be treated as affirmative evidence in behalf of the defendant. *State v. Linhoff*, 121-632.

Questions of fact only: The statutory provisions relating to reasonable doubt are applicable only to the jury trying questions of fact. They have no relation to the decision of questions of law by the court. *Busse v. Barr*, 132-463.

Not applicable on appeal: The rule as to reasonable doubt is not applicable upon review by the supreme court of the sufficiency of the evidence to support a verdict. *State v. Pray*, 126-249.

Instructions: The charge is to be taken as an entirety and it is not always necessary to explain the bearing of the doctrine

of reasonable doubt in connection with each instruction. *State v. Heacock*, 106-191.

It is error to instruct the jury that a reasonable doubt is such a doubt as the jury are able to give a reason for. Such an instruction casts the burden of furnishing reasons for not finding guilt established upon the defendant, whereas it is upon the state to make out a case excluding all reasonable doubt. Besides, jurors are not bound to give reasons to others for the conclusion reached. *State v. Cohen*, 108-208.

It is not proper to instruct the jury that "a doubt," to justify an acquittal, must be reasonable," etc., as such an instruction is open to the interpretation that the jury starts out with the primary obligation to convict the accused, unless some reasonable doubt arises to justify a verdict of not guilty. *State v. Phillips*, 118-660.

It is error to instruct that "a reasonable doubt does not mean a doubt from mere caprice or groundless conjecture, but it means a reasonable doubt such as the jury are able to give a reason for." *State v. Lee*, 113-348.

It is not error in an instruction with reference to reasonable doubt to use such expressions as "it must be shown beyond a reasonable doubt," or "it must appear beyond reasonable doubt," as the substitute for "it must be proven beyond a reasonable doubt." *State v. Crawford*, 133-478.

An instruction that "if after a careful comparison of the evidence and a full consideration of the whole case your minds are brought to an abiding conviction beyond a reasonable doubt," etc., is sufficient, without making use of the words "to a moral certainty." *State v. Van Tasel*, 103-6.

It is not necessary to instruct the jury to the effect that so long as any one juror has a reasonable doubt of guilt there can be no conviction. *State v. Penny*, 113-691.

It is unnecessary to give an elaborate explanation of the meaning of the term reasonable doubt. *State v. Mahoney*, 122-168.

An instruction in which preponderance of evidence was referred to, held not prejudicially erroneous in view of specific instruction as to the necessity of finding the evidence sufficient beyond reasonable doubt. *State v. Rivers*, 124-17.

Where the jury is instructed as to *quantum* of evidence necessary to a conviction it is not essential that the words "beyond a reasonable doubt" be used in every instruction given with reference to a sufficiency of the evidence to sustain a conviction. *State v. Carpenter*, 124-5.

The court is not required to say in each

instruction given as to the particular elements of the crime or facts tending to establish it, that they should be established beyond a reasonable doubt. The usual general instruction upon that subject is sufficient. *State v. Grouch*, 130-478.

Instructions in a particular case as to reasonable doubt, held, not erroneous. *State v. Novak*, 109-717; *State v. Ryan*, 113-536.

Burden of proof: As a general rule, when an offense is grounded on a negative, or when that negative is an essential element of the crime, the burden is on the state to prove it. Therefore, held, that in a prosecution for the statutory offense of procuring an abortion the state should satisfy the jury beyond a reasonable doubt that the miscarriage was not necessary to save the life of the woman, the statutory description of the crime containing that exception. *State v. Aiken*, 109-643.

Where there is evidence tending to show that the injury inflicted, charged as constituting a crime, was accidental, the jury should be instructed to take such evidence into account in determining whether a crime is established beyond a reasonable doubt. The burden of proving the accidental nature of the injury is not upon the defendant. *State v. Matheson*, 130-440.

Burden of proof as to insanity: The fact that defendant relies on insanity as a defense does not relieve the state of the burden of proving the commission of the crime beyond a reasonable doubt. *State v. Robbins*, 109-650.

As to alibi: While, as a distinct issue, an alibi must be established by a preponderance of the evidence, or it may be disregarded, yet if the evidence offered to show it falls short of this in weight, nevertheless such evidence is for the consideration of the jury, and if upon the whole case, including that part pertaining to the alibi, the jurors have a reasonable doubt of defendant's guilt, he should be acquitted. *State v. McGarry*, 111-709.

Even though the evidence as to alibi is not sufficient to establish that defense by a preponderance of the evidence, nevertheless the jury should be instructed to take such evidence into account in determining whether the guilt of the defendant is established beyond a reasonable doubt. *State v. Hogan*, 115-455.

A specific instruction as to reasonable doubt which may be raised by testimony tending to show an alibi does not constitute error as tending to mislead the jury into a belief that only the reasonable doubt thus raised can be considered in determining whether defendant should be acquitted, there being proper instructions as to

reasonable doubt in general. *State v. Pray*, 126-249.

The court may advise the jury to scan with care and attention the evidence tending to establish an alibi. *State v. Worthen*, 124-408.

It is proper to instruct the jury to acquit if the evidence as to alibi raises a reasonable doubt of defendant's presence at the time and place of the commission of the crime charged. *State v. Thomas*, 109 N. W. 900.

As to self-defense: The burden is on the state to show that defendant was not acting in self-defense, and this it must do by evidence sufficiently strong to remove reasonable doubt. *State v. Shea*, 104-724.

Self-defense is not an affirmative matter to be established by the defendant by a preponderance of the evidence, but it goes to the question of guilt and the evidence tending to show self-defense should be taken into consideration in determining whether there is reasonable doubt of the guilt of the defendant. *State v. Sharp*, 127-526; 103 N. W. 770.

In the instructions in a case where there is evidence tending to show self-defense, the court should not limit the jury to the consideration of such evidence as establishing the specific defense relied upon, but they should be so instructed as that they may take into account the evidence tending to show self-defense with all the other evidence in the case in determining whether there is reasonable doubt of defendant's guilt. *State v. Morris*, 128-717.

Defendant's good character: It is always permissible for the defendant in a criminal action to show his general good character or reputation as to the trait involved in the charge against him. *State v. Heacock*, 106-191.

Proof of good character is admissible, not as showing a defense, but on the ground that one of such character and repute would not be likely to commit the offense charged. *State v. House*, 108-68.

The weight to be attached to proof of good character is for the jury. *Ibid.*

Evidence of good character should be

SEC. 5377. Reasonable doubt as to degree.

It is better in ordinary cases for the court to instruct the jury in the simple language of the statute that, where there is reasonable doubt of the degree of the offense the defendant should be convicted only of the lower degree; but it is not

SEC. 5382. Separation of jury—before final submission.

It is error to allow the jury to separate during the trial where defendant asks in accordance with statutory provisions that the jury shall be kept together. *State v. Smith*, 102-656.

considered together with the other evidence in the case, and it is error to limit the jury with respect to such evidence to determining whether or not the defendant was of good moral character and to direct that a finding of good character may be considered with reference to whether the witnesses who testified to facts tending to criminate defendant were mistaken or testified falsely. *State v. Wolf*, 112-458.

One accused of a criminal offense is permitted to prove his character and general reputation in the community of his residence with respect to the trait involved, but this rule does not permit him to go into details. *State v. Dexter*, 115-678.

An instruction as to the effect of impeaching evidence and limiting the effect of proof of general moral character to the credibility of the witness, is not erroneous in failing to fully explain the effect of proof of good moral character with reference to defendant who is also a witness. *State v. Olds*, 106-110.

The state is not permitted to assail the general character of the defendant until it has been placed in issue and even then not by proof of particular instances of misconduct but only by evidence of the general reputation or actual character with respect to the trait involved. *State v. Thompson*, 127-440.

Where the defendant's character and reputation are put in issue, a witness who testifies that he knew what people said of defendant's general reputation for truth, honesty and morality in the neighborhood in which he lived, prior to the commission of the crime, is admissible. *State v. Prins*, 117-505.

Proof of occasional visits to saloons or occasional drinking is not necessarily an impeachment of good moral character. *State v. Richards*, 126-497.

The real character of the defendant when his character has been put in issue may be shown as distinct from his reputation. *Ibid.*

Instruction as to evidence of good character in a particular case, held, correct. *State v. Cunningham*, 111-233.

necessarily erroneous to instruct that the jury must consider first the principal charge and if a verdict of guilty thereon be not found must proceed to the minor included offenses in the order of their gradation. *State v. Leuhrman*, 123-476.

The authority to permit the jury to separate is granted to the court and not to the judge. *State v. Smith*, 107-480.

SEC. 5383. Admonition.

Although the jury is to be directed not to form or express an opinion until the case is finally submitted, nevertheless an inadvertent act of a juror, pending the trial, in telling a person not interested in the case what his conclusion is or will be, does not necessarily require a setting aside

of the verdict. *State v. Baughman*, 111-71.

The reading by jurors during the progress of the trial of newspapers containing reports of the trial and comments on the evidence, is improper, even though the newspaper accounts are not in themselves unfair. *State v. Caine*, 111 N. W. 443.

SEC. 5385. Law and fact.

The court has no power to instruct that an essential fact has been established, although all the evidence tends to prove such

fact. *State v. Lightfoot*, 107-344. See also notes to next section.

SEC. 5386. Instructions.

Duty to instruct in general: It is error to present to the jury the facts as claimed by the state and also those testified to by the defendant, with the direction that the jury is to carefully consider these different claims, and acquit if on the whole case they entertain a reasonable doubt of defendant's guilt. The objection is that the jury might be led to think that the primary issue is as to the matter of defense presented by the defendant. *State v. Vance*, 119-685.

It is error to call the attention of the jury to the fact that if the defendant is acquitted, the crime charged as against him, if committed, will go unpunished for the reason that the defendant cannot twice be put in jeopardy, under the law. *State v. Hunter*, 118-686; *State v. Crofford*, 121-395.

It is not error to call the attention of the jury to its duty to the state and to the defendant. *State v. Wilson*, 124-264.

It is not error to advise the jurors that the gravity or magnitude of the punishment prescribed by law for the offense charged should not be allowed to affect their judgment or determine their verdict. *State v. Baldes*, 133-158.

It is not necessarily error warranting a reversal in a prosecution for rape to fail to charge on request that the accusation is easily made, hard to prove, and harder to be defended against by the party accused though ever so innocent. *State v. Trusty*, 122-82.

It is not necessary in the instructions to define words in common use, such as the word "felonious." *State v. Penney*, 113-691.

Instructions not asked: An instruction need not be given on each specific phase of the case, except as requested. *State v. House*, 108-68.

It is not error to fail to call attention to a question arising on the evidence, where no such instruction is asked. *State v. Seevers*, 108-738.

It is the right of a defendant charged with the commission of a crime to have the jury properly instructed, and that every essential part of the case should be covered by the instructions given. But if the instructions as given are correct, the defendant cannot complain if the jury are not specifically instructed as to a question arising under the evidence, where no instruction is asked. *State v. Hoot*, 120-238.

On issue not presented: The jury should not be permitted to convict on an issue of fact not involved in the indictment and an instruction warranting such conviction is erroneous. *State v. Nine*, 105-131.

Not based on evidence: Where the evidence for the defendant in a prosecution for assault with intent to murder does not suggest that the assault was committed in self-defense, it is not necessary for the court to instruct the jury with reference to that subject. *State v. Yates*, 132-475.

Limitation of action: It is error for the court to omit to instruct as to the necessity of showing the commission of the crime within the statutory period of limitation. *State v. Kunhi*, 119-461.

As to alibi: Evidence tending to show an alibi supports the plea of not guilty, and no specific instruction on the subject is necessary where none is asked. *State v. Judd*, 132-296.

It is not error to fail to instruct as to alibi where no such instruction is not asked. *State v. Lightfoot*, 107-344.

Instructions as to facts: It is error for the court to say that the evidence shows without contradiction that the crime charged has been committed, confining the jury to the determination of the question whether the crime charged was committed by defendant. *Ibid.*

The fact that witnesses testified to material matters, and that there is no direct denial of such facts by other witnesses does not justify the court in instructing

that such matters are not in dispute. *State v. Austin*, 109-118.

It is error for the court to instruct that a certain fact which the evidence tends to show, if true, would be a strong circumstance indicating the guilt of the defendant. *State v. Kehr*, 133-35.

It is error to instruct the jury that from any particular state of facts a presumption of guilt arises. The question of guilt is to be determined by the jury on all facts. *State v. Poe*, 123-118.

It is not proper to charge that circumstances tending to show the guilt of defendant gave rise to a presumption of guilt which must be overcome by the defendant in order to entitle him to an acquittal. *State v. Brady*, 121-561.

It is error to tell the jury with reference to a material fact that the proof shows the fact beyond all controversy. The question as to whether a material fact is established by the evidence must be left to the jury, even though there is no conflict in the evidence as to such fact. *State v. Carter*, 112-15.

It is error to instruct the jury that as to essential elements of the crime there is no conflict in the evidence, and leave the jury to find the defendant guilty without passing on such elements. *State v. Bige*, 112-433.

A court may in an instruction assume as true a particular evidential fact which is expressly admitted or is assumed, or is treated as true, by both parties, although such fact weighs against the defendant. *State v. McKnight*, 119-79.

It is not error to assume in the instructions the existence of a fact testified to by the defendant himself. *State v. Mitchell*, 130-697.

Where the question was whether defendant was intoxicated at the time of committing the act charged, held, that an in-

struction to the jury that "there is some evidence tending to show that the defendant" was to some extent under the influence of intoxicating liquor was erroneous in that it tended to indicate to the jury the court's view as to the weight of such evidence. *State v. Dorland*, 103-168.

Motive of prosecution: It is error to instruct as to defendant's guilt with reference to the motives of the prosecution. *State v. Jackson*, 128-543.

Circumstantial evidence: In submitting a case depending entirely upon circumstantial evidence, the jury should have careful direction as to the *quantum* of proof necessary to justify a conviction. *State v. Brady*, 121-561.

Where the prosecution does not depend on proof of a chain of circumstances to establish defendant's guilt, it is not error to fail to charge that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish defendant's guilt. *State v. Lucas*, 122-141.

Confession: The court in instructing the jury with reference to a confession should explain the effect of the portion of the confession tending to exculpate the defendant as well as of that portion tending to incriminate him. *State v. Busse*, 127-318.

Presumption in favor of instructions: It is presumed in favor of the instructions that there was some occasion for giving them unless the contrary appears from the record. *State v. Leuhrman*, 123-476.

In general as to instructions, see notes to Code § 3705, in this Supplement.

As to additional instructions after the jury has retired for deliberation, see notes to Code § 5398, in this Supplement.

As to instructions with reference to a lower degree or included offenses, see notes to Code § 5406, in this Supplement.

SEC. 5389. Want of jurisdiction—no offense charged.

If evidence is introduced in behalf of the state, and is in dispute, and there is some evidence tending to show venue in the county in which the indictment was found, it is not proper to discharge the jury and order the prisoner committed to

await a warrant from another county, and if defendant is thereafter put on trial in such other county he may plead the dismissal of the prosecution in the first county as a former adjudication. *State v. Spayde*, 110-726.

CHAPTER 25.

OF THE JURY AFTER SUBMISSION.

SECTION 5398. Additional instructions.

After the jury has been deliberating for some time without arriving at a verdict

the court may properly call them in and instruct with reference to the desirability

of a verdict and the necessity of aljuring pride of opinion, and of the proper manner of procédure in arriving at a verdict when a difference of opinion exists as to the facts. *State v. Tripp*, 113-698.

It is proper to allow the testimony of a

witness to be read to the jury in open court at the request of the jurors. *State v. Hunt*, 112-509.

An additional instruction given to the jury pursuant to its request after retiring for deliberation, held proper. *Ibid.*

CHAPTER 26. OF THE VERDICT.

SECTION 5404. Verdict rendered.

A verdict for assault with intent to do great bodily injury is sufficient under an indictment charging assault with intent to

commit great bodily injury. *State v. Leuhrman*, 123-476.

SEC. 5405. General and special.

A verdict of guilty as charged is sufficient to sustain a sentence for the offense charged in the indictment, although it is of such character the defendant might have been convicted of a lower degree or of an included crime as to which the jury has been fully instructed. *State v. Yates*, 132-475.

A verdict of acquittal imports an acquittal on every material allegation in the indictment and is a bar to a subsequent prosecution for any act which might have been proved under the indictment on which the acquittal was secured. *State v. Price*, 127-301.

SEC. 5406. Finding an offense of different degree.

Instructions as to lower degrees and included offenses: It is not error to instruct the jury as to the crime charged of which under the evidence the defendant might be convicted, although in fact he is convicted of a lower degree of the crime. *State v. Jackson*, 103-702.

It is proper for the court to instruct the jury that in a case of reasonable doubt as to the defendant's guilt of the offense charged, he may be convicted of a lower degree of the offense or of any included crime. *State v. Leuhrman*, 123-476.

Where under the evidence defendant is clearly guilty of the offense charged, or not guilty of any offense, it is not error to fail to give instructions with reference to included offenses. *State v. Murphy*, 109-116; *State v. Stanley*, 109-142; *State v. Hoot*, 120-238; *State v. Atkins*, 122-161.

The provision requiring the jury to find as to the degree does not require that in a prosecution for murder in the first degree an instruction be given as to the second degree where the facts show that defendant is either guilty of the crime charged or is innocent of any offense. So held, where the charge was of murder committed by poison. *State v. Smith*, 102-656; *State v. Burtoch*, 112-195.

To require an instruction as to an included offense there must be some evidence which would support a conviction for such

offense. *State v. Penney*, 113-691; *State v. Bone*, 114-537.

Where one offense is necessarily included in that with which the defendant is charged, a conviction for the included offense will not be set aside on the ground that under the evidence the defendant must have been guilty of the offense charged if guilty in any degree. *State v. Barkley*, 129-484.

Error in an instruction as to an included crime will not necessitate reversal if the defendant is convicted of the higher crime, as to which there is no error. *State v. Morris*, 128-717.

It is not necessary to instruct as to an included crime for which there could not have been a conviction under the evidence. *State v. Beabout*, 100-155; *State v. Van Tassel*, 103-6.

It is not prejudicial error to submit to the jury an included offense of which the defendant could not be convicted under the indictment where the defendant is in fact convicted of the offense charged. *State v. Sheets*, 127-73.

Where the jury is instructed as to included offenses such offenses should be described in the instructions. *State v. Thompson*, 127-440.

In a prosecution for murder, where it is a matter of inference only whether the homicide was premeditated and delib-

erate, or done in a moment of desperation and passion, it is proper to instruct as to murder in the second degree. *State v. Cunningham*, 111-233.

It is not error in a prosecution for homicide to omit instructions as to assault with intent to inflict great bodily injury and assault and battery, where the record clearly shows that if defendant was guilty of any crime he was guilty at least of the crime of manslaughter. *State v. Walker*, 133-489.

It is not error in a prosecution for murder committed by lying in wait or other wilful, deliberate or premeditated killing, to charge as to included crimes although the evidence shows that the defendant if guilty of any crime is guilty of the crime charged. *State v. Shepherd*, 129-705.

While it is true that a defendant who has been tried on an indictment charging murder in the first degree and convicted of manslaughter only cannot be again tried for the offense of murder, it is not error when the defendant is put on trial a second time for manslaughter to read to the jury the original indictment charging murder. *State v. Walker*, 133-489.

There may be a conviction of manslaughter on evidence of gross negligence and recklessness of the defendant causing the death of the deceased, under an indictment charging him with murder in which there is no specific allegation as to negligence or recklessness. *State v. Moore*, 129-514.

Where defendant was charged with rape in having intercourse with a female under the age of consent, held, that it was not necessary to instruct with reference to a simple assault in view of the fact that if there was any assault it was at least an assault with intent to commit rape. *State v. Sherman*, 106-684.

The crime of assault with intent to inflict great bodily injury is not necessarily included in that of rape. *State v. McDonough*, 104-6.

While an assault is necessarily included in rape, yet if it appears from the evidence without question that if there was an assault there was also an assault and battery it will not be error to fail to instruct with reference to assault when a proper instruction as to assault and battery is given. *Ibid.*

There may be assault with intent to commit rape without an assault and battery. If the indictment does not charge the assault as accompanied with force it is error to instruct with reference to assault and battery as an included offense. *State v. Desmond*, 109-72.

Where an indictment for rape charges that defendant wilfully and feloniously as-

saulted the prosecutrix, and did wilfully and feloniously ravish and carnally know her, it is error to fail to charge the jury with reference to assault and battery, and simple battery. *State v. Wolf*, 112-458.

In a prosecution for rape where there is evidence tending to show want of consent, the court should instruct as to assault with intent to commit rape, assault and battery, and simple assault. *State v. Trusty*, 118-498.

Under a prosecution for assault with intent to commit rape it is not error to fail to instruct as to assault and battery as an included crime, where the evidence would not justify a finding that an assault or battery was intended or committed. *State v. Snider*, 119-15.

In the prosecution for assault with intent to commit rape in which no battery is charged, an erroneous instruction as to assault and battery as an included crime will be error without prejudice if the defendant is convicted of the crime charged. *State v. Miller*, 124-429.

In a prosecution for rape alleged to have been committed with force and violence, if the evidence tends to show violence, the jury should be instructed with reference to assault and battery as an included crime. *State v. Egbert*, 125-443.

In a prosecution for rape under an indictment charging acts which would constitute an assault and battery, it is error to fail to charge with reference to such an included offense, although the jury has been instructed with reference to an assault. *State v. Barkley*, 129-484.

In a prosecution for rape, it is not necessary to instruct with reference to assault and battery as an included crime, where the allegations of the indictment charge nothing more than assault with intent and the commission of the offense. *State v. Johnson*, 133-38.

In a prosecution for rape, committed by having connection with a female under the age of consent, the court may properly omit any reference to any other included crime than that of assault with intent to commit rape, there being no evidence that the connection was without the consent of the female. *State v. King*, 117-484.

In a prosecution for rape in having connection with a female under the age of consent, the evidence showing no other force than that involved in the perpetration of the act, held that it was not error to fail to instruct as to assault or assault and battery. *State v. Stevens*, 133-684.

In a prosecution for robbery the court should instruct as to assault with intent to rob if there is any evidence of an assault. *State v. Duffy*, 124-705.

SEC. 5407. Included offenses.

Where the included offenses are not degrees of the crime charged, but are distinct, failure to give instructions as to included crimes is not necessarily prejudicial error, in the absence of a request for such instructions from defendant. *State v. Murphy*, 109-116.

On reversal of a conviction for manslaughter under an indictment charging murder in the first degree, the defendant can only again be put on trial for the

offense of which he was convicted, and he is only entitled to the number of peremptory challenges allowed in case of a prosecution for such offense. *State v. Smith*, 132-645.

Under charge of the commission of a crime, there may be a conviction of an attempt. *State v. Mahoney*, 122-168.

As to instructions with reference to included offenses, see notes to preceding section.

CHAPTER 27.**OF EXCEPTIONS.****SECTION 5415. As to what.**

An exception is authorized in a criminal case as to any action or decision of the court which affects a material or substantial right of the party, whether such action or decision was made before or after the trial. Therefore, held, that a statement of the court in its decision overruling a motion for a new trial was properly em-

bodied in the bill of exceptions. *State v. Taylor*, 103-22.

Error in an instruction which has been called to the court's attention by motion for a new trial may be reviewed on appeal, although the instruction was not excepted to. *State v. Hamann*, 109-646.

SEC. 5418. Taking exceptions.

There is no provision for a judge changing a bill of exceptions as offered for his signature to conform to his view of the facts; nor can he, by *addenda* to the bill of exceptions, incorporate other matter into the record. *State v. Smith*, 107-480.

A bill of exceptions signed by bystanders may be filed within the time allowed by statute or by order of court for filing bill of exceptions. *State v. Taylor*, 103-22.

It is not competent to contradict by a bill of exceptions signed by bystanders the

recitals of the bill of exceptions as to the same matter signed by the judge. *State v. Tripp*, 113-698.

Misconduct of attorney as a ground for reversal on appeal can not be shown by affidavits, even though they are embodied in the bill of exceptions, but must be made to appear by recitals of the bill of exceptions itself. Although such affidavits may be made part of the record, they do not become competent evidence to prove the fact. *State v. Burton*, 103-28.

CHAPTER 28.**OF NEW TRIAL.****SECTION 5424. Causes for.**

As in civil cases: The rules recognized as to new trials in civil cases are applicable in criminal cases, although on some grounds the courts will set aside verdicts more readily in criminal than in civil cases. *State v. Olds*, 106-110.

No such procedure as an application for a new trial after judgment by petition is recognized in criminal cases. *State v. Hayden*, 131-1.

Misconduct of judge: Under the facts of a particular case, held that it was not such misconduct as to require a new trial that the judge, addressing the prosecuting witness, spoke to her as "my girl;" such form of address not necessarily indicating any sympathy with or immaturity on the part of the prosecuting witness. *State v. Burns*, 119-663.

It is error such as to necessitate a new

trial, for the court to refer to the effect of an acquittal as preventing another trial and allowing the defendant, if guilty, to escape punishment. *State v. Hunter*, 118-686.

Absence of the judge from the court room, held, not to be ground of new trial where it appeared that the absence was during the argument of counsel and that the judge was not out of hearing of counsel at the time, and heard all that was said. *State v. Porter*, 105-677.

The fact that the judge is during the argument out of hearing and is not presiding over the proceedings will be a ground for reversal. *State v. Carnagy*, 106-483.

While the absence of the judge from the court room during the trial may be ground of reversal, yet, where the defendant has consented thereto, he cannot afterwards complain if he might have secured the presence of the judge at any time, and shows no prejudice resulting to him from his absence. *State v. Hammer*, 116-284.

It is not sufficient as a ground for new trial that the judge was in an adjoining room, dictating instructions during the argument to the jury, if he was in such position as to hear the argument and see what took place in the court room. *State v. Burns*, 119-663.

Misconduct of jurors: Where the juror makes false answers as to having previously formed or expressed an opinion, and is shown to have been prejudiced against the defendant, a new trial may properly be granted. *State v. Wright*, 112-436.

The action of the members of the jury during the progress of the trial in reading newspaper accounts of the evidence, with comments thereon, is sufficient to authorize the granting of a new trial although the newspaper accounts are not unfair to the defendant. *State v. Caine*, 111 N. W. 443.

The consideration by the jury during their deliberations of the fact that defendant, if convicted, might have an appeal, while no appeal could be entertained for the correction of any error involved in an acquittal, does not constitute such misconduct as to require a reversal. *State v. Lucas*, 122-141.

Misconduct of the jury cannot be established by affidavits of attorneys based entirely upon alleged statements of jurors. *State v. Tyler*, 122-125.

Disqualification of juror: The objection that one of the jurors could not read or write the English language and that such fact was not known to the party complaining until after the trial will not be a ground for new trial where it appears that the complaining party, having been given the right to challenge, failed to claim such right as to such juror and made no exam-

ination of the juror as to his competency. In such case the objection will be deemed to have been waived. Overruling *State v. Groome*, 10-308; *State v. Pickett*, 103-714.

Where no examination of a juror is made before he is accepted, and it does not appear that his disqualification was not known to the defendant at that time, the right to object to the juror as disqualified is waived. *State v. Burke*, 107-659.

Where the juror gives false answers as to his having formed or expressed an opinion and is shown to have been prejudiced, the defendant is entitled to a new trial. *State v. Wright*, 112-436.

A showing that one of the jurors who has testified that he had not heard of the case nor formed or expressed an opinion with reference thereto, had in fact been present when the statements were made as to the commission of the crime, held, not sufficient to entitle the defendant to a new trial. *State v. Geier*, 111-706.

Misconduct of counsel: Where defendant make no complaint at the time as to improper remarks of counsel, and asks no direction to the jury for the purpose of removing prejudice arising therefrom, he cannot afterward complain. *State v. Hogan*, 115-455.

It is error in closing the case for the prosecution to state facts derogatory to the defendant which do not appear in evidence. *State v. Williams*, 122-115.

The mere statement of deductions from the evidence and conclusions as to what the conduct of a party might properly be in the future do not constitute such misconduct as to require a new trial. *State v. Hasty*, 121-507.

It does not constitute misconduct on the part of the prosecuting attorney in opening the case to the jury, where the defendant whose conviction for murder has been reversed on appeal is put on trial for manslaughter, to state to the jury that in his opinion the evidence would sustain a conviction of the higher offense. *State v. Walker*, 133-489.

The assertions of counsel as to a fact will not constitute misconduct if counsel does not purport to speak from other knowledge than that afforded by the evidence. *State v. Bricker*, 112 N. W. 645.

While the prosecuting attorney has no right to misrepresent or misstate the facts, he is not required to forego all the embellishments of oratory or leave uncultivated the fertile field of fancy. *State v. Burns*, 119-663.

It is not every indulgence in lurid argument on the part of counsel which will afford ground for granting a new trial. Beyond insisting that counsel must keep fairly within the record and abstain from inflammatory appeals to passion and prej-

udice, the court will not attempt to control the manner and method of argument to the jury. *State v. Drake*, 128-539.

Misconduct of the county attorney in argument to a jury alleged as consisting of the exhibition before the jury of a revolver by way of illustration, held not sufficient to require a new trial, although the revolver was not introduced in evidence as the one found in possession of defendant when arrested. *State v. Brafford*, 121-115.

It is improper for counsel for the prosecution to give countenance to violence or to inflame the passions of the jury. *State v. Harmann*, 112 N. W. 632.

It is improper for the prosecuting attorney to suggest to the jury the possibility of a lynching in case they should acquit. *State v. Busse*, 127-318.

Severe criticism by the prosecuting attorney of witnesses for the defense will not be a ground for new trial where it appears that as a whole the trial has been fair and impartial. *State v. Nowells*, 109 N. W. 1016.

Repeated attempts to get before the minds of the jury a fact which cannot properly be introduced in evidence, the purpose being to prejudice the minds of the jury against the defendant, may be sufficient misconduct on the part of the prosecuting attorney to require the granting of a new trial in case of conviction. *State v. Roscum*, 119-330.

It may constitute misconduct to ask improper questions on examination of a witness, although objections to the questions are sustained; but whether such misconduct works prejudice to the defendant is a matter peculiarly within the knowledge of the trial court, and its refusal to grant a new trial on that ground will not generally be interfered with. *State v. Waterbury*, 133-135.

Where the identity of the defendant as the person charged with the crime is in controversy, it is not improper for the prosecuting attorney to refer to the characteristics of the defendant's countenance. *Ibid.*

It is such misconduct as may require a new trial that the prosecution after adverse rulings of the court on the question insists on asking a witness as to a fact which is wholly inadmissible with the evident purpose of bringing that fact to the attention of the jury. *State v. Blydenburg*, 112 N. W. 634.

Publications in newspapers during the course of the trial, of documents secured from the prosecuting attorney, held not to necessitate a new trial, there being no indication of bad faith on the part of the prosecuting attorney, and no showing that the publication was in any way brought

to the attention of the jury. *State v. Walker*, 133-489.

Where an improper statement of counsel is at once withdrawn and the jury directed to give it no consideration, the action of a trial court in overruling a motion for a new trial on account of such improper statement will not in general be reversed on appeal. *State v. Mathews*, 133-398.

Improper argument made use of by the prosecuting attorney cannot first be made the ground of objection on motion for new trial, but should be called to the attention of the court at the time, when the court might have restrained the continuance of the improper argument and prevented the prejudice which is claimed to have resulted therefrom. *State v. Sale*, 119-1.

In the absence of bad faith or a showing of prejudice the action of the trial court in overruling a motion for new trial on account of misconduct of the prosecuting attorney in asking improper questions, will not be reversed on appeal where it appears that the trial judge ruled promptly and correctly when objections were made and at the request of the defendant instructed the prosecuting attorney to abandon objectionable lines of examination, which instructions of the court were obeyed by the attorney. *State v. Greenland*, 125-141.

Error in admission of evidence: In general, error in the admission of improper evidence may be cured by its withdrawal from the jury, and by proper instructions in relation thereto. *State v. Booth*, 121-710.

Where incompetent evidence has been received, its subsequent withdrawal or exclusion by the court will ordinarily cure the error. But held that error in admitting evidence tending to show defendant guilty of other criminal acts, having no connection with the crime charged, was such error as could not be cured by withdrawing it from the consideration of the jury. *State v. Brundige*, 118-92.

Verdict against evidence: The rule with reference to granting new trials for want of evidence in criminal cases is different from that applied in civil. The supreme court, though proceeding carefully and cautiously, will not support a verdict if it be against the clear weight of the evidence. *State v. Reinheimer*, 109-624.

Witness not sworn: Where one of the material witnesses for the prosecution was not sworn, and the fact was not discovered until after the verdict, held that the defendant was entitled to a new trial. *State v. Lugar*, 115-268.

Fair trial: Where on an application for a new trial there was a showing of excitement and manifestation of prejudice on

the part of those present in the court room, but it did not appear that there was any failure of the trial judge to discharge his full duty under the circumstances, held that it was not error to refuse to grant a new trial on that ground. *State v. Thomas*, 109 N. W. 900.

The fact that a third person asks a juror pending the trial whether he knows that he is related to the defendant, and then advises him of such relationship, does not constitute a ground for a new trial. *State v. Hasty*, 121-507.

Newly discovered evidence is not a statutory ground for a new trial in a criminal case. *State v. Watson*, 102-651.

Newly discovered evidence is not in it-

self sufficient to warrant a new trial. *State v. Reinheimer*, 109-624.

Affidavits of newly discovered evidence do not necessarily entitle the defendant to a new trial. *State v. Baughman*, 111-71.

In a particular case, held, that the court did not abuse its discretion in refusing to grant a new trial on the ground of newly discovered evidence. *State v. Seevers*, 108-738.

Newly discovered evidence impeaching in character and on a collateral matter will not be ground for granting a new trial, especially where it is not such as to indicate that a different result might be anticipated on another trial. *State v. Leuth*, 128-189.

CHAPTER 29.

OF ARREST OF JUDGMENT.

SECTION 5426. Grounds for.

The objection that a defendant, whose case was re-submitted to another grand jury than the one to which it was first submitted, did not have opportunity to challenge the grand jurors who returned

the indictment on which he was tried, must be raised by a motion to set aside the indictment, or by plea in abatement, and is not available on motion in arrest of judgment. *State v. Brown*, 128-24.

CHAPTER 30.

OF JUDGMENT.

SECTION 5431. Of conviction—time for.

As applied to a criminal case a judgment is the formal and final pronouncement of the court by which the prosecution is brought to an end, leaving nothing to be done except to carry such judgment into execution in case there has been a conviction. *State v. Hortman*, 122-104.

Where it does not appear that the court continued in session for three days after the return of the verdict, there cannot be a reversal of a sentence because three days were not allowed to elapse. *State v. Roan*, 122-136.

The fact that sentence is imposed without previously fixing a time therefor does not constitute error such as to require a reversal where it appears that the defend-

ant has taken every step which would have been open to him had the time been fixed. *State v. Usher*, 111 N. W. 811.

The sentence of the court is evidenced only by the record, and after the sentence as imposed has been fully satisfied, it cannot be corrected by *nunc pro tunc* order so as to show the imposition of a fine in addition to the imprisonment to which the defendant was sentenced. *Smith v. District Court*, 132-603.

After the pronouncement of judgment by the court it is too late to withdraw a plea of guilty under the provision of Code § 5337 although the judgment has not yet been entered of record. *Beatty v. Roberts*, 125-619.

CHAPTER 31.

OF EXECUTION.

SECTION 5443. Copy of judgment.

The court has no power to suspend sentence after it is announced. *Miller v. Evans*, 115-101.

Therefore, a defendant who after sentence of imprisonment has been allowed by the officer to remain at large until the ex-

piration of the term of imprisonment fixed by the sentence can still be committed to serve out the term. The term at which the

sentence is to be carried out is ordinarily directory only, and forms no part of the judgment of the court. *Ibid.*

CHAPTER 32.

OF APPEALS.

SECTION 5448. When allowed.

From final judgment: Where the record showed that the court sustained a motion in arrest of judgment and ordered defendant to appear before the next grand jury, held, that such ruling was a final judgment from which an appeal might be taken by the prosecution. *State v. Alverson*, 105-152.

There cannot be an appeal in a criminal case from an order overruling a demurrer. *State v. Doty*, 109-453.

This section provides only for appeals in criminal cases from the final judgment, and not from an intermediate order. *State v. Wright*, 111-621.

No appeal in a criminal case from an intermediate order or ruling is authorized even though such order or ruling would have finally disposed of the case. *State v. Sloan*, 131-676.

The action of the trial court in sustaining a demurrer to the indictment and re-submitting the case to the grand jury does not constitute a final judgment from which the state may appeal. *State v. Evans*, 111-80.

Effect of appeal: Until the judgment of the lower court is modified or reversed it

continues in force notwithstanding an appeal, although the right to execute it may be suspended; therefore the record of conviction for a felony may be introduced to impeach the credibility of a witness although an appeal from the judgment in such case is pending. *Hackett v. Freeman*, 103-296.

Appeal by state: It is not contemplated that on an appeal by the state the supreme court shall deal with imaginary questions. *State v. Gunn*, 106-120.

The fact that on an appeal by the state the court finds the ruling of the district court on a demurrer and its judgment thereon to be erroneous will not affect the right of defendant to insist that as to him the judgment was final. *State v. Fields*, 106-406.

On affirmance of a conviction in the supreme court on appeal, even though by an equally divided court as provided in Code § 195, the judgment of the trial court is to be carried into execution. No other judgment than the announcement by written opinion filed, of the affirmance by operation of law, is required. *Busse v. Barr*, 132-463.

SEC. 5450. Transcript—duty of clerk.

While a judge may have some discretion under Code § 254 as to ordering a transcript at the expense of the county when defendant is unable to pay for it, yet, if he finds that fact he should not refuse to order the transcript merely because in his judgment the defendant has had a fair trial. *State v. Robbins*, 106-688.

Under the provisions of Code § 254, that a transcript of the evidence may be ordered

at the expense of the county where it is shown by the defendant that he is unable to pay for such transcript, for the purpose of appeal, the application for such transcript should be made to the trial judge. *State v. Carter*, 109-69.

The ruling of the judge as to granting a transcript at the expense of the county is subject to review. *State v. Wright*, 111-621.

SEC. 5462. Decision—costs on reversal.

Arguments: Although no arguments are filed on either side, the supreme court will not dismiss the appeal but will inspect the record and ascertain whether it shows any manifest error in the proceedings. *State v. Rea*, 126-65.

Reversal—on what grounds: The erroneous admission of material evidence which must in the nature of the case have

been prejudicial, will be ground for reversal. *State v. Walker*, 124-414.

The full duty of the supreme court on appeal in a criminal case is discharged when the judgment of conviction is affirmed after a finding that the defendant has had a fair trial to an impartial jury, and that the verdict is supported by the evidence, and that no prejudicial error of

law has been committed. *State v. Thomas*, 109 N. W. 900.

Fair trial: A criminal case may be reversed on the ground that the defendant has not had a fair trial, although no specific rulings have been properly objected to. *State v. Barr*, 123-139.

Speedy trial: On an appeal in a criminal case it is not competent for the court to determine that the prosecution should have been dismissed because the defendant had not been given a speedy trial. *State v. Sloan*, 131-676.

Objections not made below: The rule which obtains in civil cases that an objection not made in the court below cannot be considered in the supreme court on appeal does not apply in criminal cases where the statute requires that the supreme court shall examine the record and without regard to technical errors or defects which do not affect the substantial rights of the parties render such judgment on the record as the law demands. *State v. Nine*, 105-131.

Objections waived: The defendant may waive objections to incompetent testimony and when he does so by silence or otherwise his conviction will not be reversed on account of the introduction of such evidence. *State v. Conroy*, 126-472.

Verdict against evidence: The supreme court, though proceeding carefully and cautiously, will interfere in criminal cases more readily than in civil on the ground that a verdict is without support in the evidence. *State v. Burtoch*, 112-195.

In a particular case, held that there was not sufficient evidence to warrant a conviction for murder by the administration of poison. *Ibid.*

Misconduct of counsel: The supreme court on appeal may grant a new trial where it appears that defendant has been prejudiced by the act of the prosecuting attorney in making repeated offers to prove facts which should not be considered by the jury as bearing upon defendant's guilt. *State v. Roscum*, 119-330.

Error cured: Error in admitting evidence of a confession may usually be obviated by directing the jury not to consider it, after it has become apparent that the admission was improper. *State v. Moran*, 131-645.

Error without prejudice: Action of the court which is absolutely harmless and without prejudice will not be a ground of reversal, whether erroneous or not. *State v. Novak*, 109-717.

In criminal cases only technical errors which do not affect the substantial rights of the defendant are to be disregarded as without prejudice. If the error involves a material point in the case, prejudice must be presumed unless on survey of the

whole record the contrary affirmatively appears. *State v. Nugent*, 111 N. W. 927.

In appeals in criminal cases the supreme court considers the case without regard to technical errors or defects which do not affect substantial rights of parties. *State v. Robbins*, 106-688.

A conviction will not be reversed for a refusal to allow a witness to answer a question asked where it appears that the response to the question desired would have been favorable to the party objecting. *State v. Kuhn*, 117-216.

If from the entire record it clearly appears that an error, committed by the trial court, was harmless, it will not necessitate a reversal. *State v. Miller*, 124-429; 100 N. W. 334.

Error in an instruction as to an included crime will not necessitate reversal if the defendant is convicted of the higher crime, as to which there is no error. *State v. Morris*, 128-717.

Exceptions necessary: Defendant in a criminal case may waive error on appeal, and he does so by not taking exception in the lower court to the ruling of which he subsequently complains. And if the defendant files an argument on appeal the court will consider only the errors urged in such argument. *State v. Schwab*, 112-666.

Where proper exceptions are not taken, rulings on questions of law raised during the trial will not be considered on appeal. *State v. Williams*, 115-97.

Waiver of right to appeal: An appeal in a criminal case is to be heard and decided upon its merits. There is no provision for dismissing such appeal on the ground that defendant has by statement in the lower court with a view of securing a mitigated sentence waived such right. But the right to have any particular questions reviewed may be waived by the withdrawal in the lower court of objections to rulings afterwards complained of. *State v. Conroy*, 133-195.

Costs: The provision that in case of reversal or modification in defendant's favor of a judgment on appeal he shall be entitled to recover the costs of printing abstracts and briefs, to be paid by the county from which the appeal is taken, applies to suits pending at its passage. *State v. Dorland*, 106-40.

The recovery against the county in such case is to be by way of taxation of costs. If the costs thus taxed are not paid by the county they may undoubtedly be recovered by suit against it. *Ibid.*

Rehearing: While in civil cases the supreme court will not grant a rehearing on account of matters not urged in the original presentation of the case, this

rule does not apply in criminal cases, and a reversal may be ordered on grounds presented for the first time on rehearing. *State v. Phillips*, 119-652.

SEC. 5468. Time of imprisonment deducted.

The deduction of the time of imprisonment which defendant has served under a sentence which has subsequently been reversed is to be fixed by the court, and the period of imprisonment specified in the second judgment is to be what remains after deduction is made from that which the court finds to be the proper term of imprisonment on the second conviction. It will be presumed, therefore, that the term fixed by the court on the second conviction has been determined in view of the amount of deduction to which the prisoner is entitled. *Travis v. Hunter*, 109-602.

In giving credit for a term of imprison-

ment already served, under sentence which has been set aside on appeal, the good time which the defendant has earned in serving such former sentence is to be taken into account. *State v. Barr*, 133-132.

If in imposing the second sentence in such a case the court exceeds the limitation thus fixed, the excess of the second sentence is void, and the prisoner is entitled to discharge after serving so much of the term of imprisonment fixed in the second sentence as might properly have been imposed. *Ibid.*

CHAPTER 34.

OF EVIDENCE AND WITNESSES.

SECTION 5483. As in civil cases.

Declarations or admissions of defendant: Acts, conduct, threats, declarations and statements of a person accused of crime occurring before it was committed are admissible to show a motive or intent and may be established not only by direct but also by circumstantial evidence. *State v. Smith*, 102-656.

Threats made by the accused against the person or property of the injured party may be shown to prove the existence of malice to connect the accused with the commission of the crime. *State v. Millmeir*, 102-692.

Statements by defendant made after the crime in question was committed, held, not to be shown to have relation to the crime and therefore to have been erroneously admitted. *Ibid.*

As a general rule, verbal admissions of a party should be received with great caution as that kind of evidence is subject to imperfections and mistake, but held that it was not necessary to instruct the jury to this effect where the admission relied on appeared to have been made deliberately and understandingly in a conversation in which his purpose was to state the particular facts of his connection with the crime. *State v. Jackson*, 103-702.

As to confessions, see notes to Code § 5491 in this Supplement.

Involuntary confessions: Inculpatory facts, discovered by means of involuntary confessions, are not excluded. *State v. Height*, 117-650.

Acts and declarations of co-conspirators:

Where the acts of co-conspirators may be shown as against defendant their declarations in explanation of their conduct are also admissible. *State v. Healy*, 105-162.

To justify the admission of acts and declarations of a co-conspirator as against the defendant, the alleged conspiracy must be shown by testimony outside of such acts and declarations. The rule allowing the statements of one co-conspirator to be given in evidence against another is a marked exception to the general rule excluding hearsay testimony and applies only when those statements are made pending the conspiracy and in furtherance of its unlawful purposes. *State v. Crofford*, 121-395.

Statements by a co-conspirator made before the formation of the conspiracy or after its accomplishment are not admissible except as against the person making them. *Ibid.*

The *prima facie* showing of the fact of conspiracy is first addressed to the court alone simply as governing its action in the admission of evidence. But when a *prima facie* case is thus made, the final determination whether such conspiracy did or did not exist should be left to the jury, and the finding by the jury of the fact of conspiracy is the necessary preliminary to the consideration by them of acts and declarations of the co-conspirator. An

instruction to this effect should be given. *Ibid.*

While it is within the discretion of the trial court to admit proof of acts and declarations of joint conspirators even before a *prima facie* case of conspiracy has been made, yet if subsequently the evidence does not tend to show that the person making the declarations was a co-conspirator with the defendant in the commission of the crime charged and made the declarations in carrying out the conspiracy, the declarations should be withdrawn from the jury. *State v. Walker*, 124-414.

Circumstantial evidence may be sufficient to show that the person making the declarations and the defendant were co-conspirators for the commission of the crime, but it is not enough to justify the consideration of the declarations against the defendant that the evidence introduced tends to raise a suspicion of a conspiracy. *Ibid.*

The sufficiency of the proof of the conspiracy to justify introduction of declarations of one conspirator against another in the first instance, should be determined by the trial judge and only when a *prima facie* case is made out should the question of conspiracy be left to the jury. *Ibid.*

The declarations of a co-conspirator, to be admissible, should be shown to have been made pending the conspiracy and in furtherance of its unlawful purpose. *Ibid.*

Acts and declarations of co-conspirators in carrying out the common enterprise may be shown as against one of them although not done or made in the presence of the defendant. *State v. Dickerhoff*, 127-404.

Acts and declarations of a woman upon whom the crime of abortion is alleged to have been committed are admissible as against one charged with the commission of the offense upon proof that the crime was committed in pursuance of a previous conspiracy to which the woman was a party. *State v. Crofford*, 133-478.

Those who join in a conspiracy to commit a crime subsequent to its inception adopt the prior acts of their associates, in such sense that the prior acts and declarations of such associates are admissible as against them. *Ibid.*

Evidence of acts done in furtherance of a common unlawful purpose is relevant as against one engaged in carrying out such purpose. *State v. Donovan*, 125-239.

Against one of joint defendants: Where two or more defendants are joined together, evidence admissible against one of them may be introduced although it is inadmissible against the others, the jury being directed to consider such evidence only as against the defendant as to

whom it is admissible. *State v. Wolf*, 112-458.

Testimony of one jointly accused: One of two persons separately charged with the commission of a crime identical as to each, may be called as a witness upon the trial of the other. *State v. Cobley*, 128-114.

Statements in hearing of defendant: Declarations of one who has been recently poisoned made *in extremis* in the presence of one whom he charges with the administration of the poison, held, to be admissible as against the person so charged. *State v. Kuhn*, 117-216.

It is competent to prove declarations made against the defendant in his presence. *State v. Worthen*, 124-408.

Statements made by a third person in the presence of the defendant with reference to the facts and circumstances of the crime may be proven as tending to implicate him. *State v. Burns*, 124-207.

Declarations of third persons: Declarations of third persons with reference to defendant's guilt are not admissible as independent evidence unless as a part of the *res gestae*, or unless by independent evidence they are shown to have been made by a co-conspirator. *State v. Walker*, 124-414.

In a criminal prosecution, books of account, not kept by the defendant, and the entries in which are not made by his direction, are not admissible against him. *State v. Ames*, 119-680.

Dying declarations: Declarations made under a solemn sense of approaching death are only competent as to facts which the witness might testify to if living. Therefore, expressions of opinion on the part of deceased are not admissible as dying declarations. *State v. Wright*, 112-436.

Dying declarations must be shown to have been made under a sense of impending death, but this apprehension of certain dissolution may be inferred from the conduct, condition or statements of the declarant. The question as to whether such statements are admissible as dying declarations is for the court. *State v. Kuhn*, 117-216.

The statement in such a declaration with reference to the defendant that "she poisoned me" is not inadmissible on the ground that it states a conclusion. *Ibid.*

Statements by way of dying declarations are admissible which contain no more than assertions of fact as to who fired the fatal shot, and as to the manner and attending circumstances of the shot, that it was intentional and not accidental. *State v. Fielding*, 112 N. W. 539.

While dying declarations of deceased are admissible for as well as against a defendant charged with criminal homicide,

yet they are not admissible in either case if they state merely a conclusion or opinion. Nor are statements in a dying declaration which are in the nature of conclusions admissible in favor of the defendant as admissions against interest, the legal controversy being not between the deceased and defendant, but between the state and the defendant. *State v. Sale*, 119-1.

To be admissible as a dying declaration, the declaration of deceased must appear to have been made at a time when he was in fact *in extremis* and under the belief of impending dissolution. *State v. Dennis*, 119-688.

The question of the admissibility of the statement as a dying declaration is for the court, and should be determined from all the facts and circumstances appearing in the case. The court is not limited in its inquiry to what was said by the declarant upon the subject, but the fact may be proved like any other fact in the case. *Ibid.*

To render dying declarations admissible it must appear that the person making them was actually dying, or was suffering from mortal injury and that he was fully conscious of such fact, and that the words were spoken under solemn conviction of impending dissolution. *State v. Phillips*, 118-600.

Where the wife of deceased testified with reference to dying declarations, that the deceased declared, "I cannot stand it if this pain does not leave me soon," held that her evidence did not sufficiently show that the declarations were made under a sense of impending death. Such declarations should be admitted only where the preliminary showing that deceased was in fact *in extremis*, and had himself given up all hope of recovery, is clear and unequivocal. The fact that the declarant realized that he was in danger of death, and believed that he must die if relief be not soon administered, is not enough. *Ibid.*

While it is for the court to pass upon the admissibility of the declarations in evidence, the jury should be required to take into consideration all the testimony bearing upon the character of the alleged dying declaration and the circumstances under which it was made, for the purpose of determining whether it was made under such circumstances as to entitle it to be considered, and the jury should be explicitly instructed as to such matter. *Ibid.*

Statements of the deceased in a particular case held sufficient to show consciousness of impending dissolution, such as to make his declarations admissible as dying declarations. *State v. McKnight*, 119-79.

Dying declarations are to be strictly limited to the facts and circumstances at-

tending the immediate injury from which the declarant is about to die, and statements as to prior occurrences are inadmissible. *Ibid.*

Where dying declarations are reduced to writing and signed by the deceased parol testimony as to the declarations should be excluded as the best evidence. *State v. Busse*, 127-318.

Under the evidence in a particular case, held that knowledge of impending death was sufficiently shown to justify the admission in evidence of dying declarations. *State v. Nowells*, 109 N. W. 1016.

Attempt to escape: Evidence of attempted escape is admissible as tending to show guilt. In response the defendant may show, if he can, that the attempt to escape was because of fear of mob violence. *State v. Desmond*, 109-72.

Flight: The fact of flight is a circumstance *prima facie* indicative of guilt. *State v. Matheson*, 130-440.

Evidence of other crimes and similar acts: In a prosecution for maliciously exposing a poisonous substance with intent that it be taken by a domestic animal, evidence of such acts with reference to other animals is admissible to show intent. *State v. Lightfoot*, 107-344.

The state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for separate punishment, or as aiding the proofs that he is guilty of the crime charged. The exceptions to the rule may be classified as follows: Evidence as to other offenses is incompetent to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme embracing the commission of two or more crimes so related to each other that proof of one tends to prove the others, and (5) the identity of the person charged with the commission of the crime under investigation. *State v. Vance*, 119-685.

An allegation of crime cannot be established by proof of independent criminal acts or of defendant's general disreputable character. *State v. Berger*, 121-581.

An accused person is not to be proved guilty of one crime by proving that he has committed another. In a few exceptional cases the commission of other criminal acts may be shown for the purpose of establishing the intent, but generally speaking this exception applies only to cases in which the criminal character of the act depends upon the specific intent with which it is committed. *State v. Roscum*, 119-330.

Subject to certain well defined exceptions, evidence of a crime committed by the defendant other than that with which he is charged should be excluded. *State v. Crofford*, 121-395.

Evidence of particular crimes, committed at the same time and place, by the same person, is sometimes admissible, but where offered to show defendant's connection with the main offense, it should sufficiently appear that the defendant was connected with the crime with which he is charged. *State v. Wackernagel*, 118-12.

Evidence of the commission by the defendant of other criminal acts, which have no connection with the crime charged, may constitute such error as cannot be cured by subsequently directing the jury not to give consideration to such evidence. *State v. Brundige*, 118-92.

Evidence of a distinct crime from that of which the defendant is charged cannot be shown unless it tends to establish a criminal intent with reference to the act with which the defendant is charged. *State v. Carmean*, 126-291.

If evidence is material and relevant to the issue, the mere fact that it tends to establish guilt of a crime other than the one alleged furnishes no ground for its rejection. *State v. Wrand*, 108-73.

Any evidence directly tending to prove the crime charged is admissible although it may also tend to prove the commission by defendant of some other crime. *State v. Donovan*, 125-239.

Evidence which tends to show guilty knowledge, intent, purpose or design, is competent though it may also tend to prove that the defendant has committed some other crime. *State v. Levich*, 128-372.

In a prosecution for adultery, distinct adulterous acts, committed between the same parties, may be proven in explanation of or as characterizing the acts and conduct of the parties complained of as constituting the particular act of the offense charged. *State v. Higgins*, 121-19.

When the issue is as to criminal intimacy between persons of opposite sex, evidence of prior acts of indecent familiarity is competent as showing an antecedent probability. *State v. Trusty*, 122-82.

Ordinarily evidence of another offense other than that alleged may not be received, but to this rule there are well established exceptions, one of these being in case of rape committed by having carnal connection with a female under the age of consent. In a prosecution for such crime, evidence of other acts of the same character between the parties may be proven. *State v. King*, 117-484.

In a prosecution for assault with intent to commit rape by having connection with a girl under the age of consent, held, that improper conduct of defendant with other

girls in the same transaction might be proved. *State v. Desmond*, 109-72.

In a prosecution for rape, evidence of other similar acts of the defendant with reference to the complainant as tending to show the disposition and intent of the accused in the particular act with which he is charged is admissible. *State v. Johnson*, 133-38.

In a prosecution for rape the prosecuting witness may testify as to other and prior assaults made upon her by the defendant. *State v. Carpenter*, 124-5.

In a prosecution for cheating by false pretenses, proof of other false pretenses of like kind made by the defendant to the prosecutor at about the time the offense charged was committed, is admissible as bearing upon defendant's evil motive and intent. *State v. Gibson*, 132-53.

In a prosecution for obtaining money by false pretenses, other similar fraudulent transactions by the defendant may be shown as bearing upon the question of intent. *State v. Seligman*, 127-415.

In a prosecution for obtaining property by false pretenses, evidence of similar pretenses made about the same time and in the same neighborhood to other persons may be shown, if accompanied with evidence that such pretenses were false. *State v. Carter*, 112-15.

In a prosecution for forgery, evidence of other similar forgeries may be introduced to show the intent. *State v. Prins*, 113-72.

Alibi: While the defense of alibi must be made out by a preponderance of the evidence relating thereto, nevertheless the defendant is entitled to acquittal if all the evidence, including that relating to alibi, leaves in the minds of the jury a reasonable doubt as to defendant's guilt of the crime charged. *State v. Thomas*, 109 N. W. 900.

Circumstantial evidence: Where the conviction of a crime is sought on circumstantial evidence, each circumstance necessary to reach a conclusion of guilt must be fully and fairly proven, and if in considering any such necessary circumstance the jury have a reasonable doubt as to the sufficiency of the evidence, such doubt should be resolved in favor of the defendant; and the jury should be so instructed. *State v. Harmann*, 112 N. W. 632.

Where it is sought to establish a crime by circumstantial evidence, the jury should be distinctly informed as to the established and approved rules governing the proof of crime by that form of evidence. *State v. Blydenburg*, 112 N. W. 634.

It is not error to instruct the jury that a criminal charge may be established by circumstantial evidence as well as by di-

rect and positive proof. *State v. Walker*, 133-489.

Self-crimination: Although there is no statutory or constitutional provision against requiring defendant in a criminal case to give self-criminating evidence, held that the general guaranty of due process of law was sufficient to render incompetent as against the defendant evidence of the result of a compulsory examination of his person. *State v. Height*, 117-650.

SEC. 5484. Who competent—defendant as witness.

Defendant as witness before indictment: It will not be ground for setting aside the indictment that the person against whom a charge is being investigated on which the indictment is subsequently found is called and examined as a witness. *State v. Shepherd*, 129-705.

Co-defendants: Where one of two defendants is separately tried the provisions of this section are not applicable as to failure to testify on the part of defendant not on trial. *State v. Hogan*, 115-455.

Criminating evidence: The statutory provision that defendant cannot be called as a witness by the state in a criminal prosecution is not in its terms broad enough to cover the constitutional guaranty found in some states against criminating evidence. But the common law rule against requiring a witness to give self-criminating evidence in any judicial proceeding is covered by the general constitutional provision as to due process of law, and evidence of facts discovered by the compulsory examination of the person of the accused is not admissible. *State v. Height*, 117-650.

Impeachment: Defendant testifying as a witness cannot complain of impeachment by proof of bad reputation at the time of the commission of the crime, any effect on his reputation of reports with reference to such crime being thus excluded. *State v. Hayden*, 131-1.

Where the defendant is a witness in his own behalf he may be asked on cross-examination as to his residence and occupation, although answers to such questions may tend to disgrace and discredit him. *State v. Wasson*, 126-320.

Instructions: It is error to instruct the jury with reference to the testimony of defendant in such way as to authorize them to treat the defendant as a witness already impeached, and lead them to think that he should be corroborated in order to be believed. *State v. Hunter*, 118-686.

It is not error to tell the jury that in considering defendant's testimony they should take into consideration the circumstances under which it was given, his interest in the event of the suit, and all

The rule against self-criminating evidence does not make it unlawful to require the defendant in a criminal case to uncover his face or hands, or otherwise exhibit those portions of his person which are usually subject to personal inspection for the purpose of identification. But he cannot be compelled to exhibit those portions of his body which are usually covered. *Ibid.*

other circumstances, and that they are not required to receive blindly the testimony of the accused person as true, but may consider whether it is true as made in good faith or only for the purpose of avoiding conviction. *State v. Walker*, 133-489.

Where defendant testified as a witness in his own behalf and was the only witness interested in the result of the case who did testify, held, that it was not error to call the attention of the jury to the fact that the defendant was so interested and that such interest might be taken into account in weighing his testimony. *State v. Young*, 104-730.

It is not error for the court to direct the attention of the jury to the fact that the defendant, who has testified, is an interested party as bearing on the weight to be given to his testimony. *State v. Ryan*, 113-536.

The fact that defendant was the wife of deceased does not change the rule that the credibility of her testimony is for the jury, and it is proper to instruct the jury that they may consider her interest, even though the existence of the marital relation might be regarded as strengthening the presumption of innocence. *State v. Hossack*, 116-194.

The court should on the request of defendant give an instruction in accordance with the provisions of this section, even though no reference has been made to the failure of defendant to be a witness. *State v. Carnagy*, 106-483.

Comment by prosecuting attorney: The provision of this section that when defendant does not become a witness, his failure to do so shall not be referred to, does not render it improper for the prosecuting attorney to refer to the fact that in certain respects the evidence of one who testifies is not contradicted, even though it appears that as to the matter thus testified to the defendant was the only person who could have taken the stand and testified in denial. *State v. Snider*, 119-15.

It does not constitute an improper reference to the failure of defendant to testify as a witness that the attorney for the state

calls attention to the evidence of a witness as being uncontradicted, although the only witness who could have controverted the truth of such testimony is the defendant himself. *State v. Hasty*, 121-507.

Remarks of counsel in a particular case held not objectionable as referring to failure of defendant to testify. *State v. Davis*, 110-746.

The reference to the failure of the defendant to testify which is prohibited, is any reference which may come to the notice of the jury. The prohibition does not extend to a reference to that matter in argument to the court not in the presence of the jury. *State v. Seery*, 129-259.

If notwithstanding an improper refer-

ence by the prosecuting attorney to the fact that defendant had been convicted on a former trial the counsel for defendant expressly waive the error and elect to proceed with the trial of the case, such improper statement cannot afterwards be made the ground for a new trial. *State v. Smith*, 132-645.

Comment by jurors: Reference by jurors in their consultation to the fact that defendant was not a witness is not made by statute a ground for a new trial, and does not make a new trial necessary where it appears that the fact was not taken into account by the jurors in reaching their verdict. *State v. Thomas*, 109 N. W. 900.

SEC. 5485. Cross-examination of defendant.

The defendant who has testified as a witness may be cross-examined with reference to his various places of residence, his going under assumed names, and his whereabouts at particular times. *State v. Watson*, 102-651.

Where defendant in a criminal case is a witness he may be cross-examined as to his

different occupations and places of residence. *State v. Chingren*, 105-169.

A defendant who becomes a witness may be cross-examined with reference to his memory, history, motives or matters affecting his credibility. *State v. Kuhn*, 117-216.

SEC. 5488. Corroboration in rape, seduction, etc.

Question is for jury: Whether there is any corroborating evidence is a question for the court; but its weight and sufficiency is solely for the jury. *State v. Bricker*, 112 N. W. 645.

The requirement of corroboration is met if there is some independent evidence tending to corroborate the prosecutrix in connecting the defendant with the commission of the crime, and the sufficiency of such evidence is for the jury. *State v. Norris*, 127-683.

The *quantum* of corroborative proof is not fixed by the law. If there is some proof by way of corroboration it is sufficient to sustain a verdict. *State v. Norris*, 122-154.

The statute does not fix the amount or kind of evidence required in corroboration, nor is its sufficiency to be determined by excluding the evidence of the injured party. If considered in connection therewith the other evidence tends to identify and single out the accused as the perpetrator of the crime. It is of that character contemplated by the statute and its sufficiency is to be passed upon by the jury. *State v. Baker*, 106-99.

Where there was evidence of circumstances tending to identify and point out the defendant as the perpetrator of the crime, held, that it constituted sufficient corroboration to go to the jury. *Ibid.*

Evidence in a prosecution for rape that the prosecuting witness, in making complaint soon after the offense, named the

defendant as the guilty party does not constitute such corroboration of her own testimony charging him with the crime as is required under this section. Evidence of complaint made by the prosecuting witness soon after the commission of the offense is corroborative only of her evidence that the crime was committed. *State v. Wheeler*, 116-212.

The confession of the defendant may supply the necessary corroboration of the testimony of the prosecutrix necessary to connect him with the commission of the crime. *State v. Icenbire*, 126-16.

The facts and circumstances surrounding the case, as established by the evidence, at the time of the commission of the offense, and all the circumstances as shown by the evidence, are to be considered by the jury in order to determine whether or not there is other evidence than the testimony of the prosecutrix tending to connect the defendant with the commission of the offense. *State v. Carpenter*, 124-5.

The fact that the parties kept company and acted as lovers usually do, and other like circumstances, are sufficient to constitute the corroborating evidence necessary to connect the defendant with the offense. *State v. Reinheimer*, 109-624.

Proof that defendant visited prosecutrix as a suitor is not sufficient, as a matter of law, to constitute the required corroboration. *State v. Bess*, 109-657.

Evidence of conduct of defendant towards prosecutrix as a lover prior to and about the time of the alleged seduction, held sufficient corroborative evidence. *State v. Mulholland*, 115-170.

While acquaintance and opportunity will not suffice of themselves to constitute corroborative evidence, yet if it appears that in addition thereto visits were made, company was kept and acts and conduct were indulged in such as usually characterize lovers, the jury in considering such evidence in connection with all the other evidence in the case may be warranted in finding therefrom sufficient corroboration. *State v. Smith*, 124-334.

Mere proof of acquaintance and opportunity does not constitute the corroboration required in cases of seduction. *State v. Kissock*, 111-690.

In prosecutions for seduction proof of acquaintance and of opportunity is not alone sufficient corroboration of the prosecuting witness, but the fact that accused was waiting on prosecutrix as a suitor, shown by his being with her attending church or entertainments, taking long drives, etc., may be sufficient. Proof of admissions on the part of accused that he was waiting on prosecutrix only ostensibly as a suitor, may furnish the necessary corroboration. *State v. Hughes*, 106-125.

Proof of a statement by defendant made within a week after the alleged seduction that he was going to the house of prosecutrix for sexual intercourse, held, properly admissible as tending to show that such relation had existed between them. *Ibid.*

While mere opportunity does not of itself amount to corroboration, yet if this opportunity is shown to have been of the defendant's creation, and made with apparent deliberation, it may with other evidence be sufficient to constitute the corroboration required. *State v. Crouch*, 130-478.

The testimony of the prosecutrix alone is not sufficient to connect the defendant with the crime. Opportunity alone is not of itself under some circumstances such corroborating evidence tending to connect defendant with the crime of assault to commit rape as is required by the statute. *State v. Egbert*, 125-443.

In the absence of any corroborating evidence such as is required by the statute, the court should on defendant's motion direct a verdict in his favor. *Ibid.*

Corroboration may be found, not alone in any one particular fact, but in the relation of the parties and the attending circumstances. *State v. Hayes*, 105-82.

The crime being established, evidence of intimacy and actual cohabitation is sufficient as connecting defendant with the crime. *State v. Wycoff*, 113-670.

Proof of other similar acts of the defendant with reference to the prosecuting witness tending to show the disposition and intent of the accused in the particular act with which he is charged may furnish the necessary corroboration. *State v. Johnson*, 133-38.

Any evidence tending to identify and single out the defendant as the perpetrator of the crime which is proven by the testimony of the prosecuting witness is sufficient to afford the corroboration required by the statute. *State v. Waters*, 132-481.

Where the evidence tends to exclude the possibility of anyone other than the defendant having committed the offense and confirms the testimony of the prosecutrix that it was committed by the defendant, it furnishes sufficient corroboration. *State v. Stevens*, 133-684.

A writing by defendant tending to connect him with sexual intercourse had with the prosecuting witness on one date, held, not to be a corroboration of the evidence of prosecutrix with reference to a connection had at previous date. *State v. Burns*, 110-745.

The corroboration must be by evidence other than that of the prosecutrix, and must tend to connect the defendant with the crime. Proof that prosecutrix gave birth to an illegitimate child is, therefore, not a corroborative circumstance. *State v. McGinn*, 109-641; *State v. Coffman*, 112-8; *State v. Kissock*, 111-690.

The fact of the birth of a child is not to be taken into consideration as furnishing the necessary corroborative evidence. *State v. Dolan*, 132-196.

Corroboration of the testimony of prosecutrix held sufficient in particular cases. *State v. Burns*, 119-663; *State v. Bartlett*, 127-689.

Incest: Corroboration is not required in a prosecution for incest. *State v. Kouhns*, 103-720.

Instructions: Corroboration is one of the essentials of conviction without which the accused is entitled to an acquittal and it is the duty of the court to so instruct the jury although no such instruction is asked. *State v. Carnagy*, 106-483.

An instruction that there must be evidence corroborating the testimony of the prosecuting witness without specifically stating that the corroboration must tend to connect the defendant with the commission of the offense, is erroneous. *State v. Fountain*, 110-15.

Error cured: Errors in admission of evidence and instructions as to corroboration on a charge of assault with intent to commit rape become immaterial if the conviction is for simple assault. *State v. Hoover*, 111 N. W. 323.

SEC. 5489. Corroboration of accomplice.

The woman with whom the unlawful act in seduction or incest is committed is not an accomplice in such sense as to require corroboration. *State v. Kouhns*, 103-720.

To make corroboration of the evidence of an accomplice necessary as provided by statute it is only required that it appear that the witness was an accomplice by a preponderance of the evidence. *State v. Smith*, 102-656.

The corroboration is not sufficient in such a case if it merely shows the commission of the offense or the circumstances thereof. *Ibid.*

Instructions in a particular case as to corroboration required to support the testimony of an accomplice, held correct. *State v. Smith*, 106-701.

Where defendant introduces a witness who testifies to being an accomplice with another in the commission of the crime charged, defendant cannot complain that instructions were not given as to the necessity of corroboration. *Ibid.*

Section applied, in a prosecution for keeping a house of ill fame with reference to the evidence of an inmate. Whether in such cases such a witness is to be deemed an accomplice within the meaning of the statute, *quaere*. *State v. Chauvet*, 111-687.

An accessory after the fact, as, for instance, a receiver of stolen goods, is not an accomplice under the provisions of this section. *State v. Jones*, 115-113.

SEC. 5491. Confession of defendant.

Judicial confessions are those made in conformity to law before a committing magistrate, or in court in the course of legal proceedings. Extra-judicial confessions are those which are made by a party elsewhere than before a magistrate, or in court. The latter must be corroborated by proof of the *corpus delicti*. *State v. Abrams*, 131-479.

To constitute a confession, the admission or declaration must amount to an acknowledgment of guilt of the offense charged, or participation therein, and an admission of the act charged as constituting a crime but accompanied with an explanation which negatives the criminality is not a judicial confession. *Ibid.*

A plea of guilty which is subsequently withdrawn is not a judicial confession. *Ibid.*

A conviction cannot be had upon an extra-judicial confession unless it be accompanied with other evidence that a crime has in fact been committed by some one. *State v. Westcott*, 130-1.

This corroborating testimony need not of itself and independent of the confession be such as to prove the commission of a crime beyond a reasonable doubt. It is sufficient if when considered with the confession it establishes beyond all reasonable doubt that a crime was in fact committed. *Ibid.*

A statement of fact which in itself negatives a criminal intent does not constitute a confession with reference to which an instruction as to the necessity of corroboration need be given. *State v. Thomas*, 109 N. W. 900.

Corroboration of a confession is not necessary where there is other evidence of the commission of the crime and the only purpose of the confession is to connect the

defendant with it. *State v. Icenbice*, 126-16.

A mere admission or declaration of a defendant against his interest is not necessarily a confession, even though the admission is criminating. To make an admission or declaration a confession it must in some way be an acknowledgment of guilt, and be so intended. *State v. Novak*, 109-717.

The violation by a detective to whom admissions are made of an agreement not to reveal such admissions will not render the admissions incompetent if they were voluntary when made. *Ibid.*

Evidence in a particular case held not to show any such promises, threats or duress such as to render admissions incompetent. *Ibid.*

The prosecution, in putting in evidence statements of the defendant as constituting admissions, does not bind itself to accept as true all that may be contained in the statements shown. *Ibid.*

Where the person having custody of the defendant assures him that it will go easier with him if he tells the facts tending to show him guilty of the offense, a statement of the defendant made in response to such suggestion is not voluntary, and should not be received. *State v. Jay*, 116-264.

The fact that after defendant was placed under arrest the officer in charge questioned him, and that in response to such questions he made a confession, is not sufficient to render it invalid. *State v. Penney*, 113-691.

The fact that defendant at the time of making the confession was in the custody of one of the parties does not in itself show the statements to have been involuntary. *State v. Peterson*, 110-647.

Where a confession is proven by the evidence of a detective it is proper to show to the jury what arts were used by the detective to secure such confession and all the circumstances under which the confession was made. *State v. Van Tassel*, 103-6.

Where the confession appears on its face to be free and voluntary, the burden is on defendant to rebut that presumption. *State v. Storms*, 113-385.

It is for the court to determine whether the confession was voluntary. But if there is a conflict of the evidence on that question, and the court is in doubt, the question should be left to the jury. *Ibid.*

Evidence in a particular case held not sufficient to show that the confession was not voluntary. *Ibid.*

SEC. 5492. Witnesses for defendant.

Where the court allows the subpoena of a witness for the defendant who is in another state, the county is liable for his mileage outside of as well as within the state. *Climie v. Appanoose County*, 125-292.

The board of supervisors has no discretion as to the allowance of witness fees which have been taxed against the county by the court in a criminal prosecution. *Ibid.*

SEC. 5499-a. Photograph — measurements. It shall be lawful for the sheriff of any county or the chief of police in any city in this state, to take or procure the taking of the photograph of any person held to answer on a charge of any felony, such person being in the custody of such officer, or to make and record any measurements of such prisoner, by the Bertillion or other system, and to exchange such photographs, or measurements, or copies of the same, with other sheriffs and police officers, or to distribute the same by mail for the purpose of securing evidence for the identification of such person held to answer, if the identity and past record of the said person are unknown to him, and the cost of such photographs, and measurements, and of distributing the same, may be allowed by the court as a part of the costs in the case. [29 G. A., ch. 154, § 1.]

CHAPTER 35.

OF BAIL.

SECTION 5505. Form of Bond.

The surety does not become bound to pay the fine imposed upon the principal. He is simply a jailor for the principal, charged with the duty of producing him when his personal presence is required, or to surrender him in execution of judgment. When once that duty is performed the liability of surety is extinguished, and

whenever the court orders the defendant out on bail into the custody of the sheriff, in execution of the judgment pronounced against him, and the sheriff in pursuance of that order takes possession of the prisoner, the liability of the surety ceases. *State v. Zimmerman*, 112-5.

CHAPTER 39.

OF DEPOSIT OF MONEY INSTEAD OF BAIL.

SECTION 5524. With whom and effect.

There is no provision for the deposit of money by any person other than the defendant himself, and when a deposit of money is made there is no right to have

it returned except to the defendant. One who furnishes money to secure the release of a defendant on bail must be presumed to have loaned it to the defendant, and he

is not entitled to have it returned to him individually. Such money may, therefore, be applied to the payment of the fine imposed on the defendant. *State v. Owens*, 112-403.

After deposit of money in lieu of bail, the clerk should accept a bail bond, if offered, and release the money deposit, notwithstanding the provision of Code § 5527 that money deposited as bail shall be applied to the satisfaction of the judgment. *State v. Anderson*, 119-711.

The execution of a bail bond on appeal

has the effect of releasing the money deposited as bail, and the court cannot require as a condition that a portion of the money as deposited be applied to the payment of the judgment or costs. *Ibid.*

The undertaking of a surety upon an appeal does not include payment of the costs of prosecution of the case in either court. *Ibid.*

This provision as to deposit of money in lieu of bail does not contemplate the deposit of money by third persons. *Ibid.*

CHAPTER 40.

OF SURRENDER OF THE DEFENDANT.

SECTION 5528. Method.

Where a defendant who was on bail placed himself under the control of the sheriff after conviction, and was subsequently allowed, by an order of the court,

to depart for temporary purposes, held, that his surety was thereby released. *State v. Zimmerman*, 112-5.

SEC. 5530. Return of money deposited.

As a third person is not authorized to deposit money to secure the release of defendant on bail, one who has thus furnished money to secure defendant's release

is not entitled to have it returned to him on surrender of defendant. *State v. Owens*, 112-403.

CHAPTER 43.

OF THE DISMISSAL OF CRIMINAL ACTIONS.

SECTION 5536. If not tried a second term.

This section relating to the dismissal of a prosecution where defendant is not brought to trial at the fixed regular term of the court in which the indictment is triable was evidently designed to enforce the constitutional provision giving the defendant in a criminal prosecution the right of a speedy trial. If postponement of the trial is due to any request or conduct on the part of the defendant or his counsel, or if the case is continued without objection on defendant's part without demand for a trial, he is not entitled to a dismissal because the case was not brought to trial at the second term. *State v. Smith*, 106-701.

On an appeal in a criminal case, the

court has no jurisdiction to determine whether the prosecution should have been dismissed because the defendant had not been given a speedy trial. *State v. Sloan*, 131-676.

Where good cause for continuance is shown, the defendant is not entitled to dismissal on the ground that he has not had the speedy trial provided for by statute. *State v. Johnson*, 111 N. W. 827.

Where the delay in the trial is due to the rulings and motions for continuance, the defendant is not entitled to dismissal on the ground that the case is not tried within the time specified by statute. *State v. Nugent*, 111 N. W. 927.

CHAPTER 44.

OF THE INSANITY OF A DEFENDANT.

SECTION 5540. Proceedings suspended.

After a defendant has been arrested on a warrant issued on an indictment the dis-

trict court has exclusive jurisdiction to determine the question of his sanity and

his custody in case of insanity, and the commissioners of insanity cannot be given authority to investigate such question. The provisions of Code § 2279, so far as they purport to give such authority to the commissioners, are invalid. The court should proceed in such case under this section. *Stone v. Conrad*, 105-21.

The finding in a collateral investigation as to the defendant's sanity during the trial is admissible on the issue as to

insanity at the time of the commission of the crime, but not conclusive as it relates to a subsequent date. *State v. Grendahl*, 131-602.

Such a finding under which the defendant is sent to an insane hospital, does not preclude testimony of the physician of such hospital after the defendant was received and treated there, as to his mental condition. *Ibid.*

CHAPTER 45.

OF SEARCH WARRANTS AND PROCEEDINGS THEREON.

SECTION 5545. Definition.

Ordinarily a finding in a search warrant proceeding is not conclusive as to the ownership of the property; but where rival claimants appear, employ counsel, and submit the issue of ownership upon

testimony adduced, the finding is conclusive although strictly speaking they are not parties to the action. *Montgomery v. Alden*, 133-675.

SEC. 5550. Warrant.

A description which points out or identifies the place to be searched with such reasonable identity as will obviate any

mistake in locating it is all that is required. *State v. Moore*, 125-749.

SEC. 5563. Return to owner.

While adverse claimants of the property are not strictly parties to a search warrant proceeding, yet if they raise the

issue as to ownership the finding on such issue is conclusive. *Montgomery v. Alden*, 133-675.

CHAPTER 47.

OF PROCEEDINGS AND TRIALS BEFORE JUSTICES OF THE PEACE.

SECTION 5576. Information—what to contain.

An information sworn to and left with the magistrate which is acted upon by him, is presumed to have been filed and to

have been sworn to before him acting within his jurisdiction. *Lovilia v. Cobb*, 126-557.

SEC. 5577. Must contain.

Proceedings under an information which charges an offense, but is not specific enough in stating the details thereof, will not be void, but only voidable, and therefore false testimony given in such proceeding may constitute perjury. *State v. Perry*, 117-463.

An information may be amended after appeal to the district court. *Lovilia v. Cobb*, 126-557.

An amendment to an information in a prosecution before a justice of the peace

may be made in the district court on appeal. *State v. Reilly*, 108-735.

Where there is no doubt as to the nature of the offense charged in the information, it may be so amended as to charge its commission anywhere within the jurisdiction of the court, instead of in a particular subdivision of the territory over which the court has jurisdiction. Such an amendment may require a postponement of the trial, and for this reason is largely discretionary. *State v. Abrams*, 131-479.

SEC. 5617. Trial on appeal.

On an appeal from a conviction before a justice of the peace or mayor of a city the information may be amended. *Lovilia v. Cobb*, 126-557.

On such appeal jury trial may be waived. *Ibid.*

On an appeal from a conviction before a justice of the peace, the accused may withdraw his plea of guilty on which the conviction was entered, and is then entitled to a trial. *State v. Abrams*, 131-479.

CHAPTER 49.**OF PARDONS AND THE REMISSION OF FINES AND FORFEITURES.**

SECTION 5626. By governor. The governor shall have power to remit fines and forfeitures upon such conditions and with such restrictions and limitations as he may think proper. After conviction of murder in the first degree, no pardon shall be granted by the governor until he shall have presented the matter to and obtained the advice of the general assembly thereon, but he may commute a death sentence to imprisonment in the penitentiary for life. Before presenting the matter to the general assembly for its action, he shall cause a notice containing the reasons assigned for granting the pardon to be published in two newspapers of general circulation, one of which shall be published at the capital and the other in the county where the conviction was had, once each week, for four successive weeks, the last publication to be at least twenty days prior to the commencement of the session of the general assembly to which the matter shall be presented. [C., '73, § 4712; R., §5116; C., '51, § 3278.] [31 G. A., ch. 9, § 27.]

The governor has the power to remit a fine imposed in a criminal prosecution for maintaining a liquor nuisance but cannot remit the costs nor prevent their being a lien upon the property against which they

are adjudged. *State v. Mateer*, 105-66.

The governor may grant a conditional suspension of judgment in a criminal case. *Ibid.*

CHAPTER 50.**OF ILLEGITIMATE CHILDREN.****SECTION 5629. Complaint.**

Evidence of improper relations between the prosecutrix and a man not the defendant is immaterial, unless it be shown that such relations might have existed at the time the child in dispute was conceived. *State v. Seevers*, 108-738.

If the defendant is the father of the child, he is liable in this proceeding, even though the mother was the lawful wife of another at the time the child was conceived, and he knew the fact. *Ibid.*

It is not proper to permit prosecutrix to testify that she is without money or other property with which to support the child. *Ibid.*

In a bastardy proceeding it is error to allow an infant nine months of age, claimed to be the result of intercourse be-

tween defendant and the complaining witness, to be introduced in evidence to the jury. *State v. Harvey*, 112-416.

Under complaint filed before the child is born proof of the subsequent birth of the child is competent evidence. It is not required in such case that after the birth of the child the complaint be amended by alleging that fact. *State v. Harris*, 112-589.

The procedure under a complaint of bastardy is that which obtains in ordinary civil actions, and the rules of evidence are the same. Therefore, declarations of the prosecutrix as to the act of sexual intercourse or her failure to make complaint cannot be shown. *State v. Lowell*, 123-427.

TITLE XXVI.

OF THE DISCIPLINE AND GOVERNMENT OF JAILS AND PENITENTIARIES.

CHAPTER 1.

OF THE JAILS.

SECTION 5652. Hard labor may be required.

The length of time that prisoners shall be required to labor depends upon the character of the work, the season of the year, their strength and condition of health, whether accustomed to labor, and must necessarily be left largely to the discretion of the officer in charge of the prisoners. *State v. Welsh*, 109-19.

CHAPTER 2.

OF PENITENTIARIES.

SECTION 5662. Bond—oath. Each shall, before entering upon the discharge of his duty, execute a bond payable to the state in the penal sum of twenty-five thousand dollars, with not less than five freehold sureties, to be approved by the governor, conditioned that he will faithfully discharge all his duties as general superintendent and financial agent of the state for said institution; that he will faithfully apply any and all moneys that may come into his hands by virtue of his office to the purposes for which they are appropriated, and none other; that he will cause to be kept a full and intelligible record of all the transactions of a monetary character connected with the institution; that he will impartially, and to the best of his ability, administer the disciplinary regulations of the institution so as to contribute to the health, safe keeping and profitable employment of the convicts; that he will appoint no one to the office of clerk, deputy warden or guard through favoritism or other personal consideration, and no one without due and proper regard to his qualifications for said stations; that he will render a faithful account of all the transactions of the institution to the governor, or his lawfully authorized agent, every thirty days, and oftener as he may be required; that he will not become directly or indirectly interested in any contract for supplying materials, labor, provisions, clothing or any other thing for the use of said penitentiary, and that, at the expiration of his official term, he will surrender all books, papers, records, moneys or other property or securities belonging to said institution to his successor in office. Each shall also take and subscribe an oath or affirmation, which shall be endorsed on the back of said bond, that he will support the constitution of the United States and that of the state of Iowa, and that he will scrupulously observe all the stipulations and conditions of said bond, and faithfully discharge all his duties agreeably to law according to the best of his ability, which bond shall be filed with the secretary of state. [C., '73, § 4747; R., § 5175.] [28 G. A., ch. 136, § 1.]

SEC. 5663. Restrictions — clerk — guards — assignment of duties. The warden must not carry on nor be concerned in the business of trade or commerce during his continuance in office; he must reside constantly within the precincts of the prison, and shall take charge of the penitentiary and of all the interests of the state connected therewith, and shall appoint some suitable person as clerk, who shall also act as commissary under the direction of the warden, one deputy, one assistant deputy, and as many guards as may be necessary to the safe keeping and government of the convicts, not exceeding one for every ten convicts under his charge at Fort Madison, and one for every eight at Anamosa, and the warden under the direction of the board of control shall assign said guards to any duty that may be necessary to properly conduct the business of said penitentiaries. At no time shall there be less than forty-five guards at Fort Madison and forty-two guards at Anamosa. [17 G. A., ch. 149; C., '73, § 4748; R., § 5142; C., '51, § 3128.] [27 G. A., ch. 117, § 1.] [30 G. A., ch. 139, § 1.] [32 G. A., ch. 191.]

[The amendment by the 30 G. A., chap. 139, section one, ignored the code supplement where the section appears. The change has been made to the section as it appeared in the code supplement.]

SEC. 5667. Clerk — bond — oath. Each clerk of the penitentiary shall receive his appointment from and hold his office during the pleasure of the warden, and be in all things responsible to him. Before entering upon the discharge of his duties, he shall give bond to the state in the penal sum of twenty thousand dollars, with two or more freehold sureties, to be approved by the governor, conditioned that he will keep a fair, honest, impartial and faithful record of the affairs of the penitentiary, written in a legible hand, with proper indices, upon a system of bookkeeping which shall enable him at all times to present in a plain and intelligible manner the financial condition of the institution; that he will discharge all his duties as clerk and commissary faithfully; and that he will not become interested, directly or indirectly, in any contract for furnishing supplies for the use of said institution; and that he will yield strict and implicit obedience to the laws, rules and regulations of the institution, and to all the legal orders of the warden. He shall also take and subscribe an oath, which shall be endorsed on the bond, that he will support the constitution of the United States and that of this state, and that he will scrupulously observe all the conditions, stipulations and requirements thereof, and will faithfully discharge his duty as clerk and commissary during his continuance in office, according to the best of his judgment and ability; which bond shall be filed in the office of the secretary of state, and action thereon may be brought for the violation of any of its conditions, in the name of the state, for the use of the warden or any other person injured by such violation. [26 G. A., ch. 79, § 1; C., '73, § 4752; R., § 5180.] [28 G. A., ch. 136, § 2.]

SEC. 5669. Deputy warden. Each deputy warden and assistant deputy shall receive his appointment from the warden, and shall hold his office during his pleasure; he shall give bond with sureties and in the same manner, take a like oath, and be in all respects subject to like responsibilities, as the clerk, so far as the same are applicable; but the amount of the bond shall be five thousand dollars. The deputy warden shall keep a regular time-table of the convict labor, and record the same in a book to be kept for that purpose, and shall keep a record of all the business under his control, and return an account thereof, together with an account of the convict labor, to the clerk at the close of each day. The assistant deputy warden shall perform the duties of deputy warden in his absence or inability to act, and such other duties as shall be prescribed by the war-

den with the approval of the board of control of state institutions. [18 G. A., ch. 154, § 3; C., '73, § 4754; R., §§ 5169, 5182.] [30 G. A., ch. 139, § 2.]

SEC. 5669-a. Residence for deputy—house rent. From and after the completion of the warden's house at the penitentiary at Anamosa, the deputy warden shall be entitled to occupy the building now used as the warden's residence, which shall be furnished with heat and lights. Until the new residence for the warden is completed the deputy warden is hereby allowed the sum of ten dollars, (\$10.00) per month as house rent. [27 G. A., ch. 116, § 1.]

SEC. 5683. Property of convict.

Under authority to receive and care for any property the convict may have on his person on entering, the warden may take possession of a certificate of deposit, but has no right to receive payment of the

amount called for, and if he does so the convict may afterwards recover against the bank the amount of the certificate. *Thompson v. Niles*, 115-67.

SEC. 5685-a. Repeal—visitors. The law as it appears in section five thousand six hundred eighty-five (5685) and section five thousand six hundred eighty-five a (5685-a) of the supplement to the code is hereby repealed and the following is enacted in lieu thereof:

"The warden of each penitentiary shall demand and receive of each person, except those exempt by law and relatives of a convict confined therein, who visits the prison for the purpose of viewing the interior or precincts, the sum of twenty-five cents, of which the warden shall render an account, which shall be applied, in the discretion of the board of control of state institutions, in the purchase of books and periodicals for the use of the prisons and for the use of all other institutions under their control, provided however, that they may if they deem it best use not exceeding ten per cent. of such receipts for lectures, concerts or entertainments for the prisoners. This act shall apply also to the disposition of all such funds now on hand." [30 G. A., ch. 140.]

SEC. 5702-a. Manufacture prohibited. It shall not be lawful except to complete existing contracts made by board of control to manufacture for sale any pearl buttons or butter tubs in the penitentiaries of the state, and it shall be the duty of the board of control and wardens of said penitentiaries to enforce the provisions of this act, and to prohibit the manufacture of pearl buttons or butter tubs, in whole or in part, by the inmates confined in said penitentiaries. [28 G. A., ch. 138, § 1.]

SEC. 5702-b. Existing contracts. This act shall not alter or impair the conditions of any contract actually made and entered into by and between any contractor and the board of control, which shall have been made prior to the passage of this act. [28 G. A., ch. 138, § 2.]

SEC. 5703. Good conduct—diminution of sentence.

The diminution of time from a sentence which is granted by the statute on account of good conduct should be credited to the

prisoner on a second sentence imposed on a new trial, after the first sentence has been set aside. *State v. Barr*, 133-132.

SEC. 5704. Forfeiture.

Although the right to diminution of sentence for good conduct is not a vested right, yet a prisoner is not bound by the acceptance of a conditional pardon providing for a forfeiture of the credit already accrued to a forfeiture of such credit for breach of the conditions. After

the condition is broken he can only be re-manded, for the balance of the term, to the remainder of the imprisonment which he would have been required to serve had he not accepted the conditional pardon. *State v. Hunter*, 124-569.

SEC. 5707. Work in stone quarries. Able-bodied male persons sentenced to imprisonment in the penitentiary may be taken to that at Anamosa, or to that at Ft. Madison, there confined and worked in places and buildings owned or leased by the state outside of the penitentiary enclosures; but the labor of such convicts shall not be leased, and the warden shall keep a regular time-table of the convict labor and record thereof in a book provided for that purpose, and shall also keep a record of all the business under his control, returning to the clerk at the close of each day an account thereof, together with that of convict labor. He shall also have all stone which is not used for building purposes by the state, together with all refuse stone at the quarries, broken with hammers into pieces of not more than two and one-half inches in diameter, to be used for the improvement and macadamizing of streets and highways, this work to be done by convict labor when not otherwise employed, but the warden may in his discretion make such disposition of any surplus refuse stone at the quarries as may be for the best interest of the state. [25 G. A., ch. 20, & 1; 18 G. A., ch. 154, § 3; 17 G. A., ch. 187; 16 G. A., ch. 40, §§ 7, 8; 14 G. A., ch. 43, § 14.] [29 G. A., ch. 155, § 1.]

SEC. 5711. Repeal. Section fifty-seven hundred eleven (5711) of the code is hereby repealed. [30 G. A., ch. 139, § 4.]

SEC. 5716. Compensation of officers and employes. The officers and employes of each penitentiary shall be paid for their services the following sums, monthly: The warden, one hundred and sixty-six dollars and sixty-seven cents; the deputy warden, one hundred dollars; the clerk, one hundred dollars; the chaplain, one hundred dollars; the turnkeys and guards of the penitentiaries shall be classified according to qualification, length of service, character of duties performed and general efficiency, the members of the first class shall receive not more than sixty-five (\$65.00) dollars monthly, the members of the second class shall receive not more than fifty-five (\$55.00) dollars monthly and the members of the third class shall receive not more than fifty (\$50.00) dollars monthly; the physician at Fort Madison seventy-five dollars; the physician at Anamosa, for his entire services in the penitentiary and the department for the criminal insane, one hundred dollars; the assistant deputy warden in each penitentiary, eighty-three dollars and thirty-four cents; the matron at Anamosa, seventy-five dollars; which amounts shall be paid by the state treasurer upon the requisition of the warden, accompanied with a detailed itemized statement duly verified, showing the number and kind of guards employed, the separate, several payments of the money drawn the previous month, and such other matters, if any, as the state auditor may require. [26 G. A., ch. 79, § 2; 22 G. A., ch. 69, §§ 7, 10; 20 G. A., ch. 187, § 2; 18 G. A., ch. 200; 17 G. A., ch. 167; 16 G. A., ch. 156; C., '73, §§ 4783-4; R., § 5192.] [29 G. A., ch. 156, § 1.] [30 G. A., ch. 139, § 3.] [30 G. A., ch. 141, § 1.] [31 G. A., ch. 172.]

[All the amendments made by the 30 G. A. and 31 G. A. refer to the code, ignoring code supplement where the above section appeared. The changes have been made to the code supplement.]

SEC. 5718-a1. Inmates of institutions to have free exercise of religious worship. That it shall be the duty of [the] board of control, superintendents, warden, and other officers having the management of any penal, correctional, charitable or educational institution, or other place of confinement now existing or hereafter established and supported by public funds, to permit all persons committed to, confined or detained in, or otherwise held in such institutions, or other place of confinement, spiritual

advice, instruction, and ministration from any recognized, clergyman of the church or denomination which such person so committed, confined, detained or received may profess to adhere to or prefer; which said profession or choice shall be by such person communicated to the warden, superintendent or other officer in charge of such institution. It shall be the duty of the warden, superintendent or other officer receiving such person so committed, to inquire of such committed person as to his religious preference and enter the same in the book kept for the purpose, and cause the person making such choice or preference to sign the same. And during the time of detention such person so committed, confined or detained shall be allowed at suitable and reasonable times to receive the visits of clergymen belonging to the denomination or church so preferred at the time of commitment, or chosen at any later period. [31 G. A., ch. 35, § 1.]

SEC. 5718-a2. What permitted. It shall be the duty of the superintendent, warden or other officer having the control and management of such institution to allow the person so committed or detained the privilege of communicating with any clergyman of good standing of the church or denomination so preferred for at least an hour on the first day of the week in each week; and all facilities consistent with discipline and the proper care of such person so detained or confined shall be allowed to the clergyman so ministering or teaching; and all opportunity for engaging in religious services according to the rites of such church and denomination shall be freely allowed in so far as the same are consistent with discipline and good order. In case of severe sickness of any one so committed, confined or detained, opportunity shall be given him for spiritual ministration according to laws, ritual, rites, and customs of such denomination, so far as the same may be done without interference with the efficient management and control of such institution. That minister or ministers attending persons as provided by this act shall be entitled to no compensation for so doing. [31 G. A., ch. 35, § 2.]

SEC. 5718-a3. Minors—rules and regulations. In case any person so committed, detained or restrained is a minor and has formed no choice, his preference may, at any time, be expressed by himself with the approval of parents or guardian, if he has any such. It shall be the duty of the officers or governing authorities of any such institution to provide such rules and regulations as may be necessary to carry into effect the provisions of this act. [31 G. A., ch. 35, § 3.]

SEC. 5718-a4. "The reformatory." Hereafter the penitentiary at Anamosa shall be officially known and designated as "The Reformatory," and shall be the reformatory department of the state penitentiary of Iowa. [32 G. A., ch. 192, § 1.]

SEC. 5718-a5. Commitments. Any male person who shall be committed to the penitentiary after the 4th day of July, 1907, (except those convicted of murder, treason, sodomy or incest), and who at the time of commitment is between the ages of sixteen and thirty years, and who has never before been convicted of a felony, shall be confined in the reformatory; provided, however, that persons between the ages of sixteen and thirty years convicted of rape, robbery, or of breaking and entering a dwelling house in the night time with intent to commit a public offense therein, may, as the particular circumstances may warrant, in the discretion of the court, be committed to either the reformatory at Anamosa, or the penitentiary at Fort Madison. [32 G. A., ch. 192, § 2.]

SEC. 5718-a6. Insane department. The criminal insane shall continue to be confined in the insane department at Anamosa, as provided in section fifty-seven hundred and nine of the code. [32 G. A., ch. 192, § 3.]

SEC. 5718-a7. Transfer of prisoners for violation of rules, insubordination, etc. Any male prisoner confined in the reformatory may be transferred to the penitentiary at Fort Madison, upon order of the board of control, for violation of the rules of the reformatory or for insubordination and a like transfer may be ordered by said board whenever it shall be of the opinion that a prisoner is not a hopeful subject for reformatory treatment. [32 G. A., ch. 192, § 4.]

SEC. 5718-a8. Transfer of prisoners over age limit—former convictions. If it shall appear at any time after conviction and incarceration in the reformatory that a prisoner was over thirty years of age at the time of commitment, he shall be at once transferred to the prison at Fort Madison, and he shall likewise be transferred if it shall appear that he had, prior to the last conviction, been convicted of a felony in Iowa or elsewhere. [32 G. A., ch. 192, § 4½.]

SEC. 5718-a9. What prisoners retained in reformatory—transfer of life prisoners. The board of control may retain in the reformatory such persons as have been or are committed to the penitentiary at Anamosa for crimes committed on or prior to July 4, 1907, except that all persons convicted of murder in the first degree and all persons sentenced to life imprisonment shall be kept and confined in the prison at Fort Madison and a transfer shall be made as soon as reasonably convenient after July 4, 1907, from the reformatory to the prison at Fort Madison of the persons named in this exception, provided that prisoners committed for life who are now beyond fifty-five years of age shall not be removed. [32 G. A., ch. 192, § 5.]

SEC. 5718-a10. Transfer when Fort Madison penitentiary is overcrowded. Whenever there is unoccupied room in the reformatory and the prison at Fort Madison is overcrowded, the board of control may, in its discretion, transfer from the prison at Fort Madison well-behaved and most promising convicts, who are confined for their first offense. The prison at Fort Madison shall be deemed to be overcrowded when the number of inmates exceeds the number of cells. [32 G. A., ch. 192, § 6.]

SEC. 5718-a11. Employment of inmates. The inmates of the reformatory shall be employed only on state account, which employment shall be conducive to the teaching of useful trades and callings so far as practicable, and the intellectual and moral development of the inmates, provided, however, that the inmates of the reformatory may be employed to complete any contracts for prison labor to be performed in the penitentiary at Anamosa. [32 G. A., ch. 192, § 7.]

SEC. 5718-a12. Registers and records. The board of control shall cause to be kept at the reformatory and penitentiary such registers and records of prisoners for the use of the board of parole as may be approved by the executive council. [32 G. A., ch. 192, § 8.]

SEC. 5718-a13. Indeterminate sentences. After July 4, 1907, whenever any person over sixteen years of age is convicted of a felony, committed subsequent to July 4, 1907, except treason or murder, the court imposing a sentence of confinement in the penitentiary shall not fix the limit or duration of the same, but the term of such imprisonment shall not exceed the maximum term provided by law for the crime of which the prisoner was convicted; provided that if a person be sentenced for two or more separate offenses and the second or further term is ordered to begin at the expiration of the first and such succeeding term of sentence is specified in the order of commitment, the several terms shall for the purpose of this act be construed as one continuous term of imprisonment; and

provided, that where one is convicted of a felony that is punishable by imprisonment in the penitentiary, or by fine, or by imprisonment in the county jail, or both, the court may impose the lighter sentence if it shall so elect. [32 G. A., ch. 192, § 9.]

SEC. 5718-a14. Board of parole—terms—office—supplies—compensation—secretary—salary—duties—employes. Prior to the adjournment of the thirty-second general assembly, the governor, with the advice and consent of the senate, shall appoint three electors of the state, not more than two of whom shall belong to the same political party, and one member of whom shall be a duly licensed attorney at law, as members of a board to be known as a board of parole. Said members shall hold office, as designated by the governor, for two, four and six years, respectively; subsequent appointments shall be made as provided above, and shall be for a term of six years, except appointments to fill vacancies, which shall be for the unexpired term. The terms of the members first appointed shall commence July 1, 1907, and the chairman of the board shall be the member whose term first expires. Appointments made when the general assembly is not in session shall be subject to the approval of the senate when next in session. A suitable office at the capitol shall be provided for the use of the board, with such furniture and office supplies as shall be reasonably necessary for the use of the same, and such board shall hold at least four sessions each calendar year. They shall receive as compensation ten dollars (\$10) per day for the time actually spent in discharge of the duties of this office, not to exceed one thousand dollars (\$1000) each per annum, and all necessary expenses while on official business. The board of parole shall employ a competent secretary who shall receive a salary not to exceed two thousand dollars (\$2000) per year and necessary traveling expenses when on official business required and designated by the board. He shall keep records and perform such duties as state agent or otherwise, as shall be prescribed by the board. They may employ such other employes as the executive council may authorize by written resolution. [32 G. A., ch. 192, § 10.]

SEC. 5718-a15. Appropriation. There is hereby appropriated from any funds in the state treasury not otherwise appropriated sufficient thereof to pay the salaries and expenditures herein authorized. [32 G. A., ch. 192, § 11.]

SEC. 5718-a16. Traveling expenses—emergency trips. The secretary and other employes shall be entitled to their necessary traveling expenses by the nearest traveled and practicable routes incurred in going from Des Moines to the penitentiaries or other places in the state when on official business. No expenditure for traveling expenses to other states shall be made by the board or any officer or agent thereof unless the authority to make such trip is granted at a meeting of the board upon a written resolution adopted by the board, which shall state the purpose of such trip and the reason the same is deemed necessary. Emergency trips may be made upon written order of the chairman, which shall be reported to the board at its next meeting. [32 G. A., ch. 192, § 12.]

SEC. 5718-a17. Itemized statement of expenditures—how approved and paid. Before any expenses or per diem of the members of the board or any officer or agent thereof, or any expense incurred by others under the direction of the board, shall be paid, a minutely itemized statement of such expenditures shall be presented to the proper authorities, duly verified, which certification shall aver that the expense bill is just, accurate and true, and is claimed for cash expenditures or cash disbursements truly and

actually paid and made to the parties named as shown by said statement herein. Unless the said statement is so verified and duly audited, payment thereof shall not be made. The expense bills of the members of the board, the secretary and its other employes, when so verified, shall be presented to the executive council for their written audit before payment is made. The salaries and actual expenses of the board, the secretary and other employes shall be paid monthly by the treasurer of the state upon the warrant of the auditor of state. [32 G. A., ch. 192, § 13.]

SEC. 5718-a18. Rules and regulations governing paroles. The board of parole shall have power to establish rules and regulations under which it may allow prisoners within the penitentiaries other than prisoners serving life terms to go upon parole outside of the penitentiary buildings, enclosures and appurtenances, but to remain while on parole in the legal custody of the wardens of the penitentiaries and under the control of the said board of parole and subject, at any time, to be taken back and confined within the penitentiary; and the board shall have full power to enforce such rules and regulations and to retake and reimprison any such paroled convict. The order of said board certified by its secretary shall be a sufficient warrant for any peace officer to arrest and take into actual custody or to return to the penitentiary specified in the order any prisoner conditionally released or paroled by said board; and it is hereby made the duty of all peace officers to execute such order the same as any other criminal process and they shall receive the same fees as sheriffs for like services, the same to be paid out of the appropriation made herein, but no person shall be released on parole before the expiration of the maximum term provided by law for the punishment of the crime of which he was convicted until the board of parole shall have satisfactory evidence that arrangements have been made for his employment or maintenance for at least six months. The time when a prisoner is upon parole or absent from the penitentiary shall not be held to apply upon his sentence if he shall violate the terms of his parole. [32 G. A., ch. 192, § 14.]

SEC. 5718-a19. Inquiry relative to pardon or parole. The board of parole may institute any inquiry it may deem expedient in regard to any prisoner or application for pardon, final discharge or parole; but said board shall not receive, unsolicited by them, any petition or communication or argument in regard to said application, unless provided for in their adopted rules. [32 G. A., ch. 192, § 14½.]

SEC. 5718-a20. Board of parole to recommend pardon. It shall be the duty of the board of parole to keep in communication, so far as possible, with all persons who are on parole and when, in their opinion, any prisoner who has served not less than twelve months of his parole acceptably, has given such evidence as is deemed reliable and trustworthy that he is and will continue to be a law-abiding citizen and that his final release is not incompatible with the welfare of society; and when the said board of parole shall have procured, as far as possible, all facts relating to the history of such paroled prisoner, both before and after his confinement and parole, and his record while detained, the board of parole shall recommend to the governor the discharge of such prisoner from further liability under his sentence. Said recommendation shall be entered on a proper record, kept by said board for that purpose, and a certified copy of the order of discharge, when made, by the governor, shall be filed with the clerk of the court in which said prisoner was sentenced to the penitentiary. All papers and documents relating to the pardon of any person shall, upon the granting of such pardon, become a part of the files of the governor's office. [32 G. A., ch. 192, § 15.]

SEC. 5718-a21. Power of governor to grant reprieves, pardons or commutations not impaired. Nothing in this act contained shall be construed as impairing the power of the governor under the constitution, to grant a reprieve, pardons or commutations of sentence in any case. [32 G. A., ch. 192, § 16.]

SEC. 5718-a22. Clothing, money and transportation furnished paroled prisoners. Upon the release of any prisoner upon parole, he shall be furnished with clothing and money as provided in section fifty-six hundred eighty-four (5684) of the code, and transportation to his place of employment, provided that no further allowance shall be made if final discharge is granted while on parole. [32 G. A., ch. 192, § 17.]

SEC. 5718-a23. Investigation of applications for pardon. It shall be the duty of the board of parole, under the direction of the governor, to take charge of all correspondence in reference to the pardon of persons convicted of crimes and to carefully investigate each application, and to file its recommendation with the governor with its reasons for the same. [32 G. A., ch. 192, § 18.]

SEC. 5718-a24. Repeal. All acts and parts of acts which are in conflict with this act are hereby repealed in so far as they shall apply to persons convicted of crime committed after the fourth day of July, 1907. This act shall not operate, however, to repeal any of the laws now in force, in so far as they may relate to persons that have heretofore been convicted of a crime under the laws of the state of Iowa, or to any persons that shall hereafter be convicted of a crime committed on or before the 4th day of July, 1907, and the rights under the law of all prisoners that are now or hereafter may be committed to the penitentiary for crimes committed on or prior to the 4th day of July, 1907, are expressly preserved to them. This act shall not operate in any way to repeal any laws that refer to the sentence of persons hereafter convicted of murder in the first or second degree, or treason. [32 G. A., ch. 192, § 19.]

SEC. 5718-a25. Duty of clerk of district court and county attorney. It shall be the duty of the clerk of any court in which a prisoner shall be sentenced to the penitentiary, to furnish the board of parole a record containing a copy of the indictment with the minutes of testimony attached thereto; and the name and residence of the judge presiding at the trial and of the county attorney who prosecuted the prisoner; also the jurors and the witnesses sworn at the trial. The county attorney who prosecuted said prisoner and the presiding judge, shall, when requested by the board of parole, furnish to it a full statement of all the facts and circumstances connected with the commission of the crime of which the prisoner is convicted, so far as known or believed by them. [32 G. A., ch. 192, § 20.]

SEC. 5718-a26. Employment for paroled prisoners—duty of public officers. The board of parole may render such assistance as may be deemed necessary to the success of parole system, in the procuring of employment with trustworthy employers for prisoners about to be paroled; and necessary expenses incident thereto, not already provided for, shall be paid as other expenses of the board. It is hereby made the duty of every public officer to whom inquiry may be addressed by the board of parole concerning any prisoner to give said board all information possessed or accessible to him which may throw light upon the question of the fitness of said prisoner to receive the benefits of parole. [32 G. A., ch. 192, § 21.]

SEC. 5718-a27. Female convicts to be confined in reformatory. Any female heretofore or hereafter convicted of a felony and sentenced to confinement in the penitentiary shall be kept in the reformatory at Anamosa. [32 G. A., ch. 193.]

SEC. 5718-a28. Convict labor—how employed. Convict labor may be used in caring for the houses and premises, occupied by the wardens of the penitentiaries, and for such domestic purposes as may be deemed necessary; provided, however, that nothing be done inconsistent with prison discipline and that not more than two convicts shall be thus used at any one time. [32 G. A., ch. 194, § 1.]

SEC. 5718-a29. Wardens authorized to grant vacations with pay. It shall be the duty of the wardens of the penitentiaries at Anamosa and Fort Madison to grant a fifteen days' vacation with pay, each year, to all officers and guards working under said wardens; provided that said officer or guard shall have been continuously employed at said penitentiary for a period of one year before he shall be entitled to the provisions of this act. [32 G. A., ch. 195, § 1.]

SEC. 5718-a30. Vacations granted upon application — when. The warden of each penitentiary shall grant the vacation contemplated herein to those officers and guards employed at the institution of which he is in charge, upon said officers and guards making application therefor, and at such times and under such circumstances as will not interfere with the discipline, conduct and management of the penitentiary. [32 G. A., ch. 195, § 2.]

STATUTES AND RULES

REGULATING PRACTICE IN THE

SUPREME COURT OF IOWA

REVISED AND ADOPTED AT THE OCTOBER TERM, 1903,
TAKING EFFECT JANUARY 1, 1904,

TOGETHER WITH SUBSEQUENT CHANGES MADE BY SAID COURT UP TO
AND INCLUDING THE SEPTEMBER TERM, 1907.

[Notes of cases applying these rules can be found among the notes to sections of the code and code supplement relating to the same subject matter, including sections 4100 to 4153, inclusive.]

I. ORGANIZATION.

SECTION 1. The supreme court shall consist of six judges, four of whom constitute a quorum for the transaction of business, but one alone may adjourn from day to day, or to a particular day, or until the next term. [Code, § 193.]

SEC. 2. The judge whose term first expires shall be the chief justice, and so on in rotation. [Const., Art. V, § 3.]

II. JURISDICTION.

SEC. 3. The supreme court shall have appellate jurisdiction only in cases of chancery and shall constitute a court for the correction of errors at law. [Const., Art. V, § 4.]

SEC. 4. It has appellate jurisdiction over all judgments and decisions of all courts of record, except as otherwise provided by law. [Code, § 4100.]

SEC. 5. An appeal may also be taken to the supreme court from:

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

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

3. An order which grants or refuses, continues or modifies a provisional remedy; grants or refuses, dissolves or refuses to dissolve an injunction or attachment; or grants or refuses a new trial; or sustains or overrules a demurrer;

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

5. An order or judgment on *habeas corpus*. [Code, § 4101.]

SEC. 6. If any of the above orders or judgments are made or rendered by a judge, the same are reviewable, the same as if made by a court. [Code, § 4102.]

SEC. 7. The supreme court has power to issue all writs and processes necessary to secure justice to parties, and to enforce its appellate jurisdiction; and it may exercise supervisory control over all inferior judicial tribunals. [Const., Art. V, § 4; Code, § 4109.]

SEC. 8. It may enforce its mandates upon inferior courts and officers by fine and imprisonment, which imprisonment may continue until its mandates are obeyed. [Code, § 4147.]

III. TERMS.

SEC. 9. There shall be three regular terms in each year, to be held as follows, to-wit: The first term beginning with the second Tuesday in January and ending with the first Monday of May; the second beginning with the first Tuesday after the first Monday of May and ending with the third Monday of September; and the third, beginning with the first Tuesday after the third Monday of September and ending with the third Saturday of December. [29 G. A., chap. 12, § 1.]

SEC. 10. The time allotted to each term shall be divided as nearly as practicable into periods of four weeks each, the first part of each period to be devoted to the argument and submission of cases, and the second to consultation and the preparation of opinions. Cases assigned for each period shall be called in their order as shown on the term docket, but no more submissions shall be taken for any one period than in the judgment of the court can properly be considered and determined before the next succeeding session. All causes on the docket shall be heard at each term unless continued or otherwise disposed of by order of court. [29 G. A., chap. 12, §§ 2, 3 and 4, and Code, § 192.]

SEC. 11. The regular public sessions of the court will be held in the supreme court room at the Capitol, commencing at 9 o'clock, A. M., standard time. On Tuesday and Friday of the first week of each four weeks' period submission of motions will be taken before calling the calendar. Motions noticed for a day when the court is not sitting will be taken on the next motion day on which the court sits. [New. 29 G. A., chap. 12, §§ 2, 3, 4 and 5.]

SEC. 12. Judgments of affirmance, rulings and orders, in causes submitted and orders authorized by law, may be made and entered by the court at any time regardless of the terms of court. [Code, § 192.]

IV. APPEALS.

SEC. 13. Appeals from the superior and district courts may be taken to the supreme court at any time within six months from the rendition of the judgment or order appealed from, and not afterwards. No appeal shall be taken in any cause in which the amount in controversy between the parties, as shown by the pleadings, does not exceed one hundred dollars, unless the trial judge shall, during the term in which judgment is entered certify that the cause is one in which the appeal should be allowed, and upon such certificate being filed the same shall be appealable regardless of the amount in controversy, but this limitation shall not affect the right of appeal in any action in which an interest in real estate is involved, nor shall the right of appeal be affected by the remission of any part of the verdict or judgment returned or rendered. [Code, § 4110.]

SEC. 14. A part of several co-parties may appeal; but in such case they must serve notice of the appeal upon those not joining therein and file proof thereof with the clerk of the supreme court. [Code, § 4111.]

SEC. 15. Co-parties refusing to join in an appeal cannot afterwards appeal or derive any benefit therefrom, unless from the necessity of the case, but they shall be held to have joined, and be liable for their proportion of the costs unless they appear and object thereto. [Code, § 4112.]

SEC. 16. The death of one or all of the parties shall not cause the proceedings to abate, but the names of the proper persons shall be substituted, as is provided in such cases in the district court, and the case may proceed. The court may also, in such case, grant a continuance when such a course will be calculated to promote the ends of justice. [Code, § 4150.]

SEC. 17. An appeal is taken and perfected by the service of a notice in writing on the adverse party, his agent, or any attorney who appeared for him in the case in the court below, and also upon the clerk of the court wherein the proceedings were had, stating the appeal from the same, or from some specific part thereof, defining such part. [Code, § 4114.]

SEC. 18. A notice of appeal shall be served and return made thereon in the same manner as an original notice in a civil action and filed in the office of the clerk in which the judgment or order appealed from was rendered or made. All other notices connected with or growing out of the appeal shall be served and the return made in like manner and filed in the office of the clerk of the supreme court and all notices provided for in this section become a part of the record in the case on being filed. [Code, § 4115.]

SEC. 19. The attorneys and guardians *ad litem* of the respective parties in the court below, shall be deemed the attorneys and guardians of the same parties respectively in this court, until others are retained or appointed, and notice thereof served on the adverse party. [New.]

V. SUPERSEDEAS BOND.

SEC. 20. No proceedings under a judgment or order nor any part thereof shall be stayed by an appeal unless the appellant execute a bond with one or more sureties to be filed with and approved by the clerk of the court in which the judgment or order was rendered or made, to the effect that he will pay to the appellee all costs and damages that shall be adjudged against him on the appeal, and will satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the supreme court may render or order to be rendered by the inferior court, not exceeding in amount or value the original judgment or order, and all rents of or damages to property during the pendency of the appeal out of the possession of which the appellee is kept by reason of the appeal. If the bond is intended to stay proceedings on only a part of the judgment or order, it shall be varied so as to secure the part stayed alone. When thus filed and approved, the clerk shall issue a written order requiring the appellee and all others to stay all proceedings under such judgment or order, or so much thereof as is superseded thereby, but no appeal or stay shall vacate or affect such judgment or order. [Code, § 4128.]

SEC. 21. If a party has perfected his appeal and the clerk of the lower court refuses for any reason to approve the bond or requires an excessive penalty or unjust or improper conditions, he may apply to the district court or judge thereof, who shall fix the amount and conditions of the bond and approve the same. Pending the application, the judge may, by a written order, recall and stay all proceedings under the order or judgment appealed from, until the decision of the application. The bond thus approved shall be filed with the clerk who shall issue a written order to stay proceedings. [Code, § 4132.]

SEC. 22. The appellee may move the court rendering the judgment or making the order appealed from, or the supreme court, or a judge of either court, if in vacation, upon ten days' notice in writing to the appellant, to discharge the bond on account of defect in substance or insufficiency in security, which motion, if well taken, shall be sustained, unless appellant shall, within a day to be fixed by the order made and filed therein, give a new and sufficient bond as required by said order. If the new bond is not given, proceedings shall be had in the lower court as though no bond had been given, but a new and sufficient bond may be given at any time with like effect and results as though given in the first instance. [Code, § 4133.]

SEC. 23. If the judgment or order is for the payment of money, the penalty shall be in at least twice the amount of the judgment and costs. If not for the payment of money, the penalty shall be sufficient to save the appellee harmless from the consequences of taking the appeal, but in no case shall the penalty be less than one hundred dollars. [Code, § 4134. As amended by 30 G. A., ch. 125.]

VI. DOCKETING OF CAUSES.

SEC. 24. A notice of appeal must be served thirty, and the cause filed and docketed fifteen days before the first day of the next term of the supreme court, or the same shall not be submitted at that term, unless the parties consent thereto. If the appeal is taken less than thirty days before the term, it must be so filed and docketed for the next succeeding term. [Code, § 4116.]

SEC. 25. The cause on appeal shall be docketed as it was in the court below, and the party taking the appeal shall be called the appellant, and the other party the appellee. No case shall be docketed until the fees provided by law therefor have been paid. [Code, §§ 4108, 4121.]

SEC. 26. The clerk shall docket the causes as they are filed in his office, and shall arrange and set a proper number for trial for each period of the term, placing together those from the same judicial district. No cause shall be docketed unless the abstract is filed fifteen days before the first day of the term at which the cause is set down for trial unless otherwise ordered by the court. If the abstract is not so filed the case shall be docketed for the next succeeding term. [Code, §§ 4117, 4119; Old Rules, § 17.]

SEC. 27. Immediately after the time expires during which causes may be docketed for trial at a term of court, the clerk shall make and cause to be printed, without delay, the docket for the term, which shall give all causes, whether continuances or appearances, for trial at such term, which shall designate the number, the party appealing, the court and county from which the appeal is brought, the counsel of the parties, the period for which each cause is assigned for trial, whether noticed for trial, and such other matter for the information of the court and attorneys as may be conveniently given. He shall forward to each judge of the court, to each attorney having causes at the term, and to the clerk of the district and superior courts of each county, a copy of said docket. [Old Rules, § 18.]

VII. ADVANCING CAUSES.

SEC. 28. If a cause involves the decision of a question of public importance, or rights which are likely to be lost or greatly impaired by delay, the court will, in its discretion, upon motion supported by affidavit, order the submission of the cause at a term in advance of that at which it would otherwise be submitted. All motions to advance must be submitted on the first motion day of the term. [Old Rules, § 19.]

VIII. ABSTRACTS, TRANSCRIPTS AND RECORDS.

SEC. 29. At least thirty days before the day assigned for the hearing of a cause, the appellant shall serve upon each appellee, or his attorney, a printed abstract of so much of the record as may be necessary to a full understanding of the questions presented for decision, which abstract shall be prepared as required by §§ 51, 52 and 53 of these rules. The appellant shall also, fifteen days before the first day of the term for which the cause is to be docketed for trial, file with the clerk twelve copies of said abstract.

No cause shall be heard until thirty days after such service and fifteen days after such filing with the clerk, unless advanced by order of the court. In case of cross-appeals the party first giving notice of appeal shall, under this rule, be considered the appellant. [Old Rules, § 20.]

SEC. 30. If it appear from an inspection of the abstract that the appellant has negligently or intentionally failed to comply with the rule requiring only so much of the record as may be necessary to a full understanding of the question presented for decision to be included therein, the court may, in its discretion, order a new abstract prepared in conformity with such rule or affirm the judgment of the lower court without considering the appeal. [Old Rules, § 21.]

SEC. 31. The abstract so filed will be presumed to contain the record unless denied or corrected by a subsequent abstract. Every denial shall point out as specifically as the case will permit the defects alleged to exist in the abstract. A denial by the appellee shall be taken as true unless the appellant sustains his abstract by a certification of the record. Should the appellee deem the appellant's abstract incorrect or unfair he may prepare such additional abstract as he shall deem necessary to a full understanding of the questions presented to the court for decision. A denial by the appellant of such additional abstract, if not confessed, will be disregarded unless sustained by a certification of the record. The appellee shall serve one printed copy of his additional abstract or denial on each appellant or his attorney, and deliver twelve printed copies thereof to the clerk within ten days after receiving the appellant's abstract, and a denial by the appellant shall be served on the appellee and twelve printed copies thereof delivered to the clerk within five days after service of the additional abstract. [Code, §§ 4118, 4120; Old Rules, § 22.]

SEC. 32. No certification of the record shall be required unless ordered by the supreme court, or a judge thereof, which order must be made upon an application in writing or by motion, designating the matters and things of record desired to be included therein, and showing the necessity therefor. The order, if granted, shall contain similar designations and show the parts to be given by an abstract of the original record and the portions to be by transcript, and may require any or all the matters to be presented by an amended abstract. The application and the order made shall be filed in the office of the clerk of the supreme court, who shall transmit the order to the clerk of the lower court, and send a notice or copy thereof to the appellant or his attorney. The order shall be attached to and returned with the record certified, and be submitted with the papers in the case. The appellant, upon notice or copy of the order being received by him or his attorney, shall, within five days unless otherwise ordered, pay or secure to the satisfaction of the clerk of the lower court his fees and expenses for preparing and forwarding the record ordered. [Code, § 4122; Old Rules, § 23.]

SEC. 33. When certification of the record is required the designated papers, notices, depositions, exhibits identified as evidence, notice of appeal with return or acceptance of service thereon, and any other papers filed in the case, or any part thereof, may be transmitted to the supreme court in the original form or by a transcript of the same, excepting that the shorthand reporter's translation of his report shall be transmitted in its original form, but all entries of record must be certified by transcript. The clerk of the trial court shall verify his return, whether it be of the record or transcription thereof, by his certificate, under seal, distinguishing between originals and transcripts, and such certification so made shall constitute a part of the record in the supreme court. [Code, § 4123; Old Rules, § 24.]

SEC. 34. Where a view of an original paper or exhibit in the action may be important to a correct decision of the appeal, the court may order the

clerk of the court below to transmit the same, which he shall do in the manner provided for the transmission of certifications of the record. [Code, § 4124; Old Rules, § 25.]

SEC. 35. A transcript may be denied; and when such denial is made it shall be as specific as the case will permit. The trial court, the supreme court, or judge of either court, may make any orders necessary to secure a perfect record or transcript thereof, upon a showing by affidavit or otherwise, and upon such notice as the court or judge may prescribe. [Code, § 4120; Old Rules, § 26.]

SEC. 36. The transcript of any paper or exhibit required for use in the supreme court may be transmitted thereto by the clerk of the trial court, by express or other safe and speedy method, but not by a party or any attorney of a party. [Code, § 2125; Old Rules, § 27.]

SEC. 37. If an abstract of the record is not filed by appellant thirty days before the second term after the appeal was taken, unless further time is given by the court, or a judge thereof, for cause shown, the appellee may file an abstract of such matters of record as are necessary, or may file a copy of the final judgment or order appealed from, notice of appeal and return of service thereof certified by the clerk of the trial court, and cause the case to be docketed, and the appeal upon motion shall be dismissed, or the judgment or order affirmed. [Code, § 4120; Old Rules, § 28.]

SEC. 38. If the appellant fails to promptly pay or secure to the satisfaction of the clerk of the trial court, his fees and expenses for preparing and forwarding to the clerk of the supreme court any record ordered to be certified by the supreme court, or a judge thereof, upon receiving notice thereof, a copy of the order therefor, the appeal upon motion supported by proofs of the facts, may be dismissed or the judgment affirmed as the appellee may elect. [Code, § 4122; Old Rules, § 29.]

SEC. 39. Where appellant has no right, or no further right to prosecute the appeal, the appellee may move to dismiss it, and if the grounds of the motion do not appear in the record, or by a writing purporting to have been signed by the appellant and filed, they must be verified by affidavit. [Code, § 4151; Old Rules, § 30.]

SEC. 40. The appellee may, by answer or abstract filed and verified by himself, agent or attorney, plead any facts which render the taking of the appeal improper, or destroy the appellant's right of further prosecuting the same, to which the appellant may file a reply or abstract likewise verified by himself, his agent or attorney, and the question of law or fact therein shall be determined by the court, upon evidence in the form of affidavits unless otherwise ordered. [Code, § 4152; Old Rules, § 31.]

IX. TRIAL, DECISION AND EXECUTION.

(a) Assignment of Error.

SEC. 41. Repealed. [30 G. A., chap. 126.]

SEC. 42. Repealed. [30 G. A., chap. 126.]

[Sections 41 and 42 are no longer in force, as they are simply an incorporation into the rules, of code sections 4136 and 4137, which were repealed by 30 G. A., chap. 126.]

(b) Motions.

SEC. 43. (1.) All motions must be in writing, filed with the clerk and entered upon the motion book. No motion shall be submitted without being publicly called by the court, unless the parties otherwise agree.

(2.) All motions must be served by copy of the same and of all affidavits or documents upon which they are based, upon the opposite party or attorney, ten days before the morning on which the causes for the district are set for hearing. Such opposite party shall then have five days to file papers in resistance to the same, copies of which must be served upon the other party or attorney, and no papers will be regarded which do not appear to have been so served. This rule shall not apply to motions the causes whereof arise after the filing of the abstract, but in such cases timely notice of such motions shall be given to the opposite attorneys. Nor shall this rule apply, as to time of service, to motions for continuance.

(3.) Motions made in a cause after judgment rendered by the supreme court, or after the time assigned for the hearing of causes from the district from which it was appealed, will be heard only upon proof of service of reasonable notice of such motion upon the adverse party or attorney.

(4.) Arguments in support of motions, if any, must be in writing or print, and shall be filed before the morning of the day set for the hearing of the cause, and served by copy upon the opposite party or attorney when the motion is served; and arguments in resistance, if any, must be in writing or print and filed before the morning of the day set for the hearing of the cause, and served by copy on the opposite party or attorney when the papers in resistance are served. [Code, § 4138; Old Rules, § 38.]

X. BRIEFS AND ARGUMENTS.

SEC. 44. When the appeal presents to the court only questions of law upon rulings of the court below, the appellant shall open and close the argument, and must, at least thirty days before the day assigned for the hearing of the case, serve upon an attorney for each appellee copies of his brief of points and authorities or argument. If appellee desires to be heard, he shall, at least ten days prior to the hearing, serve upon an attorney for each appellant copies of his brief or argument; and the printed reply shall be served at least three days before the case is to be finally submitted. If the trial in the supreme court is *de novo*, and the appellant has the burden he shall observe the foregoing rules. But if appellee has the burden, he may waive his right to open the argument by serving notice in writing of his intention to do so upon appellant or his attorney at least thirty days before the day assigned for the hearing of the cause. Appellant will then or after the expiration of the thirty days without notice, be entitled to open the argument, and must serve copies of his argument upon an attorney for each appellee ten days before the hearing. Appellee may then, and at least three days before the submission, serve upon an attorney for each appellant copies of his argument, which must be strictly confined to matters in reply to appellant's argument. A failure to comply with the above requirements will entitle the party not in default, unless the court shall, for sufficient cause, otherwise order, to a continuance or to have the case submitted at his option upon the briefs and arguments on file when the default occurred. [Code, § 4139; Old Rules, § 39.]

SEC. 45. All printed briefs and arguments shall be prepared as required by sections 54, 55 and 56 hereof, and each party shall file with the clerk twelve printed copies of each brief or argument, together with proper evidence of service of the same upon the opposing attorneys. The clerk shall note upon his docket the date of service and filing of all abstracts and arguments, and no brief or argument not served or filed within the time prescribed by these rules will be transmitted to the judges or considered by them in disposing of the case. No cause will be entered as submitted until the arguments are finally and actually concluded. [Old Rules, § 40.]

SEC. 46. Notice in writing or in print of intention to argue a case orally, shall be served upon an attorney for the adverse party and filed with the clerk twenty days before the first day of the term, and the party who fails to serve and file such notice shall not be entitled to argue orally, except in reply to an oral argument for the adverse party. [Old Rules, § 41.]

SEC. 47. If appellant has given the notice, he is entitled to open and close the argument, unless the cause is triable *de novo* and the appellee has the burden. If the notice was given by the appellee only, he is entitled to the opening, and the appellant must confine his remarks to a reply, unless the cause is triable *de novo*. If the cause is triable *de novo* and appellee has the burden, he may, if he has given the requisite notice, open and close the argument. [Old Rules, § 42.]

SEC. 48. On original submission not more than two attorneys will be heard on each side and but one in opening the argument, or in event no oral argument is to be made by opposing counsel. The opening argument shall not exceed an hour in length. The other side, when represented by one attorney only, will be limited to the same time, but if by two attorneys, they will be entitled to one and one-half hours, to be divided between them as they may elect. The reply in all cases shall be limited to one-half hour. On petition for rehearing only one attorney on a side shall be heard, the petitioner having not to exceed thirty minutes for oral argument and the reply being limited to fifteen minutes. No extension of time will be allowed unless applied for before argument begins. [Old Rules, § 43.]

SEC. 49. Oral argument shall be confined to the discussion of the propositions and authorities contained in the briefs. The failure to discuss in oral argument points properly made in the briefs shall not be deemed a waiver of such points, but they will be fully considered in determining the cause. [New.]

SEC. 50. At the commencement of each assignment for the several periods all causes included in that assignment will be called, but the submission of a cause shall not be taken on the preliminary call if any party thereto object. The court will hear all causes included in the assignment and take the submission thereof in the order in which they are assigned, excepting those which have been continued or otherwise disposed of by direction of court. [Code, § 4139; Old Rules, § 44.]

XI. PREPARING AND PRINTING ABSTRACTS, TRANSCRIPTS, BRIEFS, ARGUMENTS, AND PETITIONS FOR REHEARING.

SEC. 51. All abstracts, denials of abstracts, briefs, arguments and petitions for rehearing shall be printed upon unruled writing paper, with type commonly known as small pica, leaded lines, the printed page to be four inches wide by seven inches long, with a margin of two inches; but the type in which extracts are printed may be small pica solid or brevier with leaded lines. The first page of the abstract, denial, brief or argument, shall show the title of the cause, designating the appellant and the appellee, the term of the supreme court to which the appeal is brought, the court from which the appeal is taken, the name of the judge who presided at the trial, and the names of the attorneys for both the appellant and appellee; also the name of the paper filed and the party by whom filed and one copy shall show the time and manner of service. [Old Rules, § 66.]

SEC. 52. The abstract must be accompanied by a complete index of its contents. [Old Rules, § 67.]

SEC. 53. Abstracts of record shall be made substantially in the following form:

IN THE SUPREME COURT OF IOWA.

JANUARY TERM, 19....

JOHN DOE, *Appellant*, }
vs. } "In Equity" or "At Law."
 RICHARD ROE, *Appellee*. }

Appeal from Van Buren District Court.

JOHN SMITH, Judge.

J. C. K., *for the Appellant.*
 H. H. S., *for the Appellee.*

APPELLANT'S ABSTRACT OF RECORD.

Due, timely and legal service of the within.....is hereby acknowledged this.....day of.....190...

.....
Attorneys for

On the.....day of.....190..., the plaintiff filed in the Van Buren District Court a

PETITION

stating his cause of action as follows:

[Set out all of the petition necessary to an understanding of the questions to be presented to this court, and no more. In setting out exhibits, omit all merely formal irrelevant parts, as for example, if the exhibit be a deed or mortgage and no question is raised as to the acknowledgement, omit the acknowledgement. When the defendant has appeared it is useless to encumber the record with the original notice, or the return of the officer.]

On the.....day of.....A. D. 19..., the defendant filed a

DEMURRER

to said petition setting up the following grounds:

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

And on the.....day of.....19..., the same was submitted to the court, and the court made the following ruling thereon:

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

And on the.....day of.....19..., the defendant filed his

ANSWER

to the petition, setting up the following defenses:

[Here set out the defenses, omitting all formal parts. If motions or demurrers were interposed to this pleading, proceed as directed with reference to the petition. Frame the record so that it will properly present all questions to be reviewed and raised before issue is joined. When the abstract shows issue joined, proceed.]

BILL OF EXCEPTIONS.

On the.....day of.....19..., said cause was tried to a jury (or the court, as the case may be) and on the trial the following proceedings were had:

[Here set out so much of the evidence and proceedings as is necessary to show the rulings of the court to which exceptions were taken during the progress of the trial.]

INSTRUCTIONS.

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

[Set out instructions referred to and continue.]

Which the court refused as to each instruction, to which several rulings the plaintiff (or defendant) excepted at the time, and thereupon the court gave the following instructions to the jury:

[Set out the instructions.]

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

VERDICT.

On the.....day of.....19..., the jury returned into court with the following verdict:

[Set out the verdict.]

MOTION FOR NEW TRIAL.

On the.....day of.....19..., the plaintiff (or defendant) filed a motion praying the court to set aside the verdict and grant a new trial upon the following grounds:

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

On the.....day of.....19..., the court made the following ruling upon said motion:

[Set out the record of the ruling.]

To which plaintiff (or defendant) at the time, excepted.

JUDGMENT.

On the.....day of.....19..., the following judgment was entered:

[Set out the judgment entry appealed from.]

On the.....day of.....19..., the plaintiff perfected an appeal to the supreme court of the state of Iowa, by serving upon the defendant and the clerk of the district court of Van Buren county a notice of appeal.

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

ASSIGNMENT OF ERRORS.

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

[Set out the errors assigned.]

INDEX.

This outline is presented for the purpose of indicating the character of the abstract contemplated by the rule, which like all the rules, is to be substantially complied with. Of course, no formula can be laid down applicable to all cases. The rule to be observed in abstracting a case is: Preserve everything material to the questions to be decided and omit everything else. [Code, §§ 3675, 3749; Old Rules, § 68.]

SEC. 54. The brief of appellant shall contain a short and clear statement, disclosing:

First. The nature of the action.

Second. What the issues were.

Third. How the issues were decided, and what the judgment or decree was.

Fourth. The errors relied upon for a reversal.

Fifth. A brief and concise statement of so much of the facts as fully presents the errors and exceptions relied upon referring to the pages and lines of the abstract. If the insufficiency of the evidence to sustain the verdict or finding, in fact or law, is assigned, the statement shall contain a condensed recital of the evidence in narrative form so as to present the substance clearly and concisely.

Following this statement, the brief shall contain, under a separate heading of each error relied on, separately numbered propositions or points, stated concisely, and without argument or elaboration, together with the authorities relied on in support of them; and in citing cases, the names of parties must be given, with the book and page where reported. When text books are cited the number or date of the edition must be stated with the number of the volume and page, or section. No alleged error or point, not contained in this statement of points, shall be raised afterwards, either by reply brief, or in oral or printed argument, or on petition for rehearing. [New.]

SEC. 55. The brief of appellee on the assignment of errors shall point out any omissions or inaccuracies in appellant's statement of the record,

and shall contain a short and clear statement of the propositions by which counsel seek to meet the alleged errors and sustain the judgment or decree, or by which such errors are obviated. Following this statement, the brief shall contain the points and authorities relied on in like manner as required in the appellant's brief. The brief of appellee on cross-errors shall be prepared in the manner required in the case of appellant's brief. The brief of appellant, in answer to the cross-assignment of errors, shall be prepared in the manner required of appellee's answer to the assignment of errors. Reply briefs shall be prepared in manner like to answer briefs. [New.]

SEC. 56. The briefs of any party may be followed by an argument in support of such briefs, which shall be distinct therefrom, but shall be bound with the same. The argument shall be confined to discussion and elaboration of the points contained in the briefs in the order stated. The names of counsel shall be affixed to all briefs filed by them. [New.]

SEC. 57. Transcripts of the record, when required by the supreme court or a judge thereof, may be made substantially in the manner following, viz.:

STATE OF IOWA, }
County of..... }

In the district (or superior) court of Iowa, at a term begun and holden in the county of....., on the.....day of.....A. D. 19...., before J. H. G., judge of the.....judicial district (or judge of the.....superior court) of the State of Iowa.

N. P. }
v. }
C. D. }

Be it remembered that heretofore, to-wit, on the.....day of.....A. D. 19...., a petition was filed in the office of the clerk of the district (or superior) court, in and for the county (or city) of.....in words and figures following, to-wit:
[Here insert the petition in full.]

[Proceed in the same manner in relation to whatever paper is filed; such as the original notice, or a petition for attachment, etc. If the cause has come from another county by a change of venue, begin as above, "Be it remembered," and state in like manner all that was done in the county from which the venue was changed.]

And afterward there was filed in the office of the said clerk a notice, in the words and figures following, to-wit:
[Here insert the notice in full.]

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

Upon which (or attached to which) was a return as follows:

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

And afterwards, to-wit: on the.....day of.....A. D. 19...., there was filed in the office of said clerk, an answer in words and figures following, to-wit:

[Here insert answer in full.]

[Should the clerk doubt what the paper is, let him call it a "paper in the words and figures following," etc. Where a paper is filed in term time, add the day of the term to the day of the month, as in the next form.]

A. B. }
v. }
C. D. }

And afterward, to-wit: on the.....day of.....A. D. 19...., it being the.....day of the.....term of said court, the said A. B. (or plaintiff) filed the following demurrer to the answer of the said C. D. (or the said defendant) to-wit:

[Here insert demurrer in full.]

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

A. B. }
v. }
C. D. }

And now, on this.....day of.....A. D. 19..., it being the..... day of the said term thereof, the cause coming on for hearing on the plaintiff's demurrer to the defendant's answer [copy the entry of the proceedings of the court, sustaining or overruling the demurrer.]

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

[Here set out reply in full.]

And afterward on the.....day of.....A. D. 19..., the said defendant filed motion and affidavit for a continuance, as follows, to-wit:

[Here set out copy of motion and affidavit.]

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

In the district (or superior) court.....county (or.....city).

A. B. }
v. }
C. D. }

.....term, A. D. 19...

And now on this.....day of....., it being the.....day of said term, this cause coming on for trial, came to a jury, to-wit:.....

.....twelve good and lawful men, who were sworn well and truly to try the issues between the said parties, and a true verdict render, according to the law and evidence given them in court. The jury retired to consider on their verdict, and afterward, on the same day, the jury returned into court and rendered its verdict as follows:

[Here insert in full the verdict as rendered.]

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

A. B. }
v. }
C. D. }

And afterward, on the.....day of.....A. D. 19..., the jury in the foregoing cause returned into court and rendered its verdict, as follows:

[Here insert in full verdict as rendered.]

A. B. }
v. }
C. D. }

And afterward, on the.....day of.....A. D. 19..., being the..... day of said term, the shorthand reporter filed his report in writing or in shorthand (as the case may be) certified as required by law, the translation of which, duly certified, was filed on the.....day of.....A. D. 19..., and is as follows: [Here attach the original translation unless otherwise directed by order of the supreme court, or a judge thereof.]

A. B. }
v. }
C. D. }

Now, on this.....day of.....A. D. 19..., the plaintiff filed his motion for a new trial, to-wit:

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

A. B. }
v. }
C. D. }

And now, on this.....day of.....A. D. 19..., this cause coming up for a hearing on the motion of the plaintiff for a new trial, it is considered by the court, that the same be overruled (or, as the case may be).

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

The foregoing form is only an example, and is to be varied according to the circumstances. The actual facts of the case will dictate what is to be

done, but in all cases it is to be done substantially in like manner with the above, giving the proper order and date of the filing of papers and incorporating them at the proper date into the proceedings of the court. When the order made by this court or a judge thereof, pursuant to rules 31, 32 and 33, requires but a part of the record be transcribed, the foregoing form should be so modified as that it will include only those matters directed to be certified. All other, except the mere formal parts, must be omitted. [Code, §§ 3675, 3749, 4122, 4123; Old Rules, § 70.]

XII. DECISIONS AND OPINIONS.

SEC. 58. The court may reverse, modify or affirm the judgment, decree or order appealed from, or render such as the inferior court should have done. [Code, § 4139; Old Rules, § 45.]

SEC. 59. No cause will be considered as decided until a written decision is filed with the clerk. The decisions of the court on all questions passed upon by it, including motions and practice, shall be specifically stated, and shall be accompanied by an opinion upon all such matters as are deemed of sufficient importance, together with any dissent therefrom, which dissent may be stated with or without an opinion; and all decisions and opinions, including dissents, shall be in writing and be filed with the clerk except rulings on motions which may be entered upon the announcement book. If the decision is not accompanied with an opinion, it shall briefly state the title of the case, the county from which the case was appealed, the name of the presiding judge, the nature of the action, the names of counsel appearing on either side, and the conclusions reached. [Code, §§ 198, 4139; Old Rules, § 46.]

SEC. 60. When the court is equally divided in opinion the judgment of the court below shall stand affirmed, but the decision is of no further force or authority. In case of such division, opinions may be filed at the option of the court. If no opinion is filed a written announcement shall be made of the division of the court upon the questions presented, and that the judgment is affirmed by operation of law. [Code, §§ 195, 198; Old Rules, § 47.]

XIII. JUDGMENTS AND DECREES.

SEC. 61. The supreme court, if it affirms the judgment, shall also, if the appellee asks or moves therefor, render judgment against the appellant and his sureties on the appeal bond for the amount of the judgment, damages and costs referred to therein, in case such damages can be accurately known to the court without an issue and trial. [Code, § 4140; Old Rules, § 50.]

SEC. 62. Upon the affirmance of any judgment or order for the payment of money, the collection of which in whole or in part has been stayed by an appeal bond, the court may award to the appellee damages upon the amount so stayed; and, if satisfied by the record that the appeal was taken for delay only, may award as damages a sum not exceeding fifteen per cent. thereof. [Code, § 4141; Old Rules, § 51.]

SEC. 63. Decrees to be entered in this court shall be prepared by the attorney of the parties in whose favor they are rendered. Copies shall be served on the opposite attorney and filed in the court within twenty days after the attorney preparing them shall have received notice of the decision in the cause in which they are to be entered. [Old Rules, § 52.]

SEC. 64. When, by the decision, a decree is to be entered in this court at the option of either party, such opinion shall be declared and a decree furnished under the above rule within twenty days from the date at which the attorney required to prepare the decree received notice of the decision. [Old Rules, § 53.]

SEC. 65. No procedendo, except in criminal cases and in cases where petitions for rehearing have been overruled, shall issue in any case until the expiration of thirty days from the filing of the opinion in the case, except upon an order of one of the judges of the court, upon cause shown. [Old Rules, § 54.]

XIV. REHEARINGS.

SEC. 66. No petition for rehearing shall be filed after sixty days from the filing of the opinion or decision of the supreme court. [Code, § 4149; Old Rules, § 60.]

SEC. 67. Written notice of intention to petition for a rehearing shall be served on the opposite party or his attorney, and the clerk of this court, and filed with the clerk, within thirty days after filing of the opinion or decision, and if no such notice is served, the petition for rehearing shall not be filed after the expiration of such thirty days. [Code, § 4149; Old Rules, § 61.]

SEC. 68. The petition or rehearing shall be printed, and, with proof of service thereof on the opposite party or his attorney, shall be filed with the clerk of the court within sixty days after the opinion is filed, and may be made the argument or brief of authorities relied upon for a rehearing. It shall include a copy of the opinion or decision of the court to which objection is made, or a reference to the volume and page of the Northwestern Reporter in which it has been printed. The adverse party may file an argument in response. [Code, § 4149; Old Rules, § 62.]

SEC. 69. A copy of the petition shall be served upon the attorney of the adverse party, and if there be more than one, upon the attorney of each of them, within sixty days after the opinion or decision is filed; and twelve copies shall be delivered to the clerk of the court. If there be a printed argument in resistance of the petition, a copy thereof shall be served upon the attorney for the petitioner ten days before the day fixed for the hearing of the cause, and twelve copies shall be delivered to the clerk of the court. [Code, § 4149; Old Rules, § 63.]

SEC. 70. The cause shall be placed on the docket for hearing on the first day of the next period commencing not less than twenty days after the filing of the petition and service thereof. If the party applying for a rehearing shall give notice of oral argument in his petition, both parties shall be entitled to be heard orally unless the petitioner waive oral argument. [Code § 4149; Old Rules, § 64. Amended November 1st, 1907.]

[The above is a substitute for the original section. By specific provision it "applies to petitions for rehearing in cases in which opinions are filed after November 1, 1907."]

SEC. 71. If a petition for rehearing is filed, it shall suspend the decision, if the court or one of the judges upon its presentation so order, until after the final decision on the rehearing. [Code, § 4148; Old Rules, § 65.]

XV. RECORDS AND REPORTS.

SEC. 72. The records and reports must in all cases show whether a decision was made by a full bench, and whether either, and if so, which of the judges dissented from the decision. [Code, § 199; Old Rules, § 48.]

SEC. 73. All decisions and opinions of the court shall be published in the official reports, except such as the court may think unimportant. Decisions and opinions which are not to be included will be marked, "Not to be officially reported," and when so marked they will not be included in the reports. [Code, § 200; Old Rules, § 49.]

XVI. EXECUTIONS.

SEC. 74. If the supreme court affirms the judgment or order it may send the cause to the court below to have the same carried into effect, or may issue the necessary process for this purpose, directed to the sheriff of the proper county, as the party may require. [Code, § 4143; Old Rules, § 65.]

SEC. 75. If remanded to the inferior court to be carried into effect, such decision and the order of the court thereon, being certified thereto and entered on the records thereof, shall have the same force and effect as if made and entered during the session of that court. [Code, § 4144; Old Rules, § 56.]

SEC. 76. If by the decision of the supreme court, the appellant becomes entitled to a restoration of any part of the money or property that was taken from him by means of such judgment or order, either the supreme court or the court below may direct execution or writ of restitution to issue for the purpose of restoring to him such property or its value. [Code, § 4145; Old Rules, § 57.]

SEC. 77. Executions issued from the supreme court shall be like those from the district court, attended with the same consequences, and returnable in the same time. [Code, § 4153; Old Rules, § 58.]

SEC. 78. In cases in which the judgment below is affirmed in this court, the parties in whose favor the judgment is affirmed may have execution either from this court or the court below. In case of an execution from this court, if a process of garnishment is served upon the execution defendant, either principal or surety, the sheriff, in addition to his return, shall return a copy of the execution and his returns to the district or superior court from which the cause was appealed, and all issues of fact which may arise in said garnishment process shall be tried by that court. [Old Rules, § 59.]

XVII. APPEALS IN CRIMINAL ACTIONS.

SEC. 79. The mode of reviewing in the supreme court any judgment, action, or decision of the district court in a criminal case, is by appeal. An appeal can only be taken from the final judgment and within one year thereafter. Either the defendant or state may appeal. [Code, § 5448.]

SEC. 80. An appeal is taken and perfected by the party or his attorney serving on the adverse party or his attorney of record in the district court at the time of the rendition of the judgment, and on the clerk of such court, a notice in writing of the taking of the appeal, and filing the same with such clerk, with evidence of service thereof indorsed thereon or annexed thereto. [Code, § 5449.]

SEC. 81. When several defendants are indicted and tried jointly, any one or more of them may join in taking the appeal, but those of their co-defendants who do not join shall take no benefit therefrom, yet they may appeal afterwards. [Code, § 5451.]

SEC. 82. When an appeal is taken, it is the duty of the clerk of the court in which the judgment was rendered to forthwith prepare and transmit to the attorney-general a certified copy of the notice of appeal in the case, with the date of service thereof, and, without unnecessary delay, to make out a full and perfect transcript of all papers in the case on file in his office, except the papers returned by the examining magistrate on the preliminary examination, where there has been one, and of all entries made in the record book, certify the same under the seal of the court, and transmit the same to the clerk of the supreme court. [Code, § 5450.]

SEC. 83. An appeal taken by the state in no case stays the operation of a judgment in favor of the defendant. [Code, § 5452.]

SEC. 84. An appeal taken by the defendant does not stay the execution of the judgment, unless bail is put in; but where the judgment is imprisonment in the penitentiary, and an appeal is taken within ninety days after judgment is rendered, and the defendant is unable to give bail, and that fact is satisfactorily shown to the court, or judge thereof, it may, in its discretion, order the sheriff or officer having the defendant in custody to detain him in custody, without taking him to the penitentiary, to abide the judgment on the appeal, if the defendant desires it. [Code, § 5453.]

SEC. 85. When an appeal is taken by the defendant, and bail is given the clerk must give to the defendant, or his attorney, a certificate under the seal of the court that an appeal has been taken and bail given, and the sheriff or other officer having the defendant in custody must, upon receiving it, discharge the defendant from custody and cease all further proceedings in execution thereof, and forthwith return to the clerk of the court who issued it the execution under which he acted, with his return thereon, and if it has not been issued, it shall not be until after final judgment on the appeal. [Code, § 5454.]

SEC. 86. The party appealing is the appellant, the adverse party is the appellee, but the title of the action shall not be changed on the appeal, and the cause shall be so docketed at the commencement of the period assigned for trying causes from the judicial district from which the appeal comes which causes shall take precedence of all other business, be tried at the term at which the transcript is filed, unless continued for cause or by consent of the parties, and be decided, if practicable, at the same term. [Code, § 5455.]

SEC. 87. The personal appearance of the defendant in the supreme court on the trial of an appeal is in no case necessary. [Code, § 5456.]

SEC. 88. An appeal shall not be dismissed for any informality or defect in taking it, if corrected in a reasonable time, and the supreme court must direct how it shall be corrected. [Code, § 5457.]

SEC. 89. No assignment of error is necessary. [Code, § 5458.]

SEC. 90. Criminal actions shall be presented in the supreme court, by printed abstracts, denials, arguments and petitions for rehearing, as required by the rules applicable to civil actions, provided that the defendant shall be entitled to close the argument. The provisions of the code and rules of this court, in civil procedure relating to the printing, serving and filing of abstracts, denials, arguments, petitions for rehearing, notice thereof and of oral arguments, motions and resistances thereto, the certification of the record and the filing of decisions and opinions, shall apply in criminal cases. [Code, §§ 5459, 5461.]

SEC. 91. If the appeal is taken by the defendant the supreme court must examine the record, without regard to technical errors or defects which do not affect the substantial rights of the parties, and render such judgment on the record as the law demands. It may affirm, reverse, or modify the judgment, or render such judgment as the district court should have done, or order a new trial, or reduce the punishment, but cannot increase it. And in case the judgment of the trial court is reversed or modified in favor of the defendant on the appeal of the defendant, he shall be entitled to recover the cost of printing abstract and briefs not exceeding one dollar for each page thereof, to be paid by the county from which the appeal was taken. [Code, § 5462.]

SEC. 92. If the state appeals the supreme court cannot reverse or modify the judgment so as to increase the punishment, but may affirm it, and shall point out any error in the proceedings, or in the measure of punishment, and its decision shall be obligatory as law. [Code, § 5463.]

SEC. 93. If a judgment against the defendant is reversed without ordering a new trial, the supreme court must direct that the defendant be discharged and his bail exonerated, or if money be deposited instead, that it be refunded to him. [Code, § 5464.]

SEC. 94. On a judgment of affirmance against the defendant, the original judgment shall be carried into execution as the supreme court shall direct, except as otherwise provided. [Code § 5465.]

SEC. 95. The decision of the supreme court, with any opinion filed, or judgment rendered, must be recorded by its clerk and after the expiration of the period allowed for a rehearing or as ordered by the court, or provided by its rules, a certified copy of the decision and opinion shall be transmitted to the clerk of the trial court, filed and entered of record by him, and thereafter the jurisdiction of the supreme court shall cease and all proceedings necessary for executing the judgment shall be had in the trial court, or by its clerk. [Code, § 5466.]

SEC. 96. Unless some proceeding in the district court is directed, a copy of the judgment of the trial court and decision on appeal, or of the judgment and decision on appeal, certified by the clerk of the trial court, shall be delivered to the sheriff, or other proper officer, as an execution, and shall authorize him to execute the judgment of the court, or take any steps required to bring the action to a conclusion. [Code, § 5467.]

SEC. 97. If a defendant, imprisoned during the pendency of an appeal, upon a new trial ordered by the supreme court, is again convicted, the period of his former imprisonment shall be deducted from the period of imprisonment to be fixed on the last verdict of conviction. [Code, § 5468.]

XVIII. CONSTRUCTION AND MODIFICATION OF RULES.

SEC. 98. When, by reason of peculiar circumstances, the foregoing rules relating to the abstract, preparation and argument of causes, ought to be waived or modified in any case, the party desiring such waiver or modification may, upon reasonable notice to the adverse party, apply to any judge of this court in vacation, or to the court in term time, for an order directing the waiver or modification desired. The application shall be in writing, shall set out the peculiar facts relied upon by the applicant, and shall be verified by the party, or a person having knowledge of the facts, and certified by counsel as being true and made in good faith. The order upon such application shall be in writing, and shall be filed with the clerk of this court. In no case will these rules be waived or modified upon agreement of counsel alone. [Old Rules, § 90.]

XIX. DISTRIBUTING OF PRINTED MATTER.

SEC. 99. The clerk shall make the following distribution of all printed abstracts, denials of abstracts, briefs and arguments received under the foregoing rules: One copy to each judge of the court, one copy to the state library, two copies to the law department of the state university, and the remainder shall be placed in his office, one copy of which shall remain permanently among the files. [Old Rules, § 91.]

XX. RETURN OF PAPERS AND EXHIBITS.

SEC. 100. In all cases save where a decree is to be rendered in this court the clerk as soon as the cause is at an end here shall transmit to the clerk of the court below all original papers, exhibits and transcripts certified up from said court. If decree is entered in this court either party desiring

to withdraw any of the said files may, by motion, showing proper grounds therefor, and upon five days' notice to the other party or his attorney, secure an order from the court or a judge thereof, allowing him to do so, upon filing a receipt for the same with the clerk of this court. [Code, § 4126; Old Rules, § 92.]

XXI. COSTS.

SEC. 101. The appellant may be required to give security for costs, under the same circumstances and upon the same showing as plaintiffs in civil actions in the inferior courts may be. [Code, § 4135.]

SEC. 102. When the parties or their attorneys shall furnish printed abstracts, denials of abstracts, amendments, briefs, arguments, or petitions for rehearing in conformity to section 51 of these rules, the clerk will tax the actual cost of printing the same which shall not exceed one dollar for each page embraced in a single copy thereof, and when not so prepared and printed shall not exceed the sum of one dollar for every three hundred and seventy-five words, which in no event shall exceed one dollar per page against the unsuccessful party not furnishing the document to be collected and paid to the successful party as other costs. It is made the duty of every party who files any printed matter for which cost of printing is claimed, to state at the end of the document in writing or in print and have certified by his attorney as being correct, the true and actual cost of the printing of the same and no costs will be taxed for such printing unless this statement and certificate be made. [Code, § 4142; Old Rules, § 94, as amended February 14, 1907.]

SEC. 103. If any denial of the abstracts, transcripts or records is made, or if an additional abstract is filed, without good or sufficient cause, the costs of the same, or any unnecessary part thereof, and of any transcript thereby made necessary, shall be taxed to the party causing the same; and when any unnecessary casts have been made by either party the court will, upon application, tax the same to the party making them without reference to the disposition of the case. [Code, §§ 4118, 4120; Old Rules, § 95.]

SEC. 104. Whenever the translation of the shorthand notes is required to be filed in this court, the clerk shall tax as part of the costs in the case, the expense of procuring the same, which shall not exceed the rate of five cents per hundred words. If the amount paid or agreed to be paid is not stated in the translation so filed, the clerk shall tax at the statutory rate. [Code, § 4142.]

SEC. 105. All other taxable fees and costs shall abide the result of the appeal and be taxed to the unsuccessful party, unless otherwise ordered. [Code, §§ 3853, 4142.]

XXII. ADMISSION OF ATTORNEYS.

SEC. 106. The board of law examiners shall consist of five members, in addition to the attorney-general; and no examination for admission shall be conducted by less than three members of the board.

SEC. 107. Examinations shall be held at the Capitol at Des Moines, commencing on the first Tuesday in October and the Tuesday before the first Thursday in June, and at the university at Iowa City commencing on the first Thursday preceding the annual commencement of the State University, and each examination shall continue not less than three days. Such examinations shall be both written and oral. At least fifty written questions to be prepared by such board on subjects of the law shall be propounded to each candidate, to be answered in writing, and the members

of the board shall conduct such oral examinations as they deem necessary and proper. The board shall estimate each candidate's examination in percentage on the basis of one hundred per cent. for the entire examination, and no one shall be recommended by the board for admission who does not, on this basis, receive a marking of at least seventy-five per cent.

SEC. 108. The board shall determine the general educational qualifications of the applicants for examination before allowing them to enter upon the examination as to their legal attainments, and for that purpose may require such of them as do not otherwise show their qualifications, as provided by this rule, to submit to written tests as to their knowledge of the subjects of Orthography, Reading, Writing, Arithmetic, Geography, English Grammar, United States and English History, Elementary Algebra, Elementary Physics, Elementary Economics and Civil Government, and such other subjects as the board may deem necessary. But in lieu of such written tests the board shall accept as sufficient evidence of the educational qualifications required by statute proof of graduation from the regular collegiate or liberal arts' course in any university or college of good standing in the United States, or from any high school of this state having a course of study which prepares for admission to the State University, or from any normal school or academy prescribing a course of study at least equivalent to such high school course. The board shall also accept as sufficient proof of educational qualifications the certificate of the president or principal of any such university, college, high school, normal school or academy in this state that the applicant has regularly and in good faith pursued and successfully completed three years of the regular course of such school as above described; also certificates or diplomas of the State Board of Educational Examiners; also the certificate of the president of the State University or any college in this state having an equivalent collegiate or liberal arts' course of study, that the applicant has been found by examination or on proper certification to be entitled to admission without conditions as a student in such course or in any other course of study in such institution for which the same qualifications for admission are required, or for which it is required that the applicant shall have actually and in good faith acquired a general education substantially equivalent to that involved in the completion of a high school course of study of at least three years in extent. The board may adopt such reasonable regulations as shall be deemed wise with regard to acceptance of other proofs of educational qualifications as a substitute for written tests by the board. The board may, before recommending the admission of an applicant, subject him to a special examination as to general educational qualifications if his written or oral examination on legal subjects renders it doubtful whether his educational qualifications are such as required by statute.

SEC. 109. No candidate who has failed to pass any examination given by the board shall be received as an applicant for examination within three months after such failure.

SEC. 110. The Board of Law Examiners shall prepare such forms as may be necessary for application, for examination, and make such rules, not inconsistent with the rules of this court, with reference to the method of conducting the examinations herein provided for, as they may deem expedient.

SEC 111. The members of the Board of Law Examiners shall be paid \$15 each for each day spent in conducting examinations as authorized by these rules, upon the certificate of the attorney-general as to the time thus occupied; such compensation to be paid by the clerk of this court out of funds in his hands derived from fees of candidates for examination.

RULES ADOPTED BY THE BOARD OF LAW EXAMINERS OF IOWA FOR THE EXAMINATION OF CANDIDATES FOR ADMISSION TO THE BAR.

At a meeting of the Board of Law Examiners, held at the Capitol on the 28th day of August, 1901, the following rules for the examination of applicants for admission to practice as attorneys and counselors in the courts of this state, under chapter ten of Title III of the Code, as amended by chapter eleven of the acts of the Twenty-eighth General Assembly, were duly adopted, and shall be in force and effect from and after this date.

RULE 1. Every applicant for admission to the bar shall make application, under oath, and upon the form prescribed by the Board of Law Examiners, which will be furnished by the clerk of the supreme court, upon request, and shall file his application with the clerk of the supreme court at least ten days before the first day of the term at which he asks to be examined.

RULE 2. Each applicant shall attach to his application, as proof of his good moral character, a certificate of a judge of the district court of the district, or a clerk of the district court of the county in which the applicant resides, to the effect that he has knowledge of the moral character of the applicant, and that the same is good.

RULE 3. Every applicant who is a graduate of a collegiate, classical, philosophical, scientific or engineering course in any university or college of good standing in the United States, or a graduate of a three years' course in any high school which prepares for admission to the State University, or of a course of study in any normal school or academy equivalent to such high school course, or holds a certificate or diploma from the State Board of Educational Examiners, shall attach to his application the diploma or certificate issued to him by such high school, college, normal school, academy or State Board of Educational Examiners, and the same shall be accepted as proof of the general educational qualification of the applicant. Every applicant not holding such diploma or certificate, before being permitted to take the law examination, must pass a satisfactory written examination before the Board of Law Examiners in Orthography, Reading, Writing, Arithmetic, Geography, English Grammar, United States and English History, Elementary Algebra, Elementary Physics, Elementary Economics, Civil Government, and the Elementary Principles of the Government Land Surveys.

RULE 4. No applicant whose preliminary examination shall not average at least 75 per cent. on a basis of 100 per cent. will be permitted by the board to take the law examination.

RULE 5. Proof of qualification as to age, place of residence, time and place of study, shall be by affidavit made before some officer authorized to administer oaths and having a seal. Proof of residence and age shall be by affidavits of at least two witnesses, and the applicant shall also make affidavit as to his age and place of residence. Proof of his term of study shall be by affidavit of the member of the bar or judge with whom he pursued his studies; and when he has studied at a law school, such fact, and his term of study, shall be shown by the affidavit of one or more of the professors or instructors of such school; such affidavits must show that the applicant has actually, and in good faith, pursued the study of law in the manner, and for the time prescribed by statute; and must also show that the affiant is a practicing lawyer or judge of a court of record, or professor or instructor at a law school at which the applicant studied.

RULE 6. In estimating the time of study, a school year of thirty-six weeks spent at a reputable law school in the United States shall be equivalent to a full year spent in an office, and a fraction of a school year spent in such law school shall be considered the equivalent of the same fraction of a year spent in the office of an attorney or judge.

RULE 7. The examination shall be upon printed and oral questions submitted to each applicant, and during such examination he shall not have access to books or papers, nor shall he communicate with anyone upon the subject thereof.

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The references are to both sections and pages—the page number following the section number, after a colon.

The black letter "S" indicates that the section and page numbers following it will be found in the 1907 Supplement to the Code, while those not preceded by the said letter will be found in the Code.

The letter "R" before a section number indicates that the section is found in the Rules of the Supreme Court.

The term "*et seq.*," following a section number, means "and sections following."

All sections of the Code that have been amended, and are still in force, will be found complete in this Supplement, as amended, having the same section number; while repealing sections and new matter will be found in the Supplement, under sub-section numbers, as Section 4-a, etc.

A table of all legalizing acts relating to conveyances of real property has been placed in front part of this Supplement.

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- In special charter cities, § 940: 379.
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- In superior court, § 274: 174.
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- Certificates of levies for protection of property against floods, to be filed with, S. § 849-e: 177.
- Park fund tax, certification of by trustees to, S. § 850-c: 179.
- Road tax, delinquent, certification to and duties of, S. § 892: 189.
- To enter city and town assessments and taxes on county tax list, S. § 902: 191.
- May require plats to be made and filed, or make them himself, S. §§ 922-924: 196.
- Acts of, in relation to plats and conveyances, legalized, S. §§ 924-a-924-c: 198.
- To satisfy school fund mortgage, § 4295: 1754.
- Has custody of court house, § 473: 243.
- To collect money due county, § 473: 243.
- To report list of county officers to secretary of state, § 474: 243.
- To report criminal statistics to clerk, § 475: 243.
- Clerk and recorder may be, § 476: 243.
- County treasurer may not be, § 477: 243.
- Fees to be collected by, § 478: 243.
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- To make financial report annually, what shown in, printing and distribution of, S. §§ 480-a, 480-b: 97.
- Compensation of, S. § 479: 97.
- Deputy of, and other assistants; appointment; qualifications, compensation, § 481: 244.
- To issue new warrant for unpaid balance of a former one, § 485: 246.
- Filed in office of, appointment and revocation of deputy sheriffs, S. § 510-b: 102.
- May certify copies of surveyor's record, § 538: 258.
- To furnish information to governor or general assembly, § 544: 259.
- Not to act as attorney before board of supervisors, § 545: 259.
- May designate newspaper for publication of his official notices, § 549: 260.

References following the black letter "S" are to the Supplement.

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 To be notified by township clerk of election of township officers, § 577: 264.
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 Library tax, certification of by trustees to, S. § 732: 134.
 To enter taxes of special charter cities on county tax list, § 1010: 392.
 Duties of, as to nomination papers, §§ 1101-1105: 411.
 Duties of, as to ballots for elections, §§ 1107-1110: 413, and §§ 1141, 1143: 422. S. § 1106: 239.
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 Duties of, as to cards of instructions to voters, § 1111: 415.
 To furnish poll-books for election precincts, § 1132: 420.
 Poll-books to be returned to, § 1145: 423.
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 May approve bonds of county officers, when, §§ 1189, 1195: 433.
 Bonds of township and county officers to be filed with and recorded by, § 1191: 434.
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 To be clerk of court for trial of contested elections, § 1202: 437.
 Duties of, upon removal or suspension of officer, §§ 1254, 1257: 443.
 Resignation of county and township officers to be made to, § 1268, ¶ 4: 446.
 To notify governor of vacancy in general assembly, § 1269: 446.
 To notify township officers of the removal of a justice of the peace, § 1287: 449.
 To fill vacancies in township offices where there are no trustees, S. § 1272: 252.
 To furnish assessors names of stockholders in foreign building and loan associations, § 1326: 468.
 Assessment by executive council, against express companies, certified to, S. § 1346-f: 277.
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 Assessments of Executive Council, certified to, S. § 1330-b: 264.
 To enter taxable value of new buildings on tax list as part of real estate, § 1350: 475.
 To call meeting of assessors for consultation, § 1359: 479.
 To furnish assessors with books and blanks, §§ 1363, 1364: 480. S. § 1360: 280.
 Assessor's books and schedules, how kept, S. § 1361: 283.
 To distribute revenue laws to assessors, etc., § 1369: 485.
 To transmit to state auditor abstracts of property, §§ 1377, 1388: 490.
 State levy, certification of by executive council to, S. § 1380-d: 288.
 To correct tax books as directed by state board of review, S. § 1382: 289.
 To make tax list, correct errors and deliver to treasurer, §§ 1383, 1384, 1386, 1387: 491. S. § 1385-b: 289.
 To certify to state auditor valuation of property and amount of tax, § 1388: 493.
 Duty of, to keep record of forest and fruit tree reservations, S. § 1400-o: 294.
 Duty of, as to collecting tax against personal property of nonresidents, § 1404: 500.
 To keep tax account with treasurer, § 1416: 503.
 To attend tax sales and keep record thereof, § 1427: 511.
 Misconduct of, relating to tax sales, punished, §§ 1429, 1430: 512.
 Duties of, as to redemptions from tax sales, §§ 1437-1438: 517. S. § 1436: 300.
 Records of, as evidence of tax sales, § 1451: 547.
 To lay statement of treasurer's account before board of supervisors, S. § 1460: 307.
 Duty of, when receiving warrant to county from state auditor, § 1466: 550.
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 Duties of, as to the establishing, vacating and altering of roads, §§ 1484-1494, 1496-1504: 556. S. § 1495: 324.
 To make and file transcript in case of appeal from order establishing road, § 1515: 566.
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 To make and correct road plat book, § 1521: 568.
 To furnish township clerks with printed blanks, S. § 1540-a: 328.

References following the black letter "S" are to the Supplement.

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- Property road tax list, duty of, S. § 1540-a: 328.
- To enter delinquent road taxes on tax lists, S. § 1542-a: 162.
- To enter delinquent road poll tax on tax lists, § 1555: 576.
- To distribute bulletins of information concerning Russian thistles, § 1565: 580.
- Report of township trustees, filed with and published, how, S. § 1566-a: 332.
- DUTIES OF, IN RELATION TO LEVEES, DRAINS, ETC.:**
- Upon petition of abutting land owners, §§ 1941-1943, 1945, 1947: 672. S. §§ 1940, 1944, 1946: 415.
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- Compensation of, for services relating to, § 1945: 674.
- Engineer to make return to, in drainage proceedings, S. § 1989-a2: 424.
- To give notice of hearing, in drainage proceedings, S. § 1989-a3: 425.
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- To appoint appraisers, in drainage proceedings, S. § 1989-a5: 426.
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- To provide conditions for payment of damages in drainage proceedings, S. § 1989-a7: 427.
- To draw warrant for contractor, in drainage proceedings, S. § 1989-a9: 428.
- To cause notice to be served upon owners of lands benefited, in drainage proceedings, S. § 1989-a12: 429.
- In drainage improvements across right of way of railroads, S. § 1989-a18: 431.
- To certify drainage assessment to treasurer, when, S. § 1989-a27: 435.
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- Record of drainage matters to be kept by, and compensation of, in drainage matters, S. § 1989-a42: 440.
- Interurban railway, consent of abutting property owners, to location of, filed with, S. § 2026: 451.
- To certify to adjutant-general list of persons subject to militia service, § 2167: 770.
- Must collect costs of supporting insane persons from their estates or relatives, § 2297: 797.
- Superintendent of hospitals for insane to send copy of expenses of insane patients to, S. § 2292: 501.
- To issue warrants to sheriff for estimated expenses of conveying insane person to hospital, § 2309: 800.
- Duties of, as to estrays, §§ 2323-2325, 2331: 805.
- Duty of, as to bounty on wolf, lynx or wild-cat, § 2348: 809.
- Duty of, as to lost goods or property found adrift, §§ 2371-2373: 815.
- To furnish mulct tax blanks to assessors, § 2434: 857.
- To certify list of liquor dealers to county treasurer for mulct tax purposes, S. § 2437: 532.
- To certify papers in appeal from supervisors as to statement of consent under mulct law, S. § 2450: 439.
- To keep for inspection papers pertaining to mulct tax, § 2453: 864.
- Hunters, non-resident, license of by, S. §§ 2563-a-2563-h: 572.
- To furnish assessors with blanks for listing soldiers' orphans, § 2686: 919.
- To collect expenses of pupils in Institution for Feeble-minded Children, § 2697: 921.
- To collect expenses of pupils in College for Blind, § 2716: 925.
- To collect expenses of pupils in School for the Deaf, S. § 2726: 624.
- To apportion school taxes and issue warrants therefor, S. § 2808: 670.
- To report to state auditor election of county superintendent and interest on school fund, S. § 2809: 671.
- School laws, sale and distribution of by, S. §§ 2823-j-2823-m: 678.
- To be member of county board of education, S. § 2831: 680.
- Duty of, as to school funds and sale of school lands, §§ 2840, 2842-2848, 2851-2854, 2856, 2857: 966. S. §§ 2841, 2850, 2855: 681.
- Duties of, as to transfer, index and plat books, §§ 2927-2929, 2931-2933: 1010. S. § 2930: 706.

References following the black letter "S" are to the Supplement.

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- To file written application with secretary of state for survey of abandoned river channels, etc., S. § 2900-a3: 690.
- Acknowledgments of conveyances or incumbrances, by, S. § 2942: 707.
- Service of notice upon, in action against county, § 3528: 1314.
- Partition decrees, how entered by, S § 4259: 1002.
- To hold money recovered for waste or trespass on property sold for taxes, § 4312: 1761.
- To enter satisfaction of school fund mortgage, § 4295: 1754.
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County Board of Education:

- Constitution and duties of, §§ 2833-2835: 964. S. §§ 2831, 2832: 680.

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- When may be issued; form; interest, S. § 403: 85.
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County Buildings:

- To be erected, repaired and insured by board of supervisors, S. § 422, ¶ 5, 6: 87.
- Purchase and control of sites for, S. § 422, ¶ 9: 87.
- Question of erection of, to be submitted to vote, when, S. § 423: 90.
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- When held, under primary elections, S. § 1087-a25: 234.

County Fairs:

- Real estate may be purchased for by board of supervisors, S. § 422: 87.

County High Schools:

- Establishment and government of, S. §§ 2728, 2732: 647.
- Abolishment of, petition for, S. § 2733-a: 650.
- Tax for, S. § 2730: 648.

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- Defined, levy of tax for, S. § 2308: 501.

County Lands:

- May be acquired by county for buildings, S. § 422: 87.

County Officers:

- Election of, § 1873: 403. S. § 1072: 222.
- Bonds of, §§ 1183, 1185: 430.
- Nomination papers of, in primary elections, S. § 1087-a10: 227.
- Candidate for, to make sworn statement of election expenses, S. § 1137-a1: 243.
- May make complaint before board of review, in taxation, S. § 1373: 284.
- Must deliver codes to successors, § 20: 4.
- Entitled to copies of session laws, § 43: 119.
- To be furnished rooms and supplies by supervisors, § 468: 241.
- To furnish information to governor and general assembly, § 544: 259.
- Not to act as attorney or agent before board of supervisors, § 545: 259.
- Sheriff, deputy, coroner, constable, not to act as counsel, § 546: 259.
- Not to purchase property sold by them officially, § 547: 260.
- Accounts of, to be examined upon failure to report fees, § 548: 260.
- May designate papers for publication of notices, § 549: 260.
- Failure to perform duty by, misdemeanor, § 550: 260.
- Not to appropriate money to sectarian purposes, § 593: 267.
- Not to purchase or receive warrants at discount, § 596: 267.
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County Recorder:

- Election and term of, S. § 1072: 222.
- Bond of, § 1185: 432.
- To cancel vacated plats, § 919: 374.
- May also be auditor, § 476: 243.
- General provisions concerning, §§ 493, 497: 248. S. §§ 494-496, 498: 99.
- Who eligible as, sex no bar, § 493: 248.
- May also be treasurer, § 493: 248.
- Vacancy in office of, how filled, § 497: 249.
- Office and duties of, S. § 494: 99.
- Fees to be collected by, S. § 498: 101.
- Fees to be paid to county, S. § 495: 100.
- Compensation of, S. § 495: 100.
- Deputies and other assistants of, appointment, qualification, compensation, S. § 496: 100.
- To be furnished office and supplies, § 468: 241.
- To assist in drawing jurors, § 342: 204.
- Acts of in relation to plats and conveyances, legalized, S. §§ 924-a-924-c: 198.
- To record articles of incorporation, § 1642: 602. S. § 1610: 338.

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- To record physician's certificate; fee, § 2577: 894.
- Instruments of sale, lease, or mortgage of personal property to be filed with and indexed and recorded by, §§ 2905-2910: 982.
- Instruments affecting real estate to be filed with, § 2925: 1000.
 - How recorded and indexed, §§ 2936-2938: 1011. S. § 2935: 706.
- Not to file deed for record until entered in transfer book, § 2934: 1011.
- To record titles to lands held under grants, § 2939: 1014.
- To record separately instruments as to lots in cities, towns or villages, S. § 2941: 707.
- Partition, decrees of, filed with, S. § 4259:
- To keep book of original entries, § 4637: 1858.
- To witness satisfaction of mortgage, § 4295: 1754.
- To record agreement as to boundaries, § 4239: 1797.
- To record label of trade union, §§ 5049-5051: 1965.
- To reindex real estate upon change of owner's name, S. § 4471-f: 1016.
- Fees of, for reindexing real estate upon change of owner's name, S. § 4471-g: 1017.
- To record labels of bottles, S. § 5052: 1101.

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- Transcript of, may be made, indexed and certified; effect, §§ 2961-2963: 1021.

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- Proceeds of sale of meandered lakes and lake beds, placed to credit of, S. § 2900-a27: 697.

County Sealer of Weights and Measures:

- Appointment and duties of, § 3022-5: 1059.

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- Relocation of, how effected, Const., art. 3, § 30: 88, and §§ 396-398, 401, 402: 216. S. §§ 399, 400: 84.
- Terms of court where there are two, § 228: 162.
- Transcripts of liens to be certified to, when court held elsewhere, § 230: 162.

County Superintendent:

- Office and supplies for, § 468: 241.
- Election and term of, S. § 1072: 222.
- Bond of, § 1185: 432.
- To distribute school laws, § 2624: 906.
- To report list of blind, S. § 2739: 655.
- To report list of feeble-minded children, § 2695: 920.
- To report list of deaf and dumb children, S. § 2724: 624.
- Sex and qualification of, S. § 2734-b: 651.

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 - To forward papers of examinations to superintendent of public instruction, S. § 2734-m: 653.
 - Assisting superintendent of public instruction, S. § 2734-n: 653.
 - Duties of, as to normal institutes, S. § 2738: 654.
 - Reports required of, S. § 2739: 655.
 - Must see that school laws are observed, § 2740: 931.
 - Forfeiture for negligence of, § 2741: 931.
 - Compensation of, S. § 2742: 655.
 - To call special election to fill vacancies, when, S. § 2771: 662.
 - May authorize shortening of school year, S. § 2773: 662.
 - Must approve course of study in high or common schools, § 2776: 942.
 - May direct industrial expositions, § 2786: 948.
 - Duties of in consolidation of school districts, S. § 2794-a: 667.
 - To appoint appraisers to assess damages for taking property for school-house site, § 2815: 960.
 - Appeals to, from board of directors, §§ 2818, 2819: 961.
 - Appeals from, to state superintendent, § 2820: 962.
 - Cannot render judgment for money, § 2820: 962.
 - May compel witnesses to attend and testify, § 2821: 962.
 - To be chairman of county board of education, § 2833: 964.
 - Vocal music, to have taught in normal institute, S. § 2823-t: 679.
- County Supervisors:**
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- County Surveyor:**
- Election and term of office, S. § 1072: 222.
 - General provisions, §§ 534-543: 258.
 - To make and record surveys, rules to be followed, §§ 534-537: 258.
 - Copies of surveys by, presumptive evidence, § 538: 258.
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 - Chainman for, § 541: 259.
 - May subpoena and swear witnesses, fees, § 542: 259.
 - Plats and conveyances of, legalized, S. § 924-b: 198.
 - Compensation of, § 543: 259.
 - For services relating to levees, ditches, etc., § 1945: 674.
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 Duties of, as to county bonds, § 404: 219. S. § 407: 86.
 Duties of as to domestic animal fund, S. § 458-b: 95.
 May not be auditor, § 477: 243.
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 Receipt and payment of moneys by, § 482: 244.
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 To call in warrants for payment, § 484: 246.
 To give certificate for portion of warrant unpaid, § 485: 246.
 To keep warrant book, what to show, § 486: 246.
 Duty of, upon canceling warrants, § 488: 247.
 To keep separate account of each fund, § 487: 246.
 To keep separate account for each official term, § 489: 247.
 Compensation of, S. § 490: 99.
 Deputy of and other assistants, qualifications, compensation, § 491: 247.
 Fees of, to be reported and paid to county, § 492: 248.
 May be recorder, § 493: 248.
 Uniform system of books, blanks and records used by, S. § 550-a: 105.
 Blank forms to be furnished to by auditor of state, S. § 550-b: 105.
 Not to discount county warrants, § 596: 267.
 To indorse warrants received, § 597: 268.
 Breach of duty punished, § 598: 268.
 To collect special assessments and taxes for cities and towns, S. § 902: 191.
 For cities under special charters, § 1010: 392.
 Resignation of, to whom made, § 1268, ¶ 4: 446.
 To enter delinquent taxes on tax list, what to contain, lien on real estate, S. §§ 1389-a-1389-d: 290.
 To collect taxes upon authority of tax list, § 1390: 494.
 To notify tax payer of prior sale of land, § 1392: 494.
 To certify amount of taxes on real estate, when requested; fees; penalty, §§ 1393-1397: 494.
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 Upon personal property of nonresidents about to be removed, § 1404: 500.
 Upon personal property, by distress and sale, §§ 1406, 1408: 501. S. § 1407: 295.
 Against persons removed to other counties, §§ 1409-1412: 502.
 Apportionment of consolidated tax, § 1415: 503.
 By sale of real estate, §§ 1418, 1420-1431: 506. S. §§ 1419, 1432: 298.
 Misconduct at, punished, §§ 1429, 1430: 512.
 To issue duplicate tax sale certificate upon loss of original, S. § 1432: 299.
 To execute and deliver tax deed, § 1442: 530.
 Records of, as evidence of tax sales, § 1451: 547.
 May bring action at law to recover taxes, S. § 1452-a: 306.
 In actions of attachment by, for recovery of taxes, no bond required, S. § 1452-b: 306.
 County liable to state for default of, § 1454: 548.
 Must not discount auditor's warrants, penalty, § 1456: 548.
 Must not loan or use public funds, penalty, S. § 1457: 307.
 May deposit money in banks; conditions, S. § 1457: 307.
 Board of supervisors to settle with, semi-annually, and report to auditor of state, § 1458: 549.
 To report to auditor and pay to treasurer of state, § 1459: 549.
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 To account for funds, § 1462: 550.
 Penalty for official delinquency, § 1463: 550.
 To collect township road tax and pay to township clerk, § 1543: 573. S. § 1542-a: 329.
 Compensation of, for collecting road tax, S. § 1538: 328.
 Duties of, as to taxes voted in aid of railways, S. §§ 2087-2091: 469.
 Collection of mulct tax by, § 2440: 858. S. §§ 2438, 2439: 532.
 Duties of, as to mulct tax, § 2446: 860.
 To enter name of omitted liquor dealer on mulct tax list, S. § 2448, ¶ 12: 534.
 Duty of, as to school taxes, § 2810: 958. S. § 2808: 670.
 Duties of, as to school fund, § 2853: 969. S. § 2850: 682.
 Duty of, as to proceeds of sale of unclaimed property by warehousemen or carriers, § 3134: 1121.
 Clerk to pay jury fees to, § 3872: 1536.

References following the black letter "S" are to the Supplement.

County Warrants:

- Record of, to be kept by auditor, § 442, ¶ 4: 237.
- When depreciated, question of additional tax may be submitted to the people, § 443: 237.
- Duty of auditor as to issuing, § 471: 242.
- Paid by treasurer only when signed and sealed by auditor, § 482: 244.
- Presented but not paid; duty of treasurer; interest, S. § 483: 98.
- Treasurer to call in for payment; interest stopped, S. § 484: 246.
- Partially paid, certificate for balance, § 485: 246.
- Record of, to be kept, § 486: 246.
- Cancellation of, by treasurer, § 488: 247.
- Officers not to purchase or receive at discount, § 596: 267.
- Treasurer to indorse, how, § 597: 268.
- Receivable for taxes, except, § 1401: 496.
- Interest paid on, must be receipted on, § 1455: 548.
- Discounting by treasurer, punished, § 1456: 548.

Courts:

- Judicial power vested in, Const., art. 5, § 1: 93.
- Judges of, not to practice or give counsel, S. § 281: 65.
- Process of; how attested, § 282: 175.
- Proceedings of to be public, § 283: 175.
- Judges of, when disqualified, § 284: 176.
- Not to do business on Sunday, except, § 285: 176.
- To be held at places provided by law, except, § 286: 176.
- Tables, for determining value of estates, S. pages 319-322.
- Of limited jurisdiction; presumptions as to proceedings in, § 4648: 1860.
- Federal, records of as evidence, § 4644: 1859.
- See SUPREME COURT; DISTRICT COURT; SUPERIOR COURT; POLICE COURT; JUSTICES' COURTS; MAYORS' COURTS, and JUVENILE COURTS.

Court House:

- When wanting, room to be provided, § 226: 161, and § 239: 165.
- Custody of, in auditor, § 473: 243.

Court-Martial:

- Provisions concerning, §§ 2196-2198: 775.

Covenants:

- In conveyances by husband and wife; effect of, § 2921: 997.

Cows:

- Improperly kept or fed, selling milk from, punished, S. §§ 4989, 4990: 1081.

Cream:

- Regulation as to sale of, S. §§ 4989, 4990: 1081.

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- And see DAIRY PRODUCTS, §§ 2516-2521, 2523-2528: 880. S. §§ 2515, 2522: 561.
- Inch or gauge of, defined, § 3013: 1057. S. § 5077-a1: 1103.
- Misreading or manipulation of tests of, S. § 5077-a1: 1103.
- Penalty for misreading test for, S. § 5077-a2: 1103.

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- Testing of milk at, § 2523: 880. S. § 2515: 561.
- Milk sold by, to be pasteurized, S. § 4989-a: 1082.

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- Committee on, in General Assembly, § 8: 114.

Credibility of Witness:

- Facts admissible to lessen, § 4602: 1830.
- Character of, may be proved to affect, § 4614: 1841.

Credit:

- Executor may sell real estate on, § 3326: 1195.

Credit Insurance:

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- Before council, of question for protection of city property from floods, S. § 849-c: 177.
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- Execution against property in hands of, how satisfied, § 3961: 1580.
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- Pounds of to the bushel, S. § 3016: 725.

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- Use of surplus bridge fund upon, § 429: 233.
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- Violation of law by county officers, deemed, § 598: 268.
- Violation of provisions relating to board of police and fire commissioners, deemed, S. § 679-j: 122.
- Failure to provide vestibules for passenger cars on street railways, deemed, S. § 768: 157.
- Cutting, breaking or defacing trees in public parks, deemed, § 997: 389. S. § 850-g: 180.
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- Of failure to comply with uniform system of municipal accounts, deemed, S. § 1056-a7: 206.
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- In violation of election laws, §§ 1133-1135: 421.
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- Acting in official capacity without giving bond, deemed, § 1197: 435.
- Taking unlawful fees by officer, deemed, § 1297: 450.
- Misconduct of officers at tax sale, deemed, §§ 1429, 1430: 512.
- Discounting warrants by state or county treasurer, deemed, § 1456: 548.
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- Disregard of law by insurance companies or officers, deemed, §§ 1747, 1748: 627.
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- Discrimination by life insurance companies, deemed, § 1783: 636.
- Fraud against life insurance company punished as, § 1816: 645.
- Solicitation of business by insurance companies after revocation or suspension of authority, deemed, S. § 1821-f: 384.
- Violations of law by building and loan associations, deemed, §§ 1836-1838: 650.
- Soliciting new business by officers of fraternal beneficiary societies after suspension or revocation of certificate, deemed, S. § 1839-f: 390.
- Falsely pretending to be savings bank, punished as, § 1859: 655.
- Negligence of bank officers, and intentional fraud, punished as, §§ 1886, 1888: 661.
- Failure of railway to build fence, punished as, § 2058: 728.
- Failure of railway to give signal at road crossing, deemed, § 2072: 733.
- Failure to stop train at railway crossing, deemed, § 2073: 734.
- Failure of railways to observe laws as to automatic couplers and brakes, deemed, § 2083: 737.
- Failure to change name of railway station, deemed, § 2107: 749.
- Failure of sleeping car companies to comply with law, deemed, § 2110: 749.
- Obstruction of railroad commissioners, deemed, § 2115: 751.
- Violation of law by carriers, punished as, § 2132: 757.
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- Refusal by common carriers to issue transportation to shippers of live stock, deemed, S. § 2157-e: 481.
- As to messages by telegraph or telephone, defined and punished, § 2162: 767.
- In regard to encampments of Iowa National Guard, defined, S. § 2188: 491.
- As to military property of the state, defined and punished, § 2194: 774, and § 2210: 777.
- Cruelty or official misconduct as to the insane, deemed, § 2307: 800.
- Leaving inebriate hospital, by patients, deemed, S. § 2310-a20: 506.
- In releasing distrained animals, § 2320: 805.
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- In violation of liquor laws, §§ 2383, 2384: 822; § 2395: 830; §§ 2402, 2404: 834; § 2411: 841; §§ 2419-2421: 847, and § 2428: 855.
- False statement to secure exemptions allowed to firemen, punished as, § 2465: 866.
- Wrongfully removing fire apparatus, or giving false alarm of fire, punished as, S. §§ 2467, 2468: 543.
- Removal or tampering with fire apparatus of fire companies, deemed, S. § 2467: 543.
- In violation of laws relating to Bureau of Labor Statistics, §§ 2474, 2475: 868. S. §§ 2471, 2472: 544.
- Violation of provisions relating to child labor, deemed, S. § 2477-e: 546.
- Violation of provisions relating to employment bureaus, deemed, S. § 2477-l: 548.
- In violation of laws as to mines and mining, defined and punished, § 2491: 874. S. § 2494: 552.
- Violation of provisions relating to transportation of powder into mines, deemed, S. § 2496-e: 554.
- In violation of laws relating to petroleum products, S. § 2508: 557.
- Violation of provisions relating to linseed oils, deemed, S. § 2510-h: 560.
- Sale of petroleum in receptacles not marked red, deemed, S. § 2510-j: 560.
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- In violation of laws relating to dairy products, § 2527: 882.
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- Failure to obey orders of board of health, deemed, § 2573: 892.
- Disobedience to subpoena of labor commissioner, deemed, S. § 2471: 544.
- Moving of infected persons, when deemed, S. § 2575-a6: 579.
- Violation or neglect to comply with notice of labor commissioner, relating to the employment of children, or safety of employes, etc., S. § 2472: 544.
- Violation of provision relating to the practice of veterinary medicine and surgery, deemed, S. §§ 2538-l, 2538-n: 567.
- Violation of law relating to inspection of nursery stock, and San Jose scale, deemed, S. § 2575-a6: 579.
- Violation of provisions relating to practice of nursing, deemed, S. § 2575-a27: 584.
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- Illegal sale of poisons, deemed, S. § 2593: 598.
- In violation of laws as to practice of dentistry, S. § 2600-j: 601.
- Trustees or officers of Soldiers' Home being interested in contracts, deemed § 2607: 903.
- Violation of provisions relating to plans and specifications by board of control, for improvements for which appropriation is recommended, deemed, S. § 2727-a17: 630.
- Solicitation of contributions for political purposes of members of board of control, of officer or employe of institutions under their control, deemed, S. § 2727-a36: 635.
- Exerting of influence by board of control over superintendent, warden or other chief executive officer of the several institutions under their control in selection of assistants and employes, deemed, S. § 2727-a37: 635.
- Sale of liquors within three miles of Agricultural College punished as, § 2673: 916.
- Use of barbed wire about schoolhouses punished as, § 2817: 961.
- Violation of duties by parents and guardians under law relating to compulsory education, deemed, S. § 2823-a: 675.
- Mis-statement in certificate of acknowledgment, deemed § 2955: 1020.
- By public weighmasters, § 3029: 1060.
- Fraud by general partners of limited partnership, deemed, § 3116: 1116.
- Issuing of false warehouse receipt by warehousemen, deemed, S. § 3138-a51: 794.
- Delivery of goods by warehousemen without receipt, deemed S. § 3138-a54: 795.
- Negotiation of warehouse receipt for mortgaged goods, deemed, S. § 3138-a55: 795.
- In violation of marriage laws, § 3144: 1124.
- Divorced persons marrying within one year after decree of divorce, deemed, S. § 3181: 804.
- Sending claims out of state to defeat rights of exemption, deemed, § 4018: 1601.
- Violation of provisions relating to changing names, S. § 4471-j: 1017.
- Neglect of duty by public officer, deemed, § 4904: 1934.
- Performance of prohibited act, deemed, § 4905: 1934.

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- Punishment for, when not otherwise prescribed, § 4906: 1934.
- Illegal voting at primary election, deemed, S. § 4919-a: 1073.
- Violation of provisions relating to pure foods, deemed, S. § 4999-a25: 1089.
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- Depositing samples of medicines or drugs upon porches, etc., deemed, S. § 4999-a43: 1094.
- Accepting or giving tips or gratuities, deemed, S. § 5028-m: 1097.
- Violation of provisions relating to agricultural seeds, deemed, S. § 5077-a26: 1110.
- To publicly mutilate, insult, trample upon or defile any flag, standard, color or ensign of the United States, deemed, S. § 5028-a: 1096.
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- Presence of defendant not necessary upon trial for § 5338: 2036.
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- Taking of, constitutes larceny, § 4831: 1910.
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- To building and loan association, when due on, appointment of receiver, S. § 1893-a: 400.
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- Equitable interest of judgment debtor in, subjected to execution, § 4079: 1625.
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References following the black letter "S" are to the Supplement.

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When drawers and indorsers released by failure of holder to negotiate bill, S. § 3060-a144: 765.

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References following the black letter "S" are to the Supplement.

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 Meaning of term, S. 3060-a191: 772.
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- NOTING:**
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References following the black letter "S" are to the Supplement.

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When name not the name of any person, S. § 3060-a8: 732.

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Acceptance admits capacity to indorse, S. § 3060-a62: 747.

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Instrument must be for payment in money, S. § 3060-a1: 729.

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Meaning of term, S. § 3060-a191: 772.

PERSON PRIMARILY LIABLE:

Who is, S. § 3060-a192: 772.

Demand of payment not necessary to charge, S. § 3060-a70: 750.

PERSON SECONDARILY LIABLE:

Who is, S. § 3060-a192: 772.

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Of presentment, what is proper place, S. § 3060-a161: 768.

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Constitutes value, S. § 3060-a25: 737.

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Instrument payable on is payable on demand, S. § 3060-a7: 732.

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In what cases necessary, S. § 3060-a143: 765.

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Where bill not payable at drawee's place of business or residence, S. § 3060-a143: 765.

When drawer and indorsers released, S. § 3060-a144: 765.

How presentment made, S. § 3060-a145: 765.

Must be by or on behalf of holder, S. § 3060-a145: 765.

Must be at reasonable hour, S. § 3060-a145: 765.

On business day, S. § 3060-a145: 765.

Before bill is overdue, S. § 3060-a145: 765.

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Where there are two or more payees not partners, S. § 3060-a145: 765.

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On what days may be made, S. § 3060-a146: 765.

Where time insufficient, S. § 3060-a147: 765.

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Excused where drawee dead, S. § 3060-a148: 766.

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References following the black letter "S" are to the Supplement.

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Excused where drawee has not capacity to contract, S. § 3060-a148: 766.

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PRESENTMENT FOR PAYMENT:

Necessary in order to charge drawer or indorsers, S. § 3060-a70: 750.

Not necessary to charge party primarily liable, S. § 3060-a70: 750.

Where instrument payable on demand, S. § 3060-a71: 750.

What constitutes sufficient presentment, S. § 3060-a71: 750.

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Place of presentment, S. § 3060-a73: 751.

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Where persons primarily liable are partners, S. § 3060-a77: 752.

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When not required to charge indorser, S. § 3060-a80: 753.

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When delay excused, S. § 3060-a81: 753.

Waiver of, S. § 3060-a82: 753.

Where drawee is fictitious person, S. § 3060-a82: 753.

When dispensed with, S. § 3060-a82: 753.

Computation of time, S. § 3060-a86: 754.

Instrument falling due on Sunday, S. § 3060-a85: 754.

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How made to acceptor for honor, S. § 3060-a168: 769.

Within what time check must be presented, S. § 3060-a186: 771.

Effect of delay, S. § 3060-a186: 771.

PRINCIPAL:

Not liable unless his signature appears on instrument, S. § 3060-a18: 736.

PRINTED PROVISIONS:

Written provisions prevail over, S. § 3060-a17: 735.

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"PROCURATION":

Signature by, S. § 3060-a21: 737.

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Term "note" means, S. § 3060-a191: 772.

Payable in particular kind of money, S. § 3060-a6: 731.

Ambiguous instrument may be considered bill or note, S. § 3060-a17: 735.

When bill may be treated as, S. § 3060-a130: 763.

Drawn to maker's own order, S. § 3060-a184: 770.

Defined, S. § 3060-a184: 770.

PROTEST:

What waiver of includes, S. § 3060-a111: 759.

May be made in case of dishonor of any instrument, S. § 3060-a118: 760.

Not required except in case of foreign bills, S. § 3060-a118: 760.

Necessary in case of foreign bills, S. § 3060-a152: 766.

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How made, S. § 3060-a153: 766.

Must be annexed to bill, S. § 3060-a153: 766.

Must be under hand of notary, S. § 3060-a153: 766.

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Must specify fact that presentment was made, S. § 3060-a153: 766.

Cause for protesting the bill, S. § 3060-a153: 766.

Demand made and answer given, S. § 3060-a153: 766.

Manner of presentment, S. § 3060-a153: 766.

May be made by notary public, S. § 3060-a154: 767.

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Where made, S. § 3060-a156: 767.

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References following the black letter "S" are to the Supplement.

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REASONABLE DILIGENCE:
See DUE DILIGENCE.

REASONABLE HOUR:
What is, S. § 3060-a72: 751.

REASONABLE TIME:
What constitutes, S. §§ 3060-a72: 751; 3060-a193: 772.
In case of instrument payable on demand, S. § 3060-a53: 744.
Instrument payable on demand must be presented within, S. § 3060-a71: 750.

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S. § 3060-a131: 763.

RENUNCIATION:
Effect of, S. § 3060-a122: 761.
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- May be of either sex; other qualifications, § 2748: 933.
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